

---

---

INTRODUCTION:  
REFLECTIONS ON THE FIRST AMENDMENT AND  
THE INFORMATION ECONOMY

*Mark Tushnet\**

Apparently it is nearly impossible to write about the First Amendment without mentioning Professor Harry Kalven's observation, quoting Professor Alexander Meiklejohn, that *New York Times Co. v. Sullivan*<sup>1</sup> was "an occasion for dancing in the streets."<sup>2</sup> That mention need not always lead to agreement with Kalven's assessment. Professor Richard Epstein, for example, begins his article "*Was New York Times v. Sullivan Wrong?*" with a part headed "No More Dancing."<sup>3</sup> For Epstein, the dancing stopped in newspaper editorial offices.<sup>4</sup> But, as the years have passed, the dancing has continued in other corporate suites and in the law reviews. The Articles in this Symposium provide an opportunity to speculate about some of the First Amendment issues we are confronting fifty years after *Sullivan* in the information economy. This Introduction examines those Articles through the lens of general constitutional law. It focuses on broad questions about the roles of courts and legislatures in our constitutional scheme as they affect doctrines ranging from federalism (including preemption and the treaty power) to the state action doctrine. It also brings to bear "realist" or political perspectives on how the Court's doctrines might be shaped by the Justices' policy preferences. Those perspectives suggest that the Roberts Court's probusiness tilt in First Amendment doctrine might conflict with the desires of global Internet businesses.

My observations are divided into four Parts. Part I offers quite brief descriptions of the Articles in this Symposium, primarily to give some background for the remarks that follow in this Introduction. Part II suggests that the structure for producing First Amendment scholarship is skewed in favor of "liking" the First Amendment in a sense I elaborate. This skew tends to isolate First Amendment doctrine and scholarship from the concerns expressed in general constitu-

---

\* William Nelson Cromwell Professor of Law, Harvard Law School. I thank Laurence Tribe for helpful comments on a draft of this Introduction.

<sup>1</sup> 376 U.S. 254 (1964).

<sup>2</sup> Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn); see, e.g., Balkin, *infra* p. 2296.

<sup>3</sup> Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 782 (1986).

<sup>4</sup> See *id.* at 783 (describing a growth in "number and severity" of defamation actions).

---

---

tional law and theory. Part III shifts focus, briefly describing the development of a business-friendly First Amendment, as distinct from a press-friendly one, and then suggesting that a business-friendly First Amendment might turn out to be business unfriendly in a global information economy. Part IV presents some thoughts about an issue that threads through the Articles — the possibility that our understanding of the state action doctrine, as invoked in First Amendment cases, fits uneasily into the information economy’s operation. Part V follows with a brief conclusion.

### I. INTRODUCING THE ARTICLES

This Introduction tries to extract some general themes from the Articles here and to present them in the light cast by general constitutional theory. To that end, I provide brief summaries, focusing in particular on matters that I take up later in this Introduction. Each Article contains much more than what I summarize and extract from it for my own purposes, of course, and this Introduction is no substitute for reading the Articles themselves.

Professor Marvin Ammori describes the working environment of lawyers for major Internet participants, relying on interviews with the firms’ general counsels. These lawyers, Ammori tells us, grapple with First Amendment issues daily. In shaping corporate strategies, the general counsels are not Holmes’s “bad men” concerned only with the circumstances under which they might face court-imposed liability. Instead, as Ammori puts it, they “write the rules governing” speech.<sup>5</sup> And more, because their clients operate on a global scale, these lawyers are not solely concerned with the U.S. Constitution’s First Amendment, but also with the laws, customs, and practices of foreign nations.<sup>6</sup>

Professor Jack Balkin provides a catalogue of the ways in which contemporary speech regulations — “new-school” regulations — differ from traditional “old-school” ones. Old-school regulations dealt with physical spaces, the classic streets and parks, whereas new-school regulations deal with the “streets” over which digital information passes. Old-school regulations involved prior restraints and licensing targeted at disfavored speakers; new-school ones deal with the intermediaries who deliver what disfavored speakers say. And relatedly, new-school regulation is characterized by a substantial amount of cooperation be-

---

<sup>5</sup> Ammori, *infra* p. 2273.

<sup>6</sup> Section III.B below examines some implications of Ammori’s argument. *See infra* p. 2250.

tween public and private actors and the co-optation of the latter in the service of the former's regulatory goals.<sup>7</sup>

Professor Susan Crawford describes the modern technology that commercial providers of Internet services use to disseminate information and entertainment. She focuses on a challenge by Verizon to proposed regulations that would prevent such providers from operating business models that favor some information and entertainment sources over others. The providers, she argues, are modern common carriers, and equal access rules no more violate their First Amendment rights than do ordinary common-carrier rules violate the property rights of railroads and other traditional common carriers.<sup>8</sup>

Comparing the legal treatment of different advertising regulations, Professor Rebecca Tushnet observes that courts treat emotions inconsistently. Sometimes the fact that a regulation is more effective because it is predicated on the association between expression and emotion is a reason for upholding one regulation, and yet sometimes that very same fact is given as a reason for invalidating another. She concludes with a plea for more consistent treatment of emotions in the law of free expression.<sup>9</sup>

Finally, Professor Sonja West offers a defense of the position, so far rejected by the Supreme Court, that the institutional press deserves greater protection from government regulation than others, including those she describes as "occasional public commentators."<sup>10</sup> Responding to critics of that position, West provides a cluster of criteria that could guide courts in identifying the entities entitled to special protection as "the press."<sup>11</sup>

## II. FIRST AMENDMENT SCHOLARSHIP AND DOCTRINE FROM AN INTEREST GROUP PERSPECTIVE

This Part examines First Amendment scholarship and doctrine with reference to the incentives and background thinking that underlie its production. Section A develops an argument that these incentives lead to something like agency capture as it occurs in other domains: the phenomenon of "liking" the First Amendment arises from the structural fact that advocates of specific regulations limiting expression

---

<sup>7</sup> Part IV below examines the "state action" implications of this contrast. *See infra* p. 2254.

<sup>8</sup> Part IV below places this argument in the more general framework of state action doctrine. *See infra* pp. 2254–57.

<sup>9</sup> Section III.A below offers a "realist" interpretation of some implications of this observation. *See infra* pp. 2249–50.

<sup>10</sup> West, *infra* p. 2437.

<sup>11</sup> Section II.A below treats this discussion in terms of the political economy of First Amendment scholarship. *See infra* pp. 2239–40.

