

THE UNFULFILLED PROMISE OF CHILLING EFFECTS DOCTRINE

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ABSTRACT

Concern about chilling effects has pervaded First Amendment law throughout its modern history. But despite the cases' frequent reference to the problem of chill, the role of chilling effects in First Amendment doctrine is deeply contested and uncertain. As this Article shows, that role has varied dramatically, with different courts conceptualizing chilling effects in different ways at different times, and with little effort to reconcile their conflicting understandings. As the Article also shows, this contestation and doctrinal instability reflects something profound about the concept of chill, and its implications for judicial practice. Chilling effects is a fundamentally anti-formalist concept—it requires courts to focus on not merely what a government action or law does or says on its face, but its actual or likely effects in the world. As First Amendment doctrine of recent decades has become broader in scope but more formalist, courts have struggled to develop a coherent or compelling account of the place of chilling effects within that doctrine. The result is a confused and under-protective body of law that is ill-equipped to meet the challenges of the current moment and which threatens to leave the First Amendment's promise of an uninhibited, robust and wide-open public sphere unfulfilled.

INTRODUCTION

A chill has descended on the land of the First Amendment. Journalists report that their sources are scared to speak on the record because of fears of retribution.¹ Former military officials recount that “[t]he fear in the Pentagon

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¹ Elisabeth Bumiller, *‘People Are Going Silent’: Fearing Retribution, Trump Critics Muzzle Themselves*, N.Y. TIMES (Mar. 6, 2025), <https://www.nytimes.com/2025/03/06/us/politics/trump-democracy.html>; Eric Lipton NYT (@ericlipton.nytimes.com), *Post*, BLUESKY SOCIAL (Apr. 10, 2025), <https://bsky.app/profile/ericlipton.nytimes.com/post/3lmhvhstn6c2z> (“The fear among academics and lawyers now talking on the record on just about any topic that involves the federal government or the White House is really extraordinary and worrisome, and getting worse, it seems to me, every week. Dissent by an establishment figures becoming verboten in the US”); Raphael Satter et al., *Cybersecurity Industry Falls Silent as Trump Turns Ire on Sentinel One*, REUTERS (Apr. 10, 2025), <https://www.reuters.com/world/us/cybersecurity->

today is palpable,” and that officers are too afraid to express disagreement with the President or even be associated with those that do.² Student journalists are asking for articles they wrote to be taken offline out of fear of reprisal or, for international students, deportation.³ Law firms are declining to take up pro bono litigation challenging the Administration’s policies—litigation that once would have been a point of pride.⁴ Academics are changing their research agendas and hesitating before they speak or teach about certain topics in case already crippling funding cuts are made even worse.⁵ Social media companies are changing their content moderation policies—which the Supreme Court only recently affirmed are protected expressive choices⁶—to align with the Administration’s presumed preferences.⁷ Universities are doing the same with their campus speech rules,⁸ and firing or disciplining staff for expressing opinions the Administration

industry-falls-silent-trump-turns-ire-sentinelone-2025-04-10/.

² Frank Kendall, *Opinion | Fear Comes to America*, N.Y. TIMES (Jul. 21, 2025), <https://www.nytimes.com/2025/07/21/opinion/trump-fear-pentagon-harvard.html>.

³ Anvee Bhutani, *US Student Journalists Go Dark Fearing Trump Crusade against Pro-Palestinian Speech*, GUARDIAN (Apr. 7, 2025), <https://www.theguardian.com/us-news/2025/apr/07/student-journalists-remove-stories-trump>; Christine Fernando, *College Journalists Wrestle with Transparency as Students Fear Deportation for Speaking Out*, A.P. NEWS (Apr. 25, 2025), <https://apnews.com/article/trump-universities-free-speech-student-journalists-deportation-c844570d3e429abd1f37205f7c164133>.

⁴ Matthew Goldstein & Jessica Silver-Greenberg, *Some Giant Law Firms Shy Away From Pro Bono Immigration Cases*, N.Y. TIMES (May 6, 2025), <https://www.nytimes.com/2025/05/06/business/trump-law-firms-pro-bono-immigration.html>.

⁵ Warren Cornwall, *Trump’s ‘Fear Factor’: Scientists Go Silent as Funding Cuts Escalate*, SCIENCE (May 12, 2025), <https://www.science.org/content/article/trump-s-fear-factor-scientists-go-silent-funding-cuts-escalate>; Alan Blinder, *Professors Are Changing What They Teach, Even Far From Trump’s Gaze*, N.Y. TIMES (Mar. 16, 2026), https://www.nytimes.com/2026/03/16/us/professors-change-teaching-trump.html?campaign_id=9&emc=edit_nn_20260316&instance_id=172562&nl=the-morning®i_id=198088677&segment_id=216730&user_id=5ef51fcd72bc2804f54c6421ed56441e; Sonel Cutler & Jacquelyn Elias, *Nearly One-Third of Faculty in Red States Say They’ve Censored Their Research*, CHRONICAL OF HIGHER ED. (Apr. 24, 2026), <https://www.chronicle.com/article/nearly-one-third-of-faculty-in-red-states-say-theyve-censored-their-research>.

⁶ *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024).

⁷ See, e.g., Joel Kaplan, *More Speech and Fewer Mistakes*, META NEWSROOM (Jan. 7, 2025), <https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes/>; Nico Grant & Tripp Mickle, *YouTube Loosens Rules Guiding the Moderation of Videos*, N.Y. TIMES (Jun. 9, 2025), <https://www.nytimes.com/2025/06/09/technology/youtube-videos-content-moderation.html>.

⁸ Robert Tait, *Columbia Adopts Controversial Definition of Antisemitism amid Federal Grants Freeze*, GUARDIAN (Jul. 16, 2025), <https://www.theguardian.com/us-news/2025/jul/16/columbia-antisemitism-trump-administration-funding>.

condemned.⁹ As one journalist at an outlet being sued by the President described the mood at his workplace, “I think there is a lot of fear over there. Fear of losing their jobs. Fear of losing their country. Fear of losing the First Amendment.”¹⁰

Even these many signs of chill are no doubt the tip of the chilled iceberg.¹¹ It is typically hard to find people announcing they feel chilled because, well, they are chilled. Any visible signs of chill must therefore be understood as evidence of much broader self-silencing. Indeed, chilling effects are an attractively efficient way of dealing with political dissent precisely because they constitute a form of prior restraint administered by the speaker themselves and thus leave little trace in the public record.

To be sure, America still has plenty of speech that is free. Every day the leading newspapers in the country publish criticism of the President.¹² Opposition politicians openly campaign against the Administration and its policies.¹³ Protestors take to the streets by the millions to publicly and loudly signal their discontent.¹⁴ On any social media platform you can still find many people willing to contradict, mock, satirize, and swear at the Commander in Chief. But it would be a mistake to be complacent about the vitality of First Amendment freedoms.¹⁵ A chilled speech environment may still be a very vibrant one, with just certain voices or perspectives missing.¹⁶

⁹ Stephanie Saul, *The Firing of Educators Over Kirk Comments Follows a Familiar Playbook*, N.Y. TIMES (Sep. 22, 2025), <https://www.nytimes.com/2025/09/22/us/firing-educators-kirk-free-speech.html>.

¹⁰ Todd Spangler, *Defeat the Press: How Donald Trump’s Attacks on News Outlets Undermine the First Amendment*, VARIETY (Jul. 16, 2025), <https://variety.com/2025/biz/news/donald-trump-attacks-news-media-first-amendment-1236460374/>.

¹¹ Pun intended.

¹² See, e.g., The Editorial Board, *Opinion | There Is a Way Forward: How to Defeat Trump’s Power Grab*, N.Y. TIMES (May 1, 2025), <https://www.nytimes.com/2025/05/01/opinion/trump-100-days-opposition.html>; Edith Olmsted, *Trump Loses It After Wall Street Journal Trashes His Economic Policies*, NEW REPUBLIC (Mar. 13, 2025), <https://newrepublic.com/post/192708/donald-trump-wall-street-journal-economic-policies>.

¹³ See, e.g., Lauren Gambino, *Sanders and AOC Tell Packed Arena Trump is ‘Screwing over’ Working Class*, GUARDIAN (Mar. 21, 2025), <https://www.theguardian.com/us-news/2025/mar/21/bernie-sanders-aoc-arizona-rally-trump-musk>; Mike Catalini & Stephen Groves, *Sen. Cory Booker Sets Record with Marathon Senate Speech Opposing Trump’s Agenda*, L.A. TIMES (Apr. 1, 2025), <https://www.latimes.com/world-nation/story/2025-04-01/new-jersey-sen-cory-booker-launches-marathon-speech-to-protest-trumps-agenda>.

¹⁴ April Rubin & Rebecca Falconer, *“No Kings” Anti-Trump Protests Draw Millions, in Photos*, AXIOS (Jun. 15, 2025), <https://www.axios.com/2025/06/14/no-kings-protests-usa-june-14-trump-military-parade>.

¹⁵ Cf. Zack Beauchamp, *Trump is Losing*, VOX (Apr. 30, 2025), <https://www.vox.com/politics/410966/trump-democracy-100-days-losing>.

¹⁶ JONATHAN W. PENNEY, CHILLING EFFECTS: REPRESSION, CONFORMITY, AND POWER

The observable signs of chill, and the broader invisible phenomenon they represent, therefore need to be taken seriously as indicators of an unhealthy speech environment. They are fundamentally at odds with the First Amendment’s promise of an “uninhibited, robust, and wide-open” public sphere.¹⁷

If the First Amendment stands for anything, it is the principle that people should be able to express their views on matters of public concern without fear of the government.¹⁸ This promise extends beyond protection against direct censorship. The First Amendment also protects against government actions that inhibit people from expressing their views, even when those actions *do not* directly regulate that protected activity.¹⁹ This is what it means to say that the First Amendment protects against government-created “chilling effects.”

First Amendment doctrine talks a big game when it comes to chilling effects. The cases tell us that First Amendment freedoms must be protected “not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference”²⁰ because they are “delicate and

IN THE DIGITAL AGE 140 (2025) (“The true impact of chilling effects is not only that it chills or deters certain speech and activities, but also in doing so, helps foster the production of more conforming speech and activities, which will almost always be more consistent with, and conforming to, existing power structures in society.”).

¹⁷ New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

¹⁸ See, e.g., Wilkinson v. United States, 365 U.S. 399, 422 (1961) (“Our Constitution, in unequivocal terms, gives the right to each of us to say what we think without fear of the power of the Government”); Police Dep’t of City of Chicago v. Mosley, 408 U.S. 92, 95, (1972) (“above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).

¹⁹ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 693 (1978) (“A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.”); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1655 (2012–2013) (“the term ‘chilling effect’ refers to a concern that an otherwise legitimate rule will curb protected expression outside its ambit.”).

“Chilling effects,” as I use it in this Article, refers only to chilling effects created by *governmental* action. Social norms and other private pressures can also inhibit people from speaking: Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1489–1502 (2021–2022). But First Amendment doctrine, and this Article, focus on the state action that is proscribed by the Constitution: U.S. CONST. amend. I (“Congress shall make no law...”). This may include cases where government action enables a private reaction to speech that is chilling—but in these cases there must still be initial state action for there to be a First Amendment claim: Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1475 (2013).

²⁰ Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).

vulnerable,”²¹ “sensitive,”²² of “transcendent value”²³ and “supremely precious in our society.”²⁴ They proclaim that “inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.”²⁵ They insist that concerns about chilling effects are why, in an oft-quoted refrain repeated by Chief Justice Roberts just a few years ago, First Amendment freedoms “need breathing space to survive.”²⁶

The gap between these statements and the contemporary reality of chill highlights profound doctrinal confusion and uncertainty about what this promise means in concrete terms. How is it that the famously speech-protective First Amendment,²⁷ which explicitly recognizes the danger and harm of chill, is tolerating an environment in which so many people are afraid to speak because they fear government retribution? That is the question that this Article takes up.

The answer goes to the very nature of chilling effects as a legal concept, and its implications for how judges conceive of their role. Chilling effects is a fundamentally anti-formalist notion:²⁸ it requires courts to focus on not merely what a government action or law says or does on its face, but its likely effects in the world.²⁹ To recognize chill is to recognize that state action exerts a force on people and institutions beyond its formal sphere of operation—to recognize that fear is often a more powerful determinant of behavior than abstract legal rights. It thus requires judges to be suspicious of, and ready to police, the other branches of government and work out what is *really* going on, in order to determine if it impermissibly infringes expressive

²¹ Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963).

²² Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

²³ *Id.*

²⁴ Button, 371 U.S. at 433 (1963).

²⁵ Lamont v. Postmaster General, 381 U.S. 301, 305 (1965) (Brennan, J., concurring).

²⁶ Americans for Prosperity Found. v. Bonta, 594 U.S. 595, 609 (2021), citing Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963).

²⁷ See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 30–32 (Michael Ignatieff ed., 2005)

²⁸ “Formalism” defies easy definition, but when I use it in this Article I generally align myself with Fred Schauer’s definition: namely, the “concept of decisionmaking according to rule.” Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (“Formalism is the way in which rules achieve their ‘ruleness’ precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”) When I say chilling effects is an “anti-formalist notion” I mean this in two ways: first, as this Article will argue, chilling effects doctrine must respond to ever-changing techniques of speech suppression and therefore over-reliance on formal doctrinal categories will fail to recognize shifting threats; and second, recognizing *indirect* speech suppression requires looking at the effects of government action and not merely its form.

²⁹ See *infra* Part [XX].

freedom. It should be no surprise then that what I will call in this Article “chilling effects doctrine” first took its modern shape in the realist Warren Court era, when the Court adopted an expansive vision of its role in the constitutional order.³⁰ But the doctrine was rapidly domesticated and constrained by the more formalist Burger Court.³¹ This contraction has largely stayed in place in the decades since, but the Roberts Court has started to chafe against it, recognizing the dangers of a First Amendment doctrine that is too insensitive to chill. This leaves a confused body of law that is ill-equipped to meet the current moment’s profound challenge to expressive freedom—perhaps the most profound in decades. To assert claims based on chilling effects today is to make anti-formalist arguments in a formalist world, without clear guideposts.

The result is a doctrine mismatched to the current threats to the system of free expression. There are many ways that protections for free speech are still very strong. But governmental attempts to suppress speech adapt and evolve alongside First Amendment doctrine.³² If First Amendment doctrine does not continue to evolve too, it will be outpaced and outmatched. This Article therefore examines the past evolution of chilling effects doctrine with a view to understanding how that doctrine can and should continue to evolve.

The Article proceeds in three parts. Part I traces the history of chilling effects doctrine in First Amendment law. Although concerns about chilling effects have been present since the emergence of the modern First Amendment, the doctrine first explicitly took shape in response to the Second Red Scare, as governmental actors attempted to use indirect methods to suppress Communist expression and the civil rights movement. The need to respond to this repression led the Warren Court to develop an expansive vision of the role of chilling effects in First Amendment jurisprudence. But that vision was quickly reined in by the Burger Court, which took a more limited view of the chilling effects that judges should recognize and protect against. As Part I shows, that more constrained approach has largely prevailed to this day, albeit with haphazard and hard-to-reconcile exceptions.

Part II then explores what this history means for the present. As it shows, chilling effects doctrine is in a moment of flux today. Political and societal shifts have made chill a potent threat to a healthy public sphere, but the uncertainty and incoherence of existing doctrine has left courts unable to comprehensively respond.

Part III turns to filling these gaps, and outlines how First Amendment doctrine must adapt to provide more robust protection against not only the

³⁰ See *infra* Part [XX].

³¹ See *infra* Part [XX].

³² David Cole, *The New McCarthyism: Repeating History in the War in Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 1 (2003).

most blatant forms of government censorship, but also those more subtle or shrewd attempts to suppress free speech. From standing to remedies, First Amendment doctrine must reinvigorate its traditional sensitivity to the fragile nature of speech rights if it is to ensure that government-created chill can be recognized and remediated by courts. These changes are essential to make the First Amendment's promise real in practice. As this Article demonstrates, a right to free speech that cannot respond to the chill that pervades our current moment will be a right to free speech in form only.

I. THE SHIFTING ROLE OF CHILLING EFFECTS IN FIRST AMENDMENT DOCTRINE

The idea that the First Amendment protects against “chilling effects” is oft-invoked but rarely defined.³³ Perhaps its evocative name makes the concept seem self-explanatory. But in fact, what counts as a constitutionally problematic chilling effect is highly contested and not at all clear. The fundamental difficulty in defining the legal concept of chilling effects is that many if not most exercises of state power likely have some inhibitory effect on speech.³⁴ The challenge, then, is to identify when such inhibition crosses the line into impermissible chill.³⁵ As this Part shows, the Court has struggled mightily with this question, albeit largely implicitly. Different Courts have invoked chilling effects in different ways at different times, and with little effort to reconcile their conflicting understandings.³⁶

Scholarly treatments of the role of chilling effects in First Amendment doctrine, of which there are surprisingly few,³⁷ tend to focus on the doctrinal treatment of the concept at particular snapshots in time.³⁸ But, as this Part

³³ Schauer, *supra* note 20, at 689 (describing the tendency for the term to be “loosely employed”).

³⁴ *Id.* at 701 (observing that because “any rule will produce some excess deterrence and thus, some chilling effect ... to say that a regulation is unconstitutional because it has a chilling effect on protected activity is to say virtually nothing at all.”). See also Eugene Volokh, *Deterring Speech: When Is It McCarthyism - When Is It Proper*, 93 CAL. L. REV. 1419, 1449 (2005) (“not all actions that deter speech are unconstitutional or even improper. Some speech should be deterred.”).

³⁵ See, e.g., Schauer, *supra* note 20, at 701 (observing that because “any rule will produce some excess deterrence and thus, some chilling effect ... to say that a regulation is unconstitutional because it has a chilling effect on protected activity is to say virtually nothing at all.”). See also Volokh, *supra* note 34, at 1449 (“not all actions that deter speech are unconstitutional or even improper. Some speech should be deterred.”).

³⁶ Alex Chemerinsky & Erwin Chemerinsky, *Chill*, TEX. L. REV. (2026) (noting “the case law regarding chill is inconsistent”).

³⁷ *Id.* (“There has been remarkably little systematic examination of the concept of chill in the voluminous First Amendment literature”).

³⁸ See, e.g., Schauer, *supra* note 20 (the canonical account of chilling effects, evaluating

will show, such an approach obscures the fact that there have in fact been distinct judicial approaches to chilling effects doctrine.³⁹ Its goal is not to provide a complete account of how concerns about chilling effects have shaped First Amendment law. That would likely be impossible: Like the phenomenon of chill itself, the role of chilling effects in First Amendment doctrine is pervasive but often subterranean and hard to identify. Instead, this Part provides a kind of genealogy of chilling effects doctrine, heretofore missing in the literature, that documents the contrasting visions of the role that chilling effects should play in First Amendment doctrine in different eras. What tracing the evolution of chilling effects doctrine in this way illuminates is its shifting nature, the drivers of this change, and its capacity (and need) for further evolution.

Section A explores the prehistory of chilling effects and shows that concern about chilling effects has been present in modern debates about free speech for as long as such debates have existed, even if the phrase “chilling effects” did not appear until much later. Section B examines the Warren Court’s development of an explicit body of chilling effects law, in response to the Second Red Scare. As it shows, the Warren Court’s conceptualization of chilling effects doctrine was expansive but undertheorized. Section C explores how the weaknesses in the Warren Court’s conception of chill prompted the Burger Court to limit the protections the First Amendment provided against chill, a change which the Rehnquist Court maintained. The Part concludes in Section D by showing how, in the decades since, the Roberts Court has invoked chilling effects doctrine haphazardly. This leaves the law more confused—and less robust—than might be hoped for in times in which it comes to be tested.

A note on terminology: “chilling effects doctrine” is somewhat of a misnomer. As this Article will show, chilling effects play a wide variety of roles in First Amendment cases, and there is no single doctrine or rule that conclusively determines their legal impact in any particular case. Still, “chilling effects doctrine” (like, say, “equal protection doctrine”) is useful as an umbrella term for the family of legal rules that reflect concerns about chill. This simple label does not mean, however, that these rules are cohesive, clear or stable—indeed, the goal of this Part is to show just how much chilling effects doctrine is a site of continual contestation and contradiction.

the doctrine at that particular point in time); Kendrick, *supra* note 20; Penney, *supra* note 20; For a notable exception, see Youn, *supra* note 20.

³⁹ Chemerinsky & Chemerinsky, *supra* note 35 (complaining that the rules are simply inconsistent).

A. *Proto-Chilling Effects Doctrine*

Concern about the problem of chilling effects emerged in debates about free speech and government regulation far before the emergence of the evocative moniker. Indeed, dip into the record of any historically important debate about free speech in this country and you are likely to find evidence of concern about chill.

These concerns certainly pervaded debates about the constitutionality of the Sedition Act of 1798, which made it a crime to publish “false, scandalous, and malicious writing” against the government. For example, to explain why the Act threatened freedom of the press, Representative John Nicholas from Virginia remarked that under the law “no man would continue to print a newspaper, who could not *bring himself to be, at least, silent* as to any impropriety in the conduct of the General Government, which would deprive the people of a great part of its usefulness.”⁴⁰ He was not the only one to make this claim. As Jud Campbell recounts, in debates over the constitutionality of criminalizing sedition, “Republicans frequently argued [that] fear of being prosecuted might have a chilling effect on useful criticisms of government.”⁴¹

Concerns about chill were similarly common in the arguments over the criminalization of dissent during World War I. Charles Schenck—the defendant in one of the most famous cases in First Amendment history—made a chilling effects argument in urging the Supreme Court to strike down the Espionage Act in 1919. “[H]ow can a speaker or writer be said to be free to discuss the actions of the Government,” Schenck wrote in his brief, “if twenty years in prison stares him in the face if he makes a mistake and says too much? *Severe punishment for sedition will stop political discussion as effectively as censorship.*”⁴² When the Supreme Court rejected this argument and affirmed the constitutionality of the Espionage Act, Ernst Freund bemoaned the chill this would create. “To know what you may do and what you may not do, and how far you may go in criticism,” Freund insisted, “is the first condition of political liberty.”⁴³ A few years later, Zachariah Chafee made a similar argument to explain why *Schenck* was wrong. Criminalizing criticism of the war effort, he argued, only creates an “artificial unanimity of

⁴⁰ 5 ANNALS OF CONG. 2143 (remarks of Rep. Nicholas) (1798) (emphasis added). Thanks to Jud Campbell for this reference.

⁴¹ Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 279 (2017).

⁴² Charles T. SCHENCK, plaintiff in error, v. THE UNITED STATES OF AMERICA. (No. 1017) Elisabeth Baer, plaintiff in error., 1919 WL 20713, at *6 (emphasis added).

⁴³ THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND--AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 134 (Metropolitan Books 2013).

opinion” by chilling the expression of dissent.⁴⁴ That concerns about chill are present at these iconic moments in the First Amendment annals shows how naturally the concern about self-censorship flows from concerns about government power over speech.

It took time for these arguments to gain traction at the Court, but as soon as modern First Amendment doctrine began to take shape in the mid-20th century, the Court embraced a capacious and realist understanding of people’s behavior under a system of speech regulation that incorporated these concerns. The Court recognized that if a system of free expression was to achieve its democratic purposes, being too scared to speak in the first place is as harmful as being punished after having spoken.

