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Articles

LITIGANT SENSITIVITY IN FIRST AMENDMENT LAW

Adam M. Samaha*

I. INTRODUCTION

Evaluating the conduct of private litigants is not an exotic judicial task. It happens every day and in every judicial system. Yet First Amendment law often lacks that element, a fact well reflected in modern Supreme Court decision-making. That Court typically displays an acute, almost technocratic interest in the form of government rules, the justifications for regulation, and the connection between the two. In addition, the Court not uncommonly considers regulatory implications for large-scale systems of private conduct, like campaign financing or Internet-mediated communication. None of this entails assessment of individual claimant conduct. The personal stories of those asserting First Amendment claims might be vivid and dramatic, endearing or repulsive. But they are regularly irrelevant as a matter of law.

Consider Virginia v. Hicks. Kevin Hicks was convicted of trespassing after he disregarded a public housing authority’s notice that he was not wel-

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1 Examples are collected in Part III.B.1. below.

2 See, e.g., McConnell v. FEC, 124 S. Ct. 619, 684, 706 (2003) (considering facial challenges to “Congress’ most recent effort to confine the ill effects of aggregated wealth on our political system” and observing that “proliferation of sham issue ads has driven the soft-money explosion”); Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 396 (2000) (“[A] showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional . . . .”).

3 See Ashcroft v. ACLU, 124 S. Ct. 2783, 2792 (2004); Reno v. ACLU, 521 U.S. 844, 868–69 (1997) (distinguishing government regulation of “the vast democratic forums of the Internet” from “the broadcast industry”).

4 539 U.S. 113 (2003).
Hicks raised a First Amendment objection to his conviction, contending that the housing authority’s trespass policy was invalid because it might be used to inhibit constitutionally protected speech. The Court held that the policy—taken as a whole, considering its purpose, and in light of the range of situations to which it extended—was not sufficiently overbroad to violate the Amendment. There was nothing particularly surprising about the result, and the judgment was unanimous.

The notable part was the Court’s full-throated refusal to defeat the objection based on the character of Hicks’s conduct. At the time of his arrest, Hicks apparently claimed he was trying to deliver diapers to his child; and in court he did not argue that he was “engaged in constitutionally protected conduct” when arrested. Some judicial definitions of First Amendment “speech” are capacious, but none use diaper delivery as a prototype. Hicks did not lose because he was not engaged in “speech,” however. In fact, the Court indicated that his conduct was not a First Amendment issue at all. It might be a concern for federal standing doctrine. But that restraint does not bind state courts, and thus could not have been the basis for reversal sought by the Commonwealth. “Whether Virginia’s courts should have entertained this overbreadth challenge,” the Court reasoned, “is entirely a matter of state law.” That logic comes with a potential price. State and federal courts must abide by the same First Amendment law, but they need not use the same rules for standing. Different judiciaries might now provide overbreadth challenges to different classes of litigants.

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5 See id. at 116.
6 See id. at 115, 120–24.
9 See Hicks, 539 U.S. at 120 (citing ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989)). Hicks’s conviction had been reversed by the Virginia Supreme Court on First Amendment grounds. See id. at 2196 (noting the state court’s reliance on a theory of excessive administrative discretion).
10 Id. at 120.
It is nevertheless difficult to blame the *Hicks* Court for ignoring the Amendment as a source for filtering out disfavored claimants. Much First Amendment law is designed to prevent just that. Indeed, restricting overbreadth to a favored class of litigants is in tension with a popular justification for the doctrine: preventing government from "chilling" constitutionally valued third-party speech.\(^{12}\) Immediate judicial action is assertedly warranted to combat speech-dampening government action—even if the judiciary is indifferent to the fortunes of the claimant raising the challenge.

What would happen if courts simply stopped evaluating individual claimant conduct in all First Amendment cases? Some good would come of it. The judicial task probably would be simplified because one variable would be eliminated from today’s doctrinal thicket. Shearing claimant conduct from First Amendment formulas also could provide an advantage to less popular members of society, from political dissidents to minority religious sects. That comports with legitimate modern objectives for the Amendment\(^ {13}\) and at the same time steers the judiciary away from controversial assessments of private party choices. To be sure, eliminating the claimant-conduct variable would not always bolster First Amendment objections. Sometimes those wielding the Amendment will be well-liked by adjudicators, or their conduct otherwise will present a normatively attractive case for liberation from state action. But not every First Amendment objection can be successful. Perhaps focusing judicial attention on government, and not particular private parties, is the best way to adjudicate these claims.\(^ {14}\)

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\(^ {13}\) See, e.g., Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 529 & n.46 (1970) (asserting that the speech and press clauses’ contemporary significance is in protecting unpopular messages, now that government is more representative of popular will); accord JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 55–57 (1996) (addressing religious liberty and minority faiths); cf. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 21 (1998) (conceding that the Amendment’s original purposes may have included counter-majoritarian protection but stressing an asserted “historical and structural core” of safeguarding popular majorities from unresponsive government).

The tools for executing this option are familiar from the legal literature. For example, more than two decades ago Henry Monaghan endorsed a constitutional right to be judged by a valid rule of law and helped propel a line of scholarship on overbreadth doctrine. Other leading scholars have explored the significance of content-based regulation to First Amendment adjudication — a regulatory feature that the Supreme Court intermittently suggests is a unifying theme in speech clause violations. And a wave of commentary followed the Court’s virtual immunization of “neutral” laws of “general applicability” from free exercise objections. In light of such developments, Matthew Adler claimed that the doctrine surrounding the federal Bill of Rights (generally) creates rights against flawed government rules. Such rights, he argued, are not personal in any meaningful way.

18 See Police Dep’t of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (overstating that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”). But see, e.g., 18 U.S.C. § 1621 (2000) (criminalizing perjury).
There is another aspect to First Amendment law, however—a litigant-sensitive component that calls for the judicial evaluation of individual claimant conduct. It comes in several versions and serves several purposes. Yet it is not always easy to identify, especially in Supreme Court litigation. Not only has that Court's First Amendment agenda often ignored individual claimants, but the Court's modern mission is more about rule-generation than rule-application. So, even when the Court generates a litigant-sensitive rule, one cannot expect the Court to apply it frequently or at all. Perhaps for such reasons, the role of litigant sensitivity in First Amendment law seems underappreciated. It lacks a systematic examination of form and function.

With some effort and some attention to litigation in other courts, we can begin to understand when the judiciary openly examines claimant conduct in First Amendment litigation. That knowledge provides insight into substantive judicial values, future judicial behavior, and, most important for present purposes, the range of credible options for First Amendment analysis.

Part II of this Article sets out working definitions for key concepts, and rejects a faint hope that the "as-applied" and "facial" denominations are simple proxies for litigant sensitivity and insensitivity. Part III then outlines two extreme models for the doctrine. Both are inspired by early Supreme Court cases confronting First Amendment issues, and elements of both are reflected in contemporary law. But only one seems viable today.

A radically litigant sensitive model—which always assesses individual claimant conduct but never government conduct—is indefensible. Such a model has no way to distinguish targeted from incidental government burdens on constitutionally valued conduct. Courts might rationally decide to defeat First Amendment claims based on assessments of claimant conduct; but, without considering state action, they cannot adequately determine when a claim is meritorious.

21 Those who must defend against claims are litigants too, of course. But I will use the term "litigant" in "litigant sensitivity" to refer to First Amendment claimants. Note also that "First Amendment" is shorthand for inhibitions on federal, state, or local government action. See also infra Part II.A. (providing additional definitions). However, not every aspect of First Amendment law will be covered here. Attention will focus on speech/press, association, and free exercise adjudication. Establishment clause doctrine presents some interesting parallels but is sufficiently distinct to be set aside. Finally, this Article is a study of federal constitutional analysis within the courts of the United States. It does not directly address constitutional interpretation in other branches of government, nor issues of state or comparative constitutional law.

22 See SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

In contrast, a radically litigant insensitive model—which would evaluate government conduct regardless of claimant conduct—has no such problem. This model can rationally identify both successful and unsuccessful claims, it has deep roots in First Amendment litigation, and it can serve multiple normative missions. It also seems to offer the benefit of eliminating an entire set of variables without losing coherence.

Hence, courts should always know something about the character of government conduct in First Amendment cases. The issue is whether they should know anything else. In other words, is a radically insensitive model and its promise of greater simplicity better than any of several mixed models and their promise of greater variety?

To help answer that question, Part IV searches for examples of litigant sensitivity in existing First Amendment law. These examples can be grouped into five types of judicial assessment: (1) safeguards, where the judiciary tests whether the claimant’s conduct actually falls within a category of regulable conduct or whether legitimate government interests actually are served in the instant case; (2) filters, which are threshold barriers to claimants earning any possibility of judicial relief, regardless of how bad the government’s conduct might seem; (3) triggers, which set a rule of decision according to the value of the claimant’s conduct and which provide a chance of claimant victory regardless of how commendable the government’s aims; (4) limited holdings that disable a government rule or practice within a set of circumstances at least partly determined by claimant conduct; and (5) an element in a metaphorical balance, whether confined to a particular dispute or within wholesale interest balancing. These examples illustrate what would be lost if litigant sensitivity were purged from First Amendment analysis.

Part V integrates the lessons from Parts III and IV and critically examines the mixed and radically insensitive models. It begins by concluding that conventional sources and methods of constitutional interpretation probably leave the choice open. It then articulates criticisms that apply to many or all forms of litigant sensitivity. Requiring judicial evaluation of claimant conduct might, for example, unduly complicate the doctrine or present intolerable risks of error and bias. Litigant sensitivity can also unreasonably disrupt the achievement of legitimate government objectives or inhibit judicial responses to illegitimate government practices. And even if private conduct should matter in some cases, there is a hydraulic pressure in First Amendment argumentation that shifts attention up and away from individual claimants. By thinking and speaking in categories of conduct, judiciaries probably can better predict and prescribe the consequences of their judgment.

Nevertheless, the case for a mixed model is more persuasive. Some forms of litigant sensitivity are not very controversial, like safeguards. Safeguards are modest extensions of other commitments. They can combat the threat of liberty-suppressing error in the trial courts and help identify
improper government purpose. In addition, error risks and controversial value judgments arise across analytical structures. They are altered, not eliminated, by radical insensitivity. The advantage of categorical thinking, moreover, does not erase the virtues of litigant sensitivity. It is only good reason for caution. In fact, subsuming individual claimant conduct into categories is a way to preserve litigant sensitivity. Categorization can ameliorate adjudicatory bias if claimants are viewed as part of a legitimately constructed class of behavior that de-emphasizes particular political messages or religious faiths. And a mixed model affords adjudicators greater flexibility in resolving disputes. Although there are many versions of radical insensitivity, too, the ability to consider claimant conduct adds another dimension to doctrinal design.

There are disturbing disadvantages to litigant sensitivity. It can be messy, it is controversial, and it will never occupy the field of First Amendment analysis. But it is worth preserving, in some form. And whatever legal regime one might endorse, no good picture of the law or the alternatives can be achieved without a plain view of litigant sensitivity and its role in current practice.

II. FIRST STEPS AND FALSE STARTS

To get a better sense of the inquiry, the discussion begins with an explanation of litigant sensitivity as a concept and its relation to some common First Amendment terminology. At that point, the analysis turns to theoretical models and concrete examples.

A. Working Definitions

First Amendment law is litigant sensitive whenever it calls for an evaluation of claimant conduct. "Sensitive" does not mean "sympathetic." Whether a given doctrine or analytical method is litigant sensitive depends on the information necessary to reach a judgment on the merits, not on whether First Amendment claimants are advantaged. Evaluation of claimant conduct nevertheless must be prompted at least in part by First Amendment law. Other sources, like Article III of the United States Constitution, can direct attention to claimants. But those demands will not explain the Amendment's role.

The terms claimant and claimant conduct will be used inclusively. The former is simply a party to a judicial proceeding who seeks to benefit from First Amendment law. Among others, the term encompasses a criminal defendant demanding that his conviction be reversed on the ground that his conduct was privileged and a civil plaintiff seeking an injunction against

24 See supra note 8; infra note 117.
enforcement of a content-based statute. A non-exhaustive list of claimant “conduct” includes: the claimant’s state of mind (e.g., reckless disregard of the truth, or sincere religious belief), the claimant’s past or planned actions (e.g., delivering or hearing a speech, or wearing a yarmulke), or the actual or possible consequences for others stemming from such actions (e.g., imminent violence by an audience, or audience opportunity to receive accurate information, or spiritual fulfillment, or anarchy). And an evaluation of claimant conduct may—perhaps must—include consideration of attendant circumstances or context (e.g., on a public street, or at 10:32 p.m., or on cable television, or as a government employee).

It will not be enough, however, that a court discusses private conduct in general. That is possible without making the particular claimant’s conduct an element of the analysis—as when a court lauds the generic advantages of an unfettered system of communication in the course of declaring a regulation unconstitutionally broad, vague, or content-based. There must be an explicit link between the doctrine or rationale and the claimant before the court.


“Context” is a capacious and slippery term, and for those reasons it can be useful. The listed examples of “context” in the text above could just as easily be considered integral to claimant “conduct.” But those same items can be used to understand state action, as well: for example, there are rational reasons to differentiate government regulation of communication on public sidewalks from other locations. When I use the term “context,” I mean a set of variables that may affect our evaluation of either claimant conduct or government conduct, or both.

Properly identified claimant conduct likewise may inform our understanding of state action (it presumably provides an example of the impact of government conduct, and proof of its innocuous nature can reveal illegitimate government purpose, see infra text accompanying notes 104 and 387) and vice versa (state action can define the aspect of private conduct that is under fire, see infra text accompanying notes 66–69 (setting out the Schenck hypothetical)). But I am working on the assumption that state action and private conduct may be distinguished for litigation purposes.


Exceptions to the general rule against third-party standing qualify this statement. In true third-party standing cases, the claimant before the court may assert the constitutional rights of others. See generally Erwin Chemerinsky, Federal Jurisdiction § 2.3.4 (4th ed. 2003); Laurence H. Tribe, American Constitutional Law § 3-19 (3d ed. 2000). The line between first- and third-party rights is difficult to maintain, however, when substantive First Amendment doctrine becomes both litigant insensitive and focused on government rules. Substantive rights start to look like “rights against [flawed government] rules,” which are not necessarily “personal” rights. See Adler, Rights, supra note 20, at 14, 133–34; see also Monaghan, supra note 15, at 3 (associating overbreadth doctrine with narrow tailoring).
First Amendment law is accordingly litigant insensitive insofar as it calls for an evaluation of government conduct. Examples of government "conduct" include an analogous list of mind-set, action, and consequence components. Familiar concepts from the case law include the intent, purpose, motive, interest, or justification for action by a government institution or officer, the form of a regulation, and the effects thereof.\(^{31}\) Again, evaluation of such attributes might include context.

Using definitions of this scope will encompass a variety of forms and functions for litigant sensitivity. That concept is not restricted to situations in which government conduct is irrelevant; it merely means that claimant conduct is at least a consideration.

**B. Why "Facial" and "As-Applied" Labels Are Little Help**

Effort would be spared if we could identify litigant sensitivity and insensitivity according to whether a court denominates the claimant's challenge "facial" or "as-applied." The Supreme Court once stated in a licensing case that "[f]acial attacks, by their nature, are not dependent on the facts surrounding any particular permit denial,"\(^ {32}\) while the notion of an as-applied challenge suggests that the asserted constitutional problem appears only under certain circumstances.\(^ {33}\) Sometimes these labels point us in the right direction, but in many instances they are unhelpful or even misleading.

First of all, the terminology seems best suited for cases involving a statute, regulation, or other type of government rule. We can then ask whether First Amendment law dictates that the challenged rule is "invalid on its face" or "facially invalid."\(^ {34}\) Or the claimant might more narrowly assert that the rule cannot be applied to a category of circumstances into which the claimant's case falls, or is "invalid as applied" to the claimant alone.\(^ {35}\)

But not every injury stems from the authorized enforcement of a government rule,\(^ {36}\) and First Amendment law need not depend solely on flawed

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\(^{31}\) See infra Part III.B.1.b.

\(^{32}\) City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 & n.11 (1988).

\(^{33}\) See Fallon, supra note 20, at 1321 (describing an as-applied challenge as one "in which a party argues that a statute cannot be applied to her because its application would violate her personal constitutional rights").


\(^{36}\) See Dorf, supra note 20, at 272; Fallon, supra note 20, at 1365–66. Adler accepts this proposition in Rights, supra note 20, at 342, using the extraordinary example of torture. Cf. Alan Gewirth, Are There Any Absolute Rights?, in THEORIES OF RIGHTS 91, 107–08 (Jeremy Waldron ed., 1984) (arguing that a mother has an absolute right not to be tortured to death by her son).
rules. Suppose that a city bureaucrat denies a parade permit for a street march. She openly admits that she did so simply because she hates the marijuana-legalization message that she believes will be promoted at the march. That is a First Amendment violation according to any sane version of constitutional law: the actual reason for denial is easily ascertainable and undoubtedly impermissible. But the facial/as-applied distinction is irrelevant.

Nor is adjudication in such cases otherwise subject to automatic characterization as litigant insensitive or sensitive. There are several conceivable ways to structure the First Amendment analysis. A court might first demand proof that the claimant did not actually intend to engage in an "unprotected" category of speech. Or it could consider whether the claimant transparently planned to deliver a controversial message, as an indication of improper bureaucratic motive in situations where the reason for action is less clear. Or it might look only to the face of an apparently benign city policy and slough off occasional departures to complaints under state law. In any event, the First Amendment objection is not based on a government rule, and that fact alone will not identify litigant sensitivity.

Similar observations undermine the utility of "as-applied" labels even when a government rule is involved. Courts sometimes fasten the as-applied moniker to First Amendment challenges that are actually tested by largely litigant-insensitive analysis. Sometimes the doctrine is so indifferent to claimant conduct that fact-bound exemptions from government rules are apparently precluded. If we want to preserve the traditional lingo, these cases seem to create facial defenses to as-applied challenges. To be


38 See infra note 57 (listing obscenity, incitement, and so on).


40 See, e.g., Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176, 190 (1999) (holding that a regulation could not be applied to a certain class of commercial speakers but stressing that the regulation was "pierced by exemptions and inconsistencies"); Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989) (acknowledging that narrow-tailoring analysis can produce a rationale sufficiently broad to entirely invalidate a government rule).


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sure, the words "as applied" often indicate something useful: that the claimant has a set of facts in mind that purportedly cabins the reach of her claim. But those words do not predict the doctrine. As Richard Fallon observes, "when a court upholds a constitutional challenge, the nature of the test that it applies" or, more generally, the rationale it sets out, "will determine [or suggest] whether the statute is found unconstitutional solely as applied, in part, or in whole."\footnote{Fallon, supra note 20, at 1339. Note as well that the Supreme Court has used the term "as-applied" in referring to a flawed government rule that \textit{was applied} to this claimant. \textit{See} Lamont \textit{v. Postmaster Gen.}, 381 U.S. 301, 305 (1965); \textit{Terminiello v. City of Chicago}, 337 U.S. 1, 5–6 (1949) (discussing a statute as construed in the claimant's jury charge). This use does not necessarily indicate litigant-sensitive law or that the claimant seeks relief reaching no further than her particular case. For an unhappy duel over whether, in \textit{Terminiello}, Justice Douglas meant that the ordinance was "facially" invalid or only invalid "as applied," \textit{see} \textit{Virginia v. Black}, 538 U.S. 343, 364 (2003) (O'Connor, J., plurality opinion) (contending that \textit{Terminiello} "struck down an ambiguous statute on facial grounds based upon the instruction given to the jury"); \textit{id.} at 377 n.5 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing the as-applied perspective).}

The "facial" flag, in contrast, \textit{is} a fair predictor of litigant insensitivity. But it is not perfect, either. It helps to understand that there are at least two faces to "facial" attacks on government rules. The first attends to the information needed to adjudicate a First Amendment claim on the merits (which can be referred to as the elements of a facial \textit{challenge}); the second pertains to the ramification or remedy that follows (which might be facial \textit{invalidation}). Thus a claimant might argue that: (1) the court can resolve the merits and discern a constitutional violation by examining the terms of a statute and without considering this claimant’s conduct,\footnote{On this description, First Amendment overbreadth is not the only kind of "facial" challenge. \textit{R.A.V. v. City of St. Paul}, 505 U.S. 377 (1992), is an excellent example of a successful facial challenge that did not depend on overbreadth. \textit{See id.} at 381 (declaring an ordinance facially invalid for impermissibly singling out only some fighting words). For a discussion of non-overbreadth challenges that can be labeled "facials," \textit{see} Marc E. Isserles, \textit{Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement}, 48 Am. U. L. Rev. 359, 421–51 (1998).} and/or (2) the proper holding or remedy is that the statute is utterly unenforceable regardless of the circumstances. If First Amendment law indicates that both of these propositions are correct in a given case, then the court's decision will be litigant insensitive. And if the second proposition always follows the first, then every successful facial challenge is an example of litigant insensitivity.

There are, nevertheless, two shortcomings to the "facial" proxy. First, as indicated above, "as-applied" challenges might satisfy proposition (1), because the applicable law is so litigant insensitive. "Facial" labels will not identify all instances of litigant insensitivity. Second, proposition (2) does not automatically follow from proposition (1). This might be counterintuitive, but occasionally courts entertain a challenge that they are willing to call "facial," invoke doctrine that does not appear to demand inquiry into claimant conduct, and yet withhold a declaration of total statutory invalid-
Regardless of the label, precedent supports the notion of limited holdings resulting from relatively litigant-insensitive law. A litigant-insensitive test might not travel under a "facial"-challenge label, and it will not guarantee a litigant-insensitive remedy.

III. RADICAL MODELS, IN THEORY AND LAW

Those who have carefully studied First Amendment law will not be very surprised that formal doctrine is, to a degree, mixed on the question of litigant sensitivity. That understanding will be confirmed later on. But suppose for a moment that the only options were the extremes: radical litigant sensitivity or radical litigant insensitivity. What do these options look like? Do they find a foothold in actual cases? Are they feasible? And, as an introduction to looming normative questions, what are some of their implications?

A. Schenck v. United States and Radical Sensitivity

In 1919, Justice Holmes articulated a memorable approach to First Amendment problems. Disposing of an appeal from criminal convictions under the Espionage Act, his opinion for the Court in Schenck v. United States declared:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

This formulation has little to do with the character of the government's regulation and everything to do with claimant conduct and context. “[I]n

44 See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223–25, 229 (1990) (O'Connor, J., plurality opinion) (addressing procedural requirements that must be added to a business licensing scheme, attacked as an invalid prior restraint in pre-enforcement suits for anticipatory relief: “[w]e therefore hold that the failure to provide these essential safeguards renders the ordinance’s licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the court on remand” (emphasis added)); id. at 238 (Brennan, J., concurring in the judgment) (similar); see also Reno v. ACLU, 521 U.S. 844, 894–95 (1997) (O'Connor, J., concurring in part and dissenting in part) (arguing for partial invalidation of two statutory provisions in response to a facial challenge).

45 See infra Part IV.D.

46 249 U.S. 47 (1919).

47 Id. at 52 (emphasis added); see also Geoffrey R. Stone, The Origins of the “Bad Tendency” Test: Free Speech in Wartime, 2002 SUP. CT. REV. 411, 446–47 (reading such opinions to demand specific intent as an additional element of the offense).

48 “Little” rather than “nothing” because there is a reference to effects that Congress may legitimately attempt to prevent and, among other ambiguities in Schenck, it is not clear to which situations the “every” was meant to apply. The approach unlikely extended to every speech and press clause issue. Cf. HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 44 (1965) (expressing doubts about whether the formulation was fashioned so that all speech is immunized if it does not present a clear and
many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But not at that time and under those circumstances. This approach portrays the First Amendment as a source of individual rights protecting certain fields of private conduct, and the judicial role as fixing the boundaries of those rights without obvious dependence on the character of or justification for state action.

