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# Speech-Facilitating Conduct

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## ARTICLE

**Speech-Facilitating Conduct**

Wesley J. Campbell\*

**Abstract.** Free speech doctrine generally protects only expression, leaving regulations of nonexpressive conduct beyond the First Amendment's scope. Yet the Supreme Court has recognized that abridgments of the freedom of speech "may operate at different points in the speech process." This notion of protection for nonexpressive conduct that facilitates speech touches on many of the most contentious issues in First Amendment law—restrictions on photography and audiovisual recording, limits on campaign contributions, putative newsgathering privileges for journalists, compelled subsidization of speech, and associational rights, to name just a few. Scholars, however, have generally approached these topics in isolation, typically focusing on downstream effects on speech as the touchstone for First Amendment coverage. The usual conclusion is that the Supreme Court's decisions are in disarray.

This Article argues that key features of doctrine are easily overlooked when employing a granular focus on particular rights. Instead, the Article presents an overarching framework that brings together, descriptively and normatively, otherwise disparate strands of free speech law. The guiding principle of this framework is that First Amendment coverage for nonexpressive conduct depends on whether the government uses a rule that targets speech (e.g., a special tax on newspapers), not on whether expression is indirectly burdened by particular applications of otherwise constitutional rules (e.g., a child labor law applied to newspapers). Applications of this "anti-targeting" principle vary by context, but the general concept offers a surprisingly comprehensive account of most Supreme Court decisions. Tracing the development of the anti-targeting principle also reveals an underappreciated shift in the way that the Court has dealt with claims based on nonexpressive conduct. This historical argument shows that the reasoning in many of the Court's foundational cases—including *Buckley v. Valeo*, *Branzburg v. Hayes*, *Abood v. Detroit Board of Education*, and *Roberts v. United States Jaycees*—is now out of step with current doctrine.

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## Introduction

A familiar, if sometimes nebulous, distinction between “expression” and “nonexpressive conduct” undergirds modern free speech doctrine.<sup>1</sup> Expressive acts—from speaking and publishing to burning flags and dancing in the nude—generally “bring the First Amendment into play,” triggering closer judicial scrutiny.<sup>2</sup> But when the regulated conduct is nonexpressive, courts often say that the First Amendment does not apply at all.<sup>3</sup> Expressive conduct does not have to convey “a narrow, succinctly articulable message,”<sup>4</sup> but the Supreme Court has derided the idea that “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>5</sup>

Yet it is widely recognized that some protections for nonexpressive conduct are essential to basic First Amendment freedoms. Ordinary commercial transactions are not expressive, for instance, but prohibitions on the distribution or acquisition of printing presses or computers would raise obvious First Amendment concerns.<sup>6</sup> Picture taking and video recording are often not expressive,<sup>7</sup> but courts have ridiculed the “extreme” and

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1. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (“[R]estrictions on protected expression are distinct from restrictions on . . . nonexpressive conduct.”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“First Amendment cases draw vital distinctions between words and deeds . . .”). For more on the distinction between “expressive” and “nonexpressive” conduct, including criticisms of this division, see *infra* notes 41-50 and accompanying text.
  2. *Texas v. Johnson*, 491 U.S. 397, 403-04 (1989); see *infra* notes 47-50 and accompanying text.
  3. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) (“The issue presented is whether respondents have a First Amendment right to solicit contributions . . . . To resolve this issue we must first decide whether solicitation in [this] context . . . is speech protected by the First Amendment, for, if it is not, we need go no further.”); *Doe v. City of Lafayette*, 377 F.3d 757, 764 (7th Cir. 2004) (en banc) (“[A]lthough the Supreme Court has defined the boundaries of expression broadly, it never has extended the protections of the First Amendment to non-expressive conduct.” (citation omitted)).
  4. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (“[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.”).
  5. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).
  6. See, e.g., *Sorrell*, 131 S. Ct. at 2664 (“[R]estrictions on protected expression are distinct from restrictions on economic activity . . .”).
  7. See, e.g., Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1042 (2015) (“The act of recording is not itself expressive in the way that burning a flag is expressive because it does not communicate a message; it creates a message to be communicated later.”); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 270 (2004).

“extraordinary” idea that such conduct “is *wholly unprotected* by the First Amendment.”<sup>8</sup> Similarly, although financial transfers are often thought of as nonspeech, “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”<sup>9</sup>

In this vein, the Supreme Court has recognized some First Amendment protection for the *speech process*, and not merely the expressive end product. “Laws enacted to control or suppress speech may operate at different points in the speech process,” the Court recently explained.<sup>10</sup> To many, this notion of protection for the speech process is intuitive. We can hardly “disaggregate Picasso from his brushes and canvas,” or “value Beethoven without the benefit of strings and woodwinds,” one court of appeals colorfully opined.<sup>11</sup>

But full First Amendment coverage for nonexpressive acts that are tied to speech would quickly become unwieldy. “[F]ew restrictions on action,” the Court observed fifty years ago, “could not be clothed by ingenious argument in the garb of decreased data flow.”<sup>12</sup> Confronted with claims for protection of nonexpressive acts that facilitate speech, the Court has steadfastly remained “unwilling to embark the judiciary on a long and difficult journey to . . . an uncertain destination.”<sup>13</sup> How, then, should courts decide whether to apply some form of elevated First Amendment scrutiny to governmental restrictions of nonexpressive conduct?

The academic literature about First Amendment coverage for speech-facilitating conduct generally falls into three camps. First are studies that focus on particular types of conduct, like gathering information, financing campaigns, engaging in scientific research, or associating with others.<sup>14</sup> A second group of scholars takes a much broader approach by considering *all* incidental burdens on speech, whether falling on expressive or nonexpressive conduct.<sup>15</sup> Finally, a third camp denies that a claimant’s expressive purposes

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8. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012); *see also* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1511 (2000) (“It is inconceivable . . . that a ban on capturing all photographic images in public could possibly be squared with the First Amendment, any more than could a ban on carrying a notebook and a pencil.”); *cf.* *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) (discussing a right to record).

9. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

10. *Citizens United v. FEC*, 558 U.S. 310, 336 (2010). This insight is hardly novel. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) (“[T]he First Amendment protects a process . . .”); *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (“Liberty of circulating is as essential to [press] freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.”).

11. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010).

12. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

13. *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

14. *See infra* Part I.B; *see also* Bhagwat, *supra* note 7, at 1035-36 (observing similarly the literature’s disjointed treatment of speech-facilitating conduct).

15. *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200-10 (1996); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental*  
*footnote continued on next page*

implicate the First Amendment when the government regulates nonexpressive conduct, but this group of scholars does not explore other ways that free speech doctrine might cover nonexpressive conduct.<sup>16</sup>

This Article charts a different path by considering speech-facilitating conduct as a distinct category within First Amendment law.<sup>17</sup> The nonexpressive conduct involved in these cases may come before speech (e.g., donating money or traveling to a protest) or afterward (e.g., receiving speaker fees or traveling home). The potential reach of these rights is broad, but this Article does not address protection for actions that count as “expressive” on their own, like writing or delivering books.<sup>18</sup> Rather, it explores the coverage that the Supreme Court has provided and denied to *nonexpressive* conduct, addressing only whether the First Amendment applies at all—not whether any particular restriction can survive some form of elevated scrutiny.<sup>19</sup>

By looking at speech-facilitating conduct as a distinct category, an overarching framework can bring together, descriptively and normatively, otherwise disparate strands of First Amendment law. The guiding principle of

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*Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 491-500 (1996); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779 (1985); Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401 (1995); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 105-14 (1987).

16. See, e.g., Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 769 (2001); see also *infra* note 52.
17. This Article joins Ashutosh Bhagwat's recent work in broadly considering how the First Amendment applies to nonexpressive conduct related to speech. See Bhagwat, *supra* note 7, at 1035. The scope of this Article and its historical orientation, however, depart substantially from Bhagwat's article, which addresses questions of First Amendment coverage in much less depth than questions of protection. Bhagwat mostly takes for granted that general laws pose no constitutional problem and that speech-targeted laws do, see *id.* at 1061, whereas this Article evaluates the long-running and contested debates about those coverage issues.
18. See *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001).
19. As Frederick Schauer explains, “questions about the involvement of the First Amendment in the first instance”—known as questions of *coverage*—“are often far more consequential than are the issues surrounding the strength of protection that the First Amendment affords the speech to which it applies.” Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004); see also *id.* at 1771 (“Questions about the boundaries of the First Amendment are not questions of strength . . . but rather are questions of scope—whether the First Amendment applies at all.”). Confusingly, the Supreme Court sometimes refers to questions of coverage as ones of protection, but—putting aside the labels—the coverage/protection dichotomy underpins all of modern free speech law. See, e.g., *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803-04 (1984) (“[T]o say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation.” (emphasis omitted) (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 561 (1981) (Burger, C.J., dissenting))).

this framework is that coverage for nonexpressive conduct depends on whether the government uses a rule that targets speech—including speech-related rules that target the speech process.<sup>20</sup> Applications of this “anti-targeting” principle vary by context,<sup>21</sup> but the general concept offers a surprisingly comprehensive account of most on-point Supreme Court decisions.

Examining speech-facilitating conduct as a distinct category also reveals a substantial, yet mostly unannounced, shift in the Supreme Court’s approach to First Amendment coverage for nonexpressive conduct. Prior to the mid-1980s, the Supreme Court often treated all sorts of incidental burdens on speech as implicating the First Amendment, even when the laws being applied did not explicitly target speech.<sup>22</sup> During this bygone era, the Court issued rulings that continue to undergird some of the most significant and contentious areas of free speech law, including newsgathering privileges, campaign finance law, compelled-subsidy doctrine, and associational rights.

Ever since its 1986 decision in *Arcara v. Cloud Books, Inc.*,<sup>23</sup> however, the Court has mostly stopped applying First Amendment scrutiny to general (i.e., nontargeted) regulations of nonexpressive conduct.<sup>24</sup> When nonexpressive conduct is regulated, only the law—not individual expressive aims—can bring the First Amendment into play. Conceptually, free speech rights in this field operate as rules about rules, not as “shields,” “immunities,” or “trumps” that

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20. Scholars have not used the anti-targeting principle to evaluate thoroughly the scope and history of coverage for speech-facilitating conduct, but the principle is recognized in opinions and in scholarship. *See, e.g.*, *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 474-75 (1995) (applying heightened review to a ban on public employees’ receipt of funds for speech because Congress “chose to restrict only expressive activities”); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (applying heightened review to a speech-targeted law requiring convicted criminals to turn over the proceeds of their book sales); Bhagwat, *supra* note 7, at 1064 (“[P]resumably these [targeted] laws must be subject to some scrutiny.”); Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1101 (2002) (arguing that targeting “a constitutional right for a special burden” creates a constitutional harm and therefore “restricting speech that uses money is a speech restriction”).

21. In this sense, this Article proceeds on the unremarkable premise that general principles are worthy of study despite the need for contextually tailored doctrine. *See, e.g.*, Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 83-84 (2001).

22. *See, e.g.*, *United States v. Albertini*, 472 U.S. 675, 687-88 (1985) (applying heightened scrutiny to an unlawful-entry charge); *see also infra* Part II (discussing cases prior to 1986).

23. 478 U.S. 697, 706-07 (1986); *see infra* notes 156-65 and accompanying text.

24. *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 n.3 (1991) (Scalia, J., concurring in the judgment) (“A law is ‘general’ for the present purposes if it regulates conduct without regard to whether that conduct is expressive.”).

protect particular forms of speech-facilitating conduct against governmental infringement.<sup>25</sup>

The Court's decision in *Arcara* did not require overruling prior decisions, and the Justices failed to mention their significant departure from earlier reasoning—what some have described as “stealth overruling.”<sup>26</sup> Confusion has been widespread ever since. Scholarly assessments of newsgathering privileges, campaign finance law, compelled-subsidy doctrine, and associational rights, for instance, continue to rely on the outdated reasoning in seminal decisions like *Branzburg v. Hayes*,<sup>27</sup> *Buckley v. Valeo*,<sup>28</sup> *Abood v. Detroit Board of Education*,<sup>29</sup> and *Roberts v. United States Jaycees*.<sup>30</sup> Broader analyses of the Court's approach to incidental burdens on speech similarly depend on old cases. In particular, this Article takes issue with the arguments of Michael Dorf and Geoffrey Stone that significant incidental burdens trigger heightened scrutiny.<sup>31</sup> And beyond these lines of cases, the failure to grapple with the Court's shift has skewed discussions of novel questions involving nonexpressive conduct, like how courts should assess the constitutionality of restrictions on photography and other forms of audiovisual recording.<sup>32</sup>

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25. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 16 (1998) (using the term “shields”); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 728 (1998) [hereinafter Pildes, *Why Rights Are Not Trumps*] (adopting the term “immunities”); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY at xi, 184-205 (1977) (employing the term “trumps”). All three of these authors have noted that modern free speech doctrine often allows for regulations of speech for good reasons. See Adler, *supra*, at 19-26; Pildes, *Why Rights Are Not Trumps*, *supra*, at 736-44; see also Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 312-15 (2000) [hereinafter Pildes, *Dworkin's Two Conceptions of Rights*] (exploring Dworkin's views); Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 302-07 (2000) (exploring Dworkin's views also).

26. See Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 10 (2010) (“When the Justices fail to extend a precedent as the logic of its rationale would require, that is one form of stealth overruling.”); see also Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862-63 (2014) (referring to this practice as “narrowing”).

27. 408 U.S. 665 (1972).

28. 424 U.S. 1 (1976) (per curiam).

29. 431 U.S. 209 (1977).

30. 468 U.S. 609 (1984). For an argument that the “general logic of compelled support doctrine” is grounded in the reasoning of *Buckley* and *Abood*, see Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 380 & n.203 (2011). My assessment of compelled-subsidy doctrine appears in Part III.C.

31. See Dorf, *supra* note 15, at 1210; Stone, *supra* note 15, at 112-14.

32. A burgeoning set of cases and articles addresses this issue. See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 79-82 (1st Cir. 2011); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 260-62 (3d Cir. 2010); Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 78, 81-83 (2014); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 337-39, 367-69, 386-87 (2011); Howard M.

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In sum, reexamining the Supreme Court’s approach to speech-facilitating conduct offers fresh insights on a broad swath of free speech law. Part I begins this effort by explaining the terms and categories that guide current free speech doctrine. Part II turns to the pre-*Arcara* cases, showing that the Supreme Court gave broad recognition to incidental-burden claims across a wide array of free speech cases, even when laws did not target speech. This Part focuses on major decisions relating to information gathering, campaign finance, compelled subsidies, and associational rights.

*Arcara* and its progeny are examined in Part III. Two features, I argue, define these cases. First, the government faces a heightened burden when it singles out speech. This principle is relatively uncontroversial,<sup>33</sup> but this Article helps to explain its proper scope, particularly in Part IV. A law that targets conduct closely related to speech—singling out newsprint for a special tax, for instance—raises a First Amendment problem even if it does not target the expressive end product. But while free speech doctrine is structured in part to combat improper governmental motives, the anti-targeting approach focuses on what the relevant *law* does, and not what actually motivated legislators.<sup>34</sup> Second, and more controversially, regulations of nonexpressive conduct do not raise free speech problems when the government does not target speech. In short, the First Amendment does not provide an “affirmative” right to engage in speech-facilitating conduct. Rather, coverage for speech-facilitating conduct is “negative,” protecting against targeted governmental interference with the speech process.<sup>35</sup>

This framework suggests that selective enforcement of general rules could create a First Amendment problem.<sup>36</sup> Nonetheless, this Article focuses solely on challenges to legal rules and leaves enforcement questions for another day. Critically, however, by viewing free speech rights in this area as a bar against certain governmental actions rather than as a shield around particular conduct,<sup>37</sup> the anti-targeting framework rejects “as applied” First Amendment

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Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 652-57 (2009).

33. *But see* United States v. Nat’l Treasury Emps. Union, 513 U.S. 454, 490 (1995) (Rehnquist, C.J., dissenting) (“The ban neither prohibits anyone from speaking or writing, nor does it penalize anyone who speaks or writes; the only stricture effected by the statute is a denial of compensation.”).

34. *See infra* Part IV.A.

35. The distinction between “affirmative” and “negative” conceptions of rights is common. *See, e.g.*, Schauer, *supra* note 15, at 782-83; Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 155-56 (2010); *see also infra* notes 70-73 and accompanying text.

36. *See* Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972); LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 38-39 (2005); Srinivasan, *supra* note 15, at 416.

37. *See* Adler, *supra* note 25, at 16 (employing this terminology).

challenges to general laws neutrally applied to *nonexpressive* conduct.<sup>38</sup> (This Article, however, does not challenge the viability of “as applied” claims when the restricted conduct is *expressive*.)<sup>39</sup>

The anti-targeting principle makes sense of Supreme Court holdings that others have described as “remarkably erratic and fragmented.”<sup>40</sup> In doing so, it answers several looming First Amendment questions, including how to evaluate free speech claims involving incidental burdens on expressive associations, compelled subsidies for speech (e.g., bar dues and union-shop dues), and putative newsgathering privileges for journalists. To flesh out how the anti-targeting principle operates, Part IV considers its application to restrictions on audiovisual recording—one of the most interesting emerging issues in free speech law.

Beyond its historical and doctrinal arguments, this Article concludes in Part V by sketching a brief normative defense of the anti-targeting approach. That defense begins with the common recognition that values undergirding the First Amendment readily support *some* measure of constitutional protection for speech-facilitating conduct. But unlike most of its counterparts, the anti-targeting framework eschews case-by-case balancing or doctrinal tests that vary by speaker or subject. It further avoids assessments of the “significance” of incidental burdens, or other questions that might depend on cumbersome and indeterminate empirical inquiries. When it comes to nonexpressive conduct, anti-targeting thus provides a doctrinal framework that is more stable and predictable than its alternatives. Though all approaches involve tradeoffs, focusing doctrine on laws rather than individual expressive purposes adequately accounts for speech interests and concerns of judicial economy.

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38. *Cf. Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 762-63 (1994) (determining that an injunction applied to abortion protestors did not target their viewpoint because “[a]n injunction, by its very nature, applies . . . in the context of a specific dispute”); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986) (applying no First Amendment scrutiny to review a judicial order closing a bookstore because the applicable law was neutral and generally applicable).

39. *See infra* note 48 and accompanying text.

40. McDonald, *supra* note 7, at 251. McDonald’s comment relates to newsgathering cases, but his criticism is common regarding other types of speech-facilitating conduct. *See, e.g.*, Kathleen M. Sullivan & Robert C. Post, Colloquy, *It’s What’s for Lunch: Nectarines, Mushrooms, and Beef—The First Amendment and Compelled Commercial Speech*, 41 LOY. L.A. L. REV. 359, 365-67 (2007) (statement of Kathleen M. Sullivan) (describing “doctrinal instability and incoherence” in compelled-subsidy doctrine).