---

---

are scholars only of their specific regulatory domains and so are less well tutored in First Amendment doctrine than are scholars whose focus is the First Amendment itself. Section B suggests that thinking about the First Amendment as a distinct subject matter systematically undervalues the interests supporting regulation of expression.

A. *“Liking” the First Amendment: The Possibility of Capture*

First Amendment scholarship, it seems to me, differs from scholarship on other relatively discrete constitutional topics. Scholars of the First Amendment seem to “like” the Amendment, whereas scholars of the Second or Fourth Amendment do not necessarily like their Amendment. Of course one has to like a subject to which one devotes a great deal of attention, but that is not the same as “liking” the First (or Second, or any other) Amendment. What I mean by “liking” the First Amendment is something like this: A First Amendment scholar hears that a court has held that some local ordinance or state statute violates the First Amendment, and his or her initial thought is that the decision is presumptively correct.<sup>12</sup> The presumption is more than a bubble ready to burst as soon as an iota of information arrives suggesting that the decision might have been mistaken. Rather, the presumption has some weight in the scholar’s assessment of the decision: moderately strong reasons must be offered to explain why the decision was wrong.

Of course some scholars of the Second and Fourth Amendments like their Amendment in the same sense. But, I believe, a fair number of such scholars do not like their Amendment at all and think that the Constitution would be better on balance without it. The structure of scholarship in these fields differs from that in the First Amendment area. The reason is that the Second and Fourth Amendments are basically dichotomized: a scholar can be “pro-gun rights” or “pro-gun control,” or “pro-privacy” or “pro-security/pro-police.”<sup>13</sup> First Amendment scholarship, in contrast, is pluralist — but only on the side of regulation. Some advocates of consumer protection seek forced disclo-

---

<sup>12</sup> See, e.g., Howard Wasserman, *Dogfighting, Child Porn, and Unprotected Categories*, PRAWFSBLAWG (Apr. 21, 2010, 8:00 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/04/dogfighting-child-porn-and-unprotected-categories.html>, archived at <http://perma.cc/YZ5U-XQ3D> (discussing *United States v. Stevens*, 559 U.S. 460 (2010), decided on April 20, 2010, and declaring, “I am cheered by the Court’s unwillingness to wield . . . a broad power to create new categories or to defer to the legislature’s creation of such new categories”).

<sup>13</sup> I do not mean to suggest that the dichotomized positions lack nuance internally but only that there are only two sides to the discussion.

asures or restrictions on the dissemination of consumer information<sup>14</sup> and develop arguments why *those* regulations are consistent with the First Amendment. Some feminists seek regulation of sexually explicit material that does not qualify as obscene under the Supreme Court's definition<sup>15</sup> and develop arguments why *those* regulations are consistent with the First Amendment. Some pro-choice advocates seek restrictions on pro-life advocacy in close proximity to sites where abortions are provided,<sup>16</sup> and do the same. Copyright is dichotomized between content producers, who do not like First Amendment restrictions on copyright, and content disseminators, who do.<sup>17</sup>

Additionally, the structure of the pro-regulatory arguments differs from area to area. So, for example, some arguments assert that First Amendment doctrine should take into account the fact that some regulatory proposals place constitutional rights of one sort — privacy, or choice with respect to abortion, or equality — against rights of expression. Other arguments defend either a categorical or a general balancing approach to the First Amendment, even when, as in many consumer protection settings, one cannot claim that the regulation seeks to advance some constitutionally protected right.<sup>18</sup>

These various arguments are met on the other side with unified advocacy of First Amendment protections. We are familiar with one situation in which a unified interest faces diverse opposing ones. The setting is “agency capture” in administrative law. Agency capture occurs when an agency's jurisdiction extends to a single industry, railroads being the classic example. The interest groups opposing railroads are diverse: consumers, farmers, shippers of manufactured goods, trucking companies. A specific proposed regulation will promote the interests of one of these many groups at the expense of railroads, but the unaffected groups will be indifferent about it. Structurally, we can expect the railroads' interest to prevail, at least in the sense that proposed regulations will generally be watered down as they work their way through the agency. The reason is that the railroads

---

<sup>14</sup> For an example, see *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011) (involving a statute that restricted the sale of information pharmacists compiled about physicians' prescription practices).

<sup>15</sup> For an example, see *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985) (involving an ordinance banning certain explicit material that is described as discriminating against women), *aff'd*, 475 U.S. 1001 (1986).

<sup>16</sup> For an example, see *Hill v. Colorado*, 530 U.S. 703, 707 (2003).

<sup>17</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (describing a First Amendment challenge to copyright law by content disseminators); see also Crawford, *infra* pp. 2362–65 (providing an example of how dichotomizing can get complicated in the new information economy).

<sup>18</sup> Or at least one cannot make that claim without developing an argument to extend the recognition of constitutional rights to the regulatory area in question.

are there all the time, either fighting every proposal or seeking to modify each one to minimize its impact on them. Each specific pro-regulatory interest group is there only sporadically, with respect to only those proposals that affect them. The railroads will develop expertise in making arguments of the sort that the agency tends to accept, whereas the diverse interest groups on the other side will not do so as effectively.<sup>19</sup> The image we should have is one of a constant force being exerted in one direction, always offset by some force, but different each time and always less effective.

Roughly the same thing happens in First Amendment scholarship. Advocates for an expansive interpretation of the First Amendment are there all the time; advocates of particular forms of regulation are not. And, indeed, it would not be surprising to find advocates for some kinds of regulation *opposing* other kinds: pro-consumer advocates nervous, or at least indifferent, about regulation of sexually explicit material; content producers supportive of a narrow interpretation of the First Amendment with respect to copyright, but a broad one with respect to the content they produce. Structurally, then, we can expect First Amendment scholarship to tend toward expansive interpretations in a way that we would not expect for Second or Fourth Amendment scholarship.

The interest-group account brings out two features of First Amendment scholarship and doctrine. First, newspapers and other information disseminators are systematically going to “like” First Amendment decisions, in the sense I have given. Editorial comments on decisions upholding First Amendment claims will typically approve the decisions, campaign finance decisions being an exception.<sup>20</sup> Like the rest of us, judges get a warm glow when people say nice things about them, so this phenomenon gives them an incentive to uphold First Amendment claims.<sup>21</sup>

Second, like the railroads’ lawyers, proponents of an expansive First Amendment know the territory whereas advocates of specific restrictions do not. That is, the proponents know the entire field of First Amendment law and so can point out how the argument for a specific restriction is inconsistent with First Amendment doctrine dealing with other regulations that, they then assert, are indistinguishable from the one being proposed. The restriction’s advocates are not as comfortable fighting on the terrain of First Amendment doctrine generally, so they are relegated to arguments about whether they can indeed distinguish

---

<sup>19</sup> Cf. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010) (describing agency capture by means of differential information provision).