1. The Model Sketched.—Is it possible to extend this aspect of Schenck and build a radically litigant-sensitive model for all First Amendment law? Certainly we are not confined to Holmes’s standard or the way in which he applied it. Courts could identify additional private conduct that is covered and not covered by the Amendment—the latter category remaining exposed to regulation without raising any concern. There is no uncontroversial way to do this, but it is not a novel task. The terms “speech” and “press” and “religion” must have boundaries to have any meaning at all, and they are accompanied by phrases at least suggesting legal terms of art (“the freedom of” and “the free exercise thereof”). Moreover, an overwhelming variety of scholarly theories illuminate potential benefits from speech and religious liberty, as well as the point at which the good turns to bad.

49 Schenck, 249 U.S. at 52.
50 Cf. Adler, Rights, supra note 20, at 13, 20 & n.67, 22, 26 (indicating that constitutional rights could have been, but are not, structured as shields around certain actions, regardless of government rules); Frederick Schauer, Codifying the First Amendment: New York v. Ferber, 1982 SUP. CT. REV. 285, 304-05 (similar).
51 On the idea of Amendment “coverage” distinguished from “protection," see Schauer, supra note 14, at 89–91, and Schauer, supra note 23, at 267–70, 275–78 (indicating that not all covered conduct must be protected from every government burden). See also Post, supra note 27, at 1250.
52 U.S. CONST. amend. I.
In the case of speech, the boundaries could be drawn to cover only attempts to deliver or receive a message through a valued medium of expression; or only political messages likely to be understood by an audience; or only messages that are not coercive or contract-forming; or any number of other options and combinations. One could also draw on "unprotected" speech categories from existing case law. Roughly speaking, they include expression with a particular connection to sex, lies, or violence. The judiciary could then reject First Amendment claims if the claimant engaged in, or intends to engage in, uncovered or unprotected conduct.

In addition, a radically sensitive model might include consequentialist components and attention to context. Without turning to government conduct, courts could consider countervailing individual or community interests, modulating constitutional protection with reference to the harmful consequences of even covered conduct. Similarly, courts might think


*Third-party standing rules might extend claimant opportunities to raise First Amendment objections. See supra note 30. But the claimant would still have to identify third-party conduct that is at risk and covered by the Amendment.*

*See Schauer, A Comment on the Structure of Rights, 27 Ga. L. Rev. 415, 428-31 (discussing rights as shields—“a right not to have the ability to Ø infringed without the provision of a justification of special strength”); accord Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv.
about the implications of the claim for entire systems of communication and religious liberty. Radical litigant sensitivity demands consideration of the claimant’s conduct, but it need not forbid judicial understanding of large-scale consequences. Furthermore, different doctrine could be designed for different circumstances. Thus a claimant could be free to distribute literature on a public sidewalk, but not in a crosswalk; a claimant could be entitled to use a loudspeaker to promote a political candidacy, but not after 10:00 p.m. In short order, then, one can draw the outline of a sophisticated model that is nonetheless detached from assessments of government conduct.

2. The Model Erased.—Even this abstract description of radical sensitivity raises several concerns. A simple problem starts with the text of the Amendment. We are not told to worry about the “Congress [of Industrial Organizations]” but rather the Congress of the United States. The first section of the Fourteenth Amendment likewise refers to “State” action. The text at least suggests that, whatever else might be a factor in the analysis, government conduct must be assessed to make out a First Amendment claim.

Now, the judiciary has never seriously attempted to restrict the reach of First Amendment norms to the legislative branch of the federal government; and the due process clause of the Fourteenth Amendment has been construed to support application of such norms to state and local government. So to avoid repudiating large swaths of contemporary law, one must recognize some fairly loose readings of the text. But few will contend that those textual sources are entirely free from a state action limitation. Even scholars like Cass Sunstein—who see an aggressive mission for the Amendment in maintaining robust political debate as a matter of social fact—still make arguments to connect public-discourse problems with state (in)action.

The problem for radical sensitivity runs much further than the intimations of casual textualism. A radically sensitive model is unable to distinguish among different kinds of government action. For instance, it cannot

L. Rev. 1175, 1196 (1996) (“This shield metaphor better characterizes existing Supreme Court doctrine than does the concept of a trump.”).

Some objections apply to any assessment of claimant conduct. See infra Part V.B. The analysis here speaks to radical litigant sensitivity.

U.S. CONST. amend. I.


The privileges or immunities clause of the Fourteenth Amendment is an alternative textual vehicle, however. See generally I. TRIBE, supra note 30, §§ 7-1 to 7-6.

Cf. U.S. CONST. amend. XIII (declaring, with an exception, that “[n]either slavery nor involuntary servitude... shall exist within the United States, or any place subject to their jurisdiction”).

differentiate targeted from incidental—even truly accidental—government burdens on constitutionally valued claimant conduct. Whatever else it might do, First Amendment law must make such distinctions to make sense.

An example will help. After the armistice ending the World War and assuming no clear and present danger, would Schenck be immune from arrest and conviction for unpaid property taxes just because he is busy printing anti-tax circulars (or praying that he will not get arrested)? Obviously not. Enforcement of otherwise valid tax laws came at a bad time for Schenck, and he will doubtless produce fewer circulars as a result, especially if he goes to jail or must deplete his bank account to pay the levy. Yet nobody believes that every speech- or religion-dampening government action violates the Amendment. Countless, maybe all, government decisions will have that adverse impact on somebody's, maybe everybody's, speech or religion. This is true even when official action is not intended to impede, does not depend on the presence of, and only mildly burdens speech or religion. It will make immediate sense if First Amendment law protects speech production and prayer like Schenck's from punishment that is based on and singles out that conduct. It is altogether different and absurd to immunize such conduct from every inconvenience traceable to state action.

Seeing significance in the incidental nature of a government burden does not entail the defeat of every claim against it. Rational, if debatable, protests can be lodged against plenty of incidental burdens. Nevertheless, the character of state action cannot be ignored in designing First Amendment doctrine. To my knowledge, no one argues otherwise.

This flaw seems fatal to the model, but further problems are worth not-

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66 See generally Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986); Dorf, supra note 59, at 1176–78 & n.5 (defining "direct" burdens as burdens from government singling out "protected activity" for disadvantageous treatment, and "incidental" burdens as burdens from other laws, the enforcement of which consequently burdens the right to engage in such conduct under some circumstances).

67 See Dorf, supra note 59, at 1178, 1199, 1201, 1243–46 (highlighting the floodgates concern and identifying a substantial-burden requirement to moderate it); Eisgruber & Sager, supra note 20, at 268 ("Autonomy and religious autonomy both attach importance to a virtually limitless range of activities."); Schauer, supra note 14, at 784, 779–80, 790–91; Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 105 (1987) (noting that minimum wage laws raise the price of newspapers); see also Larry A. Alexander, Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory, 44 HASTINGS L.J. 921, 929 (1993); cf. Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 YALE L.J. 1311, 1313–14, 1316–17, 1361–67 (2002) (searching for the appropriate method of determining whether a constitutional claimant has suffered harm, considering a range of potentially offsetting benefits from government).

68 See, e.g., Dorf, supra note 59, at 1182–99; Stone, supra note 67, at 105–07, 114 (confronting arguments against judicial scrutiny of incidental burdens in the speech clause context); see also infra Part IV.C. (discussing triggers). But see Alexander, supra note 67, at 927 (arguing against judicial scrutiny due to the asserted futility and impermissibility of balancing speech interests against the government's speech-neutral interests).

69 Cf. Sunstein, supra note 53, at 42–43 (playing down the difference between direct and incidental burdens but concluding that "[w]e need to know about the particular rule at issue").
ing. A related obstacle involves judicial remedies. How can a court know what dispute to adjudicate and what to award without knowing the source of the claimant’s injury? In Schenck’s case itself there was reference to state action (arrest and conviction), which is necessary to analyze the problem sensibly. Theoretically and ignoring justiciability norms, courts could issue ex parte declaratory judgments that certain claimant conduct is covered by the Amendment. But that remedy is fairly fruitless on its own. Because some burdens on even constitutionally valued conduct must be suffered, no declaration could protect the claimant indiscriminately “against the world.”

Other objections probably are more debatable but still significant. One stems from the injection of countervailing interests. If that is appropriate, radical litigant sensitivity poses problems of judicial competence and legitimacy in the absence of guidance from other officials. It seems awkward for courts to assess threats from private conduct without even considering the government’s regulations and asserted interests. A judicial assessment otherwise might be indefensibly unbounded and undemocratic, and the payoff for maintaining litigant-sensitive purity is not apparent. What harm is there in simply asking the government about its interest in the matter? Moreover, there could be an array of interests strong enough to justify regulation of a claimant’s conduct, yet without an actual legislative and executive commitment to restraining private conduct on those grounds. One may sensibly demand that any competing social interest be not only conceivable, but also somehow democratically instantiated before a court may rely on it.\footnote{Cf. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (explaining, in a ballot-access case, that the Court will “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule”). But cf. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 377–78 (1997) (Stevens, J., dissenting) (criticizing the majority for relying on a particular interest in preserving two-party politics, which the State assertedly disavowed in litigation).}

Finally, radical sensitivity is a poor way to confront problems that many now believe are at the center of the Amendment’s meaning. Anti-discrimination principles, whatever their normative underpinnings,\footnote{See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 526 & n.9 (2001) (describing methods for identifying content discrimination); Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 546–47 (1993) (addressing religious-conduct targeting); Leathers v. Medlock, 499 U.S. 439, 454–57 (1991) (Marshall, J., dissenting) (discussing inter- and intra-media discrimination); infra note 347.} cannot be enforced without considering lines that the state has drawn.\footnote{See Eisgruber & Sager, supra note 20, at 260 (noting that equality claims must be grounded in “the predicate of governmental action”).} Radical sensitivity can protect the messages of government critics and the faith of minority religions only per se; the model cannot easily judge how others are treated in comparison.\footnote{This deficiency would not be so debilitating with respect to, say, criminal prohibitions imposed on such claimants—perhaps they would prevail regardless of who else was burdened—but it would appear to foreclose certain demands for equalized government benefits. See, e.g., Legal Servs. Corp. v.}
from rectifying certain systematic government practices without (perhaps even with) the right kind of claimants. Doctrines ranging from prior restraint to overbreadth and anything else based on the third-party "chilling effect" of state action would be abandoned.

A radically sensitive model can accomplish a lot. It can identify private conduct that is valued and not valued. Those understandings could be used to defeat the claims of some litigants, and to advance the claims of others. But the model is ignorant of both the form of and the reasons for government conduct. While denying First Amendment claims is a cinch (conceptually speaking) for a radically sensitive model, it has no failsafe way to determine when a claim should succeed.

B. Patterson v. Colorado and Radical Insensitivity

Now consider the alternative extreme—a radically insensitive model that excludes the claimant's conduct from consideration. At one time the Supreme Court appeared to endorse such doctrine. In 1907, about a decade before he authored Schenck, Justice Holmes wrote the opinion for the Court in Patterson v. Colorado. There he suggested that a prohibition on prior restraints exhausted the force of the speech and press clauses:

[T]he main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.

This approach is nothing like Schenck, and not just because it indicates that subsequent punishment gets a free pass under the First Amendment. The cases are dramatically different because Schenck is almost solely concerned with claimant conduct and context, while Patterson pays exclusive attention to the character of government regulation. Another difference is that Patterson describes a hard-and-fast rule, whereas Schenck relies on case-specific fact analysis. This difference is not, however, a consequence of choosing litigant insensitivity over sensitivity. We can make the Patterson rule messier without adding litigant sensitivity (e.g., "no prior restraints, except in times of national crisis"), and we can make the Schenck formula harder-and-faster without getting litigant insensitive (e.g., "words can be criminalized when they create a clear and present danger of lawbreaking by the audience, but only if the defendant expressly advocates felonious conduct"), cf. Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719, 720–21 (1975) (describing Learned Hand's alternative to the Holmes formulation).


205 U.S. 454 (1907) (involving a state-court contempt proceeding).

id. at 462 (citations omitted); see also Reynolds v. United States, 98 U.S. 145, 166 (1878) (distinguishing conduct from belief-targeted regulation in the free exercise field).

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structed from Patterson's example, everyone including the liar escapes prior restraint, while even the truth-teller enjoys no First Amendment protection from subsequent punishment.

Radical insensitivity could be more claimant-friendly and nuanced than that. The model could have, say, two rules instead of just one and also prohibit any penalty intended to injure government critics. In addition, different doctrine could be designed for different contexts, and courts might consider implications of government conduct for systems of communication and religious liberty. The doctrine could be indifferent to particular claimants while remaining sensitive to effects on private conduct as a whole. The essential character of a radically insensitive model is that it assesses, by any of many possible methods, government conduct but not individual claimant conduct.

1. Catalogs: Historical Roots and Contemporary Tools.—For those interested in judicial tradition, litigant insensitivity qualifies. It has deep roots in precedent and it remains prevalent today. And a radically insensitive model might appeal to those who value effective judicial restraints on majoritarian impulse against minority messages and faiths.

   a. Origins in Supreme Court precedent.—The tide first turned for First Amendment claimants between 1931 and 1940, during the Great Depression and before the attack on Pearl Harbor. Litigant insensitivity played a significant role in these cases.

   In 1931, statutory vagueness and facial challenges found a home in speech clause doctrine, and the presumption against prior restraint was extended to state judicial injunctions. Those decisions were to the immediate advantage of red-flag-flying socialists and (anti-Semitic) local-government critics. Improper government purpose played a role in a 1936 press clause victory permitting a group of newspapers to avoid the burden of a targeted tax. Also, uncabin ed discretion in administrative licensing

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78 See Stromberg v. California, 283 U.S. 359, 369–70 (1931) (holding one clause of a state statute unconstitutionally vague on its face in light of its potential—under the state courts' interpretation—to reach peaceful, orderly, and lawful opposition to government by red-flag flying); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 167 (1988) (counting Stromberg as the first successful First Amendment objection in the Supreme Court).

79 See Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713 (1931). But cf. id. at 716–20, 722–23 (indicating that even prior restraints may be permissible as to certain content and contexts, and that the holding was limited to the statute as it operated in this case and to charges of official misconduct).

became an issue before the decade was out, which generated the first First Amendment success for a Jehovah’s Witness engaged in peaceful proselytizing.\footnote{See Lovell v. City of Griffin, 303 U.S. 444, 451–53 (1938) (stressing the breadth of a city’s literature-distribution licensing scheme across all content, likening it to censorship by prior restraint, and concluding that the ordinance was “void on its face” such that the defendant did not have to seek a permit). The term “discretion” does not appear in \textit{Lovell}, although the concept has been attributed thereto. See City of Lakewood v. Plain Dealer Publ’g Co., 486 U.S. 750, 756 (1988). The idea was certainly in play shortly thereafter. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 304–05, 307–08 (1940); Schneider v. New Jersey, Town of Irvington, 308 U.S. 147, 164–65 (1939).} The objection to total medium bans appeared in 1939,\footnote{See \textit{Schenck} v. United States, 249 U.S. 47, 51 (1919). But cf. \textit{Swing}, 312 U.S. at 326 (prohibiting “mutila[tion]” of free communication by denying it to those picketing workers who have a dispute with an employer not their own); \textit{Carlson}, 310 U.S. at 112 (pointing out that not all sign carrying was regulated by the ordinance under challenge); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (opinion of Roberts, J.) (relying on an ordinance’s purpose and target of communication).} and what is now regarded as the genesis of First Amendment overbreadth doctrine took place in a labor-picketing case decided during the following Term.\footnote{250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting).} By the end of this period, then, the building blocks were in place for nearly every modern aspect of litigant-insensitive and government-limiting doctrine (with the exception of a general presumption against content-based regulation).\footnote{See \textit{id.} at 618–19 (rejecting summarily the First Amendment defense); see also \textit{Frohwerk} v. \textit{Burlington Northern Railroad Co.}, 504 U.S. 403, 411–12 (1992).}\\

Contrast the more litigant-sensitive approach. Insofar as \textit{Schenck}’s clear-and-present-danger formula was designed to immunize less dangerous dissidents, it seems to have failed. Justice Holmes promulgated the test in \textit{Schenck}, but for a Court that unanimously affirmed criminal convictions of individuals who tried to persuade those accepted for military service that the draft was wrong.\footnote{See \textit{Abrams v. United States}, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting).} Their method was force of thought, not threat of force; and their subject was government policy and citizen action. Holmes indicated that he could use the same formula and reach a different result on the facts of \textit{Abrams v. United States},\footnote{500 U.S. 274, 281 (1991) (Scalia, J., dissenting).} but the majority was unwilling to join the dissenters’ version of \textit{Schenck}.\footnote{308 U.S. 147, 164–65 (1939).} Six years later in \textit{Gitlow v. New York}, the Court did not impose a similar restriction on a state anti-communist law.\footnote{See \textit{id.} at 618–19 (rejecting summarily the First Amendment defense); see also \textit{Frohwerk} v. \textit{Burlington Northern Railroad Co.}, 504 U.S. 403, 411–12 (1992).}
the Court balked at any case-by-case second guessing of a state legislature’s condemnation of speech content.

Correlation between litigant insensitivity and claimant victory should not weigh heavily in anyone’s decision about doctrinal structure, however. First of all, the correlation is far from perfect. Not every successful First Amendment objection was founded solely on a negative assessment of government method, nor did every unsuccessful objection involve exclusive attention to claimant conduct. Any shortcoming of Holmes’s approach in Schenck, moreover, might have stemmed from its malleability rather than its litigant sensitivity. And it is of course plausible that no doctrinal strategy could have altered the outcome of any wartime case, and that successful objections were a result of shifting historical and political circumstance. But for those convinced that the Court underenforced First Amendment norms during this period, an understandable conclusion is that litigant sensitivity was an untrustworthy tool.

b. Modern scrutiny of government ends and means.—It is also true that the litigant-insensitive elements of early case law have contemporary life. Common and modern First Amendment rules of decision require little or no evaluation of claimant conduct. Instead they often call for judicial assessment of government ends, government means, and the connection between the two.

United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Gunther, supra note 76, at 720–21 (concluding that Holmes’s standard in Schenck was different from that of his Abrams dissent).

88 See Gitlow, 268 U.S. at 668–70.

89 See Bridges v. California, 314 U.S. 252, 270–71 (1941) (reversing contempt convictions under a clear-and-present-danger standard); Cantwell v. Connecticut, 310 U.S. 296, 308–11 (1940); Herndon v. Lowry, 301 U.S. 242, 259–61 (1937) (reversing an incitement-to-insurrection conviction where the evidence merely showed membership in the Communist Party and solicitation of membership thereof, although also referring to statutory vagueness); De Jonge v. Oregon, 299 U.S. 353, 356–57, 363–65 (1937) (holding a statute invalid as applied because simply assisting in the conduct of a Communist Party meeting cannot be criminalized); Fiske v. Kansas, 274 U.S. 380, 384–87 (1927) (reversing a conviction of a recruiter for the Industrial Workers of the World after refusing to infer from the organization’s constitutional preamble that it advocated unlawful methods of industrial or political change).

90 See, e.g., Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941) (permitting certain time, place, and manner regulations); Associated Press v. NLRB, 301 U.S. 103, 130–33 (1937) (permitting application of federal labor relations laws, “general laws” not targeted at the press; although also reasoning that the employee was not discharged for editorial bias and that the statute apparently would not inhibit discharge on that basis); Gitlow, 268 U.S. at 668–71; see also Whitney v. California, 274 U.S. 357, 371 (1927), overruled by Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam).

91 Cf. ELY, supra note 14, at 112 (connecting threat assessments with the “relative confidence or paranoia of the age”); Vincent Blasi, The Pathological Perspective and the First Amendment, 85 COLUM. L. REV. 449, 459 (1985) (arguing that doctrine will not likely prevent, but might blunt, the negative impact of a “pathological period”).

92 See, e.g., KALVEN, supra note 78, at 147 (“The Court’s performance is simply wretched.”); PAUL MURPHY, WORLD WAR I AND THE ORIGINS OF CIVIL LIBERTIES IN THE UNITED STATES 188–90 (1979); Stone, supra note 47, at 414 (“The Court as a whole evinced no interest in the rights of dissenters.”). But cf. Posner, supra note 14, at 131 (charging modern scholars with the hindsight fallacy).
Courts evaluate government ends in several different ways. One example is judicial review of asserted justifications—reasons for action identified by government lawyers for litigation purposes. These assertions must at least be constitutionally legitimate. They must be better than, say, unvarnished thought control or the suppression of unpopular opinion. And even legitimate justifications can heighten judicial concern. In addition, the actual motives for executive action are regularly tested against similar First Amendment norms. This inquiry is not confined to post hoc attorney assertions. It is a search for historical fact. Less common are judicial efforts to ascertain the actual, historical motive for legislative action. The difficulties of reconstructing the actual motive(s) of multimember legislatures have been well explored, and they might necessitate highly imperfect proxies if the assessment is to be done at all. But the difficulties have not altogether prevented the judiciary from approximating legislative motive.

94 See Stanley v. Georgia, 394 U.S. 557, 565–68 (1969) (explaining that a state may not “constitutionally premise legislation on the desirability of controlling a person's private thoughts,” though also relying on the context of home possession and privacy interests). This is not a trying task for a competent attorney; but it can be much more difficult to explain what the government actually did according to legitimate interests.
96 See, e.g., Taylor v. Keith, 338 F.3d 639, 643, 646–47 (6th Cir. 2003) (discussing evidence of the motivations for a public employer's decision to terminate an employee); Greene v. Barber, 310 F.3d 889, 895–98 (6th Cir. 2002) (holding that a police officer might be liable for arresting the plaintiff in retaliation for insults, depending on the officer's actual motivation); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (holding that affixing lechis to utility poles to demarcate an eruv was not “speech,” but the borough likely violated the free exercise clause by failing to enforce a facially neutral ban on similar uses of utility poles in other circumstances), cert. denied, 539 U.S. 942 (2003).
99 Locke v. Davey, 124 S. Ct. 1307 (2004), which upheld Washington State's decision to target and exclude “devotional theology” majors from a college scholarship program, see id. at 1309, nevertheless suggests the variety of sources that might be scoured for evidence of improper motive. The Court ultimately denied that the State was in any way acting out of anti-religion animus. See id. at 1313 & n.5, 1315 (distinguishing states' “antiestablishment interests” in not funding religious training of clergy).
As to government's means, the list of problematic regulatory forms builds on the early claimant victories discussed above. Some items might be best justified on principles that simply maximize constitutionally valued liberty. The total-medium-ban concept and the concern for regulation that suppresses "too much speech" is still alive.\textsuperscript{100} Substantial overbreadth is another challenge to regulatory method that can (though it need not only) liberate valued conduct without much concern for overt or covert government discrimination.\textsuperscript{101} It too can be discerned without assessing claimant conduct.\textsuperscript{102} As well, content-neutral regulation of time, place, and manner of speech in a public forum must be reasonably tailored to serve a significant government interest, and leave open ample alternative channels of communication.\textsuperscript{103} That sort of test can help reveal improper censorial motive by testing the plausibility of alternative explanations,\textsuperscript{104} but it also emphasizes a generic principle of regulatory precision and a healthy volume of communication.

Other problematic regulatory forms are tightly related to antidiscrimination missions. In many situations, regulations singling out disfavored viewpoints or religious beliefs are extraordinarily difficult for government

\textsuperscript{100} See City of Ladue v. Gilleo, 512 U.S. 43, 58–59 (1994) (invalidating an ordinance banning a variety of signs on residential property).


\textsuperscript{102} Except insofar as the claimant's conduct must have been "unprotected" or somehow worse than others affected by the regulation. See Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985); City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 801–05 (1984) (concluding that overbreadth was not available where the claimants seemed to have the strongest case for as-applied immunity from a content-neutral sign ordinance). But see City of Houston v. Hill, 482 U.S. 451, 458 n.6 (1987); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 487 n.2 (1989) (Blackmun, J., dissenting) (arguing that the Court has considered overbreadth before rejecting as-applied challenges).


