The Chilling Effect and the Problem of Private Action

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I. INTRODUCTION

Consider two cases. In *Miami Herald v. Tornillo*, a state law required newspapers who had published an editorial criticizing a political candidate to offer that candidate a "right of reply."[1] A unanimous Supreme Court invalidated the law, reasoning that the "right of reply" requirement might deter editors from publishing critical editorials.[2] By comparison, in the recent case *Doe v. Reed*, a public records law required the disclosure of ballot-initiative-petition signatories, and opponents of a particularly controversial initiative announced plans to identify the signatories publicly.[3] The signatories argued that the disclosure requirement put them at risk of private harassment and retaliation, and that this risk deterred them from engaging in political activities.[4]

Both cases involve a First Amendment chilling effect,[5] which occurs when a governmental action has the indirect effect of deterring a speaker from exercising her First Amendment rights.[6] A given law may lead to a particular consequence for an expressive act, such as the

1. 418 U.S. 241, 244 (1974).

2. *Id.* at 257.

3. 130 S. Ct. 2811, 2813 (2010).

4. *Id.*

5. Because my argument is predicated upon First Amendment–specific normative arguments, this paper does not directly discuss alleged chilling effects on non–First Amendment rights.

6. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 692 (1978); *see also* Leslie Kendrick, *Speech, Intent and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1649–50 (2013); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 268 (1985); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 142 (1997); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 832–40 (1969).

threat of criminal or civil sanctions, loss of state benefits, loss of privacy, or some other burden or penalty. Fear of that consequence may, in turn, deter the speaker from exercising her expressive rights.

But *Doe* features an additional twist on the chilling effect—an element of private action. A speaker may refrain from speaking because she fears a private party's reaction: criticism, harassment, protests, boycotts, employment retaliation, or violent retribution. Ordinarily, of course, we do not consider such private reactions to raise First Amendment issues. We accept, as a general proposition, that speech has consequences.

But what happens when a governmental action plays a role in enabling such private reactions; that is, where a chilling effect involves both governmental and private action? The problem of private action takes a unique form in chilling effect cases.[7] Since a chilling effect is a fear of future consequences, such feared consequences include potential private reactions. In most areas of constitutional law, such private reactions do not affect the constitutionality of a governmental action.[8] Chilling effect doctrine creates an exception: it expands the category of constitutionally cognizable injuries to encompass claims of deterrence, whether that deterrence results from governmental or private actions, from legal or illegal retaliation.

For example, courts have long recognized that the mandatory disclosure of political activities will have some chilling effect on political participation, in part due to the ever-present threat of private reactions, such as harassment or retaliation.[9] Courts take such consequences of private reactions into account when gauging a law's overall burden on protected rights.[10] Under standard balancing analysis, a court then assesses whether sufficiently important and adequately tailored state interests justify such a burden.

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7. As I argue *infra* note 108, the problem of private action in chilling effect cases presents a problem that is conceptually distinct from the more familiar private-versus-public distinction in state-action doctrine.

8. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 755 (2005); Deshaney v. Winnebago Cnty., 489 U.S. 189, 195 (1989) ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."); GEOFFREY R. STONE ET AL., AMERICAN CONSTITUTIONAL LAW 1543 (6th ed. 2009); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2278 (1990); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 193 (2004). *But see* Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 28 (2006) (arguing that, in some cases, the state is constitutionally required to take affirmative steps to prevent private misconduct).

9. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam).

10. *See id.*

But even where a law is appropriately balanced and otherwise constitutionally sufficient, a chilling effect may still arise from specific, serious private reactions. For example, in the disclosure context, political activity on a hot button social issue might spark private reactions far more extreme than those a court's balancing analysis would ordinarily anticipate, including organized protest and boycotts, or even illegal activity such as threats or violence. Should such extreme private reactions and their resulting chilling effects have the effect of invalidating an otherwise constitutional law? Is there some point at which the chilling effect is attributable to the private action rather than to the enabling governmental action? And is there reason to distinguish between severe chilling effects resulting from legal versus illegal private reactions?

Current doctrine and scholarship have paid little attention to these questions. Where a governmental action in some way enables a private reaction to speech, we lack a theory to explain when such a private reaction creates a First Amendment chilling effect.[11]

This Article argues that in a small but significant subset of cases—"private chill" cases—courts should consider the source of chill to be private action, rather than governmental action, even though state action is present. The Article further explains that in such private chill cases the distinction between chilling effects arising from private, legal reactions and private, illegal reactions becomes salient. It outlines a framework for analyzing and resolving private chill cases by focusing on three foundational questions: How can we define the dividing line between such private chill cases and governmental chill cases? Why does the distinction between private chill and governmental chill matter, in terms of a mandate for judicial intervention? And what doctrinal consequences flow from this distinction?

First, this Article argues that chilling effect doctrine should distinguish between governmental and private chill cases. The distinction does not turn on the mere presence or absence of potentially chilling private action, nor on simple causation. Some

11. Thus far, private chill cases have arisen in challenges to mandatory disclosure laws, but the potential application of this category is much broader. New technologies have made an unprecedented volume of speech and information both easily accessible and practically indelible. At the same time, governmental involvement in communications architecture is inevitable and ubiquitous. *See, e.g.*, A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1468 (2000); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 491 (2006). Already, increased technological interconnectivity has caused such reactions to be swifter and more far-reaching than in previous eras, and resulting chilling effects are correspondingly more severe.

element of private action will be present in a wide range of chilling effect situations. Instead, the distinction hinges on what theorists, such as Matthew Adler and Michael Dorf, have called the "rule-invalidity" of the government's action; that is, whether the government has trespassed a constitutional norm, as embodied in substantive doctrine.[12] For example, the government may have engaged in invidious discrimination, promulgated a vague or overbroad regulation, or created a burden on protected rights that was not justified by the interests it sought to advance. In such instances, the government has violated a First Amendment "rule," and the chilling effect is properly attributable to this violation.

By contrast, this Article defines the category of private chill to comprise cases in which the government has not trespassed constitutional norms—that is, no governmental chill is present—yet some governmental action has enabled private action, the threat of which has chilled a speaker's expressive or associational rights.

Doe exemplifies the difference between governmental chill and private chill in situations where both governmental action and private action contribute to a chilling effect. In *Doe*, the Washington Public Records Act ("PRA")—a state law analogue to the Freedom of Information Act—required the names and addresses of ballot-initiative-petition signatories to be available as a matter of public record.[13] Advocacy groups requested these records for petition R-71, which had sought to overturn a law granting domestic partnership benefits to same-sex couples.[14] The advocacy groups announced their intention to post signatory information on the Internet in searchable format.[15] In other states, contributors to anti-same-sex-marriage initiatives, such as California's Proposition 8, had been subjected to retribution by private parties, including criticism, harassment,

12. *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1166 & n.159 (2003); Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13 (1998); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 238 (1994); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 369–70 (1998); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 9; *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing,* 113 HARV. L. REV. 1321, 1364 (2000) (offering a partial critique of Adler's "rights against rules" formulation but acknowledging that the formulation accounts for a wide range of constitutional doctrine).

13. 130 S. Ct. 2811, 2816 (2010).

14. *Id.*

15. *Id.*

threats, loss of private employment, consumer boycotts, and even violence.[16]

Doe is especially relevant because the Court considered the effects of private action at two separate phases of the analysis: at the facial challenge stage and at the as-applied stage, which corresponded to the governmental chill and private chill inquiry, respectively.[17] In the facial challenge, which analyzed the petition-signatory disclosure requirements generally, the Court accepted that any disclosure law may expose speakers to private harassment or retaliation, potentially chilling political participation.[18] Despite this acknowledged chilling effect, an eight-to-one majority dismissed the facial challenge under standard balancing analysis, holding that the state's interests in transparency and electoral integrity justified the burdens of disclosing petition signatories.[19] In other words, since the PRA was appropriately balanced and was not otherwise constitutionally objectionable,[20] the government had violated no constitutional norm in promulgating or enforcing it. Thus, to apply the distinction advanced in this Article, there was no governmental chill.

But *Doe* also presented a private chill issue at the as-applied stage, where the Court considered whether a specific and potentially serious threat of retribution from private parties created an unconstitutional chilling effect.[21] Plaintiffs sought a "harassment exemption" to disclosure laws, which would apply if they could demonstrate "a reasonable probability that the compelled disclosure of [personal information] will subject [them] to threats, harassment, or reprisals from either Government officials or private parties."[22] Remarkably, although the as-applied challenge was not yet before the Court, the Justices filed a total of seven opinions to register their disparate views regarding its proper disposition.[23] The strong majority

16. Notice of Motion and Motion to Reconsider Orders Granting Washington Families Standing Together and Washington Coalition for Open Government Permission to Intervene, *Doe*, 130 S. Ct. 2811 (2010) (No. 3:09-CV-05456-BHS), 2010 WL 4635816.

17. As I will explain, the governmental chill/private chill inquiry will often, but not always, correspond to the facial/as-applied challenge phases of constitutional litigation. *See infra* note 128 and accompanying text. The discrepancy results because the term "as-applied challenge" encompasses several different forms of challenge. *See infra* note 129.

18. 130 S. Ct. at 2818 (citing Buckley v. Valeo, 424 U.S. 1, 68 (1976)).

19. *Id.* at 2819.

20. That is, the PRA did not discriminate on the basis of content or viewpoint, was not vague or overbroad, and did not otherwise violate any constitutional norm.

21. 130 S. Ct. at 2822.

22. *Id.* at 2823 (citing *Buckley*, 424 U.S. at 74).

23. The Court did not decide the as-applied challenge because the factual record was undeveloped. *Id.* at 2821. That six Justices were motivated to author separate opinions regarding

that had dismissed the facial challenge splintered when considering how to weigh the state's interests in transparency against the potential chilling effect of private harassment.[24] The Court lacked a framework for analyzing claims of private chill.

Second, this Article argues that the distinction between governmental chill and private chill is salient. In governmental chill cases, First Amendment theory provides a clear mandate for judicial intervention: chilling effect doctrine performs an important negative function by preventing the state from trespassing constitutional boundaries. Moreover, the chilling effect doctrine is prophylactic; it assumes that overprotecting speech will generally do less harm than underprotecting speech.[25] In governmental chill cases, giving the benefit of the doubt to the speaker, rather than to the state, presumably advances positive First Amendment values such as public discourse, democratic deliberation, and individual autonomy.

But the mandate for judicial intervention in private chill cases is much less clear. First, judicial intervention does not protect against state constitutional trespasses since, by definition, no constitutional rule has been violated. Moreover, in private chill cases, one cannot safely assume that overprotecting a plaintiff's First Amendment interests will enhance public discourse or other First Amendment values. Instead, overprotection may come at the expense of a third

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an as-applied question that was not yet before the Court might reflect a recognition that, with a raft of challenges to campaign-finance disclosure requirements making their way up through the lower courts, a workable constitutional standard is long overdue. *See, e.g.*, Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012); Nat'l Org. for Marriage v. Cruz-Bustillo, 477 F. App'x 584 (11th Cir. 2012); The Real Truth About Abortion, Inc. v. FEC, 681 F.3d 544 (4th Cir. 2012); Nat'l Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011); Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010); Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010); Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009); Van Hollen v. FEC, 851 F. Supp. 2d 69, (D.D.C. 2012); Hatchett v. Barland, 816 F. Supp. 2d 583 (E.D. Wis. 2011); Ctr. for Individual Freedom, Inc. v. Tennant, 849 F. Supp. 2d 659 (S.D.W. Va. 2011); Protectmarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

24. *Doe*, 130 S. Ct. at 2822, 2825 (Alito, J., concurring); *id.* at 2837 (Thomas, J., dissenting). On remand, the district court dismissed the as-applied challenge, finding little evidence of harassment in the instant case. Doe v. Reed, 823 F. Supp. 2d 1195, 1203 (W.D. Wash. 2011). Multiple commentators have analyzed *Doe v. Reed* and its disclosure policy using a balancing approach. Richard Briffault, *Two Challenges for Campaign Finance Disclosure After* Citizens United *and* Doe v. Reed, 19 WM. & MARY BILL RTS. J. 983 (2011); Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557 (2011); Lloyd Hitoshi Mayer, *Disclosures About Disclosure,* 44 IND. L. REV. 255 (2010). This paper takes no position on the optimal level or degree of mandatory disclosure.

25. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 569–70 (1991); Kendrick, *supra* note 6, at 1656; Schauer, *supra* note 6, at 705.

party's responsive speech or other legal activities. For example, the grant of a harassment exemption to signatories of controversial petitions may indeed shield those individuals from harassment, but at the cost of depriving journalists, activists, and members of the public of valuable information, discussion, and debate. Structuring a presumption to favor a plaintiff's assertion of a chilling effect claim is normatively problematic where speech values exist "on both sides of the equation," as in private chill cases.[26] Moreover, in private chill cases, a court's intervention to prevent a chilling effect may function as the equivalent of an injunction against private actors, forbidding them from engaging in potentially chilling behavior. For a court to intervene in a private chill case to prevent legal behavior by third parties raises concerns about separation of powers and judicial unilateralism that are not present in governmental chill cases.

Third, this Article argues that rather than assessing private chill claims under the First Amendment chilling effect framework, we should understand such claims to be requests for accommodation. In other words, private chill plaintiffs should be understood as demanding the exercise of a court's equitable powers to accommodate their First Amendment rights, even at the expense of the preexisting prerogatives of a private party. Accordingly, this Article suggests that an accommodation framework should govern the analysis of private chill cases. Under this approach, which is derived from equitable models, the court's intervention is directed to protecting speakers from irreparable injury arising from illegal private actions rather than protecting speakers against a chilling effect.

This Article outlines a new framework for the First Amendment analysis of mandatory disclosure requirements and other private-action scenarios. The approach would first ask whether the chilling effect arises from a governmental violation of a constitutional rule. If so, then both negative and positive accounts of expressive rights provide a clear mandate for judicial intervention. If, on the other hand, the chilling effect arises from private action rather than from a governmental rule violation, then the distinction between legal and illegal sources of private chill becomes salient. The accommodation approach provides a mandate for judicial intervention in cases where a chilling effect arises from private, illegal activity. However, neither rights-based models nor the accommodation model appear to provide a mandate for judicial intervention where a chilling

26. Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) (Breyer, J., concurring)).

effect arises from private, legal activity, rather than from a governmental rule violation or from private, illegal retribution.

The Article proceeds in four parts. Part II sets out the doctrinal and historical foundations of the First Amendment chilling effect doctrine. Part III describes the expansion of chilling effect doctrine to encompass private chill claims and provides working definitions for the categories of governmental chill and private chill. Part IV examines the normative mandate for judicial intervention under traditional chilling effect doctrine and criticizes its application to private chill claims. Part V models an accommodation approach that provides an alternative judicial mandate for intervention in private chill cases and explains the application of this approach to *Doe v. Reed* and other private chill controversies.

II. DOCTRINAL FOUNDATIONS

The "ubiquitous and slippery"[27] chilling effect is one of the most pervasive concepts in First Amendment law, but also one of the most poorly understood.[28] This Part provides a working definition of the chilling effect concept and offers a historical sketch of its origins and development.

A. Defining Chilling Effect

A chilling effect occurs where one is deterred from undertaking a certain action *X* as a result of some possible consequence *Y*. Additionally, a chilling effect is an indirect effect: it occurs when the deterrence does not stem from the direct restriction, but as an indirect consequence of the restriction's application.[29] One would not say that by banning a particular film a state censor has chilled the filmmaker's ability to show it; instead, the censor has simply prevented the screening, and the concept of chill adds nothing to the analysis.[30] As a counterexample, in *Davis v. FEC*, the Court invalidated a law providing that if a political candidate spent more than a threshold amount of her own funds on her campaign, her opponent's

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

28. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 482 (1985); Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 14–15 (2011); Solove, *supra* note 6, at 154–55; Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 37 PEPP. L. REV. 273, 277 (2009).

29. *See* Solove, *supra* note 6, at 142.

30. Schauer, *supra* note 6, at 692.

contribution limits would be trebled.[31] Although the law did not directly prevent the candidate from spending above the threshold, the Court reasoned that triggering a benefit to the opponent at the spending threshold created a substantial deterrent—in other words, a chilling effect—on such spending.[32]

Thus, we arrive at a basic definition: "a chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."[33]

But this definition does not purport to tell us when and why courts deem a chilling effect to impose an insupportable burden on First Amendment rights. After all, to say that all governmental actions create a chilling effect is no more than to say that all actions have unintended consequences.[34] For example, the post office raising the price of stamps may have a deterrent effect on my ability to write a letter to my senator, but few would argue that such a chilling effect would invalidate the price hike. As the Supreme Court has remarked, "[t]he 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."[35]

Defining when, why, and how a chilling effect is constitutionally unacceptable is a central challenge for First Amendment jurisprudence, as multiple commentators have recognized.[36] Although dozens of Supreme Court cases have used chilling effect–based reasoning, few scholars in recent decades have

31. 554 U.S. 724, 729 (2008).