The Court’s 1940 decision in *Thornhill v. Alabama* illustrates the central role that concern about chilling effects played in shaping modern First Amendment law from its earliest days, even if the decision does not itself use the term.⁴⁵ The Court in *Thornhill* held that peaceful picketing was constitutionally protected speech, because it is essential to the self-governance objectives of the First Amendment that people are able to “speak as they think on matters vital to them”⁴⁶ without “fear of subsequent punishment.”⁴⁷ This goal of ensuring people could speak as they think without fear led the Court to hold that plaintiffs could bring facial challenges in free speech cases without having to show that they themselves engaged in protected speech. The Court reasoned that such challenges were necessary because the harm of laws that purport to proscribe protected speech comes not only from any particular application but from the fact that an overbroad law “readily lends itself to harsh and discriminatory enforcement ... [which] results in a *continuous and pervasive restraint on all freedom of discussion* that might reasonably be regarded as within its purview.”⁴⁸ Such a continuous and pervasive restraint—what we would now call chill—was, the Court held, intolerable to the First Amendment.

So was born the First Amendment doctrine of overbreadth,⁴⁹ which to this day remains a doctrine unique exception to the general rule that litigants cannot sue to vindicate other people’s constitutional rights,⁵⁰ and which is

⁴⁴ Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 973 (1919).

⁴⁵ *Thornhill v. State of Alabama*, 310 U.S. 88 (1940).

⁴⁶ *Id.* at 95.

⁴⁷ *Id.* at 101–2.

⁴⁸ *Id.* at 97–98 (emphasis added).

⁴⁹ Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L. J. 853, 863 (1991) (“Commentators trace the doctrine’s origin to the 1940 decision in *Thornhill v. Alabama*”).

⁵⁰ Fallon, *supra* note 48, at 868 (“First Amendment overbreadth doctrine constitutes an essentially procedural dispensation from the rules that otherwise disfavor both facial challenges to statutes and challenges that assert third-party rights.”).

justified by the need to protect against chilling effects.⁵¹ As the Court recently explained, this exceptional rule is necessary because overbroad laws “‘may deter or ‘chill’ constitutionally protected speech,’ and if would-be speakers remain silent, society will lose their contributions to the ‘marketplace of ideas.’”⁵²

Concern about chilling effects in the earliest days of modern free speech law were also explains the creation in the earliest days of modern free speech law of another unique First Amendment doctrine—the First Amendment void-for-vagueness rule.⁵³ In this context too, the Court was concerned with the predictable impact of insufficiently narrowly tailored laws, making people err on the side of caution and refuse to speak, and the loss to society that would result if they did.

In the 1937 case of *Herndon v. Lowry*, for example, the Court struck down a law criminalizing incitement of insurrection on the grounds that the statute was unduly vague.⁵⁴ The law’s indeterminate language made it unclear what was covered, the Court held, and would thus lead people to have to “make the prophesy and abstain” from speaking if there was a risk their words could be interpreted by an audience (and, perhaps more importantly, by a jury) as falling within the statute.⁵⁵ And in 1945, in *Thomas v. Collins*, the Court explained the special vice of vague laws in the context of speech regulation in terms that we would today refer to as chill. A vague law, even if notionally targeted at unprotected speech, provides “no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.”⁵⁶ Such laws are intolerable because they “forbid[] or restrain[]” protected speech by making speakers exercise caution.⁵⁷

Unlike overbreadth claims, vagueness challenges are not only available in First Amendment cases. But the Court has held that the vagueness doctrine should be applied with extra rigor in the First Amendment context because

⁵¹ See, e.g., *id.* at 855 (“First Amendment overbreadth is largely a prophylactic doctrine, aimed at preventing a ‘chilling effect.’”); Michael C. Dorf & Brandice Canes-Wrone, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095, 1098 (2015) (“The Supreme Court’s overbreadth doctrine is the clearest doctrinal response to the chilling effect.”); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 846 (1970) (calling concern for chilling effect “dynamo of the overbreadth doctrine”).

⁵² *United States v. Hansen*, 599 U.S. 762, 769–70 (2023), citing *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

⁵³ Mila Sohoni, *Notice and the New Deal*, 62 DUKE L. J. 1169, 1184 (2013) (“First Amendment vagueness challenges began to gain traction by the late 1930s, and thereafter developed into a formidable edifice of law”).

⁵⁴ *Herndon v. Lowry*, 301 U.S. 242, 263–4 (1937).

⁵⁵ *Id.* at 262.

⁵⁶ *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

⁵⁷ *Id.*

of the special democratic harms of chill.⁵⁸ As Justice Brennan explained the Court’s rationale, “stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.”⁵⁹

As these early cases establishing the exceptional First Amendment doctrines of overbreadth and vagueness show, concerns about chilling effects were present from almost the moment that the Court started to develop a mature understanding of free speech. Awareness that government action can suppress expression without directly censoring it, and the harm to society and democratic self-governance this creates, have been ever-present in the modern First Amendment tradition.

B. The Expansion

Despite these early roots, most histories of chilling effects doctrine trace its origins to the 1950s and 60s, when the Court began to explicitly use the language of chilling effects in cases involving challenges to the anti-Communist measures of the Second Red Scare.⁶⁰

The word “chill” first appeared in a First Amendment case in Justice Frankfurter’s 1952 concurrence in *Weiman v. Updegraff*.⁶¹ In that case, the Court struck down an Oklahoma law that required all state employees, including teachers, to swear a loyalty oath and disclaim association with Communist organizations. The majority held that the law’s lack of a scienter requirement offended due process because it would result in the punishment of innocent as well as knowing association and was therefore “patently arbitrary and discriminatory.”⁶² But Justice Frankfurter argued that the law was unconstitutional not just because it might punish innocent association, but because it would prevent such association in the first place. The oath

⁵⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (“Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked”); *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (“When speech is involved, rigorous adherence to [vagueness] requirements is necessary to ensure that ambiguity does not chill protected speech.”).

⁵⁹ *Smith v. California*, 361 U.S. 147, 150-51 (1959).

⁶⁰ Schauer, *supra* note 20, at 685; Kendrick, *supra* note 20, at 1636 n 7; Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L. J. 117, 125 (2016); Dorf & Canes-Wrone, *supra* note 51, at 1098 (“Concurring in a 1952 ruling that invalidated an Oklahoma loyalty oath for public employees, Justice Felix Frankfurter first identified what has become known as the ‘chilling effect’”); PENNEY, *supra* note 17, at 19 (stating that the “modern conceptualization of chilling effects emerged in mid twentiethcentury American law during the McCarthy Era”).

⁶¹ 344 U.S. 183 (1952).

⁶² *Id.* at 191.

requirement, he argued, “has an unmistakable tendency to chill that free play of the spirit which all teachers ought to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.”⁶³ And so “chill” officially entered the First Amendment lexicon.⁶⁴

The Court first used the phrase “chilling effects” about a decade later, in the 1963 case *Gibson v. Florida Legislative Investigation Commission*.⁶⁵ Writing for the Court, Justice Goldberg recognized “the deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association” that would be created if a legislative committee was permitted to compel the National Association for the Advancement of Colored People (NAACP) to disclose names of its members in Florida, given the popular hostility the organization faced there, as elsewhere in the South.⁶⁶ As discussed further below, this case was one of many during this period in which the Court recognized the threat to speech and association that indirect attempts to suppress the civil rights movement by exposing its members to publicity and backlash posed.

The fact that concerns about chilling effects became more ubiquitous and explicit during this period reflects the way chilling effects doctrine operates as a defense against changing governmental tactics to suppress speech. As is well known, it was not until the decades following World War I that the Court repudiated the infamous First Amendment decisions of the First Red Scare and increasingly provided protections against the direct governmental speech suppression that characterized that era.⁶⁷ Before this time, then, the government did not need to rely on indirect methods to suppress speech—it could achieve a lot of speech suppression directly. For this reason, chilling effects were not as pressing a concern (even if, as discussed above, they nonetheless influenced the development of the overbreadth and vagueness doctrines).

But after the Court developed speech-protective rules, things changed. The Court’s new rules against direct censorship, unsurprisingly, did not put an end to the governmental appetite to suppress speech it didn’t like. Instead,

⁶³ *Id.* at 195. Justice Black raised the same concern in his concurrence, but his failure to use the word “chill” means his opinion often gets left out of the literature. Sorry! *Id.* at 193 (“Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended.”).

⁶⁴ The first documented use appears to be a law review article from the year before: Paul A Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951).

⁶⁵ 372 U.S. 539, 557 (1963).

⁶⁶ *Id.* at 557.

⁶⁷ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 396 (2004).

as David Cole describes it, “the government simply shifted tactics,”⁶⁸ as most prominently illustrated by the Second Red Scare.⁶⁹ Rather than targeting speech directly, the government now sought to suppress Communism *indirectly*.⁷⁰ It “sought recourse in more subtle methods of suppression,” including targeting association with disfavored groups, and using loyalty oaths, blacklists and public investigations.⁷¹ Chilling effects doctrine developed as the judicial defense against these tactics the government adopted to evade the constraints that the First Amendment newly placed on its ability to directly suppress speech.

The Court (albeit belatedly and imperfectly⁷²) recognized these efforts for what they were: invidious state action intended to drive certain views out of public discourse by raising the perceived costs of expressing them. In response to government efforts to do an end-run around the First Amendment, the Court embraced an anti-formalist approach in its First Amendment cases that holistically evaluated the practical *effects* of governmental actions on expressive freedom, rather than limiting itself to merely assessing the formal requirements.⁷³

The 1958 decision of *Speiser v. Randall* exemplifies the Court’s anti-formalist approach during this period.⁷⁴ California required applicants for a property tax exemption to swear that they did not advocate the violent

⁶⁸ Cole, *supra* note 32, at 6.

⁶⁹ Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PENN. L. REV. 11, 42 (2006) (“In the aftermath of the World War I and the succeeding Red Scare, First Amendment doctrine began to include more substantial bulwarks against efforts to criminally punish speakers or listeners. In the years before World War II, when faced with the challenge of seeking to suppress speech and publication regarded as dangerous, the federal government could no longer freely apply criminal sanctions. It began, instead, to turn to indirect methods.”).

⁷⁰ See, e.g., Leslie Kendrick, *Disclosure and Its Discontents*, 27 J.L. & POL. 575, 581 (2012) (“In fact, the strategy behind compelled disclosure was to deter indirectly what the government doubted it could criminalize directly.”).

⁷¹ Youn, *supra* note 20, at 1486.

⁷² See, e.g., *Am. Commc’ns Ass’n, C.I.O., v. Douds*, 339 U.S. 382, 405 (1950); *Adler v. Board of Education*, 342 U.S. 485 (1952). See Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CAL. L. REV. 1387, 1406 (2005) (stating that before June 1957, “the Court had consistently upheld almost every effort of the government to prosecute, expose, harass, humiliate, blacklist, and persecute members of the Communist Party and their ‘fellow travelers.’”).

⁷³ Youn, *supra* note 20, at 1486 (“[m]uch of early chilling effect doctrine developed as courts attempted to protect the communist movement and civil rights activists from such oppressive tactics.”); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 482 (1985) (“[T]he chilling effect doctrine was forged in the judicial effort to repudiate McCarthyism and forestall repression of the civil rights movement.”).

⁷⁴ *Speiser v. Randall*, 357 U.S. 513 (1958); Schauer, *supra* note 20, at 701 (“No discussion of this component of the chilling effect doctrine can start anywhere but with *Speiser*”).

or unlawful overthrow of the government. The Supreme Court assumed that the oath required applicants to disavow only speech that at the time lacked constitutional protection.⁷⁵ Such an assumption would be clearly misplaced today given the more robust protections for advocacy of unlawful action provided by modern doctrine.⁷⁶ But *notwithstanding this assumption*, the Court concluded that the oath requirement was unconstitutional because it would in practice result in protected speech being chilled. This was because, the Court held, by putting the burden on claimants to prove that they were eligible for the tax exemption—especially in circumstances where the line between lawful and unlawful speech was hardly clear—potential recipients would “necessarily ... steer far wider of the unlawful zone” in order to be sure they would not be found to fall within it.⁷⁷ In effect then, as Justice Brennan explained for the Court, the oath requirement would *indirectly* “produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.”⁷⁸

Two things are notable about the Court’s decision in *Speiser*. First, the Court only found the oath requirement unconstitutional because it looked beyond its formal terms (which simply required people to swear they would not engage in illegal activity) and considered the law’s likely effects in practice. Second, in evaluating the law’s effects, the Court looked not only at the substantive provisions but also their enforcement procedures, and in particular the fact that the claimant bore the burden of proof. As the Court explained, “[w]hen we deal with the complex of strands in the web of freedoms which make up free speech, *the operation and effect* of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment.”⁷⁹

This focus on the operation and effect of laws in practice would become emblematic of the Court’s approach to the problem of chill in its Second Red Scare cases. The Court struck down numerous other loyalty oath programs because it found that their vagueness would chill protected expression by causing those subject to them to “restrict[] their conduct to that which is unquestionably safe,” a result incompatible with the First Amendment.⁸⁰ This

⁷⁵ *Speiser*, 357 U.S. at 519–20.

⁷⁶ *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1961) (per curiam).

⁷⁷ *Speiser*, 357 U.S. at 526

⁷⁸ *Id.*

⁷⁹ *Id.* at 520 (emphasis added).

⁸⁰ *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (concluding “Free speech may not be so inhibited.”) *See also* *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 286 (1961) (finding a loyalty oath requiring teachers and other employees of the State to swear that they had never lent their “aid, support, advice, counsel, or influence to the Communist Party” vague, and observing that “it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious

kind of uncertainty, the Court held, operates as a “highly efficient in terrorem mechanism,”⁸¹ because it leads people to self-censor.⁸² The First Amendment could not tolerate such a result.

The Court’s realist approach during this period also led it to give short shrift to the formalistic arguments the government made in response to First Amendment challenges that focused on the lack of *direct* speech restrictions. For example, in *Shelton v. Tucker* the Court struck down an Arkansas statute that required public school teachers to file an annual affidavit listing organizations they had been a member of in the previous five years.⁸³ The state had argued that the statute was a mere disclosure requirement that did not restrict associational freedoms at all,⁸⁴ but the Court unequivocally rejected this argument. The Court took account of the particular social context, including the lack of job security of teachers in Arkansas, and found that the affidavit requirement would in fact exert “constant and heavy” pressure on teachers to “avoid any ties which might displease those who control [their] professional destiny.”⁸⁵ The Court concluded that this pressure (or chill) was inconsistent with teachers’ uninhibited exercise of their protected right of free association.

This same anti-formalism is what led the Court to (in some cases at least) constrain another favored tool of McCarthyism: the public investigation into suspected “subversives,” which harnessed the “spotlight of pitiless publicity” as an instrument of intimidation.⁸⁶ Government actors argued that such investigations did not violate First Amendment rights because they were not restricting speech but, literally, just asking questions.⁸⁷ The Court again

scruples were the most sensitive.”); *Whitehill v. Elkins*, 389 U.S. 54, 62 (1967) (striking down a loyalty oath, holding “Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat ... may deter the flowering of academic freedom as much as successive suits for perjury.”)

⁸¹ *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 601 (1967).

⁸² *Id.* at 683 (“It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery.”)

⁸³ *Shelton v. Tucker*, 364 U.S. 479, 480 (1960).

⁸⁴ *Shelton v. Tucker*, Brief for Appellees and Respondents, 1960 WL 98560, at *11 (U.S., 2006) (“It should be remembered that ... Act 10 is not a disqualifying enactment. It does not provide for the removal of anyone from any position.”)

⁸⁵ *Id.* at 486.

⁸⁶ Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 15–22 (1991) (describing the use of investigations during McCarthyism to impose a “constraint on public thought and discourse from the fear of public investigation”).

⁸⁷ See, e.g., Brief for the United States, *Watkins v. U.S.*, 1957 WL 87250, at *23–24 (U.S., 2006) (“even if it is accepted that disclosures before the Committee may result in unfavorable publicity and discourage persons from subjecting themselves to the risk of

rejected these formalistic arguments.⁸⁸ As the Court explained in *Sweezy v. New Hampshire*, investigations can impose a “stamp of disloyalty” and have an “inhibiting effect in the flow of democratic expression and controversy upon those directly affected”—a harm as grave as the loss of employment.⁸⁹

The focus on the operation and effect, over the form, of state power also allowed the Court to recognize chilling effects even when the government used creative methods of intimidation that did not neatly fit into precedential boxes. In *Lamont v. Postmaster General*, for example, the Court struck down a statute that prohibited the Post Office from delivering mail deemed “communist propaganda” unless the recipient affirmatively requested its delivery. Again, the government argued that the law imposed no censorship at all, because “[n]o one who wishes to receive any material is denied it. Such persons are put to the trifling nuisance of marking a post card addressed to the Post Office.”⁹⁰ But, again, the Court refused to take such a formalistic view of the regulatory scheme. Requiring people to affirmatively request their mail “is almost certain to have a deterrent effect,” the Court wrote. “[A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as ‘communist political propaganda.’”⁹¹ Such deterrence and inhibition was, the Court held, just as much a First Amendment injury as censorship.

As these cases suggest, the dynamic between the Court and the government during this period was that of a game of cat and mouse. As the Court made it harder for the government to suppress Communist and other “subversive” speech and association through outright censorship, the government responded with creative and indirect measures such as loyalty oaths, investigations and disclosure requirements intended to chill disfavored activities. The Court then responded in many cases by prohibiting those too, closing loopholes in First Amendment’s protections.

similar unfavorable reaction to their associations, it does not follow that the First Amendment is in any way violated. The sanction growing out of such disclosures is not a legal one, but, at most, the sanction of public opinion, against which the First Amendment does not guarantee.”)

⁸⁸ *Watkins v. United States*, 354 U.S. 178, 197-98 (1957) (“The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. . . . Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction.”).

⁸⁹ *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 248 (1957).

⁹⁰ *Lamont v. The Postmaster General of the U.S.*, 1965 WL 115609, at *15 (U.S., 2004).

⁹¹ *Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301, 307 (1965).

This same cat-and-mouse dynamic describes the Court's response to efforts to suppress the civil rights movement. Inspired by McCarthyism's successes, resistance in the South adopted similar methods designed to chill civil rights advocacy.⁹² The Court responded as it ultimately had to McCarthyism. Again and again, the Court employed the same realist and holistic understanding of the effects of state action to find these suppressive efforts unconstitutional.

The most important of these cases was *NAACP v. Alabama*, in which Alabama sought to compel the prominent civil rights organization the NAACP to reveal names of its members to the state Attorney General.⁹³ Although in 1958 modern chilling effects doctrine was still only just starting to take shape, Justice Brennan casually stated for the majority that it was "hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as more direct forms of governmental action.⁹⁴ The societal hostility and reprisal that would follow exposure of the membership list could, he reasoned, "induce members to withdraw from the Association and dissuade others from joining it," thus abridging First Amendment protected association.⁹⁵ Although perhaps it could have,⁹⁶ the Court did not rest its holding on any finding of improper governmental intent. The possibility of reprisals, and the chilling effect this created, "*even though unintended*"⁹⁷ said the Court, made the compelled disclosure constitutionally impermissible. The Court also rejected the state's formalistic argument that it was private, not state, action that created the inhibition, holding that it was "only after the initial exertion of state power represented by the production order that private action takes hold."⁹⁸

In the years following, the Court relied on *NAACP v. Alabama* to repeatedly strike down other state measures that chilled the civil rights movement through mandating disclosure of sensitive information or investigating its activities, especially in the hostile South where the social costs would be high.⁹⁹ And, in a case concerning civil rights pamphleteers,

⁹² Kreimer, *supra* note 69, at 45–46.

⁹³ *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958).

⁹⁴ *Id.* at 462.

⁹⁵ *Id.* at 463.

⁹⁶ Dale E. Ho, *NAACP v. Alabama and the False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 411 (2012) ("The goal ... was to put the NAACP out of business").

⁹⁷ *Id.* at 439 (emphasis added).

⁹⁸ *Id.* at 463.

⁹⁹ See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 523–24 (1960) ("compulsory disclosure of the membership lists of the local branches of the National Association for the

the same reasoning led the Court to recognize a First Amendment right to anonymity, as another important safeguard against chill.¹⁰⁰ These cases led Owen Fiss to later quip that “[c]hilling effect” ... became the slogan[] of civil rights litigators.”¹⁰¹

It was also during this period that the Court developed what would become the most fixed use of chilling effects in First Amendment law: namely, it read mens rea requirements into statutes that did not otherwise require them in order to alleviate their chilling effect.¹⁰² Again, the Court was guided by its willingness to hypothesize about the likely impacts of laws in practice. In *Smith v. California* the Court held a strict liability standard for prosecutions of the distribution of obscene material unconstitutional because “if the bookseller is criminally liable without knowledge of the contents ... he will tend to restrict the books he sells to those he has inspected,”¹⁰³ a chilling effect which “would tend to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress

Advancement of Colored People would work a significant interference with the freedom of association of their members. ... This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members’ names. Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote.”); *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 435–36 (1963) (“We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.”); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 555–57 (1963) (noting that “the strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs ... [is] all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.”)

¹⁰⁰ *Talley v. California*, 362 U.S. 60, 64 (1960) (“Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government.”)

¹⁰¹ Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1116 (1977).

¹⁰² Schauer, *supra* note 20, at 687 (describing “the critical role that the chilling effect doctrine has played in determining where the lines of privilege marking the boundaries of those categories are to be drawn”).

¹⁰³ *Smith v. People of the State of California*, 361 U.S. 147, 153 (1959)

directly.”¹⁰⁴ And most famously, the Court justified the “actual malice” standard it announced in *New York Times v. Sullivan* by the need to avoid chilling valuable criticism of public figures.¹⁰⁵

The realist and functional nature of the Court’s approach also led it to recognize the chilling effects created by informal, and not merely formal, exercises of state power.¹⁰⁶ In *Bantam Books v. Sullivan*, the Court held that informal letters pressuring booksellers to stop selling certain materials the officials deemed “objectionable” could violate the First Amendment in the same way a law could.¹⁰⁷ The Court recognized the censorious impact of the letters, even though there was no formal exercise of state power, because, in practice, the booksellers were likely to comply rather than resist.

In retrospect, though, it was the Warren Court’s effort to craft procedural and not merely substantive rules to protect against chill that represents its most distinctive contribution to chilling effects doctrine. What both *Thornhill* and *Speiser* recognized was that procedural rules—such as standing and burdens of proof—could significantly impact the extent to which courts were able to guard against state efforts to suppress speech. The Warren Court built on this understanding in decisions such as *Bantam Books*, in which it held that, although state officials had been pressuring booksellers to remove certain books from their shelves, the book publishers also had standing to sue because this was necessary to ensure First Amendment rights were adequately protected.¹⁰⁸ Book publishers, more than distributors, the Court reasoned, had an economic interest in bringing legal challenges, and so they should be given standing lest “infringements of freedom of the press may too often go unremedied.”¹⁰⁹ Similarly, in *Lamont*, allowing mail recipients, and not merely the overseas speakers, to bring a First Amendment claim was another way of ensuring that government efforts to skew the marketplace of ideas would not go unchallenged.¹¹⁰ In this way, the Court was creating what Seth Kreimer has described as “a procedural scaffolding that allowed more robust litigants willing to appear in court to raise the interests of others

¹⁰⁴ *Id.* at 154.

¹⁰⁵ 376 U.S. 254, 271–2 (1964).