<sup>20</sup> See MARK TUSHNET, *IN THE BALANCE* 233–34 (2013).

<sup>21</sup> *Id.* at 235.

their proposal from the others. For example, the consumer protection advocate faces the argument that the Supreme Court has rejected general balancing tests<sup>22</sup> (and that the proposed regulation is inconsistent with the Court's nonbalancing analysis); the advocate of more extensive regulation of sexually explicit material who argues that such a regulation advances a constitutional interest in promoting equality faces the arguments that the Supreme Court has never expressly adopted a distinctive form of analysis for rights-versus-rights problems<sup>23</sup> and that such regulation cannot satisfy the Court's stringent requirements for showing a causal connection between the dissemination of the material and physical or similar harm. This structure of argumentation indirectly validates the doctrine with respect to other regulations because when one advocate argues that her proposed regulation is different she reinforces the doctrines for all other regulations.<sup>24</sup>

We can see something of the interest-group phenomenon in West's contribution to this Symposium. Addressing the argument that the courts should not develop a separate law of press freedom because of difficulties in identifying "the press," West offers a number of criteria to distinguish "the press" from what she calls "occasional public commentators."<sup>25</sup> I focus here on only two: "training, education, or experience" and "established audience."<sup>26</sup> West's analysis, I suggest, reflects the views of traditional media operations seeking legislative protection for their activities in an environment where policymakers appear to be concerned about insulating too many people or entities from justified liability.

Training matters because "[t]he press . . . has knowledge, often specialized knowledge, about the subject matter at issue."<sup>27</sup> A skeptic would note the failures of trained and experienced journalists, both in the small and in the large. The Judith Miller episode — in which a theretofore well-regarded reporter for the *New York Times* disseminated false information she received from government sources, with im-

---

<sup>22</sup> See *United States v. Stevens*, 559 U.S. 460, 470 (2010).

<sup>23</sup> Cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (applying standard First Amendment doctrines in a case involving the exclusion of newspaper reporters from a criminal trial because of concern that their presence would make a fair trial less likely). An additional point might be a state action point: the harms said to be caused by dissemination of the material are inflicted by private actors and so do not "truly" involve an interference with a constitutionally protected equality interest (because such an interest exists only with respect to governmental action).

<sup>24</sup> As a hypothetical example: proponents of hate speech regulation would indirectly support an expansive view of the First Amendment's application to copyright were they to argue that hate speech is relevantly different from copyright.

<sup>25</sup> West, *infra* p. 2456.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2444.

portant effects on public decisionmaking about invading Iraq<sup>28</sup> — suggests that experienced reporters can fall into traps precisely because of their experience.<sup>29</sup> Press critics identify more systematic sources of “tilt”: the willingness of reporters to act as mere aggregators of press releases from interested parties and the “he said, she said” structure imposed on accounts of ongoing controversies.<sup>30</sup> These criticisms suggest that experience and training may have downsides — such as the need to maintain good relations with regular information sources — that “occasional public commentators” could avoid precisely because of their lack of experience and training.

As to “established audience,” we now have measures of “unique views” that can tell us that some “occasional public commentators” reach a wider established audience than many newspapers and radio and television stations. New-media entrepreneurs such as Josh Marshall and ProPublica would have to receive protection as “the press” under any sensible account of who “the press” is,<sup>31</sup> and I do not understand West to argue otherwise. But in light of the rapid decline in circulation of local newspapers, I would not be surprised to discover that a fair number of “occasional public commentators” on local affairs have a larger number of unique viewers than do their communities’ newspapers (if the latter even exist). If so, we might wonder how much weight we should place on West’s reliance on an “established audience.”

None of this is to suggest that West’s proposal for identifying “the press” through a checklist of criteria, not all of which need be present in any specific instance, is mistaken. Rather, I mean to suggest that the lines she proposes are quite blurry and that the specific criteria she uses will sometimes place traditional newspapers on the “non-press” side of the line. And all that means is that West’s proposal raises questions of a familiar sort — the advantages and disadvantages of rules versus standards as the hardware for legal regulation. Examining that

---

<sup>28</sup> See Franklin Foer, *The Source of the Trouble*, N.Y. MAG., June 7, 2004, at 31, 31–32, 34.

<sup>29</sup> Foer argues that “the very same talents that caused [Miller] to get the story also caused her to get it wrong.” *Id.* at 31; see also Joe Hagan, *Truth or Consequences*, TEX. MONTHLY, May 2012, at 152, 234–35, available at <http://www.texasmonthly.com/story/truth-or-consequences>, archived at <http://perma.cc/MW4M-R86Z> (discussing the dissemination by CBS News of a report on President George W. Bush’s National Guard service based on forged documents).

<sup>30</sup> For a critique of “he said, she said” journalism, see Linda Greenhouse, *Challenging ‘He Said, She Said’ Journalism*, NIEMAN REPS., Summer 2012, at 21.

<sup>31</sup> John Marshall’s outlet is *Talking Points Memo*. For a description of Marshall’s business model, see Noam Cohen, *Now Hiring at Talking Points Memo*, N.Y. TIMES, July 13, 2009, at B5. ProPublica, a web-based center for investigative reporting, has received two Pulitzer Prizes. See Paul Steiger, *A Note on ProPublica’s Second Pulitzer Prize*, PROPUBLICA (Apr. 18, 2011, 2:09 PM), <http://www.propublica.org/article/a-note-on-propublicas-second-pulitzer-prize>, archived at <http://perma.cc/U76P-TAKB>.



proposal with the analytic tools developed to deal with the rules versus standards debate seems to me the next step suggested by her argument. That observation, in turn, leads me to my second observation about the structure of First Amendment scholarship and doctrine: its (relative) disconnectedness from general constitutional theory.

*B. The First Amendment as a Distinct Field*

First Amendment scholarship has another feature, so obvious that it is likely to be overlooked. First Amendment scholarship is just that — scholarship about the First Amendment. Things could be otherwise, and historically they were. We could have scholarship about constitutional law that treats the First Amendment as a point of focus, as we did when the First Amendment was simply one topic in a general constitutional law course. The shift from treating the First Amendment as merely one part of general constitutional law to treating it as a separate field of scholarship has two effects that I discuss here: that First Amendment scholarship and doctrine tend to overlook the possibility of a generalized skepticism about judicial review and that scholarship and doctrine tend systematically to undervalue governmental interests in regulating speech. Section 1 uses Justice Breyer's opinion in *United States v. Alvarez*<sup>32</sup> to illustrate why skepticism about judicial review might sometimes be well placed. Section 2 uses Balkin's Article as an example of the undervaluation of regulatory interests.