\textsuperscript{104} See Republican Party of Minn. v. White, 536 U.S. 765, 779–80 (2002) (using the form of regulation to undercut the plausibility of asserted government goals); Kagan, supra note 97, at 454–56 (describing judicial tests for content-based and content-neutral regulation as evidentiary devices for identifying improper motive, but noting that the latter "also functions to ensure adequate expressive opportunities"); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1135–36 (1990) (advocating close examination of purported government purpose and fit with deployed means in order to identify religious prejudice).
The Supreme Court has also made general, sometimes belligerent, demands for content neutrality in government regulation; there is a similar concern about non-"neutral" or non-"general" laws burdening religious conduct. Government regulation violating those norms can prompt strict scrutiny: review for narrow tailoring and the least-restrictive means to serve a compelling government interest. Furthermore, prior restraints are disfavored under modern doctrine, at least when they aim to regulate certain messages. Vagueness is likewise a litigant-insensitive attack on government rules, while its cousin, standardless administrative discretion, encourages clear regulations that might prevent executive decisions on improper grounds. None of this necessitates an evaluation of claimant conduct. Litigant insensitivity is not limited to claimant favoritism. For example, certain contexts will prompt judicial deference to the state, such as public school management, prison administration, and conditions on public subsidies. For these contexts, operating the doctrine does not demand much assessment of claimant conduct.

State action can be even better insulated. Just as First Amendment law may prevent a claimant's wrongdoing from drawing attention away from the vices of government conduct, so too can it attempt to blind adjudicators to the hard-luck story of a virtuous litigant. Employment Division v. Smith exemplifies the litigant-insensitive and litigant-unfriendly combination. It largely eliminated exemptions for religiously motivated conduct from neutral laws of general applicability—those that do not single out such

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111 See, e.g., Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 (1988); Kunz v. New York, 340 U.S. 290, 293–95 (1951); accord id. at 285–86 (Frankfurter, J., concurring); see also id. at 298–99 (Jackson, J., dissenting) (arguing, to no avail, that the claimant uttered fighting words).
private conduct. Sometimes speech and press clause claims are treated similarly. An unintended burden on claimant speech might be ignored if the burden is occasioned by a regulation that neither expressly targets nor disproportionately burdens speech, and that was not violated by claimant speech in the instant case. As well, media operations are not sheltered from various business regulations that extend likewise to other private parties. No matter how hard the application of a regulation pinches a particular claimant, judicial scrutiny is averted in cases like these.

2. Concerns: Feasible But Flawed?—The foregoing catalog underscores how much can be done within a radically insensitive model in service of more than one goal, as well as the prevalence of these doctrinal tools within contemporary First Amendment law. The model is certainly not afflicted with the same flaws as radical sensitivity. Radical insensitivity can logically dictate either success or defeat for a First Amendment claim. It has no inherent difficulty distinguishing targeted from incidental burdens, or condemning government rules or reasons that single out viewpoints or religious sects. The model is built on such assessments.

The issue of meaningful remedies does not seem as problematic, either. True, radical insensitivity has no apparent method for restricting remedies to individual claimants or even a class of private conduct. Perhaps the model could generate such limited holdings without assessing claimant conduct; but even so, there would be no way to enforce (through the First Amendment, anyway) the resulting litigant-sensitive lines. Compensatory damages, moreover, are sometimes impossible to calculate without digging into the claimant’s situation. On the other hand, a claimant will often receive a meaningful remedy when a court declares invalid, enjoins, or otherwise disrupts government action because it is based on improper justifications, flawed rules, or a poor fit between them.

Instead one might worry about the unsettling force of litigant-insensitive holdings. Concluding that a regulation is too broad or indefensibly content-based on its face, for instance, provides a valid constitutional claim to anyone with standing to assert it. Nullifying government regulations might entail judicial power too extensive for some to accept.

But this concern probably does not foreclose the model. First of all,

114 See infra Part IV.C.1.a. (analyzing Smith).
115 See Arcara v. Cloud Books, Inc., 478 U.S. 697, 698–700, 703–07 & n.4 (1986) (rejecting an “adult” bookstore owners’ objection to the possible closure of their business at that location for one year because it was being used for sexual activity and solicitation of prostitution). Cohen v. Cowles Media Co., 501 U.S. 663, 669–71 (1991) (permitting promissory estoppel liability), seems to go further, because the conduct subjecting the defendant to liability was expression—breaking a promise by revealing the identity of a source in a news article. Cf. Arcara, 478 U.S. at 705 (“[T]he sexual activity carried on in this case manifests absolutely no element of protected expression.”). For further discussion, see infra note 248.
116 See Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575, 581 (1983) (listing, for example, labor and antitrust laws).
the objection only reaches certain versions of litigant insensitivity. The model might never declare a government rule utterly unenforceable; it could be confined to examination of government justifications in particular instances. In any event, even the most potent version of the model would not violate bedrock limits on the judicial power, at least in the federal courts. Article III requirements for justiciability are not modified by, and they easily can be honored within, a radically insensitive model.  

A particular claimant must and may identify a judicially cognizable injury (like a prison sentence or monetary loss) connected to constitutionally problematic government conduct (like prosecution under an impermissibly broad or content-based statute), and judicial repudiation of the government's rules or reasons will presumably provide redress (like freedom from incarceration or financial loss after the statute is declared void). 

If coherent and practically effective, is a radically insensitive model otherwise normatively attractive? This is a difficult question that calls for a detailed examination of litigant sensitivity in current law. A few broad-based objections can be sketched here, however.

Radical litigant insensitivity is a model of inter-branch confrontation. Private parties would invoke the judicial power and then turn the judiciary's critical eye toward legislative and administrative practices. Granted, there is nothing avant garde about inter-branch checking; the courts have so far issued more rhetoric about a genuinely narrow judicial power than substantive First Amendment doctrine to back it up; and some forms of litigant sensitivity can be quite disruptive (consider a robust set of immunities from incidental government burdens). Yet a doctrinal model that habitually fosters intergovernmental conflict without much concern for who started the fight could conflict with conventional understandings of the judicial role.

A second concern is both important and difficult to gauge: social costs and abridgment of individual liberty. Radical litigant insensitivity is probably unable to effectively moderate a regulation's scope in a way that unburdens political speech or peaceful and religiously motivated conduct. Nor

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117 "To satisfy the 'case' or 'controversy' requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." Bennett v. Spear, 520 U.S. 154, 162 (1997) (some internal quotation marks omitted). Asserting a "facial challenge" is no cure. See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230-35 (1990) (analyzing Article III standing separate from the merits of a "facial challenge"). And state courts may demand a similar showing. Cf. Hershkoff, supra note 11, at 1838 (emphasizing departures from federal judicial norms).


120 See Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) (stating, in a case refining yet preserving overbreadth doctrine, that Article III courts "are not roving commissions assigned to pass judgment on the validity of the Nation's laws"); Younger v. Harris, 401 U.S. 37, 52 (1971).
can it ignore objections to government conduct raised by those who have no interest in furthering First Amendment values, other than disruption of government practices. Such results might be defensible, but it is difficult to see them as pure goods.

A less important worry is epistemological. Identifying problematic government conduct can depend on the judiciary’s understanding of private conduct that is constitutionally valued. If disfavoring “speech” or “religiously” motivated conduct makes for constitutional trouble, it will be nice to know how those terms are defined. Particular claimants can provide raw material for constructing these categories. But this objection has only minor force. Examining a given claimant’s conduct is not necessary for category construction. Indeed, courts should be concerned that focusing on a particular claimant undermines judicial understanding. Individual claimants need not be representative of those affected by a government rule or practice.

A final note on the subject is less theoretical. A court asked to adjudicate a First Amendment issue will always know something about the claimant, even if the court does nothing but faithfully follow formal doctrine. Justiciability requirements, such as Article III standing, entail collection of information about claimant conduct. The more one doubts judges’ willingness or ability to compartmentalize their thinking, the more difficult it will be to believe that exposure to claimant conduct will not infect decisionmaking on the merits when a court is so inclined. But realists can recognize that formal law is sometimes relevant. The analysis here moves on the plausible assumption that law makes some difference in judicial deci-

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121 See Schauer, supra note 23, at 279, 282. One could take the position that no judicial definition of “speech” or “religion” is necessary; courts should simply look for government attempts to single out such conduct. Cf. Welsh v. United States, 398 U.S. 333, 346, 356–57 (1970) (Harlan, J., concurring in the result) (concluding in part that the establishment clause prohibited Congress from “drawing the line between” religious and nonreligious belief). A doctrine like that would be too soft on government, however. Courts would catch only classifications drawn with explicit reference to valued conduct categories, and perhaps official action taken with an express motive of suppressing such conduct. Not all ill-tempered officials are so daft as to explicitly draw the problematic lines; and others are sufficiently oblivious that they will actually single out “speech” or “religion” without being subjectively aware of it. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524, 531 (1993) (starting the analysis with the question whether Santaria and its adherents’ practice of animal sacrifice constituted “religion”); id. at 541 (opinion of Kennedy, J., joined by Stevens, J.) (noting opinions offered at a city council meeting asserting that the Bible does not permit the type of animal sacrifice at issue and that Santaria is a sin or foolishness). But see id. at 541–42 (opinion of Kennedy, J., joined by Stevens, J.) (noting opinions suggesting a municipal belief that Santaria was just not the right kind of religion). Properly certified federal class actions are an exception, depending on the class definition. See Fed. R. Civ. P. 23(a)(3) (requiring that claims of representative parties be typical of the class).

122 See supra notes 8 and 117. But cf. supra note 30 (noting true third-party standing situations). Even under Flast v. Cohen, 392 U.S. 83, 102 (1968), the court will know that the claimant is a taxpayer who objects to certain state action on establishment clause grounds. A jury might be better shielded from such facts about the claimant, however, if the judge is an effective evidentiary gatekeeper.
sions some of the time. Finally, even if doctrine is irrelevant to subsequent judicial decisions, it still says something about the values of its authors, and it can expose analytical options for the rest of us.

Radical litigant insensitivity could be unacceptable on principle, and it might be practically impossible to ensure that judges will ignore the claimants before them. But much contemporary law accords with the model, and it is workable in a way that radical sensitivity is not. A critical question is whether a purified model, one that seeks to eliminate judicial assessment of claimant conduct, is normatively defensible. Answering intelligently requires closer inspection of the remaining possibility—a mixed model.

IV. POCKETS AND PURPOSES OF LITIGANT SENSITIVITY

Today’s First Amendment law remains mixed. Although not dominant in current Supreme Court decision-making, litigant sensitivity is essential elsewhere. Five forms of litigant sensitivity and their functions are discussed below. The first two examples are strong forms: safeguards and filters are often outcome-determinative. The last three can be softer variables: triggers, limited holdings, and balance elements tend to leave room for additional analysis and compromise. Each depends on judicial assessment of claimant conduct.

A. Safeguards for Claimants Serving Constitutional Values

Courts are sometimes called on to prevent an unconstitutional result in a particular case in a way that demands litigant sensitivity. Two closely related versions of this safeguarding function are discussed here, one linked to judicially defined speech categories, the other to government interests. Safeguarding is thus a derivative function. It depends on a judicial commitment to maintaining categories of private conduct, and on the pertinence of live state interests in a given case. At the same time, safeguards make claimant conduct extremely important to case outcomes, and they are relatively easy to understand and defend.

1. Testing Claimant Conduct Against Unprotected Categories.—The judiciary permits content-based regulation of certain categories of speech. The cases defining these “unprotected” speech categories allow some state action on account of the message conveyed, while setting boundaries mandated through the First Amendment. So even when pitted against the

124 Accord Kent Greenawalt, “Clear and Present Danger” and Criminal Speech, in ETERNALLY VIGILANT, supra note 14, at 96–97 (“It would be naive to suppose that constitutional decision is only about doctrines, but the analysis of doctrines has continuing importance.”); see also ELY, supra note 14, at 112 (“[I]t's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing.”).

125 See supra text accompanying note 57.

126 Procedural safeguards might also be demanded, see, e.g., Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (holding that a private-figure plaintiff bears the burden of proving falsity and fault
most disfavored of plaintiffs (public officials or public figures), a defama-
tion defendant may suffer an adverse judgment if its statements are found to
be calculated lies.\textsuperscript{127} These speech categories do set a baseline for objec-
tions to poorly crafted government rules.\textsuperscript{128} But they also make possible
case-specific evaluations of claimant conduct against the boundaries of a
given category. Such safeguarding can dictate claimant victory \textit{even if} the
government's rule is properly formulated and adequately justified.

This type of litigant sensitivity was suggested no later than the founda-
tional declaration of the categorical approach itself. In \textit{Chaplinsky v. New
Hampshire},\textsuperscript{129} the Court ticked off speech categories that could be punished
and held that the statute at issue duplicated one of them.\textsuperscript{130} Then the Court
rejected an alternative First Amendment objection: "that the \textit{application of
the statute to the facts disclosed by the record} substantially or unreasonably
impinges upon the privilege of free speech."\textsuperscript{131} The Court's quick look did
not save Chaplinsky from a fighting-words conviction, but other claimants
have prevailed after a similar analysis.

Take \textit{Jenkins v. Georgia},\textsuperscript{132} which reversed an obscenity conviction for
exhibiting the film \textit{Carnal Knowledge}. On appeal, the Supreme Court did
not find flaws in the State's obscenity statute or in the jury instructions.\textsuperscript{133}
Instead, the Court concluded that the state courts had reached an erroneous
result on the obscenity question. And while the Court did not explicitly en-
dorse de novo appellate review in such cases, we do know that the majority
watched the movie, read the critics' reviews, and held that the film "could
not, as a matter of constitutional law, be found to depict sexual conduct in a
patently offensive way."\textsuperscript{134} Although I have not gone back to the primary
source material, the \textit{Carnal Knowledge} screening was probably a better ex-
perience for the Court than was reading \textit{Shame Agent} or \textit{Lust Pool} in pre-
paring to decide \textit{Redrup v. New York};\textsuperscript{135} and unlike the fractured \textit{Redrup
\textsuperscript{128} See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 247–50 (2002); Brandenburg v. Ohio, 395
\textsuperscript{129} 315 U.S. 568 (1942).
\textsuperscript{130} See id. at 571–74.
\textsuperscript{131} Id. at 574 (emphasis added); see id. ("Argument is unnecessary to demonstrate that the appella-
tions 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retalia-
tion, and thereby cause a breach of the peace.").
\textsuperscript{132} 418 U.S. 153 (1974).
\textsuperscript{133} See id. at 154, 156–58, 161.
\textsuperscript{134} Id. at 161; see id. at 158–59; accord Milkovich v. Lorain Journal Co., 497 U.S. 1, 16–17 (1990)
("[A]s a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when
spoken, and not libel when reported in the Greenbelt News Review." (quoting Greenbelt Coop. Publ'g
Ass'n v. Bresler, 398 U.S. 6, 13 (1970))).
\textsuperscript{135} 386 U.S. 767, 768 (1967) (per curiam).
Court, *Jenkins* could draw on an authoritative standard for obscenity provided by *Miller v. California*. But the Court engaged in the same safeguarding process in each instance.

The judiciary could probably eliminate these safeguards without sacrificing coherence. Courts could simply prescribe the boundaries of speech categories, and ensure only that the government’s *rule* complied with those boundaries. Factfinders would be trusted to the same extent as elsewhere. But the judiciary is not so passive. A court (maybe even a jury) can be “doing First Amendment law” when determining whether record evidence is consistent with a speech category. The obligation to perform this function plainly covers the appellate courts. As the Supreme Court put it in a related context, “[W]e must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.”

The Supreme Court might not be particularly interested in performing the safeguarding function itself, now that its docket is largely discretionary. But other courts have no choice.

The issues are whether this is a good idea and how far it already extends. For instance, First Amendment-based independent appellate review plainly reaches beyond criminal prosecutions to civil proceedings with private plaintiffs. On the other hand, the Supreme Court has distin-

guished credibility determinations,\textsuperscript{142} and the federal courts of appeals have been reluctant to second guess agency findings of deceptive advertising.\textsuperscript{143} Lower federal and state courts also are confused about whether the independent review idea is solely a claimant-protective safeguard or also a license to reverse claimant victories.\textsuperscript{144} Connick v. Myers\textsuperscript{145} actually confirms that, at least when deference to government management is due, independent review can work to a claimant’s disadvantage. But that case is an outlier. Independent review traditionally has been used as a safeguard for claimants.\textsuperscript{146}

Other types of safeguards are not so easily linked to erroneous applications of finely tuned government regulations. 

Hess v. Indiana,\textsuperscript{147} for one, reversed a disorderly conduct conviction. The record established that the claimant’s conviction was based on potentially provocative words directed at a crowd of antiwar demonstrators (“We’ll take the fucking street later” or “again”).\textsuperscript{148} The Court indicated that, because Indiana’s disorderly conduct statute had been used to punish spoken words, the conviction could not stand unless the claimant’s conduct was within an unprotected speech cate-

\textsuperscript{143} See Novartis Corp. v. FTC, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000); Kraft, Inc. v. FTC, 970 F.2d 311, 316–18 & n.3 (7th Cir. 1992) (relaying on FTC expertise and an individualized cease and desist order); see also Posner, supra note 14, at 143–44 (distinguishing expert opinion on certain questions from the truth of political ideas); Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, 56 U. CIN. L. REV. 1181, 1196 (1988); cf. Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 897–98 (D.C. Cir. 1984) (Bork, J.) (independently reviewing whether a political poster was, as a transit agency had concluded, deceptive). Insofar as they rely on antipathy to commercial speakers, these cases seem to contradict Peel v. Attorney Registration & Disciplinary Commission of Illinois, 496 U.S. 91, 108 (1990) (Stevens, J., plurality opinion), and Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 463–64 (1978).
\textsuperscript{144} See Volokh & McDonnell, supra note 139, at 2438 n.44.
\textsuperscript{146} 461 U.S. 138, 141–42, 150 n.10 (1983) (examining the character of public employee speech).
\textsuperscript{147} See, e.g., Dale, 530 U.S. at 648–49; Hurley, 515 U.S. at 567; Bose, 466 U.S. at 499, 503–11 & n.23; NAACP v. Claiborne Hardware, 458 U.S. at 915–16 & n.50; Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Pennekamp v. Florida, 328 U.S. 331, 335 (1946); Fiske v. Kansas, 274 U.S. 380, 385–86 (1927). An explanation for the cases decided between 1925 and 1988, however, is statutory and jurisdictional: First Amendment claimants often enjoyed a right to appeal to the Supreme Court, while the government had no such right. See generally CHEMERINSKY, supra note 30, § 10.3.2, at 655.
\textsuperscript{148} 414 U.S. 105 (1973) (per curiam).
\textsuperscript{149} See id. at 106–07.
Interpreting the record evidence, the majority answered in the negative. This assessment might seem like a mixed blessing for Hess. Without first confirming that the government had employed a constitutionally tolerable statute, the Court evaluated claimant conduct. But there is no suggestion that Hess would have automatically lost had he engaged in “unprotected” conduct. The Court was reinforcing the idea that penalties for speech falling outside of an unprotected category are at least presumptively invalid. Other arguments for reversal (vagueness and overbreadth) were set aside, not foreclosed. As such, Hess represents a strain of safeguarding.

2. Ensuring the Presence of Government Interests.—Another type of safeguard is not tethered to predefined conduct categories but to asserted government interests. A court sometimes accepts the theoretical validity of an interest in regulation, yet first assures itself that the interest is implicated by the claimant’s conduct. This is a claimant-friendly exercise that inhibits prophylactic government rules. While the analysis does not guarantee a government victory if the interest is present, a contrary conclusion can end the case.

A vintage example is Edwards v. South Carolina. Nearly two-hundred demonstrators were convicted of common-law breach of peace while on the grounds of the South Carolina State House, carrying signs such as “Down with segregation.” Hundreds of onlookers gathered, and law

149 See id. at 107 (quoting Gooding v. Wilson, 405 U.S. 518, 521-22 (1972)).
150 Id.; see also id. at 108-09 (concluding that the record could not support a finding of obscenity, fighting words, privacy invasion through public nuisance (i.e., expression forced on captive audiences), or advocacy of lawbreaking under Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)); accord Texas v. Johnson, 491 U.S. 397, 400 n.l, 409–10 (1989) (involving a conviction for flag desecration that qualified as symbolic and political expression); Cohen v. California, 403 U.S. 15, 16 & n.1, 18–22 (1971) (involving a breach of peace conviction for written words).
151 This is a critical qualifier, which probably requires a (partly) litigant-insensitive assessment—whether the government’s interest in, justification of, or purpose for the regulation or its application depends upon effective communication of a message to an audience. See infra Part IV.C.1.b. (analyzing United States v. O’Brien).
152 See Hess, 414 U.S. at 105–06.
153 See In re Primus, 436 U.S. 412, 434 n.27 (1978) (“Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court.”). If the government does prevail, then another “unprotected” conduct category might be created, and one might say that the government has strong interests in regulating the unprotected conduct categories already accepted by the judiciary. It should be apparent, therefore, that the two types of safeguards described in this section are closely related.

155 See id. at 229–31.
enforcement officials ordered the demonstrators to disperse. They responded with speech-making, anthem-singing, hand-clapping, and foot-stomping, and they were arrested. At the Supreme Court they argued, in part, that they were deprived of due process because there was no evidence that they had committed the crime of which they were convicted. The Court bypassed that argument, made “an independent examination of the whole record,” and held that the State had infringed the claimants’ rights of speech, assembly, and petition. The claimants “were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.” Without more evidence of threatened disorder, the convictions were reversed on First Amendment grounds.

To be sure, Edwards includes significant themes of litigant insensitivity. The Court flagged the breadth and vagueness of the state courts’ description of breach of peace under state law. Moreover, it would not be surprising if the demonstration was singled out by law enforcement officials, and the convictions obtained and affirmed, because of hostility to the civil rights message. Perhaps the Court’s opinion could be rewritten to stand solely on these grounds. But the opinion that did issue stands for more: First Amendment respect for “the peaceful expression of unpopular views,” which is to be protected absent a good and demonstrable reason to the contrary.

This kind of fact-sensitive objection has not vanished. Texas v. Johnson is an unappreciated and contemporary illustration. After concluding that Johnson’s flag burning constituted First Amendment “speech” entitling him to proceed with an as-applied objection to his conviction, the Court turned to the interests asserted by the State. The Court was not looking only for interests explaining the flag-desecration statute under which Johnson was convicted. The investigation was initially about the interest in Johnson’s conduct. If an asserted interest is “not implicated on these facts,” then the interest “drops out of the picture,” and the government must search for another or else surrender. Texas tried breach-of-peace preven-

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156 See id. at 233.
157 See id. at 234.
158 Id. at 237; see id. at 232–33, 236 (noting adequate police presence). It was probably not impossible to find a significant risk of violence or public disturbance on the part of the crowd that had gathered in response to the demonstration, see id. at 238–39, 241–44 (Clark, J., dissenting)—making the Court’s decision that much more powerful in its protection of unpopular messages. See id. at 237.
160 Edwards, 372 U.S. at 237.
162 See id. at 403–06 & n.3. The Court did not declare the statute at issue invalid in all of its applications. See id. at 403 n.3 (limiting the holding to cases involving political expression “like his”).
163 Id. at 404; see id. at 407; accord United States v. Popa, 187 F.3d 672, 677 (D.C. Cir. 1999).
tion. But as in Edwards, even if that interest could have overcome other objections, the Court did not see sufficient record evidence of an actual risk of disorder. The State was thereby compelled to rely on an interest in symbol preservation, which was at stake in Johnson’s case but was far more troubling to the Court’s majority.

The doctrine need not be structured this way. It might instead focus on the character of the regulation and supporting interests without permitting case-specific evaluation thereof. In fact, in contexts amenable to judicial deference, courts sometimes foreclose such litigant sensitivity. But First Amendment law does include interest-testing safeguards. Courts are often wary of government interests that arise from effective and peaceful communication, and they are usually opposed to prophylactic regulation when it is aimed at speech.

B. Filters for Claimants Not Serving Constitutional Values

Filters present another way in which claimant conduct can be determinative, but there is nothing claimant-friendly about them. A filter weeds out classes of claimants altogether, regardless of how difficult the government’s action is to defend. If claimant conduct is not somehow serving First Amendment values, the case is over and the claim is rejected.

In addition to the two examples discussed below, a sort of filtering may take place whenever a claimant promotes the value of her own conduct. For instance, surely a claimant’s conduct must involve “speech” if the requested remedy is a speech-based exemption from regulation (ignoring true third-party standing cases). Those challenges aim to protect the claimant’s own conduct without necessarily demolishing the regulation in question.