¹⁰⁶ Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, U. CHI. L. REV. 11 (2026) (“Since 1963, when the Supreme Court decided *Bantam Books v. Sullivan*, it has been a black letter principle of First Amendment law that informal censorship can violate the free speech guarantee of just as formal censorship can.”).

¹⁰⁷ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61–63, 70–72 (1963).

¹⁰⁸ Evelyn Douek & Genevieve Lakier, *Lochner.Com?*, 138 HARV. L. REV. 100, 45 (2024).

¹⁰⁹ *Bantam Books*, 372 U.S. at 65 n.6.

¹¹⁰ *Id.* at 308 (Brennan, J., concurring) (“The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”)

elsewhere in the chain.”¹¹¹

Indeed, perhaps the most ambitious use of chilling effects doctrine during the Warren Court era was procedural. In *Dombrowski v. Pfister*, the Court held that federal courts need not abstain from enjoining state criminal prosecutions (as the doctrine of abstention would normally require) in cases where the defendant brought a First Amendment facial challenge. The Court justified this exception from the doctrine of abstention as necessary to avoid the chilling effects of state prosecutions that implicated expressive freedoms.¹¹² As Justice Brennan, the author of the *Dombrowski* opinion, explained a few years later, “to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.”¹¹³

The Court in *Dombrowski* recognized furthermore that prosecutions could create invidious chilling effects even when not the product of invidious government intent. The appellants in *Dombrowski* had argued that the prosecutions against them were brought in bad faith, “without any hope of ultimate success, but only to discourage [their] civil rights activities.”¹¹⁴ The Court was clear, though, that its holding did not depend on proof of bad faith.¹¹⁵ That the decision authorized equitable relief in federal court *even without showing governmental bad faith* is what made it such “a potent weapon for vindication of society’s interest in freedom of expression,”¹¹⁶ because such intention would often be very hard to prove. Indeed, it was this aspect of *Dombrowski* that led Fred Schauer to describe chilling effects as “the key to the federal courthouse in free speech cases” during this period.¹¹⁷

In sum, it might be fair to say that chilling effects doctrine was the primary engine of First Amendment law during the Warren Court era. By the end of the 1960s, concerns about chilling effects had motivated the development of the exceptional First Amendment doctrines of overbreadth and vagueness, justified federal courts intervention in state proceedings, served as the linchpin of the Court’s response to efforts to indirectly suppress

¹¹¹ Kreimer, *supra* note 69, at 51.

¹¹² *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (“[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure”).

¹¹³ *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

¹¹⁴ *Dombrowski v. Pfister*, 380 U.S. 479, 489 (1965).

¹¹⁵ *Id.* at 489 (“the abstention doctrine is inappropriate for cases such as the present one where ... statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities”) (emphasis added).

¹¹⁶ Robert Allen Sedler, *Dombrowski in the Wake of Younger: The View from without and Within*, WIS. L. REV. 1, 4 (1972).

¹¹⁷ Schauer, *supra* note 20, at 686.

Communist speech and the civil rights movement, and shaped the substantive law of the categories of unprotected expression—all informed by a judicial approach that looked past mere formal threats to First Amendment freedoms and sought to account for the way that law and state power worked in practice.

As Justice Brennan summarized in 1967, “[w]e have molded both substantive rights and procedural remedies ... to conform to our overriding duty to insulate all individuals from the ‘chilling effect’ upon exercise of First Amendment freedoms.”¹¹⁸ In the same year, Justice Harlan would complain that the “‘chilling effect’ doctrine” was “ubiquitous,” “slippery” and “amorphous.”¹¹⁹ Both were right. Concern about chilling effects pervaded the Court’s First Amendment jurisprudence and played a wide variety of important doctrinal roles. But the Court’s invocation of chilling effects was often casual, inconsistent and undertheorized. The Court never gave a developed account of what a plaintiff had to show in order to establish a claim based on chill. In some cases, the Court referenced facts or studies as evidence of chilling effects,¹²⁰ but more often the Court simply asserted that chilling effects were a likely consequence of a particular government action.

The Court also never identified the limits of its chilling effects jurisprudence. As I suggested at the start of this Part, the First Amendment cannot forbid any state action that inhibits expressive freedom in some way. Many government actions likely do that—after all, it can be scary to express views hostile to those in power. The difficult question that chilling effects doctrine needs to answer, therefore, is when this inhibition crosses the line from legitimate to illegitimate chill. But the Warren Court never seriously grappled with this challenge or provided a limiting principle for its chilling effects doctrine.

The Court’s cases about the chilling effects of governmental investigations illustrate the doctrinal quagmire this created. As discussed above, in some cases the Court held that such investigations were unconstitutionally chilling.¹²¹ But in other cases—as vociferous dissents

¹¹⁸ *Walker v. City of Birmingham*, 388 U.S. 307, 345 (1967).

¹¹⁹ *Zwickler v. Koota*, 389 U.S. 241, 256 n.2 (1967) (Harlan, J., concurring).

¹²⁰ *See, e.g., Bates v. City of Little Rock*, 361 U.S. 516, 523–24 (1960) (discussing the “substantial uncontroverted evidence” of chilling effects); *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (discussing the plaintiffs’ “uncontroverted showing” of past reprisals, and their likelihood of inducing fear); *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 607 (1967) (citing “recent studies” that documented chilling effects). *Cf. Talley v. California*, 362 U.S. 60, 69 (1960) (Clark, J., dissenting) (“The record is barren of any claim, much less proof, that [the plaintiff] will suffer any injury whatever by identifying the handbill with his name.”)

¹²¹ *See supra* notes [XX]–[XX].

pointed out¹²²—the Court was more cavalier about the chilling effects of the use of the government spotlight, either because the majority was reticent to question Congressional motives,¹²³ or because the Court found the asserted governmental interests sufficiently compelling,¹²⁴ or because it refused to speculate about the likely inhibitory effects.¹²⁵ This “ad hoc balancing” of First Amendment interests against the governmental right to investigate or otherwise monitor the Communist Party “hardly charted a straight course,” as Seth Kreimer generously summarized.¹²⁶ The lack of clear rules and predictable outcomes became a favorite example in the contemporary literature on the perils of judicial balancing.¹²⁷

¹²² *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) (Black, J., dissenting) (lamenting the Court’s decision to uphold a conviction for contempt of Congress for the petitioner’s refusal to answer questions from a Subcommittee of the House Committee on Un-American Activities, stating that “[T]he obloquy which results from investigations such as this not only stifles ‘mistakes’ but prevents all but the most courageous from hazarding any views which might at some later time become disfavored.”); *Uphaus v. Wyman*, 360 U.S. 72, 84 (1959) (Brennan, J., dissenting) (“in an era of mass communications and mass opinion ... exposure and group identification by the state of those holding unpopular and dissident views are fraught with such serious consequences for the individual as inevitably to inhibit seriously the expression of views which the Constitution intended to make free.”)

¹²³ *Barenblatt v. United States*, 360 U.S. 109, 132 (1959) (“So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power”); *Wilkinson v. United States*, 365 U.S. 399, 415 (1961) (applying *Barenblatt*).

¹²⁴ *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959) (“exposure—in the sense of disclosure—is an inescapable incident of an investigation into the presence of subversive persons within a State. And the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy”); *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 93 (1961) (“The present case differs from *Thomas v. Collins* and from *N.A.A.C.P., Bates*, and *Shelton* in the magnitude of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests.”)

¹²⁵ *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 78 (1961) (refusing to adjudicate the constitutionality of various provisions of an Act requiring the Communist Party to register with the Attorney General and imposed various burdens on the Party, because the burdens had not yet actually been applied). *Cf.* 145 (Black, J., dissenting) (“By refusing to do so, the Court in effect allows this serious question to be decided by default. For the Party can no more continue to function with all of these tremendous burdens of undetermined constitutional validity overhanging it and its members than it could if the burdens were considered and upheld. The only sense in which the Court has avoided a constitutional issue is by permitting the destruction of a group seeking to raise the issue of the constitutionality of its destruction”).

¹²⁶ Kreimer, *supra* note 86, at 24.

¹²⁷ See, e.g., Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1429 (1962); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test*, 76 HARV. L. REV. 755, 774 (1963); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 739 (1963).

In some ways, the undertheorized nature of the role of chilling effects was part of what made it so useful. It gave the concept a “flexibility” that “allowed the Court to address the ever-changing tactics of indirect suppression that federal and state officials developed.”¹²⁸ But the doctrine’s greatest strength would become its greatest weakness. Chilling effect doctrine’s lack of clear definition in Warren Court decisions left the concept vulnerable to critique and erosion.

C. *The Containment*

Beginning in the 1970s, the powerful but amorphous chilling effects doctrine of the Warren Court era was quickly and dramatically domesticated. Within five years, the Burger Court had reined in the Warren Court’s most expansive uses of chilling effects, declining to extend chilling effects doctrine in substantive First Amendment law,¹²⁹ and, more significantly, greatly reducing the doctrine’s influence on procedural rules.

The first important shift came in *Younger v. Harris*,¹³⁰ which “demolished ... a goodly portion of *Dombrowski*,”¹³¹ the “potent weapon” that allowed litigants to go to federal court to get an injunction against a state prosecution if the law they were being prosecuted under facially violated the First Amendment. In his majority opinion in *Younger*, Justice Black for the Court read *Dombrowski* very narrowly. Black insisted the case had not held that injunctive relief should be available to all plaintiffs who challenged state prosecutions on First Amendment grounds even if there were some statements in the opinion “that would seem to support this argument.”¹³² Instead, Justice Black held, injunctions should only be available where plaintiffs could make a showing they were being prosecuted in bad faith. The Court thus retained the rule from *Dombrowski* for cases involving the most invidious form of chill (intentional use of legal process as intimidation), but the difficulty of proof of such bad faith severely limited the rule’s reach. Reflecting on the dramatic shift, Owen Fiss lamented the Court’s complete dismissal of the “chilling effect on First Amendment rights of overbroad statutes,”¹³³ and failure to take account “of what was then established doctrine—that First Amendment rights were especially ‘vulnerable’ and

¹²⁸ Youn, *supra* note 20, at 1487.

¹²⁹ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (refusing to extend the rule in *NYT v. Sullivan* to private figures because “The need to avoid self-censorship by the news media is ... not the only societal value at issue.”)

¹³⁰ *Younger v. Harris*, 401 U.S. 37 (1971).

¹³¹ Fiss, *supra* note 101, at 1116.

¹³² *Younger v. Harris*, 401 U.S. 37, 50 (1971).

¹³³ Fiss, *supra* note 101, at 1119.

‘important,’ thus warranting the earliest judicial intervention.”¹³⁴

Younger was a clear signal of the Burger Court’s very different conception of chilling effects doctrine, and it stemmed from its different understanding of the proper judicial role. Instead of being primarily concerned with protecting sensitive First Amendment freedoms against state inhibition, the *Younger* Court emphasized principles of “Our Federalism” and the need for federal courts to refrain from unduly interfering with the operation of state courts.¹³⁵ And instead of expressing concern that infringements of expressive freedom might not be vindicated in court, the *Younger* Court expressed anxiety about overly interventionist judicial review. The power of courts to declare laws unconstitutional “broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them,” Black declared.¹³⁶

Younger is not usually taught in First Amendment courses.¹³⁷ And yet, by signaling the start of a new era for the doctrine of chilling effects, *Younger* may be one of the most significant First Amendment decisions in the U.S. reports. Justice Black’s assertion in his majority opinion that “the existence of a ‘chilling effect,’ even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action”¹³⁸ simply ignored many of the precedents discussed in the previous section and foreshadowed the generally skeptical view of the doctrine of chilling effects that became ascendant in the next few years. The concern about the proper role of courts in a democracy that pervades *Younger* would become a recurring theme in the Burger Court’s decisions limiting the reach of chilling effects doctrine.

Consider in this respect the changes that the Burger Court made to overbreadth. Not content to just limit access to federal court for plaintiffs who sought injunctive relief from state prosecutions pursuant to overbroad statutes, the Court also sharply limited the doctrine of overbreadth itself.¹³⁹ In the 1973 decision of *Broadrick v. Oklahoma*¹⁴⁰ the Court imposed sweeping limits on the doctrine.¹⁴¹ Because overbreadth doctrine was

¹³⁴ *Id.*

¹³⁵ *Younger v. Harris*, 401 U.S. 37, 44 (1971).

¹³⁶ *Id.* at 52.

¹³⁷ Fred Smith, Jr. & Peter O’Neill, *The Forgotten Face of “Our Federalism,”* 135 YALE L. J. 17 (SSRN 2025) (discussing the forgotten civil liberties and racialized context of *Younger*).

¹³⁸ *Id.* at 51.

¹³⁹ Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U. L. REV. 532, 533 (1974) (“With changes in the membership of the Supreme Court came a change in attitude toward this activist policy [of overbreadth]”).

¹⁴⁰ 413 US 601 (1973).

¹⁴¹ Martin H. Redish, *Warren Court, the Burger Court and the First Amendment*

“manifestly, strong medicine,” Justice White for the Court in *Broadrick* held that it should be employed “sparingly and only as a last resort.”¹⁴² To be facially invalid, it would no longer be enough to show that a statute covered *some* protected expressive activity but must instead be shown to be “*substantially* overbroad,”¹⁴³ such that “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”¹⁴⁴ That is, a plaintiff now had to show that an overbroad law would not merely create *some* chill, and not only a *substantial* amount of chill, but also that this chill in some way outweighed the law’s legitimate reach.

Like *Younger*, the Court’s opinion in *Broadrick* was motivated by a desire to maintain what the Court viewed as the proper judicial role. Standing doctrines, Justice White explained, “rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.”¹⁴⁵ Thus, the Court insisted its role in adjudicating facial challenges must be “a limited one,”¹⁴⁶ even if it was broader in the First Amendment context than any other. This minimalist orientation made the *Broadrick* Court especially reticent to interfere with the other branches of government on the basis of claims of chill. Justice White observed that while overbroad laws “may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face.”¹⁴⁷ Whereas the Warren Court was willing to make exactly such predictions about the existence of chill, the Burger Court was more skeptical.¹⁴⁸

The third big way in which the Burger Court cabined chilling effects doctrine was by curtailing plaintiffs’ ability to establish standing based on chilling effects outside the overbreadth context—that is, even when they were asserting their *own* First Amendment injury. This shift came in the 1972 decision *Laird v. Tatum*.¹⁴⁹ In January 1970, a former Army intelligence officer published an article in *The Washington Monthly* magazine that alleged that the Army had been conducting widespread surveillance of civilian

Overbreadth Doctrine, 78 NW. U. L. REV. 1031, 1057 (1983); Fallon, *supra* note 48, at 863 n 62.

¹⁴² *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

¹⁴³ *Id.* at 615 (emphasis added).

¹⁴⁴ *Id.*

¹⁴⁵ *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973).

¹⁴⁶ *Id.* at 615.

¹⁴⁷ *Id.* at 615 (emphasis added).

¹⁴⁸ Note, *supra* note 140, at 548 (“The new standing procedure introduced in *Broadrick* can ... be viewed as a manifestation of the Court’s insensitivity to deterrence of expression.”).

¹⁴⁹ 408 U.S. 1 (1972).

political activity across the country, keeping files on groups and people that Army intelligence officers thought might “cause trouble for the Army.”¹⁵⁰ On the heels of this exposé and the Congressional hearings it prompted,¹⁵¹ a group of individuals and organizations who were reportedly Army targets brought suit challenging the surveillance program. Just as the plaintiffs in *NAACP v. Alabama* had argued about being forced to produce their membership lists, the plaintiffs in *Laird* argued that “as a result of the Army’s investigation of civilian politics, members of the plaintiff organizations have been deterred from continuing their membership and prospective members have been dissuaded from joining.”¹⁵²

Chief Justice Burger’s opinion for the Court, unlike Justice Black’s opinion in *Younger*, at least acknowledged the Court’s prior chilling effects jurisprudence. Citing cases such as *Keyishian*, *Lamont*, and *Baggett*, the opinion recognized that “[i]n recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”¹⁵³ But, on behalf of a slim 5-4 majority, the Chief Justice distinguished those cases on the grounds that in each of those cases “the challenged exercise of governmental power was *regulatory, proscriptive, or compulsory in nature*, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.”¹⁵⁴ The plaintiffs in *Laird*, Chief Justice Burger insisted, could show no similar direct coercive impact of being surveilled, and thus had failed to show an injury sufficient to establish standing. While the plaintiffs might have some “generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents,” that was not enough. “Allegations of a subjective ‘chill,’” the Chief Justice concluded, “are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”¹⁵⁵

To be sure, the distinction the Chief Justice drew between the allegations in *Laird* and the claims in the Court’s prior chilling effects cases had a superficial logic. The NAACP was being asked to produce its membership

¹⁵⁰ *Ex-Officer Says Army Spies on Civilian Activists; 1,000 Plainclothesmen Said to Report on Virtually All Political Groups*, N.Y. TIMES (Jan. 16, 1970), <http://timesmachine.nytimes.com/http://timesmachine.nyt-archives.us-east-1-01.pr.dv.sp.nyt.net/timesmachine/1970/01/16/76677234.html?pageNumber=26>.

¹⁵¹ Jeffrey L. Vagle, *Laird v. Tatum and Article III Standing in Surveillance Cases*, 18 U. PA. J. CONST. L. 1055, 1058 (2015–2016).

¹⁵² *Laird v. Tatum*, 1972 WL 135682, at *20 (U.S., 2004).

¹⁵³ *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ *Id.* at 13–14.

list. The plaintiffs in *Keyishian* were fired or threatened with being fired. The plaintiff in *Lamont* had to fill out a reply card to receive his mail. The state employees in *Baggett* were required to swear a loyalty oath. Here, by contrast, the plaintiffs were not being compelled to do, or not do, anything. They were just being watched.

But this is exactly the kind of formalistic distinction the Warren Court's approach to chilling effects would have rejected. The Warren Court had not simply asked "is this case exactly like the others?" or "what is the formal effect of the state action?" Instead, it focused on the core question, "would the plaintiffs have been inhibited from exercising their First Amendment rights as the result of state action?" The answer to that question in *Laird* was, surely, yes. All else being equal, a group being surveilled by the Army because the Army thinks they are troublemakers is going to have a harder time recruiting members than one that isn't. The chill created by this kind of surveillance was, Justice Douglas argued in a cutting dissent, "at war with the principles of the First Amendment."¹⁵⁶

But Chief Justice Burger's majority decision in *Laird* focused on the form that state action took, rather than its inhibitory effects, and as a result found the case an easy one. The opinion did not hold that chilling effects could *never* be a legally cognizable injury,¹⁵⁷ but by insisting that "subjective" chill was not enough to establish standing the decision made it much harder to bring challenges not only to government surveillance,¹⁵⁸ but also any governmental activities that might chill speech without a directly coercive governmental act. Thomas Emerson complained that this approach "revealed either a total ignorance of or a shocking lack of concern for the actual operation of the system of freedom of expression."¹⁵⁹

Again, this formalistic reasoning was justified by concerns about the scope and limits of federal judicial power. If plaintiffs could bring challenges on the basis of chill alone, Burger asserted in *Laird*, the result would be to make federal courts "virtually continuing monitors of the wisdom and soundness of Executive action."¹⁶⁰

In the abstract, fears about the threat that claims based on chill pose to the constitutional separation of powers might seem reasonable. As I noted above,

¹⁵⁶ *Id.* at 28.

¹⁵⁷ Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 445 (2016–2017).

¹⁵⁸ Jonathan R. Siegel, *Chilling Injuries as a Basis for Standing*, 98 THE YALE LAW JOURNAL 905, 924 (Mar. 1989); Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 480; Vagle, *supra* note 152, at 1055.

¹⁵⁹ Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 468 (1980).

¹⁶⁰ *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

almost any governmental act might have *some* indirect chilling effect. Hence, without some limiting principles, chilling effects claims could make courts very busy indeed. But the plaintiffs in *Laird* were not suggesting that any and all allegations of chill should establish standing to challenge government action. Their allegations of chill were serious and reasonable, as an amicus brief filed in the case by a group of former military intelligence officers and servicemen argued.¹⁶¹ These former military officials argued that the scale of government surveillance was enough to make any “persons of ordinary courage, commitment, and vulnerability” hesitate before exercising their First Amendment rights, and warned that “[w]hat may not seem intimidating to a judge may well be chilling to a private citizen with limited resources who seeks lawfully to advance a controversial idea.”¹⁶² The Court rejected these arguments though, and sowed the seeds of a standing jurisprudence that showed little of the concern about the societal loss that chill created that had informed the broader approach to First Amendment standing in the first place.

The Burger Court’s decisions in *Younger*, *Broadrick* and *Laird* were emblematic of a more general shift in the Court’s approach to chilling effects doctrine during this era. The Burger Court minimized the extent to which procedural rules were crafted to minimize chill in part because, given substantive First Amendment doctrines had now incorporated concerns about chilling effects, to take them into account in crafting procedural rules would be “a form of double counting,”¹⁶³ as if it wasn’t possible that both substantive and procedural rules might have different chilling effects.

As *Laird* might suggest, the Court was also more willing to accept formalistic government defense of state actions that the Warren Court had been. For example, in *Law Students Civil Rights Research Council, Inc. v. Wadmond*, the Court upheld a loyalty oath requirement for admission to the New York Bar, which the Court acknowledged used language very similar to the language of oaths struck down in previous cases.¹⁶⁴ Nevertheless, the Court found the oath permissible, because it accepted the government’s assurance that the Committee on Character and Fitness would interpret the requirement very narrowly and “fully cognizant of protected constitutional freedoms.”¹⁶⁵ Justice Marshall was incredulous in dissent, observing that the requirement “suffers from the very defects that this Court has found fatal to other schemes.”¹⁶⁶ But the Burger Court focused on the oath’s words and the

¹⁶¹ *Laird v. Tatum*, 1972 WL 135683, at *6 (“the plaintiffs have good reason to be chilled.”).

¹⁶² *Id.* at *12.

¹⁶³ *Calder v. Jones*, 465 U.S. 783, 790-91 (1984).

¹⁶⁴ *L. Students C.R. Rsch. Council, Inc. v. Wadmond*, 401 U.S. 154, 162 (1971).

¹⁶⁵ *Id.* at 163.

¹⁶⁶ *Id.* at 194.

government's assurances about how they would be interpreted, rather than, as in previous cases,¹⁶⁷ the chilling effect created when broad or vague oaths caused attestees to err on the side of caution.

The Burger Court's skepticism about chilling effects was consistent across doctrinal areas, as is demonstrated by the important campaign finance decisions of the period. In the landmark decision *Buckley v. Valeo*, better known for striking down the expenditure limits in the Federal Election Campaign Act, the Court upheld the Act's reporting and disclosure requirements in full.¹⁶⁸ The Court acknowledged the Warren Court precedents that held that compelled disclosure can have a "deterrent effect on the exercise of First Amendment rights" and therefore applied "exacting scrutiny."¹⁶⁹ But in *Buckley* the Court described the possibility that "any serious infringement on First Amendment rights" would be caused by the compelled disclosure "highly speculative,"¹⁷⁰ and emphasized the substantial governmental interests behind the legislation.¹⁷¹ Of course, generally applicable campaign finance regulations are very different from targeted demands for civil rights organizations to reveal their membership lists in hostile Southern states.¹⁷² And the *Buckley* Court left the door open to a specific showing of severe chilling effects in a future case.¹⁷³ But its skepticism led it to reject the idea that it should speculate about the general chilling effects of campaign finance disclosure requirements, as it had in other areas.