*1. The Possibility of General Skepticism About Judicial Review.* — Though it can range more widely, scholarship about general constitutional law tends to focus on the justifications we might have for allowing courts to displace judgments made by elected institutions, which are directly responsive to the people.<sup>33</sup> First Amendment scholarship and doctrine then take those justifications as given and seek to develop appropriate doctrine. First Amendment scholars sometimes focus on how the protection of expression serves interests in individual autonomy, without grappling with the difficulties associated with grounding constitutional rights in autonomy.<sup>34</sup> More often they nod in the direc-

<sup>32</sup> 132 S. Ct. 2537 (2012).

<sup>33</sup> That scholarship also focuses on the interpretive techniques that flow from these justifications. I put to one side here issues about constitutional review in states with elected judiciaries and about the possibility that the indirect political accountability of federal judges is good enough to allay so-called countermajoritarian concerns. On the latter, see TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 189–209 (1999).

<sup>34</sup> The difficulties center around the problem of distinguishing autonomous choice with respect to expression from autonomous choice with respect to decisions about how to earn a living. Except for strong libertarians, individual autonomy cannot be a freestanding basis for judicial review (cue *Lochner* here). Something must be distinctive about the autonomy interests specifically

tion of *Carolene Products*,<sup>35</sup> connecting the First Amendment to ideas about democratic representation but here too without much concern about working out such a theory in detail.<sup>36</sup> This inattention leads to a tendency within First Amendment scholarship and doctrine to disregard the possibility of a generalized skepticism about judicial review.<sup>37</sup>

Consider for example Justice Breyer's argument in *Alvarez*, concurring with the plurality's determination that the Stolen Valor Act of 2005<sup>38</sup> was inconsistent with the First Amendment.<sup>39</sup> The Act made it a federal crime for a person to state falsely that he or she had received a military honor.<sup>40</sup> The government argued that the Act was a permissible means of preserving the reputation of those who actually did receive such honors; allowing others to make false assertions that they too had received the honors would have tarnished that reputation. Justice Breyer rejected that argument. He began by stating his general approach. Judges should "examine the fit between statutory ends and means" and "determine whether the statute works speech-related harm that is out of proportion to its justifications."<sup>41</sup> He observed that existing prohibitions on the dissemination of false statements were limited to circumstances where "specific harm is . . . especially likely to occur."<sup>42</sup> Actions that "dilute[] the value of the awards" might count as specific harm.<sup>43</sup> But, Justice Breyer continued, "it should be possible significantly to diminish or eliminate . . . risks [from 'breadth of coverage'] by enacting a similar but more finely tailored statute," such as

---

implicated by restrictions on expression. I confess to finding myself unconvinced by the attempts that I have read to identify such distinctive interests — or, perhaps better, those attempts seem to me infected by a fairly obvious elitism that undermines any purported respect for democratic decisionmaking generally. (Of course if one does not regard the public as generally competent to make policy decisions through representatives, one would not have much trouble with judicial review anyway.)

<sup>35</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>36</sup> For additional discussion, see *infra* note 52.

<sup>37</sup> As Professors Louis Michael Seidman and Silas Wasserstrom have observed, something similar occurs in connection with scholarship and doctrine dealing with the Constitution's criminal procedure provisions. See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 100 (1988). However, *Dickerson v. United States*, 530 U.S. 428, 432 (2000), which found unconstitutional a federal statute purporting to displace *Miranda v. Arizona*, 384 U.S. 436 (1966), provoked a spate of scholarship dealing with the justifications for judicial displacement of legislative choice with respect to criminal procedure.

<sup>38</sup> 18 U.S.C. § 704 (2012).

<sup>39</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2551–56 (2012) (Breyer, J., concurring in the judgment).

<sup>40</sup> 18 U.S.C. § 704.

<sup>41</sup> *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring in the judgment).

<sup>42</sup> *Id.* at 2555.

<sup>43</sup> *Id.*

one that distinguished among military awards.<sup>44</sup> This was simply Justice Breyer's assessment of that possibility, without any weight given to the fact that Congress might have assessed the probabilities differently.<sup>45</sup>

Justice Breyer's opinion is a robust assertion of a judge's power to assess legislation in light of the Constitution independent of any possible congressional judgment. As such, it exemplifies the modern tradition of constitutional review, rejecting an older one articulated in 1893 by James Bradley Thayer in *The Origin and Scope of the American Doctrine of Constitutional Law*.<sup>46</sup> There Thayer offered a broadly skeptical view of judicial review, arguing that courts should find legislation unconstitutional only when the unconstitutionality is "so clear that it is not open to rational question."<sup>47</sup> We can find Thayerians whose skepticism about judicial review leads them to support a quite deferential judicial approach to questions of federalism, separation of powers,<sup>48</sup> the Second Amendment,<sup>49</sup> and almost everything else — except the First Amendment.<sup>50</sup> First Amendment Thayerians are hard

<sup>44</sup> *Id.* at 2555–56. The Stolen Valor Act did in fact distinguish among military awards in its penalty structure. See 18 U.S.C. § 704(c) ("Enhanced penalty for offenses involving Congressional Medal of Honor"); *id.* § 704(d) ("Enhanced penalty for offenses involving *certain* other medals." (emphasis added)).

<sup>45</sup> Compare Justice Breyer's analysis in *Alvarez* to his analysis in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In that Second Amendment case he stated his approach in similar terms: "[T]he Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* at 689–90 (Breyer, J., dissenting). He then observed that "[i]n applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity." *Id.* at 690. His First and Second Amendment analyses are different, it would seem, only because Congress's judgment about the inability to protect the interests in honor served by the Stolen Valor Act through other means did not involve an empirical judgment on a matter where the legislature has greater expertise and factfinding capacity than the courts do. Perhaps that case could be made, but its content is not apparent by merely stating the question.

<sup>46</sup> 7 HARV. L. REV. 129 (1893).

<sup>47</sup> *Id.* at 144.

<sup>48</sup> For the classic expression of Thayerianism in connection with federalism and the separation of powers, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

<sup>49</sup> The lack of a thick set of judicial precedents on the Second Amendment does not, I think, explain why scholars of that Amendment revert rather quickly to the fundamental issues of institutional design that concern Thayerians. The thickness of the precedents about federalism and separation of powers has not stopped some from sounding Thayerian themes in those areas. So, I doubt that the accretion of precedents as such obscures the Thayerian questions about judicial review. (I thank Professor Laurence Tribe for bringing this point to my attention, though he takes a different view on it.)