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164 For example, the claimant contended that this interest was “related to the suppression of free expression” because it depended upon an audience receiving the claimant’s message. Johnson, 491 U.S. at 408 n.4.
165 Id. at 410; see id. at 408 (rejecting any presumption that a seriously offended audience “is necessarily likely to disturb the peace”).
166 See id. at 410; accord Cohen v. California, 403 U.S. 15, 18-22 (1971). This exercise might have been designed to reveal the State’s “real” interest or purpose in the statute and/or conviction. Whatever the ultimate objective of Johnson’s safeguard, it was a litigant-sensitive assessment.
167 Compare Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 462-68 (1978) (permitting attorney discipline for in-person solicitation for pecuniary gain based on a likelihood, not case-specific evidence, of bad consequences), with In re Primus, 436 U.S. 412, 434 (1978) (rejecting Ohralik’s approach for an attorney seeking to achieve political and ideological goals) and Edenfield v. Fane, 507 U.S. 761, 774 (1993) (same for a prohibition on in-person solicitation of clients by CPAs, as applied to solicitation of business clients).
169 See Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (“To determine whether a group is protected by the First Amendment’s expressive associational right, we must determine whether the group engages in ‘expressive association.’”); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (Rehnquist, C.J., plurality opinion) (starting with the question whether “speech” was involved in an as-applied challenge); id. at 581 (Souter, J., concurring in the judgment); id. at 587 (White, J., dissenting);
same idea reaches demands for access to government-operated forums for communication.\footnote{Johnson, 491 U.S. at 403 (same); see also Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994) (discussing free exercise claims of prison inmates).} Insofar as the judiciary permits such claims,\footnote{Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985) ("[W]e must first decide whether solicitation in the context of the [Combined Federal Campaign (CFC), a charity drive,] is speech protected by the First Amendment, for, if it is not, we need go no further.") (emphasis added).} examination of the claimant’s conduct will take place before she prevails.

That said, existing First Amendment law seems largely unfiltered. If a government reason, rule, or practice is sufficiently problematic, the judiciary is often willing to ignore the quality of the claimant’s own conduct. Consider the list of “unprotected” speech categories. It is a resource as good as any for identifying conduct that should be filtered. And yet, in addition to the shrunken scope of these categories,\footnote{See supra notes 113–115 and accompanying text.} think about all of the doctrine that benefits claimants whether or not their conduct falls within one—the prohibition against substantial overbreadth,\footnote{Cf Jed Rubenfeld, The First Amendment’s Purpose, 53 STAN. L. REV. 767, 774 & n.13 (2001) (arguing that “[a]n individual arrested for engaging in prohibited conduct should not be required to show that his conduct was ‘expressive’ before he can raise First Amendment claims” against a rule).} the procedural edifice for certain content-based prior restraint schemes,\footnote{505 U.S. 377 (1992).} and so forth. “Unprotected” speech categories define conduct that may be regulated or suppressed if government goes about it in the right way.\footnote{See id. at 379–80 (citing ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).}

The majority’s logic in \textit{R.A.V. v. City of St. Paul}\footnote{See id. at 391.} stands out on this point. The claimant was charged under the City’s Bias-Motivated Crime Ordinance after he allegedly burned a cross on a neighbor’s lawn.\footnote{Id.; see also id. at 381, 391–94, 396 (relying in part on the city’s characterization of, justifica-} The trial court dismissed the charge, but was reversed on appeal. The \textit{R.A.V.} majority then accepted, or at least was willing to assume, that the Minnesota Supreme Court successfully narrowed the ordinance to reach only fighting words,\footnote{See, e.g., Ashcroft v. Free Speech Coalition, 535 U.S. 234, 248–49 (2002).} and the claimant apparently did not contend that the charged conduct was safely outside the constitutional definition thereof. So, even assuming that the claimant actually used fighting words, he still prevailed. As the Court read the ordinance and in light of how it was defended by the City, the law sliced out an improperly content-based subset of fighting words, making it viewpoint discriminatory “[i]n its practical operation.”\footnote{See, e.g., Freedman v. Maryland, 380 U.S. 51, 58–60 (1965).} A filter was nowhere to be found.
I. Public Employee Speech and Private Concern.—One exception to the unfiltered First Amendment can be located in government employee speech cases.\textsuperscript{180} This is territory that the Supreme Court has largely vacated in recent years, probably satisfied that it has promulgated an adequate framework for resolving most cases.\textsuperscript{181} Regardless of how well those rules were written, the lower federal courts are repeatedly called on to apply them. First Amendment claims arising from adverse employment action against government employees have been adjudicated hundreds of times, and there is no indication that these disputes will vanish anytime soon.\textsuperscript{182}

\textsuperscript{180} Note that these cases often do not involve government "rules" that can be scrutinized, or at least the courts are not demanding them (as a matter of First Amendment law) before adverse employment action may be taken. \textit{Cf.} Lawrence Rosenthal, \textit{Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee}, 25 HASTINGS CONST. L.Q. 529, 557 (1998) (arguing for overbreadth protection for public employees and decrying ad hoc terminations). The Court has suggested in dicta that a defendant is better off if the employee violated an announced office policy. \textit{See} Connick v. Myers, 461 U.S. 138, 154 & n.14 (1983); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977). But that did not prevent a plaintiff victory in \textit{United States v. National Treasury Employees Union}, 513 U.S. 454, 468 (1995) (hereinafter \textit{NTEU}).

\textsuperscript{181} In the last decade, the Court extended the doctrine, without drastic modification, to independent contractors. \textit{See} Bd. of County Comm’rs, Wabaunsee County v. Umbhr, 518 U.S. 668, 673 (1996); \textit{see also} O’Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 726 (1996) (addressing associational rights and independent contractors); Rutan v. Republican Party of Ill., 497 U.S. 62, 65, 79 (1990) (extending such protection beyond discharge); \textit{cf.} \textit{NTEU}, 513 U.S. at 468 (entertaining a class challenge to honoraria restrictions imposed by government rule).

\textsuperscript{182} \textit{See} Douglas O. Linder, \textit{Trends in Constitution-Based Litigation in the Federal Courts}, 63 UMKC L. REV. 41, 46, 54 & n.94 (1994) (estimating that, in 1992, public employment cases made up 25% of all speech clause decisions in the federal district courts). Recent figures are hard to come by. A quick look suggests that government employee cases are still a substantial segment of First Amendment litigation in the lower federal courts, even if the same is not so in the Supreme Court.

Expression that gets public employees into trouble with their superiors can be (1) quite valuable to public discourse about government operations and/or (2) quite disruptive of those same operations. The Court has, accordingly, both validated and qualified employee speech rights. A public employee's challenge to adverse employment action alleged to be in retaliation for employee expression cannot prevail unless that expression was of a certain quality. Her speech must be on a matter of "public concern." If the speech has that character (there is no black-letter formula to tell if it does), then the employee's interest in expressing it is weighed against or somehow compared with any government interest in efficient and effective operations. Thus in Connick v. Myers, the Court sifted through an assistant district attorney's in-house questionnaire and the attendant context.

See, e.g., Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); see also id. at 571-75.

But cf. id. at 147 (adding an oblique reference to "the most unusual circumstances"). For insightful criticism of such a "rigid threshold barrier" as a matter of doctrinal structure, see Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 GEO. WASH. L. REV. 1, 40 (1990).

Connick demanded examination of "the content, form, and context of a given statement, as revealed by the whole record," 461 U.S. at 147-48, but this is an expansive description of sources, not a meaningful standard. For helpful commentary, see Estlund, supra note 184, at 30-39, 44-46 (charging the options for defining "matters of public concern" with contradicting core First Amendment principle, underinclusiveness, meaningless breadth, vagueness, and/or subjectivity), and Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667-79, 683-84 (1990) (elucidating factors in precedent and acknowledging that "the boundaries of public discourse cannot be fixed in a neutral fashion," id. at 683). For a sign that "public concern" is either a misnomer or means little to some courts, see Roe v. City of San Diego, 356 F.3d 1108, 1109-10 (9th Cir. 2004) (holding that a police officer's non-work-related, off-duty production and sale of sexually explicit videos satisfied the public-concern test).

See Rankin v. McPherson, 483 U.S. 378, 384 & n.7 (1987) (referring to "balancing" but denoting public concern as the "threshold question"); Connick, 461 U.S. at 142, 147.

Considering her apparent purposes and strained relations with superiors, the majority found that only one question evaded the public-concern filter.\(^8\)

The doctrine certainly is not pointed at employee conduct alone. It is designed for disputes arising from a type of public/private relationship (employer/employee) and a type of government conduct with respect thereto (adverse employment action). When an employee satisfies the public concern test, government interests are often critical to resolving the claim.\(^9\) Nevertheless, once the context of a case suggests resolution through employee-speech doctrine, its filter makes claimant speech an essential consideration.

This filter’s litigant-sensitive character was undermined, however, by *Waters v. Churchill.*\(^9\) There the Court established a new method for ascertaining the speech to be judged for public concern. The plurality concluded that the public employer’s *reasonable belief* about that fact controls, at least if the employer investigated and believed a report about non-public concern speech (or public concern speech outweighed by government interests), and then acted on that basis.\(^9\) The Court fractured in *Waters,* but there were seven votes for the notion that the employer’s belief matters.\(^9\) Such attention to government conclusions is a step away from litigant sensitivity, even if it still hinders claimants. It suggests a doctrine attuned to reasonable government decisions, not claimant conduct per se.

Does that mean that the filtering structure is gone? Not quite. First of all, lower federal courts have not followed the *Waters* rule when it might benefit the plaintiff. Several circuits bar claims by employees who assert that they were *silent* yet *mistakenly* retaliated against by management for speech that they never uttered.\(^9\) This result will seem bizarre to anyone

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\(^{188}\) See id. at 148–49 & n.8; see also id. at 155–56 (reproducing the content of the questionnaire).

\(^{189}\) Another important and regularly litigated element is whether adverse employment action was taken *because* of speech on a matter of public concern. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). That question is not so litigant sensitive.

\(^{190}\) *511 U.S. 661 (1994).*

\(^{191}\) See *id.* at 677, 679–82 (O’Connor, J., plurality opinion). There is some vagueness in the language used by the plurality, see, e.g., *id.* at 677–80, but the basic idea is clear enough for present purposes. *Cf. Connick,* 461 U.S. at 154 (referring to the district attorney’s “reasonable[,] belief” about the threat of office disruption); *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 274–76 (1988).

\(^{192}\) See *Waters,* *511 U.S.* at 682–83, 685 (Souter, J., concurring) (stating that government employers avoid liability only when they reasonably investigate a third-party report and actually believe that report (of unprotected speech)). Justices Scalia, Kennedy, and Thomas disagreed with any requirement that government employers conduct a reasonable investigation before firing someone, but their position was no more litigant sensitive. *Id.* at 686–88, 693–94 (Scalia, J., concurring in the judgment). They preferred to fashion employee speech claims like intentional torts, with the employer’s given reason for adverse employment action testable for pretext. *Id.* at 688–90. Justice Blackmun and Justice Stevens dissented. *Id.* at 694–95 (Stevens, J., dissenting).

\(^{193}\) See *Wasson v. Sonoma County Junior Coll.,* 203 F.3d 659, 662–63 (9th Cir. 2000), *cert. denied,* 531 U.S. 927 (2000); *Jones v. Collins,* 132 F.3d 1048, 1054 (5th Cir. 1998); *Fogarty v. Boles,* 121 F.3d 886, 887, 890 (3d Cir. 1997) (pre-*Hicks*); *id.* at 890 ("[A] free speech claim depends on speech, and
trained to concentrate on government faults. It has the effect of immunizing demonstrably dangerous government officials, and it trades on logic that cannot survive beyond specialized situations. A First Amendment objection to a thought-crime prosecution could hardly be defeated because the defendant protested, in the alternative, that he actually loved Big Brother all along. But lower court cases, demanding that public employee plaintiffs actually participate in discussions of public concern, accord with a litigant-sensitive filter and the gist of Connick, whatever the tension with Waters.194

Moreover, even if Waters applies, an employer's unreasonable conclusion about what was said will not govern. In that event, the historical fact of what was said is presumably an issue for a judicial factfinder, and it might defeat the employee's claim. Finally, Waters effectively defers to reasonable administrative factfinding rather than eliminate the relevance of the fact itself. As the plurality put it, "[t]he dispute is over how the factual basis for applying the test—what the speech was, in what tone it was delivered, what the listener's reactions were—is to be determined."195

2. Commercial Speech and Deception.—A filter might be part of commercial speech doctrine as well,196 despite obvious differences from the public employment cases. The Supreme Court has been more active in the commercial speech field and more receptive to such claims.197 Another dif-

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194 If the background principle is that employee suits are too costly so plaintiffs should lose more often, see Waters, 511 U.S. at 675–77 (O'Connor, J., plurality opinion) (showing concern for managerial efficiency and effectiveness), then Waters can be squared with these lower court decisions. Their analytical character is nevertheless distinct.

195 Id. at 668 (citation omitted).

196 The “commercial speech” doctrine is itself triggered by claimant conduct, but filters differ from triggers. See infra Part IV.C.2. For useful commentary on the doctrine as a whole, see, for example, Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. REV. 1 (2000), and Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1996 SUP. CT. REV. 123, 123 (noting the revival of commercial speech as a protective doctrine).

ference is that typically these cases assess government rules. And although the Court has proclaimed greater leeway for government regulation in both fields, the reasons for judicial restraint are different. Put roughly, employee speech claims can undermine effective management of public institutions, while commercial speech claims can do the same for private markets. The former concern is validated by recognition of strong government interests in managing its institutions to achieve designated purposes; the latter by intermittent declarations of lower value for commercial messages, their supposed objectivity and hardiness, as well as state interests in clean commerce and fair bargaining.

Regardless, a challenge to regulation inhibiting commercial speech might be barred unless the claimant’s own speech is truthful, not misleading, and free from any proposal to engage in an illegal transaction. According to the restatement in Central Hudson, “At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.” Like government employee speech cases, less litigant-sensitive parts of the Central Hudson test can be considered if and after the filter is surmounted. Courts might be obligated to ask up front whether the claimant is serving the social interest in accurate advertising of lawful transactions.

198 See supra note 197 (collecting recent cases and claimant victories). But see, e.g., Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 143–45 (1994).


202 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 566 (1980) (emphasis added) (reviewing an agency’s ban on electric utilities engaged in advertising intended to stimulate purchase of utility services, where the truthfulness of the claimant’s speech was not an issue).

203 See id. at 566 (listing substantial government interest, direct advancement by the regulation, and whether the regulation is not more extensive than necessary to serve the interest). The last demand has been moderated to require a reasonable fit. See Fox, 492 U.S. at 480. Note that the standard for compelled disclosure of additional information by a commercial advertiser to avert consumer misunderstanding is probably different and less demanding of government. See Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 650–53 (1985).

204 See Central Hudson, 447 U.S. at 563 (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”); First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) (“A commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’”).

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Some other opinions might be interpreted to defeat claims of deceptive advertisers only if the relevant regulation is somehow aimed at misleading statements or illegal transactions. But sources beyond the plain text of Central Hudson support filtering. First is the language used by the Court when performing Central Hudson's threshold inquiry. It seems directed at the claimant's conduct, and not necessarily the conduct covered by the pertinent regulation. Some attorney advertising decisions also indicate that filtering is in play. Bates v. State Bar of Arizona confirmed that attorney advertising is entitled to some First Amendment respect. After concluding that the State's flat ban could not be justified, however, the Court turned to the claimants' speech and asked whether it was "outside the scope of basic First Amendment protection" because it was misleading. Similar analysis took place in Justice Brennan's opinion in Shapero v. Kentucky Bar Ass'n, which involved targeted direct mail solicitation. It might be difficult to explain the Court's reasoning sequence (condemning a regulation before testing claimant conduct). And in both cases the claimants survived any filter. Still, an assessment of claimant conduct was important enough to include. Finally, a filter is consistent with the Court's suggestions that overbreadth and prior restraint attacks are incompatible with

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205 See, e.g., In re R.M.J., 455 U.S. 191, 203 (1982) (referring to "appropriate restrictions"); Va. State Bd., 425 U.S. at 771-72 (discussing states "dealing effectively with" false, deceptive, or misleading commercial speech); cf. Post, supra note 196, at 21 (noting that it is unclear whether misleading ads qualify as regulable speech, or whether they are not even "commercial speech").


208 Id. at 381; see id. at 381-82.


210 See id. at 468, 476-78 (criticizing the flat ban); id. at 478-80 (Brennan, J., plurality opinion) (assessing claimant conduct); cf. id. at 480 (White, J., concurring in part and dissenting in part) (stating that analysis of the claimant's conduct "should be left to the state courts in the first instance").


212 Some state and lower federal court decisions suggest filtering as well. See CFTC v. Vartuli, 228 F.3d 94, 108 (2d Cir. 2000); Joe Conte Toyota, Inc. v. La. Motor Vehicle Comm'n, 24 F.3d 735, 757-58 (5th Cir. 1994) (addressing a regulation barring the term "invoice" from any advertisement for motor vehicle sales, but also scrutinizing the misleading character of the claimant's own advertisement); State v. Robinson, 468 S.E.2d 290, 291 (S.C. 1996) (involving penalties for unauthorized practice of law imposed in part for the claimant's advertising as a paralegal when not subject to supervision by any attorney); see also Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 507 (5th Cir. 2001) (concluding that an Internet advertisement, "while of truthful facts, is part of an integrated course of conduct which violates Texas law—retailing motor vehicles without a license").

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commercial speech doctrine. Those are litigant-insensitive weapons that turn judicial attention away from claimant conduct, a course that filters are dead-set against.

There is also a plausible, value-driven argument for filters here. Perhaps misleading commercial advertising is so disfavored as to demand expenditure of judicial resources necessary to identify it, at the threshold and regardless of flaws in the regulation applied—indeed, regardless of whether the regulation is in any way related to deception. Courts might be willing to assume, in effect, an independent regulatory role in purifying public communication.

It is rough justice, though. Deceptive advertisers would not be able to assert First Amendment defenses against statutes not directed at false advertising, and so they might be hit with sanctions not tailored to prevent and redress such misconduct. And this extreme litigant sensitivity is discordant with contemporary Supreme Court trends. It is impossible to miss the Court's recent attention to regulatory form and purpose in commercial speech cases, and the government's now-habitual losses when public ignorance is the method of public policy. Finally, a filter might only delay


214 In accord with Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977), Justice Brennan connected the absence of overbreadth attacks with litigant-sensitive filtering in the plurality portion of his Shapero opinion: "Since . . . the First Amendment overbreadth doctrine does not apply to professional advertising, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection." 486 U.S. at 478 (citation omitted).


216 Compare Lorillard v. Reilly, 533 U.S. 525, 562 (2001) ("The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved."); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 190 (1999) ("The operation of [the statute] . . . is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."); and Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 117 n.1 (1990) (Marshall, J., concurring in the judgment) ("The burden is on the State to enact a constitutional regulation, not on petitioner to guess in advance what he would have to do to comply with such a regulation."), with id. at 119 (White, J., dissenting) ("[I]t is petitioner who should have to clean up his advertisement so as to eliminate its potential to mislead."). See Sullivan, supra note 196, at 127–28.

217 See Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) (claiming that the Court had already denied any government interest "in preventing the dissemination of truthful commercial informa-
the day of reckoning for a flawed regulation. If the government's rule cannot survive Central Hudson (or whatever standard is in fashion), a suitable claimant will probably be found at some point. Moreover, assuming availability of declaratory and/or injunctive relief in advance of enforcement, few claimants will have any interest in describing their planned speech as misleading.

Given its uncertain existence and debatable value, we cannot be sure that a filter will ever become entrenched in commercial speech doctrine. Ultimately, the negative impact of questionable regulation might overcome doubts about the First Amendment worth of particular commercial advertisements. In fact, this move was recently on the agenda in Nike, Inc. v. Kasky, before the petition for certiorari was dismissed as improvidently granted. Nike had argued that, even if its speech was commercial and misleading, the suit against it could not be maintained considering the character of the consumer-protection statutes on which the plaintiff relied. That round of appeals came to an acutely unsatisfying end and the case settled. But the filtering question in commercial speech cases is bound to arise again.

C. Triggers for Standards of Scrutiny

Some First Amendment doctrine uses claimant conduct to trigger a particular standard of scrutiny or rule of decision. Like safeguards and filters, triggers are attuned to where government burdens actually fall in a particular case. A primary difference is that triggers lead to standardized constitutional tests that must be administered to complete the First Amendment in order to prevent members of the public from making bad decisions with the information"); accord Va. State Bd., 425 U.S. at 770. Contrast the dead letters in Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986), along with the logic of Central Hudson itself: at those points, the Court was far from suggesting that there was something inherently improper in dampening demand by advertising restrictions. See generally Sullivan, supra note 196, at 138-41.

218 See Nike, Inc. v. Kasky, 539 U.S. 654, 656 (2003) (per curiam). The Court's per curiam does not explain why the case was dismissed. Justice Stevens wrote a concurring opinion that was joined by Justice Ginsburg and in part by Justice Souter. He contended that the Court lacked jurisdiction at this prejudgment stage, that Nike somehow lacked standing, and that important and difficult constitutional questions should be deferred at this time. Id. at 656-65. Justice Breyer issued an extended dissent from the dismissal, which was joined by Justice O'Connor. Id. at 665. Justice Kennedy also noted his dissent, but without giving his reasons. Id.


221 I am not the first to use the term "trigger." E.g., Dorf, supra note 59, at 1242; Stone, supra note 67, at 63.
ment analysis. Filters can tell us when claimants lose but, standing alone, are mute on how they can prevail; safeguards are often employed at the other end of the spectrum, to monitor the operation of conduct categories that were designed to conclusively resolve discrete disputes. Triggers fall between the two. A claim can be denied because the claimant’s conduct is insufficiently valued, but triggers provide a second step to the analysis. That second step does not assure claimant success, nor will it necessarily pay any attention to claimant conduct. The basic idea of a trigger is that the doctrine is initially driven by what government hits, not necessarily what it targets.\textsuperscript{222}

Because of the attention to effects on private conduct, triggers can be useful to a claimant hindered by a regulation that does not seem so bad on its face.\textsuperscript{223} By the same token, however, triggers can work against the interests of claimants. Although examples are more difficult to come by, there do appear to be spaces in the doctrine where less-valued conduct triggers a test that is easier for the government to satisfy.

1. Incidental Burdens and Constitutionally Valued Conduct.—The first type of trigger is probably best known for its demise within free exercise jurisprudence and its weakness in speech clause cases. In those fields, the character of government conduct often overwhelms the analysis. But the idea has survived, with bite, in associational rights cases.

a. Free exercise and the transition from Sherbert to Smith.—An exemplar for claimant-protective triggers appears in \textit{Sherbert v. Verner}.\textsuperscript{224} The claimant had been denied unemployment compensation based on her refusal to accept any job requiring work on her Saturday Sabbath.\textsuperscript{225} This claim was a bit difficult to ground in sect-based discrimination or anti-religious hostility: atheist, agnostic, and non-Sabbatarian applicants could also run afoul of the conditions that they must both be able to work and available for work, and that they not refuse “suitable” work “without good cause.”\textsuperscript{226} And yet the Court could perceive a substantial burden on the

\textsuperscript{222} See generally Schauer, supra note 59, at 428–31 (discussing rights as shields—“a right not to have the ability to be infringed without the provision of a justification of special strength”—rather than trumps); accord Dorf, supra note 59, at 1196.

\textsuperscript{223} See generally Dorf, supra note 59, at 1182–98 (marshaling arguments for the recognition of incidental, not just “direct,” burdens on certain constitutional rights as an important concern); Alexander, supra note 67, at 931–48 (raising objections to “track two” scrutiny).

\textsuperscript{224} 374 U.S. 398 (1963).

\textsuperscript{225} See id. at 399–401.