## I. Basic Principles

### A. Expressive and Nonexpressive Conduct

“First Amendment law,” a prominent commentator explains, “view[s] expressive and nonexpressive activity as meaningfully different, even though drawing a line between the two raises hard questions.”<sup>41</sup> Writing and speaking are, of course, quintessential “speech,” but the First Amendment also provides qualified protection to a wide array of “expressive conduct,” including so-called “symbolic speech.”<sup>42</sup> Burning flags, wearing black armbands, participating in a parade, and even dancing in the nude are well-known examples.<sup>43</sup> To determine whether conduct is expressive, courts ask whether the conduct is “imbued with elements of communication.”<sup>44</sup> Expressive conduct need not convey “a narrow, succinctly articulable message,”<sup>45</sup> but mere intent to communicate an idea or feeling is insufficient.<sup>46</sup>

Generally speaking, regulations of expressive conduct “bring the First Amendment into play,” even when that conduct is circumscribed by a law having nothing to do with speech.<sup>47</sup> This Article—which emphasizes *laws* rather than *conduct* when it comes to *nonexpressive* acts—does not challenge the

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41. Kagan, *supra* note 15, at 491 n.207. For criticism of the division between speech and conduct as “notoriously problematic,” see Dan M. Kahan et al., “*They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*,” 64 STAN. L. REV. 851, 855-56 (2012). For the necessity of distinguishing between expressive and nonexpressive activity, notwithstanding the difficulties, see Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79-80 (1968); Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873, 884 (1993); and Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 902 (1979).

42. *See United States v. O’Brien*, 391 U.S. 367, 376 (1968).

43. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568-70 (1995) (parade); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (nude dancing); *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (flag burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (black arm band).

44. *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam).

45. *Hurley*, 515 U.S. at 569; *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (“[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.”).

46. *O’Brien*, 391 U.S. at 376 (disclaiming that “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea”); *see also Clark*, 468 U.S. at 293 n.5 (“[T]he person desiring to engage in assertedly expressive conduct [must] demonstrate that the First Amendment even applies.”).

47. *Johnson*, 491 U.S. at 404; *see also id.* at 403 (“We must first determine whether Johnson’s burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction.”).

general rule that restrictions of *expressive* acts trigger the First Amendment, regardless of the law at issue.<sup>48</sup> Applying a breach-of-the-peace statute to a rowdy protestor, for instance, implicates free speech principles even though the statute does not single out expression. The First Amendment, in other words, usually “covers” expressive conduct,<sup>49</sup> meaning that whenever a law incidentally regulates expressive conduct, courts apply some form of elevated judicial scrutiny.<sup>50</sup>

But what happens when the incidence of a law falls on nonexpressive conduct? Suppose a journalist needs to eavesdrop on a source to complete an exposé. Or a scientist needs to circumvent a ban on destroying embryonic stem cells to create a publishable article. Or a photographer takes photographs without obeying state privacy laws. How should courts decide whether to apply some form of elevated scrutiny to these restrictions of nonexpressive conduct?

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48. Descriptively, this distinction reflects current law; the First Amendment treats expressive and nonexpressive conduct differently for purposes of coverage. Normatively, Part V offers some reasons why that distinction makes sense.

49. For the standard work on “coverage” and “protection,” see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981).

50. When a law directly burdens expressive conduct, the Supreme Court considers, but does not give talismanic importance to, whether the law targets expression. Here are the basics: if the expressive aspect of conduct triggers a legal restriction, the Supreme Court generally evaluates governmental interests “under a more demanding standard.” *Johnson*, 491 U.S. at 403. If the law or a particular application is content based, the Court generally applies “the most exacting scrutiny.” *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)); see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010). Meanwhile, content-neutral laws that target expressive conduct usually receive intermediate scrutiny. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). But even when the expressive aspect of conduct does not trigger the regulation, the Court still uses a variant of intermediate scrutiny known as the *O’Brien* test to consider whether particular applications of general laws comport with the First Amendment. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (endorsing “the framework set forth in *O’Brien* for content-neutral restrictions on symbolic speech”); *id.* at 310 (Souter, J., concurring in part and dissenting in part) (agreeing with the plurality’s approach).

Scholars have disputed the extent to which expression triggers heightened scrutiny. Compare Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250-60 (1995) (challenging the idea that expression triggers heightened review), and Schauer, *supra* note 19, at 1771 (describing “countless . . . instances” where communicative acts are “not measured against First Amendment-generated standards”), with Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1105-06 (2005) (favoring First Amendment coverage for communicative acts that facilitate crime), and Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1347 (2005) [hereinafter, Volokh, *Speech as Conduct*] (“When the law restricts speech because of what the speech communicates—because the speech causes harms by persuading, informing, or offending—we shouldn’t deny that the law is a speech restriction, and requires some serious justification.”).

B. Doctrinal Possibilities

Approaches to coverage for speech-facilitating conduct generally fall on a continuum that focuses on the speaker, not the government.<sup>51</sup> At one pole, free speech coverage is denied for all claims involving nonexpressive conduct regardless of expressive aims or indirect effects on speech.<sup>52</sup> A limitation on giving money to an expressive group, for instance, would not raise a First Amendment problem unless the act of giving money counted as “expressive.” Some cases suggest this approach. “[A]lthough the Supreme Court has defined the boundaries of expression broadly,” one Court of Appeals has opined, “it never has extended the protections of the First Amendment to non-expressive conduct.”<sup>53</sup> At this pole, the distinction between expressive and non-expressive conduct is absolutely crucial; restrictions of nonexpressive conduct do not implicate the First Amendment at all.

At the other pole, heightened First Amendment scrutiny applies whenever a regulation of nonexpressive conduct burdens an expressive goal—most commonly when someone wants to engage in nonexpressive conduct for an expressive reason.<sup>54</sup> On this view, a limitation on giving money to an expressive group would raise a free speech problem by diminishing the supply of money used for speech. At this pole, the distinction between expressive and nonexpressive conduct is less important, and the scope of First Amendment

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51. This Article is not the first to offer a taxonomy of approaches to this problem. Particularly useful, in my view, is Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U.L. REV. 1291, 1297-99, 1337-44 (2004).
52. See, e.g., Erwin Chemerinsky, *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla*, 67 GEO. WASH. L. REV. 1152, 1156 (1999) (“[A] general law restricting behavior is not vulnerable to a First Amendment challenge based on its impact in restricting the gathering of information.”); Gary L. Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417, 483 (1987) (“[T]he first amendment does not generally protect noncommunicative preconditions of speech . . . .”); Dana Remus Irwin, *Freedom of Thought: The First Amendment and the Scientific Method*, 2005 WIS. L. REV. 1479, 1504 [hereinafter Remus, *Freedom of Thought*] (“[A]bsent very specific exceptions, the Court has never construed general noncommunicative preconditions of speech as indispensable conditions of free expression.”); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1187 (2005) (“[N]o case recognizes a First Amendment investigative privilege that provides immunity from generally applicable property and tort rules like trespass.”); Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers’ Power*, 117 YALE L.J. 1549, 1550 (2008) (“[T]he First Amendment protects individuals . . . who *distribute* recordings of illegal police conduct. But it probably does not protect individuals . . . who *produce* the recordings.”). These works do not reject the idea of heightened scrutiny for speech-targeted laws, but their focus is on individual conduct rather than on laws.
53. *Doe v. City of Lafayette*, 377 F.3d 757, 764 (7th Cir. 2004) (en banc).
54. Cf. John A. Robertson, *The Scientist’s Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1217-18 (1977) (“If the first amendment serves to protect free trade in the dissemination of ideas and information, it must also protect the necessary preconditions of speech . . . .” (footnote omitted)).

coverage is extraordinarily broad. Tax laws, environmental standards, and labor laws, for instance, all routinely impose costs that could have derivative effects on the supply of speech.

Not surprisingly, most scholarly accounts fall somewhere between these extremes. Scholars who advocate First Amendment coverage for nonexpressive conduct based on the effects on speech usually craft limiting principles, lest expressive purposes trigger heightened review of nearly any law.<sup>55</sup>

The most frequent proposals define First Amendment boundaries by subject, asking *what* expressive goal is at stake. Scholars have debated an array of possibilities. Subject-specific First Amendment rights could include a right to gather news (which facilitates publishing news),<sup>56</sup> a right to give money to political campaigns (which facilitates political speech),<sup>57</sup> a right to be free from compelled giving (which otherwise facilitates undesired speech),<sup>58</sup> and a right to engage in scientific research (which facilitates publishing scientific articles).<sup>59</sup> These categories could be further delineated—limiting information-gathering claims, for example, to instances where the desired information is of public rather than private concern.<sup>60</sup>

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55. See, e.g., McDonald, *supra* note 7, at 327.

56. See, e.g., *id.* at 273-308, 327. Other key pieces in this voluminous literature include Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 938-39 (1992); RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1223-25 (2013); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999); Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1197-1200 (2000); Diane L. Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 646-48.

57. See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1054 (1985) (favoring First Amendment protection for campaign contributions because “[t]hose who give to and spend on election campaigns are intrinsically legitimate participants in the ongoing process of representative democracy”). For other discussions of free speech rights in the context of campaign contribution limits, see *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011); *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010); and Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 665-67 (1997).

58. See, e.g., Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 202-03. Micah Schwartzman notes the logical relationship between laws that limit contributions and those that compel contributions. See Schwartzman, *supra* note 30, at 381-82.

59. See, e.g., Robertson, *supra* note 54, at 1217 (“As an essential step in the process of dissemination of ideas and information, research should have the same constitutional status as dissemination itself.”). Other contributions to this literature include James R. Ferguson, *Scientific Inquiry and the First Amendment*, 64 CORNELL L. REV. 639 (1979); and Barry P. McDonald, *Government Regulation or Other “Abridgments” of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979 (2005).

60. See, e.g., McDonald, *supra* note 7, at 338 n.301 (proposing a “news value” test).

Other proposals seek to limit *who* gets First Amendment protection. News-reporting privileges, for instance, might be confined to journalists.<sup>61</sup> Coverage could similarly depend on *where* the nonexpressive conduct takes place,<sup>62</sup> or on the *degree* to which the regulations burden certain speakers.<sup>63</sup> Geoffrey Stone and Michael Dorf both argue that *significant* incidental burdens on speech ought to trigger elevated scrutiny.<sup>64</sup> Finally, many scholars assert that First Amendment interests should give way when the rights of others are infringed.<sup>65</sup>

Speaker-focused approaches rest on the familiar distinction between *protected* and *unprotected* conduct—the idea that some conduct is constitutionally privileged, while other conduct is not.<sup>66</sup> That distinction reflects how we typically talk about rights,<sup>67</sup> and it fits with a commonsense understanding that rights protect individuals. “From the perspective of a rightholder,” Dorf points out, “the severity of a law’s impact has no necessary connection to whether the law directly or incidentally burdens the right’s exercise.”<sup>68</sup> In other words, usually people care most about *whether* their actions are lawful, not *why* they might be unlawful. Modern substantive due process doctrine seems to exemplify this way of thinking about rights as protecting certain types of conduct against governmental infringement.<sup>69</sup> And, as explained in Part II, the Supreme Court focused on protection for certain types of conduct in many of its decisions prior to the mid-1980s.

But speech rights do not have to fall on this speaker-focused continuum. The First Amendment could instead “direct our attention to the *law* rather than to the *conduct* prohibited by a particular application.”<sup>70</sup> Indeed, as Matthew

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61. See Jones, *supra* note 56, at 1239 (“By its very designation, a constitutional reporter’s privilege applies only to a ‘reporter,’ and thus mandates a threshold showing that the party seeking the constitutional protection qualifies occupationally for the privilege.”); see also *Developments in the Law—The Law of Media*, 120 HARV. L. REV. 990, 996-98 (2007) (discussing various statutory and constitutional approaches for privileging journalist activities).

62. For instance, the First Amendment might afford special solicitude for expression-related conduct that takes place in public fora or other public places. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599-600 (1980) (Stewart, J., concurring in the judgment).

63. See *infra* notes 243-46 and accompanying text.

64. See Dorf, *supra* note 15, at 1210; Stone, *supra* note 15, at 112-14.

65. See, e.g., Robertson, *supra* note 54, at 1206. This limiting principle could be used to determine “coverage” or “protection,” or both.

66. See, e.g., *id.* at 1204 (asking whether scientists “have a legal right to conduct research”).

67. Pildes, *Dworkin’s Two Conceptions of Rights*, *supra* note 25, at 311 (“I believe [a conduct-based view] is the dominant view of rights in the contemporary political culture (though I do not know how one would prove that).”).

68. Dorf, *supra* note 15, at 1177.

69. See *id.* at 1219-21.

70. *Id.* at 1185-86; see also Samaha, *supra* note 51, at 1294.

Adler observes, many constitutional rights—including some free speech rights—“function not as shields around particular *actions*, but as shields against particular *rules*.”<sup>71</sup> The Supreme Court has mostly adopted that view of the Free Exercise Clause, holding that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>72</sup> Individuals, in other words, cannot obtain constitutional exemptions when laws happen to conflict with their religious beliefs and practices; the “right” of free exercise is a rule about rules, not a shield around particular behavior. Justice Scalia has advocated (without success) for an analogous principle in free speech cases, proposing that heightened scrutiny should be limited to situations “[w]here the government prohibits conduct precisely because of its communicative attributes.”<sup>73</sup>

### C. Anti-Targeting

How would a focus on *laws* rather than *conduct* work in the context of restrictions of speech-facilitating conduct? This question is explored in greater depth in Parts III and IV, which argue that the Supreme Court now uses a law-focused approach to assess regulations of nonexpressive conduct. But it is useful to offer a preliminary sketch. In short, a law-focused approach can be based on an anti-targeting concept. Laws regulating nonexpressive conduct raise free speech concerns when those laws single out speech—including speech-related rules that target the speech process. At the same time, however, the speech-restrictive effects of general (i.e., nontargeted) laws do not trigger heightened scrutiny when those laws are neutrally applied to regulate nonexpressive conduct.

In most cases, applying the anti-targeting principle is straightforward. For example, riding a public subway is not expressive, and therefore standard metro hours are immune from a First Amendment challenge. If a late-night

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71. Adler, *supra* note 25, at 16 (emphasis added); see also Pildes, *Why Rights Are Not Trumps*, *supra* note 25, at 730-31 (articulating a similar “structural” account of rights).

72. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). *But see* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012) (holding that religious institutions are sometimes constitutionally exempt from neutral, generally applicable labor laws).

73. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring in the judgment) (emphasis omitted). Justice Scalia has advocated for an overarching framework that treats the structure of free exercise and free speech claims alike. *See id.* at 579; see also *Smith*, 494 U.S. at 886 n.3 (asserting, perhaps inaccurately, that “generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment”). This Article makes a more limited argument. *See supra* notes 39, 48 and accompanying text.

protestor insisted that a public subway extend its usual hours of operation for his convenience, he and his free speech argument would get nowhere. An ordinance barring the use of the subway to attend protests, however, would raise clear First Amendment problems.<sup>74</sup>

Still, targeting could be defined in different ways. The concept could refer, for instance, to the subjective intentions of governmental actors, asking whether they are motivated by speech-related effects. Targeting could also refer to whether the law, evaluated objectively on its face, singles out speech.<sup>75</sup>

For purposes of this Article, targeting refers to an *objective* concept, thus avoiding unwieldy inquiries into subjective intentions and maintaining greater consistency with current law across a wide array of constitutional doctrines.<sup>76</sup> At the same time, however, the anti-targeting principle bars not only laws that facially single out speech but also laws that, evaluated contextually, have an apparent disproportionate effect on speech. This caveat, common in other areas of constitutional law, helps avoid the common problem of “gerrymandering.” A special tax on newsprint, for instance, would facially target only a particular type of printing paper—not expression itself—but its disproportionate effects on expression would be facially apparent.

Readers might wonder how the anti-targeting framework—which accounts for a law’s anticipated *effects*—differs from a speaker-focused approach that applies heightened scrutiny based on indirect effects on speech. The answer is that the anti-targeting framework focuses on *laws* rather than on *individuals*. A speaker-focused approach allows for free speech exemptions when otherwise valid laws happen to burden speech. A proponent of this view, for instance, might argue that journalists should sometimes be allowed to disregard general laws, or that newspapers should be able to hire low-cost teenagers to deliver papers notwithstanding child labor laws. The anti-targeting approach, by contrast, rejects the idea of exemptions from general laws when the restriction falls on nonexpressive conduct. Instead, the anti-targeting principle focuses on whether the relevant *law* targets speech either on its face or by targeting conduct that is closely related to speech.<sup>77</sup>

Deciding whether a law has an apparent disproportionate effect on speech will sometimes be difficult. Part IV explores this challenge in greater detail, but

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74. This scenario is expropriated from Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 421 (2013).

75. Of course, objective tests often serve as administrable proxies for assessing subjective motives. See John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1156 (1978).

76. See *infra* Part IV.A.

77. Again, my only concern in this Article is First Amendment *coverage*. “Questions about the boundaries of the First Amendment are not questions of strength—the degree of protection that the First Amendment offers—but rather are questions of scope—whether the First Amendment applies at all.” Schauer, *supra* note 19, at 1771.

it is worth emphasizing up front that this Article eschews any claim to clarity in all cases. Close questions are inevitable, and some ambiguity in this area may even be a benefit, allowing doctrine to develop over time as judges confront real cases. Importantly, however, a focus on *laws* rather than on individual conduct provides substantial predictability for speakers—giving precedents a well-defined effect (i.e., laws are either constitutional or not), while moving doctrine away from a rigid reliance on the speech/conduct distinction.<sup>78</sup> Part V offers a normative defense of anti-targeting and takes a closer look at its challenges and tradeoffs, but for now we can return to a brief sketch of the concept.

Laws that single out nonexpressive acts undertaken for an expressive purpose present the clearest example of targeting. Consider the example mentioned above: an ordinance barring use of public subways to attend a protest. Ordinary travel on a subway is not expressive, but the ordinance raises free speech concerns because it singles out speech activities for particular disadvantage. The same issue arises even if the incidence of the law does not fall directly on conduct that facilitates speech. An ordinance barring subway use by groups of speakers—journalists or lobbyists, for example—would not directly target speech-facilitating conduct, but it would nonetheless target speech by using a speech-related rule.

These hypothetical ordinances could be viewed as direct regulations of speech under the “unconstitutional conditions” doctrine.<sup>79</sup> But the anti-targeting principle applies even when that characterization is unwarranted. Consider, for instance, campaign contribution caps. Assuming that campaign donations facilitate speech but are not themselves expressive acts, campaign contribution ceilings do not directly burden expressive conduct. Nonetheless, contribution caps plainly target speech-facilitating conduct by singling out donations used for campaigning.<sup>80</sup> Compelled monetary transfers that are designed to fund someone else’s speech present a similar problem.<sup>81</sup> As these examples illustrate, the anti-targeting principle ensures that the government stays presumptively neutral not only toward speech acts and speakers but also

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78. The anti-targeting approach uses the speech/conduct distinction, too, but it reduces reliance on that distinction by applying heightened scrutiny in many cases where the regulated conduct is nonexpressive.