Overall, then, the Burger Court radically transformed the role of chilling

¹⁶⁷ See *supra* nn [XX] and accompanying text.

¹⁶⁸ *Buckley v. Valeo*, 424 U.S. 1, 75–76 (1976) (per curiam). See also Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1450–53 (2014).

¹⁶⁹ *Buckley*, 424 U.S. at 64 (1976) ("we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," citing *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958)).

¹⁷⁰ *Id.* at 70.

¹⁷¹ *Id.* 66–8 ("The disclosure requirements, as a general matter, directly serve substantial governmental interests.")

¹⁷² Ho, *supra* note 97, at 408 (describing efforts to analogize *NAACP v. Alabama* to campaign finance disclosures as resting on a "false symmetry" which "obscures fundamental differences between the First Amendment harms inflicted by disclosure requirements as applied to minority or dissident groups, and the costs exacted when such rules are applied in most circumstances").

¹⁷³ *Id.* at 71–2 ("There could well be a case, similar to those before the Court in *NAACP v. Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied. But no appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*.")

effects in First Amendment law. As early as 1978, Schauer could write that the then-current Court had “closed many of the doors” that chilling effects doctrine had previously opened.¹⁷⁴ Much of the shift reflected the Court’s anxieties about the proper judicial role. Its desire to avoid undue judicial interference with the activities of the other branches of government, especially on the basis of speculation as to how people might behave, led the Court to adopt a much more formalistic style of reasoning that narrowed the extent to which chill was cognizable. This gave the Court’s opinions a markedly abstract quality. The decisions seemed remarkably unconcerned with the real-world effects of state power. As Thomas Emerson wrote in 1980, while the Warren Court had tried “to ensure that the legal doctrine it proclaimed at an abstract level was translated into practice at the operating level,” the Burger Court “paid little attention to the dynamics of the system of freedom of expression.”¹⁷⁵ The realist chilling effects doctrine withered in this new paradigm and this once-great engine of First Amendment doctrine was put on ice.

The Rehnquist Court largely maintained this status quo. Take *Meese v. Keene*, the Rehnquist Court’s most extended discussion of chilling effects doctrine.¹⁷⁶ On the one hand, *Meese* seemed to suggest a way to temper the stringency of *Laird*. Barry Keene wanted to publicly screen three Canadian films that the government had classified as “political propaganda” under the Foreign Agents Registration Act, and sought to challenge the Act’s classification and disclosure mandates.¹⁷⁷ In support, Keene submitted detailed affidavits, including the results of a poll and the opinion of a political analyst, showing that his “personal, political, and professional reputation would suffer” if he screened films that the government characterized as political propaganda.¹⁷⁸ The Court found Keene’s evidence sufficient to distinguish *Laird* and demonstrate cognizable injury “more than a ‘subjective chill.’”¹⁷⁹ *Meese* seemed to suggest, therefore, that courts could recognize a plaintiff’s First Amendment injury, notwithstanding *Laird*, if they adduced evidence that the governmental action would cause reputational harm.

But when it came to the merits, the Court once again displayed the same formalistic skepticism of chilling effects arguments. The Court held that labelling the films “political propaganda” did not burden protected expression because the label might be merely descriptive, not necessarily

¹⁷⁴ Schauer, *supra* note 20, at 686.

¹⁷⁵ Emerson, *supra* note 160, at 467.

¹⁷⁶ *Meese v. Keene*, 481 U.S. 465 (1987).

¹⁷⁷ *Id.* at 467.

¹⁷⁸ *Id.* at 473.

¹⁷⁹ *Id.*

pejorative, and therefore simply served to provide recipients information.¹⁸⁰ The Court was uninterested in the obvious (and intended) priming effect—and therefore burden on expression—that labelling something “propaganda” would have on its audience. Justice Blackmun’s dissent castigated the majority for this formalistic reasoning. “By ignoring the practical effect of the Act’s classification scheme,” he wrote, “the Court unfortunately permits Congress to accomplish by indirect means what it could not impose directly—a restriction of appellee’s political speech.”¹⁸¹ In *Meese*, then, the Rehnquist Court’s approach to chilling effects resembled that of the Burger Court much more than the Warren Court.

The most significant development for chilling effects doctrine during the Rehnquist Court era, however, was the Court’s development of a doctrine—the government speech doctrine—that did not discuss chill at all and whose impact on chilling effects doctrine would not be fully apparent for decades. The doctrine—which provides that when the government “speaks” it is not bound by the constraints of the First Amendment¹⁸²—has its origins in the 1991 decision of *Rust v. Sullivan*,¹⁸³ which held that the government can impose certain viewpoint-based restrictions on the recipients of government funding.¹⁸⁴ By distinguishing cases in which the government is speaking from those in which it is regulating private speech, government speech doctrine recognizes the important reality that the very act of governing involves speaking about, carrying out, and funding policies on a non-neutral basis. But, as is discussed further below,¹⁸⁵ this can create tension with chilling effects doctrine, because it is by speaking or using its economic power to fund speech that the government will most often exert the pressure that creates chill. Early government speech cases, however—consistent with the formalistic tenor of the times—did not evince any concern about the potential chilling effects of this form of state power.

D. The Roberts Court: A Goldilocks Approach

The Warren Court and the Burger Court’s free speech cases thus presented two starkly different visions of the role that chilling effects should

¹⁸⁰ *Id.* at 480–81.

¹⁸¹ *Id.* at 492.

¹⁸² *Matal v. Tam*, 582 U.S. 218, 234 (2017) (“[O]ur cases recognize that ‘[t]he Free Speech Clause . . . does not regulate government speech.’”).

¹⁸³ 500 U.S. 173 (1991). *See also* HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 32 (2019) (noting that the Court would later describe *Rust* “as the beginning of the government speech doctrine, although *Rust* itself makes no mention of the term”).

¹⁸⁴ *Rust*, 500 U.S. at 193.

¹⁸⁵ *See infra* nn [XX]–[XX] and accompanying text.

play in First Amendment doctrine. Where the Warren Court opinions looked at the effects of a particular governmental action on the system of free expression, the Burger Court focused more narrowly on the form that state action took. Where the Warren Court was willing to speculate about how people might behave under certain conditions, the Burger Court largely rejected this as judicial conjecture. And where the Warren Court consciously shaped procedural rules to ensure that claims based on chilling effects would be meaningfully adjudicated in court, the Burger Court worked hard to limit the number of chilling effects cases federal courts could hear.

A pendulum never stays at its maxima in either direction though, and the arrival of the Roberts Court in the early 2000s prefigured yet another shift in chilling effects doctrine. In some ways, the Court has showed an appetite to reinvigorate chilling effects doctrine. But it has not done so based on a comprehensive or coherent account of chilling effects. Instead, it has relied on haphazard and inconsistent invocations of the concept.

Let's start with the ways that the limits the Burger Court imposed on the reach of chilling effects still shapes the Roberts Court's doctrine. Most notably, the Court's approach to the canonical exceptional First Amendment procedural rule—overbreadth doctrine—has retained the skeptical tone of the Burger Court era. Justice Thomas has repeatedly called for the doctrine to be reconsidered,¹⁸⁶ and while no one else on the Court has gone so far, the Court has applied the doctrine with increasing stringency.¹⁸⁷ In the 2023 case *United States v. Hansen*, the Court held that overbreadth challenges needed to show a “lopsided ratio” of unconstitutional applications to constitutional ones before courts could invalidate a statute on overbreadth grounds lest they “throw out too much of the good based on a *speculative* shot at the bad.”¹⁸⁸ Justice Jackson's dissent complained that the Court's crimped and skeptical approach to overbreadth claims “undermines the goal of the overbreadth doctrine, which aims to keep overly broad statutes off the books in order to avoid chilling constitutionally protected speech.”¹⁸⁹ But she was joined only by Justice Sotomayor, suggesting a significant majority on the Court that remains wary of the “strong medicine” of overbreadth, and insensitive to the chilling effects concerns that it is intended to vindicate.

¹⁸⁶ *United States v. Hansen*, 599 U.S. 762, 792 (2023); *United States v. Sineneng-Smith*, 590 U.S. 371, 383 (2020) (Thomas, J., concurring) (“Although I have previously joined the Court in applying this doctrine, I have since developed doubts about its origins and application. It appears that the overbreadth doctrine lacks any basis in the Constitution's text, violates the usual standard for facial challenges, and contravenes traditional standing principles.”)

¹⁸⁷ Chemerinsky & Chemerinsky, *supra* note 35 (describing “the Court's timid treatment of the remedy afforded by overbreadth”).

¹⁸⁸ *United States v. Hansen*, 599 U.S. 762, 785 (2023) (emphasis added).

¹⁸⁹ *Id.* at 793.

The Roberts Court's narrow view of First Amendment standing has held outside the overbreadth context too in a number of chilling effects cases. *Laird*'s restrictive standing rule for plaintiffs seeking to challenge government surveillance based on its chilling effects has largely been left intact by the Roberts Court in the decades since, even as the surveillance state has dramatically expanded.¹⁹⁰ In 2013, the Court doubled down on *Laird* in *Clapper v. Amnesty International* and held that the plaintiffs lacked standing to bring a First Amendment challenge to laws authorizing electronic surveillance for foreign intelligence purposes.¹⁹¹ The plaintiffs were lawyers and human rights advocates who had good reason to believe their communications would be surveilled because they worked with people overseas who were likely surveillance targets. Justice Alito for the Court held, however, that plaintiffs' assertions they would be surveilled were "too speculative" to establish Article III standing.¹⁹² (The plaintiffs could not definitively prove their communications were being surveilled because, of course, the government tends not to be transparent about its surveillance practices.¹⁹³) But the Court's opinion was also insensitive to arguments based on chilling effects. Justice Alito rejected the plaintiffs' argument that they could show a *current*, not merely potential future, injury because they felt chilled by the possibility of surveillance and were as a result taking costly and burdensome measures to try and protect the confidentiality of their communications. This was, he said, exactly the kind of "self-inflicted injuries" based on "subjective fear" that *Laird* held was insufficient to create standing.¹⁹⁴

¹⁹⁰ Vagle, *supra* note 152, at 1055–56 ("Plaintiffs seeking to challenge government surveillance programs have faced long odds in federal courts" as "Federal courts have since relied—and built upon *Laird* to deny standing to plaintiffs in surveillance cases."); Penney, *supra* note 60, at 121 (stating *Laird* "reflected a deep skepticism about both the potential chilling effects and attendant harms of surveillance. Such 'judicial skepticism' has persisted over the decades").

¹⁹¹ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

¹⁹² *Id.* at 401.

¹⁹³ See, e.g., Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 143 (2014) ("It is because of the necessary secrecy of government operations to obtain foreign intelligence that the plaintiffs could not say, with absolute certainty, that they were being surveilled; only in unsuccessful covert surveillances could such a plaintiff emerge."); Alan Z Rozenshtein, *Surveillance Intermediaries*, 70 STAN. L. REV. 99, 156 (2018). See also Brief for Respondents, *Clapper v. Amnesty International USA*, 2012 WL 4361439, at *26 (U.S., 2012) ("Requiring plaintiffs to establish a certainty of future injury would be particularly inappropriate in the present context because the secrecy that surrounds the government's surveillance activities will prevent anyone from ever satisfying that requirement - not because the surveillance will never take place but because they will be unaware of it when it does.")

¹⁹⁴ *Id.* at 417–18.

The *Clapper* Court was similarly unmoved by the argument that it should recognize the plaintiffs' standing because otherwise there would be no plaintiffs with sufficient incentive and capacity to challenge governmental actions in such cases. Citing non-speech clause cases, Justice Alito blithely concluded that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."¹⁹⁵ This statement is almost diametrically opposed to Justice Brennan's conclusion in *Bantam Books* that the publisher plaintiffs in that case must have standing in order to ensure that First Amendment infringements did not "go unremedied." The *Clapper* Court simply ignored the special equities, and democratic costs, involved in allowing state action that chills expression to go unchallenged that had been so salient to the Warren Court.

Similarly, in *Murthy v. Missouri*, the Roberts Court treated the question of standing as entirely divorced from the substantive First Amendment questions or values raised by the case.¹⁹⁶ In that case, social media users argued that members of the Biden Administration violated the First Amendment by pressuring social media platforms to suppress users' speech.¹⁹⁷ The Court decided that the plaintiffs did not have standing because they could not show that decisions by social media platforms to remove their content were caused by, and therefore traceable to, government pressure that affected "any discrete instance of content moderation."¹⁹⁸ This was in large part, Justice Barrett explained, because the "evidence [in the case] indicate[d] that the platforms had independent incentives to moderate content and often exercised their own judgment."¹⁹⁹ As Genevieve Lakier and I have argued elsewhere, this conclusion showed shockingly little sensitivity to the fact that platforms have strong incentives to be highly responsive to government pressure, and plaintiffs would usually have an incredibly difficult time providing the kind of evidence that the majority in *Murthy* seemed to suggest was required.²⁰⁰ The Court's narrow standing analysis forced these kinds of structural and practical considerations out of the picture in a way that, as will be discussed in the next Part, enables the government to chill speech through pressure on speech intermediaries.

Consistent with this general narrowing of standing, *Murthy* also suggested that the Court might take a narrower view of listener rights claims,

¹⁹⁵ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420, 133 S. Ct. 1138, 1154, 185 L. Ed. 2d 264 (2013) (citations omitted).

¹⁹⁶ Douek & Lakier, *supra* note 108, at 146 (noting that in deciding the plaintiffs did not have standing to bring a jawboning claim, "the Court cited almost no First Amendment cases ... Instead, it cast the decision as resting entirely on Article III principles.").

¹⁹⁷ 144 S. Ct. 1972, 1981 (2024).

¹⁹⁸ *Id.* at 1987.

¹⁹⁹ *Id.* at 1987–88.

²⁰⁰ Douek & Lakier, *supra* note 108, at 169.

which would limit another key protection against chill. The Court suggested that if listener rights were interpreted too broadly, this could give anyone “the right to sue over *someone else’s* censorship.”²⁰¹ In arguing as much, the majority articulated a similar anxiety about overly expansive judicial review as the Burger Court had in its chilling effects cases. And like the Burger Court, the *Murthy* majority embraced a formalist solution to this problem. The Court insisted that plaintiffs who sought to raise listener rights claims must identify “specific speakers or topics that they have been unable to hear or follow” in order to have standing.²⁰² The Court did not explain what this means. But if this requirement is interpreted stringently, it could make it significantly harder to bring claims that vindicate the public’s right to hear from speakers silenced by fear (and who are thus unlikely to bring a legal challenge themselves). The very nature of chill is that it can make it difficult to identify with specificity the speech that is missing.

It is not only in its standing decisions that the Roberts Court has echoed the formalist Burger Court. In substantive First Amendment law, the Roberts Court has at times also shown the same reticence to speculate about the possibility of chilling effects that the Burger Court showed. Take for instance Justice Thomas’ opinion for the Court in *Free Speech Coalition v. Paxton*.²⁰³ The case involved a Texas law which requires websites that host sexually explicit content to verify the ages of their visitors in order to prevent minors from accessing such materials. Decades earlier, the Court had found similar online age verification requirements to be unconstitutional even though they restricted access to material that children had no constitutional right to view because of the burden they imposed on adults’ free speech rights.²⁰⁴ And in *Paxton*, both the petitioners and dissent made a similar argument. They argued that the Texas law burdened adults’ First Amendment rights because it created a chilling effect by forcing people to identify themselves to access speech that might be socially embarrassing.²⁰⁵ But in a single paragraph at the end of his opinion, Justice Thomas brushed these concerns aside. The Texas law was unlikely to create a meaningful chill, he argued, because websites had incentives to ensure user privacy, and “[i]n any event, the use of pornography has always been the subject of social stigma ... [but] the

²⁰¹ *Murthy v. Missouri*, 603 U.S. 43, 75 (2024).

²⁰² *Id.*

²⁰³ 606 U. S. ____ (2025).

²⁰⁴ *Reno v. Am. C.L. Union*, 521 U.S. 844, 875 (1997) (“It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.”); *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 665 (2004) (holding that because “the statute was likely to burden some speech that is protected for adults” the government had to show that there were no less restrictive alternatives for achieving its goal).

²⁰⁵ 606 U. S. ____ (2025).

decades-long history of some pornographic websites requiring age verification refutes any argument that the chill of verification is an insurmountable obstacle for users.”²⁰⁶ These arguments are not convincing and are hard to reconcile with the underlying theory of chilling effects doctrine. The fact that some people have not been chilled in the past does not mean others weren’t chilled, nor does it mean that additional burdens—like those imposed by the Texas law—won’t create additional chill. But Justice Thomas showed a lack of imagination about these possibilities. The result was a decision that failed to give much weight to the constitutional harm caused by chill.

In other cases, however, the Roberts Court has broken with the Burger Court and shown much more appetite to entertain claims based on chilling effects.

Early signs that members of the Court were chafing against the way *Laird* and *Clapper* had narrowed plaintiffs’ ability to establish standing on the basis of chilling effects injuries came in a pair of dissents of denial from certiorari in cases concerning university programs for dealing with various speech-related incidents on campus. The lower courts in those cases had held that plaintiffs lacked standing to challenge the university programs because university administrators had no formal power to sanction students.²⁰⁷ But in two opinions, Justice Thomas (joined by Justice Alito in one case) expressed concern about the chilling effects that such university programs might have nonetheless.²⁰⁸ Without any apparent irony, Justice Thomas cited *Laird* and *Clapper* (which, recall, both *denied* standing based on alleged chilling effects of government surveillance) for the proposition that “[i]t is well settled that plaintiffs may establish standing based on ‘the deterrent, or ‘chilling,’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.”²⁰⁹ By suggesting that courts should pay attention to how these university programs might chill speech, even when they do not involve formal sanctions, Justice Thomas, in essence, called for a less formalistic and more interventionist judicial approach to the problem

²⁰⁶ *Id.*

²⁰⁷ *Speech First, Inc. v. Sands*, 69 F.4th 184, 197 (4th Cir. 2023), cert. granted, judgment vacated, 144 S. Ct. 675 (2024) (“It is undisputed that the Bias Policy itself does not set forth or contemplate sanctions and that the BIRT has no power to impose any sanctions. Nor is there any evidence that the BIRT makes threats suggesting that it can punish students. ... [Therefore,] the organization has failed to establish an injury in fact and so lacks standing to challenge the Bias Policy”); *Speech First, Inc. v. Whitten*, No. 1:24-CV-00898-JPH-MG, 2024 WL 3964864, at *4 (S.D. Ind. Aug. 28, 2024), *aff’d*, No. 24-2501, 2024 WL 4363740 (7th Cir. Sept. 5, 2024).

²⁰⁸ *Speech First, Inc. v. Sands*, 144 S. Ct. 675 (2024); *Speech First, Inc. v. Whitten*, 145 S. Ct. 701 (2025).

²⁰⁹ *Id.*

of chill, at least in some cases.²¹⁰

The full Court seemingly embraced this approach this term in *First Choice Women's Resource Centers v. Davenport*.²¹¹ The plaintiff was a nonprofit organization in New Jersey that provided counseling and support to pregnant women, but which did not provide abortions or referrals for abortions because of its religious beliefs. As part of a broader campaign aimed at investigating whether groups like First Choice provided false or misleading information about abortion and reproductive care, the New Jersey Attorney General had subpoenaed the organization seeking a wide variety of information, including details of its donors. First Choice challenged the subpoena on First Amendment grounds, arguing that the subpoena, and specifically the demand for donor information, chilled donors from associating with the organization, and that this was a First Amendment injury sufficient to establish standing.²¹² The New Jersey Attorney General argued, however, that the subpoena was “non-self-executing”—that is, that it had no independent legal force until the state obtained a court order enforcing it—and First Choice was therefore not yet injured by it. This is an argument the Burger Court might have been receptive to, focused as it was on formal legal force rather than effects.

But a unanimous Roberts Court categorically rejected this formalistic argument, holding that the subpoena chilled (and therefore created a First Amendment injury) even before it was formally enforced. Citing Warren Court precedents including *Bantam Books* and *NAACP v. Alabama*, the Court speculated that an objectively reasonable recipient would not lightly disregard the possibility of enforcement and would therefore trim their protected activity knowing that they were in the government's crosshairs. This case was “nothing like” *Laird*, the Court held, because “the Attorney General targeted First Choice for investigation,” whereas in *Laird* the government did not take any “specific action ... against” the plaintiffs. The Court did not reference the language from *Laird* that government actions had to be “regulatory, proscriptive, or compulsory in nature” to establish chill (which, it is arguable, the non-self-executing subpoena was not). Instead, the Court insisted that it is a “commonsense inference[]” that someone in the plaintiff's position would be chilled.²¹³

²¹⁰ *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 677 (2024) (“even if the ‘perpetrator’ is not technically required to accept the team's invitation to meet, it is hard to believe a college student could so easily ignore a university official's request, especially when the report will be filed and ‘the referral power lurks in the background of the invitation.’”).

²¹¹ 146 S. Ct. 1114 (2026).

²¹² *Id.* at 1122.

²¹³ *Id.* at 1125. *See also id.* at 1131 (“Just ask yourself, would it have been an answer in *NAACP v. Alabama* if the State's Attorney General promised to keep the NAACP's membership rolls to himself?”)

The Court closed by observing that this commonsense is built on decades of experience with chilling effects cases, and the cat-and-mouse dynamic they reflect:

Since the 1950s, this Court has confronted one official demand after another like the Attorney General's. Over and over again, we have held those demands burden the exercise of First Amendment rights. Disputing none of these precedents but seeking ways around them, the Attorney General has offered a variety of arguments. Some are old, some are new, but none succeeds.²¹⁴

Davenport thus evinces the kind of anti-formalist and expansive understanding of chilling effects that would not be out of place alongside cases from the Warren Court era. This is not the only such example.

In its disclosure cases, the Roberts Court has also shown markedly *increased* concern about the First Amendment harms of chilling effects than was true of the Burger and Rehnquist Courts.

In the decades following *Buckley*, the Court generally upheld mandatory disclosure laws in the campaign finance context,²¹⁵ on the basis that they facilitated the democratic process by providing information to voters.²¹⁶ As I noted earlier, the Court made clear that this general democratic interest would have to yield if plaintiffs could show evidence of specific harms, including chill in as-applied challenges. These chilling effects had to be real and not merely speculative, however, and the Court rarely found the evidence plaintiffs provided sufficient.²¹⁷ In *Brown v. Socialist Workers '74 Campaign*

²¹⁴ *Id.* at 1131.

²¹⁵ Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. LAW. SOC. SCI. 11, 14 (2018) (Since *Buckley*, the court has almost always upheld disclosure requirements"); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 283 (2010) ("Whereas other aspects of campaign finance law have been marked by shifts in doctrine, close division within the Court, and more than occasional hostility to regulation, the Court has been consistently and broadly supportive of disclosure requirements."); Jessica Levinson, *Full Disclosure: The Next Frontier in Campaign Finance Law*, 93 DENV. L. REV. 431, 433 (2016) ("While the Court has recently looked with disfavor on laws that limit the amount of money that can be given and spent in elections, it has consistently endorsed laws requiring report and disclosure of campaign spending.").

²¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (per curiam) (recognizing the value of information about campaign finance in "aid[ing] voters in evaluating those who seek federal office"); *Citizens United v. FEC*, 558 U.S. 310, 370–71 (2010) (recognizing that campaign finance disclosures "enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

²¹⁷ Levinson, *supra* note 216, at 439 ("Socialist Workers is the first and last case since *Buckley* where plaintiffs successfully waged an as-applied challenge to a campaign disclosure law.").

Comm. (Ohio), the Court exempted a minor party from disclosure requirements, citing considerable evidence of past harassment and hostility.²¹⁸ But in *Doe v. Reed* the Court rejected a challenge to a law requiring public disclosure of referenda signatories, because most referenda were on issues that were unlikely to incite the kinds of threats or harassment that the Court considered chilling.²¹⁹ Even in its otherwise famously (or infamously) deregulatory decision, *Citizens United v. FEC*,²²⁰ the Court endorsed the constitutionality of the disclosure requirements, on the grounds that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”²²¹ While Justice Kennedy’s opinion for the Court acknowledged the potential for disclosure to chill speech because of threats of retaliation, he upheld the law because the plaintiffs had offered no specific evidence they faced such threats.²²² In none of these cases was the Court particularly rigorous about its evaluation of the chilling effects alleged.²²³ But the Court consistently insisted that *something* more was necessary than the mere assertion of chill.

The Court’s calculus seemed to shift dramatically in the 2021 decision *Americans for Prosperity Foundation v. Bonta*, though.²²⁴ *Bonta* concerned disclosures of donations to charitable foundations, not campaign finance, but the Court applied the same test, in theory.²²⁵ In practice, however, the Court now seemed to apply the “exacting scrutiny” standard from the campaign finance cases with unprecedented stringency. Indeed, the majority reached back to cases from the Warren Court era to support its claim that “a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. ... Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly.”²²⁶ The dissent argued convincingly that this kind of fine tailoring had previously only been required in cases where parties had shown that the disclosure in question

²¹⁸ *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 102 (1982).

²¹⁹ *Doe v. Reed*, 561 U.S. 186, 200 (2010), citing *Buckley*, 424 U.S. 1, 74 (1976), *Citizens United*, 558 U.S. 310, 367 (2010).

²²⁰ 558 U.S. 310 (2010).

²²¹ *Id.* at 369.

²²² *Id.* at 370.

²²³ See, e.g., Wood, *supra* note 216, at 14 (“The court’s disclosure jurisprudence is based on a thin and incomplete theory of disclosure’s costs and benefits.”); Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA L. REV. 1847, 1852 (2013) (arguing that the logic underlying the Court’s campaign finance jurisprudence is “flawed”); Heerwig & Shaw, *supra* note 170, at 1447 (“we suggest that much of what the Court and reformers assume about the reality of disclosure is wrong”).

²²⁴ 594 U.S. 595 (2021).

²²⁵ *Bonta*, 594 U.S. at 608 (“exacting scrutiny is not unique to electoral disclosure regimes”).

²²⁶ *Id.* at 609 (citations omitted) (citing *Shelton v. Tucker* and *NAACP v. Button*).

would “impose a severe burden” on First Amendment rights,²²⁷ and no such burden had been shown to exist here. But because the majority doubted that the disclosures in this case actually helped the government’s purported aim of reducing fraud,²²⁸ it held that any *potential* chill was too much for the First Amendment to bear.²²⁹ This was notwithstanding the fact that the disclosures in this case were not made to the public, only to the Attorney General’s Office,²³⁰ and notwithstanding that many donors are not sheepish about but in fact very proud of their charitable donations.²³¹

The remarkable solicitude the Court showed in *Bonta* towards chilling effects claims broke with decades of precedent about what needed to be shown to successfully challenge general disclosure requirements based on chill.²³² The Court’s only hint of an explanation for the shift was an implicit suggestion that it was justified by technological change. The risks of reprisal, the majority wrote, “are heightened in the 21st century and seem to grow with each passing year, as ‘anyone with access to a computer [can] compile a wealth of information about’ anyone else.”²³³

Bonta is formalistic in its reasoning—but in *Bonta*, the Court’s formalism cut the opposite way to the Burger Court’s. Both Courts seem uninterested in thinking about the actual effects of particular governmental actions under prevailing social conditions. In the 1970s, this led the Burger Court to be skeptical about claims of chill. In *Bonta*, this led the Court to assume that all disclosures were alike, and equally potentially chilling. “The same scrutiny the Court applied when NAACP members in the Jim Crow South did not want to disclose their membership for fear of reprisals and violence now applies equally in the case of donors only too happy to publicize their names across the websites and walls of the organizations they support,” Justice Sotomayor lamented in dissent.²³⁴ Highlighting *Bonta*’s discontinuity with

²²⁷ *Id.* at 634.

²²⁸ *Id.* at 613 (“Given the amount and sensitivity of this information harvested by the State, one would expect Schedule B collection to form an integral part of California’s fraud detection efforts. It does not.”)

²²⁹ *Id.* at 615 (holding that the lack of tailoring meant “Every demand that might chill association therefore fails exacting scrutiny.”)

²³⁰ *Id.* at 615–6 (“Our cases have said that disclosure requirements can chill association ‘[e]ven if there [is] no disclosure to the general public.’”).

²³¹ *Id.* at 616 (“It is irrelevant, moreover, that some donors might not mind—or might even prefer—the disclosure of their identities to the State.”)

²³² Michael Kang, *The Post-Trump Rightward Lurch in Election Law Symposium Essay*, 74 STAN. L. REV. ONLINE 55, 62 (2021) (“The *Bonta* decision marks a decided shift in the Court’s approach to mandatory disclosure away from the traditional deference to the government’s interest in preventing corruption and voter education it has applied at least since *Buckley*.”).

²³³ *Bonta*, 594 U.S. at 617,

²³⁴ *Id.* at 623.

recent chilling effects precedents, she accused the Court of contradicting *Laird* and turning “a subjective preference for privacy, which previously did not confer standing” into a reason for the Court to subject disclosure requirements to close scrutiny.²³⁵

This critique is generalizable. The Court’s current invocation of the concept of chill is scattered and confused and it is hard to reconcile the various cases. The general impression might be best represented by an exchange between the majority and principal dissent in *Counterman v. Colorado*.²³⁶ The question at issue in *Counterman* was the mens rea standard required by the First Amendment to punish unprotected true threats. As I noted earlier, heightened mens rea requirements for the regulation of unprotected speech remained the primary way concern about chilling effects impacted First Amendment doctrine after the Burger Court containment. This was clear as the majority marched through some categories of unprotected speech (defamation, obscenity, incitement) and the mens rea standards that the Court said were necessary to provide “strategic protection” against chill in each context.²³⁷ Based on these precedents, the majority decided that under the First Amendment, true threats prosecutions must include a subjective mens rea standard, and in particular recklessness, in order to avoid “chill[ing] too much protected, non-threatening expression.”²³⁸

Justice Barrett in dissent, however, accused the majority of picking and choosing its precedents—focusing on some categories of unprotected speech, and ignoring others.²³⁹ The majority’s conclusion, she suggested, “is not grounded in law, but in a Goldilocks judgment: Recklessness is not too much, not too little, but instead ‘just right.’”²⁴⁰ Justice Kagan quipped in response that “in law, as in life, there are worse things than being ‘just right.’”²⁴¹ This is a good line, but an inadequate response. Another interpretation of Goldilocks is not that the protagonist gets her choices “just right,” but that she picks and chooses what suits her own preferences, without any coherent or thoughtful account of what makes the best bed, or porridge.

This could just as well describe the Roberts Court’s use of chilling effects more generally. The Court uses the concept here and there, without much theorizing or explanation, as it sees fit. Sometimes the Court is very solicitous of potential chilling effects (see *First Choice*, *Bonta* and *Counterman*); at other times, it blithely ignores them (see *Hansen*, *Clapper*, *Murthy* and

²³⁵ *Id.*

²³⁶ 600 U.S. 66 (2023).

²³⁷ *Id.* at 75.

²³⁸ *Id.* at 78, 82.

²³⁹ *Id.* at 109 (“the Court neglects certain cases and misreads others”).

²⁴⁰ *Id.* at 118.

²⁴¹ *Id.* at 82 n 7.

Paxton). Perhaps the Court is getting it “just right.” But equally, perhaps the Court is just expressing its own preferences. As Alex and Erwin Chemerinsky recently observed, “[t]he Court’s inconsistency gives rise to the inescapable conclusion that chill is a concept that justices invoke when it helps defend the conclusion they desire, but dismiss when they want an opposite result.”²⁴² This is an approach to chilling effects that produces an unpredictable and seemingly manipulable doctrine untethered from any unifying approach to the constitutional problem of chill. And the resulting tensions and inconsistencies leave chilling effects doctrine less clear than one would hope for in times when it comes to be tested.

II. THE BIG CHILL

The chilling effects jurisprudence of the Roberts Court is thus undertheorized and unstable. It is not generally capacious and ambitious, like that of the Warren Court, nor largely constrained and modest, like that of the Burger Court. It is, instead, a bit of both, depending on the context. This exacerbates the cat-and-mouse dynamic: governmental actors look for ways to exploit gaps in existing doctrine so they can indirectly suppress dissent, while plaintiffs ask courts to expand First Amendment protections to safeguard against these new threats. This Part describes how this dynamic is playing out under modern conditions, and the tensions it illuminates in the Roberts Court’s chilling jurisprudence. Section A describes the current profound threat to freedom of expression and how it illustrates the perpetual innovation of governmental attempts to chill. Section B discusses how courts have dealt with these challenges so far, and Section C argues that the Supreme Court’s current chilling effects doctrine gives courts inadequate tools to respond to challenges like the current moment. The overall picture this Part paints is of First Amendment doctrine under strain.

A. *Efforts to Suppress Flow to the Cracks*

From its opening days, even as it declared that it was “Restoring Freedom of Speech and Ending Federal Censorship,”²⁴³ the second Trump Administration as a whole, and the President in particular, has engaged in a concerted, expansive and innovative campaign to chill.²⁴⁴ This campaign has

²⁴² Chemerinsky & Chemerinsky, *supra* note 35.

²⁴³ Exec. Order No. 14,149, 90 Fed. Reg. at 8243.

²⁴⁴ Tim Zick, *Trump 2.0: Executive Power and the First Amendment*, FIRST AMENDMENT WATCH (Jul. 28, 2025), <https://firstamendmentwatch.org/deep-dive/trump-2-0-executive-power-and-the-first-amendment/> (“The warning signs were there, but few anticipated the extent to which Trump 2.0 would or could use the powers of the presidency

more heterogenous targets and tools than the anti-Communist measures employed during the Second Red Scare, which makes it harder to describe as a cohesive whole. But the sum of many parts clearly adds up to a sweeping attempt to suppress speech, including dissent, using indirect means.

To be clear, the Trump Administration is not the only government actor that has in modern times used the tremendous political, regulatory and economic resources of the state to chill disfavored speech.²⁴⁵ But the reach and ingenuity of the Trump Administration's efforts,²⁴⁶ and the litigation these efforts have (and have not) spurred, make them a useful frame for examining modern chilling effects doctrine. Whether the Trump Administration's actions, or any particular one of them, are historically unique is perhaps beside the point—either way, they highlight tools that could be wielded by any governmental actor against any disfavored viewpoint. The lessons that follow should therefore transcend partisan divides.

Most relevantly for the thesis of this Article, the second Trump Administration's chilling campaign has demonstrated one of the core insights from the history of chilling effects doctrine: the fundamental cat-and-mouse dynamic of governmental speech regulation and the doctrine that protects against it. One of the remarkable facts about the Trump Administration's efforts has been how much it has been shaped by the contours of existing law, even as it seeks to suppress speech protected by the First Amendment. By and large the Administration has not sought to *directly* prohibit particular speech or viewpoints, given the strength of the First Amendment barrier (and cultural norm) against such direct speech regulation. It has instead looked to the tools of indirect suppression and chill.

Some of these tools are familiar and have drawn comparisons to the

and the bully pulpit to restrict, suppress, and coerce expression”).

²⁴⁵ I have written about other examples elsewhere: See, e.g., Evelyn Douek & Genevieve Lakier, *Title VI as a Jawbone*, KNIGHT FIRST AMENDMENT INSTITUTE (Sep. 26, 2024), <http://knightcolumbia.org/blog/title-vi-as-a-jawbone>; Evelyn Douek, *The Jawboning Forests and Trees*, KNIGHT FIRST AMENDMENT INSTITUTE (Oct. 4, 2023), <http://knightcolumbia.org/blog/the-jawboning-forests-and-trees>.

²⁴⁶ William Baude, *Abuse of Power in the Second Trump Administration*, 23 U. ST. THOMAS L. J. (2026) (“one of the distinctive patterns of the Trump Administration is the use – and abuse – of a broad range of constitutional and statutory powers to reward the friends and punish the enemies of the regime”).

Second Red Scare.²⁴⁷ As in the McCarthy era,²⁴⁸ the president has attempted to impose ideological conformity on the federal workforce, asking for allegiance from new federal employees,²⁴⁹ and firing those that are seen to be disloyal.²⁵⁰ As was true of the McCarthy era also,²⁵¹ the government has targeted non-citizens for speech repression. The Administration has attempted to deport foreign students and scholars who have engaged in pro-Palestinian advocacy,²⁵² imposed visa restrictions on people who have worked on social media platform policies that the Administration disagrees with,²⁵³ refused to admit foreigners who had expressed viewpoints the Administration doesn't like,²⁵⁴ and started reviewing visa applicants' social

²⁴⁷ See, e.g., Genevieve Lakier, *Balkinization: The Trump Administration's War on Free Speech, the McCarthy Analogy, and the Limits of the First Amendment-- Part One*, BALKINIZATION (Jul. 5, 2025), <https://balkin.blogspot.com/2025/07/the-trump-administrations-war-on-free.html>; Genevieve Lakier, *Balkinization: The Trump Administration's War on Free Speech, the McCarthy Analogy, and the Limits of the First Amendment-- Part Two*, BALKINIZATION (Jul. 6, 2025), https://balkin.blogspot.com/2025/07/the-trump-administrations-war-on-free_01902568603.html; Ellen Schrecker, *Worse Than McCarthyism: Universities in the Age of Trump*, NATION (Apr. 3, 2025), <https://www.thenation.com/article/society/mccarthyism-universities-trump-attacks/>; Quinta Jurecic, *The Third Red Scare*, ATLANTIC (Nov. 10, 2025), <https://www.theatlantic.com/ideas/2025/11/first-amendment-trump-free-speech-red-scare/684866/>; Zack Beauchamp, *The Third Red Scare*, VOX (Sep. 17, 2025), <https://www.vox.com/on-the-right-newsletter/461722/charlie-kirk-killing-trump-vance-miller-free-speech-cancel>.

²⁴⁸ STONE, *supra* note 67, at 342–52.

²⁴⁹ Emily Peck, *Critics Warn of Loyalty Test in New White House Hiring Guidelines*, AXIOS (Jun. 2, 2025), <https://www.axios.com/2025/06/02/white-house-loyalty-trump>.

²⁵⁰ Glenn Thrush et al., *Justice Dept. Fires Prosecutors Who Worked on Trump Investigations*, N.Y. TIMES (Jan. 27, 2025), <https://www.nytimes.com/2025/01/27/us/politics/justice-department-firings-trump-jack-smith.html>; Andrea Hsu, *They Had Left Their DEI Roles. Trump Still Fired Them*, NPR (Apr. 7, 2025), <https://www.npr.org/2025/04/07/nx-s1-5348922/trump-dei-federal-employees-firing>; Maxine Joselow, *E.P.A. Suspends 144 Employees After They Signed a Letter Criticizing Trump*, N.Y. TIMES (Jul. 3, 2025), <https://www.nytimes.com/2025/07/03/climate/epa-letter-administrative-leave.html>; Peter Baker, *Trump's Efforts to Control Information Echo an Authoritarian Playbook*, N.Y. TIMES (Aug. 3, 2025), <https://www.nytimes.com/2025/08/03/us/politics/trump-bls-jobs-facts.html>.

²⁵¹ Julia Kraut & Tyler McBrien, *The Trump Admin's Embrace of Ideological Exclusion and Deportation*, LAWFARE (Jul. 5, 2025), <https://www.lawfaremedia.org/article/the-trump-admin-s-embrace-of-ideological-exclusion-and-deportation>.

²⁵² Josh Gerstein & Kyle Cheney, *Trump Officials Used Shadowy Website to Target Pro-Palestinian Academics for Deportation, Court Records Show*, POLITICO (Jul. 9, 2025), <https://www.politico.com/news/2025/07/09/pro-palestinian-deportation-documents-trial-00445238>.

²⁵³ Coalition for Independent Technology Research v. Rubio, No. 1:26-cv-815 (D.D.C.).

²⁵⁴ Alistair Kitchen, *How My Reporting on the Columbia Protests Led to My Deportation*, THE NEW YORKER (Jun. 19, 2025), <https://www.newyorker.com/news/the>

media activity for “political activism” and “any indications of hostility towards the citizens, culture, government, institutions or founding principles of the United States,”²⁵⁵ a vague and sweeping directive that can only serve to chill criticism of the United States and its government. These moves make the Second Red Scare a natural comparison for the current moment.

As the history in Part I suggests, however, campaigns to chill speech innovate, seeking new levers of power to suppress dissent that work around the clearest doctrinal constraints on governmental power. The number and extent of retaliatory and chilling actions by the Trump Administration defy comprehensive accounting, but a survey of some of its actions shows how the Administration has targeted weak points in the way existing doctrine protects the modern public sphere.

First, the Trump Administration is using the power of the purse to an unprecedented degree to create chill. It has cut funding to research projects on particular blacklisted topics, such as race, gender, “misinformation,” and climate change,²⁵⁶ and announced a policy to prevent any federal grants that aren’t politically aligned with the Administration’s views.²⁵⁷ It has also used funding as leverage to shape research and other institutions more broadly—for example, to push universities to crack down on student protests, to influence hiring and admissions decisions, and reform other aspects of university life.²⁵⁸ The chilling effects of such efforts are unprecedentedly successful because of the government’s greatly expanded role as a funder of education and research in recent decades,²⁵⁹ with universities in particular

lede/how-my-reporting-on-the-columbia-protests-led-to-my-deportation.

²⁵⁵ Nahal Toosi & Eric Bazail-Eimil, *State Department Unveils Social Media Screening Rules for All Student Visa Applicants*, POLITICO (Jun. 18, 2025), <https://www.politico.com/news/2025/06/18/social-media-screening-student-visas-00413160>.

²⁵⁶ Lisa Larrimore Ouellette, *The Trump Administration’s Multi-Front Assault on Federal Research Funding*, JUST SECURITY (Jul. 9, 2025), <https://www.justsecurity.org/116486/trump-assault-federal-research-funding/>.

²⁵⁷ Tony Romm, *New Proposal Would Allow Administration to Block Grants If They Don’t Support Trump’s Agenda*, N.Y. TIMES (Jun. 2, 2026), <https://www.nytimes.com/2026/06/02/us/politics/trump-budget-grants-omb-vought.html>.

²⁵⁸ See, e.g., Genevieve Lakier, *The Unconstitutional Conditions Doctrine and the Compact for Excellence*, DIVIDED ARGUMENT (May 7, 2025), <https://blog.dividedargument.com/p/the-unconstitutional-conditions-doctrine>; Evelyn Douek, *Federal Funding as a Jawbone*, KNIGHT FIRST AMENDMENT INSTITUTE (Jun. 10, 2025), <http://knightcolumbia.org/blog/federal-funding-as-a-jawbone>.

²⁵⁹ Genevieve Lakier, *The Trump Spending Cuts, the Public/Private Distinction, and the Limits of the Modern First Amendment*, KNIGHT FIRST AMENDMENT INSTITUTE (Jul. 1, 2025), <http://knightcolumbia.org/blog/the-trump-spending-cuts-the-public-private-distinction-and-the-limits-of-the-modern-first-amendment>; Evelyn Douek, *Federal Funding as a Jawbone*, KNIGHT FIRST AMENDMENT INSTITUTE (Jun. 10, 2025), <http://knightcolumbia.org/blog/federal-funding-as-a-jawbone>.

much more dependent on government funding than in the past,²⁶⁰ making them far more susceptible to government pressure.²⁶¹ As will be discussed further below, it also takes advantage of the way government speech doctrine has developed in recent decades, and the potential loophole that doctrine promises to create in the protections against chill.

Second, the Trump Administration has exploited the reach of the modern surveillance and national security state. It has labelled dissident viewpoints—including “anti-fascism,” “anti-Americanism, anti-capitalism, and anti-Christianity”²⁶²—“domestic terrorism.” It has, for example, described protestors, including those killed by ICE agents,²⁶³ as domestic terrorists, and suggested that such protestors are being added to a database for monitoring and investigation.²⁶⁴ The label itself does not have legal force, but likely it exerts a chill on dissent by suggesting that mere opposition to the Administration is enough to justify the invocation of the expansive arsenal of state power used against national security threats. Deeming dissent a national security threat is hardly new. But this strategy also leverages recent doctrinal developments. The specific use of the label “terrorism” seems to invoke the Supreme Court’s decision upholding laws prohibiting providing material support to terrorist organizations that cover even peaceful speech and association (even if the Court insisted that this can only be applied to international, not domestic, organizations).²⁶⁵

The chill of this securitization is greatly increased by the third trend, which is the government’s use of private intermediaries to expand the government’s surveillance capabilities, targeting people who express dissent with a far greater reach than was previously possible.²⁶⁶ While the extent of this is hard to ascertain (which is part of the chill), reporting indicates that the

²⁶⁰ Jeremy W. Peters & Andrea Fuller, *How Universities Became So Dependent on the Federal Government*, N.Y. TIMES (Apr. 18, 2025), <https://www.nytimes.com/2025/04/18/us/trump-universities.html>.

²⁶¹ For a canonical early piece observing these dynamics, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

²⁶² National Security Presidential Memorandum 7, Countering Domestic Terrorism and Organized Political Violence (Sept. 25, 2025), <https://www.whitehouse.gov/presidential-actions/2025/09/countering-domestic-terrorism-and-organized-political-violence/>.

²⁶³ Tom Joscelyn & Ryan Goodman, *The Smearing of Alex Pretti and NSPM-7*, JUST SECURITY (Jan. 26, 2026), <https://www.justsecurity.org/129797/alex-pretti-nspm-7/>.

²⁶⁴ Ken Klippenstein, *Exclusive: ICE’s Secret Watchlists of Americans* (Dec. 10, 2024), <https://www.kenklippenstein.com/p/ices-secret-watchlists-of-americans>.

²⁶⁵ See, e.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010); David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine* General Essay, 6 HARV. L. & POL’Y REV. 147 (2012).

²⁶⁶ Rozenshtein, *supra* note 195, at 114 (describing how internet platforms hold a “mass of data [which] tells rich stories about our lives—what we do and where, when, and with whom we do it. Hence it’s a treasure trove for surveillance officials.”).

Administration has issued subpoenas to email providers and social media companies for information to help it identify those who have criticized the Administration online.²⁶⁷ In the past, a comment to a friend or participation at a protest was almost always ephemeral—it left no trace that could be later discovered by government officials seeking to identify and punish dissenters. Now, the internet creates and stores a trove of information about who was where when and said what.²⁶⁸ This online record can be used by public and private actors alike to track and threaten consequences for others for the things they say.²⁶⁹ Technology has also increased the government’s capacity to surveil offline activity, including through the use of facial recognition²⁷⁰ and location tracking data.²⁷¹ This strategy at once takes advantage of the technological changes that the Court noted in *Bonta* have increased the potential for chill in recent decades (in that case, because of retribution by private actors), while also exploiting current doctrine’s ambivalence about how to treat government surveillance-based chilling effects.