\textsuperscript{226} Id. at 400–01 & nn.3–4 (quoting S.C. CODE §§ 68-113(3), 68-114(3)(a)(ii), 68-114(b), and discussing eligibility and disqualification provisions); id. at 416 & n.3 (Stewart, J., concurring in the result) (pointing out that inability to get a babysitter was a ground for denying benefits under state law); id. at 419–20 (Harlan, J., dissenting). The reasoning in \textit{Sherbert} can be supplemented by suggesting sect-based favoritism in the South Carolina Code. Benefits-seekers who were “conscientiously opposed” to \textit{Sunday} work were better off, commentators have argued, because the State apparently had a Sunday work requirements.
claimant worthy of constitutional redress: the inability to both observe her Sabbath and receive unemployment benefits until non-Saturday work became available. The Court demanded a "compelling state interest" to justify the "substantial infringement" of the claimant's right to free exercise, and indicated that the State would have to prove the futility of non-infringing alternatives.227

To similar effect is Wisconsin v. Yoder,228 which involved Amish parents' refusal to send their children to either public or private schools after eighth grade. The State's compulsory school-attendance statute did include exemptions for disabled children and "good cause" findings by local school boards, but all seemed to agree that the Amish children were not exempt under these provisions.229 The Court did not rely on the disparate treatment: "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."230 As in Sherbert, the burden of the government's regulation on constitutionally valued claimant conduct—the liberty to follow religious faith without formal penalty or loss of benefits—triggered a judicial demand for a persuasive government justification.231

Free exercise doctrine no longer looks like this, even though Sherbert and Yoder have not been overruled. The subsequent history of free exercise exemptions from generally applicable government rules is well-known and can be quickly restated. Unemployment compensation applicants continued closing law that applied to textile mills (making such work ordinarily unavailable and therefore no reason to deny benefits). See Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1279 (1994). And the Court itself pointed out that when the mills were authorized to operate on Sundays during a "national emergency," conscientious objectors could not be required to work on that day. See Sherbert, 374 U.S. at 406 (quoting S.C. CODE § 64-4).

Still, it seems that the claim recognized in Sherbert was not for perfect equalization of treatment with Sunday worshipers: the State "may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions . . . ." Id. at 410; see also id. at 423 n.4 (Harlan, J., dissenting) (noting that the claimant's equal protection argument was premised on Sunday work provisions, and the Court's decision not to reach that question). That ruling reaches both Saturday and Sunday worshippers, and regardless of closing laws, a national emergency, or the claimant's desire to work in a textile mill. Cf. id. at 409 (denying an establishment clause problem, because benefits were being "extended in common with Sunday worshippers").

227 Sherbert, 374 U.S. at 406; see id. at 403, 406–09 & n.7.
228 406 U.S. 205 (1972).
229 See id. at 207 & n.2 (quoting WIS. STAT. § 118.15(3) (1969)).
230 Id. at 220.
231 See id. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); id. at 214; id. at 238 (White, J., concurring) ("Cases such as this one inevitably call for a delicate balancing of important but conflicting interests."); see also United States v. Lee, 455 U.S. 252, 257–58 (1982). There are, however, points in the opinion at which the Court relies on an additional constitutional interest in parenthood and child-rearing. See Yoder, 406 U.S. at 229, 232–34. This element of Yoder is still litigant sensitive, but extends beyond the First Amendment.
to score victories in the Supreme Court, but no one else did. Some Justices expressed doubts about the validity and administerability of such claims, and the "compelling interest" demand was confined and moderated. Finally, the triggering approach was largely abandoned in Employment Division v. Smith—a landmark shift toward litigant insensitivity.

Like Sherbert, the claimants in Smith had been denied unemployment compensation, although the State’s reasons were different. These claimants had been fired from their jobs at a drug rehabilitation organization because they ingested peyote as a sacrament of the Native American Church, conduct which violated state criminal laws against possession of controlled substances. Oregon denied benefits when it concluded that the claimants had been discharged for work-related "misconduct." These details probably played some role in the Court’s decision, but the resulting opinion can be read for much more. At its broadest point, Smith endorses the proposition 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).’"

There are fair yet far narrower readings of the case, and some courts are reluctant to stretch Smith. There is no denying, however, that it


233 See Goldman v. Weinberger, 475 U.S. 503, 510-13 (1986) (Stevens, J., joined by White and Powell, JJ., concurring); Lee, 455 U.S. at 262-63 (Stevens, J., concurring in the judgment); see also Sherbert, 374 U.S. at 414-17 (Stewart, J., concurring in the result) (asserting that a successful free exercise claim contradicted the Court’s (erroneous) interpretation of the establishment clause).


236 See Smith, 494 U.S. at 874-76. The pertinent criminal statutes did include an exception for prescriptions, see id. at 874 (discussing ORE. REV. STAT. § 475.992(4) (1987) and associated regulations), but otherwise seem to have applied generally to possession by private citizens.

237 See Laycock, supra note 235, at 41-54; Douglas Laycock, The Supreme Court and Religious Liberty, 40 CATH. L. REV. 25, 26 (2000) ("[L]awyers for religious claimants should not despair prematurely."). For example, the Court distinguished cases where (1) free exercise objections are combined with an additional constitutionally grounded interest, like speech or child-rearing—a.k.a., hybrid rights situations. See Smith, 494 U.S. at 881-82 (attempting to distinguish cases like Yoder). But see Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003) (refusing to follow Smith’s hybrid-rights suggestion). The Smith rule likewise might not apply if (2) the relevant regulatory scheme includes a system of
marked an important change in course, one leading away from a litigant-sensitive trigger and toward judicial policing for improper government rules and reasons.260

b. The speech clause and the O'Brien test.—If litigant-sensitive triggers are dead in most of the free exercise field, can the same be said for speech doctrine? A speech clause analog to Smith is United States v. O'Brien,241 which permitted a criminal conviction under a statute prohibiting “knowingly destroy[ing], knowingly mutilat[ing], or in any manner chang[ing] any” Selective Service registration certificate.242 The claimant contended that the statute could not be applied to punish his violation, because he had burned his certificate during a public protest against the war and the draft.243

The situation mimics Smith in two important respects. Although the statute in O'Brien happened to hit allegedly expressive conduct, it was not facially targeted at speech. Constitutionally valued conduct was not an element of the crime. A person could violate the statute by secretly destroying someone else's certificate for non-expressive purposes—just as an Oregonian could have possessed peyote as part of a profitable drug-dealing individualized exemptions for hardship, but the system does not extend to religiously motivated conduct—which looks to be a litigant-insensitive assessment of government rules. See Smith, 494 U.S. at 884 (attempting to distinguish cases like Sherbert). And there are passages in the opinion which support (3) confining the holding to cases in which government criminally prohibits the conduct in question, rather than encouraging or compelling claimant action. See id. at 884–85; see also id. at 875–76, 890.

239 See, e.g., Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698 (7th Cir. 2003) (holding that a Hispanic Community Manager's Title VII claims alleging gender and national-origin discrimination were barred because she served a ministerial function for her Church employer); Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002) (holding that a church was properly granted a preliminary injunction to prevent the City from dispersing homeless people sleeping on church grounds, in the absence of an easily identifiable and neutral regulation); Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002) (holding that prison officials violated the free exercise clause by refusing to provide free kosher meals to Orthodox Jewish prisoners).

Prison-context cases like Beerheide use the standard in Turner v. Safley, 482 U.S. 78, 89 (1987), as followed in the pre-Smith case of Shabazz, 482 U.S. at 349. That standard is deferential to prison administrators yet better for claimants than a broad reading of Smith. This leads to the curious possibility that ritual drug users have a better shot at constitutional immunity from penalties after they are incarcerated for drug possession.

240 See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523–24, 542, 545–47 (1993) (striking down a set of ordinances as neither neutral nor generally applicable); Tenafly Eruv Ass’n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (relying on lack of executive enforcement against other but similar conduct), cert. denied, 539 U.S. 942 (2003). The recent free-exercise decision in Locke v. Davey, 124 S. Ct. 1307 (2004), alludes to light burdens on private parties, but it hardly indicates retreat from the Smith regime. There the Court permitted the state to single out and exclude devotional theology majors from a scholarship program. Id. at 1309.


242 See id. at 370 (quoting 50 U.S.C. APP. § 462(b), as amended by 79 Stat. 586 (adding the language regarding destruction and mutilation)).

243 See id. at 369–70. The claimant also alleged invalid legislative purpose, see id. at 382–83, but the litigant-sensitive objection is more important for present purposes.
operation and with no interest in conducting or facilitating religious practices. In this sense, both statutes were "generally applicable."\textsuperscript{244}

Second, in \textit{O'Brien} the government could justify the statute and its application to conduct during a political protest while remaining indifferent to any communicative impact. \textit{All} cases of certificate destruction implicated the interests in maintaining individualized proof of registration and facilitating communication between cardholders and draft boards\textsuperscript{245}—just as Oregon could contend that peyote possession poses a health threat regardless of any spiritual benefit for a particular claimant. These interests are somewhat less important than preventing the fall of Western civilization; they might not have actually mattered to many federal legislators who voted on the provision under which \textit{O'Brien} was convicted; and perhaps nearly all draft-card destruction during 1966 was done in the context of public anti-war protests. But those observations do not change the speech-neutral character of the asserted interests. They only minimize the strength of those interests.

Despite these parallels, and the fact that each case denied a First Amendment claim, they evince distinct analytical structures. \textit{Smith} is myopically concerned with the character of the government rule, and the analysis usually ends there. \textit{O'Brien} began with the character of the affected claimant conduct—more like \textit{Sherbert} than \textit{Smith}. The Court had to at least assume that \textit{O'Brien}'s conduct was sufficiently communicative "to bring into play the First Amendment,"\textsuperscript{246} otherwise the as-applied challenge was hopeless. The Court's favorable assumption hardly established immunity from regulation, but the character of that regulation did not assure a government victory, either. Such an "incidental" burden falling on "speech" is permissible if the regulation "furthers" an "important or substantial" government interest that is "unrelated to the suppression of free expression," and if the restriction on speech is "no greater than is essential to the furtherance of that interest."\textsuperscript{247}

\begin{footnotes}
\item[244] Accord McConnell, supra note 104, at 1138 (connecting \textit{O'Brien} with pre-\textit{Smith} case law).
\item[245] See \textit{O'Brien}, 391 U.S. at 378–79; see also id. at 382 ("For this noncommunicative impact of his conduct, and for nothing else, he was convicted."). Contrast \textit{Edwards v. South Carolina}, 372 U.S. 229 (1963), and \textit{Hess v. Indiana}, 414 U.S. 105 (1973) (per curiam), which involved convictions for the generally applicable crime of breach of peace, but where disturbances would have been the result effective communication by claimants engaged in protests. See supra text accompanying notes 147–160; see also \textit{Cohen v. California}, 403 U.S. 15 (1971) (reversing an "offensive conduct" conviction for wearing a jacket with the words "Fuck the Draft" into a Los Angeles county courthouse during the spring of 1968); \textit{Stone}, supra note 17, at 208 (observing that breach-of-peace laws may "turn in application on communicative impact").
\item[246] \textit{O'Brien}, 391 U.S. at 376; accord \textit{Texas v. Johnson}, 491 U.S. 397, 403–06 (1989). Presumably Smith needed to establish that his peyote possession was linked to "religious" exercise in order to make out his exemption claim. But the \textit{Smith} Court's focus on government conduct pretermitted the issue.
\item[247] \textit{O'Brien}, 391 U.S. at 376–77. Justice Harlan's vote was not necessary to the judgment, but his concurrence added a potentially litigant-sensitive factor. See id. at 388–89 (stating that he did not believe the majority opinion prevented consideration of claims if the regulation "in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not other-
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Many of these elements are not directed at claimant conduct, yet the test cannot be triggered without a burden on the claimant’s attempt to communicate. The potential reach of the test is also difficult to overstate. Countless regulations can hit communicative conduct without singling it out, especially if the judicial definition of “speech” is generous. Although the O’Brien test cannot fairly be interpreted as among the most stringent in constitutional law (the result demonstrates that much), it does leave room for judicial intervention in favor of expressive claimants. At first glance, then, speech claims appear to be treated more favorably than free exercise claims when matched against “generally applicable” and “neutral” regulation.248

On the other hand, commentators have long observed that case outcomes do not support a rigid or even meaningful application of the O’Brien test. John Hart Ely interpreted the case as forbidding only “gratuitous” speech restrictions, where the government has an equally efficient regulatory alternative but nevertheless selects a more speech-restrictive rule.249

The Smith Court did not discuss O’Brien, although it did assert that its view of free exercise doctrine was consistent with speech clause cases. See Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990). But in doing so, the Court only made the tepid assertion that the compelling-interest test is not used when “generally applicable laws unconcerned with regulating speech” have an adverse impact on communication. Id. That does not foreclose some other form of judicial analysis, beyond a background rational-basis scrutiny dictated by the due process clauses.

It is true that there are cases disavowing any scrutiny of burdens imposed through regulations not targeted at “speech.” Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), rejected an “adult” bookstore owners’ First Amendment claim without applying the O’Brien test. See id. at 704–05, 707. One way to square Arcara with O’Brien is to narrow the trigger in a litigant-sensitive fashion, looking only for the regulation’s initial impact. See id. at 706 & n.3 (distinguishing cases in which conduct “with a significant expressive element” or “intimately related to expressive conduct,” “drew the legal remedy in the first place”). In O’Brien, a draft-card bonfire was both the actus reus and a political protest. In Arcara, the basis for suit was on-location sexual activity and prostitution solicitation, which the Court assumed was not “speech”; only the State’s remedy for this conduct would inhibit the claimants’ ability to communicate (i.e., closing their business at that location, which happened to be a bookstore). Other litigant-sensitive ways to reconcile the cases are to assess the constitutional value of the claimant conduct (protesting government policy as opposed to selling sexually explicit books), or the severity of the burden imposed on claimants in light of their alternatives. See id. at 704.

Alternatively, the no-/some-scrutiny cases might be explained by the likely government purposes behind the regulations or their application. See Srikanth Srinivasan, Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court’s Jurisprudence, 12 CONST. COMMENT. 401, 412–20 (1995) (attempting to harmonize Arcara with United States v. Albertini, 472 U.S. 675 (1985), a pre-Arcara decision that applied the O’Brien test even though the “enforcement trigger” was non-expressive conduct, and Cohen v. Cowles Media Co., 501 U.S. 663 (1991), which did not apply the test to a promissory estoppel suit against media defendants). But even that explanation would not eliminate litigant-sensitive triggers. Cf. id. at 420 (arguing that the expressive-conduct trigger is a proxy and default rule).

248 The Smith Court did not discuss O’Brien, although it did assert that its view of free exercise doctrine was consistent with speech clause cases. See Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990). But in doing so, the Court only made the tepid assertion that the compelling-interest test is not used when “generally applicable laws unconcerned with regulating speech” have an adverse impact on communication. Id. That does not foreclose some other form of judicial analysis, beyond a background rational-basis scrutiny dictated by the due process clauses.

249 Ely, supra note 17, at 1485; see TRIBE, supra note 17, § 12-23, at 982–84 (asserting that, if the...
Nor does experience with the test in the lower courts provide much traction for claimants. The Supreme Court certainly has not been willing to forfeit its ability to immunize certain claimants from generally applicable regulation, despite the arguments of Justice Scalia. But if actual experience with the test does not bear out the potential stringency of formal doctrine, then any meaningful distance between Smith and O'Brien collapses.

c. Associational rights and Dale.—Whether or not speech clause doctrine will follow the Smith model, it appears that litigant-sensitive triggers have life in the associational rights context. Emphasis on the burdensome effect of government action was central to the success of a classic set of associational rights claims, those asserted by the NAACP in the post-Brown South. In one line of cases, the Supreme Court underscored a concern about dampening group effort by exposure of member identities.


Exceptions are rare. See, e.g., United States v. Popa, 187 F.3d 672, 676-79 (D.C. Cir. 1999) (reversing a conviction for anonymous phone calls with intent to harass and so forth, which is a questionable situation for the O'Brien test in the first place); Church of the Am. Knights of the Ku Klux Klan v. Kerik, 232 F. Supp. 2d 205, 215-16 (S.D.N.Y. 2002) (using the O'Brien test as one of several alternative grounds for granting plaintiff Klan members summary judgment in their challenge to an anti-mask ordinance), rev'd, 356 F.3d 197, 206 (2d Cir. 2004) ("[T]he mask does not communicate any message that the robe and the hood do not."); Elam v. Bolling, 53 F. Supp. 2d 854, 855-56, 858, 860-64 (W.D. Va. 1999) (finding insufficient evidence of the relevant type of dancing at the plaintiff's establishment to assess an as-applied claim, but nevertheless using the O'Brien test as one basis for declaring facially invalid a prohibition on the allowance of certain public dancing without a permit); see also Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048, 1051, 1057-65 (7th Cir. 2004) (applying the O'Brien test (among others) to a juvenile curfew statute based on the chill supposedly felt by juveniles who wish to engage in First Amendment covered conduct, but forbidding any enforcement of the statute).

See Pap's, 529 U.S. at 307-08 (Scalia, J., joined by Thomas, J., concurring in the judgment) (refusing to apply any degree of judicial scrutiny because the public nudity prohibition was a "general law regulating conduct and not specifically directed at expression," id. at 307).

Accord Stone, supra note 67, at 52 ("The test of a test is not its formulation, but its application."). Note that the standard for valid content-neutral time, place, and manner regulation in public forums is formulated much like the O'Brien test, even though the former includes regulation targeting speech and for reasons not necessarily limited to facilitating communication. For persuasive criticism, see Post, supra note 27, at 1257-60, and Keith Werhan, The O'Briening of Free Speech Methodology, 19 ARIZ. ST. L.J. 635, 638 (1987). On the other hand, it is far from apparent that lower courts feel that their hands are tied when faced with public forum regulation. See infra note 309.

See generally Kalven, supra note 48, at 90-121.

A regulation's extension beyond the NAACP was not enough to justify its application in especially threatening circumstances. 255

These outcomes were surely fueled by extraordinary if unspoken federal judicial doubt about the states’ legislative and/or enforcement aims. They nevertheless incorporate a trigger sensitive to the character of, and threats to, particular associations. 256 Indeed, Sherbert tapped into this line of cases to fortify its regard for incidental burdens on religious exercise, 257 and it was used to immunize from tort liability an NAACP-led economic boycott despite an “incidental effect” issue under O'Brien. 258

That analytical structure recently reappeared in Boy Scouts of America v. Dale. 259 The membership of an assistant scoutmaster, James Dale, was revoked after the organization learned that he had made public the fact that he is gay. Dale successfully sued for reinstatement under a state statute that prohibited, in relevant part, discrimination in places of public accommodation “because of . . . sexual orientation.” 259 A closely divided Court concluded that this use of the statute would violate the Scouts’ right of expressive association. 259 The Court used a litigant-sensitive trigger to assess the claim. The Court first considered whether the Scouts engaged in expressive association, 260 then turned to whether compelled inclusion of Dale would “significantly affect the Boy Scouts’ ability to advocate public or private viewpoints.” 261 Finally, the majority concluded that the imposition could not be overridden by any “compelling” state interest that is also “unrelated to the suppression of ideas” and that cannot be achieved through “significantly less restrictive” regulatory alternatives. 262

255 See Bates, 361 U.S. at 517–18, 523; see also Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (“[W]here it is shown . . . that disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required.”).

256 See Bates, 361 U.S. at 524 (“Where there is a significant encroachment upon personal liberty, [that finding triggers a test under which] the State may prevail only upon showing a subordinating interest which is compelling.”).


260 Id. at 661–62 (quoting N.J. STAT. ANN. § 10:5-4 (West Supp. 2000)); see also id. at 646–47.

261 See id. at 644, 659.


263 Dale, 530 U.S. at 650 (“This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts’ view of homosexuality.”); see id. at 648, 650–56. This approach was not directly contested by the dissenters, only its application and the result. See id. at 664–65 (Stevens, J., dissenting) (arguing that state law did not impose a serious burden on the Scouts’ collective efforts toward shared goals, nor compel it to communicate a message to which it is opposed).

264 Id. at 648 (internal quotation marks omitted); see id. at 659 (suggesting that the Court had engaged in interest balancing, but without showing its work); see also id. at 656–59 (emphasizing the char-
Dale’s standard seems more demanding of government than O’Brien’s. For one thing, the asserted government interest must be not only compelling but also unrelated to the suppression of ideas. O’Brien similarly applies when the government interest is not related to the suppression of free expression, but there the Court did not call for compelling interests. Nor, in my unavoidably subjective estimation, did the draft-administration interests at stake in O’Brien seem overwhelming. Indeed Dale’s analysis is at least as protective of claimants as Sherbert, especially considering Dale’s deference to claimant allegations of organizational positions and burden.

Nothing must be added to demonstrate that Dale’s standard is more claimant-friendly than Smith’s.

But just how litigant sensitive is Dale? If its test is tougher on government burdens than Smith, O’Brien, or even Sherbert, is it fair to say that Dale applies to state action of a similar complexion? Is the difference in judicial concern explained by differing government conduct or by disparate judicial sympathy for various forms of claimant liberty? A good argument can be made for either (or both), but Dale will retain an element of litigant sensitivity regardless.

The discussion above linked the free exercise and speech clause cases according to (1) the generality of the regulation with respect to constitutionally valued conduct and (2) religion- and speech-neutral government interests in the existence and application of the regulation.

Character of the regulation and its relatively novel application).


266 For alarm bells about Dale’s refusal to apply O’Brien and its use of compelled speech concepts in a symbolic speech setting, see Andrew Koppelman, Signs of the Times: Boy Scouts of America v. Dale and the Changing Meaning of Nondiscrimination, 23 CARDOZO L. REV. 1819, 1834 (2002). For some thought-provoking commentary on the case in general, see Dale Carpenter, Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach, 85 MINN. L. REV. 1515, 1517–18 (2001) (attempting to separate out “predominantly” commercial associations and commercial functions of other organizations); Richard A. Epstein, The Constitutional Perils of Moderation: The Case of the Boy Scouts, 74 S. CAL. L. REV. 119, 120–21 (2000) (arguing that the Court’s rationale should have been expanded to immunize all private organizations lacking monopoly power); David McGowan, Making Sense of Dale, 18 CONST. COMMENT. 121, 123–25 (2001) (identifying hitches in the Court’s logic and concerns about the opinion’s scope in light of deference to the Scouts’ assertions during litigation); Michael Stokes Paulsen, Scouts, Families, and Schools, 85 MINN. L. REV. 1917 (2001); Rubenfeld, supra note 175, at 768–69 (arguing that Dale improperly tested for effect on the Scouts rather than for improper government purpose); Laurence H. Tribe, Disentangling Symmetries: Speech, Association, Parenthood, 28 PEPP. L. REV. 641, 644–50 (2001) (rejecting much of the Court’s logic, but finding alternative and additional justifications to protect a group’s freedom to teach by example rather than express messages of moral condemnation).

267 See Dale, 530 U.S. at 651, 653.

268 See supra Part IV.C.1.b.
associations or not. Even among the associations reached, only some would qualify as the type of "expressive association" protected by the Court's doctrine. Nobody on the Court openly contends that every organization qualifies for immunity from antidiscrimination laws.

A more difficult question is whether the justification or interest backing the statute and its enforcement against the Scouts was equally untroubling. The issue is particularly trying because the Court did not articulate the specific interest at stake when it supposedly performed a balancing analysis. Perhaps the least problematic yet pertinent state interest, one that would make the case look most like Smith and O'Brien, is pegged to injuries suffered by classes of people including Dale. The interest could be articulated as preventing and remedying the hurt feelings and isolation from social benefits suffered when people like Dale are excluded from any of the covered public accommodations—regardless of the impact on the places or groups causing the harm. This protective interest might be as unrelated to whether expressive association is hindered as the federal government's interest in preventing draft-card destruction was to whether draft-card burners were participating in political protests, or as Oregon's interest in denying unemployment compensation was to whether the claimant was discharged for religiously motivated conduct.