79. The unconstitutional conditions doctrine generally prohibits the government from requiring “a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship” to the regulated right. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994).

80. Even accepting Justice White’s point that “many expensive campaign activities . . . are not themselves communicative or remotely related to speech,” *Buckley v. Valeo*, 424 U.S. 1, 263 (1976) (per curiam) (White, J., concurring in part and dissenting in part), campaign contribution limits could still trigger heightened scrutiny because they target campaigns, whose mission is expressive.

81. See *infra* Part III.C.

toward “conduct commonly associated with expression.”<sup>82</sup> This idea—as Part IV argues—calls for heightened scrutiny when laws target conventional means of expression (that is, objects conventionally used for expressive reasons), such as phones, televisions, computers, printers, and so forth.<sup>83</sup>

## II. Before *Arcara*

In order to understand current doctrine, we need to appreciate how the Supreme Court’s approach has evolved. This Part, which explores the Court’s treatment of speech-facilitating conduct prior to its 1986 decision in *Arcara*, focuses on four lines of cases: (1) information-gathering cases; (2) campaign finance law; (3) compelled-subsidy doctrine; and (4) associational rights. Part III then reevaluates each of these areas, exposing dramatic changes in the Court’s jurisprudence along with confusion sown by the Court’s failure to identify or grapple with those shifts.

### A. Information Gathering

Information-gathering cases arise when someone asserts a qualified right to gather information—often “newsworthy” information—for use in subsequent expressive acts.<sup>84</sup> Prior to the mid-1980s, the *outcomes* in information-gathering cases were consistent with the anti-targeting principle, but the Supreme Court’s *reasoning* sometimes revealed an approach that let indirect effects on speech trigger First Amendment coverage.

Information-gathering claims had a rocky start. In *Zemel v. Rusk*—a free speech challenge to the Cuba travel embargo—the Court flatly denied that “a First Amendment right . . . [was] involved” in merely gathering information.<sup>85</sup> Writing for the Court, Chief Justice Warren explained:

[T]he Secretary’s refusal to validate passports for Cuba . . . is an inhibition of action. There are few restrictions on action which could not be clothed by

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82. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759-61 (1988). The Court in *Lakewood* decided to allow a facial challenge to a licensing scheme because the regulation was not a general law but instead was “aimed at conduct commonly associated with expression.” *Id.* at 760-61.

83. Uses of expressive media—such as radio, music, and film—to disseminate audiovisual content would usually count as “expressive” without resort to doctrines relating to nonexpressive conduct. *See, e.g., Superior Films, Inc. v. Dep’t of Educ.*, 346 U.S. 587, 589 (1954) (per curiam) (Douglas, J., concurring) (“Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas.”); *see also Saia v. New York*, 334 U.S. 558, 561 (1948) (“Loud-speakers are today indispensable instruments of effective public speech.”).

84. The legal concept of “newsworthiness” typically refers to information “of legitimate public concern.” *See, e.g., Anderson v. Suitsers*, 499 F.3d 1228, 1235-36 (10th Cir. 2007).

85. *Zemel v. Rusk*, 381 U.S. 1, 16 (1965).

ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.<sup>86</sup>

Importantly, the Court noted that the restriction on travel had not "result[ed] from any expression or association."<sup>87</sup> The travel restriction, in other words, did not target speech.

Several years later in *Branzburg v. Hayes*,<sup>88</sup> however, the Supreme Court seemed more receptive to the possibility of constitutional protection for newsgathering. *Branzburg* involved journalists who objected to testifying about their confidential sources. Revealing this information to grand juries, they argued, would deter their sources "from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment."<sup>89</sup>

For the most part, the Court squarely rejected the journalists' claims.<sup>90</sup> Though acknowledging that "without some protection for seeking out the news, freedom of the press could be eviscerated,"<sup>91</sup> the five-Justice majority was acutely concerned with the potential breadth of newsgathering rights. "It is clear," Justice White wrote for the majority, "that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."<sup>92</sup> Pointing to *Zemel v. Rusk*, he observed that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally,"<sup>93</sup> and that it would be "frivolous" to claim a constitutional right to violate otherwise valid criminal laws.<sup>94</sup> "Although stealing documents or private wiretapping could provide newsworthy information," Justice White

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86. *Id.* at 16-17.

87. *Id.* at 16.

88. 408 U.S. 665 (1972).

89. *Id.* at 679-80. Specifically, they argued that journalists generally should not have to testify about confidential sources unless the government is able to show that the information is relevant and otherwise unavailable, and that "the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure." *Id.* at 680.

90. *Id.* at 690 ("We are asked to . . . interpret[] the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.").

91. *Id.* at 681.

92. *Id.* at 682.

93. *Id.* at 684.

94. *Id.* at 691.

explained, “neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.”<sup>95</sup>

Yet the *Branzburg* decision is frustratingly ambiguous. To begin with, the Court framed its discussion by observing that “a State’s interest must be ‘compelling’ or ‘paramount’ to justify even an indirect burden on First Amendment rights.”<sup>96</sup> It then proceeded to apply elevated scrutiny. “On the records now before us,” the Court remarked—intimating a possible limitation on its holding—there was “no basis” for giving constitutional priority to journalists based on a “consequential, but uncertain, burden on news gathering.”<sup>97</sup> The effect of subpoenas on newsgathering was “unclear” and “to a great extent speculative,” producing “widely divergent” estimates.<sup>98</sup> Worried about where recognition of journalist privileges might lead, the majority cautioned that it was “unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination.”<sup>99</sup> With more clarity about the speech effects of reporter subpoenas, however, perhaps the Court’s conclusion would have changed.

Justice Powell—one of the five Justices who joined the majority opinion—wrote a short concurrence. A claimed privilege, he emphasized, “should be judged on its facts,” balancing governmental interests against the freedom of the press.<sup>100</sup> “The balance of these vital constitutional and societal interests on a case-by-case basis,” he argued, “accords with the tried and traditional way of adjudicating such questions.”<sup>101</sup>

No wonder lower courts were thoroughly confused by *Branzburg*. The majority had rejected the asserted privilege, seemingly in categorical terms. But the Court nonetheless applied heightened scrutiny, and Justice Powell’s “enigmatic” concurrence—as the dissenting Justices put it<sup>102</sup>—provided further hope to proponents of a reporter’s privilege. Following the decision, many lower courts read the unusual combination of opinions as supporting the availability of a reporter’s privilege in certain cases.<sup>103</sup>

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95. *Id.*

96. *Id.* at 700.

97. *Id.* at 690-91.

98. *Id.* at 693-94.

99. *Id.* at 703.

100. *Id.* at 710 (Powell, J., concurring).

101. *Id.*

102. *Id.* at 725 (Stewart, J., dissenting). Justice Powell continued to adhere to this view of *Branzburg* in his later writings. See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting) (“[A] fair reading of the majority’s analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated.”).

103. See, e.g., *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594-96 (1st Cir. 1980).

Subsequent information-gathering cases ventured down the same trail. The Court, for the most part, steadfastly rejected case-specific exemptions. But the Justices often applied some form of heightened scrutiny to determine whether certain *categories* of speech-related conduct should be constitutionally protected. In *Kleindienst v. Mandel*, for instance, the Court acknowledged that the First Amendment was “implicated” by the application of a travel restriction that barred a communist from entering the country to speak at an academic conference.<sup>104</sup> Like in *Branzburg*, however, the Court nevertheless rejected the asserted right because it “would prove too much.”<sup>105</sup> Were courts to recognize such a right, either “every claim would prevail,” thus nullifying the travel restriction, or “courts in each case would be required to weigh the strength of the audience’s interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.”<sup>106</sup>

A series of “access” cases raised the same concern, reflecting continued divisions about how to approach speech-facilitating conduct.<sup>107</sup> In *Houchins v. KQED, Inc.*,<sup>108</sup> for instance, the Court split over whether journalists should be exempt from certain prison visitation rules. The plurality opinion of Chief Justice Burger firmly rejected the journalists’ First Amendment claim, explaining that it would require judges “to fashion ad hoc standards, in individual cases, according to their own ideas of what seems ‘desirable’ or ‘expedient.’”<sup>109</sup> A constitutional *interest* was at stake, he acknowledged, but this interest did not justify a First Amendment right to nonpublic information. “The public’s interest in knowing about its government is protected by the guarantee of a Free Press,” the Chief explained, “but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”<sup>110</sup> Justice Stevens dissented, joined by Justices Brennan and

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104. 408 U.S. 753, 755-56, 765 (1972).

105. *Id.* at 768.

106. *Id.* at 768-69. The Supreme Court employed similar arguments to reject a claim that “education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Although acknowledging that education promotes “a system of freedom of expression,” the Court held that this effect does not warrant “judicial intrusion,” the “logical limitations” of which are “difficult to perceive.” *Id.* at 36-37.

107. See *Saxbe*, 417 U.S. at 850; *Pell v. Proconier*, 417 U.S. 817, 833-35 (1974).

108. 438 U.S. 1 (1978).

109. *Id.* at 14 (plurality opinion).

110. *Id.* (quoting Potter Stewart, Assoc. Justice, U.S. Supreme Court, “Or of the Press,” Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), in 26 HASTINGS L.J. 631, 636 (1975)). Justice Stewart agreed with the plurality’s premise that the Constitution does not grant journalists access to nonpublic information, but he argued that the press—as a constitutionally privileged conduit for public information—should be granted a few special privileges (like being allowed to use recording

*footnote continued on next page*

Powell. “Without some protection for the acquisition of information about the operation of public institutions,” they claimed, “the process of self-governance contemplated by the Framers would be stripped of its substance.”<sup>111</sup>

The contours of doctrine were thus heavily contested as the Supreme Court entered the 1980s. Although the Court had consistently rejected information-gathering claims, the shifting majorities, pluralities, and concurring opinions varied in their approaches to threshold questions. Most importantly, the Justices remained divided about whether First Amendment coverage should depend on the distinction between expressive and nonexpressive conduct.

The Court’s first putative recognition of an information-gathering right came in a pair of access decisions in the early 1980s addressing whether the closure of a criminal courtroom abridges the freedom of speech. Justice Brennan’s view, which the Court adopted in 1982, deserves the most attention. “Read with care and in context,” Justice Brennan wrote in *Richmond Newspapers, Inc. v. Virginia*, prior cases indicated that “access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.”<sup>112</sup> Interestingly, however, Justice Brennan did not locate an access right in the First Amendment’s ordinary guarantee “to protect communication between speaker and listener.”<sup>113</sup> “[T]he First Amendment,” he explained, “embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.”<sup>114</sup> This structural component, he insisted, “links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.”<sup>115</sup>

Justice Brennan recognized the practical challenges of applying First Amendment protection to nonexpressive conduct that facilitates speech. “[T]he stretch of this protection is theoretically endless,” he acknowledged, and

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equipment) to facilitate more effective performance of their constitutionally respected role. *Id.* at 16-18 (Stewart, J., concurring in the judgment).

111. *Id.* at 32 (Stevens, J., dissenting).

112. 448 U.S. 555, 586 (1980) (Brennan, J., concurring in the judgment). Prior decisions, Justice Brennan continued, “neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.” *Id.*

113. *Id.* at 586-87.

114. *Id.* at 587.

115. *Id.* at 588.

therefore “must be invoked with discrimination and temperance.”<sup>116</sup> At first glance, he seemed to endorse a case-by-case balancing test, “considering the information sought and the opposing interests invaded.”<sup>117</sup> Yet he tethered this open-ended statement to two sturdier principles. Consideration of “public access claims in individual cases,” he wrote, “must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances.”<sup>118</sup> Using these historical and structural guideposts, Justice Brennan concluded that the Constitution presumptively guarantees a public right of access to criminal trials.<sup>119</sup> Thus, as late as the early 1980s, the Court was still willing to recognize a speech right based on the incidental effects of a general rule.

### B. Campaign Contributions

Governmental restrictions on contributions to political campaigns raise a similar concern about coverage for speech-facilitating conduct, and not merely for the expressive end product.

In the watershed case of *Buckley v. Valeo*,<sup>120</sup> the Supreme Court famously distinguished between limits on how much money campaigns may spend and limits on how much money individuals may contribute. Restrictions on campaign expenditures, the Court held, were essentially restrictions on speech itself.<sup>121</sup> But contributions were less protected by the First Amendment, thus triggering a lower level of scrutiny.<sup>122</sup>

For purposes of this Article, the pivotal question is why campaign contribution limits implicate the First Amendment at all. The *Buckley* opinion offers two possibilities. First, contributions to political candidates “may result in political expression . . . by someone other than the contributor.”<sup>123</sup> In other words, contributions are covered by the First Amendment because they facilitate speech. Second, the Court seems to have recognized that campaign contributions might be expressive. “A contribution serves as a general

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116. *Id.* (quoting William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Address at the Dedication for the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 RUTGERS L. REV. 173, 177 (1979)).

117. *Id.*

118. *Id.* at 597-98.

119. *Id.* at 589-97. The Court explicitly adopted this framework two years later. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982).

120. 424 U.S. 1 (1976) (per curiam).

121. *Id.* at 16-17.

122. *Id.* at 20-23.

123. *Id.* at 21.

expression of support for the candidate and his views,” the Court explained, “but does not communicate the underlying basis for the support.”<sup>124</sup>

This Article takes no position on whether campaign contributions are sufficiently expressive to count as “speech” under the First Amendment—an issue that strikes me as mostly an irrelevant distraction.<sup>125</sup> Supreme Court opinions and scholarly discussions point in both directions.<sup>126</sup>

For present purposes, the key point is that *Buckley* focused on the *effects* of contributions. To be sure, the Court described contributing as a “general expression of support” and a “symbolic act,”<sup>127</sup> but these comments were made to *disparage* the expressive value of the contributions. *Buckley*, we must remember, came at a time when the speech/conduct distinction was still being worked out and did not yet have threshold doctrinal significance. Thus, as Kathleen Sullivan aptly explains, the doctrinally relevant point in *Buckley* was that monetary contributions are conduct that “merely facilitate[s] or associate[s] the contributor with speech,” whereas individual expenditures “are more directly expressive.”<sup>128</sup> In this way, *Buckley* supports a speaker-focused

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124. *Id.*; see also *id.* (“[T]he expression rests solely on the undifferentiated, symbolic act of contributing.”).

125. Even if the First Amendment “covers” contributions as expressive conduct, the government’s justification for restricting contributions has nothing to do with cutting off their symbolic support for a candidate, and it is okay to limit expressive conduct when the law seeks to prevent harms unrelated to the communicative impact of speech. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 291-96 (2000) (plurality opinion); *id.* at 310 (Scalia, J., concurring in the judgment); *id.* (Souter, J., concurring in part and dissenting in part); *United States v. O’Brien*, 391 U.S. 367, 382 (1968). But see BeVier, *supra* note 57, at 1058-60 (offering a thoughtful rebuttal to this argument). Rather, the constitutionally problematic aspect of campaign finance rules, in my view, is the government’s patent effort to influence the distribution of speech resources. See *infra* Part III.B; see also *Buckley*, 424 U.S. at 17 (per curiam) (explaining that contributions are not subject to *O’Brien* analysis).

126. Compare *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (“Money is property; it is not speech.”), *id.* at 400 (Breyer, J., concurring) (“[A] decision to contribute money to a campaign is a matter of First Amendment concern—not because money is speech (it is not); but because it enables speech.”), and Deborah Hellman, *Money Talks but It Isn’t Speech*, 95 MINN. L. REV. 953, 971 (2011) (“In sum, giving and spending money are not expressive enough to warrant First Amendment protection as speech.”), with Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 54 (1997) (“Gifts of money and the expenditure of money are forms of speech.”). Scholars typically describe *Buckley* as equating money and speech. See, e.g., Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 31 (2012) (mentioning “*Buckley*’s debatable equation that ‘money is speech’”); David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate Contributions and Independent Expenditures*, 14 J.L. & POL. 33, 35 (1998) (“*Buckley* effectively equated speech with money . . .”).

127. *Buckley*, 424 U.S. at 21 (per curiam).

128. Sullivan, *supra* note 57, at 666. Deborah Hellman concludes that “it is not at all clear that the *Buckley* Court really treats giving and spending of money as speech because it is expressive, though it appears to endorse this rationale for doing so.” Hellman, *supra* note 126, at 971.

rather than law-focused approach to First Amendment coverage for nonexpressive conduct.<sup>129</sup>

### C. Compelled Subsidies

Compelled-subsidy cases present the mirror image of campaign finance cases: instead of *restricting* monetary transfers that facilitate speech, the government *compels* them (e.g., union-shop dues).<sup>130</sup> Not surprisingly, these cases raise a particularly challenging set of issues tied to free speech rights, including associational rights. And scholars have rightly criticized the Supreme Court's response as both erratic and lacking a sound theoretical foundation.<sup>131</sup>

The seminal compelled-subsidy case is *Abood v. Detroit Board of Education*,<sup>132</sup> decided only a year after *Buckley*. In *Abood*, a group of nonunion teachers challenged a Michigan law requiring payment of union fees equal to regular union dues.<sup>133</sup> The Court divided the teachers' First Amendment challenge in two. First, the Court held that, although "compel[ling] employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests," the intrusion was "constitutionally justified" because of the union's pivotal role in collective bargaining.<sup>134</sup> Essentially, the government could require nonunion teachers to pay for collective-bargaining expenses to prevent them from "free riding" on union efforts. Second, the Court considered the teachers' argument that they should be allowed to block the union from spending mandatory fees on speech activities "unrelated to its duties as exclusive bargaining representative."<sup>135</sup> On this issue, the Court ruled in favor of the nonunion teachers.

Underlying the *Buckley* decision, the *Abood* Court explained, was the principle that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment."<sup>136</sup> This understanding of *Buckley* was sound, but the *Abood* Court followed this statement with two curious sentences:

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129. *But see* Francione, *supra* note 52, at 460 n.150 ("Both *Buckley* and [*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)] . . . involved speech, not noncommunicative preconditions to speech. . . . *Buckley* and *Bellotti* simply do not support an argument that noncommunicative preconditions to speech are protected by the first amendment.").

130. *See* Schwartzman, *supra* note 30, at 381-82.

131. *See* Post, *supra* note 58, at 228 ("The only hope of avoiding a string of precedents as self-evidently ragged as [the compelled-subsidy cases] is to repudiate the premise of [compelled-subsidy doctrine] and to rethink the fundamental question of when the compelled subsidization of speech does and does not raise First Amendment issues.").

132. 431 U.S. 209 (1977).

133. *Id.* at 211-12.

134. *Id.* at 222.

135. *Id.* at 234.