Fourth, the Administration has leveraged private intermediaries in another way too: by exerting pressure on them to do the speech regulation on the government’s behalf. This takes advantage of what Jack Balkin has described as the triadic nature of the modern public sphere.²⁷² In the past, the

²⁶⁷ John Woodrow Cox, *Homeland Security is Targeting Americans with this Secretive Legal Weapon*, WASH. POST (Feb. 7, 2026), <https://www.washingtonpost.com/investigations/2026/02/03/homeland-security-administrative-subpoena/>; Jimmy Jenkins & Zoe Tillman, *The DOJ Wants to Know Who on Reddit and X Is Criticizing ICE’s Tactics*, BLOOMBERG (May 28, 2026), <https://www.bloomberg.com/news/articles/2026-05-28/trump-s-doj-ramps-up-probes-of-anonymous-ice-critics-with-x-reddit-subpoenas>.

²⁶⁸ Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 126 (2007) (“Due to changes in technology and the realities of modern life, much First Amendment activity now leaves digital fingerprints beyond private zones protected by the Fourth Amendment.”).

²⁶⁹ Penney, *supra* note 20, at 1508–9 (collecting studies and noting that “Observation alone has chilling and conforming effects ... [a]nd there is substantial empirical support for such surveillance chilling effects.”); Kaminski & Witnov, *supra* note 159, at 485 (reviewing literature and concluding “existing studies suggest that surveillance causes conforming and other potential harms to First Amendment values”) ; Solove, *supra* note 269, at 123 (“Surveillance can make people reluctant to engage in robust and candid discourse.”).

²⁷⁰ Sheera Frenkel & Aaron Krolik, *How ICE Already Knows Who Minneapolis Protesters Are*, N.Y. TIMES (Jan. 30, 2026), <https://www.nytimes.com/2026/01/30/technology/tech-ice-facial-recognition-palantir.html>.

²⁷¹ Joseph Cox, *Inside ICE’s Tool to Monitor Phones in Entire Neighborhoods*, 404 MEDIA (Jan. 8, 2026), <https://www.404media.co/inside-ices-tool-to-monitor-phones-in-entire-neighborhoods/>.

²⁷² Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2014 (2018); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297 (2014) (“Increasingly, speech regulation and surveillance are technologically imposed and involve cooperation between governments and the private entities that control the

government would need to find ways to regulate speech and speakers directly (what Balkin calls “old-school speech regulation”), but now the government can increasingly regulate private speech intermediaries who themselves regulate individual speakers (“new school speech regulation”).²⁷³ Exerting pressure on these speech intermediaries (what is known as “jawboning”) to suppress particular viewpoints or speakers can be an efficient and opaque way of suppressing the speech of many, simply by leveraging the weakness at a single chokepoint.²⁷⁴ Jawboning is also not new, but the power of modern speech intermediaries makes it an especially attractive tool in what Genevieve Lakier has described as “a new era of jawboning.”²⁷⁵ Pressure on social media platforms to change their content moderation rules,²⁷⁶ app stores to remove disfavored apps,²⁷⁷ artificial intelligence companies to train their models in particular ways,²⁷⁸ and universities to suppress certain kinds of speech,²⁷⁹ are all examples of this intermediary strategy.²⁸⁰ This strategy is especially effective given ways the Supreme Court’s recent standing decisions have made it harder to challenge this kind of pressure on intermediaries.

Finally, and as in the McCarthy era too,²⁸¹ the Trump Administration is using its investigatory powers to chill the speech and association of people and grounds it perceives as hostile to its interests. The targets are diverse,

infrastructure of free expression.”).

²⁷³ *Id.*

²⁷⁴ Balkin, *Old-School/New-School Speech Regulation*, *supra* note 273, at 2341 (“New-school speech regulation offers additional possibilities - and more effective possibilities - for ex ante prevention than old-school speech regulation did.”); Kreimer, *supra* note 69, at 27 (“the cost of monitoring and sanctioning disfavored communications is largely externalized onto the intermediaries who are the subjects of direct regulation.”).

²⁷⁵ Genevieve Lakier, *Enforcing the First Amendment in an Era of Jawboning*, U. CHI. L. REV. at 3–4 (forthcoming 2026).

²⁷⁶ Cristiano Lima-Strong & Anish Wuppalapati, *100 Days of Trump: His Enforcers Are Waging War On Content Moderation. It's Likely Just The Start.* | *TechPolicy.Press*, TECH POLICY PRESS (Apr. 30, 2025), <https://www.techpolicy.press/100-days-of-trump-his-enforcers-are-waging-war-on-content-moderation-its-likely-just-the-start/>.

²⁷⁷ Bobby Allyn, *Legal Experts Condemn Apple Bowing to White House’s Request to Remove ICE Tracking App*, NPR (Oct. 3, 2025), <https://www.npr.org/2025/10/03/nx-s1-5561999/apple-google-iceblock-app-removal>.

²⁷⁸ Bobby Allyn, *Trump’s New AI Policies Keep Culture War Focus on Tech Companies*, NPR (Jul. 23, 2025), <https://www.npr.org/2025/07/23/nx-s1-5476771/trump-artificial-intelligence-woke-eo>.

²⁷⁹ See *supra* nn [XX].

²⁸⁰ Nat’l Rifle Ass’n of Am. v. Vullo, 602 U.S. 175, 197 (2024) (discussing the constitutional dangers of such an “intermediary strategy”)

²⁸¹ STONE, *supra* note 67, at 352–53 (describing investigations as a “weapon in the nation’s “war on subversion” during the McCarthy era that was ‘deployed in this era with unprecedented intensity and viciousness’ and which ‘chilled the whole of American society’).

from news outlets being investigated for purported violations of their obligations as public broadcasters,²⁸² to tech platforms being investigated for their content moderation practices,²⁸³ to law firms being investigated for their hiring practices,²⁸⁴ or universities being investigated for their diversity initiatives.²⁸⁵ The list could go on. The premise of these investigations are varied, but all target people or entities the Administration perceives as critics or enemies. This strategy exploits current doctrine's ambivalence and uncertainty about the extent to which governmental investigations can be constrained by the First Amendment.

This catalogue of actions is necessarily incomplete, especially as the list expands by the day. But the overall picture is clear. More than any specific strategy or action, the President has communicated that he is prepared to use whatever leverage he has (and that leverage is considerable) to retaliate against those that express disfavored views. The overall impression is that there is no lever too big or too small to be pulled in an effort to make life more difficult for the Administration's critics. The result is what we might call "ambient" chill, where opposition of any kind comes with significant potential costs.

The Trump Administration did not invent these strategies and is not alone in exploiting them. But the aggregation of all these efforts all at once represents the most ambitious and aggressive challenge to expressive freedom that this country has faced in decades, perhaps since the creation of modern First Amendment doctrine. It has thus brought into sharp relief the areas of weakness in chilling effects doctrine and accelerated the timeline on which courts are being forced to confront them.

B. Chilling Doctrinal Uncertainty

Litigation is slow, and so at the time of writing the First Amendment jurisprudence of the second Trump Administration is still taking shape.²⁸⁶ My

²⁸² Liam Scott, *FCC Launches Media Investigations, Reinstates Complaints*, VOICE OF AMERICA (Feb. 5, 2025), <https://www.voanews.com/a/us-communications-agency-reinstates-complaints-starts-investigating-media/7964421.html>.

²⁸³ *Federal Trade Commission Launches Inquiry on Tech Censorship*, FEDERAL TRADE COMMISSION (Feb. 20, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship>.

²⁸⁴ Jessica Silver-Greenberg et al., *Angst Builds Inside Federal Agency Over Trump's Moves Against Law Firms*, N.Y. TIMES (Apr. 22, 2025), <https://www.nytimes.com/2025/04/22/business/eeoc-trump-dei-law-firms.html>.

²⁸⁵ Vimal Patel, *Faculty Support of George Mason's President Draws Federal Investigation*, N.Y. TIMES (Jul. 28, 2025), <https://www.nytimes.com/2025/07/28/us/justice-department-george-mason-faculty-senate-investigation.html>.

²⁸⁶ See especially Stanford Daily litigation; *UAW v. DOJ*; *Doe v. Mullin*; *Coalition for Independent Technology Research v. Rubio*; *AAUP v. Rubio* on appeal.

goal in this subsection is not to provide a full account or final reckoning about how the First Amendment has fared during this time. It is simply to show that despite the long history and forceful rhetoric of First Amendment concerns about chilling effects, litigants and courts have at times struggled to translate the current real-world experience of pervasive chill into tractable First Amendment violations because of the way the Administration has targeted weak points in the doctrine.

These weaknesses are all the more clear when looking at the features of the cases in which courts have acknowledged the current chill. When cases have matched the typical dyadic paradigm—that is, when the president or Administration has directly targeted individuals or institutions based on their protected speech—courts have been able to make chilling effects cognizable. The direct burdens on the plaintiffs in these cases mean standing is straightforward, and these claims are not affected by the Court’s narrower standing decisions from recent decades. In adjudicating these cases, though, courts have recognized the broader chilling effects of the Administration’s actions as they have vindicated the rights of the plaintiffs directly targeted. For example, law firms targeted for various sanctions by Executive Orders for doing work or hiring lawyers deemed hostile to the President’s interests have been universally successful in having those orders enjoined, and the courts hearing those claims have acknowledged the chilling effects of these retributive orders beyond the particular plaintiffs.²⁸⁷ As one district court found, such orders “cast[] a chill over the whole of the legal profession, leaving lawyers around the country weighing the necessity of vigorous representation against the peril of crossing the federal government.”²⁸⁸ The court also took notice of the ambient chill that is created in a climate where such actions come to be expected:

[T]he chill does not end with the legal profession. ... [W]hat the President does to the bar he can equally do to other pillars of our constitutional order—the press, non-governmental organizations, and more. Retaliatory action against one profession thus ‘tells the others that they engage in protected activity at their peril.’ A republic overcast with such a pervasive

²⁸⁷ See, e.g., *Jenner & Block LLP v. U.S. Dep’t of Just.*, No. CV 25-916 (JDB), 2025 WL 1482021, at *22 (D.D.C. May 23, 2025); *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of President*, No. CV 25-917 (RJL), 2025 WL 1502329, at *11 (D.D.C. May 27, 2025) (“the Order is akin to a sword of Damocles hanging over WilmerHale’s head”); *Susman Godfrey LLP v. Exec. Off. of President*, No. CV 25-1107 (LLA), 2025 WL 1779830, at *21 (D.D.C. June 27, 2025) (holding that the Executive Order in that case “chills Susman’s speech advocating for clients whose interests are adverse to the government. Indeed, the Order hangs like the sword of Damocles over the firm.”).

²⁸⁸ *Jenner & Block LLP v. U.S. Dep’t of Just.*, No. CV 25-916 (JDB), 2025 WL 1482021, at *22 (D.D.C. May 23, 2025).

chill would not long endure, ‘for what is at stake is the equilibrium established by our constitutional system.’²⁸⁹

Courts have similarly noted systemic chill in cases brought by individual immigrants who have been targeted for deportation on the basis of their protected speech. These courts, in ordering the release of these plaintiffs from detention, have noted the broad chilling effects of detaining noncitizens for their speech.²⁹⁰ As the judge in Rumeysa Ozturk’s case put it, “[h]er continued detention potentially chills the speech of the millions and millions of individuals in this country who are not citizens.”²⁹¹

In these cases, courts have recognized chilling effects as a byproduct of the more direct First Amendment injury—the retaliation against a law firm, or a university, or a non-citizen, for example. But as *Thornhill* first recognized, protecting against chilling effects requires courts to be able to vindicate First Amendment interests beyond those raised by plaintiffs whose own protected speech is being directly suppressed. Cases successfully vindicating these more indirect forms of chill have been much harder to bring and to win.

One big reason is chill itself, which causes what we might call a missing plaintiff problem. Plaintiffs who are scared to speak will be scared to sue. This is especially true when those targeted by the government are speech intermediaries, rather than speakers themselves. Intermediaries often have relatively little incentive to protect the expression of the third-parties whose speech they mediate, and thus will “adopt a conscious policy of prophylactic self-censorship that blocks any content that could precipitate the threat of

²⁸⁹ *Id.* at *23 (citations omitted).

²⁹⁰ *See, e.g.,* Mahdawi v. Trump, No. 2:25-CV-389, 2025 WL 1243135, at *14 (D. Vt. Apr. 30, 2025) (“Mr. Mahdawi’s release is also in the public interest. His continued detention would likely have a chilling effect on protected speech, which is squarely against the public interest.”); Ozturk v. Trump, No. 2:25-CV-374, 2025 WL 1145250, at *16 (D. Vt. Apr. 18, 2025), amended sub nom. Ozturk v. Hyde, 136 F.4th 382 (2d Cir. 2025) (“[Ozturk’s] evidence supports her argument that the government’s motivation or purpose for her detention is to punish her for co-authoring an op-ed in a campus newspaper which criticized the Tufts University administration, and to chill the political speech of others. The government has so far offered no evidence to support an alternative, lawful motivation or purpose for Ms. Ozturk’s detention.”); MAHMOUD KHALIL, Petitioner, v. DONALD TRUMP et al., Respondents., No. 25-CV-01963 (MEF)(MAH), 2025 WL 1983755, at *2 (D.N.J. July 17, 2025) (“The Court ... finds as a factual matter that the continued post-June 11 efforts to remove [the Petitioner] from the United States ... are causing various types of harm. Reputational harm. Professional harm. And the chilling of speech.”)

²⁹¹ Cristian Farias, *Donald Trump Is Torching the First Amendment. Judges Are Putting Him in His Place*, VANITY FAIR (May 22, 2025), <https://www.vanityfair.com/news/story/donald-trump-first-amendment-judges>.

sanctions.”²⁹² For this reason, Seth Kreimer describes speech intermediaries as the “weakest link” in the system of free expression. “To be sure,” Kreimer explains, “every prospect of liability or other sanction can chill speech, but intermediaries have a peculiarly fragile commitment to the speech that they facilitate.”²⁹³ The response to the Trump Administration’s chilling campaign bears this out. For example, many law firms reached settlements with Trump, even as their peer firms were successful in court.²⁹⁴ Many universities, too, have sought to make deals with the administration rather than challenge federal funding cuts.²⁹⁵ Social media companies settled lawsuits and changed their content moderation rules, rather than face the President’s ire.²⁹⁶ Media organizations have done the same.²⁹⁷ Institution after institution has chosen to settle rather than press their First Amendment rights in court. In the modern triadic world, intermediary incentives are not necessarily aligned to ensure that First Amendment rights are defended against chill.

These dynamics only underline why chilling effects doctrine needs to be sensitive to the ways that freedom of speech requires breathing space to survive and otherwise will tend to be under-vindicated in court, as the Warren Court recognized. But more recent chilling effects doctrine has deprived claims based on chill of some of their oxygen and kept them out of court even when there are willing challengers.

This is one product of the Court’s narrowing of First Amendment standing, which has limited opportunities for others to bring challenges when the speech intermediary does not. For example, following *Murthy*, one court threw out a challenge brought by faculty to the Trump Administration’s pressure campaign against Columbia University, despite the very direct impacts the campaign had on those faculty, because the University had its own reasons to make a deal and so the faculty’s dispute was, in that court’s telling, with the university not the government.²⁹⁸ But this formalistic

²⁹² Kreimer, *supra* note 69, at 28.

²⁹³ Kreimer, *supra* note 69.

²⁹⁴ Michael S. Schmidt et al., *Law Firms Made Deals With Trump. Now He Wants More From Them.*, N.Y. TIMES (Apr. 16, 2025), <https://www.nytimes.com/2025/04/16/us/politics/law-firms-deals-trump.html>.

²⁹⁵ Michael C. Bender & Sharon Otterman, *Columbia and White House Enter Final Stage of Talks to End Standoff*, N.Y. TIMES (Jul. 18, 2025), <https://www.nytimes.com/2025/07/17/nyregion/columbia-trump-near-deal.html>.

²⁹⁶ Josh Gerstein, *Meta Settles Trump Lawsuit over Facebook Ban for \$25 Million*, POLITICO (Jan. 29, 2025), <https://www.politico.com/news/2025/01/29/meta-settles-trump-facebook-ban-lawsuit-007810>.

²⁹⁷ Katie Fallow, *Paramount’s Trump Lawsuit Settlement: Curtain Call for the First Amendment?*, KNIGHT FIRST AMENDMENT INSTITUTE (Jul. 8, 2025), <http://knightcolumbia.org/blog/paramounts-trump-lawsuit-settlement-curtain-call-for-the-first-amendment>.

²⁹⁸ *Am. Ass’n of Univ. Professors v. United States Dep’t of Just.*, No. 25-CV-2429

reasoning ignores the “weakest link” problem of intermediary incentives and allows the government to exploit these incentives in predictable ways. As the Court reaffirmed just last term, where the third-party’s actions are the “predictable” response to government action, this does not break the chain of causation necessary to establish standing.²⁹⁹ Speech intermediaries bowing to government pressure is, as decades of First Amendment literature and cases recognize, an entirely predictable response.³⁰⁰ The costs of failing to recognize this are enormous because the choices these institutions make impact not just themselves; they also affect the speech of others (their clients, students and faculty, or users), who are governed by the terms of whatever deal the institution makes. Not all courts have been so formalist in their reasoning. In a case challenging the Administration’s similar threats against Harvard, the court recognized the standing of unions representing professors and students, rejecting the argument accepted in the Columbia case.³⁰¹ But there is plenty of language in some of the Court’s standing decisions that allow this kind of formalist restriction on standing which makes chill harder to challenge.

Courts have also evinced the same skepticism that the Court has of broad listener rights which also helps insulate chill from review. The judge in a case challenging the Administration’s attempts to chill non-citizen students and faculty who express pro-Palestinian views, for example, did not entertain a claim brought by citizen listeners—instead, insisting that vulnerable non-citizens who themselves felt chilled had to bring a claim.³⁰² But in many—perhaps most—cases, it will not be easy to find chilled speakers willing to give evidence about their fear, for obvious reasons.

Similarly, *Laird* and *Clapper* have at times been relied on by courts to deny standing for plaintiffs seeking to challenge forms of surveillance that

(MKV), 2025 WL 1684817, at *11 (S.D.N.Y. June 16, 2025) (“Plaintiffs lack standing to assert the claims they purport to allege in this case. They are inserting themselves into a quarrel between the Executive Branch and non-party Columbia, which, Plaintiffs’ own submissions make clear, Columbia wishes to resolve cooperatively, and perhaps through administrative appeals, without resorting to litigation that might further imperil Columbia’s resources and reputation.”)

²⁹⁹ *Diamond Alternative Energy, LLC v. Env’t Prot. Agency*, 145 S. Ct. 2121, 2134 (2025).

³⁰⁰ Lakier, *Enforcing the First Amendment in an Era of Jawboning*, *supra* note 106, at 18.

³⁰¹ *President & Fellows of Harvard Coll. v. United States Dep’t of Health & Hum. Servs.*, 798 F. Supp. 3d 77, 113 (D. Mass. 2025).

³⁰² *Am. Ass’n of Univ. Professors v. Rubio*, No. CV 25-10685-WGY, 2025 WL 2777659, at *46 (D. Mass. Sept. 30, 2025) (“Although this Court rejected the Plaintiffs’ arguments that their citizen members had standing to sue on the basis of chilled listening and association as such, it nevertheless takes seriously their concern that their own speech rights and rights to hear and to associate are implicated in this case.”).

create chill even when those cases could have been distinguished. For example, a court threw out a challenge on standing grounds to the Administration's policy of requiring visa applicants to give the government their social media handles, which involved a direct compulsory proscription unlike *Laird* or *Clapper*.³⁰³ Social media surveillance is a chilling mechanism of unprecedented power and reach, and if courts fail to even hear such cases they will be blind to the most important spaces for both speech and chill.

The muddled state of chilling effects doctrine has also meant that, even when they reach the merits, courts have struggled with the question of where legitimate government action ends and unconstitutional efforts to chill begin, with few clear guideposts. In particular, as the last section noted, the Trump Administration has relied heavily on government speech doctrine to defend its actions, including the termination of research grants and retaliation against law firms and universities.³⁰⁴ These defenses have not always been successful, but in some cases courts have read government speech doctrine to override any concern about chill. This highlights the ambiguity in how these two doctrines fit together.

In particular, in some cases, courts have taken a narrow and formalistic approach to determining the purpose and effect of government speech. Take *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*.³⁰⁵ The district court in that case had enjoined two Executive Orders aimed at eliminating federal grants for undefined diversity equity and inclusion programming, including a requirement that grant recipients certify that they do not engage in "DEI" (regardless of whether those activities occur outside the scope of federal funding) because it found that the "clear purpose, and clear effect" of the orders was to chill protected speech, especially given the vagueness of their terms.³⁰⁶ That is, the district court recognized that the inevitable impact of Executive Orders that targeted vaguely-defined research programs would be to chill a broad swath of protected expression as researchers, and their institutions, sought to avoid even the specter of legal trouble.

The Fourth Circuit vacated the injunction, however, relying on the government speech cases of the Rehnquist Court, rather than the chilling effects precedents of the Warren Court.³⁰⁷ It held that a requirement to certify

³⁰³ *Doc Soc'y v. Rubio*, 141 F.4th 1273, 1279 (D.C. Cir. 2025) ("the complaint fails to address the likelihood that these injured members may remain unwilling to engage on social media or to travel to the United States because of the possibility that a consular officer could request their social media information upon applying for a visa.")

³⁰⁴ Sonja B. Starr & Genevieve Lakier, *The War on DEI as a Project of Constitutional Subversion*, 105 TEX. L. REV. 70–71 (2027).

³⁰⁵ *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243 (2025).

³⁰⁶ *Id.*

³⁰⁷ *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 167 F.4th 86, 103 (4th

compliance with the law does not violate the First Amendment, even in circumstances where there was reason to believe that the Administration's intention was to chill protected speech.³⁰⁸ *Speiser* had rejected a very similar argument. Now, however, the court ignored copious statements the plaintiffs had compiled from the President and administration officials that the orders were intended to target “very bad ideas,” “very sick ideas” like “teaching people to hate our country,” and “radical and divisive ideology.”³⁰⁹ To impute bad intention to the government would be, the court suggested, to read “subtext” into the orders, rather than simply reading the text. That is: the plaintiffs were asking the court to analyze the orders realistically rather than formalistically, and this the court refused to do. As Genevieve Lakier has explained, the Fourth Circuit appeared to “view the executive orders ... as something akin to government speech”³¹⁰—expressive acts unconstrained by the First Amendment—and so did not have to consider the chilling effects. Chief Judge Diaz wrote separately to underline, in a way reminiscent of similar statements from the Burger Court era, that he thought that this limited kind of inquiry was all that was permitted given the constraints of the judicial role.³¹¹

Similarly, in its opinion holding that large parts of an Executive Order targeting the law firm Jenner & Block violated the First Amendment, the district court refused to enjoin officials from taking future action pursuant to section 1 which described the “Background” to the order.³¹² As the court described it, the section represented “something of a screed airing the President's grievances with Jenner,”³¹³ accusing the firm of “abandon[ing] the profession's highest ideals,” and hiring “unethical” lawyers.³¹⁴ The problem, the court held, was that as government speech it could not be enjoined “in the abstract,” in the absence of concrete applications.³¹⁵ Echoing

Cir. 2026) (citing *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

³⁰⁸ *Id.*

³⁰⁹ NATIONAL ASSOCIATION OF DIVERSITY OFFICERS IN HIGHER EDUCATION; v. Donald J. TRUMP., 2025 WL 391958 (D.Md.)