32. *Id.* at 738.

33. Schauer, *supra* note 6, at 693; *see also* Solove, *supra* note 6, at 142; Stone, *supra* note 28, at 277. In a forthcoming article, Leslie Kendrick argues that, in addition to the deterrent effect, First Amendment chilling effect cases all share a common thread: "risks imposed by legal uncertainty." Kendrick, *supra* note 6, at 1655. Although I certainly agree that many, if not most, chilling effect cases are concerned with minimizing the deterrent effects of uncertainty, I disagree with Professor Kendrick's analysis to the extent that she suggests that all chilling effect cases fall into the uncertainty category. For example, in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court invalidated a state law imposing a loyalty oath requirement upon a veteran's receipt of a tax exemption. There was nothing uncertain about the operation of the chilling effect in *Speiser*—the law simply deterred individuals from membership in certain associations by imposing a cost: the loss of a governmental benefit. Thus, chilling effect doctrine takes account of deterrent effects beyond simple uncertainty.

34. Schauer, *supra* note 6, at 692.

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

36. Schauer, *supra* note 6, at 700; Solove, *supra* note 6, at 154.

attempted to pin down the scope and significance of chilling effect doctrine.[37]

One reason why the so-called chilling effect doctrine resists ready explanation is that the chilling effect concept does not delineate a discrete, freestanding doctrinal category. Instead, chilling effect–based reasoning is the common denominator among a number of procedural, categorical, and substantive doctrines in First Amendment case law. Often, chilling effect–based reasoning manifests itself as a constitutionally mandated exception to a general doctrinal rule.

For example, Article III "case or controversy" requirements generally require that a plaintiff demonstrate concrete and particularized injury in order to establish standing.[38] But by recognizing bare deterrence—fear of some future consequence—as a potential First Amendment injury, chilling effect doctrine opens the door to relatively attenuated or inchoate claims. Courts have used chilling effect reasoning to invalidate laws even where giving credence to such claims has involved courts in unavoidably subjective and contingent speculation about future effects.[39] Similarly, general principles of standing bar a plaintiff from raising another's rights in court.[40] However, under the overbreadth and vagueness doctrines, a plaintiff can bring a facial challenge to vague or substantially overbroad laws that create a chilling effect on protected speech even if she fails to demonstrate that her own speech is entitled to First Amendment protection.[41]

Moving from the procedural to the substantive, courts are relatively tolerant of a certain degree of imprecision in legislative line

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37. The seminal work is Frederick Schauer's 1978 article *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*. *See* Schauer, *supra* note 6. Subsequent efforts at a comprehensive overview of chilling effect doctrine have been sparse, and most commentators have followed Schauer's formulation. *See* Kendrick, *supra* note 6, at 1649; Solove, *supra* note 6, at 142. I discuss Schauer's account in more depth, *infra*, notes 149–52 and accompanying text.

38. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

39. For example, Justice White, dissenting in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), criticized the majority's unsupported assumption that current libel rules had a chilling effect upon freedom of the press: "To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth." *Id.* at 390 (White, J., dissenting). Similarly, Chief Justice Burger, dissenting in *Gooding v. Wilson*, 405 U.S. 518 (1972), criticized overbreadth doctrine for resting on "some insubstantial or imagined potential for occasional and isolated applications that go beyond constitutional bounds." *Id.* at 531 (Burger, C.J., dissenting). *See also* Kendrick, *supra* 6, at 1661; Schauer, *supra* note 6, at 730.

40. *See, e.g.*, United States v. Raines, 362 U.S. 17 (1960). *See generally* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

41. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104 (1972); Gooding v. Wilson, 405 U.S. 518 (1972). *See generally* STONE, *supra* note 8, at 1112–18.

drawing outside the First Amendment context. In non–First Amendment cases, courts will normally accept some overdeterrence as the inevitable result of lawmaking.[42] But in the First Amendment context, courts consider such uncertainty to be particularly problematic, as what is being overdeterred might also be constitutionally protected. Thus, where such categories as libel, incitement, and obscenity are excluded from First Amendment protection or are accorded a lesser degree of protection, courts have used chilling effect–based reasoning to insist that such categorical distinctions be bounded by bright lines in order to prevent spillover effects on protected speech.[43]

Moreover, as a general rule, courts are relatively deferential to laws that incidentally burden the exercise of First Amendment rights rather than regulate speech based on its communicative content.[44] One is not generally entitled to an exemption from an otherwise valid law merely because one can demonstrate such an incidental burden.[45] For example, where park regulations prohibit sleeping in public parks, one cannot override these regulations by arguing that such sleeping is an expressive part of a political demonstration.[46] But under chilling effect doctrine, courts have taken the unusual step of granting exemptions to otherwise valid laws where plaintiffs have

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42. Kendrick, *supra* note 6, at 1661; Schauer, *supra* note 6, at 730.

43. Schauer, *supra* note 6, at 687.

44. *See, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2994 (2010) ("Where the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992))); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (holding that freedom of the press does not exempt journalists from generally applicable laws); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789–94 (2d ed. 1988); Larry A. Alexander, *Trouble on Track Two: Incidental Regulation of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 930 (1993); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1180 (1996); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54–57 (1987).

45. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (refusing to grant constitutionally required religious exemption to a "neutral law of general applicability"); *see also* William P. Marshall, Smith*,* Christian Legal Society*, and Speech-Based Claims for Religious Exemptions from Neutral Laws of General Applicability*, 32 CARDOZO L. REV. 1937, 1950 (2011); Stone, *supra* note 44, at 63.

To use a well-known example, where a generally applicable statute prohibits the destruction of draft cards, a defendant cannot escape prosecution by arguing that burning a draft card was essential to his exercise of First Amendment rights. Indeed, as the draft card example demonstrates, courts will uphold regulations that not only incidentally burden rights, but entirely prohibit their exercise with respect to some category of expression—i.e., if draft card burning is prohibited, then a protesters' ability to burn a draft card in protest is not merely "burdened," it is entirely foreclosed. United States v. O'Brien, 391 U.S. 367, 386 (1968).

46. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984).

demonstrated a severe chilling effect on expressive or associational rights.[47] Relatedly, under the state-action doctrine, the actions of a private party generally will not result in a First Amendment violation, even where there is some level of state involvement in a regulatory scheme.[48] But under chilling effect doctrine, the problem of private action in *Doe* and other cases raises the possibility that reactions by private actors could result in the invalidation of an otherwise valid law.[49]

As illustrated by the examples above, chilling effect doctrine is somewhat of an uncomfortable fit in constitutional jurisprudence, and the courts' extension of chilling effect–based reasoning has been marked by periodic and severe withdrawals.[50] The logic of deterrence alone cannot explain the doctrinal path of the chilling effect concept; an understanding of history is indispensable.

B. A Brief History

The Court's adoption of the chilling effect concept's expansive logic has been hesitant and partial, driven by perceived necessity and animated by a perpetual undercurrent of governmental distrust. In the following sections, I will briefly relate how the chilling effect concept first arose as a means to counter invidious state efforts to suppress disfavored groups and then expanded to encompass governmental actions that, although lacking any element of animus, imposed unwarranted deterrent burdens on the exercise of expressive and associational rights.

1. The Origins of First Amendment Chilling Effect Theory

Like so much of modern free speech jurisprudence, the chilling effect theory first began to gain traction as a First Amendment concept in the mid-twentieth century. During this period, the courts

47. *See, e.g.*, Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); *see also* Geoffrey P. Stone & William P. Marshall, Brown v. Socialist Workers*: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583.

48. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (holding that there was no state action where a private association imposed sanctions against an employee of a public university that was a member of that association); CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (holding that the refusal of state-licensed broadcasters to accept editorial advertisements did not violate the First Amendment).

49. For a further clarification of the relationship between private action in chilling effect cases and standard state-action doctrine, see *infra* note 108.

50. *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972); Younger v. Harris, 401 U.S. 37 (1971).

had begun to respond to governmental efforts at censorship by creating increasingly robust First Amendment protections against direct state suppression of speech.[51] At the same time, state and federal governments felt increasing urgency to quash ideas and groups they deemed subversive, especially those deemed sympathetic to communism or the civil rights movement.[52]

Thus, government officials sought recourse in more subtle methods of suppression, including the loss of government employment or other benefits as well as the "spotlight of pitiless publicity" employed in governmental blacklists and investigations.[53] Such indirect methods were thought to suppress subversive ideas and activity while evading the strictures of the First Amendment. Much of early chilling effect doctrine developed as courts attempted to protect the communist movement and civil rights activists from such oppressive tactics.

Were these cases to arise today, a court could turn to an array of First Amendment tests and standards to strike down such indirect efforts at suppression.[54] But at the time, none of these doctrines had been fully articulated in the constitutional case law.

Instead, the Court turned to the chilling effect concept as a kind of "protodoctrine": an early instantiation of the overarching principle that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly."[55] As such, the First Amendment chilling effect concept functioned much as the court's equity jurisdiction had functioned in a previous era: to alleviate unjust results stemming from the application of otherwise valid laws.[56]

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51. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 396 (2004).

52. *Id.* at 312.

53. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 22 (1991) (quoting H.R. REP. NO. 75-1381, at 2 (1937) ("[T]he spotlight of pitiless publicity [can] serve as a deterrent to the spread of pernicious propaganda.")).

54. For example, modern First Amendment doctrine creates a presumption against regulations that discriminate on the basis of content or viewpoint. Additionally, the doctrine of unconstitutional conditions prevents the government from conditioning the receipt of a governmental benefit on the relinquishment of a constitutionally protected right. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1506 (1989).

55. Rutan v. Republican Party of Ill., 497 U.S. 62, 77–78 (1990).

56. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 932 (1987); *see also* OWEN W. FISS & DOUG RENDLEMAN, INJUNCTIONS, at iv (2d ed. 2001); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1303 (1976).

The flexibility provided by the chilling effect concept allowed the Court to address the ever-changing tactics of indirect suppression that federal and state officials developed.[57] For example, one harassing tactic employed by state officials was to enmesh targeted groups in legal proceedings, forcing them to defend themselves against meritless prosecutions and litigation. In the classic case of *Dombrowski v. Pfister*,[58] plaintiffs brought suit under the Civil Rights Act against state officials who were prosecuting or threatening to prosecute them under state subversion statutes that had already been ruled unconstitutional in the federal courts.[59] The Supreme Court invoked its equitable powers to hold that, under such circumstances, the chilling effect upon plaintiffs' First Amendment activities was sufficient to constitute irreparable injury, warranting injunctive relief.

Courts were at first disturbingly deferential to such suppressive tactics.[60] As the excesses of McCarthyism became more pervasive, however, the federal judiciary slowly began to change course, holding that the use of seemingly neutral tools would not immunize legislative acts from judicial review if such tools were used

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57. *See* Leslie Kendrick, *Disclosure and Its Discontents*, 27 J.L. & POL. 575, 576 (2012); Adam Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1341 (2004). *See generally* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59.

58. 380 U.S. 479 (1965); *see also* Zwickler v. Koota, 389 U.S. 241 (1967) (reversing dismissal on abstention grounds of request for declaratory judgment that the state statute was facially unconstitutional, even though injunctive relief was not warranted). *Dombrowski*'s effect on preexisting abstention doctrine, and the extent to which its holding was narrowed by *Younger v. Harris*, 401 U.S. 37 (1971), has been the subject of considerable scholarly discussion. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 826–27 (5th ed. 2007). *See generally* Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977) (arguing that *Dombrowski* heralded a new era in which the federal courts would be "the primary guardian of constitutional rights"); Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636 (1979) (arguing that *Dombrowski* contracted, rather than expanded, the injunctive powers of federal courts).

59. As the Court noted, under the pretext of criminal investigation, state officials had already subjected the plaintiffs to extensive harassment. *Dombrowski*, 380 U.S. at 487 n.4:

> At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the Council for the State Un-American Activities Committee. The home and office of the director of the Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truck load of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function.

60. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 129–30 (1956) (declining to rule on the constitutionality of the Subversive Activities Act, which required disclosure of officers, funds, and membership of communist organizations); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 393 (1950) (explaining that a federal loyalty oath requirement had the "effect of discouraging the exercise of political rights protected by the First Amendment," but holding that the state's interests outweighed this effect); *see also* Kendrick, *supra* note 57, at 6.

to single out and punish disfavored viewpoints. For example, in *Joint Anti-Fascist Refugee Committee v. McGrath*, Justice Hugo Black authored a classic dissent likening governmental blacklists to "bills of attainder."[61]

The first Supreme Court reference to a First Amendment chilling effect is found in Justice Frankfurter's concurrence in *Wieman v. Updegraff*[62] in 1952. In that case, a unanimous Court struck down a state statute conditioning state employment on a loyalty oath requiring that employees swear that they had not been affiliated with certain organizations designated as "subversive" for the past five years. The majority held that the requirement failed to fulfill due process scienter requirements, since an employee may have been involved with such an organization without knowledge of its subversive activities.[63] Frankfurter based his concurrence on the First Amendment rather than the Due Process Clause. He noted that the plaintiffs in *Wieman* were teachers at a state university and argued that the loyalty oath created an "unwarranted inhibition upon the free spirit of teachers" that "has an unmistakeable [sic] tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."[64] Soon thereafter, in *Speiser v. Randall*, the Court adopted Frankfurter's reasoning in *Wieman*, articulating chilling effect theory as a distinct First Amendment concept and striking down on First Amendment grounds a state law that required a loyalty oath of veterans seeking a property tax exemption.[65]

Even as McCarthy-era politicians made use of the "pitiless publicity" of the blacklist and the legislative investigation, the white majority and its elected representatives in the South were

61. 341 U.S. 123, 144 (1951) (Black, J., dissenting).

62. 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

63. In a number of cases in this era, the Court relied upon due process rights, rather than freedom of expression, to shield targets of McCarthyist excess. In *United States v. Rumely*, 345 U.S. 41 (1953), the Court overturned the contempt conviction of a bookseller who had refused to divulge the names of the purchasers of certain books in an investigation by the House Select Committee on Lobbying Activities. Justice Frankfurter's opinion held that the committee had exceeded the bounds of its statutory authority. *Id.* at 58. Similarly, in *Watkins v. United States*, 354 U.S. 178 (1957), the Court overturned a contempt conviction for a witness who had refused to answer questions regarding former communists in a hearing of the House Un-American Activities Committee. Again invoking the due process clause, the Court held that there is "no congressional power to expose for the sake of exposure." *Id.* at 200.

64. 344 U.S. at 195.

65. 357 U.S. 513, 529 (1958).

collaborating to perpetuate Jim Crow.[66] Private violence was the de facto principle of social ordering in the civil rights–era South, and whether the perpetrators of such violence "happened to use the mechanism of the government instead of one of the other available mechanisms was essentially a fortuity."[67]

One common strategy was to use otherwise innocuous disclosure regulations to harness the power of private stigmatization and retaliation—a phenomenon Seth Kreimer has called "censorship by proxy."[68] Given the availability of private violence as a tool of suppression, state officials learned that they could selectively enforce these disclosure regulations to, in effect, paint a target on a victim's back while keeping their own hands clean. Thus, government officials used seemingly neutral laws to single out and expose activists and dissidents, knowing that such exposure would result in private sanctions ranging from social opprobrium to lynching.

NAACP v. Alabama,[69] for example, involved the discriminatory application of a run-of-the-mill state corporate regulation, which required out-of-state corporations to qualify before doing business in the state.[70] In prosecuting the NAACP, the state attorney general enforced the law for the first time against a nonprofit corporation.[71] Then, in discovery, the state insisted upon production of the NAACP's membership lists—a requirement of no apparent relevance to the

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66. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 14–16 (noting that the actions of state officials in opposition to a federal court decision mandating school desegregation "have brought about violent resistance to that decision in Arkansas"); *see also* John Dorsett Niles et al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 914 (2011); David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 412 (1993).

> For example, during Mississippi's Freedom Summer of 1965,
>
> [t]hree civil rights workers were murdered by clan agents, four were shot and wounded, 52 beaten severely enough to warrant reports to the authorities. 250 civil rights workers were arrested by Mississippi authorities, 13 black churches were burned to the ground, 17 other buildings used by civil rights groups were damaged by arson fires or bombs, 10 automobiles were damaged or destroyed, and there were an additional seven bombings that resulted in no property damage or injury.

Michael E. Tigar, *Whose Rights? What Danger?*, 94 YALE L.J. 970, 975 (1985) (book review).

67. Strauss, *supra* note 66, at 412.

68. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link,* 155 U. PA. L. REV. 11, 17 (2006).

69. 357 U.S. 449 (1958).

70. Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 890 (1994); Joseph B. Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 COLUM. L. REV. 614, 614–19 (1958).