136. *Id.*

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.<sup>137</sup>

These are ill-fitting rationales. The monetary transfers were mandatory irrespective of the teachers' personal views, leaving the teachers perfectly free to think and say whatever they wanted. To be sure, being forced to transfer funds could violate an individual's *conscience*.<sup>138</sup> But the teachers did not claim a religious or moral objection to funding the union's speech.<sup>139</sup>

The better reading of the decision—notwithstanding the Court's tortured explanation—is that *Abood* is the mirror image of *Buckley*. In short, because money can facilitate speech, being forced to give money can abridge the freedom of speech. On this account, the lofty invocations of “freedom of thought” and “belief” were rhetorically powerful but doctrinally useless; what really mattered in *Abood* was the speech-facilitating aspect of the subsidies.

#### D. Associational Rights

Associating with others is a common way for individuals to pursue their expressive goals, and therefore enjoys protection under the First Amendment. Like nearly any other speech activity, associational activities involve a mix of expressive and nonexpressive conduct. Consequently, restrictions of an association's nonexpressive acts—from the ways that it raises money, for instance, to the rules it adopts regarding membership—can incidentally burden speech, raising the question of how far nonexpressive conduct is covered in the context of associational rights.

Yet again, the Supreme Court initially gave broad free speech coverage for burdens placed on the nonexpressive conduct of expressive groups. This Subpart focuses on two particularly contentious areas of associational law: cases involving compelled public disclosure of membership lists, and

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137. *Id.* at 234-35 (footnote omitted).

138. For a historical discussion of this issue, see Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005), discussing religious objections to paying an “equivalent.”

139. See Post, *supra* note 58, at 227 n.134 (“It is odd to speak of violations of conscience in the context of nonideological speech like beef advertisements.”). In the context of religion, the term “conscience” usually refers to “categorical demands on action—that is, demands that must be satisfied no matter what an individual's antecedent desires and no matter what incentives or disincentives the world offers up.” BRIAN LEITER, *WHY TOLERATE RELIGION?* 34 (2012) (emphasis omitted); see also Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 782 (2013) (reviewing LEITER, *supra*) (agreeing with Leiter's definition); cf. Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1489-94 (discussing other definitions of “conscience”).

challenges to antidiscrimination rules when groups prefer not to admit certain members. Because this Article addresses only freedom of expression, it does not engage with the noteworthy suggestion that associational rights might be derived from other parts of the Constitution.<sup>140</sup>

### 1. Compelled-disclosure cases

The foundational compelled-disclosure ruling is *NAACP v. Alabama ex rel. Patterson*.<sup>141</sup> The famous civil rights case began when the Attorney General of Alabama sought to enjoin the NAACP “from conducting further activities within, and to oust it from,” Alabama on account of its unlicensed expressive activities.<sup>142</sup> At that point, the State also sought and obtained an extensive discovery order imposing onerous burdens—including disclosure of the organization’s membership lists—having no apparent connection to the order’s ostensible purpose, which was to establish that the NAACP was engaged in unlicensed activities.<sup>143</sup> Contrary to popular belief, the case did not involve a generally applicable disclosure rule; Alabama required all corporations to register with the State before undertaking in-state activities, but the law said nothing about disclosing membership lists.<sup>144</sup>

The NAACP appealed the discovery order on First Amendment grounds, arguing that publicly revealing its membership would lead to backlash against its members.<sup>145</sup> The Supreme Court agreed. Disclosure, Justice Harlan explained, was “likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.”<sup>146</sup> In other words, disclosure would indirectly burden speech, thus triggering free speech concerns.<sup>147</sup>

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140. See, e.g., JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012); Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 150 (2006); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 981 (2011).

141. 357 U.S. 449 (1958).

142. *Id.* at 452.

143. *Id.* at 453.

144. *Id.* at 451.

145. *Id.* at 462.

146. *Id.* at 462-63.

147. The Court later explained that *NAACP v. Alabama ex rel. Patterson* recognized a “right to privacy in one’s political associations and beliefs,” *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 91 (1982), and that compelled disclosure “may burden the ability to speak,” *Citizens United v. FEC*, 558 U.S. 310, 366 (2010). The Court has tied this right, however, to demonstrated burdens on speech. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 70 (1976) (per curiam) (“*NAACP v. Alabama* is inapposite where . . . any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative.”).

## 2. Associational-membership cases

Another strand of freedom of association cases involves challenges to antidiscrimination laws that override selective admission policies. For instance, if a private group that engages in expressive activities wants to exclude women or gay people, does it implicate the First Amendment for the government to ban that discrimination? Consistent with its treatment of other incidental burdens before *Arcara*, the Supreme Court initially applied heightened scrutiny to incidental burdens that happened to fall on expressive associations.

In the seminal case of *Roberts v. United States Jaycees*, the Supreme Court considered whether the Jaycees—a group promoting civic participation by young men—could be required to accept female members pursuant to a general antidiscrimination law.<sup>148</sup> The Court applied heightened scrutiny because the group was forced to “accept members it does not desire.”<sup>149</sup> First Amendment review, in other words, did not depend on whether the law directly restricted speech.<sup>150</sup> As with other areas of free speech law, the Court viewed indirect effects on speech as sufficient to trigger heightened review.

### III. Current Doctrine

Looking back on the Supreme Court’s treatment of speech-facilitating conduct from the 1960s through the early 1980s, two noteworthy features emerge. First, reasoning scattered throughout the Court’s opinions showed wavering support for some form of heightened scrutiny when the government indirectly burdened speech. As late as the 1984 decision in *United States v. Albertini*,<sup>151</sup> for instance, the Court applied intermediate scrutiny to review the arrest of a protestor on account of his unlawful entry onto a military base. Without considering whether the regulated conduct was expressive, the Court simply stated that “[a]pplication of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment if it ‘furthers an important or substantial governmental interest . . . .’”<sup>152</sup>

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148. 468 U.S. 609, 612-13 (1984).

149. *Id.* at 623. Applying heightened scrutiny, the Court upheld the application of the antidiscrimination law, finding “no basis in the record for concluding that admission of women as full voting members [would] impede the organization’s ability to engage in [its] protected activities or to disseminate its preferred views.” *Id.* at 626-27.

150. For a defense of associational rights based on similar reasoning, see Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 N.W. U. L. REV. 839, 840-41 (2005), which comments that expressive associations should obtain greater protection for their nonexpressive conduct because they are “special sites for the generation and germination of thoughts and ideas.”

151. 472 U.S. 675 (1985).

152. *Id.* at 687 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). Elena Kagan argues that the *Albertini* decision may have been based on “a visceral sense that an illicit factor

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The second notable feature of these cases, however, was uniformity in *outcomes*. With only rare exception, the Court consistently rejected First Amendment claims involving nonexpressive conduct that violated general laws. Thus, while the Court was often saying one thing, results in a wide array of cases suggested that it might have effectively been doing another.<sup>153</sup>

Indeed, the Justices were well aware of problems with protecting nonexpressive conduct,<sup>154</sup> and they increasingly suggested that free speech coverage was limited to cases involving expressive acts. Shortly after *Albertini*, for instance, the Court addressed whether the First Amendment provides a right to solicit contributions. “To resolve this issue,” the Justices explained, “we must first decide whether solicitation in [this] context . . . is speech protected by the First Amendment, for, if it is not, we need go no further.”<sup>155</sup> Doctrine, it seems, was ready for realignment.

The doctrinal status of speech-facilitating conduct came to a head in *Arcara v. Cloud Books, Inc.*<sup>156</sup> This case arose when state officials in New York sought to shut down an adult bookstore for at least a year because of repeated sexual misconduct on the premises.<sup>157</sup> Based on the impact of the closure order on the bookstore’s expressive activities, the New York Court of Appeals applied intermediate scrutiny under *United States v. O’Brien* and reversed the order as “broader than necessary to achieve the restriction against illicit commercial sexual activities.”<sup>158</sup> The Supreme Court granted certiorari and reversed.

The lack of targeting was pivotal. “[T]he sexual activity carried on in this case manifests absolutely no element of protected expression,” the Court

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entered into a governmental decision.” See Kagan, *supra* note 15, at 499. The better explanation, in my view, is that the Court gave little thought to what it was doing and simply grouped all incidental burdens into a common pool.

153. This argument simply posits a realist interpretation of judicial decisionmaking without claiming that doctrine should necessarily align with a realist understanding of past outcomes. Cf. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1084 (1990) (“[T]he legal realist’s effort to discern the law by looking not to what courts say but what they do may well be a valuable heuristic for *predicting* the outcome of any given case, but it is hardly an acceptable method for *deciding* cases.”).

154. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972).

155. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 & n.5 (1984) (assuming *arguendo* that “overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment” and clarifying that “it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies”).

156. 478 U.S. 697 (1986).

157. *Id.* at 698-99.

158. *Id.* at 702; see also *id.* at 700-02 (discussing procedural history).

explained, “[n]or does the . . . New York Public Health Law inevitably single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden.”<sup>159</sup> In other words, the case involved the regulation of nonexpressive conduct by a general law. Accordingly, in the Court’s view, the First Amendment did not apply. The *O’Brien* test, Chief Justice Burger explained for the Court, “has no relevance to a statute directed at imposing sanctions on nonexpressive activity.”<sup>160</sup>

Nor did incidental speech-restrictive effects bring the First Amendment into play. That argument, the Court declared, “proves too much.”<sup>161</sup> Indeed, “every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.”<sup>162</sup> For instance, someone “liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim.”<sup>163</sup> Thus, the Court held, regulations having an incidental effect on speech activities trigger heightened scrutiny “only where it was conduct with a significant expressive element that drew the legal remedy in the first place,”<sup>164</sup> or “where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity.”<sup>165</sup> In other words, expressive conduct and targeted laws each bring the First Amendment into play, but general regulations of nonexpressive conduct do not.

Following *Arcara*’s open embrace of anti-targeting when it comes to speech-facilitating conduct, the Supreme Court has not looked back. In the thirty years since the decision, the Court has affirmed over and over that restrictions of nonexpressive conduct that incidentally burden speech do not trigger elevated First Amendment review. As Jed Rubenfeld observes, “there is no such thing as a free speech immunity based on the claim that someone wants to break an otherwise constitutional law for expressive purposes.”<sup>167</sup> The consistency of prior *outcomes* with the anti-targeting principle, however, has led the Court not to overrule its earlier decisions, lending confusion to several doctrinal areas.

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159. *Id.* at 705.

160. *Id.* at 707.

161. *Id.* at 705-06.

162. *Id.* at 706.

163. *Id.*

164. *Id.*; see also Srinivasan, *supra* note 15, at 410 (“The Court’s use of *O’Brien* and *Clark* to illustrate the *Arcara* rule’s meaning suggests that the rule should be construed narrowly, so that incidental restraints only concern the First Amendment when the activity that draws the law’s application *is itself* used to express a message.”).

165. *Arcara*, 478 U.S. at 706-07. For discussion of this category, see *infra* notes 256-73 and accompanying text.

167. Rubenfeld, *supra* note 16, at 769; see also *supra* note 52 (collecting sources).

A. Information Gathering

Following *Arcara*, the Court has considerably backed off its earlier hint that information-gathering claims might, in some circumstances, proceed based on the incidental effects of general laws. In *Cohen v. Cowles Media Co.*, for instance, the Court held that journalists cannot receive First Amendment exemptions from liability for breaching promises.<sup>168</sup> But unlike in *Branzburg*, where the Court observed that “a State’s interest must be ‘compelling’ or ‘paramount’ to justify even an indirect burden on First Amendment rights,”<sup>169</sup> in *Cowles Media* the Justices did not seem to think that indirect burdens on speech triggered heightened scrutiny. According to the Court, “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”<sup>170</sup> Lower courts have recently followed suit, often categorically rejecting newsgathering claims.<sup>171</sup>

The Court has consistently followed this approach ever since. The Justices have explained, for instance, that trespassing laws can be enforced without implicating the First Amendment, even when doing so incidentally burdens speech.<sup>172</sup> The same principle guided the Court’s declaration in *Los Angeles Police Department v. United Reporting Publishing Corp.* that “a governmental denial of access to information in its possession” does not abridge the freedom of speech and press,<sup>173</sup> notwithstanding the obvious inhibiting effect that such a denial may have on public debate.

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168. 501 U.S. 663, 665 (1991).

169. *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972).

170. *Cowles Media*, 501 U.S. at 669. The term “generally applicable law” has several meanings, and the immediate purpose of the Court’s statement in *Cowles Media* was to clarify “only . . . that the press gets no special exemption from press-neutral laws.” Volokh, *Speech as Conduct*, *supra* note 50, at 1294. Thus, speakers may still “raise as a defense the fact that the law is being applied to them because of their speech,” even if the law is facially speech-neutral. *Id.* at 1296 (emphasis omitted). But *Cowles Media* also clarifies that restrictions of *nonexpressive* conduct by general laws do not trigger heightened review. See *Cowles Media*, 501 U.S. at 669; Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1088 (2001).

171. See *United States v. Sterling*, 724 F.3d 482, 494 & n.5 (4th Cir. 2013). The Court has characterized the *Branzburg* holding in a way that reflects this view. See *Cowles Media*, 501 U.S. at 669.

172. See *Virginia v. Hicks*, 539 U.S. 113, 123 (2003). Writing before *Hicks*, Srikanth Srinivasan argued that the Court’s earlier ruling in *Albertini*—applying *O’Brien* review to a trespassing violation—“must be an exception to the *Arcara* rule.” Srinivasan, *supra* note 15, at 413. In my view, the Court’s method of decision in *Albertini* simply does not reflect current doctrine following *Arcara*. See *supra* note 152.

173. 528 U.S. 32, 40 (1999).

## B. Campaign Contributions

Recent information-gathering decisions have shifted to an anti-targeting approach, but the Court has yet to openly reorient campaign finance doctrine, leading some scholars to conclude that “indispensable” preconditions of speech are constitutionally protected.<sup>174</sup> This view has considerable appeal. “In any economy operated on even the most rudimentary principles of division of labor,” Justice Scalia has explained, “effective public communication requires the speaker to make use of the services of others.”<sup>175</sup> Accordingly, “[t]he right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.”<sup>176</sup> Indeed, as previously explained, the Court’s foundational decision in *Buckley v. Valeo* relied on the idea that contributions to political candidates “may result in political expression . . . by someone other than the contributor.”<sup>177</sup>

As Justice White pointed out in his separate opinion in *Buckley*, however, “the argument that money is speech and that limiting the flow of money to the speaker violates the First Amendment proves entirely too much.”<sup>178</sup> At the heart of this concern was a recognition that countless laws affect speech. Tax laws, labor regulations, environmental standards, and so forth, all routinely impose costs—diverting countless dollars from speech activities.<sup>179</sup> Sometimes these costs are onerous. “But it has not been suggested, nor could it be successfully,” Justice White aptly explained, “that these laws . . . are invalid because they siphon off or prevent the accumulation of large sums that would otherwise be available for communicative activities.”<sup>180</sup>

Sure enough, fourteen years after *Buckley*, the Supreme Court seemed to clarify that heightened First Amendment review is not triggered whenever the application of a rule “make[s] the exercise of First Amendment rights more difficult,” even in situations where the restricted activity is “essential” or “necessary” to engage in protected speech.<sup>181</sup> The Court thus rejected a university’s argument that being forced to turn over otherwise private tenure-review materials would negatively affect its expressive activities, explaining that “if the University’s attenuated claim were accepted, many other generally

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174. Remus, *Freedom of Thought*, *supra* note 52, at 1496-97.

175. *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

176. *Id.* at 252.

177. *Buckley v. Valeo*, 424 U.S. 1, 21 (1975) (per curiam); *see also supra* Part II.B.

178. *Buckley*, 424 U.S. at 262 (1976) (per curiam) (White, J., concurring in part and dissenting in part).

179. *Id.* at 263.

180. *Id.*

181. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 200 (1990) (citing *Buckley*, 424 U.S. at 19 (per curiam)).

applicable laws might also be said to infringe the First Amendment.”<sup>182</sup> But why, then, do campaign contribution limits still pose a First Amendment problem?

The Supreme Court’s inability to answer that question has left campaign finance law in a state of uncertainty. A minority of Justices continue to assert that restrictions on campaign donations trigger heightened scrutiny because those donations facilitate speech.<sup>183</sup> That approach, however, departs from the Court’s general approach to restrictions of nonexpressive conduct. Other Justices sometimes assert that campaign donations are expressive.<sup>184</sup> But if that is the relevant concern, then contribution limits ought to be upheld; the justification for restricting contributions has nothing to do with their symbolic effect.<sup>185</sup>

The anti-targeting framework supplies a more coherent explanation of why campaign finance restrictions pose a free speech problem. In short, singling out political campaigns triggers heightened scrutiny—not a misguided notion that “*any* regulation of money is a regulation of speech.”<sup>186</sup> Thus, while the government can apply “general commercial regulations to those who use money for speech if it applies them evenhandedly to those who use money for other purposes,” it presumptively cannot target the expressive process of political campaigning.<sup>187</sup>

In sum, giving money for speech purposes does not trigger heightened review. What matters is the law. Although the Court has not explicitly adopted anti-targeting as the guiding principle of campaign finance law, doing so would maintain consistency with other free speech cases that involve money. A law that “singles out income derived from expressive activity for a burden the State places on no other income,” for instance, triggers heightened scrutiny,

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182. *Id.*

183. *See, e.g.,* *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“[A] decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech.”).

184. *See, e.g.,* *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 636 (1996) (Thomas, J., concurring in the judgment and dissenting in part). Another prominent argument is that contributions are protected by the freedom of association. *See, e.g., id.* at 637.

185. *See supra* note 125 and accompanying text.

186. *McConnell v. FEC*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (criticizing this notion).

187. *Id.*; *see also id.* (“[W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.”); Volokh, *supra* note 20, at 1101 (making the same point). Of course, paper producers, delivery trucks, and bookstores are subject to all sorts of general regulations that raise no First Amendment problems.

even though the speech-burdening effects of general income taxes do not.<sup>188</sup> Targeted restrictions on the front end of the “speech process” raise the same problem.<sup>189</sup>

### C. Compelled Subsidies

Following *Buckley*, the Supreme Court in *Abood v. Detroit Board of Education*<sup>190</sup> extended free speech coverage to compelled monetary transfers used for speech.<sup>191</sup> As the Court has cut back on free speech coverage for nonexpressive conduct, however, the basis for *Abood* has been challenged. “It is simply not true,” Robert Post insists, “that First Amendment concerns are implicated whenever persons are required to subsidize speech with which they disagree.”<sup>192</sup> A trio of recent decisions illustrates the Court’s muddled but improving efforts to find a sound principle to govern compelled-subsidy doctrine.