The Dale opinion appears to deny any parallel to cases like O'Brien, but without offering an intelligent explanation. It asserts that the impact on associational rights was "direct[] and immediate[],&quot; in contrast to the "incidental" effect on free speech in O'Brien. This is unsatisfying. The Court could not have meant "direct" and "immediate" in the sense of whether the regulation's first strike was constitutionally valued conduct. In that respect, the prohibition on draft-card destruction could not have been a more direct hit on O'Brien's communicative effort. Another possibility is that the majority perceived Dale's lawsuit and requested reinstatement as backed, in fact, by a state interest in inhibiting the values and messages preferred by the Scouts. Although plausible, that account is not spelled out and it does

269 See Dale, 530 U.S. at 657 (noting that the statute extended to restaurants and public libraries, for example); cf. id. at 662–63 (exempting "private" clubs, institutions, and places of accommodation (quoting N.J. STAT. ANN. § 10:5-5(l) (West Supp. 2000))).

270 See id. at 658–59 (adverting to the "interests imbedded in" the statute).

271 "[E]liminating 'the destructive consequences of [anti-gay and other forms of] discrimination from our society.'&quot; Id. at 647 (emphasis added) (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196, 1227–28 (N.J. 1999)); see Erwin Chemerinsky & Catherine Fisk, The Expressive Interest of Associations, 9 WM. & MARY BILL RTS. J. 595, 614 (2001) (objecting to the idea that neutral laws of general applicability are insulated from First Amendment challenge in application, but arguing that this principle was satisfied in Dale).

272 See Dale, 530 U.S. at 659.

273 Laurence Tribe has set forth a basis for understanding such antidiscrimination laws as constitutionally problematic, even if defensible. See Tribe, supra note 266, at 653–54 ("[I]n such antidiscrimination instances, the state is making an intrinsically contestable statement about the rightness or wrongness of using the characteristic in question as a criterion for association.") (footnotes omitted).
not confront the alternative interest sketched above. And it might have the dramatic consequence of infecting many or all applications of like statutes. In any event, this perception of an especially problematic interest would not eradicate Dale's trigger. Serious judicial scrutiny would still depend on expressive association and, in a related analysis, the significance of the burden thereon.

Speaking of claimant burdens, a final reading of Dale ignores the "direct" and "immediate" language and concentrates on the severity and character of the burden borne if the claim is rejected. We could then distinguish situations in which a regulation and its attendant remedy prohibit just one method of expressing an idea (i.e., burning an actual Selective Service registration certificate to protest the war and the draft), as opposed to specifically compelling action that hinders First Amendment liberty (i.e., the freedom to select and confine membership when compulsion to do otherwise thwarts expressive goals).

Such attention to the character of the burden and compelled messages is also consistent with Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, a compelled-speech case on which Dale heavily relied. In Hurley, a unanimous Court conceded that the public accommodations law at issue did not single out speech, let alone disfavored content. The Court nevertheless asserted that the statute had been "applied in a peculiar way":

to open a privately organized parade to contingents marching with messages unwelcome to the parade organizers. Hurley is no carbon copy of Dale, but both can be read to suggest that some untargeted burdens are more troublesome than others. If so, Dale is restricted to such burdens but would again retain its trigger. Dale might not contradict cases like Smith and O'Brien, but it contains an undeniable—and claimant-protective—element of litigant-sensitivity.

274 Conceding for the moment that (1) method and message are practically distinct, which is dubious, or (2) change in the latter from loss of the former can be constitutionally acceptable, which must be true. Messages delivered by murder are not immune from prosecution.

275 See Dale, 530 U.S. at 648 (framing the case in part on this basis). Tribe is skeptical of Dale's compelled-speech rationale, but he observes "the right not to be used to express another's message and the right not to be forced into association with another appear, with some frequency, to be sheltered under the Constitution even from neutral, general rules against what the state deems 'discrimination.'" Tribe, supra note 266, at 656 (footnotes omitted).


278 Hurley, 515 U.S. at 572 (quoted in Dale, 530 U.S. at 658).

279 Other compelled-speech cases also seem litigant-sensitive. See Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that government could not penalize objecting Jehovah's Witnesses for obscuring the State's motto on the license plates of their car); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that government could not compel objecting Jehovah's Witnesses to participate in a public-school flag-salute ceremony); Tribe, supra note 266, at 656; cf. supra note 238 (discussing a conceivable limitation of Smith to criminal conduct).
2. **Targeted Burdens and Less-Valued Conduct.**—Much less can be said about triggers that undercut claimant objections. Commercial speech doctrine appears to be the best, and perhaps only, example of a litigant-sensitive trigger that formally downgrades the government's burden in defending speech-targeted laws.

Theoretically, that doctrine could be constructed either to govern only cases involving regulations that target "commercial speech," or more broadly, for situations in which government action hits "commercial speech" regardless of the target. In the Supreme Court, this choice has not mattered much. Commercial speech doctrine usually has been invoked when the applicable regulations appeared to be aimed at for-profit advertising promoting the sale of goods or services, or at least the Court did not accept the possibility of broader coverage.280

An exception is *Board of Trustees of the State University of New York v. Fox.*281 The university had restricted access to school property, including dormitories, with respect to certain "private commercial enterprises."282 That restriction extended to "any invited speech where the end result is the intent to make a profit by the invitee."283 A restriction like that exceeded the Court's definition of "commercial speech," and the Court said so.284 The dispute was made even more interesting because the remaining plaintiffs in the case were university students—a willing audience for such messages—rather than profit-motivated speakers. One set of messages they wanted to receive in their dorm rooms involved Tupperware parties hosted by representatives of American Future Systems, Inc., but they sought convenient access to other messages as well.285

How should this dispute be analyzed? Solely according to the terms of the restriction? Or with a more litigant-sensitive inquiry into particular types of messages that the claimants sought to receive? The Court selected the latter course. The opinion began by concluding that "the principal type of expression at issue"286 (dorm-room-venued Tupperware parties) was commercial speech, and therefore the *Central Hudson* standard was triggered.287 This is an inexplicable place to start if the standard is driven solely.

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281 492 U.S. 469 (1989). It seems that the Court's central mission in this case was to explicate the litigant-insensitive demands of *Central Hudson*. See id. at 471, 475–81, 486 (rejecting a least-restrictive-means requirement and remanding).
282 Id. at 471–72 (quoting a university resolution).
283 Id. at 482 (internal quotation marks omitted) (quoting App. 87).
284 See id. (noting specific examples where the restriction concededly applied, such as for-profit tutoring or legal advice). Whether *Fox*'s definition of commercial speech—"speech that proposes a commercial transaction," *id.*; see *id.* at 473–74—is appropriate need not be resolved here.
285 See *id.* at 472–73, 483–84.
286 *Id.* at 473.
287 See *id.* at 475; see also *id.* at 481 ("[T]he principal attack on the resolution concerned its appli-
by the character of the government’s restriction, which the Fox Court later confirmed reached beyond commercial speech.\textsuperscript{288} And it is otherwise difficult to perceive the utility in remanding the case for, in part, analysis under \textit{Central Hudson} with respect to the Tupperware parties.\textsuperscript{289} The university singled out conduct beyond commercial speech, yet the First Amendment standard varied with the type of communication under review.\textsuperscript{290}

\textbf{D. Limited Holdings for Partly Problematic Regulation}

While litigant-sensitive triggers operate at the front end of First Amendment analysis, litigant sensitivity can be produced at the back end of a case as well. This can happen even if the claimant’s injury flows from a government rule and even if the court analyzes the claim according to a litigant-insensitive test. Hence problematic government rules need not be nullified by a claimant victory,\textsuperscript{291} and a claimant defeat need not validate an entire regulation. These kinds of holdings are difficult to systematize or predict. They are nevertheless an ongoing phenomenon.

1. \textit{Claimant Success Under Triggered Tests}.—A litigant-sensitive result may follow a litigant-sensitive trigger. When a doctrinal test is triggered just because of the type of claimant conduct getting hit, the government rule or practice may be unacceptable only with respect to that type of conduct—barring some additional principle, like a hardline judicial demand for narrow tailoring by the legislature itself.\textsuperscript{292} Only those claimants able to trigger the First Amendment test would be able to benefit from it, leaving other applications of the government’s rule unhindered.

Had O’Brien come out the other way, for example, only draft-card burners engaged in public protest like O’Brien’s would be assured of First Amendment protection from the statute at issue. Nor did the Court in Dale

\textsuperscript{288} See id. at 482 (addressing overbreadth arguments).

\textsuperscript{289} See id. at 485–86 (remanding for consideration, first, of the students’ “as-applied” challenges and chiding the lower courts for failing to separately analyze the restriction on noncommercial speech).

\textsuperscript{290} Cf. \textit{FEC v. Beaumont}, 539 U.S. 146, 160–63 (2003) (claiming that “[financial] contributions [to political candidates] lie closer to the edges than to the core of political expression” and explaining that the “degree of scrutiny turns on the nature of the activity regulated,” but in a case involving a regulation \textit{singling out} conduct that the Court understood as a contribution).


\textsuperscript{292} Putting aside non-constitutional, non-severability rules, under which regulations or certain clauses therein can be invalidated in whole due to an inability to enforce them in part. See \textit{Brocket}, 472 U.S. at 506; Dorf, supra note 16, at 283–87 (discussing severability principles operating in federal court but under state law); John C. Nagle, \textit{Severability}, 72 N.C. L. REV. 203, 204–07 (1993) (criticizing judicial flexibility under current federal severability doctrine).
suggest that New Jersey's public accommodations statute is now unenforceable against anyone.\(^2\)\(^9\)\(^3\) The judicial task in these cases was to consider whether to exempt private parties from government rules that did not appear to single out constitutionally valued conduct on an invalid basis—not to eradicate the rules altogether.\(^2\)\(^9\)\(^4\)

2. Limited Holdings Despite Litigant-Insensitive Tests.—Even more significant, litigant-sensitive results are not unknown to doctrinal tests that look litigant insensitive. Fox suggested this point. The Court elaborated on Central Hudson's narrow-tailoring demand, and explained that the claimant is only asserting that his own conduct would not be included within a "properly drawn prohibition."\(^2\)\(^9\)\(^5\) This indicates that courts must imagine a valid regulation that serves the state's interests, and then confirm that the claimant's conduct would not fall within it. Otherwise the claimant's objection fails. Narrow-tailoring inquiries are directed at government conduct, but even there claimant conduct may be relevant.\(^2\)\(^9\)\(^6\)

Different illustrations can be found in cases assessing content-neutral time, place, and manner (TPM) regulations that inhibit speech in public forums. The formalized TPM test is not triggered by a particular type of "speech,"\(^2\)\(^9\)\(^7\) and so it is therefore even less litigant sensitive on its face than the Central Hudson test. The holding in a TPM case can nevertheless be restricted to a category of private conduct\(^2\)\(^9\)\(^8\)—something that lower courts do not always appreciate.\(^2\)\(^9\)\(^9\)


\(^{294}\) O'Brien also addressed a "facial challenge" to the statute at issue, see supra note 243 and accompanying text; in the text I am referring only to the "as-applied" section of the opinion.

\(^{295}\) Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989); cf id. at 483 (noting, however, that "the rationale of the narrow-tailoring holding may be so broad as to render the statute effectively unenforceable") (emphasis added).

\(^{296}\) See Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176 (1999) (relying in part on a deep assault on the regulatory rationality of a partial prohibition on truthful broadcast casino advertising, yet formally limiting its holding: "[the statute at issue] may not be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal"); Edenfield v. Fane, 507 U.S. 761, 763, 774 (1993) (invalidating Florida's prohibition on in-person solicitation of clients by CPAs, as applied to solicitation of business clients).

\(^{297}\) See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. Grace, 461 U.S. 171, 177 (1983) (explaining that government may enforce reasonable TPM regulations if they are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication).

\(^{298}\) See City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984) ("We may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity."); see also Frisby v. Schultz, 487 U.S. 447, 454 (1988) (leaving open as-applied challenges in cases where the city interest in protecting residential repose would not reach situations arguably covered by the anti-picketing ordinance at issue).

\(^{299}\) Courts have occasionally indicated that the TPM test is for "facial" invalidity of a regulation. See Horton v. City of St. Augustine, 272 F.3d 1318, 1333 (11th Cir. 2001); Nunez v. City of San Diego, 114 F.3d 935, 951 (9th Cir. 1997). Such statements are in accord with the apparent litigant insensitivity
Take the mundane contextual distinction adopted in *United States v. Grace.* Thaddeus Zywicki and Mary Grace had each been threatened with arrest for displaying written messages on the sidewalk in front of the Supreme Court Building. They sought, and obtained from the court of appeals, a holding that the statute with which they had been threatened was unconstitutional on its face. The statute prohibited certain displays "in the Supreme Court Building or grounds." The Supreme Court, for its part, did not confine itself to the broad terms of the statute—despite restating TPM rules which seem well-drafted for wholesale regulatory assessments. *Grace’s* holding reached only the sidewalks around the Building, the location where the claimants ran into police opposition, even though there was nothing very litigant-sensitive about the Court’s rationale. The Court was not convinced that the statute, with respect to the sidewalks, sufficiently served the asserted government interests or legislative purposes to justify the restriction on speech.

There might be a litigant-insensitive way to restate the result: the statute has been effectively trimmed back to cover less geographic space. Yet the statute itself was not altered by the Court. In fact, it was recently recodified by Congress without conforming the provision to the Court’s twenty-year-old decision. As far as the United States Code is concerned, of the test, and its narrow tailoring element resembles the overbreadth concept—a doctrine that permits "facial" challenges to regulations. *Broadrick* itself stated that “[f]acial overbreadth claims have . . . been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct.” *Broadrick v. Oklahoma,* 413 U.S. 601, 612–13 (1973) (collecting cases); *see Prayze FM v. FCC,* 214 F.3d 245, 252 (2d Cir. 2000); *Nunez,* 114 F.3d at 950. This is not the place to fully reconcile or integrate overbreadth doctrine and TPM narrow tailoring. It is enough to say that claimant circumstances have been relevant in the TPM cases. *See Grace,* 461 U.S. at 179, 181 (discussed in text below); cf. *Frisby,* 487 U.S. at 476, 481, 488 (restating the TPM test to analyze a "facial" challenge to an anti-picketing ordinance, but leaving open the possibility of successful as-applied challenges where the asserted government interests might not be implicated).

301 See id. at 173–75; *Grace v. Burger,* 665 F.2d 1193, 1205–06 (D.C. Cir. 1981) (stating, however, that the panel was not suggesting that people may picket or leaflet in the Building).
302 *Grace,* 461 U.S. at 173 n.1 (internal quotation marks omitted) (quoting 63 Stat. 617 (codified at 40 U.S.C. § 13k; repealed by Pub. L. 107-217, § 6(b), 116 Stat. 1304)). The provision under review stated, in full, "It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." *Id.* (emphasis added). It was interpreted to include, more or less, a ban on all signs and leaflets. *See id.* at 176, 181 n.10.
303 See id. at 177 (quoting Perry Educ. Ass’n v. Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).
304 See id. at 179, 181.
305 See id. at 180–84. The circumstances of the claimants’ past conduct were referenced at one point, but apparently for illustrative purposes. *See id.* at 182.
306 Cf. Adler, Rights, supra note 20, at 137 & n.144 (asserting that courts repeal or amend rules when they use rule-centered doctrine, but accepting Grace as involving an as-applied challenge).
307 The text of the old provision is quoted infra note 302. In 2002, Congress recodified the provision with only a minor change in language: “therein” has been changed to “in the Building and grounds.” 40 U.S.C. § 6135 (2000); *see H.R. Rep. No.* 479, 107th Cong., 2d Sess., at 1–3 (2002), re-
it is still a crime to hoist a sign displaying the plain text of the First Amendment on the sidewalk in front of the Supreme Court Building. It is the ability of speakers to assert a successful, albeit limited, constitutional objection that protects people like Zywicki and Grace from interference with their communicative efforts.

A case like Grace covers very little geographic territory by its own terms. But it is connected to a powerful concept with broad implications for First Amendment law. The possibilities for limited and litigant-sensitive holdings are endless, even after the application of a seemingly litigant-insensitive test.

3. Conduct Categories Resulting from Freer-Form Analysis.—It should be no surprise, then, that litigant-sensitive results also appear when the courts are not using a standardized First Amendment test. Defamation cases offer some notable instances. Starting with New York Times Co. v. Sullivan, courts have promulgated a series of First Amendment restrictions on the ability of certain defamation plaintiffs to obtain certain remedies given certain circumstances. Defamation doctrine is plainly litigant-sensitive. Constitutional protection for defendants turns on what they said and about whom. There is no talk of “strict scrutiny” in these cases. The

printed in 2002 U.S.C.C.A.N. 827, 827–29 (stating that substantive changes were not intended by the legislation).

308 The Supreme Court Marshal, under authority granted by Congress, has issued a regulation governing signage on the sidewalks around the Building, permitting signs at those locations. The rule is numbered “Six” and is available at http://www.supremecourtus.gov/publicinfo/publicinfo.html. Presumably the regulation is not meant to trump federal statutes; the regulation is meaningful because of the Court’s use of the First Amendment in Grace.

309 That Grace relied on First Amendment immunity rather than (re)construction of a federal statute is significant for another reason: its principles can be applied uncontroversially and in like fashion to state laws, via the Fourteenth Amendment. See, e.g., City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1548–49, 1551 & n.10, 1556 n.18 (7th Cir. 1986) (holding that a municipal ordinance restricting door-to-door soliciting to Monday through Saturday between 9 a.m. and 5 p.m. could not constitutionally be applied to ban soliciting on those days between 5 p.m. and 9 p.m., a result tracking the claimants’ objection, and only with respect to solicitors who go to the front door of a residence rather than around the back), aff’d, 479 U.S. 1048 (1987) (summary affirmation); see also Grossman v. City of Portland, 33 F.3d 1200, 1207–08 (9th Cir. 1994) (stating that “we simply cannot agree that six to eight people carrying signs in a public park constituted enough of a threat to the safety and convenience of park users . . . to justify the restrictions imposed on their speech here,” but also indicating that the ordinance itself was invalid); SHIFFRIN, supra note 53, at 187 n.122; Alan E. Brownstein, Alternative Maps for Navigating the First Amendment Maze, 16 CONST. COMMENT. 101, 115–16 n.45 (1999) (book review). In Watseka three Justices dissented from the summary affirmation arguing that the court of appeals had erred by imposing a least-restrictive-alternative demand. 107 S. Ct. 919, 920 (White, J., joined by Rehnquist, C.J., and O’Connor, J., dissenting). The Court later confirmed the dissenters’ view, but suggested that the result in Watseka could be preserved on other grounds. See Ward v. Rock Against Racism, 491 U.S. 781, 800 n.6 (1986).


311 See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69, 775–76, 779 n.4 (1986) (setting out a rough matrix of the Court’s defamation rulings and holding that a private-figure plaintiff must bear the burden of proof on falsity to recover damages for allegedly defamatory statements involving “speech
Court generated the rules by reconciling competing and quite generic concerns, with inspiration from sets of facts—what Melville Nimmer called definitional balancing. The Court moved in fits, sometimes backtracked, and ended up with a relatively complex set of rules. But they are litigantsensitive rules.

Bartnicki v. Vopper is a recent decision within the same tradition, although it involved statutes designed to protect private conversation. The Court evaluated competing interests at a wholesale level, but then suggested a rule-like holding for guidance in future cases. The case arose from a lawsuit filed by two teachers’ union officials seeking damages and other monetary relief for the dissemination of a surreptitiously recorded cell-phone call between the plaintiffs. The conversation took place during, and pertained to, collective bargaining negotiations. The identity of the person who initially intercepted the call was not known, but the plaintiffs alleged that one defendant later received and played the tape for school board members, and another did so repeatedly for the general public during his local radio talk show. Although the statutes did single out distribution of recorded speech, they were “content-neutral law[s] of general applicability.” And they served and could be justified by undeniably significant interests—such as promoting private conversation and preventing additional harm through dissemination of recordings after an initial invasion of privacy.

The majority did not, however, apply a generic, all-or-nothing formula. The Court permitted itself to think about “the validity of the stat-
utes as applied to the specific facts of these cases." And so the decision came down to scrutiny of claimant conduct and its connection to broader interests and constitutional values. The Court accepted that the defendants at least had reason to know that the plaintiffs’ conversation had been illegally intercepted. Still, the defendants had not participated in the interception, had not violated any statute by simply receiving the recording, and the resulting speech disseminated to the community was an accurate rendering of a conversation that was, in the Court’s estimation, at least related to an issue of “public concern.”

As in the defamation and public-employee fields, the Bartnicki decision does not set out a black-letter test for determining when a statement is in the public concern category. Maybe a formal test is impractical or undesirable; it certainly would be a challenge to formulate. Regardless, the decision yields a narrow and litigant-sensitive conclusion: individuals are now immune from liability under these statutory provisions when the character of their conduct matches the defendants’ story in Bartnicki. Other applications of the statute are either permissible, or raise questions yet to be resolved.

Limited holdings are nothing new. They stretch from the exclusion of troop-transport sailing dates in Near v. Minnesota, to the inclusion of “political expression like his” in Texas v. Johnson. Nor is there anything original about successful “as-applied” challenges to government rules. It
is even possible for "facial" challenges to end in something less than total demolition of a regulatory regime.\textsuperscript{328} And yet we have seen that the Supreme Court regularly resolves First Amendment issues in a manner both wholesale and litigant insensitive.\textsuperscript{329} Cases like Bartnicki are significant because they show that the Court is still willing to produce a circumscribed holding that distinguishes among potential claimants. One problem, maybe the deepest for structuring the doctrine, is knowing when those times have arrived.

\textbf{E. Elements in a Metaphorical Balance}

This typology can end with a word on "balancing." The idea has received a great deal of attention from commentators.\textsuperscript{330} This is an important discussion, in no small part because courts sometimes tell us that they are balancing but rarely explain how to do it—or at least how to reconcile competing values that are not easily reduced to a common metric. Perhaps due to these difficulties, much doctrine avoids overt balancing.\textsuperscript{331} It is nevertheless true that the balancing metaphor persists in First Amendment law. The following analysis briefly connects the idea to litigant sensitivity.

In a few circumstances, the Supreme Court has directed lower courts to balance public and private interests within the confines of a particular controversy. In the public employee speech cases, if the claimant surmounts the litigant-sensitive filter, and if adverse employment action was taken because of the claimant’s speech, then the claimant’s interest in expression can be balanced against the government’s interest in effective management.\textsuperscript{332} This is a combination of litigant sensitivity and insensitivity. The character of and interests backing both government and private action are isolated, compared, and somehow squared. Another instance seems to be the path to exemption from antidiscrimination laws under Dale. There the Court stated that in past cases “the associational interest in freedom of expression has been set on one side of the scale, and the State’s interest on the other.”\textsuperscript{333} The Court did not give explicit instructions for how to construct

\textsuperscript{328} See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223–25, 229 (1990) (O’Connor, J., plurality opinion); id. at 238 (Brennan, J., concurring in the judgment); supra note 44.

\textsuperscript{329} See supra text accompanying notes 1–4; Part III.B.1.


or operate the scales, unfortunately. It only declared that (unspecified) state interests “embodied in” the statute at issue “do not justify such a severe intrusion on the Boy Scouts’ right to freedom of expressive association.”

The Court also engages in balancing at a high level of generality. In this vein, we have already reviewed defamation jurisprudence and Bartnicki. Such cases recognized competing interests or values, but well beyond the immediate concerns of individual claimants. There was a connection to litigant sensitivity, but it came most prominently at the end, after a category of private conduct had been generated. In these instances the courts are establishing more generally applicable rules, and providing more guidance than might be conveyed by an unadorned judgment on a given set of facts.

Claimant conduct can play a role even in this rule-generation process. It is often the inspiration for developing a conduct category and associated private interests against which government concerns are purportedly balanced. But this form of litigant sensitivity is attenuated. A particular claimant’s interaction with government is at most an example that informs wholesale balancing. One litigant’s story might even be more dangerous than useful, insofar as the instant case is atypical and sound judgment calls for understanding a government operation writ large. Hence, private conduct can be relevant without the individual claimant’s conduct being so critical.