71. Glennon, *supra* note 70, at 889.

statute at issue.[72] On appeal, the Alabama Supreme Court defied its own precedents,[73] ruling that the NAACP could not obtain a hearing on its constitutional challenge to the prosecution "until it purged itself of contempt by divulging its membership lists."[74] Collusion between state courts and law enforcement officials trapped the NAACP in a procedural Catch-22—it could not argue that producing the membership lists would violate its constitutional rights until it had already produced the membership lists. Although Justice Harlan's opinion—a masterpiece of tight-lipped reserve—did not explicitly call out the State on its discriminatory enforcement of the law, he ruled that such forced exposure burdened the organization's constitutional right of association and that the states' interests in requiring disclosure of rank and file members were insubstantial. While the opinion never used the term "chill," the Court clearly employed chilling effect–based reasoning, explaining that the disclosure requirement "may induce members to withdraw from the association and dissuade others from joining it because of fear of exposure of their beliefs through their associations and of the consequences of this exposure."[75]

Similarly, in *Bates v. City of Little Rock*,[76] *NAACP v. Button*,[77] and *Gibson v. Florida Legislative Investigation Committee*,[78] a state sought disclosure of the NAACP's membership lists on grounds that appeared patently fabricated.[79] In *Bates*, the state asserted that production of the NAACP's lists was necessary to enforce municipal license taxes, even though the state failed to show that such licensing

72. *NAACP*, 357 U.S. at 464. ("Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of petitioner's rank-and-file members has a substantial bearing on either of them."); *see also* Robison, *supra* note 70, at 640 n.140.

73. *NAACP*, 357 U.S. at 456 ("We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment.").

74. Glennon, *supra* note 70, at 891.

75. *NAACP,* 357 U.S. at 462.

76. 361 U.S. 516 (1960).

77. 371 U.S. 415 (1963).

78. 372 U.S. 539 (1963) (reversing contempt conviction for failure to comply with legislative committee subpoena where committee had failed to show substantial connection between local race-relations association and Communist activities).

79. In *Branzburg*, 408 U.S. 665 (1972), the Court described such cases as *NAACP v. Alabama, Button,* and *Bates* as "attempt[s] to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed." *Id.* at 700.

was even applicable to a nonprofit organization.[80] In *Button,* a state law required any group engaged in race-based affirmative litigation—but no other form of litigation—to file its membership list with the state, among other requirements, while failing to impose the same requirements on other litigation. In *Gibson*, a state legislative committee empowered to investigate communist activities subpoenaed the NAACP's membership lists, even though there was no evidence of any involvement by the NAACP in communist activities.[81] In all of these cases, the Court dismissed these purported rationales as meritless.

2. The Modern Development of Chilling Effect Theory

Outside of the socially and politically fraught context of McCarthyism and the civil rights movement, the Court began to recognize that a chilling effect could be constitutionally cognizable even in the absence of invidious governmental motive.[82] Thus, even where deterrent effects were the unintended consequences of regulation, rather than the results of state animus, such deterrence could give rise to a constitutional claim.

McCarthyism and the civil rights era seem to have heightened the Court's awareness of the possibilities for state suppression that were latent in vague or overbroad statutes and seemingly content-neutral regulatory burdens. Having seen such tools used for invidious purposes, the Court now seemed reluctant to leave their use to the discretion of government officials, even where there was no evidence of improper governmental animus.

For example, in *Thornhill v. Alabama*, the Court struck down an antipicketing ordinance on its face, even though it was unclear from the factual record whether the ordinance would have proscribed the conduct of the particular defendant in the case.[83] The Court held that the statute was overbroad to the extent that it extended to peaceful labor picketing, which the First Amendment protected, regardless of the merits of the prosecution of the particular

80. 361 U.S. at 525 ("In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists . . . .").

81. 372 U.S. at 539.

82. NAACP v. Alabama, 357 U.S. 449, 461 (1958) ("[A]bridgement of [First Amendment] rights, even though unintended, may inevitably follow from varied forms of governmental action.").

83. 310 U.S. 88, 105–06 (1940).

defendant.[84] Allowing such overbroad statutes, the Court reasoned, placed all speech at risk of invidious suppression. Although the Court did not use the term "chilling effect," its language demonstrates its concern over the deterrent effects of such overbroad laws on protected speech.[85] The Court focused not on any particular animus in the case before it, but instead upon the potential of overbroad statutes to mask invidious governmental action in future applications. In later cases, the Court continued to facially invalidate overbroad loitering and disorderly conduct statutes, effectively removing such potentially abusive tools from the state's legislative arsenal.[86]

Eventually, the Court's concern in chilling effect cases moved beyond the potential for invidious governmental motivation and focused directly on two forms of indirect burden. First, procedural chilling effect applications took shape to protect against the deterrent effect of uncertainty, whether such uncertainty stemmed from the inevitable risks of the litigation process (as in *Dombrowski*)[87] or the similarly inevitable imprecision of any effort at regulatory line drawing.

For example, in *New York Times Co. v. Sullivan*, the Supreme Court used chilling effect–based reasoning to hold that a public figure could sustain a libel claim only by showing that such statements were made with "actual malice" (i.e., knowledge of falsity or reckless indifference to the truth).[88] The Court explained that a more expansive definition of actionable libel would create uncertainty in the minds of prospective critics and could therefore deter protected speech.[89] Thus, in situations where legal rules create doubt in the

84. *Id.* at 97.

85. The Court reasoned that such an overbroad statute, "which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Id.* at 97–98.

86. Coates v. City of Cincinnati, 402 U.S. 611 (1971); Gooding v. Wilson, 394 U.S. 147 (1969); *see also* Henry P. Monaghan, *First Amendment "Due Process*,*"* 83 HARV. L. REV. 518, 518–19 (1970) ("[I]nsensitive procedures can 'chill' the right of free expression. Accordingly, wherever First Amendment claims are involved, sensitive procedural devices are necessary."); Neuborne, *supra* note 57, at 80.

87. Virginia v. Hicks, 539 U.S. 113, 119 (2003) (" Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."); Speiser v. Randall, 357 U.S. 513, 525 (1958) ("There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account.").

88. 376 U.S. 254, 280 (1964).

89. *Id.* at 277–79.

minds of speakers as to whether their speech is protected, the resulting chilling effect renders that uncertainty constitutionally intolerable. The benefit of the doubt must go to the speaker, not the state.[90]

Accordingly, the presence of a chilling effect can lead to the facial invalidation of laws that are flawed for reasons of vagueness[91] or overbreadth,[92] can forbid administrative regimes that allow governmental officials unguided discretion to permit speech,[93] and can create a presumption at the margins of certain regulatory categories—such as libel,[94] obscenity,[95] or incitement[96]—in favor of the asserted speech claim.[97]

Second, in addition to invalidating laws that created procedural uncertainty, the Court also began to use chilling effect theory to invalidate laws that imposed a substantial deterrent effect upon the exercise of First Amendment rights.[98] Prior to this period, courts would not have treated such deterrence as a cognizable First Amendment burden, short of an outright prohibition or other concrete penalty. But the Court began to recognize that "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government."[99]

In *Lamont v. Postmaster General*, for example, a postal regulation barred mail delivery of "communist political propaganda" to any customer who had not submitted a written request for the

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90. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (First Amendment standards, however, "must give the benefit of any doubt to protecting rather than stifling speech."); *see also* Stone, *supra* note 44, at 79.

91. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 42 (1999); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); United States v. Robel, 389 U.S. 258, 264–65 (1967).

92. Broadrick v. Oklahoma, 413 U.S. 601, 611–13 (1973).

93. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 158–59 (1969); Freedman v. Maryland, 380 U.S. 51, 58 (1965); *see also* Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 964 n.12 (1984) ("By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech."). *But see* United States v. Thirty-Seven Photographs, 402 U.S. 363, 374 (1971) (upholding seizure of obscene materials by customs officials despite statute's lack of procedural safeguards).

94. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191, 213 (arguing that *Sullivan* is the result of "a strategy that requires that speech be overprotected in order to assure that it is not underprotected")

95. *Freedman*, 380 U.S. at 58.

96. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

97. Schauer, *supra* note 6, at 692.

98. Sedler, *supra* note 28, at 15; Note, *supra* note 6, at 809.

99. Lamont v. Postmaster Gen., 381 U.S. 301, 309 (1965).

delivery of such materials.[100] The Court reasoned that the state's asserted interest—protecting recipients from exposure to potentially offensive material—could be adequately addressed by existing regulations that allowed a recipient to request a delivery block. Therefore, the state interests did not justify the burden on First Amendment freedoms imposed by the regulation. Similarly, in *Shelton v. Tucker*, the Court used chilling effect–based reasoning to strike down a state statute compelling every public school teacher to file annually an affidavit listing every organization to which she had belonged or regularly contributed within the preceding five years.[101]

Of course, the bare assertion of a chilling effect would not suffice to invalidate a statute. Instead, applying standard balancing analysis, the Court would assess the severity of the deterrent effect against the substantiality of the state's interest in the challenged regulation.[102] For example, in *Branzburg v. Hayes*, the Court held five-to-four that the First Amendment does not preclude requiring reporters to testify regarding confidential sources before a grand jury.[103] The Court used balancing analysis to hold that the "overriding and compelling state interest"[104] in the investigation of crime by the grand jury outweighed any chilling effect on newsgathering or reporting. By contrast, in *Talley v. California*, the Court struck down a statute that prohibited the distribution of handbills that did not bear the names and addresses of their proponents.[105] The Court noted that the purported state interest in this regulation—to provide a means of identifying "those responsible for fraud, false advertising and

100. *Id.* at 310; *see also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 760 (1996) (striking down provision that required, with respect to leased access channels, that cable-system operators place patently offensive programming on separate channel, block channel from viewer access, and unblock channel within thirty days of subscriber's written request).

101. 364 U.S. 479, 489–490 (1960).

102. *See, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 191 (1983).

103. 408 U.S. 665, 709 (1972); *see also* Univ. of Pa. v. EEOC, 493 U.S. 182, 196–97 (1990) (rejecting argument that disclosure of academic peer evaluations to the EEOC would result in an unconstitutional chilling effect on candid evaluations and discussions of candidates); Herbert v. Lando, 441 U.S. 153, 198 (1979) (upholding required disclosure of editorial conversations and reporters' notes in a libel action, reasoning that any chilling effect on freedom of the press resulting from such disclosure was outweighed by the state's interest in adjudicating defamation lawsuits).

104. *Branzburg*, 408 U.S. at 700.

105. 362 U.S. 60, 66–67 (1960).

libel"—bore no relation to the broad sweep of the prohibition at issue.[106]

As we have seen in this Part, from its tumultuous origins in the 1950s and 60s, the chilling effect concept eventually became normalized as part of First Amendment jurisprudence in three principal ways. First, courts used the chilling effect concept to invalidate actions that represented invidious efforts at governmental suppression, whether such efforts resulted from legislative enactments or from executive enforcement decisions. Second, on a procedural level, courts used chilling effect doctrine to invalidate laws that were defective by creating unwarranted uncertainty, such as statutes that were vague or overbroad. Third, on a substantive level, courts incorporated deterrence burdens into standard First Amendment balancing analysis so that chilling effects were treated as the equivalent of any other burdens on First Amendment rights.

III. THE PROBLEM OF PRIVATE ACTION

As it was incorporated into First Amendment jurisprudence, the chilling effect concept expanded the category of which of a law's indirect effects count as a constitutionally cognizable burden on expressive freedoms. Under chilling effect theory's expansive reasoning, any indirect consequence that deterred speech could potentially constitute an unconstitutional burden so long as the threshold requirements of state action were satisfied.

But this expansive logic tended to overlook one aspect of chilling effect theory that I argue is both normatively and doctrinally salient—the source of chill. Specifically, as chilling effect doctrine developed, it failed to differentiate between chilling effects arising from governmental action and chilling effects arising from private action. I will explore some of the normative and doctrinal consequences of this distinction in Part IV, but in this Part, I will first continue to sketch the historical development of chilling effect doctrine beyond its formative period. In particular, I will explain how the Court began to grapple with emerging private-action problems in First

106. *Id.* at 64; *see also* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 205 (1999) (invalidating statute requiring that initiative-petition circulators wear identification badge and that proponents of an initiative report names and addresses of all paid circulators and amount paid to each circulator); McIntyre v. Ohio Elections Bd., 514 U.S. 334, 357 (1995) (invalidating state statute requiring all campaign literature to bear the name and address of its distributor, reasoning that state's antifraud interest was already protected through criminal prohibitions on false statements).

Amendment chilling effect cases. I will then provide working definitions for governmental chill and private chill.

A. The Harassment Exemption and Private Action

As chilling effect doctrine developed, the category of consequences that were deemed to constitute an actionable chilling effect expanded to encompass a new and potentially problematic category: the consequences of private action. Since the theory's initial development in the McCarthy-era and civil rights–era cases, First Amendment chilling effect cases have often considered deterrent consequences arising from a mix of governmental and private action. As noted above, in the "censorship by proxy" cases of the 1950s and 1960s, such as *NAACP v. Alabama*, *Bates*, and *Gibson,* government officials who wished to suppress speech and associational rights were able to selectively manipulate existing laws requiring disclosure, knowing that both official and private retaliation were a certain result. In these cases, the Court acknowledged that private action could substantially contribute to a deterrent effect on First Amendment rights. However, in those cases, the Court recognized that governmental animus was the driving force behind the chilling effect.[107]

But as chilling effect doctrine expanded beyond these "censorship by proxy" cases and began to consider burdens that were the unintended consequences of governmental regulation, courts began to suggest, at least in dicta, that an unconstitutional chilling effect could arise solely from the consequences of private action as long as some form of state action was present in the chain of causation.[108]

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107. *See, e.g.*, Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) ("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."); NAACP v. Alabama, 357 U.S. 449, 463 (1958) ("The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.").

108. Because of the unusual way in which the chilling effect doctrine encompasses the deterrent consequences of private action, the private-action problem examined in this paper is conceptually distinct from a typical state-action problem. A state-action problem will often pose the question: Under what circumstances, if any, should a private actor be subject to constitutional requirements? For some relatively recent takes on this longstanding debate, see, for example, Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767 (2010); John Dorsett Niles et al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885 (2011); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779 (2004); and Cass R. Sunstein, Essay, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465 (2002). But state action poses a threshold inquiry as to whether a particular dispute should be deemed to be a constitutional case at all. Chilling effect doctrine, by contrast, focuses on a

This possibility was most clearly articulated in the "harassment exemption" line of cases that were at issue in *Doe v. Reed*. This line of cases considered the possibility of constitutionally compelled exemptions to otherwise applicable campaign-finance disclosure laws.

The harassment exemption has its origins in the per curiam decision in *Buckley v. Valeo*, which considered a multitude of constitutional challenges to various provisions of the Federal Election Campaign Act.[109] In particular, the *Buckley* Court decided a challenge by minor political parties who claimed that the compelled disclosure of political contributions chilled their expressive and associational rights. First, the Court analyzed a facial challenge to the requirement as an infringement of the "privacy of association and belief guaranteed by the First Amendment."[110] In the facial challenge, the Court explicitly recognized the possibility of a chilling effect, including the possibility of private retaliation: "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation."[111] Despite this chilling effect, the Court upheld the regulation, given the importance of the state interests at issue.

But the *Buckley* Court explicitly carved out the possibility of a future as-applied challenge if there were "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[112] This standard, derived from the chilling effect analysis in *NAACP v. Alabama*,[113] is the harassment exemption at issue in the as-applied challenge in *Doe v. Reed* and other contemporary disclosure challenges.

By lumping together deterrent effects resulting from the actions of both "[g]overnment officials [and] private parties," the *Buckley* Court suggests that, for the purposes of First Amendment chilling effect analysis, harassment or retaliation by private parties is the equivalent of harassment or retaliation by governmental entities.

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later stage of constitutional analysis than the state-action inquiry. Chilling effect–based reasoning expands the category of constitutional injury to include the consequences of both governmental and private action. The problem of private action under chilling effect doctrine asks the question: Should the same First Amendment framework govern the analysis of chilling effects deriving from governmental action and chilling effects deriving from private action?

109. 424 U.S. 1 (1976) (per curiam).

110. *Id.* at 64.

111. *Id.* at 68.

112. *Id.* at 74.

113. *Id.*

Moreover, the language in which the *Buckley* Court phrased the harassment exemption seems to suggest that a chilling effect resulting from private actions alone can be the basis for such an exemption.