In *Glickman v. Wileman Bros. & Elliott, Inc.*, the Court upheld a mandatory subsidy scheme requiring California tree-fruit growers to pool money to advance mutual goals.<sup>193</sup> Writing for the Court, Justice Stevens began by emphasizing that when the government regulates nonexpressive conduct, incidental burdens on speech do not raise a First Amendment problem.<sup>194</sup> Turning to *Abood*, Justice Stevens acknowledged that the law did “compel financial contributions that are used to fund advertising.”<sup>195</sup> But being forced to subsidize tree-fruit advertising did not “engender any crisis of conscience.”<sup>196</sup> “The mere fact that objectors believe their money is not being

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188. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (applying heightened review to a law requiring convicted criminals to turn over the proceeds of their book sales); *see also* *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) (applying heightened review to a ban on public employees’ receipt of funds for speech because Congress “chose to restrict only expressive activities”).

189. *Cf. Citizens United v. FEC*, 558 U.S. 310, 336 (2010) (“Laws enacted to control or suppress speech may operate at different points in the *speech process*.” (emphasis added)). Thus, for instance, heightened scrutiny should apply to laws restricting access to otherwise public information based on the expressive aims of the person seeking the information. *See Bhagwat, supra* note 7, at 1079-80; *cf. L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring) (hinting at this idea).

190. 431 U.S. 209 (1977).

191. *See supra* Part II.C.

192. *See* Post, *supra* note 58, at 197.

193. 521 U.S. 457, 460-61, 477 (1997).

194. *Id.* at 470. Similarly, the regulation did not require the fruit growers “themselves to speak,” but “merely required [them] to make contributions for advertising.” *Id.* at 471.

195. *Id.* at 471.

196. *Id.* at 472.

well spent,” he concluded, “does not mean [that] they have a First Amendment complaint.”<sup>197</sup> Justice Souter dissented, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, arguing that a lack of conscientious disagreement with the tree-fruit advertisements was beside the point under *Abood*.<sup>198</sup>

The *Glickman* decision revealed a Court at odds over the basic features of compelled-subsidy doctrine. The Court has not fully cleaned up this doctrinal mess, but it has suggested a new direction, focusing on *laws* rather than individual objections.

In *United States v. United Foods, Inc.*, Justice Kennedy, joined by the four *Glickman* dissenters, reinterpreted the *Glickman* decision and struck down a nearly identical cooperative law, this time involving an advertising scheme for mushroom farmers.<sup>199</sup> The compelled contributions at issue in *Glickman*, Justice Kennedy explained, were “part of a far broader regulatory system that does not principally concern speech.”<sup>200</sup> By contrast, the mushroom-grower assessments were “not part of some broader regulatory scheme,” and thus “the compelled contributions serve[d] [only] the very advertising scheme in question.”<sup>201</sup> In other words, *Glickman* involved a *general* subsidy scheme, whereas the *United Foods* program was speech specific.

Robert Post has argued that we should “rethink the fundamental question of when the compelled subsidization of speech does and does not raise First Amendment issues.”<sup>202</sup> Justice Kennedy’s opinion in *United Foods* advances the ball further than Post lets on. The Court did not ground its holding on the freedoms of belief and conscience,<sup>203</sup> or on the mushroom growers’ desire not to facilitate certain speech. Instead, Justice Kennedy asked whether the government had forced the mushroom growers to associate for an expressive purpose or, instead, for “a purpose . . . independent from the speech itself.”<sup>204</sup> He concluded that by compelling mushroom growers to join a private association

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197. *Id.* (alteration in original) (quoting *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 456 (1984)). The Court also explained that “assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group,” so long as the expenses are germane to the speech-neutral purposes of the group. *Id.* at 472-73.

198. *Id.* at 487-89 (Souter, J., dissenting).

199. 533 U.S. 405, 408-13 (2001).

200. *Id.* at 415 (quoting Reply Brief for the Petitioner at 4, *Glickman*, 521 U.S. 457 (No. 95-1184), 1996 WL 629907).

201. *Id.*

202. Post, *supra* note 58, at 228.

203. See *United Foods*, 533 U.S. at 413 (“Before addressing whether a conflict with freedom of belief exists, a threshold inquiry must be whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place.”).

204. *Id.* at 415-16.

for expressive ends, the government had encroached upon their freedom of association.

This analysis reflects a substantial, and much-needed, departure in the framing of compelled-subsidy doctrine. The constitutional defect that the Court identified in *United Foods* was *targeting*—forced association *for an expressive purpose*. Had the mushroom farmers been forced to associate for nonspeech reasons, and had the association then engaged in speech activities germane to that mission, the encroachment on speech interests would have been “ancillary” rather than “the principal object of the regulatory scheme.”<sup>205</sup> What matters under *United Foods* is the law—that is, whether the speech effects are targeted or incidental.

The Court’s subsequent decision in *Johanns v. Livestock Marketing Ass’n*<sup>206</sup> seems to reinforce this shift in compelled-subsidy jurisprudence. *Johanns* upheld a mandatory advertising fee imposed on beef producers because the speech at issue was “government speech.”<sup>207</sup> Writing for the majority, Justice Scalia explained: “Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech.”<sup>208</sup> Notably missing from this analysis is any reference to the freedoms of thought and conscience mentioned in *Abouod* and *Glickman*. Indeed, Justice Scalia noted that compelled-subsidy doctrine “invalidates an exaction not because being forced to pay for speech that is unattributed violates personal autonomy, but because being forced to fund someone else’s private speech *unconnected to any legitimate government purpose* violates personal autonomy.”<sup>209</sup>

*Johanns* is still an uneasy fit with anti-targeting. After all, one could easily argue that the beef-advertising program targeted speech by laying an assessment for speech purposes.<sup>210</sup> But separating two aspects of the program might answer this difficulty. First, the beef producers—unlike the mushroom farmers in *United Foods*—could not claim encroachment of their associational rights because association with the government is assumed. Second, the spending component of the program was immune from objection because individuals generally cannot challenge governmental spending on free speech

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205. *Id.* at 411-12; *see also id.* at 415-16 (noting that *Glickman* involved an “ancillary” speech burden, whereas in *United Foods* “the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself”).

206. 544 U.S. 550 (2005).

207. *Id.* at 560-62.

208. *Id.* at 562.

209. *Id.* at 565 n.8 (emphasis added); *see also id.* (concluding that the First Amendment was not infringed “simply because individual taxpayers feel ‘singled out’ or find the exaction ‘galling’” (quoting *id.* at 575-76 (Souter, J., dissenting))).

210. *Cf. Post*, *supra* note 58, at 197 (“*Johanns* . . . never offers a theoretical account of why taxation is an exception to the basic premise of [compelled-subsidy doctrine].”).

grounds. Thus, with both the assessment and spending components insulated from challenge, the Court upheld the regulation.

Although compelled-subsidy doctrine remains in flux, it seems headed toward stronger ground, consistent with other aspects of free speech doctrine. Yet again, the Supreme Court's treatment of speech-facilitating conduct seems to have shifted to a focus on what the government is doing rather than on the conduct of individual speakers. While the government cannot "compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors,"<sup>211</sup> incidental burdens imposed through a speech-neutral regulatory regime do not raise First Amendment concerns.<sup>212</sup> To determine whether heightened scrutiny should apply, courts ask whether a compelled subsidy exacts a disproportionate sum for speech activities in light of any nonspeech purposes.<sup>213</sup>

#### D. Associational Rights

Associational rights, too, have evolved toward the anti-targeting framework, although the Court has yet to fully consider how its general treatment of nonexpressive conduct would affect associational doctrine. This section begins by showing that an anti-targeting framework would not disturb the Court's disclosure holdings. It then assesses membership cases.

##### 1. Compelled-disclosure cases

As explained in Part II, the Court's early compelled-disclosure decisions supported a right based on the incidental burdens of disclosure on speech. But two significant caveats are in order. First, these cases involved *targeted* regulations. In *NAACP v. Alabama ex rel. Patterson*, for instance, Alabama had clearly retaliated against the NAACP because of the group's expressive activities, and the onerous discovery request—which was case-specific and not generally applicable—was unrelated to the State's claim.<sup>214</sup> Subsequent

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211. *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

212. *Id.* at 415 ("[T]he majority of the Court in *Glickman* found the compelled contributions were nothing more than additional economic regulation, which did not raise First Amendment concerns.").

213. Cases since *Abood* have essentially asked this question. *See, e.g., Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990) (holding that "[c]ompulsory [bar] dues may not be expended to endorse or advance" speech unrelated to a bar association's core mission, but lawyers do not have a valid free speech claim against "compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession").

214. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463-64 (1958); *see also Dale Carpenter, Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1524 (2001) (noting that the disclosure order was intended to impair the NAACP). Stone writes that, "in *NAACP v. Alabama*, the Court used strict scrutiny to test a state law, as applied to the NAACP, that required any

*footnote continued on next page*

disclosure cases have involved other types of targeting, such as disclosure laws that single out political campaigns.<sup>215</sup>

Even more to the point, forced public disclosure is a form of compelled expression that forces organizations to communicate otherwise private information to the public. According to the Supreme Court, “compelled statements of fact[,] . . . like compelled statements of opinion, are subject to First Amendment scrutiny.”<sup>216</sup> Mandatory disclosure thus presents a straightforward First Amendment problem under compelled-speech doctrine.<sup>217</sup> The Supreme Court has not considered how its general shift in handling speech-facilitating conduct might apply to compelled disclosure of membership lists, but an anti-targeting framework would not threaten those decisions.

## 2. Associational-membership cases

Unlike disclosure regimes, general antidiscrimination laws do not target or compel speech. The application of antidiscrimination laws to expressive groups thus provides a way of testing whether, in the context of associational rights, restrictions of nonexpressive conduct implicate the First Amendment because of their indirect effects on speech. (Having to admit unwanted members, for instance, might decrease a group’s size or vigor, thus affecting its speech.)<sup>218</sup> Carefully assessed, the reasoning in these decisions shows a lack of First Amendment coverage for indirect burdens on speech, thus supporting the

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foreign corporation seeking to do business in the state to provide the state with certain information, including the names and addresses of its members.” Stone, *supra* note 15, at 111. Disclosure, however, was compelled by a case-specific discovery order, not a general law. See *supra* notes 143-44 and accompanying text.

215. See, e.g., *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 89-90 (1982) (considering a First Amendment challenge to an Ohio law requiring *political campaigns*, but not other organizations, “to file a statement identifying each contributor and each recipient of a disbursement of campaign funds”); see also *Carpenter, supra* note 214, at 1525 (observing that associational claims often involve governmental actions with “the goal of putting the screws on an expressive association”).

216. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). And in the context of expressive associations, disclosure of membership information raises special concerns because it may reveal sensitive information about members’ views. See *Brown*, 459 U.S. at 97 (noting that even disbursements to vendors may reveal their “support for an unpopular cause”); *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam) (“[F]inancial transactions can reveal much about a person’s activities, associations, and beliefs.” (quoting *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring))).

217. Here, in contrast to the campaign finance context, see *supra* note 125, the government’s justification for the law is based on the communicative effects of disclosure.

218. In any event, externally imposed membership requirements at least *burden* collective expression, even if expressive output is unaffected. Individuals and groups do not have to stop speaking before a burden counts as a burden.

anti-targeting framework. And, yet again, the Court has quietly shifted its approach.

As described earlier, *Roberts v. United States Jaycees* applied heightened scrutiny to the application of a general antidiscrimination law that forced the Jaycees to admit female members.<sup>219</sup> After *Roberts*, however, the Court has consistently upheld applications of general antidiscrimination laws without applying elevated scrutiny so long as the regulation of a group's membership does not directly change its expressive message.

Several years after *Roberts*, the Court considered a case involving the application of an antidiscrimination law to Rotary Clubs, which also excluded women.<sup>220</sup> The case was nearly identical to *Roberts*, but this time the Court denied the claim without applying heightened scrutiny, concluding that in light of the gender-neutral purpose of Rotary Clubs, being forced to accept female members would not "affect in any significant way the existing members' ability to carry out their various purposes."<sup>221</sup> The decision did not cite *Arcara*, but it reflects a parallel evolution in the Court's treatment of restrictions of nonexpressive conduct.<sup>222</sup>

The Court reaffirmed this approach in *Boy Scouts of America v. Dale*. The Boy Scouts, which barred openly gay men from serving as scoutmasters, challenged the application of a general law banning discrimination on the basis of sexual orientation.<sup>223</sup> The Court held that applying the law to the Boy Scouts interfered with the group's expressive rights.<sup>224</sup>

The Court's reasoning in *Dale* focused on the direct impact of the law on the group's symbolic expression. Writing for the majority, Chief Justice Rehnquist explained that "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on

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219. See *supra* notes 148-49 and accompanying text.

220. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539 (1987).

221. *Id.* at 548. The Court noted in the alternative that, even if the act did "work some slight infringement on Rotary members' right of expressive association," that infringement would be justified by the state's antidiscrimination goals. *Id.* at 549.

222. The Court later summarized: "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Bhagwat notes a broader turn in the Court's association cases toward grounding in free speech principles rather than a freestanding associational right. See Bhagwat, *supra* note 140, at 988-89. His point is well taken, but it should be noted that even if associational rights had been grounded in free speech principles all along, associational doctrine still might have undergone a significant transformation because of the shifts in free speech doctrine described in this Article.

223. 530 U.S. at 643-44.

224. *Id.* at 644.

record as disagreeing with Boy Scouts policy.”<sup>225</sup> Accepting openly gay scoutmasters thus, in the Court’s view, would have directly changed the group’s message and its “method of expression.”<sup>226</sup>

*Dale* has been the subject of considerable controversy, often surrounding the Court’s definition of “expressive associations.” Chief Justice Rehnquist gave the term a seemingly broad reach, explaining that “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment.”<sup>227</sup> Instead, “[a]n association must merely engage in expressive activity that could be impaired.”<sup>228</sup> Scholars have criticized this definition as far too expansive, leading to widespread exemptions from antidiscrimination laws,<sup>229</sup> and as far too narrow, failing to recognize the speech rights of nonexpressive groups.<sup>230</sup> A common perception seems to be that characterizing an association as “expressive” is doctrinally significant. Expressive associations, under this view, can obtain “First Amendment immunity from an otherwise constitutional law” simply because of their expressive goals—a reading of *Dale* that would perhaps support broad coverage for the speech-facilitating conduct of expressive groups.<sup>231</sup>

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225. *Id.* at 655-56.

226. *Id.* at 655; *see also id.* at 653 (noting that the Boy Scouts had sufficiently shown that “acceptance of a [gay leader] would impair its message”). The dissenting Justices in *Dale* disagreed with this factual conclusion, arguing that the inclusion of a gay scoutmaster would “send[] no cognizable message to the Scouts or to the world.” *Id.* at 694 (Stevens, J., dissenting). Perhaps so, but the majority thought otherwise. Accordingly, *Dale* essentially adopted Geoffrey Stone’s tentative suggestion that a general antidiscrimination law might sometimes restrict expression if an exclusionary policy “defines the organization ideologically and is a symbolic expression of policy.” Stone, *supra* note 15, at 112; *see also* David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 134 (2001) (noting the heavily fact-dependent nature of the constitutional inquiry under *Dale*).

227. *Dale*, 530 U.S. at 655.

228. *Id.*; *see also id.* at 648 (stating that “[t]he First Amendment’s protection of expressive association is not reserved for advocacy groups” and applies when groups “engage in some form of expression, whether it be public or private”).

229. *See, e.g.*, Andrew Koppelman, *How “Decentralization” Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 27-28 (2003).

230. Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139 (2000). Epstein’s criticism, however, is mostly directed at the Court’s view that associational rights are “derived from the free speech right, and from the free speech right alone.” *Id.* at 140.

231. Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1157 (2002); *see also* Carpenter, *supra* note 214, at 1570, 1573 (asserting that the Court in *Dale* “implicitly followed the analysis of Justice O’Connor in *Roberts*,” and that “[a]n expressive association, under this approach, enjoys a general exemption from anti-discrimination law regardless of whether the particular application of the law trenches on a certain message” (emphasis omitted)).

These arguments overlook the central reasoning of *Dale*, which turned not on whether an association is “expressive” but rather on whether particular membership requirements directly affect an association’s symbolic speech. Concluding that a group is expressive does not resolve this threshold question of First Amendment coverage,<sup>232</sup> and the Supreme Court was not granting exemption rights to certain associations on account of their expressive goals. Rather, *Dale* holds that *groups* have speech rights,<sup>233</sup> and sometimes membership requirements (such as those imposed by antidiscrimination laws) directly interfere with a group’s message, either by forcing it to send symbolic messages it does not want to convey, or by undermining symbolic messages it does want to convey.<sup>234</sup> In other words, *Dale* involved a regulation of *expressive* conduct, based on a case-specific finding that a particular application of an antidiscrimination law directly restricted symbolic speech.

The Supreme Court’s recent decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*<sup>235</sup> supports this understanding of associational rights as protection for *expressive* conduct, not speech-facilitating conduct. The case involved a federal funding condition that effectively forced private universities to host military recruiters on campus.<sup>236</sup> A group of universities challenged the law, bringing both compelled-speech and associational claims.

The Court began by considering the compelled-speech claims. Recognizing that the law, on its face, had little to do with speech,<sup>237</sup> the Court explained that forcing universities to host recruiters on campus did not directly affect the universities’ messages. In prior cases, the compelled-speech violation “resulted

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232. Other groups enjoy identical First Amendment protection in theory, but it is empty in practice because their lack of expressive purposes means that their membership would not reflect a message that an antidiscrimination law could change. For that reason, the Court correctly observed in *Dale* that “[t]o determine whether a group is protected by the First Amendment’s expressive associational right, we must determine whether the group engages in ‘expressive association.’” *Dale*, 530 U.S. at 648.

233. Daniel A. Farber, *Foreword: Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1495 (2001) (“The focus in recent cases such as *Dale* . . . is on the rights of the organization as an entity, not on the rights of its individual members.”). Recent decisions underscore this conclusion. *See, e.g., Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (“The Court has . . . rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 771 (1978))).

234. I am not alone in this reading of *Dale*. *See, e.g., Alexander, supra* note 140, at 150.

235. 547 U.S. 47 (2006).

236. *Id.* at 51.

237. *Id.* at 60 (“The Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.”). In addition, the law required universities to advertise, but the Court upheld these requirements as permissible content-neutral regulations. *See id.* at 62.

from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."<sup>238</sup> But being forced to host military recruiters did not have that consequence "because the schools are not speaking when they host interviews and recruiting receptions."<sup>239</sup> In short, the Court emphasized, "a law school's decision to allow recruiters on campus is not inherently expressive."<sup>240</sup>

The Court then rejected the universities' associational claims for precisely the same reason, noting that nonexpressive conduct does not enjoy constitutional protection because of expressive aims. "The law schools say that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters," the Court opined, "but just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'"<sup>241</sup> In other words, the universities' associational claims failed because the recruiter-access rule did not directly impact expression.<sup>242</sup>

In sum, just as with other forms of speech-facilitating conduct, an unannounced shift has taken place in associational doctrine. The Supreme Court initially applied heightened scrutiny based on the incidental burdens of general laws, even when falling on nonexpressive conduct. The reasoning in more recent cases, however, has required more—a showing that changing a group's membership would directly alter its symbolic message.

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238. *Id.* at 63.