³¹⁰ Genevieve Lakier, *Chilling Effects, Trump's Anti-DEI Executive Orders, and the Role of the Courts (or Why the Fourth Circuit Decision in National Association of Diversity Officers v. Trump is Wrong)*, BALKINIZATION: (Mar. 19, 2025), <https://balkin.blogspot.com/2025/03/chilling-effects-trumps-anti-dei.html>.

³¹¹ *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 167 F.4th 86, 105 (4th Cir. 2026) (“Cognizant of my oath, I've framed the limited question before us and answered it. And I've (reluctantly) left others for tomorrow.”).

³¹² *Jenner & Block LLP v. U.S. Dep't of Just.*, No. CV 25-916 (JDB), 2025 WL 1482021, at *24–25 (D.D.C. May 23, 2025)

³¹³ *Id.*

³¹⁴ *Addressing Risks From Jenner & Block*, 90 FR 13997.

³¹⁵ *Jenner & Block LLP v. U.S. Dep't of Just.*, No. CV 25-916 (JDB), 2025 WL 1482021, at *24–25 (D.D.C. May 23, 2025).

the concerns of the Burger Court, again, the court held that to enjoin action taken pursuant to these criticisms “would exceed the Court’s proper role,”³¹⁶ even as the court recognized the severe chill created by the executive order as a whole.³¹⁷ This shows the limits of the ability of courts to recognize the chilling effects of government speech, to act against more ambient chilling effects, and how little guidance Supreme Court doctrine currently gives lower courts on how to balance government speech and chilling effects.

Not all courts have felt so constrained by government speech doctrine in adjudicating cases based on systemic chilling effects. The most significant example of a court directly vindicating more widespread chilling effects to date is *AAUP v. Rubio*.³¹⁸ The district court in that case found that the Administration’s actions in “detaining, deporting, and revoking noncitizens’ visas solely on the basis of political speech, and with the intent of chilling such speech and that of others similarly situated” violated the First Amendment.³¹⁹ What distinguishes this case, and makes it a particularly important chilling effects precedent, is that the individuals who the Administration had attempted to deport for their speech were not before the court—they were raising their own First Amendment claims in separate proceedings.³²⁰ Instead, the court recognized the First Amendment injury done to *third-parties* by these who were chilled as a result of the attempted deportations and, crucially, the Administration’s publicity of those deportations and the threatening statements of Administration officials that accompanied them.

The decision therefore demonstrates the capacity of courts to recognize something like ambient chill. At the same time, it also illustrates another obstacle to plaintiffs bringing and courts recognizing chilling effects claims—uncertainty as to remedy. This is an area where concerns about the limits of the judicial role are especially salient. As the court in *AAUP v. Rubio* recognized, crafting a remedy that thaws chill, especially when the chilling effects have been created in part through government speech, is a “delicate task.”³²¹ As the Burger Court’s jurisprudence reflected, remedying chilling effects implicates core questions about the extent to which the judicial branch can monitor and constrain the other branches of government in the exercise of governmental powers and especially in their speech. In *AAUP v. Rubio*,

³¹⁶ *Id.*

³¹⁷ *See supra* n [X].

³¹⁸ No. CV 25-10685-WGY, 2025 WL 2777659 (D. Mass. Sept. 30, 2025)

³¹⁹ *Id.* at *46.

³²⁰ I have previously written about this aspect of *AAUP v. Rubio* here: Evelyn Douek, *Balkinization: AAUP v. Rubio and the Big Chill*, BALKINIZATION (Oct. 7, 2025), <https://balkin.blogspot.com/2025/10/aaup-v-rubio-and-big-chill.html>.

³²¹ *Am. Ass’n of Univ. Professors v. Rubio*, No. CV 25-10685-WGY, 2025 WL 2777659, at *58 (D. Mass. Sept. 30, 2025).

the court was anxious to craft an injunction that did not overly interfere with government officials' ability to talk about immigration policy or to properly enforce the law.³²² But these were the very mechanisms through which the government officials had created the unconstitutional chill, and so the task of crafting a remedy that both did not interfere with these capacities while remediating the harm was daunting. Thus, even for the *AAUP v. Rubio* court, government speech doctrine is playing a significant role in constraining its ability to address chill.

Chill is generally a very difficult injury to remedy and in many cases there may not be effective remedies available. Take the example of Jimmy Kimmel. Towards the end of 2025, ABC suspended Kimmel's show in response to threats from the Federal Communications Commission Chairman Brendan Carr that the channel might lose its broadcast license if Kimmel wasn't suspended ("we can do this the easy way or the hard way," Carr said³²³). Kimmel had a strong First Amendment claim against Carr for jawboning ABC into suppressing and chilling his speech.³²⁴ But even if he had brought and won such a claim, it is unclear what a court could give him by way of meaningful relief. A declaration that Carr violated the First Amendment, and an injunction prohibiting him from making similar threats to ABC in the future, would be a symbolic victory, but how much would this achieve in practice? Once the threat was issued, preventing Carr from repeating his demands would do little to make ABC forget what had been already said. A court could not order ABC, a private company with its own First Amendment right to choose its programming, to give Kimmel his job back. And there is no statutory or implied constitutional right to damages when a federal official violates the First Amendment.³²⁵ So at the end of the day, Kimmel could likely get little by way of tangible relief, despite the blatant violation of his rights. In this and similar cases, the lack of remedy prevents claims from being brought in the first place and means the government faces little consequence for a clear First Amendment violation.

³²² *Id.* at 158–9.

³²³ Brian Stelter, *How Brendan Carr, the Attack-Dog FCC Chair, Helped Take down Jimmy Kimmel with Words, Not Actions*, CNN (Sep. 18, 2025), <https://www.cnn.com/2025/09/18/media/brendan-carr-jimmy-kimmel-fcc-first-amendment>.

³²⁴ See, e.g., Eugene Volokh, *Jimmy Kimmel, the NRA, and the First Amendment*, REASON (Sep. 18, 2025), <https://reason.com/volokh/2025/09/18/jimmy-kimmel-the-nra-and-the-first-amendment/>; Aziz Huq, *Opinion | Jimmy Kimmel Should Have Strong Odds at the Supreme Court*, POLITICO (Sep. 18, 2025), <https://www.politico.com/news/magazine/2025/09/18/jimmy-kimmel-supreme-court-first-amendment-lawsuit-00570697>. Ultimately his show was reinstated, and so it became a moot point.

³²⁵ Lakier, *Enforcing the First Amendment in an Era of Jawboning*, *supra* note 106, at 74–75.

In cases where injunctive relief might be meaningful, courts have found other obstacles to its issuance. In *Tincher v. Noem*, for example, a district court found that ICE agents had engaged in an “ongoing, persistent pattern” of retaliatory behavior (including “traffic stops, arrests, the indiscriminate use of chemical irritants, and pointing of firearms”) towards protestors in Minneapolis that had the effect of chilling future protected protest activity.³²⁶ It therefore enjoined federal agents deployed as part of Operation Metro Surge in Minnesota from retaliating against “peaceful and unobstructive protest activity,” including specific behaviors, such as using pepper-spray.³²⁷ The Eighth Circuit stayed the injunction, however, finding that it was too broad and vague, and amounted to simply telling agents to “follow the law,” in circumstances where officers need to retain discretion to react to fast-changing conditions.³²⁸ That is: the Eighth Circuit did not contest that a “ongoing, persistent pattern” of First Amendment violations existed, but found that the court could not give injunctive relief to remedy it regardless. Beyond government speech doctrine, then, concerns about preserving executive discretion limit judicial appetite to remedy chill. And again, in the absence of a damages remedy being available, federal officials face little incentive to change their behavior.

All this uncertainty has a sadly ironic effect: it itself creates chill. If plaintiffs are unsure about whether First Amendment doctrine will recognize their injury or be able to remedy it, they will be less likely to bring suit.

C. The Mixed Signals of the Roberts Court

As the above account showed, the Trump Administration’s efforts to chill speech have coalesced on the areas where the Roberts Court’s chilling effects doctrine is the most ambiguous, inconsistent and undertheorized. It has exposed the uneasy relationship that chilling effects doctrine has with government speech doctrine, with standing doctrine (especially in cases where the government uses an intermediary strategy), and with the government’s power to surveil and investigate people based on their protected expression. This section summarizes the doctrinal weaknesses that this has exposed.

The Trump Administration’s reliance on the government speech doctrine has brought into sharp relief how that line of cases as it has been developed by the Roberts Court creates acute tensions with chilling effects doctrine. Government speech doctrine has been on a collision course with chilling

³²⁶ *Tincher v. Noem*, No. 0:25-CV-4669 (KMM/DTS), 2026 WL 125375, at *19 (D. Minn. Jan. 16, 2026).

³²⁷ *Id.* at *36.

³²⁸ *Tincher v. Noem*, No. 26-1105, 2026 WL 194768, at *2 (8th Cir. Jan. 26, 2026).

effects doctrine since its inception during the Rehnquist Court era, but the Roberts Court has adopted an especially formalistic approach to government speech and spoken in relatively absolute terms about its contours. Its cases include statements that “the Government’s own speech ... is exempt from First Amendment scrutiny,”³²⁹ that “the Free Speech Clause ... does not regulate government speech,”³³⁰ and that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”³³¹ And it has continued to expand the government speech doctrine to cover a wide variety of circumstances where the government is not literally speaking, but is instead providing subsidies or other forms of support for speech.³³² For this reason, much rides on the characterization of something as government speech: once in that doctrinal category, the Court’s rhetoric seems to suggest that all First Amendment bets are off. This makes it unsurprising that the Trump Administration has relied on it so heavily. But government speech doctrine must, at some point, account for chilling effects: it is through “speaking” (in the capacious sense of that term, including the provision of governmental benefits) that government actors most effectively chill speech.³³³ The Roberts Court has not explained how to reconcile these two lines of doctrine, but as I will argue below, but chilling effects doctrine means that it simply cannot be true that “the Government’s own speech ... is exempt from First Amendment scrutiny.”³³⁴

The court’s standing doctrine in chilling effects cases is also slippery.³³⁵ The Roberts Court’s last word on this is a strong one—a unanimous Court affirmed that an “objectively reasonable chill” of First Amendment rights can give rise to standing, even in cases where there is not yet a legally enforceable burden on the affected party.³³⁶ As I suggested above, this is a shift away from *Laird*’s formalism. This welcome shift needs to be applied uniformly, however. There is no reason why the announced investigation and non-self-executing subpoena from *First Choice* should be understood any less

³²⁹ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

³³⁰ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

³³¹ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

³³² *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 217 (2013) (holding that the First Amendment does not constrain the government’s choice to “selectively fund certain programs to address an issue of public concern”); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

³³³ Reich, *supra* note 262, at 763 (“It takes a brave man to stand firm against the power that can be exerted through government largess”).

³³⁴ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

³³⁵ See also Alex Chemerinsky & Erwin Chemerinsky, *Chill*, 104 TEX. L. REV. 439, 482 (2026) (“the Court has been inconsistent regarding standing based on claims of chilled speech”).

³³⁶ *First Choice Women's Res. Centers, Inc. v. Davenport*, 146 S. Ct. 1114, 1126 (2026).

objectively chilling than the effects of surveillance in cases like *Clapper* and *Laird*. The realist approach from *First Choice* cannot be waved away by a formalistic insistence on a difference between receiving a letter and knowing you are being watched for other reasons.³³⁷ As the Court said in *First Choice*, what was material was that “the Attorney General targeted First Choice for investigation” and this created an objective chill. This realism should also inform courts’ approach in government speech cases and cases involving pressure on speech intermediaries.

These sites of confusion, at a moment of profound threat to expressive freedom, have highlighted weaknesses in First Amendment doctrine at a moment when that doctrine is being tested. If First Amendment doctrine is not capable of protecting against such pervasive and intentional chill as we see today, then it is failing in its promise to keep the public sphere uninhibited and wide-open. There is, therefore, a need and an opportunity to reset, and reclaim this promise.

III. THE WAY THAWARD

This is a unique opportunity for litigants, courts and regulators to reaffirm what the Court has recognized since the emergence of the modern First Amendment doctrine: that the Constitution protects against chill and not just direct speech suppression. This project requires reaffirming the vital role that courts must play in providing these protections. Chilling effects doctrine has been a site of such contestation because it raises profound questions about the role of courts and their relationship with the other branches of government. But what the history shows, and what the Roberts Court has at times acknowledged, is that the *only* way to effectively protect against chill is for judges to be active and sensitive guardians of expressive freedom. This requires asking how state power actually operates in practice, and not just in form. To be sure, this raises difficult questions at the margins. But there are also many simple cases. This Part provides a roadmap for the project of reaffirming these protections, by canvassing the procedural and substantive safeguards necessary to make First Amendment protections against chill more effective.

A. *Recovering the Tradition of Exceptional First Amendment Procedure*

³³⁷ At various points in the oral arguments a number of Justices (including Barrett, Roberts and Thomas) asked questions that showed that what was material was the fact that a chill was created, not the particular form of document that created it, likening the non-self-executing subpoena to a “letter,” “a threat of a subpoena” or a “request”: see Oral Argument Transcript pages 15–16; 31–32; 48.

As Part I shows, the cases that first established the basis for chilling effects doctrine recognized that if the First Amendment is to effectively protect against not just the prohibition but the inhibition of expressive freedoms, the procedural rules that govern when and how plaintiffs can ask courts for relief are in some ways as important as the substantive rules. This is an insight that courts should recapture. Generous standing rules and, as a necessary corollary, a capacious and inventive approach remedying chill are essential if chilling effects doctrine is to be meaningful in practice.

1. Access to Court

As Part I showed, First Amendment doctrine has long recognized the fragility of First Amendment freedoms. Because many of the benefits of speech accrue not to the speaker but to society at large—that is, because speech is a public good—it is likely to be underproduced and over-deterred.³³⁸ Thus, as the Court has recognized since *Thornhill*, “[w]here regulations of the liberty of free discussion are concerned, there are special reasons” for ensuring plaintiffs have access to court to challenge government actions that chill the exercise of expressive freedom.³³⁹ This is why First Amendment cases have formulated exceptional and broad standing rules to ensure that, as much as possible, people can raise First Amendment claims on behalf of speakers who, because they are chilled, are not likely to challenge government action in court. In other words, First Amendment doctrine recognized the obvious truth that speakers who are too scared to speak will also be too scared to sue, but that society is the loser if their right to speak goes undefended.³⁴⁰

The Burger Court, however, construed standing rules more strictly across the board, and at the same time reined in the exceptional nature of First Amendment standing.³⁴¹ And, as Part I showed, the Roberts Court often followed in its footsteps. Recent cases like *Clapper* and *Murthy* have tended to treat standing as a separate Article III question that is unrelated to the substantive First Amendment issue and thus missed the special free speech equities involved. On the other hand, the level of coherence in the Court’s standing jurisprudence should not be overstated,³⁴² and the unanimous

³³⁸ Daniel A. Farber, *Free Speech without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 559 (1991).

³³⁹ *Thornhill v. State of Alabama*, 310 U.S. 88, 98 (1940).

³⁴⁰ See discussion of *Thornhill*, *Bantam Books*, *Lamont* in Part I, *supra*.

³⁴¹ Fallon, *supra* note 48, at 880 fn 170; Stephen I. Vladeck, *Standing and Secret Surveillance* 5 (Nov. 2013).

³⁴² Samuel L. Bray & William Baude, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 137, 154–55 (2023) (“[standing] doctrine sometimes seems rootless, and it is often criticized as highly malleable”).

decision in *First Choice* shows the Court's appreciation of the necessity of taking a broad and anti-formalist approach to standing in chilling effects cases. This brings the Roberts Court back into line with the long history and tradition of crafting First Amendment standing rules in a way that is attentive to the special equities and sensitivities of speech cases. As the Court explained in the 1984 case of *Secretary of State of Maryland v. J.H. Munson Co.*:

Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing. Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, *when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.*³⁴³

This is a principle that courts should do more to vindicate today. This requires realism at every step of the standing inquiry.³⁴⁴ As *First Choice* suggests, courts should take a capacious approach to the injury-in-fact inquiry in chilling effects cases: what matters is not the form of government action, but whether it creates a chill and whether that chill is objectively reasonable.³⁴⁵ As *First Choice* also suggests, *Laird* should be confined to its facts and be understood as holding that plaintiffs cannot be chilled by surveillance they do not know about and has since ceased.³⁴⁶ Nor should

³⁴³ *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984) (emphasis added).

³⁴⁴ *Diamond Alternative Energy, LLC v. Env't Prot. Agency*, 606 U.S. 100, 111 (2025) ("This Court's 'cases have established that the irreducible constitutional minimum of standing contains three elements': injury in fact, causation, and redressability," citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)")

³⁴⁵ *First Choice Women's Res. Centers, Inc. v. Davenport*, 146 S. Ct. 1114, 1126 (2026).

³⁴⁶ Justice Marshall almost immediately suggested *Laird* should be understood narrowly in his opinion as a Circuit Justice in *Socialist Workers Party v. Att'y Gen. of U. S.*, 419 U.S. 1314, 1318 (1974) which held that surveillance could provide the basis for standing based on chilling effects ("the Government reads *Laird* too broadly [by arguing that *Laird* required some "regulatory, proscriptive or compulsory" government action]. In the passage relied upon by the Government, the Court was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not"). See also Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 *BROOK. L. REV.* 41, 88–90 (2011) (showing how lower courts have read *Laird* more narrowly).

courts refuse to engage in any speculation when assessing whether chilling effects exist.³⁴⁷ Chilling effects are *always* speculative to some extent—they require contemplating what has *not* happened. Thus, claiming chilling effects are too speculative is to misunderstand the objectiveness inquiry. Recognizing the injury inflicted on listeners by chill and giving standing to those who raise listener’s rights claims is also vital to ensure that free speech rights can be vindicated by those other than the people intimidated into silence.³⁴⁸ In all these ways, courts must take a capacious approach to identifying the harm that chill inflicts on individuals and society by diminishing a core democratic right.

Courts should similarly take an expansive approach in the traceability and redressability prongs of the standing analysis in chilling effects cases, especially in cases which involve an intermediary strategy. Crucially, this means recognizing the weakest link problem when it comes to speech intermediaries, and the fact that intermediaries’ incentives are not adequately aligned to protect First Amendment freedoms. As the Court did in *Bantam Books*, courts should allow those affected by intermediary decisions taken under government pressure standing to sue for First Amendment violations, even when they are not the direct targets of that pressure.³⁴⁹

To be clear, taking a realist approach to assessing the elements of standing does not mean dispensing with them entirely. Many claims may still be kept out of court if a plaintiff cannot demonstrate an objectively reasonable chill caused by particular state action. The argument is simply that the anti-formalist nature of chilling effects requires courts to be anti-formalist in their assessment of whether they exist and how they have been caused. Furthermore, a finding of standing only means that the claim is justiciable, not that there is necessarily a First Amendment violation. As a number of the Court’s chilling effects cases show, a broad approach at the standing stage does not prevent the government from justifying its actions in a particular case.³⁵⁰ Generous standing rules simply allow chilling effects on public discourse to become legible to courts and subject to First Amendment scrutiny, even if the claim is not ultimately successful.³⁵¹

³⁴⁷ *Cf. Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013).

³⁴⁸ *Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301 (1965). *Cf. Murthy v. Missouri*, 603 U.S. 43, 75 (2024); *Am. Ass’n of Univ. Professors v. Rubio*, No. CV 25-10685-WGY, 2025 WL 2777659, at *58 (D. Mass. Sept. 30, 2025).

³⁴⁹ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n6 (1963); *Diamond Alternative Energy, LLC v. Env’t Prot. Agency*, 145 S. Ct. 2121, 2134 (2025). *Cf. Murthy v. Missouri*, 603 U.S. 43, 75 (2024); *Am. Ass’n of Univ. Professors v. United States Dep’t of Just.*, No. 25-CV-2429 (MKV), 2025 WL 1684817, at *11 (S.D.N.Y. June 16, 2025).

³⁵⁰ *See, e.g., Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947 (1984); *Meese v. Keene*, 481 U.S. 465 (1987).

³⁵¹ *See Chemerinsky & Chemerinsky*, *supra* note 35 488–90 (making a similar

Congress also has a role to play here. Legislation could make explicit that plaintiffs have access to federal courts for the injury that is an objective chill on the exercise of First Amendment freedoms,³⁵² and that federal courts are not divested of jurisdiction to hear First Amendment claims just because Congress may have provided a separate channel for the resolution of other kinds of disputes (such as employment or contract disputes).³⁵³ As Justice Brennan once explained in the context of abstention, but which applies more generally, forcing a plaintiff to wait to be able to raise their First Amendment claims until the conclusion of some other proceedings will “itself effect the impermissible chilling of the very constitutional right he seeks to protect.”³⁵⁴ By explicitly clarifying what First Amendment doctrine already demands, Congress can ensure that plaintiffs do not suffer additional uncertainty or delay that might prevent them from raising First Amendment claims.

2. Remedies

Closely related to the question of standing is remedies.³⁵⁵ As the last Part discussed, chilling effects claims can raise tricky remedial issues. The simplest cases are when a plaintiff is directly targeted by the government. In such cases, injunctive relief can help remediate chill—and this extends to cases where the actions being enjoined are not coercive.³⁵⁶ For example, an order requiring that government actors cease particular forms of surveillance, stop issuing public threats, or creating designations or labels for certain groups or individuals would meaningfully help remediate the inhibition felt by the targets of those acts.

argument).

³⁵² *Spokeo, Inc. v. Robins*, 578 U.S. 330, 331 (2016) (noting that “history and the judgment of Congress are instructive” in determining whether plaintiffs have suffered a concrete injury that establishes Art. III standing).

³⁵³ *See, e.g., President & Fellows of Harvard Coll. v. United States Dep’t of Health & Hum. Servs.*, No. 25-CV-10910-ADB, 2025 WL 2528380, at *13 (D. Mass. Sept. 3, 2025) (finding that First Amendment claims, even when federal grants contracts are involved, are not subject to the Tucker Act and therefore do not need to be filed in the Court of Federal Claims); *Nat’l Ass’n of Immigr. Judges v. Owen*, 139 F.4th 293, 299 (4th Cir. 2025) (finding that the Civil Service Reform Act ordinarily strips federal courts of jurisdiction to hear First Amendment claims based on an employee policy for federal employees). *Cf. Margolin v. Nat’l Ass’n of Immigr. Judges*, 146 S. Ct. 1285 (2026).

³⁵⁴ *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

³⁵⁵ *Bray & Baude*, *supra* note 348, at 158 (“it would be no exaggeration to say that one of the most important reasons that plaintiffs must demonstrate their injury in the first place is so that they can demonstrate that they are seeking the proper relief to redress it”).

³⁵⁶ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 141 (1951) (“We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them.”)