Despite the suggestive language in which the harassment exemption is phrased, the Court has never granted a harassment exemption in an instance where the deterrent effect resulted only from private actions, without any element of governmental wrongdoing. Indeed, although the harassment-exemption language has been dutifully recited in a number of election-related disclosure challenges, the only time the Supreme Court has actually granted such a harassment exemption was in *Brown v. Socialist Workers '74 Campaign Committee*,[114] in which the Court granted an exemption from campaign-finance disclosure requirements to "a minor political party which historically ha[d] been the object of harassment by government officials and private parties."[115] The factual record in *Brown* reflected "substantial evidence of both governmental and private hostility toward and harassment of SWP [the Socialist Workers Party] members and supporters."[116] Such harassment was extensive and severe, including shots fired at an SWP office, the retaliatory discharge of at least twenty-two SWP members by their employers, and "massive" past and present governmental surveillance and harassment.[117] Thus, like the earlier censorship-by-proxy cases discussed above, *Brown* did not result solely from the consequences of private action, but involved an element of governmental wrongdoing.

But in *Doe v. Reed* and other recent disclosure cases, the element of governmental wrongdoing has fallen away; no one seriously suggests that Washington's longstanding Public Records Act or other generally applicable disclosure statutes were enacted in order to suppress disfavored viewpoints or groups, nor that those statutes have been discriminatorily enforced for invidious purposes. Moreover, courts have uniformly rejected the argument that generally applicable election-related disclosure statutes impose disproportionate burdens on First Amendment rights as a facial matter.[118] Instead, employing standard balancing analysis, courts have found that any burdens on First Amendment rights resulting from electoral-disclosure statutes are outweighed by the important state interests of combating

114. 459 U.S. 87, 101–02 (1982).

115. *Id.* at 88.

116. *Id.* at 91 (internal quotation marks omitted).

117. *Id.* at 99–100.

118. Doe v. Reed, 130 S. Ct. 2811, 2818 (2010); Citizens United v. FEC, 130 S. Ct. 876, 913–14 (2010); McConnell v. FCC, 540 U.S. 93, 199 (2003).

corruption and providing voters with information relevant to their decisions at the ballot box. Accordingly, in *Doe v. Reed*, an eight-to-one majority of the Court rejected the facial challenge that disclosure requirements for petition signatories were overly burdensome or otherwise constitutionally defective. Thus, the issue presented in the *Doe v. Reed* as-applied challenge and other recent disclosure challenges is an issue of pure private chill, as I will explain and further define in the next section.

B. Governmental Chill v. Private Chill

As we saw in the previous sections, chilling effect cases—particularly in the disclosure context—will often present situations in which a speaker fears retaliatory actions by both state and private actors. In the next sections, I attempt to divide these situations into two principal categories: (1) those situations in which the chilling effect derives from the government's violation of a constitutional rule and (2) those situations in which the chilling effect derives from specific acts by private parties.

1. Defining Governmental Chill

We will start by defining the boundaries of the category of government chill. Chilling effect cases have generally followed the foundational principles of First Amendment doctrine. Of course, there are nearly as many formulations of these principles as there are First Amendment cases and commentators, but certainly one of these principles is that the government, when acting as regulator, must remain neutral among competing viewpoints and speakers. Distinctions drawn by the state on the basis of content or viewpoint are therefore presumptively suspect.[119] A second such principle is that the government should not promulgate procedurally defective rules, such as vague or overbroad laws that create unjustified uncertainty costs.[120] A third such foundational principle is that the government must not impose disproportionate or unjustified burdens on free expression, so that any law burdening free expression must be tailored

119. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove 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."); *see also* Dorf, *supra* note 44, at 1181.

120. *See* Monaghan, *supra* note 12, at 9.

to advance a sufficiently important state interest.[121] I am not asserting that these three hastily sketched principles are either exhaustive or authoritative. Instead, my point is that these principles can be stated as rules constraining the government.

In Matthew Adler's influential account, First Amendment doctrine, like much of constitutional jurisprudence, largely treats expressive and associational rights as "rights against rules."[122] That is, for the most part First Amendment doctrine does not directly protect the act of speaking itself; it instead shields the speaker from governmental sanction under an invalid rule (i.e., a rule that violates a First Amendment principle such as the three principles sketched in the previous paragraph).

To take the example of flag burning, in *Texas v. Johnson*, the Court invalidated a flag-desecration statute on the grounds that the government may not "proscribe particular conduct *because* it has expressive elements" without demonstrating a significant interest in doing so.[123] However, had the act of burning the flag fallen within a general prohibition against arson, no First Amendment issue would have been raised. Thus, it is not the act of burning a flag—even for expressive purposes—that the First Amendment protects. Instead, the First Amendment protects the speaker against an unconstitutionally discriminatory rule. The rule is invalid because it violates the First Amendment principle of governmental neutrality.

This "rule-invalidity" formulation is helpful in explaining much of the chilling effect doctrine. For example, as Henry Monaghan explained in his classic analysis of overbreadth doctrine, an overbreadth claim cannot be characterized as a claim of privilege—that the plaintiff's conduct is somehow constitutionally immune from regulation.[124] Indeed, in overbreadth cases, the plaintiff's conduct is not the focus of the court's inquiry. The plaintiff instead asserts a right that his "conduct be judged in accordance with a rule that is constitutionally valid."[125] The antipicketing statute at issue in *Thornhill* failed the rule-validity standard because it was procedurally defective; it swept in more constitutionally protected conduct than was warranted.

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121. Adler, *supra* note 12, at 13; Stone, *supra* note 102, at 191.

122. Adler, *supra* note 12, at 13; *see also* Dorf, *supra* note 12, at 128; Monaghan, *supra* note 12, at 9.

123. 491 U.S. at 406.

124. Monaghan, *supra* note 12, at 4.

125. *Id.* at 8.

Similarly, the oath requirement in *Speiser* can be deemed an invalid rule because it violated First Amendment neutrality norms. The speech-deterring regulations at issue in *Lamont, Shelton,* or *Talley* can be considered invalid rules because they were poorly tailored to the governmental interests they purportedly advanced. The libel statute in *New York Times v. Sullivan* and the movie censorship statute in *Freedman* can both be deemed invalid rules because they imposed unwarranted uncertainty costs on the exercise of expressive rights. Such analysis also extends to cases like *NAACP v. Alabama*, in which the law itself—the corporate registration requirement—was innocuous, but the state violated neutrality principles through its discriminatory enforcement and prosecution of the statute.[126]

Thus, the category of governmental chill can extend to cases where (1) constitutional state-action requirements are satisfied, (2) a chilling effect has occurred, and (3) the government has violated a constitutional "rule," in the sense this term is used above. The category of governmental chill will encompass instances where a chilling effect renders a statute facially invalid[127] but will also extend to instances where a statute may be valid on its face but involve bad-faith prosecution or enforcement, as in *NAACP v. Alabama* or *Dombrowski.*

2. Defining Private Chill

Having set out the boundaries of governmental chill, we can now try to define the category of private chill by contradistinction.[128] In a private chill case, (1) constitutional state-action requirements are satisfied and (2) a chilling effect has resulted but (3) the government

126. *See* Samaha, *supra* note 57, at 1300. *But see* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1236 (2010) (arguing that, as a textual matter, First Amendment challenges should extend only to judicial review of legislative action, not to judicial review of executive action).

127. Relatedly, Marc Isserles has argued that statutes may be facially invalid for two reasons: (1) an "overbreadth" challenge asserts that a statute is facially invalid because "an otherwise valid rule of law" would have too many unconstitutional applications and (2) a "valid rule" facial challenge asserts that a statute possesses some defect other than overbreadth that renders it invalid in all its applications, for example that it has a constitutionally illegitimate purpose. Isserles, *supra* note 12, at 363–64.

128. I do not claim that the categories of governmental and private chill exhaust the universe of chilling effect claims. It is possible to envision an instance in which a statute passes facial constitutional muster, but a cognizable chilling effect results from some combination of circumstances that are not private retaliatory action.

has violated no First Amendment "rule"[129] and (4) the source of chill is specific action by private parties.

To apply this definition to the example of *Doe v. Reed*, where state action was present, (1) the state's action in enacting the PRA was at least a necessary condition for the disclosure of the petition signatories and any subsequent private harassment, (2) plaintiffs asserted that the possibility of harassment chilled their political involvement, (3) the PRA passed facial constitutional muster, and (4) the source of chill was, first, the action of same-sex-marriage advocates in posting signatory information on a website and, second, anticipated harassment by private parties.

This definition, however, seems open to the following objection. Where an otherwise constitutionally inoffensive governmental action enables private reactions that create a severe chilling effect on a group of speakers, does the government violate a constitutional rule if it does not exempt that group of speakers from the rule? Certainly one could articulate a constitutional rule mandating that where a governmental action has the effect of enabling chilling private action, it violates the First Amendment for the state to take that action. The problem with this proposed "rule," however, is that it bears little relation to existing First Amendment doctrine. As explained above, under general First Amendment doctrine, an incidental effect of an otherwise valid law will not normally entitle a speaker to a constitutionally compelled exemption.[130]

A further clarification may be useful. The mere presence of private action—even when such action contributes to a deterrent effect—is not sufficient to transform a governmental chill case into a private chill case. In other words, both governmental chill cases and private chill cases may involve deterrent actions by private parties. The dividing line between the two categories turns on whether the government has violated a constitutional rule, not on the mere presence or absence of some level of private action.

Indeed, the risk of private retaliation currently is, and should be, taken into account in the overall assessment of whether the state has promulgated or enforced a constitutionally infirm rule. For

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129. This will often correlate to instances in which a given regulation is deemed to be facially valid. But a governmental action can violate a constitutional rule even where the statute itself bears no facial infirmity, for example, through discriminatory enforcement. *See supra* notes 127–28 and accompanying text. Thus, the category of "rule invalidity" will encompass some laws that are invalid as-applied (based on the way in which a facially constitutional rule is enforced or interpreted) as well as encompassing facially unconstitutional laws.

130. *See supra* notes 44–49 and accompanying text.

example, in *Buckley*, as in *Doe*,[131] the Court considered the likelihood of private harassment at two separate points in its analysis. First, in the facial challenge to disclosure laws, it acknowledged the possibility that "disclosure may expose contributors to harassment or retaliation."[132] The Court considered this potential for private harassment to be part of the general burden that disclosure laws impose. Employing an "exacting scrutiny" standard, it held that this burden was justified by the state's important interests in the disclosure laws.[133] Thus, to use the framework developed in this Article, there was no "governmental chill" because there was no violation of a constitutional rule: the Court's balancing analysis was satisfied because the state interests at issue justified the burden that the law imposed.

But the *Buckley* Court also explained that private acts of harassment could be considered at a separate, second phase of the analysis—as the basis for a potential as-applied challenge seeking a "harassment exemption" from disclosure law.[134] To the extent that specific groups could demonstrate a particularly severe risk of harassment, they could claim the benefit of such a harassment exemption. As I previously explained in Part III.A, I disagree with the *Buckley* Court's analysis to the extent that it lumped together governmental and private harassment. But it does make sense for overall balancing to take into account the generalized risk of private harassment and to insist that sufficiently important state interests justify such a risk. It is only once a statute passes such overall balancing analysis (or other applicable standard) in the first phase of analysis that the private chill question comes into play in the second phase.

Thus, chilling effect cases involving private actions mandate a two-phase analysis: A court should first determine whether the government has chilled expression by violating a constitutional rule. Only once the court has determined that there is no governmental chill should a court turn to the analysis of private chill.

This is because, in constitutional law, we think of injury resulting from a governmental violation as different in kind from an equivalently severe consequence that results from a lawful state

131. *See supra* notes 16–24 and accompanying text.

132. 424 U.S. 1, 68 (1976).

133. *Id.* at 16–67.

134. *Id.* at 68.

action, even though the real-world effects may be comparable.[135] To return to the flag-burning example, we consider it constitutionally salient if the government punishes a protester under a content-based law forbidding flag desecration but not if the protester receives an identical consequence under a content-neutral law forbidding arson. The state's violation of neutrality creates a constitutional consequence, not merely an adverse consequence. The First Amendment injury at issue is not merely the injury of being deterred from speaking, but rather of being subjected to an invalid rule.[136]

Even if private action contributes to the deterrence effect, the government's violation of a constitutional norm "transforms the nature of the harm."[137] In *Miami Herald*, for example, private actions —the political opponent's particular response editorials—certainly contributed to the chilling effect of the right-of-reply statute on the newspaper's editorial decisions. But *Miami Herald* is properly deemed a governmental chill case because the state violated First Amendment norms of neutrality by imposing a content-based penalty on speech.

Similarly, in the censorship-by-proxy cases, such as *NAACP v. Alabama*, private acts of retaliation or violence were unquestionably a major—if not the major—component of the chilling effect created by the mandated disclosure of the membership lists. But the state's violation of neutrality norms through invidious discrimination created a further category of harm in addition to the direct consequences of private harassment.[138] Likewise, in cases like *Talley*, the burden imposed upon the speakers largely stemmed from a "fear of reprisal" from private parties.[139] But the resulting burden on speech and privacy rights was not justified by the state's asserted interest in the law. The burdens on expressive freedoms were therefore not tailored to an important state interest and did not satisfy balancing requirements, violating a constitutional rule. Thus, in *NAACP v. Alabama* and *Talley*, the government's First Amendment violations

135. Alexander, *supra* note 44, at 931–54; Dorf, *supra* note 44, at 1183; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–505 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775–98 (2001); Srikanth Srinivasan, *Incidental Restrictions on Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401, 415–20 (1995); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195–204 (1988).

136. Adler, *supra* note 12, at 13; Monaghan, *supra* note 12, at 8.

137. Dorf, *supra* note 44, at 1183.

138. NAACP v. Alabama, 357 U.S. 449, 463 (1958).

139. 362 U.S. 60, 65 (1960).

mean that these cases, too, are properly classified as governmental chill cases, despite the presence of private action.

IV. THE NORMATIVE STAKES

In this Part, I explain that the distinction between governmental chill and private chill is rooted in the normative justifications for chilling effect doctrine. In particular, the mandate for judicial intervention in governmental chill cases does not appear to extend to private chill cases. Moreover, analyzing private chill cases under a chilling effect rubric leads to significant concerns about separation of powers and judicial unilateralism. Instead, I argue that private chill cases are better conceptualized as requests for accommodation: an argument that a court should intervene to facilitate the exercise of a speaker's First Amendment rights, even at the expense of the preexisting entitlements of private parties.

A. Positive-Rights and Negative-Rights Accounts

Generally, the mandate for judicial intervention in a First Amendment case can be understood either as a negative- or a positive-rights claim:[140] the argument is either that the court should intervene to prevent the government from trespassing constitutional boundaries, or that the court should intervene in order to enhance First Amendment values such as public discourse, deliberation, or autonomy.

In the constitutional context, a negative right is a right to pursue one's aims without governmental interference, while a positive right is an entitlement or guarantee that may require affirmative governmental facilitation.[141] The core of negative First Amendment

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140. This distinction is drawn from Isaiah Berlin's foundational distinction between negative and positive liberty. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 4 (1958), *available at* http://www.wiso.uni-hamburg.de/fileadmin/wiso_vwl/johannes/Ankuendigungen/Berlin_twoconceptsofliberty.pdf. Berlin's formulation does not map neatly onto American constitutional theory; he conceptualized negative liberty as the freedom to pursue one's goals without interference by others and positive liberty encompassed self-actualization and self-determination.

141. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY at xi (1978); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001); Dorf, *supra* note 44, at 1244. A number of scholars, building from legal-realist critiques, have criticized this distinction, arguing that the concept of a "negative" right is illusory since all rights depend, to some extent, upon legal enforcement. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS UPON TAXES (1999).

Most constitutional rights, such as the right against self-incrimination or the prohibition against cruel and unusual punishment, are considered to be negative rights, which

reasoning is a strong presumption against governmental censorship or other state suppression of speech.[142] Moving beyond this core, the negative account of the First Amendment also extends to nonpurposive abridgments of free expression, such as those in which the asserted state interests do not justify the resulting burden on expression.[143] In all of these instances, the First Amendment functions as a shield against state overreaching.

At the same time, many First Amendment theorists have argued that freedom of expression also incorporates an important positive-rights component:[144] freedom of expression is constitutionally sacrosanct, in part because it is instrumental to such ends as truth, self-governance, and individual autonomy.[145] Freedom of expression is one of the few rights that constitutional theorists have deemed to include such a positive, consequentialist element.[146] Under a positive-rights conception of free expression, governmental actions to enhance the opportunities for expression would be constitutionally favored, if not actually required. For example, a court following the positive-

convey no affirmative entitlement but simply confer protection against prohibited governmental action. Schauer, *supra* note 6, at 692 n.37.

142. Generations of courts and commentators have taken note of the fact that the First Amendment itself is phrased in negative terms ("Congress shall make no law…"), and there is widespread consensus that freedom of expression contains an indispensable negative component. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove 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."); *see also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); TRIBE, *supra* note 44, at 790; Alexander, *supra* note 44, at 955; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 616; Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1424 (1987); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986); Strauss, *supra* note 66, at 334.