239. *Id.* at 64.

240. *Id.*; see also *id.* at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."); *id.* at 66 ("The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it.").

241. *Id.* at 69 (emphasis omitted) (citation omitted) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000)).

242. The Court reiterated this conception of associational rights in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). The Hastings Law School chapter of the Christian Legal Society (CLS) objected that a putative "all comers" rule burdened its speech and associational rights by requiring the group either to give up university recognition or to accept students whose sexual conduct was inconsistent with the group's mission. *Id.* at 668. Writing for the majority, Justice Ginsburg explained that it made "little sense to treat CLS's speech and association claims as discrete." *Id.* at 680. Rather, the Court explained, the group's "expressive-association and free-speech arguments merge: *Who* speaks on its behalf, CLS reasons, colors *what* concept is conveyed." *Id.* "When these intertwined rights [of speech and association] arise in exactly the same context . . . it would be anomalous for a restriction on speech to survive constitutional review . . . only to be invalidated as an impermissible infringement of expressive association." *Id.* at 681. The majority went on to uphold the law school policy as a reasonable condition for access to governmental benefits under the "limited public forum" doctrine. *Id.* at 692-94.

### E. History and Speech-Facilitating Conduct

We are now in a better position to evaluate competing scholarly accounts of First Amendment coverage for speech-facilitating conduct. Most scholars agree that the Supreme Court treats general regulations of nonexpressive conduct as not impinging on First Amendment rights, even when incidentally burdening speech. But are there exceptions to this rule?

Geoffrey Stone argues that “[i]n a few decisions the Court has found incidental restrictions unconstitutional,”<sup>243</sup> particularly “when an incidental restriction has a *significant effect* on free expression.”<sup>244</sup> Elsewhere he explains that “the Court has held incidental effects unconstitutional as applied when the incidental effect of the law was seen by the Court as *particularly severe*.”<sup>245</sup> Michael Dorf agrees, arguing that, “[a]s a general matter, free speech doctrine treats *substantial* incidental burdens as raising a bona fide constitutional problem and ignores most other incidental burdens.”<sup>246</sup>

Other scholars take a slightly different view of current doctrine, but one that still recognizes limited constitutional coverage when incidental restrictions have a derivative effect on speech. Dana Remus, for instance, asserts that the Court has recognized protection for “indispensable” preconditions of speech<sup>247</sup>—“a necessary corollary,” she argues, “to the right to communicate information and ideas.”<sup>248</sup> Thus, in her view, “the Court has

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243. Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 206 n.69 (2007) (citing *Dale*, 530 U.S. 640; *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)). Writing in 1987, Stone acknowledged that *Jaycees*, *NAACP v. Alabama*, and *Globe Newspaper Co.* could be viewed as having “involved a penalty on expressive activit[ies],” but such a view, he argued, would be “strained.” Stone, *supra* note 15, at 112.

244. Stone, *supra* note 15, at 112 (emphasis added); see also Stone, *supra* note 243, at 208 (“[L]aws having only an incidental effect on free expression are presumptively constitutional and may be invalidated only in the very unusual situation in which they have a *substantial* impact on free expression.”). Later in the same article, Stone seems to reach a somewhat different conclusion, stating that laws are constitutionally suspect when they have “a highly *disproportionate* impact on free expression.” Stone, *supra* note 15, at 114 (emphasis added). I agree with that latter view. My disagreement is only with Stone’s conclusion that the First Amendment applies “when an incidental restriction has a *significant effect* on free expression.” *Id.* at 112 (emphasis added).

245. Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 298 (2009) (emphasis added) (“*NAACP v. Alabama*, *Brown v. Socialist Workers '74 Campaign Committee*, and *Boy Scouts of America v. Dale* illustrate such decisions.” (footnotes omitted)); see also Stone, *supra* note 243, at 214 (“[T]he Court has invalidated laws when their impact on free expression was sufficiently severe.”).

246. Dorf, *supra* note 15, at 1210. Dorf’s reference is to incidental burdens on expressive and nonexpressive conduct.

247. Remus, *Freedom of Thought*, *supra* note 52, at 1497 (noting constitutional protection for conduct that is “an indispensable condition of free expression.”).

248. *Id.* at 1496; see also Ferguson, *supra* note 59, at 653 (“[I]n the *Buckley* and *Branzburg* decisions, the Court acknowledged that certain forms of noncommunicative conduct

*footnote continued on next page*

established a right to make financial contributions for spreading a political message because it is considered fundamental to the First Amendment guarantees of free speech and association.”<sup>249</sup> Charting yet another approach, Srikanth Srinivasan argues that only laws “inevitably” limiting speech trigger heightened scrutiny.<sup>250</sup>

All of these are plausible readings of the Supreme Court’s jurisprudence. What this Article has tried to show, however, is that efforts to synthesize the Court’s treatment of speech-facilitating conduct ought to account for historical change. Importantly, nearly all of the problematic cases cited by Stone, Remus, and Srinivasan can be understood as employing a conduct-focused approach that no longer guides Supreme Court doctrine. Although longstanding precedents are still in place—decisions like *Buckley*, *Abood*, and *Roberts*—the Court has struggled to redefine their conceptual premises.

Access-to-court decisions might be an exception. Sitting in a courtroom gallery is not expressive conduct, even if it leads to expression later.<sup>251</sup> Scholars therefore often point to access decisions in support of coverage for speech-facilitating conduct. But does the *Globe Newspaper* holding support Justice Brennan’s open-ended declaration that “[t]he First Amendment is . . . broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights”?<sup>252</sup>

Scholars should be hesitant to glean larger principles from access cases. Importantly, Justice Brennan considered the First Amendment question in terms of the systemic effects of a category of governmental action—not based on the speech effects in particular cases.<sup>253</sup> The right of access, for instance, applies regardless of any speech-related reasons for attending court.<sup>254</sup> The access rulings are still outliers in the Court’s free speech repertoire—notably

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are essential to the ability to communicate—so essential, in fact, that they cannot be restricted without also abridging first amendment rights.”).

249. Remus, *Freedom of Thought*, *supra* note 52, at 1496.

250. Srinivasan, *supra* note 15, at 402 (noting constitutional scrutiny of laws that “inevitably burden expression”).

251. See McDonald, *supra* note 7, at 269, 326; Stone, *supra* note 15, at 112 (noting that an argument to the contrary would be “strained”).

252. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

253. Recognizing this feature of access rights, Barry McDonald has criticized the Court for having “seriously undermined the societal purpose of a right of access by permitting any member of society to invoke it without demonstrating a ‘public’ justification for doing so.” McDonald, *supra* note 7, at 343.

254. *Cf. id.* at 325 (“[I]t is probably fair to say that most members of the public are likely to seek access to a criminal trial for reasons having nothing to do with engaging in speech about issues of governance.”).

coming before the decision in *Arcara*—but they offer little support for broader First Amendment coverage for speech-facilitating conduct.

#### IV. Anti-Targeting and Disproportionate Burdens

Anti-targeting defines the Supreme Court’s *general* approach to speech-facilitating conduct—the clear holding of *Arcara v. Cloud Books, Inc.*<sup>255</sup>—and it provides, in my view, the most coherent account of decisions in particular enclaves where the Justices continue to debate the scope of First Amendment coverage.

This Part fleshes out in greater detail how the anti-targeting concept works in practice. In particular, it argues that anti-targeting supplies a sound basis for affording free speech coverage to restrictions on photography and other forms of audiovisual recording—one of the most interesting emerging issues in free speech law.

##### A. Disproportionate Burden Claims

How should courts decide when a law impermissibly targets speech? As discussed in Part I, courts could reserve heightened scrutiny for laws that *explicitly* target speech acts. An ordinance barring protestors from using the subway, for instance, would explicitly target speech.

But this approach would leave out many efforts to circumscribe speech indirectly. Consider, for instance, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,<sup>256</sup> where the Supreme Court “struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax had the effect of singling out newspapers to shoulder its burden.”<sup>257</sup> As the Court later explained in *Arcara*, “even though the tax was imposed upon a nonexpressive activity,” heightened scrutiny still applied because “the burden of the tax inevitably fell disproportionately—in fact, almost exclusively—upon the shoulders of newspapers exercising [sic] the constitutionally protected freedom of the press.”<sup>258</sup> (Importantly, this holding is not specific to the Press Clause; it applies whenever the government “singles out expressive activity for

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255. 478 U.S. 697 (1986).

256. 460 U.S. 575 (1983).

257. *Arcara*, 478 U.S. at 704.

258. *Id.*

special regulation.”)<sup>259</sup> The constitutional defect, in other words, was the law’s “differential treatment” of newspapers.<sup>260</sup>

Notably, however, the Court was not endorsing a test where any incidental speech effects trigger heightened scrutiny, and it was not even granting free speech coverage for all laws that disproportionately burden speech. Rather, the constitutional flaw in *Minneapolis Star* was the fact that “the burden of the tax *inevitably* fell disproportionately” on newspapers.<sup>261</sup> In other words, the effects that mattered were the *anticipated* effects, not the actual effects. To be sure, the anticipated effects depend on a judicial assessment of the real world, but the inquiry is *legal* in nature, not *factual*.<sup>262</sup>

Plenty of laws might *happen* to burden speech disproportionately—that is, they might happen to burden expressive activities more than nonexpressive ones. A minimum wage law, for instance, might end up burdening news agencies more than other businesses. By specifying that heightened review is triggered by burdens that are *inevitably* disproportionate, however, the Court suggests that the disproportionate burden has to be apparent based on an examination of the law itself, rather than on a fact-intensive inquiry into the law’s observed effects.<sup>263</sup> A minimum wage law does not satisfy this standard because the *law* does not target “conduct commonly associated with expression.”<sup>264</sup>

Perhaps a harder case is a law banning child labor. For some, this rule might immediately call to mind an image of kids throwing newspapers onto neighborhood porches during early morning bike routes. But this example, too, is properly resolved in favor of the government (i.e., no First Amendment coverage), because the anti-targeting principle is not concerned simply with apparent effects on speech but—more precisely—apparent *disproportionate* effects on speech *compared to the rule’s effects on nonexpressive activities*. In the case of a child labor ban, for instance, newspaper delivery services might be the first

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259. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 475 (1995); *see, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (applying heightened scrutiny to “special obligations upon cable operators”); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (describing *Minneapolis Star* as a case about speaker-based distinctions).

260. *Minneapolis Star*, 460 U.S. at 583.

261. *Arcara*, 478 U.S. at 704 (emphasis added).

262. Similarly, whether conduct is expressive is socially contingent, based on an assessment of how people communicate, but courts treat this inquiry as a legal one.

263. *Cf. City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 760 (1988) (applying heightened scrutiny to “special licensing procedures for conduct commonly associated with expression”). Michael Dorf similarly concludes that “[t]his category comprises regulations that, although formally not directed at expression, apply to speech so disproportionately as to suggest that the government is targeting speech.” Dorf, *supra* note 15, at 1205. In other words, “laws subjecting speech to grossly disproportionate burdens are not *incidental* burdens at all.” *Id.*

264. *City of Lakewood*, 486 U.S. at 760-61.

thing to pop into our minds when we think of kids working, but this intuition offers little guidance about whether countless *other* business will similarly lose out on the benefit of child labor. Thus, a child labor law would not trigger heightened scrutiny, even when applied to newspapers. A tax on newsprint, however, would surely have a disproportionate effect on speech because newsprint is conventionally used for expression. In the end, of course, boundary cases may become challenging—a point addressed in Part V—but the question being asked of judges is straightforward: Does the law target expression or something closely related to expression?

The Supreme Court applies a similar approach to many other constitutional rights. Under the Equal Protection Clause, for instance, the Court has explained that “[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.”<sup>265</sup> Judges considering equal protection claims are thus “called upon only to measure the basic validity of the legislative classification,” not any disproportionate burdens that laws happen to impose on a protected class.<sup>266</sup> Indeed, even if legislators know that a law will have effects that correlate with race, the law is constitutionally unproblematic so long as it is written in a race-neutral way and does not evince an effort to target particular racial groups.<sup>267</sup> But governmental actions that reveal racial targeting can trigger heightened scrutiny even if they do not explicitly single out race.<sup>268</sup> So too in free exercise law. “The Free Exercise Clause protects against

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265. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979). Others have noted this similarity between free speech, equal protection, and free exercise. *See, e.g.*, Schauer, *supra* note 15, at 781 n.15; Smolla, *supra* note 56, at 1114 & n.68; *see also* Stone, *supra* note 245, at 281-83 (pointing out the Equal Protection Clause analog in earlier doctrinal development); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 672-73 (1991) (same).

266. *Feeney*, 442 U.S. at 272; *see also id.* (“[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.” (citing *Washington v. Davis*, 426 U.S. 229 (1976); and *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977))).

267. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting an equal protection challenge to the death penalty, notwithstanding a documented racially disparate impact, because “there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment”); *United States v. Burgos*, 94 F.3d 849, 876-77 (4th Cir. 1996) (en banc) (noting the uniform rejection of equal protection challenges to the crack/powder sentencing disparity, which also had a well-known racially disparate impact).

268. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (“Ancestry can be a proxy for race.”); *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (plurality opinion) (arguing that some classifications “should be treated as a surrogate for race under an equal protection analysis”). *Rice v. Cayetano* was a Fifteenth Amendment case, but the doctrinal point would easily apply in other contexts.

governmental hostility which is masked as well as overt,” but mere differential effects on religious groups do not trigger heightened review.<sup>269</sup>

As described above, the “differential treatment” principle in free speech doctrine operates in a similar way. The pertinent question is a legal one that asks whether disproportionate burdens on speech are obvious when looking at the law—not a factual one that asks whether the observed effects of the law are sufficient to create a constitutional defect, or whether the subjective motives of particular legislators were malign.<sup>270</sup> The reason why is no secret. In the Court’s view, doctrinal tests better secure expressive freedom when they are objective, focusing on palpable legal materials and eschewing “amorphous considerations of intent and effect.”<sup>271</sup>

In short, regulations targeting “conduct commonly associated with expression” raise First Amendment concerns.<sup>272</sup> Laws targeting journalists,

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269. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706-07 (2012) (discussing the requirement of “neutrality” in free exercise doctrine).

270. *See Minn. Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 592 (1983) (“Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”); *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (advancing the same idea). Nor will the Court strike down legislation solely “on the basis of an alleged illicit legislative motive.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (quoting *United States v. O’Brien*, 391 U.S. 367, 383 (1968)); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring in the judgment) (“Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.”). Instead of focusing directly on intent, the doctrine that implements the anti-targeting principle *indirectly* combats illicit governmental motives, and in doing so, it also helps ensure that the government does not arbitrarily impose disproportionate burdens on speech. *Cf. Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (noting how First Amendment doctrine ensures that governments do not engage “in a purposeful attempt to interfere with . . . First Amendment activities”); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 (1975) (noting that a purpose of the First Amendment is limiting the “gratuitous inhibition of expression”); Kagan, *supra* note 15, at 414 (stating that the First Amendment “has as its primary[] . . . object the discovery of improper governmental motives”). Of course, failing to assess governmental motives directly may lead to judicial under- or overenforcement relative to “true” constitutional meaning, *cf. Daniel R. Ortiz, The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113-14 (1989) (criticizing this feature of equal protection law), but that is a conventional feature of all sorts of constitutional doctrines that account for judicial administrability, *see, e.g., Richard H. Fallon Jr., Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1278 (2006) (“Because the demand for judicially manageable standards stands partly distinct from the search for constitutional meaning, it is not uncommon for judicially prescribed tests either to underenforce or to overenforce the constitutional norms that they reflect.” (footnote omitted)).

271. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (plurality opinion).

272. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759-61 (1988).

book publishers, and artists trigger heightened scrutiny, whereas laws targeting airlines, pharmaceutical companies, and power plants generally do not, even though all of these groups sometimes engage in speech and help facilitate speech.<sup>273</sup>

## B. Recording Restrictions

Do laws that disproportionately burden expression include laws targeting conventional means of communication, such as cameras and other audiovisual recording devices? The Supreme Court has not yet had such a case, and scholars offer widely divergent assessments of why, if at all, recording restrictions might trigger elevated scrutiny. Meanwhile, lower courts have given the issue little attention. As one leading scholar puts it, recent cases “in the main assert, rather than argue for, First Amendment protection” for recordings.<sup>274</sup>

At first blush, audiovisual recording seems to be, as one court remarked, “conduct, pure and simple,”<sup>275</sup> and perhaps therefore undeserving of *any* First Amendment protection. Seth Kreimer proposes an interesting way of circumventing this doctrinal roadblock. He argues that “the difference between capturing images and disseminating images erodes rapidly” as images increasingly “are immediately disseminated upon capture (as in live video broadcasting).”<sup>276</sup> Thus, he asserts, limiting protection to “users who upload their images immediately and automatically” would put “undue weight on

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273. *Id.* at 761 (distinguishing a law targeting newspapers from one targeting soda vendors on the basis that “[n]ewspapers are in the business of expression, while soda vendors are in the business of selling soft drinks”). Two additional points regarding the generality of laws: First, a provision that targets speech implicates the First Amendment even if the overall regulatory scheme is neutral (or even favorable) toward speech. *See Minneapolis Star*, 460 U.S. at 577-85. (For a dissenting view, see *id.* at 593-94 (White, J., concurring in part and dissenting in part); and *id.* at 596 (Rehnquist, J., dissenting).) Second, the presence of exceptions for some nonspeech interests probably does not undermine the law’s generality unless the exceptions are so extensive that they reveal an effort to target speech. *Cf. Lukumi*, 508 U.S. at 534 (employing this approach in the free exercise context). For instance, issuing subpoenas to journalists does not implicate the First Amendment, *see Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)), even though subpoena laws typically exempt lawyers, doctors, spouses, etc. An alternative approach would make speech a “most favored interest”—where as soon as exceptions exist for other social interests, but not for speech, the law loses its “generally applicable” status. *Cf. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 361, 366-67 (3d Cir. 1999) (Alito, J.) (employing this approach in the free exercise context).

274. Kreimer, *supra* note 32, at 368.

275. *D’Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1541 (D.R.I. 1986), *aff’d mem.*, 815 F.2d 692 (1st Cir. 1987); *see also, e.g., Chemerinsky, supra* note 52, at 1156 (“[I]t is unclear that taking photographs or gathering sound should be regarded as ‘acts of communication and expression.’”); *McDonald, supra* note 7, at 270; *Mishra, supra* note 52, at 1550-51. *But see Smolla, supra* note 56, at 1112 (arguing that laws restricting paparazzi photography are “triggered only by acts of communication and expression”).