A classic example is Martin v. City of Struthers, a case in which aggregation worked to the claimant’s benefit. The Court invoked interest balancing and declared invalid an ordinance prohibiting a particular method of

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334 Id. at 659. The analysis for free exercise exemptions before Smith has also been described as balancing. See Employment Div. v. Smith, 494 U.S. 872, 882–83 (1990); McDaniel v. Paty, 435 U.S. 618, 628 n.8 (1978); see also Smith, 494 U.S. at 905 (O’Connor, J., concurring in the judgment).

335 See supra Part IV.D.3.

336 See Fallon, supra note 330, at 77 (describing two forms of balancing tests); Kathleen M. Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. COLO. L. REV. 293, 295 n.6 (1992). On the current Court, Justices Stevens, O’Connor, and Breyer are notable proponents of the balancing metaphor in reconciling interests at wholesale, although Justice Breyer is at least as partial to the idea of “proportionality” when truly significant constitutional interests appear to be in tension. See, e.g., United States v. Am. Library Ass’n, 539 U.S. 194, 217–18 (2003) (Breyer, J., concurring in the judgment) (considering whether speech-related harm was “disproportionate” in relation to the statute’s legitimate goals); Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 163 (2002) (Stevens, J.); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) (O’Connor, J., plurality opinion); Bartnicki v. Vopper, 532 U.S. 514, 532 (2001) (Stevens, J.); id. at 536 (Breyer, J., concurring); Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 402–03 (2000) (Breyer, J., joined by Ginsburg, J., concurring). Support for, or at least concession to, some sort of balancing is not limited by personnel, however. Writing for the Court, Justice Scalia recently described First Amendment overbreadth doctrine in terms of social costs and benefits. See Virginia v. Hicks, 539 U.S. 113, 119–20 (2003). For a note of concern, see Paul Gewirtz, Privacy and Speech, 2001 SUP. CT. REV. 139, 197 (“The question, of course, is not whether we trust judges like Justice Breyer to engage in this kind of balancing, but whether we trust our adjudicative system as a whole.”).

337 319 U.S. 141 (1943).
communication (essentially, handbilling by door-to-door canvassing). The Court did not rely on only Martin's personal interest, and it admitted that the recipient who prompted this prosecution actually was annoyed by Martin.

In the instant case, for example, it is clear from the record that the householder to whom the appellant gave the leaflet which led to her arrest was more irritated than pleased with her visitor. While door to door distributors [sic] of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion.

It was an aggregated category of private conduct on which the Court relied.

More generally, there is a hydraulic pressure in First Amendment argumentation and adjudication. Especially at the Supreme Court level, each decision reverberates through the legal community. Holdings can be formally limited, but even those cases will be used at some future time in circumstances similar but not the same. All the more so when the Court generates a rule or standard it intends to govern a broad set of situations. As such, the Court will likely attempt to predict the consequences of each opinion for future cases and other institutions. However imperfect or difficult, long-term impact should be, and often is, an explicit consideration in First Amendment adjudication.

Instances of these hydraulics appear in time, place, and manner cases. In Heffron v. ISKON, for example, the claimants challenged the application of State Fair regulations restricting their attempts to communicate effectively. The Court could understand the regulatory burden. At the same time, it was not willing to minimize the impact of a successful claim by solely considering the (supposed) threat of a single religious society freely circulating on the fairgrounds.

That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the

338 See id. at 141–43, 149.
339 Id. at 144–45.
340 See also, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 339 n.3, 341–43 (1995) (beginning with the general tradition of anonymous speech implicated by the statute, of which the claimant's was a part); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838–42 (1978) (concluding that the article at issue was an accurate contribution to public scrutiny of governmental affairs, and holding that the Commonwealth's interests were insufficient to justify a criminal sanction on "nonparticipants such as Landmark"); Talley v. California, 362 U.S. 60, 64 (1960) (adverting to the importance of anonymous publications to persecuted groups and "the progress of mankind").
342 See id. at 647–48.
fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. 343

One can disagree with the result in Heffron and still accept the good sense of aggregating the impact of additional exemptions that could not be withheld without violating constitutional norms. 344 Whether courts are “balancing” or applying a more bounded form of scrutiny, consequentialism seems to demand larger thinking than the narrowest forms of litigant sensitivity. Litigant sensitivity is not eradicated by these hydraulics, but it is moderated.

V. CHOICES IN DOCTRINAL DESIGN

Some fundamental choices are now clearer. A radically sensitive First Amendment doctrine is indefensible, but a radically insensitive model might work. If so, the options are: (1) a purified doctrine that assesses only government means, ends, and/or systemic effects, perhaps according to a variety of contexts; or (2) a mixed model, which could include all of the foregoing plus some evaluation of individual claimant conduct. To understand the difference, we now have a good sample of forms and functions for litigant sensitivity. Reordering a bit, courts might:

- filter out claimants who are not adequately serving First Amendment values, even if the government’s conduct is problematic;
- trigger litigant-insensitive tests due to the value of the claimant’s conduct, even if the government’s conduct seems unproblematic;
- balance government interests with the value of claimant conduct, or a category of private conduct into which the claimant fits;
- limit the operation of a government rule or practice to less-valued private conduct; and/or
- safeguard claimants from state action exceeding regulable categories or legitimate interests, within the circumstances of a particular case.

Choosing the best model is difficult, however, and for several reasons. One model applies to many constitutional disputes: there is no authoritative instruction manual for doctrinal design. The project can be approached in more than one way without crossing any clear boundary of legitimate rea-

343 Id. at 652–53 (footnote omitted); accord United States v. Edge Broad. Co., 509 U.S. 418, 427, 430–31, 435 (1993) (“Because the approach Edge advocates has no logical stopping point once state boundaries are ignored, this process might be repeated until the policy of supporting North Carolina’s ban on lotteries would be seriously eroded.”); City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984); see also Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989); Frazee v. Ill. Dep’t of Employment Sec., 489 U.S. 829, 835 (1989) (rejecting a chaos concern unsupported by record evidence); Goldman v. Weinberger, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring) (expressing a concern for ensuing sect-based discrimination if this litigant were granted an exemption from uniform dress codes).

344 The claimants in Heffron did. See 452 U.S. at 652 n.15.
sioning. It can first be addressed as a matter of constitutional meaning in a narrow sense: given some method for interpreting a fundamental legal text authored and authorized by others,\textsuperscript{345} does the Constitution mean that claimant conduct should be judicially evaluated? Second, the decision also involves (in real-life adjudication anyway) the related task of pragmatic constitutional implementation: given limited textual guidance, a set of normative commitments, a variety of institutional considerations, and a degree of uncertainty, what textual elaboration is most sensible at this time?\textsuperscript{346}

In addition, the radically insensitive and mixed models both include numerous conceivable versions. The former excludes one set of variables without specifying precisely which other considerations should matter; the alternative model is even more open. Without selecting particular versions of the general models, comparisons can be frustratingly abstract. And perhaps most important, there are plausible and competing normative visions for the First Amendment, such as maximum private liberty of a defined type, or various antidiscrimination schemas.\textsuperscript{347} Defensible doctrine cannot be drafted without substantive goals. This is not to pretend that we lack consensus on a few scenarios, like prior restraints designed to withhold printing licenses from those who would criticize the incumbent government, or prison terms for those whose religious beliefs diverge from the creed favored by those in power. At the same time, there is a live choice among values.

Even so, a meaningful discussion is possible at this point. A basic issue is whether claimant conduct should ever matter in First Amendment law. That question can be answered without taking on the monumental task of comprehensive doctrinal design. Moreover, some interpretive resources are pertinent to all forms of litigant sensitivity. The analysis below begins with the most conventional.

\textsuperscript{345} See, e.g., I Tribe, supra note 30, § 1-11, at 31 (setting out to discuss textualism, structure and architecture, history, national ethos, stare decisis, and eclecticism).

\textsuperscript{346} See Fallon, supra note 23, at 5; Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 5 (1994) ("Goal choice may be necessary to the determination of law and public policy, but it is far from sufficient."); Schauer, supra note 23, at 266-67 & n.5, 291-92 n.124. Sometimes this analysis will suggest that no doctrine should be articulated in favor of further study or deference to other institutions. See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 174 (1999) (advocating “free speech minimalism” for the new, high-tech media); Fallon, supra note 330, at 114 ("Justices appropriately weigh the costs of delay against the risk of injudicious innovation.").

\textsuperscript{347} See generally supra note 53 (collecting positive, liberty-oriented theories); Adler, Rights, supra note 20, at 99-121 (discussing general schemas of liberty and discrimination); Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 28 (1975); Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 999-1010 (1990); Stone, supra note 67, at 54 ("[T]he first amendment is concerned not only with the extent to which a law reduces the total quantity of communication, but also . . . distortion of public debate, improper motivation, and communicative impact."); id. at 57-58; see also Rebecca L. Brown, Liberty, the New Equality, 77 N.Y.U. L. Rev. 1491, 1492-99 (2002) (exploring liberty, equality, and justifications for constitutional judicial review).
A. Openness in Conventional Methods and Sources

Common methods of constitutional interpretation do not appear to forbid litigant sensitivity, and their sources seem to run out fairly quickly. Constitutional text will not finish the work for us. The First Amendment begins by singling out a government institution and a form of government action ("Congress . . . mak[ing] . . . law"), but then adds references consistent with either radical insensitivity or a mixed model ("prohibiting the free exercise" of religion, or "abridging the freedom of speech," and so on). One could conceivably say that the latter references mean a form of regulation that aims to do what the Amendment forbids, or an effect of government action on systems of private conduct, or the impact on a particular claimant’s exercise of valued conduct. Provisions of the Fourteenth Amendment, by which courts may bind the states to First Amendment principle, are structured similarly.

Contrasting the establishment clause might suggest that effects are more important to the rest of the Amendment: it addresses laws “respecting,” rather than prohibiting or abridging. Maybe “respecting” requires that the law under challenge itself respect or refer to an establishment; the other clauses are not so easily subject to this condition. But there are equally rational alternatives, and this logic leaves open what kind of effect warrants concern.


349 U.S. CONST. amend. I.

350 Even the Smith Court did not argue otherwise. See Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (contending that the claimants’ reading of the text was not necessary and that the Court’s reading was permissible; then turning to precedent to “reveal that the latter reading is the correct one”); cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring in part and concurring in the judgment) (stating that “[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted,” but obviously viewing such “effects” as restricted to targeting constitutionally protected conduct); McConnell, supra note 104, at 1115 (asserting that “the more natural reading” of “prohibiting” is the effect of making a religious practice illegal).

351 See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .” (emphasis added)). I will not address the proper vehicle for “incorporation” of First Amendment norms against state and local action.

352 Id. amend. I.

353 See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 997 (10th ed. 1999) (defining “respecting” as “in view of” or “with respect to,” as in considering or concerning).

354 One is that the establishment clause is an element of federalism, and “respecting” ensures that
History might help. Founding era materials could be consulted, although at this point I have neither seen nor given up on finding concrete guidance from that source. An amateur’s view of the Amendment’s history does indicate some support for radical insensitivity. For instance, one of the few certainties in this field is founding era opposition to prior restraint. But hopes for straight answers on the general issue of litigant sensitivity probably should not be high. Too many questions remain open considering the variety of litigant-sensitive doctrinal forms and the circumstances in which they can be used—even setting aside the problems of competing historical method, surviving primary sources, and the proper weight or relevance of the drafters’ (and/or ratifiers’, and/or general population’s) understanding(s) of the Constitution in 1791 (or 1868). There is no sense holding our breath until all of those questions are adequately explored.

We do have about a century of experience with the First Amendment in the Supreme Court, and we could draw lessons from that tradition. But we have already seen that this tradition does not disclose a uniform treatment of individual claimants. Nor could we effectively critique and suggest reform without moderating the commitment to precedent.

First Amendment theory could contribute something, but often indirectly. As noted, much work has been done to explain the good and bad of expressive and religious liberty, and to isolate acutely problematic govern-

the federal government may neither establish nor disestablish any religion for the States. See Adam M. Samaha, Separation Rhetoric and Its Relevance, 19 CONST. COMMENT. 713, 723-24 (2002) (reviewing PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002), noting this possibility, and collecting sources). Another reading sees great breadth in the term “respecting,” such that the federal government need not actually establish religion before it violates the clause. Still another, more novel reading would be that the federal government may not show “respect[]” to an establishment of religion. Any of these interpretations undercut the establishment clause’s ability to bolster an effects-based reading of the rest of the Amendment by the contrast in language.


See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *150-53 (1769); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS xi (1985) (conceding that “freedom of the press merely began with its immunity from previous restraints”); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874 (1833), reprinted in 5 THE FOUNDERS' CONSTITUTION 182 (Philip B. Kurland & Ralph Lerner eds., 1987); see also Cass, supra note 14, at 1461-65 (arguing from history and a select set of precedent that the “core” of the speech and press clauses is a concern for official self-interest and, less likely, official intolerance of ideas).

See Bork, supra note 53, at 22 (asserting a seeming absence of “coherent theory of free speech” among the framers). Although Smith did not rely on originalism, illuminating work has been done on the aspect of litigant sensitivity at issue there. See Philip Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 GEO. WASH. L. REV. 915 (1992) (contending that historical sources do not support such constitutionally required exemptions); McConnell, supra note 53, at 1414-15 (finding some support otherwise). For judicial use of such history, see City of Boerne v. Flores, 521 U.S. 507, 537-44 (1997) (Scalia, J., concurring); id. at 548-64 (O'Connor, J., dissenting).
ment conduct. But these theoretical perspectives do not always speak very precisely to the practical doctrinal choices examined here. At its best, doctrine draws on substantive values and then provides a workable analytic structure that facilitates sound judgment. The structural options are numerous even when the substantive purposes are settled. And more than one trustworthy observer has advised that we need not choose between a "positive" or "negative" view of the Amendment; insights from all schools might be eclectically mixed according to the demands of a given situation. Attitudinal openness of that magnitude strongly militates against radical insensitivity.

Beyond these familiar sources, we head into even more contested territory. Out here, creativity and pragmatics play more explicit roles. This supplemental analysis relies on practical considerations of feasibility and consequence—everything from comparative institutional competence in a given context, to the risks of legal complexity, to the predicted mix of results when doctrine is applied in actual litigation.

358 See supra notes 14 and 53 (collecting sources in legal scholarship).
359 See SCHAUER, supra note 14, at 14; SHIFFRIN, supra note 53, at 177 n.35 ("[H]owever much one emphasizes the government’s incompetence, it must at least be conceded that speech has positive value for otherwise one would not be concerned about the government’s conduct."); TRIBE, supra note 17, § 12-2, at 789; Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615, 1640-42 (1987); see also GREENAWALT, supra note 56, at 12-14; Cass, supra note 14, at 1451, 1471. However, we might have to assign priorities to the theories to get meaningful guidance in concrete cases. See Post, supra note 54, at 2373.
360 This does not mean that the eclectic theorist or the pragmatist will resist all simplicity and rule-like doctrine. See Richard A. Posner, Pragmatism Versus Purposivism in First Amendment Analysis, 54 STAN. L. REV. 737, 740-41 (2001).
361 See, e.g., Neil K. Komesar, Slow Learning in Constitutional Analysis, 88 NW. U. L. REV. 212, 220 (1993); David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. CHI. L. REV. 190, 208 (1988) ("Under any plausible approach to constitutional interpretation, the courts must be authorized—indeed, required—to consider their own, and the other branches', limitations and propensities when they construct doctrine to govern future cases."); Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 MICH. L. REV. 885, 886 (2003) ("The central question [in legal interpretation] is not 'how, in principle, should a text be interpreted?' The question instead is 'how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?'").
362 See, e.g., SCHAUER, supra note 14, at 84 ("[T]here is a limit on the complexity of the concepts that we can reasonably expect people to understand."); Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 STAN. L. REV. 1105, 1162 (2003) (discussing costs of complex rights structures).
363 See generally FALLON, supra note 23, at 4-5; Cynthia L. Estlund, Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment, 75 TEX. L. REV. 687, 741 (1997) (following Schauer and considering "the soundness, durability, 'ruleness,' and 'learnability' of free speech principles . . . with an eye toward the actors and institutions that will implement and live with it"); Schauer, supra note 143, at 1202-03 (counseling against incremental design in First Amendment law); Frederick Schauer, Justice Stevens and the Size of Constitutional Decisions, 27 RUTGERS L.J. 543, 543 (1996) (stressing the guidance function of appellate courts); see also Eisgruber & Sager, supra note 20, at 253, 258-59, 262-68 (distinguishing speech claims from religious liberty claims).
This is obviously a lot to consider, and it would be surprising indeed if one useful formula suited all First Amendment disputes. An expectation of judicial ambivalence, however, is not a very strong defense of it. An unrelenting commitment to context-dependent hedging is just as bad as any addiction to blunt and simplistic rules. Mixed models have costs. Considering First Amendment values and the institutions in which the model will operate, those costs could be prohibitive.

B. Vices of a Mixed Model

1. Complexity and Uncertainty.—Constitutional doctrine drafted by courts, like other forms of law, should be as clear and administrable as practically possible. Complexity and ambiguity make it more costly and difficult for judges, who are human beings, to correctly operate legal doctrine, and for everyone else to understand and predict results. These are legitimate concerns in First Amendment law. Eliminating an entire set of variables hopefully would simplify judicial duties, enhance clarity, and provide greater certainty and predictability for all concerned. We cannot achieve those goals with radical litigant sensitivity, because judicial assessment of government conduct is indispensable.

Yet clarity is only one value in doctrinal design. First Amendment

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364 In fact, a logical system cannot hold to a flat rule dictating context-laden inquiries in every circumstance. The character of that rule (flat) deviates from its dictate (contextualize), so it must have a limitation (to preserve itself), and the system must accept the virtue of a flat rule under certain circumstances. Cf. Cass R. Sunstein & Edna Ullmann-Margalit, Second-Order Decisions, in BEHAVIORAL LAW AND ECONOMICS 187, 187-88 (Cass R. Sunstein ed., 2000) (distinguishing second-order from first-order decisions).

365 See, e.g., Blasi, supra note 91, at 472 (referring to “the enervating contingencies and complexities of contemporary First Amendment doctrine”); Fallon, supra note 16, at 864 (“First Amendment doctrine is almost infinitely complex.”); Schauer, supra note 50, at 309 (“First Amendment doctrine is beginning to resemble the Internal Revenue Code.”).

366 See supra Part III.A.2. Maintaining a First Amendment law that is explicable to non-specialists could also be significant. Cf. JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT’S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 4–7 (1991) (linking intelligible Supreme Court opinions to an intelligent democracy); Akhil Reed Amar, The Supreme Court 1999 Term—Foreword: The Document and the Doctrine, 114 HARV. L. REV. 26, 48 (2000) (“Many doctrinal tests seem better designed for in-court application than out-of-court edification.”). If so, this consideration might cut both ways. Mixed models might be hard to explain. But radical insensitivity is sometimes jarring to the uninitiated. It is not immediately apparent why diaper-deliverers can even assert First Amendment objections, see Virginia v. Hicks, 539 U.S. 113, 120–121 (2003), or why two sets of teenagers who both burned makeshift crosses in their African-American neighbors’ yards should obtain different results in the Supreme Court, compare R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (prohibiting punishment under an ordinance that singled out only some fighting words), with Virginia v. Black, 538 U.S. 343, 359–64 (2003) (generally permitting criminal statutes singling out cross burning with intent to intimidate); id. at 343 (O’Connor, J., plurality opinion) (remanding the teenagers’ case for further consideration). Thanks to Dan Farber for this thought.
rules that are clear and clearly wrong cannot be automatically preferred to vagueness and complexity. As well, a small amount of litigant sensitivity might be exceptionally valuable, making any incremental loss of simplicity worthwhile. And a radically insensitive model itself can be plenty complicated and foggy—cases addressing conditions on government subsidies facilitating expression come to mind.  

Finally, radical insensitivity might enjoy only a short-run edge. If the doctrine is simple but yields sufficiently outrageous results in a significant number of applications, the judiciary is likely to moderate the model. Clarity and certainty will be lost at that point and probably before, insofar as alterations are seen as possible but cannot be easily forecast. Still, those developments are speculative; a short-run reduction in doctrinal complexity is more certain. The complexity objection probably counts against a mixed model, but not heavily.

2. Improper Judicial Inquiries and Bias.—Another rationale for extricating the doctrine from claimant assessments involves improper judicial inquiries and the risk of bias. Is it acceptable for judges and juries to play film critic, or to adjudicate a newspaper editor’s state of mind, or to guess at the danger posed by provocative public protests, or to estimate the value of a particular religious belief to the claimant? Exposing First Amendment claimants to judicial evaluation exposes them to erroneous or malicious misjudgment. And perhaps the inquiry itself exceeds the judiciary’s jurisdiction over private preferences.  

Surely the best elaboration of the Amendment forbids some kinds of litigant-sensitive inquiry for some purposes. The doctrine is never going to authorize the judiciary to identify religious heretics or political-thought criminals, and rightly so. Current law already includes prohibitions along these lines: the judiciary may not hold trials on the validity, nor probably the centrality, of an individual’s or organization’s religious belief. Maybe these inhibitions should be extended.

A reason to make the extension is fear of a particular kind of bias or error. Every human-run institution is going to make mistakes, honest or otherwise, and so permitting any First Amendment litigation entails error. But perhaps there is an acute danger of populist, majoritarian, or otherwise problematic sentiment infecting jury deliberations on First Amendment is-

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368 Cf. United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 818 (2000) (asserting that aesthetic judgments about “art and literature” are not for government, but without declaring that Miller v. California, 413 U.S. 15, 24 (1973) (permitting government to criminalize “obscenity,” which is defined in part by a judgment about “serious . . . value”), is bad law).
sues.\textsuperscript{370} Even life-tenured judges can produce similar errors.\textsuperscript{371} A doctrine directing the judiciary to assign degrees of constitutional value or social threat to claimant conduct risks under-protecting unpopular claimants, over-protecting popular claimants, and unevenly protecting private parties in aggregate.

Modern free exercise litigation underscores the concern about questionable special treatment and uneven overall results.\textsuperscript{372} I can see why, in \textit{Wisconsin v. Yoder}, the Amish had a convincing case against punishment for refusing to school their children in a more institutionalized setting for a couple more years.\textsuperscript{373} Nonetheless, it is a humbling experience attempting to justify that conclusion without tipping over into sect-slanted cheerleading. The majority’s own romantic tribute to traditional agrarian lifestyle and, as John Hart Ely put it, “nice people not on welfare”\textsuperscript{374} marks a low point in First Amendment reasoning, exacerbated by a troubling analytic gerrymander ensuring that hippie communes would not fall within the Court’s protective fold.\textsuperscript{375} A differently worded opinion could have reached the same result, but it is hard to believe that it would have been as honest.

Eliminating bad types of judicial bias is always going to be a challenging task, but perhaps any significant degree of litigant sensitivity in the fields of communication and religious faith is asking for disappointment.

\textsuperscript{370} See, e.g., Zechariah Chafee, Jr., \textit{Free Speech in the United States} 70 (1941); Ely, supra note 14, at 112 (“[A]ttempts to evaluate the threat posed by the communication of an alien view inevitably become involved with the ideological predispositions of those doing the evaluating, and certainly with the relative confidence or paranoia of the age.”); Murphy, supra note 92, at 190 (discussing World War I era trials); Monaghan, supra note 15, at 527 (“Like administrative agencies, the jury cannot be expected to be sufficiently sensitive to the first amendment interests involved in any given proceeding.”); Frederick Schauer, \textit{Slippery Slopes}, 99 Harv. L. Rev. 361, 377 (1985) (“Jurors . . . are asked to protect those who are unpopular . . . .”). For a recent behavioral analysis that distinguishes commercial speech cases from illegal advocacy cases, see Paul Horwitz, \textit{Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment}, 76 Temp. L. Rev. 1, 9 (2003). No doubt such risks attach to the evaluation of minority religious beliefs and organizations.

\textsuperscript{371} See Ely, supra note 14, at 112; Kalven, supra note 48, at 61 (discussing New York Times Co. v. Sullivan and the difficulties of “putting the speaker to the risk of proof before fallible judges, juries, or administrative officials”); Murphy, supra note 92, at 188–90; Schauer, supra note 143, at 1190–91; Stone, supra note 67, at 73 (discussing demerits of a “balancing” approach to content-based regulation); see also Bollinger, supra note 53, ch. 3 (investigating the connection between popular public opinion and outcomes in adjudication).