143. Cass, *supra* note 142, at 1477–78.

144. *See, e.g.*, STEPHEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 177 n.35 (1995); Dorf, *supra* note 44, at 1225; Farber, *supra* note 25, at 569–70; Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1640–42 (1987); Schauer, *supra* note 6, at 692. *But see* Cass, *supra* note 142, at 1424.

145. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1963); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 685 (1990).

146. *See, e.g.*, Schauer, *supra* note 6, at 692 n.37 (citing the Sixth Amendment right to counsel and the Equal Protection Clause as other "positive" guarantees).

rights conception might require the state to accommodate the exercise of expressive freedoms under certain circumstances.

Examples of such constitutionally compelled accommodation, however, are relatively rare in the case law, and it is difficult to identify cases in which a court has held that the First Amendment requires affirmative action to enhance positive rights.[147] After all, one could always argue that the state opening a library rather than a prison or exempting publishers from otherwise applicable business taxes would enhance the opportunities for expression. But to recognize every missed enhancement opportunity as a constitutional claim would obviously create impossible floodgates problems, as well as raise separation of powers concerns.[148]

In most cases, the distinction between positive and negative rights—though of considerable consequence to scholars—has little traction in practical terms. This is because most First Amendment cases will involve both positive and negative First Amendment values. For example, a law that criminalizes the criticism of elected officials violates the First Amendment not only because public discourse is deprived of ideas and expression, but also because there are good reasons not to trust elected officials to shape public discourse, especially in a way that entrenches their own ascendancy. But the positive- versus negative-rights distinction is foundational to understanding the normative justifications for traditional governmental chill cases and why these justifications do not apply to the category of private chill.

B. The Positive-Rights Account of the Chilling Effect Concept

Theorists who have considered the chilling effect concept have generally suggested that its normative justifications rest on a positive-

147. Several commentators have located such a positive-rights conception in public-forum doctrine, where the government is, under certain circumstances, required to provide space for the exercise of expressive freedoms. *See, e.g.*, United States v. Grace, 461 U.S. 171, 183–84 (1983) (holding unconstitutional a statute prohibiting the use of the sidewalks around the Supreme Court building for purposes of peaceful picketing and leafletting); *see also* Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 16; Currie, *supra* note 142, at 886; Farber, *supra* note 25, at 554, 574. Others have discerned such a positive-rights component in the heckler's veto cases, in which it is suggested that, under certain circumstances, the state may have an affirmative obligation to protect a speaker against a hostile audience rather than silence the speaker. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 552 (1965) ("Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."); Edwards v. South Carolina, 372 U.S. 229, 237 (1963); *see also* Herzog, *supra* note 8, at 23; Seana Valentine Shiffrin, *Reply to Critics*, 27 CONST. COMMENT. 417, 418 (2011).

148. Cross, *supra* note 141, at 888; Dorf, *supra* note 44, at 1144, 1179.

rights conception of the First Amendment.[149] For example, in his seminal and still-authoritative account of chilling effect theory, Frederick Schauer argues that the chilling effect concept is predicated upon the assumption that speech is a "preferred value."[150] Accordingly, chilling effect doctrine reflects "the view that the harm caused by the chilling of free speech (or other protected activity) is comparatively greater than the harm resulting from the chilling of the other activities involved."[151] Thus, in Schauer's account, the chilling effect concept's doctrinal mandate is "that legal rules be formulated so as to allocate the risk of error away from the preferred value [of free expression], thereby minimizing the occurrence of those errors which we deem the most harmful."[152]

Similarly, in a public-choice-theory spin on this argument, Daniel Farber explains First Amendment doctrine by conceptualizing information as a public good.[153] According to this conception, markets and political systems tend to undervalue information, leading to its production at suboptimal levels.[154] The value of information to the individual who produces it is far less than its value to society as a whole; that is, information has positive externalities.[155] Accordingly, laws regulating speech will systematically overdeter the production of speech.[156] Thus, it makes sense to subsidize the production of speech, and the chilling effect concept is one example of such a speech subsidy.[157] In this account, chilling effect doctrine represents special constitutional protection for the production of valuable, yet potentially vulnerable, information.

The positive-rights account of chilling effect doctrine is predicated on the affirmative value of speech, which is considered a "preferred value." The actionability of chilling effects under the First Amendment is presumed to advance the instrumental values underlying expressive and associational rights—to enrich public discourse, facilitate deliberative self-government, enhance individual autonomy, or some other such end.

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149. Schauer, *supra* note 6, at 705; Farber, *supra* note 25, at 569–70; Kendrick, *supra* note 6, at 1656; Note, *supra* note 6, at 841.

150. Schauer, *supra* note 6, at 705.

151. *Id.*

152. *Id.*; *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech.").

153. Farber, *supra* note 25, at 555.

154. *Id.*

155. *Id.* at 558.

156. *Id.* at 568.

157. *Id.* at 568–70.

But the positive-rights account of the chilling effect concept falls short in two important respects. First, the positive-rights account does not give adequate weight to the important negative-rights function of the chilling effect in governmental chill cases. Although recognition of the chilling effect in government chill cases may arguably advance positive First Amendment values, it also performs its more familiar negative-rights task of shielding the exercise of rights against governmental overreaching. Second, the "preferred value" assumption is potentially untrue as well as normatively problematic in private chill cases.

1. Government Chill

First, the positive-rights account of the chilling effect concept tends to understate the extent to which governmental chill cases embody and advance the negative values of the First Amendment. In those cases, as explained above, the chilling effect stems from the government's violation of a First Amendment rule. Thus, as the concept of the chilling effect in governmental chill cases has developed, it has not merely helped advance such positive values as autonomy and self-government. It has also, crucially, performed a negative-rights function, providing a means for courts to police and prevent governmental violations of First Amendment norms.

As we saw in our brief survey of the McCarthy-era and civil rights–era cases, invidious governmental motivation that we would now consider viewpoint discrimination was apparent on the record in many of these seminal governmental chill cases.[158] But even in cases where no such animus was present, the Court repeatedly emphasized the principle that defective laws violate the First Amendment, not merely because they unnecessarily impoverish public discourse, but also because they provide tools by which unscrupulous officials might suppress disfavored viewpoints or groups.[159] The McCarthy era and the civil rights era provided ample historical examples that governmental officials should not be trusted with such tools, even where such tools were neutral on their face and did not purport to regulate expression.

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158. *See* Kendrick, *supra* note 57, at 1. *See generally supra* Part II.B.

159. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (emphasizing that vague laws create "dangers of arbitrary and discriminatory application"); Thornhill v. Alabama, 310 U.S. 88, 98 (1940); Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) ("The struggle for the freedom of the press was primarily directed against the power of the licensor."); *see also* Farber, *supra* note 25, at 562; Srinivasan, *supra* note 135, at 401; Strauss, *supra* note 135, at 196.

Even beyond the possibility of invidious or potential chill, there are good reasons for rules against government actions that inadvertently deter disproportionate amounts of speech. We do not want governmental regulators to be so insensitive to First Amendment values that they indirectly impose disproportionate burdens on speech; nor do we want the drafters of regulatory rules to be so careless that they unintentionally sweep significant amounts of protected speech in with other targets of regulation. Although in a governmental chill case a court may not necessarily be shielding the exercise of First Amendment rights against direct regulation or suppression, the court still has an important negative role to play in such regulation or suppression through indirection or inadvertence.[160]

In addition to this negative-rights role, recognition of the chilling effect concept in governmental chill cases is presumed to advance positive First Amendment values by giving the benefit of the doubt to the speaker, rather than to the state. Thus, both a negative-rights and a positive-rights account of free expression provide a normative mandate for judicial intervention in governmental chill cases.

2. Private Chill

In contrast to governmental chill cases, neither a negative-rights nor a positive-rights account of the First Amendment seems to provide a mandate for judicial intervention in private chill cases. By definition, recognition of a chilling effect claim in private chill cases will not advance negative First Amendment values since the government has violated no constitutional norm. Instead, in private chill cases, any salience that the chilling effect concept has must be predicated entirely on the positive-rights assumption that protecting against the asserted chilling effect will enhance public discourse or otherwise have a speech-positive overall outcome.

But a pure positive rights justification is on shaky doctrinal ground. As mentioned above, courts have only espoused a positive-rights view of the First Amendment in scattered dicta, and in the cases where those dicta arose, the negative justifications for free expression were also in play.[161] More pertinently here, whatever the

160. Similarly, in her influential account of the unconstitutional-conditions doctrine, Kathleen Sullivan argues that the doctrine "preserves spheres of private ordering from government domination and ensures that citizens receive appropriately evenhanded treatment from government." Sullivan, *supra* note 54, at 1506.

161. *See* note 147 and accompanying text.

merits of positive rights as a descriptive theory of First Amendment doctrine, the positive-rights account of chilling effect doctrine does not justify the extension of chilling effect protections to private chill cases.

As Professor Schauer has explained, chilling effect doctrine incorporates a "preferred value" assumption: "the view that the harm caused by the chilling of free speech (or other protected activity) is comparatively greater than the harm resulting from the chilling of the other activities involved."[162] After all, if speech is deemed to be the "preferred value," then one can safely assume that structuring a presumption to favor a chilled speaker at the expense of other interests will result in a net gain to First Amendment values, since only the speaker is presumed to have speech interests at stake. But this assumption, grounded in a positive-rights conception of the First Amendment, does not necessarily hold true in private chill cases.

Such an assumption may make sense in governmental chill cases when the state is on the other side of the equation. We are generally content in such situations to give the benefit of the doubt to the speaker, not to the state. But the assumption that recognizing a chilling effect will enhance First Amendment rights becomes highly problematic in private chill cases.

As noted above, private chill cases will often involve instances where speech is "on both sides of the equation."[163] If a chilled activity consists of protected expression, a private actor's response to that activity will also often involve some expressive element. The "preferred value" assumption breaks down if the response itself is constitutionally favored speech.

For example, consider *Protectmarriage.com v. Bowen*, a case in which contributors to California's anti–gay marriage initiative, Proposition 8, brought a First Amendment challenge to the legally compelled disclosure of their contributions.[164] Like the plaintiffs in *Doe*, these plaintiffs sought an as-applied exemption to disclosure based on alleged harassment. The court dismissed their suit, but had plaintiffs succeeded in blocking disclosure of the contributions, the public dialogue in the state and nation might have been significantly impoverished. Enormous public controversy and discussion surrounded the revelation that members of the Mormon Church both in and out of California had contributed as much as half of the $40

162. Schauer, *supra* note 6, at 705; *see also id.* at 687 ("[A]n erroneous limitation of speech has, by hypothesis, more social disutility than an erroneous overextension of freedom of speech.").

163. Bartnicki v. Vopper, 532 U.S. 514, 533 (2001).

164. Protectmarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1200 (E.D. Cal. 2009).

million spent to advance Proposition 8.[165] This fact not only was of relevance to California's voters in making their decisions at the ballot box, but also sparked a nationwide debate regarding the role of organized religion in politics. Moreover, the role of corporations and other business entities providing financial support to Proposition 8 provoked consumer boycotts and much public discussion.

Under existing First Amendment doctrine, a court would count such gains to public discourse only as furthering a legitimate state interest—such as the voters' "informational interest"[166]—that might serve to justify the constitutional harm of deterring contributions. But a court would not question whether such gains to public discourse themselves possessed any countervailing constitutional heft. Yet, in terms of its net effect on public discourse, a chilling effect on contributions is by no means obviously more harmful than a judicial act that prevents activists and journalists from engaging in constitutionally protected speech and would deprive voters of politically relevant information. Indeed, it is equally possible that the dialogue enabled by such disclosures could substantially outweigh any net loss to public discourse resulting from those deterred from participating.[167]

In private chill cases, then, it is no longer clear that shielding a speaker against an asserted chilling effect will necessarily advance positive First Amendment values. Accordingly, in private chill cases, the concept of a "preferred value" that undergirds the positive-rights account of chilling effect theory becomes highly problematic. As Richard Fallon has argued in other contexts, "The argument for preferring overenforcement to underenforcement of rights has no bite in genuinely zero-sum contests between competing claims of fundamental rights."[168] In private chill situations, the usual normative justifications for constitutional protections are difficult to discern, if not entirely absent. Thus, neither a negative-rights nor a positive-rights account of the First Amendment appears to provide a mandate for judicial intervention in private chill cases.

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165. Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 14, 2008, at A1; Mark Schoofs, *Mormons Boost Antigay Marriage Effort*, WALL ST. J., Sept. 20, 2008, at A8.

166. *See, e.g.*, McConnell v. FCC, 540 U.S. 93, 276 (2003).

167. As Seth Kreimer has put it, "If the interplay of social pressure is a crucial element of the formation of public opinion, itself protected and fostered by the First Amendment, disclosures that facilitate the deployment of such social pressures should be, if not required, at least constitutionally favored." Kreimer, *supra* note 53, at 64.

168. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1730–31 (2008).

3. Separation of Powers and Judicial Unilateralism

In addition to the absence of a clear negative- or positive-rights mandate for judicial intervention in private chill cases, the extension of chilling effect–based reasoning in such cases generates particular concerns about separation of powers and judicial unilateralism. The perpetually vexed question of judicial review becomes particularly intractable in private chill cases. Of course, the justifications for judicial review are an inexhaustible source of disputation,[169] but my point is a narrower one: the legitimacy of the courts' exercise of judicial review is at an especially low ebb in situations where, as in private chill cases, a court reviews a legislative resolution of a conflict among the constitutional interests of private parties and there is no apparent violation of constitutional norms.[170]

When a court overturns a statute in a private chill situation—an act that inherently favors one private party's exercise of constitutional freedoms over another's—the legislature has not trespassed constitutional norms such that the court must interpose its jurisdiction as a shield against suppression. Instead, the court is simply shifting the constitutional burden from one private party to another. There are serious questions regarding the institutional competence of courts to perform such a role.[171]

For example, a disclosure policy will generally require the policymaker to strike an appropriate balance between privacy and free speech interests, on the one hand, and the First Amendment prerogatives of the press, activists, and the electorate-at-large on the other. It is unclear why a court enforcing constitutional rights should have a privileged perspective regarding the propriety of such a tradeoff: "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[172] Thus, the Court has repeatedly

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169. *See, e.g.*, Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 935 (2001).

170. Fallon, *supra* note 168, at 1731.

171. *See, e.g.*, Cross, *supra* note 141, at 888; Jeremy Waldron, *The Core Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006). As a number of commentators have noted, a court's purview is necessarily constrained: courts are "forced to consider only the information and claims that are placed directly before them." Scott Barclay & Thomas Birkland, *Law, Policymaking, and the Policy Process: Closing the Gaps*, 26 POL'Y STUD. J. 227, 324 (1998); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 3 (1993).

172. Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978). As Richard Briffault has recently argued in the campaign finance context,

> [the Court] has no greater constitutional authority and no greater political legitimacy than Congress or state or local legislatures in making the trade-offs and weighing and

emphasized that, despite the fact that the tradeoff between transparency and privacy will inevitably impinge upon the exercise of some protected rights, "[t]he choice as to the most effective and appropriate model [of disclosure] is a policy decision to be resolved by a legislative decision."[173] In *Doe*, for instance, the state of Washington could have chosen to have no disclosure of initiative-petition signatories, and, had such a policy decision been made, R-71 protesters would not have been able to base a constitutional claim on their inability to access information.[174] The same principle would apply to any number of legislative resolutions along the spectrum from privacy to transparency, including exemptions from disclosure or access-and-use restrictions for disclosed information.[175] Alternatively, the legislature could have chosen to outlaw a wider category of private harassing and retaliatory actions.[176]

> balancing the respective roles of free speech, political participation, voter information, competitive elections, voter equality, government integrity, and elected official time-protection in determining campaign finance law.

Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 924 (2011).

173. *Houchins*, 438 U.S. at 13.

174. LAPD v. United Reporting Publ'g Corp., 528 U.S. 32, 43–44 (1999) (denying facial challenge by private publishing service that had provided personal information of recently arrested individuals to its clients to statute limiting commercial users' access to such information); *Houchins*, 438 U.S. at 15 (holding that neither first nor fourteenth amendment mandates a right to information or sources of information within the government's control.). *But see* Sorrell v. IMS Health, 131 S. Ct. 2653, 2667 (2011) ("This Court has held that the creation and dissemination of information is speech within the meaning of the First Amendment.").

175. *See, e.g.*, Federal Election Campaign Act, 2 U.S.C. § 438(a)(4) (2012) (disallowing commercial use of disclosed information regarding campaign contributions); Freedom of Information Act, 5 U.S.C. § 552 (2012) (listing nine privacy-based exemptions to Freedom of Information Act); *see also* Kreimer, *supra* note 53, at 123 n.327 (listing federal statutes that place limitations on broad disclosure of information about individuals). Kreimer argues that constitutional concerns mandate that such disclosure limitations be broadly construed. Solove, *supra* note 11, at 1165–72 (listing federal and state access and use restrictions for public records acts); *see also* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770 (1989) (construing broadly FOIA privacy exemption in light of constitutional concern with "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks").