276. Kreimer, *supra* note 32, at 376.

technological fortuity.”<sup>277</sup> Kreimer exposes how the line between expression and nonexpressive conduct can blur at the margins, but his doctrinal solution is unsatisfying to me. Conceptually, and typically, recording and disseminating are two separate acts. The fact that these acts are sometimes merged by “technological fortuity” is an unpersuasive reason to abandon the line between protected expression and unprotected conduct.<sup>278</sup>

Jane Bambauer offers a different theory. First Amendment doctrine, she points out, is undergirded by concerns of protecting the creation of knowledge and preventing improper governmental motives. Putting these together, Bambauer argues that “state action will trigger the First Amendment any time it purposefully interferes with the creation of knowledge.”<sup>279</sup> Thus, she maintains, all privacy-protecting laws, including audiovisual recording restrictions, should trigger heightened scrutiny.<sup>280</sup> Bambauer makes a significant contribution—especially in the emphasis on *laws* rather than individual expressive aims—but her far-reaching prescription relies on the questionable argument that restricting access to otherwise private information abridges a freedom of thought derived from the First Amendment.<sup>281</sup>

In my view, the anti-targeting principle offers a better account of why recording restrictions trigger heightened scrutiny. Cameras and other audiovisual recording devices are conventional means of communication—that is, they are conventionally used for communicative purposes.<sup>282</sup> Targeted regulations of audiovisual recording thus single out conduct commonly

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277. *Id.* at 377.

278. See generally *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (distinguishing between acquisition and dissemination). Along similar lines as Kreimer, Jane Bambauer argues that “it would be odd if First Amendment analysis of [regulations of] data could be radically changed just by moving data across a human eyeball.” Bambauer, *supra* note 32, at 83 n.114. It is doubtful that “moving data across a human eyeball” makes conduct expressive, see *supra* notes 44-50 and accompanying text, but in any event it does not seem odd to me that doctrines implementing freedom of expression might ask whether regulated conduct is expressive.

279. Bambauer, *supra* note 32, at 63.

280. *Id.* at 83; see also *id.* at 63 (“[F]or all practical purposes, and in every context relevant to the current debates in information law, data is speech.”).

281. Consider, for instance, the difference between audiovisual-recording restrictions and laws against wiretapping. In the case of recording restrictions, the regulated party generally has lawful access to the relevant information, and thus, as Bambauer observes, recording restrictions seem “designed to cut down on communicative potential,” implicating First Amendment concerns. *Id.* at 83. The first-order aim of a wiretapping law, however, is to prevent access to private information, not to prevent dissemination of that information. The law thus seeks to prevent *noncommunicative* harm, and the connection to freedom of expression is at best attenuated.

282. *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 n.4 (1991) (Scalia, J., concurring in the judgment) (encouraging use of the term “conventionally expressive” rather than “inherently expressive”).

associated with expression and impose an apparent disproportionate burden on speech.<sup>283</sup>

The U.S. Court of Appeals for the Seventh Circuit recently employed this approach in *ACLU of Illinois v. Alvarez*.<sup>284</sup> The case involved an Illinois statute making it a felony to record “all or any part of any conversation” without the consent of all conversing parties,<sup>285</sup> “regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.”<sup>286</sup> The ACLU and several of its employees challenged the statute as applied, asserting First Amendment protection for their plans to record “matters of public concern.”<sup>287</sup> The district court denied their request for a preliminary injunction because audiovisual recording is not protected expression.<sup>288</sup>

On appeal, a divided panel of the Seventh Circuit reversed. The court framed its analysis in terms of the law’s targeting of the speech process. “[T]he eavesdropping statute operates at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication,” the Seventh Circuit explained.<sup>289</sup> Maintaining focus on the Illinois statute rather than the ACLU’s expressive aims, the court held that

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283. *See supra* notes 256-73 and accompanying text. Kreimer deserves credit for developing this argument:

Emerging efforts to constrain image capture do not target actions collateral to expression—they sanction the disposition of information itself. Like prohibitions on sketching, taking notes, or memorializing observations in a diary, they bar individuals who have already acquired information from preserving it for future review, reflection, and dissemination. As such, they are not “generally applicable” regulations of conduct that adventitiously interfere with speech; rather they are targeted regulations in which the very definition of violation involves interference with a medium of expression.

Kreimer, *supra* note 32, at 391-92.

284. 679 F.3d 583, 601-02 (7th Cir. 2012). To be sure, the court’s lengthy discussion mentions several possible rationales for applying heightened scrutiny, but the court’s holding was that *even if incidental speech burdens cannot trigger First Amendment review of a general law*, the speech-inhibiting effects of a recording ban are “far from incidental” because “the statute specifically targets a communication technology.” *Id.* at 601-02.

285. 2005 Ill. Laws 1917 (codified at 720 ILL. COMP. STAT. 5/14-2(a)(1) (2014)), *invalidated by* *People v. Melongo*, 6 N.E.3d 120 (Ill. 2014).

286. 2007 Ill. Laws 2539 (codified as amended at 720 ILL. COMP. STAT. 5/14-1(d) (2015)).

287. Reply Brief of Plaintiff-Appellant the American Civil Liberties Union of Illinois at 4-8, *Alvarez*, 679 F.3d 583 (No. 11-1286), 2011 WL 3892663. Particularly, the ACLU planned to engage in “open audio recording of on-duty police speaking audibly in public places while discharging their public duties.” *Id.* at 1.

288. *Alvarez*, 679 F.3d at 589.

289. *Id.* at 596; *see also id.* (“Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording.”).

some form of heightened scrutiny applies to “[l]aws that restrict the use of expressive media.”<sup>290</sup>

Scholars have casually characterized the *Alvarez* decision as recognizing a “right to record,”<sup>291</sup> but the Seventh Circuit avoided saying that recording is “protected conduct.”<sup>292</sup> Rightly so. The Illinois eavesdropping statute targeted only the *capture* of audiovisual material, not its dissemination, and therefore did not regulate expression. The ACLU obtained heightened review, instead, because the Illinois eavesdropping statute “specifically target[ed] a communication technology . . . [and thus] burden[ed] First Amendment rights directly, not incidentally.”<sup>293</sup>

Under *Alvarez*, plenty of restrictions on other types of mechanical devices would *not* trigger any First Amendment scrutiny. Machines that enable access to otherwise private information—thermal imaging or wiretapping devices, for instance—are not conventional means of expression, regardless of whether they happen to include a recording feature. Consequently, a law targeting thermal imaging or wiretapping devices would not raise a constitutional problem,<sup>294</sup> even when expressive goals inspire the use of those devices, or even when those devices are equipped with a recording feature.

Although praising the decision in part, Ashutosh Bhagwat has criticized *Alvarez* for its “fatally flawed” analysis that recording “necessarily targets an ‘expressive activity.’”<sup>295</sup> The court’s explanation is terse,<sup>296</sup> but Bhagwat may

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290. *Id.* at 595; *see also id.* at 602 (“[T]he statute specifically targets a communication technology; the use of an audio recorder—a medium of expression—triggers criminal liability.”).

291. *See* Bambauer, *supra* note 32, at 84.

292. Indeed, the court took pains to emphasize that it was not “immuniz[ing] behavior,” and that the government was free to restrict recording *incidentally* using a general rule. *Alvarez*, 679 F.3d at 607. “It goes without saying that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations,” the majority explained. *Id.* “While an officer surely cannot issue a ‘move on’ order to a person *because* he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs.” *Id.*

293. *Id.* at 602-03. Moreover, while the Seventh Circuit discussed the public-accountability backdrop of the ACLU’s challenge, *see id.* at 597-600, the court did not apply heightened scrutiny based on a decision that the planned recordings were of public concern. The court mentioned that concept only once. *See id.* at 597. Nor did the *Alvarez* majority base its decision on impermissible governmental motives.

294. Froomkin, *supra* note 8, at 1510 (“General regulation of new technologies such as thermal imaging or passive wave imaging seems unproblematic on First Amendment grounds so long as the regulation were to apply to all uses.”).

295. Bhagwat, *supra* note 7, at 1040 (quoting *Alvarez*, 679 F.3d at 602-03).

296. In full, the court explained:

The Illinois eavesdropping statute may or may not be a law of general applicability; as we have noted, it contains a number of exemptions. Either way, it should be clear by now that its effect on First Amendment interests is far from incidental. To the contrary, the statute specifically targets a communication technology; the use of an audio recorder—a medium of

*footnote continued on next page*

misunderstand the Seventh Circuit’s reason for viewing the eavesdropping statute’s speech effects as “far from incidental.”<sup>297</sup> The *Alvarez* decision does not rely—at least not explicitly—on the erroneous notion that every application of a recording ban necessarily restricts expression. Rather, the opinion simply says that the targeting of “a communication technology” created the First Amendment problem.<sup>298</sup> By analogy, not all newsprint is used to produce newspapers,<sup>299</sup> and not all campaign contributions go toward expressive activities,<sup>300</sup> but laws that target newsprint or political campaigns have readily apparent disproportionate effects on speech. In determining whether speech effects are “incidental,” what seems to matter under *Alvarez* is what the law targets, not whether expressive goals are impeded.<sup>301</sup>

Of course, this approach, along with any legal framework that incorporates social facts, could require difficult line drawing and, potentially, introduce path dependency into free speech law. That is, the ways that people communicate may depend, in part, on what the law allows. But this criticism is largely theoretical. In practice, whether people communicate with cell phones or thermal imaging devices has more to do with technological capacity than with questions of First Amendment coverage. In any event, legal doctrines often rely to some extent on social facts or norms, even when law has a role in shaping those norms.

## V. Defending Anti-Targeting

The anti-targeting principle has quietly become the defining feature of a broad range of free speech law. This Part briefly defends this doctrinal approach. Without returning to first principles—an effort that would extend well beyond the scope of this Article—my emphasis is on widely accepted

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expression—triggers criminal liability. The law’s legal sanction is directly leveled against the expressive element of an expressive activity. As such, the statute burdens First Amendment rights directly, not incidentally.

*Alvarez*, 679 F.3d at 602-03.

297. *Id.* at 602.

298. *Id.*

299. See *Newsprint Paper Rolls & Newsprint Paper Sheets*, U.S. PACKAGING & WRAPPING LLC (Sept. 1, 2011), <http://packagingblog.org/2011/09/01/newsprint-paper-rolls-newsprint-paper-sheets> (listing many nonexpressive uses of newsprint, including as wrapping paper, packaging material, and disposable table cloths).

300. See *Buckley v. Valeo*, 424 U.S. 1, 263 (1976) (per curiam) (White, J., concurring in part and dissenting in part) (“[M]oney is not always equivalent to or used for speech, even in the context of political campaigns.”).

301. It is worth emphasizing, once again, that this Article deals only with the question of First Amendment “coverage,” not whether particular recording restrictions should survive some form of heightened scrutiny. For scholarship addressing this issue, see Bhagwat, *supra* note 7, at 1069.

interests, such as combating illicit motives, ensuring ample opportunities for speech, and maintaining judicially administrable standards.<sup>302</sup>

A. Protecting Nonexpressive Conduct

One view of the First Amendment is that freedom of expression protects only *expressive* acts, and therefore nonexpressive conduct is entirely unprotected. “[A]lthough the Supreme Court has defined the boundaries of expression broadly,” one court of appeals has explained, “it never has extended the protections of the First Amendment to non-expressive conduct.”<sup>303</sup> If “there is no expression at issue,” the court continued, “First Amendment doctrine simply has no application.”<sup>304</sup>

Existing doctrine, however, *does* recognize free speech protection for nonexpressive conduct in many circumstances. And rightly so. Denying heightened scrutiny to all regulations of nonexpressive conduct might seem plausible at first glance, but the implications of that approach would be startling. The government could ban the purchase of computers or printing presses, prohibit the pooling of money for speech purposes, and require citizens to give money to partisan newspapers that support the government. It would be odd indeed if the government could target the preconditions of speech without any restraints.

Asking whether regulated conduct is “expressive” therefore cannot resolve the question of First Amendment coverage. As Robert Post observes, a myopic focus on expressive conduct “frames the threshold condition for triggering First Amendment scrutiny far too narrowly.”<sup>305</sup> Instead, “our First Amendment jurisprudence is concerned not merely with what is regulated, but

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302. Accordingly, this Part will not attempt a systematic assessment of the anti-targeting principle according to particular “theories” of the First Amendment. See generally Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (discussing First Amendment values); Schauer, *supra* note 19, at 1786 (mentioning various such theories). Most people do not view speech and press freedoms through a single lens, instead weaving together a collection of First Amendment values and creating a patchwork free speech doctrine. See Schauer, *supra* note 19, at 1786 (“[I]f there exists a single theory that can explain the First Amendment’s coverage, it has not yet been found.”); Stone, *supra* note 245, at 276 (“[T]here is no unified field theory of the First Amendment—no single test that can apply to all cases.”). Moreover, the term “freedom” can be multifaceted, so the First Amendment may simultaneously afford free speech coverage *to* expressive conduct and *against* targeted laws. Proponents of anti-targeting need not endorse Justice Scalia’s broader view that First Amendment rights are solely shields against laws.

303. *Doe v. City of Lafayette*, 377 F.3d 757, 764 (7th Cir. 2004) (en banc).

304. *Id.*; see also *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (“As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech.”).

305. Post, *supra* note 50, at 1255.

also with why the state seeks to impose regulations.”<sup>306</sup> Viewed from the perspective of the individual, the First Amendment must extend some protection for speech-facilitating conduct; otherwise the government could starve the supply of speech. Restrictions on speech, after all, can occur at different stages of the speech process.

## B. Problems with Conduct-Based Approaches

As discussed in Part I, one way to protect nonexpressive conduct would be to ask whether regulations of that conduct burden speech. The difficulty with this approach is that “virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose.”<sup>307</sup> For instance, “[a] parking ordinance incidentally restricts speech when applied against an illegally-parked newspaper delivery van,” and “the tax code burdens speech when used to tax a book publisher.”<sup>308</sup> But few people think that these circumstances ought to trigger heightened review. Forcing judges to review all incidental-burden claims, Geoffrey Stone remarks, “would be a judicial nightmare”<sup>309</sup> and “would open the door to endless litigation and encourage all sorts of fraudulent claims.”<sup>310</sup> Indeed, the principal rationale for not granting constitutional protection to speech-facilitating conduct, the Supreme Court has explained, “is largely one of practicality.”<sup>311</sup>

Most scholars applying First Amendment coverage based on the effects of a regulation on speech recognize the impracticality of applying heightened scrutiny to every law. Instead, they propose restricting coverage either to particular types of incidental burdens defined by subject matter, or to incidental burdens that substantially burden speech. These two ideas are briefly addressed in turn. Both approaches, in my view, face intractable problems.

### 1. Domain-specific approaches

One framework would limit coverage for speech-facilitating conduct to particular subjects or domains.<sup>312</sup> Some proposals, for instance, call for giving

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306. *Id.* (emphasis omitted).

307. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring in the judgment). This point is widely recognized in the literature. See, e.g., Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 930-31 (1993); Dorf, *supra* note 15, at 1208; Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1683 (2013).

308. Srinivasan, *supra* note 15, at 405.

309. Stone, *supra* note 243, at 208.

310. Stone, *supra* note 245, at 298.

311. Stone, *supra* note 243, at 208.

312. See *supra* notes 54-65 and accompanying text.

special legal privileges to journalists.<sup>313</sup> Others argue that coverage should depend on whether the activity is especially beneficial to the public.<sup>314</sup> These issue-by-issue or speaker-by-speaker approaches are referred to here as “domain-specific.”

A domain-specific framework would have certain notable benefits. Most significantly, ad hoc analysis would allow for more finely tuned doctrine tailored to the particular First Amendment interests at stake in each situation. A domain-specific approach also would find some support in other aspects of free speech doctrine.<sup>315</sup> Speech about public figures or public issues, for instance, sometimes receives stronger First Amendment protection than does speech concerning private figures or private issues.<sup>316</sup> Similarly, the Supreme Court has determined that some categories of speech have less value and deserve little or no protection.<sup>317</sup>

Nonetheless, a domain-specific approach to nonexpressive conduct would come with considerable drawbacks.

First, this approach would create enormous content-based line-drawing problems. The main challenge would be determining whether a particular domain ought to receive special protection. Proponents of scientific-research privileges, for instance, assert that scientific research is “a central and unique part of a highly favored process.”<sup>318</sup> But how should judges decide whether

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313. See *supra* note 61 and accompanying text.

314. See, e.g., McDonald, *supra* note 7, at 338 n.301 (“[A] newsgatherer defending against the application of general laws would first need to meet a ‘threshold’ showing of ‘news value’ before even being eligible for such a balancing analysis.”).

315. Robert Post, *Regulating Election Speech Under the First Amendment*, 77 TEX. L. REV. 1837, 1840 (1999) (“[T]he First Amendment has domain-specific applications . . .”).

316. See Snyder v. Phelps, 132 S. Ct. 1207, 1215 (2011) (“[W]here matters of purely private significance are at issue, First Amendment protections are often less rigorous.”). Interestingly, however, the Justices sometimes disfavor legislative efforts to carve out special treatment of newsworthy information. See Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (plurality opinion).

317. See, e.g., United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (explaining that certain categories of speech, such as fighting words, libel, and incitement, are generally excluded from First Amendment coverage); Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (“[C]ommercial speech [enjoys] a limited measure of protection . . .” (second alteration in original) (quoting Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978))). But see City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424-26 (1993) (limiting governmental efforts to distinguish commercial and noncommercial speech); R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992) (explaining that some forms of expression have “constitutionally proscribable content” but still are not “entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content” (emphasis omitted)).

318. Roy G. Spece, Jr. & Jennifer Weinzierl, *First Amendment Protection of Experimentation: A Critical Review and Tentative Synthesis/Reconstruction of the Literature*, 8 S. CAL. INTERDISC. L.J. 185, 214 (1998).

science is “highly favored” compared to other disciplines, like journalism?<sup>319</sup> And determining which domains to protect is only the beginning of the line-drawing difficulties. Judges would then have to define each domain’s scope. What counts as “scientific research” or “journalism”? Adopting a domain-specific view would require drawing content-based boundaries that define each domain.<sup>320</sup>

Doctrines based on the identity of the speaker would pose even greater challenges. Consider, for example, the notion of giving a special newsgathering privilege to journalists. “Recognizing the privilege,” Lillian BeVier observes, “would inevitably entail the necessity of resolving difficult definitional issues, as courts would be forced to decide which claimants were legitimately entitled to call themselves ‘journalists’ and which were not.”<sup>321</sup> It seems highly questionable that judges are in a position to make these types of unguided judgments,<sup>322</sup> and the Supreme Court has shown a general unwillingness to venture into this uncharted territory.<sup>323</sup>

This discussion is not meant to disparage doctrines that require line drawing. Nearly every aspect of modern free speech law separates cases into categories, asking whether conduct is expressive, whether the governmental action is content based, and so on. The anti-targeting framework—to which we

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319. See Francione, *supra* note 52, at 477 (“[T]here is simply no reason to accept that information-gathering is more important for scientists than for journalists.”); Remus, *Freedom of Thought*, *supra* note 52, at 1503 (“There is no basis for asserting that the preconditions of scientific speech should receive greater protection than preconditions of any other forms of protected speech.”).