\textsuperscript{373} See Wisconsin v. Yoder, 406 U.S. 205, 225 (1972).

\textsuperscript{374} Ely, supra note 17, at 1482 n.3.

\textsuperscript{375} See Yoder, 406 U.S. at 235 (“It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some ‘progressive’ or more enlightened process for rearing children for modern life.”).

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And insofar as one adopts certain antidiscrimination principles over per se liberty enhancement, the need for litigant sensitivity probably abates.\textsuperscript{376}

3. Impotence, Potence, and Constitutional Hydraulics.—Potency problems are another issue, even if we could anticipate no improper favoritism or animus. They are also unabashedly normative.

First, litigant-sensitive decisions might be too weak to accomplish First Amendment purposes, insofar as they inhibit the judiciary’s ability to prevent or remedy systematic government wrongdoing. A radically insensitive doctrine can include tools like overbreadth and strong antidiscrimination norms, which can quickly respond to problematic government practices. If one is convinced that the only defensible First Amendment goal is eradicating disparate treatment of and official animus toward minority faiths and opinions, then excising litigant sensitivity might be acceptable. Moreover, a litigant-sensitive claimant \textit{defeat} prevents a flat validation of a government reason, rule, or practice, thereby preserving a measure of uncertainty. Litigant insensitivity avoids that problem. And yet litigant sensitivity might be too \textit{strong} in some situations. Exemptions from otherwise neutral and untargeted regulation, for example, privilege a claimant and interfere with concededly valid government objectives.\textsuperscript{377}

The potential privileging and disruption is magnified because of a hydraulic force in constitutional argumentation—the sensible tendency to categorize and aggregate private conduct noted above.\textsuperscript{378} A jurisprudential and epistemological problem gently pushes against a singular attention to claimant conduct. Even if private conduct must be incorporated into judicial analysis, it is often preferable to think in generic, aggregated categories. Presumably the claimant must fall into the judicially articulated category; but thinking beyond the individual claimant can be indispensable to sound judgment. A categorical analysis helps reveal consequences for one ruling

\textsuperscript{376} See Alexander, \textit{supra} note 67, at 927 (“[S]omewhat counterintuitively, the First Amendment dictates that speech \textit{not} be treated as important (or as unimportant).”). However, even then one might make an exception for assessment of claimant conduct intended to test for government pretext. See \textit{supra} Part IV.A.2. (discussing safeguards).

\textsuperscript{377} See Employment Div. v. Smith, 494 U.S. 872, 888 (1990) (asserting an acute problem with free exercise exemptions in a society of diverse religious faiths); Stone, \textit{supra} note 67, at 75–76 (noting risks of disruption, alternative means of expression, and the threat of strategic behavior by claimants in arguing against strict scrutiny for content-neutral regulation); \textit{see also} Reynolds v. United States, 98 U.S. 145, 166–67 (1879). Note that the threat of strategic behavior to government interests might vary according to the nature of the claim and the relevant state action. For example, conduct motivated by sincere religious belief might be generally more difficult to ascertain than expressive conduct, insofar as the latter is social by definition. As well, different kinds of government regulations, programs, and subsidies might correlate with different levels of false claims. See Mayer G. Freed & Daniel D. Polsby, \textit{Race, Religion, and Public Policy}: Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 22–30 (distinguishing, for example, \textit{Wisconsin v. Yoder} from \textit{Sherbert v. Verner}).

\textsuperscript{378} See \textit{supra} Part IV.E. It should be noticed, however, that certain forms of litigant insensitivity are as disruptive as can be. There is nothing moderate about declaring a government rule facially invalid for overbreadth or because improperly content-based.
rather than another, and using relatively generic categories can give superior guidance for future controversies.\textsuperscript{379} True, the claimant’s story might assist the judiciary in building these categories. Yet often there will be no guarantee that the particular claimant is representative of those similarly situated with respect to government action. Such problems are not sufficiently serious to rule out all attention to claimant conduct, but they are important notes of caution. Care must be taken even when claimants are used merely for illustrative purposes.

Some of these attacks contributed to the virtual elimination of litigant-sensitive exemptions in free exercise doctrine. The opponents of multifactor balancing prevailed.\textsuperscript{380} More important for present purposes, the substance of the resulting rules reflected a commitment to one type of antidiscrimination norm, rather than undifferentiated promotion of religious liberty. Fears about disrupting “neutral” government operations were minimized, as were doubts that the judiciary could fairly evaluate exemption claims. If judged against a primary mission of preventing official antipathy toward religious faith, little or nothing was lost.\textsuperscript{381} The transition in the free exercise field opens the possibility of export to other clauses.

C. Virtues in Well-Placed Forms of Litigant Sensitivity

Despite the objections, litigant sensitivity has a defensible foundation in current First Amendment law. Not every kind of litigant sensitivity will be endorsed here, however. Filters, for example, might be eliminated without serious sacrifice. In many instances they already have been.\textsuperscript{382} In contrast, safeguards are quite easy to justify. They are short logical extensions of other commitments. The other forms of litigant sensitivity are more susceptible to reasonable disagreement. The safest conclusion, then, is that First Amendment law should retain a degree of litigant sensitivity. The question of its precise and proper form can be reserved for future consideration.

1. Safeguards as Wedge, Filters as Dispensable.—It takes relatively little effort to defend litigant-sensitive safeguards. Consider first the type of safeguard that tests claimant conduct against “unprotected” categories. Insofar as the judiciary is committed to devising such categories at all, policing their boundaries is important. Any decisionmaker can dutifully block-quote the description of an unprotected speech category without understanding, or caring to understand, whether the claimant’s conduct properly

\textsuperscript{379} See supra Parts IV.D.3, IV.E.
\textsuperscript{380} See Smith, 494 U.S. at 889 n.5 (“[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”).
\textsuperscript{381} See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523–24 (1993) (post-Smith) (holding that a city violated the free exercise clause by singling out religious ritual).
\textsuperscript{382} See supra Part IV.B.
falls within it. Availability of appeal with a relatively unrestrained scope and standard of review can deter and correct such errors. In fact, safeguards are teaching tools in more than one respect. Applying generalized, abstract categories to particular settings illuminates their boundaries and facilitates critical thinking about their reach and propriety. It makes their meaning more concrete.

Such safeguards, moreover, are nearly untouched by the general arguments against litigant sensitivity. They add little complexity to the law—they follow the lines of pre-existing categories—other than admittedly important issues about the proper scope of independent appellate review in light of institutional limitations. Nor is there a separate potency issue. These safeguards are no more disruptive of government practices than the intended impact of the very categorical boundaries that they aim to enforce. Furthermore, concerns about judicial error and bias actually animate the desire for safeguards. With minor exceptions, the purpose of these category-oriented safeguards is to protect claimants from regulation, absent a high degree of confidence that their conduct is “unprotected.” How much good they will do can be debated. For example, appellate judges might be able to provide more dispassionate analysis than trial judges (or juries), but it seems difficult to conclude that they are actually insulated from societal preferences. In any event, the purpose of safeguards is relatively clear and sensible.

Similar justifications apply to case-specific testing for the presence of legitimate government interests. When prophylactic rules are inappropriate, this testing can protect individual claimants from government overreaching. If the state has a substantial reason for the impact on

383 One might question the marginal utility of involving more judges in the task of category application. Perhaps there is no better than an equal chance of error or bias at each iteration, while the system simply racks up costs associated with additional procedure. And one would expect the trial-level fact-finder to possess the best grasp of the record evidence. Nevertheless, there might be strong arguments for judges checking juries on these issues, and the very existence of appellate courts suggests a commitment to redundancy (at least for some issues). Additional layers of judicial review usually work from more finely honed arguments already vetted in another forum; it might be easier for appellate judges to see the long view; judicial passions might subside a bit at the appellate level; and an appellate opportunity might enhance perceived legitimacy of judgments. See generally Paul D. Carrington, Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542, 550–51 (1969) (stressing the risk of trial-court megalomania); Martin H. Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 COLUM. L. REV. 89, 97 (1975) (positing the importance of “the appearance of justice in the eyes of the litigants” and preserving faith in the legal system).


385 Assuming that an overinclusive, prophylactic buffer was not built into the description of the category in the first place.

386 See supra Part IV.A.1 (characterizing Connick v. Meyers as an outlier).

387 See supra Part IV.A.2.
constitutional liberties, that reason should show itself in the record. Such safeguards likewise allay fears of bias and error. By directing judicial attention to government interests, this form of litigant sensitivity can uncover actual and improper government justifications. An excellent way to identify pretext is by demonstrating that an asserted government concern was simply not implicated by the facts of a given case. Safeguards can thus further both the enforcement of antidiscrimination norms and a more general goal of promoting individual liberty.

However logical, these arguments are confined. Aside from speaking only to safeguards, that form of litigant sensitivity depends on other commitments. Ensuring that individual claimants fall into certain conduct categories, for example, follows from a judicial dedication to such boundaries. Eliminate the categories and the justification for litigant sensitivity disappears as well.388 Likewise, case-specific interest testing links with judicial opposition to prophylactic government regulation. Where that opposition fades, the necessity for such safeguards recedes. So this first line of defense for a mixed model might establish a wedge against radical insensitivity, but a narrow one.

Filters, by contrast, are on shakier footing. Instead of furthering another given mission, they tend to hinder litigant-insensitive goals. The judiciary is less able to punish or prevent problematic state action when it must

388 Compare free exercise doctrine. Although there is room for policing the boundary between "religious" and non-religious beliefs, conduct, and institutions, see supra note 121 and accompanying text, contemporary law has never had a list of beliefs, conduct, or institutions that the judiciary is willing to call both "religious" and "unprotected," see supra note 57 and accompanying text. Therefore, safeguards might be less important in the free exercise field, which counsels against unamended export of the free exercise approach to litigant sensitivity.

There are several other ways to distinguish free exercise from speech/press and association litigation. Some readings of the establishment clause emphasize "neutrality" between religious and secular activity. See Wallace v. Jaffree, 472 U.S. 38, 52-53 & n.37 (1985); Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 875 (1986). A version of that principle (although not Laycock's) could forbid courts from considering claims that are both litigant-sensitive and defined by religious belief. See Sherbert v. Verner, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting) (objecting to a judicially mandated exemption); see also Eisebruber & Sager, supra note 20, at 264 (rejecting free exercise theories that privilege religious over secular conscience). But see McConnell, supra note 104, at 1138-40 (distinguishing free exercise from race-related equal protection claims, and likening it to legal protection for speech and the physically disabled). In addition, one might arrive at a relatively broad definition of "religiously" motivated conduct, cf. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (putting Secular Humanism on a list of religions), and see a special difficulty for courts attempting to separate sincere from feigned belief. Speech/press and association claims, as a class, might be less socially disruptive and easier to adjudicate. Cf. Choper, supra note 13, at 61-63 (pointing out a variety of factors affecting such conclusions, including the definition of religion and the form of judicial scrutiny). On the other hand, we might find that religionists suffer from more serious constraints on alternatives. Perhaps alternative methods of communication should be more readily imposed than effective prohibitions on a religious practice.

I leave a detailed assessment of potential differences for another day. My purpose here is to recognize that one need not adopt the same attitude toward litigant sensitivity across all clauses of the First Amendment.
wait for a sufficiently respectable claimant. Yet the claimant as well as more sympathetic characters might have all been threatened or hit by the same government rule, reason, or practice. As discussed above, the objection to challenges by claimants who are not otherwise furthering First Amendment values does not seem to be dictated by constitutionally mandated prerequisites for adjudication. Filters do not duplicate justiciability norms, defeating only those who lack a concrete and judicially redressible interest. In many cases, the claimant will be facing a loss of liberty or money.

Perhaps filters make sense under particular conditions. Given a persuasive case for government discretion and private conduct at the outer edges of First Amendment value, some claimants could be understandably prevented from demanding judicial scrutiny of government operations. Additionally, expeditious judicial intervention is arguably less crucial when the challenged state action seems episodic, rather than entrenched in a government rule or practice. Unlike commercial speech litigation, many public employee speech cases appear to satisfy all of these conditions. The public concern filter might well survive for them.

2. The Value-Laden First Amendment.—At least beyond safeguards, litigant sensitivity is subject to an objection from improper inquiry, risk of error, and threat of bias. There is no denying that a consistent goal for modern First Amendment law has been minimizing improper assessments of unpopular claimants. The core question is whether such concerns truly advantage radical litigant insensitivity over a mixed model.

There are strong reasons to believe that both models are subject to similar objections. Especially in the face of ambiguity in the constitutional text, it is absurd to think that courts can be restricted to uncontroversial and value-free judgments in First Amendment cases. Doctrinal structure is no cure because the enterprise of adjudicating First Amendment disputes is unavoidably value-laden. Which is not to become overly excited about the

389 See supra text accompanying notes 117–118.
390 Standardized government employment rules or practices are not now required as a matter of First Amendment law and do not appear to play a major role in the Supreme Court's treatment, anyway. See supra note 180 and accompanying text. Commercial speech cases leave a different impression. See supra note 198 and accompanying text.
391 This problem is marginally less pressing when claimants themselves are requesting a litigant-sensitive immunity from otherwise valid government regulation. Claimants must waive at least part of their objections to judicial scrutiny when it is their conduct that generates the constitutional claim. Still, the issue of unequal distribution of exemptions because of decisionmaker bias is not solved by litigant consent. And there is still an issue of proper judicial function. Cf. Boy Scouts of Am. v. Dale, 530 U.S. 640, 651, 653 (2000) (deferring to the assertions of an expressive association); CFTC v. Schor, 478 U.S. 833, 851 (1986) (“When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.”).
392 For an unapologetic view on this point and “free speech,” see STANLEY FISH, THE TROUBLE
prospect, only to recognize that the risk of bad decisions by the judiciary comes in many forms. For example, even a radically insensitive model is highly likely to maintain definitions of "speech" and "religion." That will require judgment. At least for speech, the law must be formulated to permit a range of regulation inhibiting what is popularly and historically referred to as "speech." Many of those judgments will rest on assessments of government or social interests. One way or another, the state will be permitted to punish perjury. The Uniform Commercial Code is not unconstitutional. A member of the public will properly be removed from the courtroom for bel- lowing during oral argument. In other words, discomfort with evaluating private conduct varies with the particular character and purpose of the inquiry.

Similar unease about judicial evaluation extends to pure forms of litigant insensitivity. Brazenly assessing from afar the work of elected officials and their agents is something that we permit voters to do without formal constraint. But the judiciary? We might pause before endorsing court-run inquisitions into whether a regulation will be effective or reasonably crafted to solve a "real" social problem and thereby further a judicially acceptable government goal. The same can be said for identifying the "actual" purpose of executive or legislative action. Such questions are probably tolerable in view of the constitutional values served and the practical alternatives. They are not, however, obvious outgrowths of the judiciary's institutional strengths, nor are they removed from subjectivity and highly debatable policy judgments.

Yoder might illustrate these issues, too. Clearly the Court had a soft spot for the Amish. But the Yoder Court also relied on the weakness of the State's interests. Under the circumstances, a purported need for institutionalized schooling between the ages of fourteen and sixteen likely seems

WITH PRINCIPLE chs. 5-7 (1999). One can accept value-laden First Amendment law, however, without rejecting all distinctions between judicial and nonjudicial reasoning, and between law and politics. Cf. Fallon, supra note 330, at 143 (acknowledging reasonable disagreement "without also accepting that what ought to be done is a matter of mere subjective opinion"); Post, supra note 185, at 683-84 ("[T]he boundaries of public discourse cannot be fixed in a neutral fashion."); Post, supra note 196, at 17 (stating that constitutional law presupposes active characterization of the social world).

393 See supra note 121 and accompanying text.

394 Note, too, that First Amendment coverage for non-verbal and non-written but still communicative conduct raises additional issues of judgment and value. See generally Frederick Schauer, Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 GEO. L.J. 899, 905-06 (1979).

395 See, e.g., United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000); Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (restating the test for "reasonable" restrictions on the time, place, or manner of speech in a public forum).

trivial to any armchair policymaker. Yet a judicial assessment is bothersome, even if warranted.

Risk accompanying claimant evaluation is an argument against all forms of litigant sensitivity only if that risk is somehow worse than the dangers arising from alternative analytical models. This is a difficult question, subject to both quantitative and qualitative analysis. It might be fair to guess that the risks are asymmetrical once we account for mainstream First Amendment priorities. Some traditional criticism of judicial performance in the field emphasizes the great risk of underprotection for unpopular claimants.\(^{397}\) Boldly assuming that the unsympathetic character of a particular claimant will not taint the evaluation of government conduct, maybe it is safer to channel judicial attention away from individual claimants. Yet that conclusion itself depends on a contestable judgment about the harm done by different kinds of judicial errors. We can only move and structure valuation questions, not avoid them altogether.

An important factor, however, is the version of radical insensitivity under review. Litigant-insensitive tests can be devised to avert evaluation of some value-laden issues better left to more democratic institutions. Those alternative tests might lack subtlety and flexibility, but they certainly exist—such as forbidding all government targeting of (valuable) speech or religion, without considering the efficacy of the state action at issue. At the same time, developing that advantage for litigant insensitivity comes at a price, and it points up goals for which the model is not well-suited. If the radically insensitive model becomes sufficiently mechanical to truly minimize judicial choice and therefore bias risks, courts lose capacity to delve into the full range of circumstances for unique and unanticipated situations.

3. **Broad Missions and Fine Tools.**—Radical insensitivity is generally simpler, and more flatfooted, than a mixed model. We have already seen that the various forms of litigant sensitivity serve several functions, and enable the pursuit of goals beyond prohibiting government preferences among ideas and religions. Sacrificing that flexibility and sophistication would have important consequences.

Consider filters and triggers. Each calls for a valuation of claimant conduct—the first in order to seal a victory for the government regardless of any defects in its reasons or rules, the second to alert the judiciary to burdens on private conduct. Given broad authorization to make cost/benefit assessments, theoretically there will be situations in which a particular claimant’s conduct should be regulated even if the regulation is flawed, or when the claimant’s conduct should be exempted even if the regulation is otherwise perfectly crafted. A radically insensitive model is blind to these situations. “Bad” claimants always escape “bad” government rules or reasons, and “good” claimants always get hit with “good” rules or reasons.

\(^{397}\) See supra notes 370–371 and accompanying text.
Certainly it will be difficult for judges to identify the conditions under which filters and triggers are defensible. The assessment is, however, familiar\(^3\) and it is an option that must be overcome with argument.\(^3\)

Similar observations can be made for limited holdings and balancing elements. These tools can moderate case outcomes and preserve judicial flexibility for the future.\(^4\) They permit an array of creative solutions unavailable under any radical model. Disruption of legitimate government goals can be minimized, and liberties suggested by the Amendment can be enhanced. In addition, limited holdings can be deliberately tentative. Courts might enter new fields with caution, considering limited information and lack of expertise, and therefore attempt to restrain the impact of initial decisions. To forbid all of this, one must take an extraordinarily firm stance against judicial choice—and perhaps an inconsistently rosy view of judicial ability to prescribe flat rules at early moments in time.

Radical insensitivity can be fashioned to include tentative and limited holdings, too. The judiciary might only consider government justifications and actual motives for action in individual cases, for example. But leaving out all litigant-sensitive resolutions forecloses an additional dimension of choices. Although radically insensitive courts might narrow their holdings by reference to private conduct categories, those results could not easily be enforced (under the First Amendment, anyway) without injecting litigant-sensitive safeguards into the doctrinal structure.\(^4\)

Meticulously sculpted case resolutions do have a jurisprudential stopping point, as suggested above. Categorical thinking is often attractive and has a way of raising the stakes in any particular case, especially at the Supreme Court. But this is not an argument against litigant sensitivity. This is a reason for courts to think a little larger even when claimant conduct matters.

In fact, these hydraulics undercut some of the objections to litigant sensitivity. If the categories are apparent, then we might expect better clarity and guidance for private parties, government officials, and judicial officers in future cases. Moreover, worries about biased or inequitable outcomes could soften as adjudicators place individuals into defensible categories. Claimant attributes that should be irrelevant (like particular political or religious beliefs) can fade as the individual is associated with others (like “all political messengers” or “all those with sincere religious

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\(^3\) See, e.g., Virginia v. Hicks, 539 U.S. 113, 119–21 (2003) (discussing the appropriate reach of overbreadth doctrine in terms of social costs and benefits).

\(^3\) For arguments against the now-faded instances of filters, see Parts IV.B and V.C.1.

\(^4\) On the virtues of smaller-scale thinking in First Amendment law, see, for example, SUNSTEIN, supra note 346, at 174. See generally Sunstein & Ullmann-Margalit, supra note 364, at 201–03 (arguing that “small steps” can be better than constructing rules in light of information deficiencies, rapid change, and unpredictable effects on complex systems, despite problems with adequate notice, facilitating planning, and status quo bias).

\(^4\) See supra note 121 and accompanying text.
belief

And serious consequences suggested by relief in the instant case can promote healthy judicial restraint. Given a list of distinctions that probably should not be made in the future (again, lines separating one political or religious belief from another), skirmishes over individualized and seemingly costless privileges become larger-scale conflicts subject to substantial objection. When drastic results of a particular ruling appear unlikely or threatening to a preferred result, such arguments have been ridiculed. But there is nothing illegitimate about raising these red flags.

Finally, litigant sensitivity is certainly flexible enough to advance more than one normative vision of the First Amendment. Sometimes it confirms or dispels litigant-insensitive doubts about government motive and impartiality; the NAACP’s associational rights challenges are one example among many. In addition, litigant sensitivity can more generally further the cause of private liberty at the expense of state action. Triggers, like safeguards, are powerful examples. Whatever difficulties there are in designing and operating them, triggers are fashioned for a laudable purpose: liberating constitutionally valued private conduct, regardless of government’s innocent intentions, when the justifications for the regulatory burden seem inadequate. At least some cases will be clear enough.

VI. CONCLUSION

State action is an indispensable element in First Amendment adjudication. Courts must know something about the character of government conduct to sensibly resolve such litigation, and some cases should be closed without even considering individual claimant conduct. So, litigant sensitivity is not always appropriate. And yet its use in certain situations is well justified—for example, to police the lines of less-valued conduct categories, and to facilitate the discovery of improper government purpose. Other strands of litigant sensitivity—triggers, balance elements, and limited holdings—are more difficult to systematize, which is part of their charm. They multiply analytical options, presenting opportunities for creativity and compromise.

Litigant sensitivity is not without risk. Any judicial assessment of claimant conduct is subject to worry over error and bias. But those con-

402 See, e.g., McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 339 n.3, 341–43 (1995) (analyzing the general tradition of anonymous speech implicated by the statute); Martin v. City of Struthers, 319 U.S. 141, 143–44 (1943); Frederick Schauer, Harry Kalven and the Perils of Particularism, 56 U. CHI. L. REV. 397, 398 (1989) (“Although the principle of free speech concerns the expansion of knowledge, the law of free speech, paradoxically, concerns limiting the knowledge of the free speech decision maker.”).


404 See supra text accompanying notes 253–258.

405 See, e.g., McConnell, supra note 104, at 1142–43.
cerns are not unique to litigant-sensitive inquiries. First Amendment law does and always will include debatable norm choices and valuations, whichever variables are stressed as a matter of law. And concerns about litigant sensitivity might be allayed with a preference for categorical analysis of private conduct, which also can enhance clarity and recognition of consequences. In any event, an openly mixed model is superior to radical insensitivity.

One lesson to learn from the history of First Amendment litigation is that judges and juries cannot always be trusted to fairly evaluate the quality of claimant conduct, especially when ideologically charged expression or deeply held religious views are at stake. Another lesson, one just as valuable, is that the First Amendment is implicated in countless circumstances; and those disputes can be and have been resolved through many different analytical structures. This is no reason to adopt a fundamentalist preference for fact-bound, let alone litigant-sensitive, First Amendment law. Legal complexity and nuance generate their own difficulties. But when guidance through doctrine is appropriate, it should be constructed with an understanding of the bounded yet wide range of models that are both theoretically sound and practically useful.