176. Many of the private acts of retaliation feared by the R-71 signatories, such as harassing threats and employment retaliation, were already outlawed under Washington law. *See, e.g.*, WASH. REV. CODE § 42.17.680(2) (2004) (prohibiting employers from retaliating against employees for political speech); § 9A.46.020 (defining criminal harassment as extending to threats of bodily injury, property damage, or other harm to physical or mental health or safety). Approximately half of Americans live in jurisdictions which protect some employee speech or political activity against private employer retaliation. *See generally* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012). Obviously, such criminal acts as assaults, death threats, and vandalism are already outlawed.

Of course, a court should assess the facial validity of such a legislative action under the appropriate form of balancing analysis and should also determine whether a seemingly neutral state action in reality cloaked invidious motivation or other constitutional infirmity.[177] But once a legislature strikes a policy resolution that generally passes facial constitutional muster, a separation of powers problem results when a court upsets this resolution through an as-applied challenge or another judicially created exception in a private chill scenario.[178]

The legitimacy of a court's intervention is on firm ground where the court is shielding constitutional liberties against state incursions—a negative-rights function. But in the absence of such a negative-rights role, it is hard to understand why a positive-rights account of chilling effect theory should justify intervention, especially when it is unclear that intervening would, in fact, result in a net gain to public discourse.[179]

A related judicial-unilateralism problem would still exist even if the private actions causing the chilling effect did not consist of speech or some other constitutionally preferred value but still comprised legal, private activities. For example, in the wake of the revelation that TD Ameritrade founder Joe Ricketts was planning to spend millions to finance advertisements attacking President Obama, multiple TD Ameritrade customers closed their brokerage accounts with the company.[180] A court would be unlikely to find that such account closings, absent any accompanying expressive component, are constitutionally protected speech. But if a court were to take it upon

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177. Kreimer, *supra* note 53, at 23; Note, *supra* note 6, at 882.

178. Such judicially created exceptions are as much state action as the underlying statute would be. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 797 (1994) (Scalia, J., dissenting) ("[A]n injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint."); Alexander v. United States, 509 U.S. 544, 550 (1993) ("[P]ermanent injunctions, i.e., court orders that actually forbid speech activities, are classic examples of prior restraints.").

A growing number of commentators have argued that judicial review is particularly normatively problematic in as-applied challenges, severability situations, and other instances of court-created exceptions to otherwise valid laws. *See, e.g.*, Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 958 (2011); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 885 (2005); Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1653 (2009). Like as-applied challenges and severability, private chill cases require a court to fashion a policy compromise that no democratically elected actor either proposed or ratified.

179. Dorf, *supra* note 44, at 1144.

180. Jim Rutenberg & Jeff Zeleny, *Magnate Steps into 2012 Fray on Wild Pitch*, N.Y. TIMES, May 18, 2012, at A1.

itself to enjoin such account closings to prevent a chilling effect upon Mr. Ricketts' political spending, clear judicial-unilateralism problems would result. Were Mr. Ricketts to seek an as-applied exemption to disclosure laws to prevent such a chilling effect on his spending,[181] the practical effect would be the same as enjoining the customers from closing the accounts—private customers would be deprived of information pertinent to their investment decisions, so the account closings would not take place.

In private chill situations such as *Doe*, there has often been no determination by any source of law that the potentially deterrent actions are illegal. Yet the court is asked to block such actions from occurring. The question then becomes under what circumstances is a court justified in acting to prevent the private exercise of legal or even constitutionally protected third-party prerogatives?

C. Private Chill as Accommodation

As I have argued in the previous sections, it is difficult to justify a private chill claim as a negative-rights claim since the state is not trespassing constitutional limits. Nor can one justify a private chill claim in positive-rights terms since there is no reason to believe that extending chilling effect protections to private chill claims will necessarily advance First Amendment values. But if a private chill claim is neither a negative-rights claim nor a positive-rights claim, what kind of claim is it? In other words, what is the source of the mandate for judicial intervention in private chill cases?

A private chill claim can perhaps best be conceptualized as a request for accommodation: an argument that a court should accommodate the exercise of a speaker's First Amendment rights, even at the expense of the preexisting prerogatives of a private party.[182] Accordingly, the essence of a private chill claim can be

181. As it happens, the particular proposed expenditures at issue would not have been subject to current disclosure requirements, since the expenditures were made through a nonprofit group. Instead, Mr. Ricketts is reported to have voluntarily disclosed his contributions to the group and his intentions for the expenditures. Amanda Terkel, *The One-Person Funded Super PAC: How Wealthy Donors Can Skirt Campaign Finance Restrictions,* HUFFINGTON POST (May 25, 2011, 7:05 PM), http://www.huffingtonpost.com/2010/10/21/super-pac-taxpayers-earmarks-concerned-citizens-campaign-finance_n_772214.html.

182. For a general discussion of the problems of legal baselines in arguments regarding state action and positive and negative rights, see Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (arguing that the defining error of the *Lochner* era was an understanding of state action in which governmental neutrality and inaction "were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements").

described as follows. Private party *A* claims that the anticipated actions of private party *B* deter *A*'s exercise of a protected right. *A* therefore requests that the court grant prospective relief that will prevent *B*'s action.

Thus, a private chill claim shares the same structure as a request for an injunction or other court-created prohibition against the allegedly chilling private behavior. The differences are in the parties sued and in the relief sought. In an as-applied challenge, such as in *Doe*, the state is the defendant and the relief *A* requests is an individual exemption from a state regulation that forms a necessary precondition for *B*'s action. In a request by *A* for an injunction, the source of deterrence is the direct target of the suit: the defendant is private party *B* and the requested relief is the prohibition of *B*'s anticipated action.

In private chill cases, a judicially created as-applied exception is the functional equivalent of a prohibition of the private party's alleged chilling behavior.[183] Such an as-applied challenge therefore functions as a substitute for a direct prohibition against the third party. In a way, then, the state acts somewhat like a litigation proxy for the real source of deterrence in private chill as-applied challenges—private party *B*. This is especially so when *B* is sufficiently difficult to identify with particularity that a suit directly against *B* is impracticable. One can think of state action in such cases as enabling *A* to bring suit against a state actor "upstream" in the causal progression of the challenged activity.

For example, in *Doe*, the asserted injury that plaintiffs sought judicial intervention to prevent—the threat of identification, reporting, confrontations, accusations, picketing, and politically motivated boycotts—comprised largely activities that themselves carried a high degree of speech value. The judicial grant of an as-applied harassment exemption would thus remove a significant amount of information from public discourse and would itself significantly distort political speech. A court's grant of a harassment exemption from the state ballot-initiative disclosure law to the *Doe* plaintiffs in order to prevent them from being chilled by third-party action would have the same effect as the grant of an injunction against the R-71-initative protesters. Either way, the protestors would be precluded from engaging in a wide range of activities with respect to the R-71 signers, either individually or in the aggregate—identifying them, contacting them, writing about them, protesting against them,

183. Marshall, *supra* note 45, at 1953; Stone, *supra* note 44, at 68.

or boycotting them. Moreover, as Chief Justice Roberts framed the as-applied challenge in *Doe*, such an exemption could potentially extend not only to the R-71 signatories, but also to petitions for any controversial ballot initiative as well.[184]

Had the R-71 signatories requested an injunction directly against the source of chill—that is, against the particular advocacy groups who had requested and were planning to publish the information regarding the petition signatories—the First Amendment would have barred such relief.[185] Even were such an injunction somehow deemed constitutionally acceptable, the R-71 signatories would still have had to demonstrate irreparable injury and other prospective-relief requirements in order to demonstrate their entitlement to an injunction.[186] But because the R-71 signatories instead brought their lawsuit in the form of an as-applied challenge against the state, neither the First Amendment nor traditional limitations on equitable remedies posed any obstacles to plaintiffs' request.

My point in bringing up these discrepancies is not to argue that a speaker must bring a private chill case as a direct suit against the private source of chill rather than as an as-applied challenge against an enabling governmental action. Such a mandate would foreclose the valuable upstream role that such as-applied challenges allow. In private chill cases, the normal processes of private-law adjudication—including both prospective injunctions and post hoc remediation—may be inadequate to redress First Amendment injuries. After all, it will rarely be possible to identify in advance potential harassers or other malefactors in order for preliminary injunctive relief to be effective. Similarly, post hoc remediation, such as damages or reinstatement to an unjustly terminated job, addresses only consequences that actually materialize, not the deterrent effect of the threat itself. The threat of

184. Doe v. Reed, 130 S. Ct. 2811, 2820–21 (2010) (characterizing the as-applied issue as "whether . . . disclosure violates the First Amendment with respect to those who signed the R-71 petition, or other particularly controversial petitions").

185. Courts have generally rejected requests that private parties be barred from publishing lawfully obtained information. *See, e.g.*, Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311–12 (1977) (finding unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an eleven-year-old boy in connection with a juvenile proceeding involving that child which reporters had attended).

186. FED. R. CIV. P. 65. For example, to obtain an injunction, a plaintiff must ordinarily demonstrate: (1) that it has suffered an irreparable injury, (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury, (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted, and (4) that the public interest would not be disserved by a permanent injunction. *See, e.g.*, eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006).

violence or other wrongdoing can create a substantial chilling effect regardless of whether the threat is actually carried out. Thus, in at least some private chill cases, an upstream solution seems desirable.

But understanding a private chill claim as a request for accommodation, rather than as a negative- or positive-rights claim, allows us to set appropriate limits upon the scope and consequences of accommodation. Courts have generally tended to be unsympathetic to requests for accommodation, especially where the accommodation would arguably be at the expense of third-party prerogatives.[187] Even if speech is considered to be a "preferred value,"[188] a speaker is not generally entitled to a constitutionally compelled exemption from an otherwise valid law merely because the speaker can demonstrate that the law would have particularly harsh consequences when applied to her situation.[189] First Amendment law, in short, fails to provide a mandate for judicial intervention in private chill cases.

But looking outside the First Amendment context, we can find models for judicial intervention in cases where a court has granted equitable relief to obviate a chilling effect arising from private action. In these cases, the chilled right did not stem from the First Amendment, but the structure of the claim was the same: party *A*

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187. In "private forum" cases, for example, courts have generally denied speakers' requests that they be able to use private property to enable their exercise of First Amendment rights. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (holding privately owned St. Patrick's Day parade need not include gay organization); Hudgens v. NLRB, 424 U.S. 507 (1976) (rejecting claim that exclusion of labor picketers from private shopping mall violated First Amendment). *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), is arguably an exception to private forum doctrine. In that case, the Supreme Court upheld the California Supreme Court's interpretation of a state constitutional provision to guarantee speakers access to a privately owned shopping center. However, *PruneYard* did not turn upon a freestanding First Amendment right of access to private property, but was contingent upon the California constitution's recognition of a positive free speech right. *See* Lillian R. BeVier, *Give and Take: Public Use as Due Compensation in* PruneYard, 64 U. CHI. L. REV. 71, 71–72 (1997); *see also* Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of* PruneYard v. Robins, 64 U. CHI. L. REV. 21 (1997) (arguing that the law upheld in *PruneYard* does not serve any constitutionally valid public "use" or interest); Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 57 (1997) (arguing that the state law in *PruneYard* should not be considered a taking because it merely offsets a harm to an important public interest that the mall operation would otherwise be causing).

Similarly, courts have generally invalidated laws that require privately owned means of mass communication to accommodate opposing viewpoints, except where such mass communication is held only as a result of governmental grant. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986); Miami Herald v. Tornillo, 418 U.S. 241 (1974). *But see* Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180 (1997) (upholding "must carry" provisions for cable operators); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC "fairness doctrine").

188. *See, e.g.*, Schauer, *supra* note 6, at 705.

189. *See supra* notes 44–46 and accompanying text.

claimed that the anticipated actions of private party *B* chilled *A*'s exercise of a protected right and requested judicial intervention to prevent *B*'s action. In resolving these disputes, courts adopted what I call an "accommodation" approach, as I explain in the next Part. Rather than focusing on preventing a chilling effect, courts following an accommodation approach instead focused their intervention on preventing irreparable injury arising from illegal action.

V. PRIVATE CHILL MODELS OF ACCOMMODATION

As a starting point for a model to resolve private chill claims, I look at cases in which a party requested judicial intervention to prevent a chilling effect arising from private action, including from activity that itself was constitutionally protected. In many of the cases in this line, the chilled right was not a First Amendment right but another right of constitutional significance. For example, in the *Lochner* era, courts considered economic rights, such as freedom of contract, to be of paramount constitutional significance and were unsympathetic to labor regulations that might chill the free exercise of economic rights. In more modern cases, the chilled right has involved the exercise of reproductive freedom.

Although the substance of the chilled right has changed over the decades, the structure of the accommodation approach has remained the same. Courts have used this approach to resolve private chill claims in a line of cases dating back to the labor injunction controversies of the early twentieth century. The development of this approach in private chill situations tracks the federal courts' struggle over the past century to reach some principled resolution regarding the proper scope of their equitable powers.[190]

The accommodation approach has two basic characteristics. First, the court does not view its role as protecting one party against a chilling effect. As I have explained, such an approach would assume that the plaintiff is the only party with constitutionally salient interests in the case, an assumption that generally does not hold true in private chill cases. Instead, the court employing an accommodation

190. Equity, for nineteenth-century American lawyers, was an English import that, from its origins at Chancery, carried a connotation of unbounded judicial discretion. It thus fit uneasily within the American federal judicial framework of limited jurisdiction and separation of powers. GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 30–31 (1982); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 383 (1983). Despite these concerns, equity was deemed essential to add flexibility where an overly rigid application of legal rules would work injustice. Chayes, *supra* note 56, at 1292.

approach views its role as protecting against irreparable injury arising from illegal conduct, especially violence.

Second, the accommodation approach is more deferential to legislative resolution of competing rights claims than a negative-rights or positive-rights approach would require. It is not the role of the court to provide a remedy where no legal right is violated.[191] Instead, the accommodation approach is common law in nature, sensitive to the contours of existing law and subject to legislative revision.[192]

A. The Labor Injunction Cases

The labor injunction cases of the late nineteenth and early twentieth centuries provide a useful model for the analysis of present-day private chill cases. In these cases, the courts considered disputes that were structurally similar to private chill cases such as *Doe*. The typical labor injunction case involved private party *A* (the employer) seeking judicial intervention to prevent the anticipated actions of another private party *B* (various forms of agitation by workers and labor activists). Private party *A* would claim that *B*'s action would deter *A*'s exercise of a protected right (freedom of contract or a related economic right).

In resolving such disputes, *Lochner*-era courts at first adopted an approach analogous to a chilling effect theory: they broadly enjoined any labor activity—whether legal or illegal—that was likely

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191. This aspect of the approach derives from the equitable maxim *aequitas sequitur legem*, or equity follows the law—a tenet which Justice Story once described as the most important in equity jurisprudence. MCDOWELL, *supra* note 190, at 30–31 (1982). This tenet required that a court acting in equity should tailor its decrees to the substantive law. The emphasis placed on the principle of *aequitas sequitur legem* in American equitable jurisprudence might have reflected the extent to which this maxim is congruent with separation of powers concerns. *Id.* at 108; Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 674 (1978).

For an early articulation of this principle, see *Rees v. Watertown*, 86 U.S. 107, 122 (1873) ("A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels."). This principle has been incorporated into general equity practice: under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a "cognizable danger of recurrent violation." United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

192. Eugene Volokh has argued for a somewhat comparable approach in assessing claims for religious exemptions from otherwise valid laws. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999). Professor Volokh argues that state-law analogues to the Religious Freedom Restoration Act should follow a "common-law exemption" approach in which exemption decisions are initially made by courts but are ultimately revisable by legislatures. *Id.* at 1481.

to deter an employer's exercise of economic rights. This approach sparked widespread criticism of "government by injunction."[193] Critics charged judges with abusing their equitable powers by forbidding otherwise legal activity.

With the onset of the New Deal, however, the courts began to change course, adopting limits on their equitable powers and crafting an accommodation approach. Under this approach, the court tailored equitable relief to protect against irreparable injury arising from illegal private retribution instead of attempting to stop one party's rights from deterring another's.

1. "Government by Injunction"

The rise of the American labor movement in the mid- to late nineteenth century generated worker agitation of increasing breadth, sophistication, and impact.[194] Labor's new tactics included general strikes involving tens or even hundreds of thousands of workers, consumer boycotts and blacklists, and targeted picketing that, at times, included threatened or actual violence.[195] In seeking judicial relief from these practices, employers invoked what we would recognize as a chilling effect–like theory, although the chilled right at issue was not generally speech, but instead was often an economic right, such as freedom of contract. Typically, employers would claim that these practices constituted threats, intimidation, and coercion that deterred them from exercising these economic rights.