320. See, e.g., Francione, *supra* note 52, at 503-04; McDonald, *supra* note 7, at 309. Notably, as the definition of a protected domain becomes broader, the reasons for protecting that domain may become weaker. See Francione, *supra* note 52, at 463 (“If the general view seeks *prima facie* protection for *every* instance of what is sincerely claimed to be experimentation [or] research, then the general view would undercut its own premise that the first amendment should protect science because of its inestimable practical value to society and its theoretical importance to the marketplace of ideas.”). Similar problems arise in determining what counts as a matter of public concern. See Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 578-79 (2007); Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 567-68 (2011). Some scholars see these problems as surmountable. See, e.g., Bhagwat, *supra* note 7, at 1065 (arguing for a test that applies when conduct “contributes in some substantial way to democratic self-governance”).

321. Lillian R. BeVier, *The Journalist’s Privilege—A Skeptic’s View*, 32 OHIO N.U. L. REV. 467, 467 (2006).

322. See, e.g., McConnell, *supra* note 74, at 438 (“There is no coherent way to distinguish the institutional press from others who disseminate information and opinion to the public through communications media.”).

323. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (“The balancing of conflicting interests of this type is particularly a legislative function.”); *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (“The dangers and the undesirability of making [free speech] determination[s] on the basis of factors such as the size of the audience or the probity of the speaker’s ideas are obvious.”).

will return shortly—is no different, requiring sometimes-challenging assessments of whether laws target speech or conduct closely related to speech.<sup>324</sup> At the end of the day, some distinctions are essential; otherwise, First Amendment law would become a case-specific balancing test with virtually no predictability. And it is fallacious to suppose “that a distinction that cannot be sharply drawn cannot be drawn at all.”<sup>325</sup>

A domain-specific approach, however, would require judges to make distinctions that they are especially ill suited to make. Whether audiovisual recording is conventionally expressive, for instance, requires only a basic understanding of American society; whether a journalist’s nonexpressive acts should enjoy special protection, by contrast, is far more a question of policy. Even for those comfortable with judicial policymaking, it is worth noting that most First Amendment doctrine is deliberately structured so that value-based choices (which are inevitable in any legal regime) are made only at a high level of abstraction, with a resulting web of categories and doctrines that seek to preclude content-based policy judgments in particular cases. “In the most profound sense,” Frederick Schauer explains, “the first amendment stands as a barrier to excess subdivision.”<sup>326</sup>

## 2. Substantial-burdens approaches

An alternative framework would apply heightened scrutiny whenever a regulation of nonexpressive conduct *substantially* burdens expression.<sup>327</sup> In theory, this approach has considerable appeal. By employing a uniform method based on a neutral principle, this approach ostensibly would solve many of the line-drawing problems of the domain-specific approach. In practice, though, the problems created by a substantial-burdens method would likely prove even more unmanageable and underprotective of speech interests.<sup>328</sup>

The most difficult challenges of a substantial-burdens framework are figuring out how to measure burdens and determining what level of generality to use in making that assessment.

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324. See *supra* Part IV.A.

325. Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 CINN. L. REV. 1181, 1189 (1988); see also Stone, *supra* note 243, at 209 n.75 (“[T]his is sometimes the nature of legal reasoning. General principles are useful to distinguish among different types of cases, but the principles are almost always imprecise at the margins.”).

326. Schauer, *supra* note 325, at 1198.

327. See, e.g., Dorf, *supra* note 15 (advocating this approach).

328. Dorf recognizes many of these difficulties, but he does not respond to them “because they cannot be adequately addressed in the abstract.” *Id.* at 1210. In my view, these problems are insurmountable.

One possibility would be for judges to make case-specific assessments of the burdens on speech.<sup>329</sup> A problem with measuring incidental speech burdens in these cases, however, is that regulations of nonexpressive conduct necessarily require an additional causal step before they burden speech.<sup>330</sup> Sometimes, identifying significant burdens on speech would be simple enough, but often this approach would require a perplexing counterfactual inquiry. In newsgathering cases, for instance, courts would need to determine what information claimants could have found by alternative means—an inquiry that judges frequently will be in no position to answer.

Notably, this problem of attenuated burdens usually does not arise with respect to other exemption rights against general laws. Free speech accommodations under *O'Brien* and free exercise accommodations prior to *Employment Division v. Smith*,<sup>331</sup> for example, involve burdens that fall directly on the constitutionally relevant activity. Under *O'Brien*, the restriction is imposed directly on expressive activities, so the case-specific effect on expression is readily apparent. The same is true in religious accommodation cases, where individuals attest directly to whether the governmental regulation causes significant burdens on their religious beliefs or practices.<sup>332</sup> With claims based on speech-facilitating conduct, however, the effect on speech would often be unclear.

Similarly, looking to case-specific speech effects would make rights to engage in nonexpressive conduct dependent on contingencies unknown at the time of the regulated conduct. Consider, for instance, someone who sees a police officer performing her duties in public and decides to start recording. Should the legality of this amateur recorder's conduct depend on whether he later puts the video online, or whether the recorded events become difficult to recount through other means? That would be unsettling (and potentially chilling) to the videographer. Similarly, it would be strange if a presumptive

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329. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 677 (1991) (Souter, J., dissenting); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 710 (1986) (Blackmun, J., dissenting); *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

330. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 200 (1990) (noting that “the injury to academic freedom claimed by petitioner” was “remote and attenuated . . . [and] also speculative”); *Branzburg*, 408 U.S. at 690, 693-94 (noting that burdens on newsgathering were “consequential, but uncertain,” and “to a great extent speculative,” producing “widely divergent” estimates).

331. 494 U.S. 872 (1990).

332. To be sure, there may be logical steps between the governmental restriction and its burdensome effect. Cf. *Univ. of Pa.*, 493 U.S. at 199 (“[B]urdens that are less than direct may sometimes pose First Amendment concerns . . .”). My point, which is orthogonal to that issue, is that the *evidence* of the burdensome effect is direct; courts simply inquire whether the religious beliefs or practices of the relevant individuals are burdened by the regulation. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (stating that “federal courts have no business addressing” the question “whether the religious belief asserted in a RFRA case is reasonable”).

right to engage in scientific research were triggered only when the results lead to publishable results,<sup>333</sup> or if a presumptive right to trespass for expressive purposes were dependent on what intruders end up discovering.<sup>334</sup>

Courts using case-specific assessments would also lack a uniform way of evaluating the significance of burdens. As Srikanth Srinivasan points out, “calculating the degree of speech-restrictive effect in different situations. . . . along a common metric seems unworkable, which makes comparing their extent in different circumstances largely guesswork.”<sup>335</sup> Indeed, even in similar circumstances, the inquiry would be unwieldy. For instance, how should courts evaluate claimed tax exemptions for someone who spends every marginal dollar on speech, compared to someone who spends every tenth marginal dollar on speech? Would a general income tax impose a substantial burden on the first person but not the second? What if the tax effectively prevented an individual from buying a television advertisement, forcing her to purchase a radio spot instead? Should the IRS have to defend the assessment based on the particular circumstances presented by this reluctant radio advertiser? Would we care about the other ways that she chooses to spend her money—that she owns an expensive car, for instance? These would be routine cases.

Case-by-case analyses would also lead to case-by-case results, creating considerable doctrinal instability and undermining free speech values. “It turns out to be incredibly difficult to identify and assess all of the many factors that should go into [a balancing] judgment on a case-by-case basis,” Geoffrey Stone explains.<sup>336</sup> Consequently, the use of a case-specific approach “would produce a highly uncertain, unpredictable, and fact-dependent set of outcomes that would leave speakers, police officers, prosecutors, jurors, and judges in a state of constant uncertainty.”<sup>337</sup>

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333. See Remus, *Freedom of Thought*, *supra* note 52, at 1503; Robertson, *supra* note 54, at 1218 n.57.

334. As noted below, the typical response to this objection is to identify the relevant rule at a higher level of abstraction, applicable to many cases even though “not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

335. Srinivasan, *supra* note 15, at 414.

336. Stone, *supra* note 245, at 275-76. Stone’s point relates to case-specific analysis generally, not just the analysis that might apply to speech-facilitating conduct.

337. *Id.*; see *Gertz*, 418 U.S. at 343 (“Theoretically, of course, the balance between the needs of the press and the individual’s claim to compensation for wrongful injury might be struck on a case-by-case basis. . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable.”); see also, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT’S PARADOX 66 (2008) (“Given the vagaries of fair use doctrine, fair use thus provides a highly permeable, often merely theoretical, defense of First Amendment interests.”); Jones, *supra* note 56, at 1225 (stating that reporter-privileges doctrine “is uniformly regarded as confusing, resulting in a ‘privilege’ that is ambiguous, inconsistent, and the subject of significant criticism” (footnotes omitted)); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1496-97 (2007) (“[A]pplication of the law  
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Collectively, the many problems with a case-specific approach suggest that free speech rights would need to be identified at a higher level of generality. By evaluating whether certain *classes* or *categories* of behavior give rise to substantial burdens, judges could provide individuals with far greater notice of their rights and could avoid unwieldy case-specific inquiries into speech-restrictive effects.

But despite its considerable advantages over a case-by-case approach, an approach that focused on speech burdens in various categories would almost surely prove unworkable too.

First, the myriad factual problems described above would resurface, but instead of making case-specific factual determinations, judges would have to make classwide factual determinations. Do promissory estoppel laws substantially restrict news reporting? It is hard to know, largely because of the attenuated nature of the burdens on speech. Would judges answer this factual question as a matter of law, guided by logic and intuition? Doing so could have advantages, but it might also make decisions appear artificial or contrived.<sup>338</sup> On the other hand, the Supreme Court is generally averse to using empirical evidence to answer broad-reaching constitutional questions.<sup>339</sup>

Perhaps worse, a category-based assessment of speech effects would require judges to engage in the unbounded enterprise of trying to define the relevant categories. Countless variables could be relevant. Consider a newsgathering claim where a journalist in the French Quarter of New Orleans gained unauthorized access to a private computer. At what level of generality should judges determine the effect on speech in order to decide whether restrictions of that conduct trigger heightened scrutiny? Would the relevant category be journalists who gain unauthorized access to computers, or journalists who commit any tort? Would local circumstances enter the picture, or would courts assess the burdens on a statewide or nationwide basis? Perhaps the dynamics of news reporting differ between Louisiana and Arkansas, or between New Orleans and Shreveport, or between the First Ward and the French Quarter. Perhaps professional sports reporters and amateur national-security bloggers deserve separate analysis. Perhaps speech effects differ year-to-year, or month-to-month, depending on innumerable factors that courts have no competency to judge.

Nor should judges rely on claimants to frame the relevant categories. Determining First Amendment coverage is a question of *law*, and judges ought

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[of fair use] has become so unpredictable that would-be fair-users can rarely rely on the doctrine with any significant level of confidence.”).

338. *Cf.* McConnell, *supra* note 74, at 451-52 (criticizing the Supreme Court’s decision in *Citizens United* for holding that independent expenditures do not create a risk of corruption).

339. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279 (1987).

to decide questions of law without regard to the legal theories advanced by the parties in a particular case.<sup>340</sup> If a claimant asserted that her conduct was covered by the First Amendment based on the substantial burden of tort actions on journalists in southern Louisiana, the court would need to decide on its own if the claimant had correctly framed the relevant category for assessing the substantiality of speech burdens.

As these decisions move to higher and higher levels of abstraction—as they surely would once judges confront these impossibly difficult line-drawing problems—the relevant tests would start to look more and more like questions of public policy rather than constitutional law,<sup>341</sup> forcing judges to weigh speculative costs against speculative benefits. The substantial-burdens approach—ostensibly content neutral—would thus likely become the domain-specific approach in practice, requiring judges to make a wide range of content-based policy judgments.

### C. Advantages of an Anti-Targeting Approach

An anti-targeting approach avoids the content-based line-drawing problems that would overwhelm other methods. Instead, judges would assess legal rules using a content-neutral metric, determining whether rules target speech—either on their face or by targeting “conduct commonly associated with expression.”<sup>342</sup>

To be sure, this inquiry would not always lead to easy answers.<sup>343</sup> Restrictions on audiovisual recording, for instance, are especially challenging because they do not *necessarily* restrict expression, yet by targeting a

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340. See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99-100 (1991).

341. See, e.g., Larry D. Kramer, “*The Interest of the Man*”: *James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 699 (2006) (“Both in daily parlance and as a technical matter, we draw a line between law and politics and see them as distinct categories.”). This is not to suggest that a neat line divides the two realms. My point is simply that as the level of generality rises, determining the “significance” of the speech burden moves further from the judicial ken.

342. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759-61 (1988). Similarly, whether conduct is expressive or nonexpressive does not require a content-based judgment. See Steve Keane, Note, *The Case Against Blanket First Amendment Protection of Scientific Research: Articulating a More Limited Scope of Protection*, 59 STAN. L. REV. 505, 527 (2006) (“A critically important feature of expressive conduct theory is that it does not require a judgment about what qualifies as science.”).

343. See *City of Lakewood*, 486 U.S. at 788 (White, J., dissenting) (“[T]he Court’s new ‘nexus to expression, or to conduct commonly associated with expression’ test is peculiarly troublesome, because it is of uncertain scope and vague expanse.”). For one court’s struggle deciding whether encryption source code is closely related to expression, see *Bernstein v. U.S. Department of Justice*, 176 F.3d 1132, 1139-42 (9th Cir.), *reh’g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); and *id.* at 1149 (Nelson, J., dissenting).

conventional means of expression, they seem to be more speech-targeted than ordinary regulations of conduct. With these and other laws, judges have to determine in a common law fashion which types of laws are targeted and which types are not. It is worth emphasizing, however, that the Court has recognized this category of free speech law since the 1980s, with no apparent paralysis or disarray in lower courts. And a similar inquiry features prominently in other areas of constitutional law.<sup>344</sup>

An anti-targeting approach is also likely to account for the mine-run of cases where the government has acted for improper reasons. As Elena Kagan persuasively argues, when a law targets speech, “a legislator cannot help but consider, consciously or not, whether and how the law will affect particular messages.”<sup>345</sup> As Kagan puts it, “this is to say little more than that when a law is about speech, the legislator will consider its impact on speech—a proposition neither deep nor shocking.”<sup>346</sup> Once the First Amendment is deemed to apply, judges use heightened scrutiny to help ensure the government is acting for legitimate reasons.<sup>347</sup>

Importantly, a heightened risk of improper speech-related motives also arises when an ostensibly general law has apparent disproportionate effects on speech.<sup>348</sup> Kagan explains:

The relevance of hugely disproportionate impact to the level of scrutiny is, under a motive-based approach, no great mystery. What separates direct from incidental restraints is breadth: whether the law applies to more than just speech. If an incidental restraint has no such sweep, effectively regulating only speech, then the danger it poses of illicit motive approaches the level associated with direct restraints, and the same standard of review thus should obtain.<sup>349</sup>

In sum, laws that target speech on their face or in their obvious effects pose a substantially higher risk of illicit motive.

This danger of improper motives is present, though perhaps to a lesser degree, when laws target conventional means of expression, such as cameras and other audiovisual recording devices. To be sure, a recording device, just like a computer or a printing press, can be used for nonexpressive purposes. (For instance, these machines could serve as decorations, toys, or investments.) But the conventional use of a recording device is to capture audiovisual content in order to convey that content to others. A legislature that targets audiovisual recording is thus likely to have that *conveyance* of information in mind when it restricts the front-end use of the recording device.

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344. See *supra* notes 265–69.

345. Kagan, *supra* note 15, at 496.

346. *Id.*; see Stone, *supra* note 245, at 298 (making the same point).

347. See generally Kagan, *supra* note 15 (explaining how free speech law is largely structured to combat illicit governmental motives).

348. *Id.* at 496.

349. *Id.* at 498; see Dorf, *supra* note 15, at 1205.

Consider *ACLU of Illinois v. Alvarez*,<sup>350</sup> where an Illinois statute barred the capture of audio without the consent of the recorded parties. The governmental interests in that case did not stem from the mere *capture* of the audio; indeed, the conversations that the ACLU wanted to record were already audible to those within earshot. Rather, as Judge Posner aptly explained (albeit in dissent), the legislature was seeking to prevent the *conveyance* of recorded conversations to a broader audience, and the most effective means of preventing such communication was to ban recordings at the front end. “The distinction . . . between an overheard private conversation recalled from memory and one that is recorded is something that everyone feels,” Judge Posner remarked.<sup>351</sup>

Of course, the government may have ample reason to restrict the recording of audiovisual content that is otherwise available to members of the public. An interest in conversational privacy, for instance, may justify laws that restrict surreptitious recording.<sup>352</sup> This Article takes no view on that issue. But the predominant reason for a legislature to restrict the recording of otherwise available information is concern over the dissemination of that information to a broader audience.<sup>353</sup> And that is exactly the type of likely speech-related motive that has led courts to apply heightened scrutiny.<sup>354</sup>

By contrast, general laws that do not reveal any effort to target speech are typically “poor vehicles for censorial designs.”<sup>355</sup> As the Supreme Court has explained, “laws of general application that are not aimed at conduct commonly associated with expression . . . carry with them little danger of censorship” and “provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.”<sup>356</sup> Moreover, when laws are general, their broad-ranging application increases the chance that ordinary politics will account for any unduly burdensome effects.<sup>357</sup>

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350. 679 F.3d 583 (7th Cir. 2012).

351. *Id.* at 612 (Posner, J., dissenting).

352. *See supra* note 301.

353. *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (per curiam) (making a similar observation about contribution caps).

354. *See supra* note 270. Content-based recording statutes, such as bans on recording industry practices on industrial farms, raise even more acute concerns about governmental efforts to restrict the *conveyance* of information by targeting the front end of the speech process. *See* Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State “Ag-Gag” Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1169-70 (2012).

355. Kagan, *supra* note 15, at 496; *see also id.* at 489 (making a similar point).

356. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 760-61 (1988).

357. This point is widely recognized. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 445-46 (1991).

### **Conclusion**

The Supreme Court has wisely abandoned a vacillating and confusing practice of applying heightened scrutiny to regulations of nonexpressive conduct based on incidental burdens on speech. Good reasons may support granting First Amendment coverage in particular cases, but the doctrinal problem of incidental burdens on nonexpressive conduct has not admitted of a principled and predictable solution that relies on incidental speech effects.

Anti-targeting offers a far better course. Stepping back from a granular focus on particular rights, a broader guiding principle comes into view that brings together the Court's disparate treatment of various types of speech-facilitating conduct. It is indeed true that "[l]aws enacted to control or suppress speech may operate at different points in the speech process."<sup>358</sup> But free speech rights do not protect particular forms of speech-facilitating conduct. When nonexpressive conduct is regulated, it is the law, rather than individual aims, that brings the First Amendment into play. Speech-facilitating conduct is protected indirectly—through rights against targeted governmental interference with speech.

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358. *Citizens United v. FEC*, 558 U.S. 310, 336 (2010).