But crafting effective relief is harder when the chill is less direct, for example when the target of the government's actions is a speech intermediary or other a more amorphous group of speakers (consider the Jimmy Kimmel, *Tincher* and *AAUP v. Rubio* cases discussed above). In such cases, it is unclear whether any court order could fully thaw the chill created by public threats because a threat can continue to act on its target, even without repetition. A declaration that an intimidation campaign violates the First Amendment is thus important as a symbolic matter but may not fully re-embolden those who have been scared into silence. This might be particularly true in chilling effects cases, because when government actors intentionally chill speech they demonstrate their willingness to disregard legal rights. It is after all never legitimate for government actors to attempt to suppress constitutionally protected speech.³⁵⁷

Crafting remedies that effectively “thaw” speech is therefore a challenging task. Two things follow from this. First, courts will need to be creative the remedies they employ.³⁵⁸ This is an area where there is little Supreme Court guidance and therefore represents an opportunity to craft innovative equitable remedies. The remedies the plaintiffs requested in *AAUP v. Rubio* illustrate what this might look like.³⁵⁹ Plaintiffs’ proposed order in the case asked the judge to require the government to issue notices to non-citizens that they were entitled to First Amendment protection, engage in ongoing reporting to help identify if other non-citizens had been targeted for deportation on the basis of their protected expressive activity, and to actively train staff on First Amendment restrictions that apply to them in their governmental roles. As noted earlier, the court refused to order the government to take these remedial actions but it is not clear why. It is true

³⁵⁷ *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 188 (2024) (“What [a government actor] cannot do ... is use the power of the State to punish or suppress disfavored expression.”)

³⁵⁸ The scope of equitable relief that can be granted by courts may be impacted by the Court's recent decision in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025) which held that courts may not issue “universal injunctions” that are not “necessary to provide complete relief to each plaintiff with standing.” A full discussion of the implications of *CASA* for chilling effects cases is beyond my scope here. It is sufficient to note that my argument is only that judges need to be innovative in how they craft relief *for the parties* before the court. In many cases, it may be that universal relief is necessary to provide complete relief to chilled plaintiffs. In others, it may not. But that will be a case-by-case inquiry. There are also difficult questions about how to reconcile *CASA* with First Amendment overbreadth doctrine (and its chilling effects basis), which expressly relies on the necessity of courts being able to vindicate the rights of parties not before the court: *see, e.g.* *Griffin v. HM Fla.-ORL, LLC*, 144 S. Ct. 1, 2 (2023) (statement of Kavanaugh, J.) (noting that First Amendment overbreadth challenges “present[their] own doctrinal complexities about the scope of relief”). I leave those questions for future work, however.

³⁵⁹ <https://knightcolumbia.org/documents/7mfsvx8oby>.

that each of these steps goes beyond merely declaring a constitutional violation or enjoining the actions that created the chill in the first place but attempt to affirmatively reassure potentially chilled speakers that they can engage in First Amendment activity without fear. This is, however, what the thawing of chill will require.

But even remedies of this kind will likely only ever go part of the way to thawing fear that has already been created. So, second, the difficulty of effectively remediating chill means that the only real remedy will be to prevent chill in the first place. This means developing a clear and robust chilling effects doctrine, actively administered by courts, as discussed in the next section.

But no discussion of remedies is complete without noting the crucial role that Congress could play by providing a statutory cause of action for damages claims against federal officials who are found to violate the First Amendment and chill the exercise of expressive freedoms.³⁶⁰ This would not only have the benefit of providing plaintiffs with additional incentive to vindicate infringements of First Amendment rights, but it would also deter government actors from violating those rights in the first instance.

B. Chill as a First Amendment Violation

The question of where to draw the line between the legitimate exercise of government power that has some inhibitory effect and a First Amendment violation is a very difficult one and, as this Article has shown, the Court has never provided a clear or stable answer. This section sets out some guideposts that can be distilled from the precedents. Whenever the government *intends* to chill speech, it violates the First Amendment. The harder question is when such an intent does not exist or can't be proved. In such cases, courts will necessarily be drawn into balancing the extent of the burden on protected expression against the legitimate government interest asserted—a form of analysis familiar to First Amendment doctrine.

1. Intentional Efforts to Chill

A unanimous Court recently affirmed that “a government official cannot do indirectly what she is barred from doing directly.”³⁶¹ That case, *NRA v. Vullo*, concerned informal threats designed to suppress protected expression, but the same principle applies to any effort by the government to suppress or

³⁶⁰ *Egbert v. Boule*, 596 U.S. 482, 499 (2022) (“we hold that there is no Bivens action for First Amendment retaliation. There are many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy.”)

³⁶¹ *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024).

chill speech without engaging in direct censorship. Government actors cannot use their otherwise legitimate powers “in order to punish or suppress” or, as this Article has shown, chill, protected expression.³⁶² This is just a rearticulation of the orthodox First Amendment rule that the government may not favor certain ideas over others.³⁶³ Thus, a governmental action, no matter how burdensome or trivial, violates the First Amendment if done in order to suppress speech.

To effectively protect against chilling effects, courts must take a realist, not overly formalist, approach to determining governmental intent. The presence of signals about the chilling motivations of government actors is what creates chill. It is only when the target *knows* that the government wishes them to stop speaking that the government actor can successfully chill their speech. Thus, while in other contexts the Court has been reluctant to invalidate otherwise lawful government action on the basis of statements that evince an invidious motive,³⁶⁴ the considerations are different in the First Amendment context. The statement of invidious motive *creates* the chill which is the injury. Thus, when it comes to chilling effects, the concern with governmental purpose is not a merely formalistic one of requiring the government to speak differently while exercising their powers.³⁶⁵ The statement of illegitimate purpose makes the government action one of completely different nature and effect. And so courts must take the statements of government actors into account when evaluating their motivations for acting, just as the targets of their actions will.

Courts are sometimes reluctant to engage in a sweeping inquiry of governmental purpose.³⁶⁶ To be sure, the Supreme Court has indeed cautioned against relying on statements of governmental officials in the context of *legislative* purpose.³⁶⁷ But the famous and oft-quoted statement from *United States v. O'Brien* that “the purpose of Congress ... is not a basis

³⁶² *Id.* at 187.

³⁶³ *See, e.g.,* City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 76 (2022) (“If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based”); Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 166 (2015) (“Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.”)

³⁶⁴ *See* Trump v. Hawaii, 585 U.S. 667, 702-05 (2018).

³⁶⁵ *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

³⁶⁶ *See, e.g.,* discussion of Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, *supra* nn [].

³⁶⁷ This might also explain some of the messiness of the legislative investigations case law: *see, e.g.,* Wilkinson v. United States, 365 U.S. 399, 412 (1961) (“Moreover, it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner.”).

for declaring [] legislation unconstitutional”³⁶⁸ is easy to overread. It emphatically does not mean that governmental purpose is irrelevant to First Amendment analysis.³⁶⁹ To the contrary, the First Amendment cases make clear that one of the things that makes state action unconstitutional is the motives that prompt it—particularly the desire to suppress speech the government doesn’t like.³⁷⁰ As then-Professor Kagan once argued, much of First Amendment doctrine is directed at flushing out illicit governmental motives, even if precedents like *O’Brien* require courts to use rough proxies to identify those motives because of concerns about determining the purpose of a collective body like a legislature.³⁷¹

Moreover, when it comes to executive action—the most common way governments chill—the various concerns about determining the purpose of a multi-member governmental body do not apply.³⁷² As Kagan noted, “[i]n cases involving executive action, the Court routinely speaks in terms of motive. ... The Court apparently sees the examination of motive in such cases as different in kind ... and less problematic.”³⁷³ Thus, courts can and should take into account what executive branch officials say when determining whether their actions were motivated by an intent to chill protected expression.

This is borne out by First Amendment jawboning and retaliation cases. In *Vullo*, for example, the Court unanimously held that it was a violation of the First Amendment for a New York state official to use her regulatory oversight over banks to pressure them into terminating their business relationships with the National Rifle Association (NRA) in order to suppress the NRA’s gun advocacy.³⁷⁴ There was no question that the official, Vullo, had lawful authority to investigate and pursue violations of New York state insurance law—and indeed, the banks in question had even conceded that some of their activities were illegal.³⁷⁵ But the Court held Vullo’s actions violated the First Amendment nonetheless because of her censorious motivation. In imputing this motivation to Vullo, the Court considered allegations about statements

³⁶⁸ *United States v. O’Brien*, 391 U.S. 367, 383 (1968).

³⁶⁹ Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 316–17 (1997); Richard H. Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 526 n 15 (2016).

³⁷⁰ *See, e.g., Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

³⁷¹ Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414, 441 (1996).

³⁷² Fallon, *supra* note 372, at 531.

³⁷³ Kagan, *supra* note 374, at 427 n 43.

³⁷⁴ *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 181 (2024).

³⁷⁵ *Id.* at 196 (“the conceded illegality of the NRA-endorsed insurance programs does not insulate Vullo from First Amendment scrutiny”).

made in private meetings, guidance letters, press releases, and even the tweets of her superiors.³⁷⁶ That is: any and all available statements were considered relevant by the court.

Similarly, illicit governmental motive is what taints otherwise authorized governmental action in First Amendment retaliation cases³⁷⁷ which “prohibits government officials from subjecting an individual to retaliatory actions for speaking out.”³⁷⁸ In determining whether a particular action violates this prohibition, the plaintiff must demonstrate that their protected speech was a “substantial” or “motivating” factor in the government’s decision to take action against them.³⁷⁹ The government can defend their actions by showing that they would have taken the same adverse action even in the absence of the plaintiffs’ protected speech.³⁸⁰ But at all points, it is the government’s “motive ... that matter[s].”³⁸¹ And in proving (or disproving) retaliatory motive, “parties ... may present a wide range of evidence—both objective and subjective.”³⁸²

Courts need to engage in this kind of searching inquiry for governmental purpose even outside the context of jawboning and retaliation claims. When governmental actors make statements that chill, courts should interpret the exercise of governmental power in light of these statements—just as those who are subject to that power will. As discussed further below, nothing in government speech doctrine precludes courts from doing so. And once the government has demonstrated an intention to chill protected expression, courts should find a First Amendment violation.

2. In the Absence of Evidence of Speech Suppressive Governmental Intent

Cases where a plaintiff alleges chill but there is not a damning public record of suppressive intent pose more difficult analytic questions. Chill is a First Amendment injury, and public discourse is impoverished by it,

³⁷⁶ *Id.* at 182–5.

³⁷⁷ First Amendment retaliation claims share many similarities with chilling effects claims, given they involve the use of governmental power to sanction protected speech in indirect ways. As the Court has observed, government retaliation for protected speech “offends the Constitution [because] it threatens to inhibit exercise of the protected right”: *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10 (1998). But because retaliation occurs after the fact, and chill operates to suppress future expressive activity, the claims are distinct and I leave exploration of their relationship for future work.

³⁷⁸ *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

³⁷⁹ *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977).

³⁸⁰ *Id.*

³⁸¹ *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 272 (2016)

³⁸² *Gonzalez v. Trevino*, 602 U.S. 653, 662–63 (2024) (Alito, J., concurring) (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), *Texas v. Lesage*, 528 U.S. 18, 19, (1999)).

regardless of whether it is intentionally created or not. And, of course, it will not always be possible to prove invidious governmental intent, even if such intent exists. Therefore, a rule that chilling effects doctrine only protects against intentional governmental attempts to chill will severely under-protect speech and fail to create an uninhibited, robust and wide-open public sphere. Intentionally created chill is an attempt to do an end-run around the First Amendment, but unintentional chilling effects still diminish public discourse. For this reason, the cases have never insisted that state action that creates a chilling effect must be invidiously motivated in order to violate the First Amendment.³⁸³

At the same time, a rule that *any* governmental action that creates chill violates the First Amendment would incapacitate the government, because almost any governmental action has the potential to be chilling. Current fears of First Amendment Lochnerism would seem quaint in such a world.³⁸⁴ The Burger Court's concerns about the consequences of chilling effects doctrine for the judicial role were motivated by anxiety about precisely this outcome.³⁸⁵

Given that neither extreme is a tenable doctrinal answer, there is no escaping judicial balancing, or means-end tailoring, to determine when state-created inhibition becomes a First Amendment violation. Some general principles can guide this case-by-case assessment, however.

First, to establish a substantive First Amendment violation, courts should require plaintiffs to produce some actual evidence of chill-in-fact, and not simply rely on assertions or judicial conjecture. *Bonta* is an example of a case that skipped this step—but doing so opens up almost any disclosure requirement to challenge, based on judicial hypothesis that some chill *might* exist. This is an overly interventionist approach which ignores the legitimate government interests that often exist in certain forms of transparency. And it also creates the risk that courts will be more willing to hypothesize a chill when they are sympathetic to the plaintiff.

At the same time, courts should not raise the evidentiary burden too high. People like to complain about the weak empirical basis of chilling effects doctrine,³⁸⁶ but this is in part an unavoidable by-product of the fact that

³⁸³ See, e.g., discussion of *NAACP v. Alabama*, *Dombrowski*, *Bonta* in Part I *supra*.

³⁸⁴ See, e.g., Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020); Robert C Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015); Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179 (2018).

³⁸⁵ See *supra* Part I.B.

³⁸⁶ See, e.g., Kendrick, *supra* note 20, at 1656 (“Dissents and majorities routinely criticize each other for the flimsy empirical basis of their assessments of chilling.”); Solove, *supra* note 269, at 155 (“It is hard to measure the deterrence caused by a chilling effect

chilling effects are notoriously hard to empirically measure or demonstrate. Indeed, this is part of their appeal: when the government suppresses speech by chilling it, there is no arrest or fine to provide evidence of speech suppression. Instead, the verboten speech simply never gets said, and the disfavored writing never gets written. Nor is evidence of silence an adequate way of proving chill. Chilling effects do not mean expressive activity ceases entirely—instead, speakers *change* their expression to topics and viewpoints that are considered safe.³⁸⁷ People will still talk, read, create art and journalism, but they say, read, create and report different things. A chilled speech environment may therefore still be a noisy and vibrant one—but certain views will be missing or more muted because people will be too scared to express them. And requiring plaintiffs to attest that they are too scared to speak in the public sphere will have the likely result of making courts instruments of the very chill are attempting to identify. Thus, while plaintiffs should have to bear some burden of proving the existence of objectively reasonable chill-in-fact, courts should interpret this requirement generously in light of the inevitable evidentiary difficulties in such cases.

Once evidence of chill has been established, the burden should shift to the government to establish that the chill is justified and necessary. This is, in effect, making the “exacting scrutiny” framework from *NAACP v. Alabama*, applicable to all chilling effects claims, not merely disclosure mandates. By requiring courts to take seriously the need for the government’s actions to be tailored to their stated purpose, it puts the onus on the government to justify actions that create chill. This was one of the main tools, for example, that the court used in the Second Red Scare to declare various forms of investigations unconstitutional.³⁸⁸ Courts should robustly assess whether the government’s asserted purpose in fact justifies its speech-chilling

because it is impossible to determine with certainty what people would have said or done in the absence of the government activity”); Blasi, *supra* note 73, at 482 (“The chilling effect doctrine is unsatisfying in its reliance on crude behavioral speculation and in its tendency to be indiscriminately employed both by judges and advocates.”); Redish, *supra* note 142, at 1040–41 (noting the reasoning of chilling effects is “not premised on any empirical basis, and the extent to which people actually base their conduct on knowledge of statutory content may be questioned.”).

³⁸⁷ Penney, *supra* note 20, at 1455 (“Chilling effects ... not only involve the silencing of speech, but also the expression of socially conforming speech and behavior.”).

³⁸⁸ See *supra* nn [XX]–[XX] and accompanying text; *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557–58 (1963) (“Nothing we say here impairs or denies the existence of the underlying legislative right to investigate or legislate with respect to subversive activities by Communists or anyone else; our decision today deals only with the manner in which such power may be exercised and we hold simply that groups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association.”).

actions.

Nothing in government speech doctrine allows the government to side-step the need to make such a showing. As explained to above,³⁸⁹ certain rhetoric in government speech cases suggests that government speech can *never* raise First Amendment problems. But the Roberts Court’s absolutist statements about government speech doctrine cannot be taken literally.³⁹⁰ Indeed, as the previous section makes clear, the Court has regularly found that government actors violate the Constitution by speaking in a way that coerces the suppression of or evinces retaliation for protected speech.³⁹¹ Thus, as many other scholars have argued, courts must recognize that government speech is subject to constitutional constraints, just as any other government action is.³⁹² If the Constitution prohibits the government from *acting* in a certain way, then it surely must be understood to prevent the government from “speaking” in a way that achieves the same outcome.³⁹³ This is particularly true given the fact that the government is no ordinary speaker—when the government speaks, it also clearly exerts an extraordinary amount of power, given “its coercive power as sovereign, its considerable resources, its privileged access to key information, ... and more.”³⁹⁴

This is not to deny that government speech doctrine is important and serves valuable democratic purposes. Indeed, as Justice Breyer once put it, “[w]ere the Free Speech Clause interpreted otherwise, government would not work.”³⁹⁵ Democratic responsiveness and accountability require government actors to speak about their opinions, attempt to persuade people that they are right, and describe their policies in non-neutral terms. The government must be able to shape its message and criticize particular beliefs, even forcefully.³⁹⁶

³⁸⁹ See *supra* nn XX.

³⁹⁰ Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 712 (2013) (“The Summum Court was mistaken when it said that government speech is never limited by the Speech Clause”); Toni M. Massaro, *TREAD ON ME!*, 17 J. CON. L. 365, 368 (2014) (“none of these formalistic, absolutist statements can be squared with other free speech doctrines, significant zones of traditional government regulation, or even common sense.”).

³⁹¹ See *supra* nn [XX].

³⁹² Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, U. ILL. L. REV. 1954 (2022) (collecting examples).

³⁹³ NORTON, *supra* note 185, at 172 (“If we understand the Free Speech Clause to deny the government the power to act for the purpose of censoring speech, ... under certain circumstances we can also understand it to deny the government the power to speak for that purpose”).

³⁹⁴ HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 11 (Cambridge University Press 2019).

³⁹⁵ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

³⁹⁶ *Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 188 (2024) (“A government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead. In doing so, she can rely on the merits and force of her ideas, the strength of her convictions, and her ability to inspire others. What she

And it must be able to expend resources in ways that match its policy priorities. To the extent that there are always costs to disagreeing with people who exercise political, economic and regulatory power, this form of governmental speech will always have chilling effects.

As the Court has recognized, however, “while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse,” and taken too far, it could become a tool to “silence or muffle the expression of disfavored viewpoints.”³⁹⁷ This is all the more true as government actors and courts bring more and more under the umbrella of government speech, which Caroline Mala Corbin has labelled “First Amendment capture.”³⁹⁸ Just as with literal government speech, so too with government funding decisions—government speech doctrine cannot become a loophole in First Amendment doctrine.

As is true of the task of determining when unintentional chill violates the First Amendment in general, reconciling the important values protected by both government speech doctrine and chilling effects doctrine is not a simple task. But there is no escaping it. A failure to reckon with the tension has only left courts unable to effectively respond to chill. The government must be forced to justify the chill on protected freedoms that its actions create.

C. Chilling Effects Doctrine and the Judicial Role

This reinvigoration of an anti-formalist and robust chilling effects doctrine will no doubt raise anxieties, as it did during the Burger Court era, about judicial overreach. This is particularly so because, as this Article argues, doing so will require courts to more explicitly embrace means-ends tailoring—a bugbear of formalists who see this kind of balancing as a pretext for unconstrained judicial policymaking. However, even assuming that balancing allows for more discretion and tends to result in less predictability,³⁹⁹ there is simply no real alternative if chill is to be made cognizable in First Amendment cases given the fundamentally realist nature of the underlying phenomenon. The innovation of chilling effects doctrine was to look past the form of state action to its substance,⁴⁰⁰ and to recognize the many ways that state power can inhibit expression. As the Court observed in *First Choice*, governmental actors will always “seek[] ways around”

cannot do, however, is use the power of the State to punish or suppress disfavored expression.”)

³⁹⁷ *Matal v. Tam*, 582 U.S. 218, 235 (2017).

³⁹⁸ Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 225 (2021).

³⁹⁹ *But see* Douek & Lakier, *supra* n 107, 163–4 (arguing that greater formalism has not in fact resulted in more predictable First Amendment doctrine).

⁴⁰⁰ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

existing rules.⁴⁰¹ Therefore doctrine needs to adapt to evolving threats. Bright line rules may provide more certainty—but only the certainty that First Amendment doctrine will fail to protect against a pervasive and ever-shifting threat to expressive freedom.

The need to embrace this judicial mandate is even clearer given that even an anti-formalist chilling effects doctrine will under-protect against chilling effects in fact. The ambient chill created by a concerted governmental campaign to suppress speech will never be able to be fully funneled into the constraints of an adversarial justice system. Even with broader standing rules, there will be many people who are chilled who cannot challenge any particular governmental action or policy. But once those requirements are met, a proper conception of the judicial role means that courts should not be prevented but *required* to vigorously protect the ability of people to “speak as they think on matters vital to them” which is “essential to free government.”⁴⁰²

CONCLUSION

The place of chilling effects in First Amendment doctrine is an uneasy and deeply contested one. This is because it raises fundamental questions about the judicial role: how readily should courts entertain plaintiffs who claim that government action chills expression, not on its face but in effect? How suspicious should courts be of government actors’ stated purposes for their actions? How much should courts police government “speech,” or the various ways in which the government expresses its political views and priorities? Compounding the problem is the difficulty of identifying and measuring the underlying phenomenon: chilling effects are inherently hard to identify and measure; both obvious and speculative, at the same time.

There is a temptation, it seems, to avoid these difficult questions by not letting them through the courthouse door,⁴⁰³ accepting innocent governmental explanations of purpose at face value,⁴⁰⁴ creating a highly categorical government speech doctrine that suggests these questions are easy,⁴⁰⁵ or simply dismissing claims of purported chill.⁴⁰⁶ But if the First Amendment is to be anything other than a mere “parchment barrier,” courts need to pay attention to how government action actually operates in practice,

⁴⁰¹ *First Choice Women's Res. Centers, Inc. v. Davenport*, 146 S. Ct. 1114, 1131 (2026).

⁴⁰² *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940).

⁴⁰³ *See, e.g., Murthy v. Missouri*, 603 U.S. 43, 56 (2024); Douek & Lakier, *supra* note 108, at 149–50 (suggesting that the standing decision in *Murthy* might have been influenced by the Court’s desire to avoid getting embroiled in an especially messy case).

⁴⁰⁴ *See, e.g., TikTok Inc. v. Garland*, 604 U.S. 56, 79 (2025).

⁴⁰⁵ *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015).

⁴⁰⁶ *See, e.g., Free Speech Coalition v. Paxton*, 606 U. S. ____ (2025).

and not merely its form. That is, courts need to be anti-formalist and vigorous guardians of expressive freedom. Otherwise, as history demonstrates and our current moment makes all too clear, government actors will work around any bright line rules the Court creates to leverage governmental power in ways that do not involve direct censorship but inhibit expression nonetheless. Governmental attempts to suppress speech evolve and, like water, find the cracks and vulnerabilities in the system of free expression into which they can flow. By failing to see and respond to these evolutions, an overly formalistic, uncertain and constrained chilling effects doctrine will mean that the First Amendment's promise of an *uninhibited*, robust and wide-open public sphere will go unfulfilled.