<sup>50</sup> *But see* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012) (describing how Thayerian judicial review declined as constitutional theory took hold).

to come by.<sup>51</sup> One reason for their absence may be that scholars of the First Amendment implicitly believe that some of the justifications for judicial review are unassailable with respect to all First Amendment issues. What I find striking, though, is a significant lack of attention given to the justifications for regulation. This is in part an undervaluation of the substantive reasons for regulation but, in more substantial part, an absence of serious grappling with the fact that the regulations are the product of a democratic process.<sup>52</sup>

2. *Undervaluing Regulatory Interests.* — On one available reading, Balkin's discussion in his Article here of what he calls the National Surveillance State can be taken as an example. As he has described it elsewhere, "In the National Surveillance State, the government uses surveillance, data collection . . . and analysis to identify problems, to head off potential threats, to govern populations, and to deliver valuable social services."<sup>53</sup> Though Balkin says relatively little here about the last of these functions, one of those services is national security. Many of the programs he discusses aim to further national security. And, it deserves emphasizing, all of these programs are authorized by statutes implemented by an executive branch whose actions are themselves supervised by the courts.<sup>54</sup> So someone assessing the programs' constitutionality might ask, either from a citizen's perspective or from that of a person seeking a predicate for an argument that courts should evaluate constitutionality, what significance legislative authorization and judicial endorsement have.

---

With respect to criminal procedure, a similar disregard, *see supra* note 37, is offset by the dichotomized structure of advocacy.

<sup>51</sup> I count myself and Professor Adrian Vermeule as Thayerians about everything, though he does not write much about the First Amendment. It should be clear that my argument deals with only two groups: those who are Thayerians about everything and those who are Thayerians about some things but not the First Amendment. It does not deal with those who are not Thayerians about anything. The latter are few and far between, I believe, although some originalists might squeak into the category. *Cf.* CLARK M. NEILY III, *TERMS OF ENGAGEMENT* (2013) (advocating for judicial "engagement," a term that describes a judicial role located somewhat ambiguously between Thayerianism and a fully robust version of judicial review).

<sup>52</sup> This lack of attention may also be the result of an implicit assumption that the problem at hand demonstrates conditions, as identified by John Hart Ely, that show the governmental action in question could not reasonably have been the outcome of a democratic process.

<sup>53</sup> Jack M. Balkin, Essay, *The Constitution in the National Surveillance State*, 93 *MINN. L. REV.* 1, 3 (2008).

<sup>54</sup> Of course, as with any complex program, critics can develop arguments that some of the executive branch's actions are not actually authorized by statutes "properly interpreted," and even "properly interpreted" statutes can be implemented by executive officials who violate the legal constraints on their actions. For a notable instance of the latter, not involving any "new-school" regulation, consider the case of Brandon Mayfield, wrongfully arrested and detained on the basis of grossly erroneous conclusions drawn about fingerprints found at the site of a terrorist bombing. *See* Dan Eggen, *U.S. Settles Suit Filed by Ore. Lawyer*, *WASH. POST*, Nov. 30, 2006, at A3.

At times the answer appears to be: no significance whatever. That answer, it seems to me, flows from the characterization of the National Surveillance State as an actor in itself. That characterization occurs in the course of a discussion of the Obama Administration's attempt to discover the sources of leaks about antiterror programs.<sup>55</sup>

Perhaps the implicit theory about the constitutionality of the National Surveillance State's programs is an Ely-like<sup>56</sup> one. Some who study authoritarian regimes have developed the idea of a "Deep State," an organization or network of people whose decisions actually determine the course of public policy notwithstanding purported supervision by democratically accountable executives and legislatures.<sup>57</sup> The National Surveillance State might be like that.<sup>58</sup> True, Congress enacted the statutes that the agencies of the National Surveillance State invoke when their activities are challenged. And true, Congress has set up procedures for oversight of the statutes' implementation, which include the transmittal of information from the agencies to Congress and the courts. But, the argument would go, the oversight mechanisms are inherently flawed because of the secrecy surrounding the National Surveillance State's activities. Neither Congress nor the courts can know what they don't know — Donald Rumsfeld's un-

<sup>55</sup> One of the leaks the Obama Administration investigated involved the modern equivalent of disclosing troop movements in wartime, which is the classic example of information the dissemination of which the government can properly suppress, *see* *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops."). The leaked information dealt with the disruption of a plot to bomb an airplane traveling to the United States, and the content of the leak would have made it clear to the plotters that the U.S. government had an informant in an al-Qaeda affiliate in Yemen. For a description, see Hayes Brown, *Why the Department of Justice Is Going After the Associated Press' Records*, THINKPROGRESS (May 13, 2013, 5:31 PM), <http://thinkprogress.org/justice/2013/05/13/2005021/doj-yemen-aqap/>, archived at <http://perma.cc/6PWR-4EMK>.

<sup>56</sup> *See supra* note 52.

<sup>57</sup> *See, e.g.*, Gareth Jones, *Bombing Throws Spotlight on Turkey*, HÜRRİYET DAILY NEWS (Nov. 20, 2005, 12:00 AM), <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=bombing-throws-spotlight-on-turkey-2005-11-20>, archived at <http://perma.cc/ZA2N-B32Y> ("The 'deep state' is made up of elements from the military, security and judicial establishments wedded to a fiercely nationalist, statist ideology who, if need be, are ready to block or even oust a government that does not share their vision.").

<sup>58</sup> *See* Peggy Noonan, *The Deep State*, WALL ST. J. (Oct. 28, 2013, 9:10 PM), <http://blogs.wsj.com/peggynoonan/2013/10/28/the-deep-state/>, archived at <http://perma.cc/9A2X-6CD6> ("[The Deep State is] the vast, unfathomable and not fully accountable innards of the permanent U.S. intelligence and national-security apparatus. I have been wondering if it isn't true that presidents change and directors change — you can keep changing the showbiz side, the names on the marquee — but the ways, needs, demands, imperatives, secrets and strategies of The Agencies stay pretty much the same, except for one thing: They always want more. The dynamic is always toward growth, toward more reach and more power."). For a more academic presentation of this argument, see Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT'L SECURITY J. (forthcoming 2014).

known unknowns. So, when the National Surveillance State's activities come to light, through leaks or otherwise, their justification cannot always rest on authorization from the people and their representatives. The predicate for a Thayerian approach to the National Surveillance State is absent. Conversely, the inadequacies of the political process with respect to actions taken in secret and not subject to oversight justify courts and citizens in assessing the rationales for the actions directly, without referring to the actions' (often nonexistent) democratic pedigree.