Prior to the New Deal, courts responding to such complaints would commonly grant broad injunctive relief in the form of blanket injunctions. Notably, these blanket injunctions did not distinguish between legal and illegal labor practices, enjoining not only violent or threatening activity, but also peaceable labor activism, such as

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193. *See, e.g.*, Charles Noble Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 487 (1898).

194. *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1963).

195. FORBATH, *supra* note 194, at 79–83; Brendan D. Cummins, Note, *The Thorny Path to Thornhill: The Origins at Equity of the Free Speech Overbreadth Doctrine*, 105 YALE L.J. 1671, 1672 (1996).

One dramatic example was the Pullman Strike of 1894, which involved as many as 250,000 workers in twenty-seven states, and brought railroad traffic across the nation to a halt. FRANKFURTER & GREENE, *supra* note 194, at 18; DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA, 35–37 (1999). *See generally*, ALMONT LINDSEY, THE PULLMAN STRIKE (1942). The strike ended when the federal courts granted the railroads' requests for injunctions against the strikers, and federal troops were sent in to enforce the terms of the injunctions.

publishing boycott lists, parading, and applying "opprobrious epithets."[196] For example, in the Danbury Hatters case, *Loewe v. Lawlor*,[197] the Supreme Court held that the hatters union had violated both the Sherman Act and common law principles where the union had used newspapers and union publications to urge consumers to boycott a supplier's nonunion goods.[198] Similarly, in *Gompers v. Buck's Stove & Range Co.*,[199] the Court rejected a First Amendment challenge to an injunction prohibiting defendants from boycotting the plaintiff-business and from publishing or stating that the business employed unfair labor practices. Indeed, the Court reasoned that there was no meaningful distinction between labor action that took the form of "verbal acts" and "any other force whereby property is unlawfully damaged."[200] Over the course of the Gilded Age, courts issued thousands of such blanket injunctions,[201] which became the primary legal mechanism for the regulation of labor.[202]

Contemporary legal critics of this "government by injunction"[203] pointed out that the same equitable doctrines used to extend judicial

196. Truax v. Corrigan, 257 U.S. 312, 326 (1921).

197. 208 U.S. 274 (1908); *see also* FORBATH, *supra* note 194, at 91–93.

198. At first, judges based this new equitable power on property law, specifically the " 'indubitable authority' of 'ancient times' . . . derived from cases involving equitable jurisdiction over nuisances." Charles Noble Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 488 (1898); Ralph K. Winter, Jr., Comment, *Labor Injunctions and Judge-Made Law: The Contemporary Role of* Norris-LaGuardia, 70 YALE L.J. 70 (1960). Later, in an ironic twist on "trust-busting," industry lawyers convinced federal courts that the Sherman Antitrust Act of 1890 was enforceable against organized labor, so that strikes and other labor protests could be treated as an illegal restraint of trade and accordingly enjoined. FRANKFURTER & GREENE, *supra* note 194, at 8–9; FORBATH, *supra* note 194, at 96; *see also* Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 438 (1911) (holding that the Sherman Act covers any restraint of trade "whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter").

199. 221 U.S. at 418.

200. *Id.* at 439.

201. FORBATH, *supra* note 194, at 61 (estimating that at least 4,300 such injunctions were issued between 1880 and 1930); *see also* FRANKFURTER & GREENE, *supra* note 194, at 97 (offering catalogue of blanket labor injunctions issued prior to the passage of the Clayton Act in 1914); Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 832 (1925) (estimating that such blanket clauses occurred in over half of labor injunctions).

During this period, strikes to improve wages and working conditions had long been legal under the common law, and no statutes prohibited labor's new tactics so long as such tactics steered clear of violence and other criminal acts. FORBATH, *supra* note 194, at 104; FRANKFURTER & GREENE, *supra* note 194, at 200; Cummins, *supra* note 195, at 1673–74.

202. MICHAEL C. HARPER ET AL., LABOR LAW: CASES, MATERIALS, AND PROBLEMS 45 (6th ed. 2007).

203. *See* Gregory, *supra* note 193, at 488.

power also set limits on the exercise of that power.[204] By ignoring those limits, courts were assuming unbounded discretion and, according to these critics, were engaging in judicial lawmaking.[205] As then-Professor Felix Frankfurter and Nathan Greene wrote in their classic treatise *The Labor Injunction*, "As to labor controversies during the last quarter-century, equity in America has absorbed the law."[206]

At first, disputes between employment and labor were purely private law disputes, but as the Gilded Age wore on, economic rights against labor agitation took on constitutional dimensions.[207] Congress and state legislatures began to push back against perceived judicial excesses by passing a series of anti-injunction statutes, most notably the Clayton Act of 1914. These anti-injunction statutes tried to immunize certain forms of peaceful labor agitation from judicial injunctions.

Many courts responded to this legislative pushback by awarding constitutional status to employers' interests in the economic status quo. The courts reasoned that if picketing (or other labor activism) had previously been enjoined as interfering with employers' economic rights, then employers could have a substantive due process right in the availability of an antipicketing injunction—a due process right that the anti-injunction statute might violate by immunizing picketing from injunctions.

For example, in *Truax v. Corrigan*, a five-justice majority declared unconstitutional an Arizona anti-injunction statute that closely tracked the terms of section 20 of the Clayton Act.[208] The Court reasoned that by permitting previously enjoined picketing, the law "deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the Fourteenth Amendment."[209] Similarly, in the notorious case of *Hitchman Coal &*

204. Such limits included the principle of *aequitas sequitur legem* as well as such familiar equitable limitations as the requirement of irreparable injury and the tenet that equity would not enjoin the conduct of innocent parties. FORBATH, *supra* note 194, at 62; FRANKFURTER & GREENE, *supra* note 194, at 201; Gregory, *supra* note 193, at 502.

205. Gregory, *supra* note 193, at 502 (comparing the Court's use of the equitable injunction in this period to "criminal legislation").

206. FRANKFURTER & GREENE, *supra* note 194, at 47.

207. FORBATH, *supra* note 194, at 87–88; Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305, 306 (1994).

208. 257 U.S. 312, 341 (1921).

209. *Id.* at 328; *see also* Currie, *supra* note 142, at 876. However, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), which was argued and decided within a few days of *Truax*, the Court upheld a requested antipicketing injunction against a union that had engaged in occasionally violent agitation but eliminated the word "persuasion" from the order, since persuasion was deemed "lawful" activity.

Coke Co. v. Mitchell,[210] union organizing "was enjoined as an infringement of the operators' 'property interest' in the nonunion status of their miners."[211] The Court deemed this right against labor interference with an ongoing business to be part of business owners' "constitutional rights of personal liberty and private property."[212] Gilded Age courts increasingly assumed that industrial interests had a constitutionally protected property interest in status quo contractual arrangements and entitlements, and any regulatory efforts to dislodge these arrangements were presumptively suspect.[213]

2. Frankfurter and the Foundations of Accommodation

With the onset of the New Deal, courts began to change course, responding to increased popular and legislative criticism of the excesses of labor injunctions. In 1932, Congress passed the Norris-LaGuardia Act,[214] championed and partially drafted by Professor Frankfurter.[215] The Act substantially restricted the use of the labor injunction in all but a few limited circumstances, prohibiting federal courts from issuing injunctions in nonviolent labor disputes, including strikes, picketing, and publicizing the facts of a labor dispute.[216] By the time the anti-injunction provisions of the Norris-LaGuardia Act first came before the Court,[217] the New Deal Majority had supplanted the *Lochner* Court.

At the same time, courts increasingly began to recognize that labor's right to organize and to engage in peaceable activism was a right of constitutional dimensions.[218] Only a few weeks after the Court's historic "switch in time" in *West Coast Hotel v. Parrish*,[219] and by the same majority, the Court in *Senn v. Tile Layers Protective Union, Local No. 5*[220] first recognized, albeit in dicta, that the First

210. 245 U.S. 229 (1917).

211. FORBATH, *supra* note 194, at 115; *see Hitchman Coal*, 245 U.S. at 251.

212. 245 U.S. at 251.

213. Thus, the labor injunction cases exhibit what Cass Sunstein has argued was the defining error of the *Lochner* era—the tendency to treat an existing distribution of common-law property entitlements as a neutral baseline, for constitutional purposes. Sunstein, Lochner*'s Legacy*, *supra* note 182, at 882.

214. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–10. 113–15 (2012)).

215. FORBATH, *supra* note 194, at 161.

216. *See* 29 U.S.C. §§ 101–115 (1932).

217. *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938).

218. Cummins, *supra* note 195, at 1672.

219. 300 U.S. 379 (1937).

220. 301 U.S. 468 (1937).

Amendment protected the rights of workers and unions to publicize the facts of a labor dispute through picketing.[221] Soon afterwards, in *Thornhill v. Alabama,*[222] the Court elevated this dictum to the status of First Amendment doctrine, striking down an antipicketing statute on the grounds that such activity is speech protected by the First and Fourteenth Amendments.

But the recognition of the constitutionally protected status of much labor activism did not mean that the courts withdrew from the task of protecting employers and nonunionized employees from the outbreaks of violence and illegality that sometimes stemmed from labor agitation. Instead, courts began to develop an accommodation approach recognizing that both union members and business owners had constitutional interests at stake in these struggles.

This new approach used the courts' equitable powers to craft flexible remedies that could protect parties against irreparable injury resulting from unlawful actions. But, unlike the previous generation of blanket labor injunctions, the courts did not attempt to shield parties from any and all actions that might chill their economic rights. Instead, the courts attempted to disentangle legal "intimidation" and "coercion" (that resulting from protected speech) from illegal intimidation and coercion (that resulting from violence or other illegality). Only the latter was deemed a proper subject for the court's equitable powers.

In Justice Frankfurter's opinion in *Milk Wagon Drivers Union v. Meadowmoor Dairies*,[223] we can discern the beginnings of this accommodation approach. In *Meadowmoor*, the plaintiff-dairy sought an injunction against the defendant-union from allegedly conspiring to reduce sales of the plaintiff's products by picketing stores and by using violence and other unlawful acts. The record in *Meadowmoor* demonstrated far more than "episodic or isolated"[224] incidents of violence—on more than fifty occasions, union supporters had resorted to explosive bombs, severe beatings, shootings, and arson.[225] The Court affirmed the injunction but limited it to conduct occurring near

221. *Id.* at 478 ("Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.").

222. 310 U.S. 88, 105 (1940).

223. 312 U.S. 287, 296 (1941).

224. *Id.* at 295.

225. *Id.* at 291–92, 295.

stores selling plaintiff's milk and noted that the injunction could be modified once there was no longer "a continuing intimidation."[226]

Somewhat surprisingly, Justice Frankfurter—the archcritic of the labor injunction and a primary drafter of the Norris-LaGuardia Act—authored the decision upholding the requested injunction.[227] Although the scope of the injunction eventually upheld in *Meadowmoor* was nearly as broad as the previous era's labor injunctions had been, Frankfurter's reasoning in *Meadowmoor* broke with the *Lochner* generation of courts, instead displaying the hallmarks of an accommodation approach.

First, Frankfurter's reasoning demonstrated significant deference to both legislative determinations and the constitutional prerogatives of labor activists. Frankfurter continually emphasized the common-law nature of the equitable relief at issue, repeatedly reaffirming the state legislature's ability to limit the courts' equitable powers.[228]

Second, Frankfurter viewed the courts' role as attempting to craft a remedy that could protect against illegal violence and coercion. By contrast, *Lochner*-era courts had viewed their mandate as a broader effort to insulate employers from any labor activism that might chill their economic rights.[229]

But Frankfurter also pointed out that, in order to fashion effective protection against future violence, a court may have to extend its injunctive powers to reach some activity that is legal, in addition to merely enjoining illegal activity.[230] Under the circumstances of this particular dispute, a storekeeper observing picketing around his store would understand such picketing to convey

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226. *Id.* at 298.

227. Reading the opinion, one can sense Frankfurter's defensiveness in this role, especially given the dissents of three Justices—Black, Douglas, and Reed—who deemed the injunction to violate constitutional rights by including peaceable persuasion within its scope. In emphasizing the limited reach of the challenged injunction, which was limited "to conduct near stores dealing in respondent's milk," *id.* at 298, Frankfurter even invoked Justice Cardozo as a role model: "An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo." *Id.* (citing Nann v. Raimist, 174 N.E. 690 (1931)).

228. *Id.* at 295, 298.

229. *See, e.g.*, Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439 (1911) (refusing to differentiate between verbal acts and other, illegal forms of intimidation).

230. I refer to a court's limitation of legal activity for the purpose of preventing illegal activity as the "buffer zone" approach, for reasons that will become clearer as we discuss the abortion clinic cases, *infra* Part V.B.

a threat of violence.[231] Therefore, although peaceful picketing is ordinarily protected, in this case, there were special reasons to allow injunctive relief to extend to legal activity: "[T]he power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion."[232]

Frankfurter was careful to point out that such an inference should not apply to any situation in which sporadic acts of violence have occurred: "[The r]ight to free speech in the future cannot be forfeited because of dissociated acts of past violence."[233] The Court viewed its task, then, as crafting a solution that protects against illegal conduct yet avoids encroaching on the "[r]ight to free speech in the future" by "drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."[234] Such an inquiry inevitably involves searching review of the factual record.[235]

Moreover, Frankfurter noted that "in the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language" that, optimally, the court itself should draft.[236] Thus, Frankfurter, crusader against labor injunctions and perennial champion of judicial restraint, envisioned an active role for the courts in tailoring carefully crafted remedies that would respect legislative and private prerogatives while still safeguarding protected speech against the threat of illegal activity.

B. Modern Accommodation Cases

Justice Frankfurter's opinion in *Meadowmoor* laid the foundations for the accommodation approach in private chill cases, but courts did not follow this approach with any degree of consistency.[237]

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231. As Frankfurter observes: "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." *Meadowmoor*, 221 U.S. at 294.

232. *Id.* at 296.

233. *Id.*

234. *Id.* at 293, 296.

235. *Id.* at 293.

236. *Id.* at 296.

237. In the labor-law context, for example, later generations of courts showed a troubling tendency to revert to *Lochner*-like premises, reifying common-law property rights against legislative modification at the expense of the speech rights of activists and organizers. *See, e.g.*, Lechmere, Inc. v. NLRB, 502 U.S. 527, 538 (1992) (forbidding nonemployee union organizers from soliciting union support on private property except where no reasonable alternatives exist);

On the public law side, the *Buckley* Court articulated the harassment exemption, which gave short shrift to the responsive speech of activists and protesters by failing to distinguish between governmental and private sources of chill. On the private law side, a line of cases following *Meadowmoor* continued the tradition of accommodation into the modern era. These cases deepened and refined the accommodation approach along the lines that Frankfurter mapped out.

1. *Claiborne Hardware*

Like the dispute in *Meadowmoor*—and like the feared harassment in *Doe*—the factual situation in *NAACP v. Claiborne Hardware* comprised a mix of legal and illegal private chilling actions: "elements of criminality and elements of majesty."[238] White merchants who had been the target of a civil rights boycott sued the boycott participants and organizers, including the NAACP, for malicious interference with business and other state-law tort claims. The NAACP had organized the boycott in protest of white elected officials' refusal to meet demands for racial equality and integration.

The organizers employed a range of tactics to support the boycott. Some of these tactics were relatively innocuous, such as protest marches and peaceful picketing. Others, however, were more aggressive, as the organizers attempted to "discipline" members of the black community who continued to patronize white-owned businesses. Boycott violators "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."[239] Most problematic was the appointment of "store watchers"

Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (denying that First Amendment protection would entitle union members to strike inside a private shopping mall).