Perhaps so, but the foregoing arguments rest on empirical claims about the adequacy of authorization and oversight. And, at least as far we know now, the mechanisms Congress set up for overseeing the National Surveillance State's actions have been used: key members of Congress have been fully briefed about the programs, and courts have been informed about them, requiring modifications where, in the courts' view, the National Security State exceeded its statutory mandate.<sup>59</sup> Perhaps the members of Congress behaved irresponsibly after being briefed, although I doubt that, standing alone, such behavior can count as the kind of systematic failure of the political process necessary to justify disregard of a program's democratic warrant.<sup>60</sup> And perhaps the oversight mechanisms were designed badly — but then the target of constitutional concern should be not the National Surveillance State's activities, but the statutory oversight mechanisms. The secrecy of the National Surveillance State's activities seems to me to have nothing to do with the latter question. That suggests, in turn, that we have not yet identified a defect in the political process justifying the abandonment of a Thayerian stance.<sup>61</sup>

---

<sup>59</sup> As to the latter, consider the apparent failure of the National Security Agency to comply with the judicially mandated requirements that specific forms of surveillance be "minimized." Upon learning of these violations, the Foreign Intelligence Surveillance Court required the adoption of procedures to reduce the number of violations. See [Redacted], 2011 WL 10945618, at \*28 (FISA Ct. Oct. 3, 2011) (holding government's "targeting and minimization" procedures inconsistent with Fourth Amendment); see also [Redacted], 2011 WL 10947772, at \*7 (FISA Ct. Nov. 30, 2011) (approving modified "targeting and minimization procedures" that "adequately corrected the deficiencies identified in the October 3 Opinion"). I note that it is unclear (as yet) whether the failure of minimization had any consequences at all, except perhaps inducing increased anxiety about the program's scope — a consequence, it should be noted, flowing not from the failure of minimization itself but from the disclosure of that failure.

<sup>60</sup> I suppose one could devise an account according to which irresponsibility would have some systemic root. Without going too far afield in this Introduction, I simply note my longstanding argument that adding complexity to an Ely-like theory substantially reduces its attractiveness as a justification for abandoning a Thayerian stance by the courts (and probably by citizens generally).

<sup>61</sup> Even if abandoning such a stance is appropriate, there remains the question of whether the National Surveillance State's activities are justified without regard to their democratic warrant. My reading of Balkin's Article, and in particular of its rhetorical moves, is that he assumes without argument that many of those activities are not justified by their contribution to national secu-

Perhaps the National Surveillance State is so “Deep” that we cannot know whether legislators can know enough to regulate it. That would be a situation where paranoid fantasies happen to be true. No institutions can deal with such situations. Short of that, First Amendment scholarship would profit from a more systematic engagement with general constitutional theory, and especially with the Thayerian tradition.

### III. IS THE FIRST AMENDMENT BUSINESS FRIENDLY?

Writing shortly after the Supreme Court held that the First Amendment covered commercial speech,<sup>62</sup> Professors Thomas Jackson and John Jeffries accurately foresaw that the First Amendment would become this generation’s version of economic due process, a constitutional right restricting the ability of legislatures to regulate business practices.<sup>63</sup> This Part pursues Jackson and Jeffries’s insight into the Internet era. After elaborating in section A the proposition that the First Amendment has become business friendly in general, I argue in section B that the First Amendment might come to tilt against Internet businesses operating on a global scale: those businesses might prefer to trade off some protections afforded them by the U.S. regime of protecting free expression to get access to markets in nations that regulate speech more extensively.

#### A. *How the First Amendment Is Business Friendly*

The First Amendment covers all businesses but only with respect to those of their activities that can be described as expressive. So, for example, cigarette makers receive constitutional protection for some of their advertising activities,<sup>64</sup> and pharmacies that combine pharmaceuticals, nominally to tailor drugs to individual patients, receive similar protection when they advertise the general availability of compounded drugs.<sup>65</sup>

Coverage does not mean protection.<sup>66</sup> Whether covered material is protected turns on whether the government lacks sufficient justifica-

---

rity. Not being an expert in the techniques of ensuring national security, I have no view on this matter.

<sup>62</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>63</sup> Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); see also Crawford, *infra* pp. 2344–46 (reference to *Lochner*).

<sup>64</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

<sup>65</sup> See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

<sup>66</sup> For a discussion of the coverage/protection distinction, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270–71 (1981).

tion for its regulation. The Supreme Court has recently come to require that regulations serving even important goals must do a substantially better job at promoting those goals than other, almost-as-good regulations that have a smaller impact on covered speech.<sup>67</sup> As an example, the Court has held that the First Amendment protects the activities of a company that mines publicly available data about physicians' practices in prescribing specific medications and then compiles that data in a way especially useful to pharmaceutical manufacturers seeking to locate doctors who might be persuaded to sell more expensive, rather than less expensive, medications.<sup>68</sup>

All this matters for two reasons. First, as I have suggested, much of the modern law of commercial speech has become disconnected from general constitutional law and its focus on the justifications for overturning legislation.<sup>69</sup> The Court relies on its own assessment of how well the regulation serves important goals, giving essentially no weight to the legislature's apparent determination that its regulation was as narrowly tailored as it could be, given the legislature's sometimes complex goals. Second, and perhaps more important, it suggests why denying protection to much commercial speech is compatible with the core idea that the First Amendment quite strongly protects the activities of businesses whose primary purpose is the dissemination of information.

*New York Times Co. v. Sullivan*, after all, did involve a business. How does it differ from Verizon, the subject of Crawford's detailed case study? Verizon has invoked the First Amendment against efforts to ensure that information producers have equal access to the Internet's channels of information dissemination.<sup>70</sup> But, I suggest, though with some diffidence, the difference lies in the business models of the *New York Times* and Verizon. One reading of *New York Times Co. v. Sullivan* is that the Court believed it was essential to provide strong

---

<sup>67</sup> This is what the doctrinal requirement of narrow tailoring means.

<sup>68</sup> See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (holding unconstitutional a regulation restricting the sale, disclosure, and use of records revealing the prescribing practices of doctors, in part because it restricted the information's use by pharmaceutical companies while not similarly restricting use by academic researchers).

<sup>69</sup> Most obviously, regulations of commercial speech are only tenuously connected to *Carolene Products*-like justifications for judicial review. *But see* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (asserting, in the first modern commercial speech case, that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

<sup>70</sup> Notably, Crawford relies on then-Justice Rehnquist's *dissent* in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), as the basis for her presentation of the Jackson-Jeffries analysis of economic due process and the First Amendment. Crawford, *infra* p. 2389 & n.241.



protections for the dissemination of falsehoods that damaged reputation to ensure that businesses and individuals would continue to engage in information dissemination. That is the “chilling effect” at the heart of Justice Brennan’s analysis. In contrast, perhaps, requiring that Verizon use an “equal access” business model will have only modest effects on Verizon’s bottom line and will not deter it from continuing to disseminate information.<sup>71</sup>

Verizon’s case has some plausibility, whether it prevails or not, because the First Amendment has become friendly to businesses generally, not simply to businesses for whom strong First Amendment protection is arguably integral to the business model.<sup>72</sup> Tushnet describes the courts’ inconsistent treatment of “emotion” as a component of First Amendment analysis, but a cynic might suggest that there is a non-doctrinal consistency in the courts’ actions: the courts say that emotion matters when taking it into account allows them to find a regulation of business activities unconstitutional under the First Amendment but doesn’t matter when regulation of nonbusinesses is at stake. Trademark cases typically involve conflicts between businesses, but as Tushnet suggests, trademark’s rules “discriminat[e] in favor of the already powerful,”<sup>73</sup> that is, in favor of big businesses and against small ones. For two generations, then, the First Amendment has been business friendly. It might not remain so.

*B. Why the First Amendment Might Become Less  
Business Friendly in the Internet Era*

While the First Amendment has become business friendly, Ammori’s interviews with general counsels of “new media” companies suggest that might change. Ammori shows that “new media” companies see the First Amendment as “a local ordinance,” akin to a regulation adopted by a city council or state legislature.<sup>74</sup> The reason is that these companies operate in a necessarily international environment, and their financial returns come only in part from their operation within the United States. “New media” companies of this sort are likely to seek implementation of a consistent regulatory regime, and that

---

<sup>71</sup> For a discussion of the relation between Verizon’s business model and its First Amendment claims, see Crawford, *infra* pp. 2375–78, 2388–91.

<sup>72</sup> As Tribe suggested to me in his comments on a draft of this Introduction, perhaps it is not “the First Amendment” that has become business friendly, but the Rehnquist and Roberts Courts. To some extent, though, the doctrinal structure those Courts have created poses an obstacle to future Courts whose members might be more sympathetic to legislative regulation of commercial expression.

<sup>73</sup> Rebecca Tushnet, *infra* p. 2403–04.

<sup>74</sup> Ammori, *infra* section II.B, pp. 2278–84.

regime might conflict with the First Amendment as interpreted by the U.S. Supreme Court in connection with purely domestic regulations.

The analogy here is to corporations operating on a national scale within the United States. Such corporations sometimes face a plethora of regulations emanating from city councils and state legislatures. Complying with such a wide array of regulations can be quite burdensome. The solution is obvious: seek national legislation that preempts state and local regulation. The corporations' preference ordering might be the following: Most preferred is a national regime of no regulation at all.<sup>75</sup> Least preferred is a system allowing a wide range of state and local regulations, from quite restrictive to quite permissive. The most interesting possibility lies in between — a national regime of moderately stringent regulation. Corporations might prefer such a regime even if its regulations are more stringent than some of those applied locally because it might be cheaper to comply with a single, moderately stringent regulation than to comply with all the various regulations adopted locally.<sup>76</sup>

Treaties provide the analogue in the international domain to congressional legislation in the domestic one. And just as national corporations might want to see Congress enact a statute preempting diverse local regulations, so international corporations might want to see the United States enter into treaties preempting diverse national regulations. Now suppose that, responding to pressure from “new media” corporations operating internationally, the United States enters into a treaty displacing domestic regulation everywhere, including the United States. It is not difficult to imagine circumstances under which that treaty would contain provisions that, if enacted as purely domestic legislation within the United States, would raise serious First Amendment questions. I am not technologically sophisticated enough to know whether in the international domain there are close analogues to the “open access” rules Crawford discusses. But if there are, one can imagine a situation in which U.S. treaty partners insist on open-Internet rules that would be unconstitutional were Verizon's challenge to succeed. The U.S. negotiators might resist such rules, with support from U.S. “new media” companies whose first preference is a regime of no

---

<sup>75</sup> The doctrine of field preemption accomplishes this to some degree. According to that doctrine, federal regulation of a “field” can sometimes preclude state regulation of anything that falls within the field, including aspects of the regulatory domain that national legislation does not deal with. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

<sup>76</sup> In a related setting, imagine a sales tax regime, not unlike our present one, in which sales taxes applicable to goods sold over the Internet range from zero to five percent, with hundreds of different rates in between. A national company might prefer a national sales tax rate of 2.5% applicable to all sales, even though it will find itself or its customers paying 2.5% on some items that had been free from sales tax before.

regulation at all. But the partners might insist, and the U.S. “new media” companies might be willing to accept a regime of some regulation instead of having to deal with different regulations in each country.

We can easily imagine other cases. *New York Times Co. v. Sullivan* places rather strict limits on the ability of states to impose liability for disseminating false information that harms reputation, and it has been extended to limit the imposition of liability for disseminating true information that invades privacy by casting the personae people present to the world in a false light.<sup>77</sup> Most other nations interpret their constitutional protections of free expression to allow liability to be imposed in such cases.<sup>78</sup> Similarly, perhaps there are nations that would not insulate intermediaries from liability as extensively as the United States does at present.<sup>79</sup> Suppose, then, that treaty partners insisted on regulations authorizing imposition of liability for libel or invasion of privacy via the Internet, or imposition of liability on intermediaries, more extensively than would be permitted by the First Amendment as it has been interpreted so far. The First Amendment would then turn from being businesses’ friend into being (some) businesses’ enemy.

It is completely uncontroversial — now — that the Senate and the President cannot enter into a treaty with binding domestic effect that would violate the Bill of Rights, including of course the First Amendment.<sup>80</sup> The treaties I have sketched might be business friendly, ac-

<sup>77</sup> See *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>78</sup> For a dramatic example, see *Von Hannover v. Germany*, VI Eur. Ct. H.R. 41, 44–45 (2004), which held that German law violated the European Convention on Human Rights by precluding the issuance of an injunction against the publication of photographs of Princess Caroline von Hannover of Monaco on vacation and engaged in other private activities.