238. 458 U.S. 886, 888 (1982); *see also* Michael C. Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claiborne Hardware *and its Implications for American Labor Law*, 93 YALE L.J. 409, 410–13 (1984) (describing the case in greater detail); Theresa J. Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531 (2012) (summarizing political-boycott case law and comparing it to recent development in campaign finance doctrine); Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of* Doe v. Reed, 45 LOY. L.A. L. REV. 207, 208 (2011) (reviewing key rulings on economic boycotts, and specifically focusing on *Doe v. Reed*). Notably, in the oral argument in *Doe v. Reed*, Justice Kennedy chided petitioners' attorney James Bopp for failing to cite *Claiborne Hardware*. Transcript of Oral Argument at 13–14, 38–39, Doe v. Reed, 130 S. Ct. 2811 (2010) (No. 09-559). Kennedy asked if any boycott or picket by the R-71 opponents itself was "a First Amendment activity," so that "the signers' interest in keeping their names private would be somewhat diminished." *Id.* Neither side's advocate provided a substantive response. *Id.*

239. *Claiborne Hardware*, 458 U.S. at 904.

known as the "Black Hats" or "Deacons," who stationed themselves outside white-owned businesses and recorded the names of black customers who traded with white merchants. Names of these boycott violators were read aloud at meetings of the Claiborne County NAACP and published in a mimeographed paper called the "Black Times." At times, such retaliatory acts spilled over into threats and actual incidents of violence.[240] Boycott violators were beaten, had shots fired at their houses, had their tires slashed, and were the victims of other acts of vandalism.[241]

Although members of the black community who had violated the boycott were not parties to the suit, the Court was understandably concerned with crafting a remedy that would forestall the illegal violence and harassment directed at boycott violators. These boycott violators, too, had expressive interests at stake in the conflict: if a boycott is deemed protected speech, then a fortiori the decision not to participate—or not to be coerced into participating—in a political boycott also has expressive value.[242]

The state court found a severe chilling effect upon the expressive and associational freedoms of black boycott violators: "[T]he volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse from the complainants."[243] The state court reasoned that both the legal and illegal elements of the boycott campaign had contributed to the "atmosphere of fear that prevailed among blacks from 1966 until 1970."[244] Accordingly, the state court did not attempt to disaggregate the effects of the legal and illegal actions of the boycott organizers. Instead, the Court found all 130 defendants liable for the judgment of $1.25 million and issued a broad injunction, forbidding defendants from stationing "store watchers" at plaintiffs' premises, from "persuading" any person to withhold his patronage, from "using demeaning and obscene language to or about any person" because of

240. For example, in announcing the boycott, Charles Evers, one of the boycott leaders, told the black community that any "uncle toms" who violated the boycott would " 'have their necks broken' by their own people." *Id.* at 900 n.28. Other boycott violators received personal threats, either over the telephone or in person. *Id.* at 904 n.37, 906.

241. *Id.* at 903–06.

242. *See, e.g.*, Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 782 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."); Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.").

243. *Claiborne Hardware*, 458 U.S. at 894–95.

244. *Id.* at 904.

the boycott, from "picketing or patrolling" the plaintiffs' premises, and from using violence or inflicting damage to any person or property.[245] Thus, the state-court injunction extended to illegal violence and vandalism as well as to protected speech and activism.

In a decision issued in the same year as *Brown v. Socialist Workers '74 Campaign Committee*, discussed supra, the Supreme Court reversed and remanded, holding that the damages award and injunction went too far since they extended to the nonviolent elements of the protest that the First Amendment protected.[246] The Court acknowledged that the First Amendment does not protect violent activity but rejected the argument that the overall thrust of the politically motivated boycott could be "characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts."[247] The Court continued:

> The burden of demonstrating that fear, rather than protected conduct, was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.[248]

Thus, even though both lawful and unlawful conduct were arguably part of the same enterprise in *Claiborne Hardware* and both contributed to the chilling "atmosphere of fear," the Court was only empowered to remedy the portion of deterrence that arose from illegal, rather than legal, acts.[249] Rather than relying on "insubstantial findings of fact screening reality,"[250] the Court's task was to engage in a searching review of the factual record in order to distinguish the "reptiles" from the "forest."[251]

Accordingly, relying heavily on the accommodation approach outlined in *Meadowmoor*, the *Claiborne Hardware* Court attempted to craft a remedy that would provide relief against past and future illegal

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245. *Id.* at 893.

246. *Id.* at 915.

247. *Id.* at 933.

248. *Id.*

249. With respect to the damages portion of the ruling, distinguishing consequences resulting from legal action from consequences resulting from illegal action was a relatively straightforward question of proximate causation: "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." *Id.* at 918.

250. *Id.* at 924 (citing Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 293 (1941)).

251. *Id.* at 934.

activity without encroaching upon protected speech.[252] To the extent that injunctive relief would still be deemed necessary,[253] the Court ruled that "the injunction must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character."[254] The Court's decision reflected a recognition that overly broad protections against a chilling effect could have the speech-negative consequences of foreclosing activism, protest, and public discourse.

2. The "Buffer Zone" Cases

A similar private chill blend of legal activism and illegal intimidation came before the Court in several cases arising from the abortion wars.[255] In *Madsen v. Women's Health Center*, *Inc.*,[256] for example, the Court considered the constitutionality of an injunction regulating antiabortion protests targeting an abortion clinic and its personnel. In the underlying state court action for trespass,[257] the plaintiff–health clinic had asserted a chilling effect theory, noting that the protestors' aggressive tactics had deterred patients from seeking the clinic's services and that clinic personnel and their families were being subjected to protests and harassment at their homes.[258]

The Court applied an intermediate standard of scrutiny to uphold the provisions of the injunction requiring the maintenance of certain "buffer zones" and limited noise restrictions around the clinic, its clients, and its personnel, although it modified the scope of the "buffer zones" to the extent that they were deemed unnecessarily broad.[259] In particular, the Court struck down a portion of the injunction that prohibited the display of images observable from the clinic and banned approaching clinic patients to attempt to dissuade them from seeking abortion services.[260]

Significantly, the line drawn by the Court was not one dictated by the need to prevent a chilling effect. Instead, the primary concern

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252. *Id.* at 916 (explaining that when impermissible "conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded.").

253. The Court noted that the boycott had apparently ended, so that the question of injunctive relief may have been moot. *Id.* at 924 n.67.

254. *Id.*

255. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 290 (4th ed. 2010) (listing cases).

256. 512 U.S. 753, 761 (1994).

257. Operation Rescue v. Women's Health Ctr, Inc., 626 So. 2d 664, 667–68 (Fla. 1993).

258. 512 U.S. at 758–59.

259. *Id.* at 768–73.

260. *Id.* at 773–74.

of the *Madsen* Court, as with the *Claiborne Hardware* Court, was to keep the courts from exceeding the boundaries of their injunctive power. The Court located the limit of permissible equitable power at the line between legal and illegal private conduct.[261] Thus, the Court was careful to fashion injunctive relief against only those activities that existing law proscribed—such as traffic impediments, noise violations, or illegal threats—while refusing to enjoin other activities that contributed to the chilling effect of the protest.

For example, the Court reasoned that blocking traffic access and creating disruptive levels of noise are actions proscribed by statutes and common-law rules, even where such expressive conduct constitutes protected speech.[262] But approaching individuals is an action that no statutory or common-law rule has deemed illegal, unless the communication constitutes an actionable threat or other proscribed speech.[263] Accordingly, the Court upheld the injunction as to traffic-access impediments and noise limitations but invalidated the injunction as to approaching patients.[264] The Court's remedy was not directed to preventing a chilling effect; directly approaching a patient entering a clinic to seek reproductive health services (which the Court allowed) is just as, if not more, chilling than chanting via loudspeaker (which the Court enjoined). Similarly, the Court reasoned that "threats to patients or their families . . . are proscribable under the First Amendment."[265] But the mere display of images, however graphic, is not illegal, and a court has no grounds to enjoin such displays.

Like the *Claiborne Hardware* Court, then, the *Madsen* Court stakes out a middle ground: where First Amendment activity creates a chilling effect arising from both illegal and legal actions, the Court should not seek to prevent all chill by enjoining all deterring actions. Nor should it abandon the field and assume that any prospective remedy would impermissibly encroach on First Amendment interests. Instead, per *Madsen*, a court is empowered to intervene in a situation

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261. *See* 512 U.S. at 765 n.3 ("Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.' " (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953))).

262. *Id.* at 769–773.

263. *Id.* at 774 ("Absent evidence that the protesters' speech is independently proscribable (i.e., 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." (citing Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 292–93 (1941))).

264. *Id.* at 768–74.

265. *Id.* at 773.

of private chill, but the scope of its intervention follows the contours of existing law.[266]

The concept of the injunctive buffer zone introduced in *Madsen* is a useful metaphor for the accommodation approach. Chilling effect–based reasoning would legitimate judicial intervention to prevent any activities—legal or illegal—that could deter the exercise of protected rights. By contrast, a buffer-zone injunction is directed to protecting a party against the effects of illegal activity. Such a buffer zone may extend to a limited amount of legal activity—after all, absent an injunction, an antiabortion protester would legally be able to walk right up to an abortion clinic without respecting a judicially created boundary. But the court creates buffer zones not to shield a party against a chilling effect, but to minimize the risk of illegal, irreparable injury. Such a buffer zone, then, can burden "no more speech than necessary to eliminate the unlawful conduct targeted by the . . . injunction."[267]

C. Doe v. Reed *Revisited*

What difference would the accommodation approach make with respect to the difficult issues posed in the *Doe v. Reed* as-applied challenge and similar disclosure challenges that are working their way up through the federal courts?

1. The Chilling Effect Approach

Under current doctrine, the harassment-exemption standard that governs the as-applied challenge in *Doe* applies if a speaker can demonstrate "a reasonable probability that the compelled disclosure of [personal information] will subject [her] to threats, harassment, or reprisals from either Government officials or private parties."[268] Of course, any harassment exemption would be subject to some form of substantiality threshold: few would argue that any third-party response, however trivial, would entitle a speaker to claim the benefit of the exemption.

Under a chilling effect framework, the severity of harassment would be assessed according to the likelihood that such harassment would deter a speaker from exercising her protected rights. Such an

266. *See id.* at 765 n.3; *see also id.* at 765 ("Injunctions . . . are remedies imposed for violations (or threatened violations) of a legislative or judicial decree.").

267. *Id.* at 776.

268. Buckley v. Valeo, 424 U.S. 1, 74 (1976).

analysis would not be required to take account of (1) whether that harassment resulted from private action or from the state's violation of a constitutional rule or (2) whether that harassment resulted from legal or illegal activity. Current chilling effect doctrine, as embodied in the harassment-exemption standard, does not assign significance to such distinctions.

For example, from a deterrence standpoint, a consumer boycott of a signatory's business could have as severe a deterrent effect as the proverbial brick through the window, even though the former is legal (and constitutionally protected)[269] and the latter constitutes illegal vandalism. Under chilling effect–based reasoning, if the deterrent effect were sufficiently severe, the court would grant an as-applied exemption to prevent all such deterrent activities from happening, whether legal or illegal. The responsive speech of activists, journalists, and other nonparties would be considered only as part of the state's overall interest in transparency or some other recognized state interest.

Following the chilling effect approach in *Doe*, Chief Justice Roberts framed the as-applied issue for future consideration as "whether . . . disclosure violates the First Amendment with respect to those who signed the R-71 petition, or other particularly controversial petitions."[270] Under this framework, if an as-applied exception was warranted for any "particularly controversial" petition, any signatory would be entitled to such an exemption, whether or not the signatory belonged to a group particularly susceptible to harassment. For example, a future disclosure challenge might involve contributors to a "particularly controversial" petition. Under the *Doe* standard, so long as a well-founded fear of "threats, harassment, or reprisals" chilled any contributor, all contributors could avail themselves of the harassment exemption. Moreover, chilling effect logic offers no reason to distinguish between a severe chilling effect resulting from legal means of reprisal (such as a consumer boycott or harsh public criticism) and a severe chilling effect resulting from illegal means of reprisal (such as threats or vandalism).

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269. *See supra* note 238.

270. 130 S. Ct. 2811, 2820–21 (2010). This framing in terms of the controversial nature of the petition at issue suggests a potentially significant expansion of the scope of the harassment exemption, which had previously only been applied with respect to minor political parties or other protected associations.

2. The Accommodation Approach

An accommodation framework, by contrast, would be more targeted. It would first ask whether the source of the chilling effect was a constitutional rule violation by the state. Assuming that the Court once again ruled that the Public Records Act violated no constitutional norm, the inquiry under the *Doe* facts would then turn to whether the private actions giving rise to the chilling effect were themselves legal or illegal. If the private actions are themselves legal, then the court has no clear mandate to intervene to prevent such activities, even if those actions deter protected expression.

But if the private actions are illegal, then the court has a mandate to craft a remedy to prevent such actions. In addition to merely enjoining action that is already illegal, the court may need to create a buffer zone that extends to some legal activity. But such a buffer zone should "burden no more speech than necessary to eliminate the unlawful conduct."[271] Moreover, the remedy should satisfy traditional requirements for equitable intervention—in other words, that irreparable injury will result absent the court's intervention and that existing legal remedies are inadequate to protect the speaker.

For instance, if the signatories were able to demonstrate a well-founded fear of physical violence, the court might decide that, under the circumstances, it is necessary to redact the identifying information of individual signatories.[272] But such an exemption would not automatically apply to all participants in the ballot initiative. If the basis for the exemption was the threat of physical injury, such an exemption would not necessarily extend to shield a corporation that had contributed to the ballot-initiative campaign. The accommodation approach thus allows for a more flexible and tailored remedy than a chilling effect approach.

I do not claim that the accommodation approach "solves" *Doe v. Reed* or any of the difficult policy and constitutional questions surrounding the issue of disclosure. Instead, I offer the equitable accommodation approach as a starting point for analysis. Viewing a private chill claim as an accommodation claim rather than a First Amendment chilling effect claim may assist a court both in

271. *Madsen*, 512 U.S. at 776.

272. *Cf.* 5 U.S.C. § 552(b) (2012) (Freedom of Information Act provision allowing for redaction of private information).

understanding the interests at stake and in tailoring an appropriate remedy.

D. Toward a Taxonomy of Chilling Effects

Based on the previous discussion of *Doe v. Reed* and other private chill cases, we can start to construct a partial taxonomy of chilling effect claims. The first step in this framework is an inquiry into the challenged governmental action at issue: Is what deters speakers from exercising their protected rights the consequence of the government's violation of constitutional norms?

Governmental Chill: Where the source of chill is a governmental rule violation, whether inadvertent or invidious, the dispute is properly framed as a right against the state. Procedurally, a speaker might claim that a procedural defect such as vagueness or overbreadth imposes unwarranted uncertainty costs on the exercise of First Amendment rights. Substantively, a speaker might claim that the indirect consequence of a given regulation imposes an unjustifiable constitutional burden in the form of deterrence. With respect to invidious discrimination, a speaker might claim that an otherwise supportable and neutral law creates a constitutional burden as a result of state animus. Both negative-rights and positive-rights accounts of the First Amendment provide a clear mandate for court intervention to prevent such governmental chill.

Private Chill: Where there is no governmental rule violation, and the source of chill is private action, the courts' role changes, as does the focus of its inquiry. Rather than conceiving of the dispute as a positive-rights or negative-rights claim against the state, the court should treat the dispute as more akin to a private law dispute among private parties, both of which have constitutional interests at stake.

In such a private chill dispute, the distinction between legal and illegal sources of chill becomes paramount. Where the source of chill is *illegal* private activity, it is within the court's equitable authority to take action to prevent such illegal action from occurring. This task will necessarily involve courts in fact-intensive inquiries to determine what remedy would best target illegal sources of chill while minimizing any encroachment on legal activity. This process will also be informed by traditional equitable principles—for example, that equitable relief is appropriate only where there is no adequate remedy at law.

But if the source of chill is *legal* private activity, a court should be reluctant to enjoin or otherwise prevent that conduct. There are certainly scenarios where the grant of such relief might seem

intuitively desirable: the range of legally permissible chilling behavior includes much private retaliation that we find repellent, such as hate mail, private employment discrimination,[273] and communications that push the boundaries of actionable harassment. But as explained above, if directed against legal conduct, such relief would be the equivalent of allowing a judge to forbid otherwise legal—or even constitutionally protected—activity that no source of law had previously deemed impermissible. Neither a negative-rights nor a positive-rights account of the First Amendment warrants a court's intervention in such situations. Instead, the scope of legally permissible private reaction is ordinarily a question more suited to legislative, rather than judicial, resolution.

VI. CONCLUSION

This Article proposes a new and salient distinction in chilling effect analysis. This distinction focuses on the underlying source of the chilling effect. The inquiry I proprose would first determine whether the gravamen of a particular dispute is a constitutional rule violation by the state, or whether it primarily involves a conflict of interests between two private parties. Each of these possibilities, in turn, generates its own normative consequences and doctrinal framework, as I have argued at length.

It may seem excessive to have developed such a framework to deal with a subset of cases—private chill cases—that thus far have arisen only in the context of mandatory disclosure laws. Moreover, in practical terms, the result of the application of the equitable accommodation approach in *Doe v. Reed* and other disclosure cases does not differ radically from the result reached under existing doctrine. The private chill framework, then, might seem to be a solution awaiting a problem.

But the category of private chill seems destined for rapid expansion. Potential private chill issues arise wherever a governmental action in some way enables a private reaction to speech. In various First Amendment spheres, chains of consequences are lengthening, resulting in an increased potential for chilling effects.[274] Given the likelihood that the problem of private action will arise with

273. *See supra* text accompanying note 176 (noting that such private employment retaliation is already illegal in many jurisdictions, including Washington state).

274. *See supra* text accompanying note 11 (describing the effect of new technologies and the broader reach of private chill cases).

increasing frequency and urgency, this Article offers a starting point for both scholarly and judicial analysis.