<sup>79</sup> For a discussion of intermediary insulation, see Balkin, *infra* pp. 2311–14. It may be worth noting that some activists appear to contend that the proposed Trans-Pacific Partnership would “enact,” through an international agreement, provisions with a stronger deterrent effect on intermediaries than the proposed Stop Online Piracy Act (SOPA). See, e.g., *Trans-Pacific Partnership — Similar to, but Stronger than, SOPA and ACTA*, INFO SECURITY (Nov. 16, 2013), <http://www.infosecurity-magazine.com/view/35659/transpacific-partnership-similar-to-but-stronger-than-sopa-and-acta>, archived at <http://perma.cc/NYL2-BVWV>. If, as some suggest, SOPA would violate the First Amendment, the problem discussed in the text would arise. For the suggestion of unconstitutionality, see Mike Masnick, *Constitutional Scholars Explain why SOPA & PROTECT IP Do Not Pass First Amendment Scrutiny*, TECHDIRT (Dec. 9, 2011, 4:16 AM), <http://www.techdirt.com/articles/20111208/15442917016/>, archived at <http://perma.cc/P8EQ-4PP7>, quoting a letter from Tribe to that effect.

<sup>80</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1, 5 (1957) (Black, J., announcing the judgment of the Court and delivering a plurality opinion) (“[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”). For an indication of how uncontroversial that position is, see Transcript of Oral Argument at 49, *Bond v. United States*, No. 12-158 (U.S. argued Nov. 5, 2013), in which Justice Ginsburg pointed out to Solicitor General Donald Verrilli that he had not “answered directly why the Bill of Rights does constrain the treaty power, the implementation of it” and asked if it was because of “*Reid v. Covert*.” I note two qualifications: (1) the portion of *Reid v. Covert*, 354 U.S. 1, that most clearly supports this position is a plu-

ording to Ammori's informants, but the First Amendment would be the enemy of their businesses.

Of course, perhaps none of this will come about: no relevant treaties might be negotiated; those that are might not contain provisions that raise serious domestic First Amendment questions; and by the time any such treaties come before the courts, the First Amendment might already be interpreted in a less business friendly way (so that the treaty provisions would not violate the First Amendment domestically). Likewise, the treaty power might be interpreted in a more business friendly way (so that treaties could in fact make domestically valid provisions that would otherwise be domestically invalid). But, the possibilities suggested by reading Crawford and Ammori's Articles together bring to mind the Psalmist's wisdom, "[p]ut not your trust in princes"<sup>81</sup> — or in the First Amendment. They also show why it is important to reconnect First Amendment scholarship with general constitutional law, here the law dealing with preemption and the treaty power.

#### IV. STATE ACTION ISSUES AND THE NEW INFORMATION ECONOMY

Balkin and Crawford show that the interactions between government and private corporations caused by contemporary regulation raise a question that we would typically assess using the state action doctrine: when do actions taken by those who transmit digital speech from one place or person to another, whether regulated by the government or insulated by statute against liability, become actions subject to direct constitutional control?<sup>82</sup>

Here too *New York Times Co. v. Sullivan* is the key case. It should be found in two places in standard constitutional law casebooks, once in the section on the First Amendment and once in the section on the state action doctrine.<sup>83</sup> The Court held unconstitutional central aspects of Alabama's common law rules defining the contours of a privately held right to reputation.<sup>84</sup> The case shows that the Constitution

---

rality opinion, and (2) the treaty might create international obligations, and the United States' inability to comply with the treaty because of the First Amendment might then subject the United States to liability on the international plane.

<sup>81</sup> *Psalms* 146:3.

<sup>82</sup> By "direct constitutional control," I mean imposition of liability or immunity from regulation enforced by courts interpreting the Constitution, independent of any statutory or common law regulations or immunities.

<sup>83</sup> Several leading casebooks do just that. See, e.g., GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 1135, 1576 (7th ed. 2013); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 862-63, 999, 1711 (2d ed. 1988).

<sup>84</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

sometimes — in my view, always — speaks to state common law definitions of entitlements. Of course many state law entitlements are constitutionally permissible, but some are not. To say that state action is absent is to say that the common law rules under examination are constitutionally permissible; to say that it is present is to say that we must engage in further analysis by applying the relevant substantive constitutional law to those rules. So, for example, in *New York Times Co. v. Sullivan* the Court first concluded that Alabama's imposition of civil liability on the newspaper was state action because "the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press."<sup>85</sup> It then examined that claim using substantive constitutional law and held that the "state rule of law" was unconstitutional.<sup>86</sup>

The state action doctrine has become complex and confusing because the courts and commentators have lost sight of the fact that in every state action case the core issue is whether the "state rule of law" — in *New York Times Co. v. Sullivan*, the state rule of law defining the contours of the right to reputation — is consistent with the Constitution. The Articles by Balkin and Crawford bring that fact back into focus.

For Balkin, one feature of new-school regulation is "public/private cooperation or co-optation."<sup>87</sup> Ammori writes in a similar vein that statutory standards have displaced the Constitution as the primary legal vehicle for protecting corporate speech activities.<sup>88</sup> These observations immediately bring to mind one current formulation of some of the circumstances where state action should be found. Under that formulation, nominally private action is directly subject to constitutional constraints when public and private actors are "pervasive[ly] entwine[d]."<sup>89</sup> Further engagement with the state action doctrine might well benefit the First Amendment analysis of some of the more interesting questions about regulation of the new information economy. The ideas of intermediary liability and immunity, for example, would be transformed dramatically were intermediaries treated as directly subject to First Amendment constraints. Balkin describes various forms of collateral censorship by Internet intermediaries.<sup>90</sup> With the

---

<sup>85</sup> *Id.* at 265.

<sup>86</sup> *See id.*

<sup>87</sup> Balkin, *infra* p. 2298 (italics omitted).

<sup>88</sup> *See* Ammori, *infra* p. 2263.

<sup>89</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001).

<sup>90</sup> *See* Balkin, *infra* pp. 2308–10.

state action doctrine in hand, we could call them simply censorship and ask directly whether the censorship could be justified.<sup>91</sup>

I doubt that, under existing case law, much intermediary activity is sufficiently entwined with public action to count as state action directly. Yet that does not dispose of the state action issue as identified in *New York Times Co. v. Sullivan*, which calls on courts to assess the constitutionality of the “state rule of law” that defines property entitlements.<sup>92</sup> The intermediaries’ property rights should be the focus of attention.

Crawford’s Article identifies a subject to which the state action doctrine properly understood speaks rather directly because the subject is one where the “rule of law” is precisely what is at issue.<sup>93</sup> She argues that the “equal access” rules Verizon is challenging are the modern version of common carrier rules at common law.<sup>94</sup> Suppose that the Federal Communications Commission had never proposed those rules and Verizon adopted a policy limiting the access of some users to its facilities. And suppose a user disfavored by that policy challenged it as a violation of the user’s First Amendment rights. The user’s initial problem would be to establish state action. Where could it be found?

*New York Times Co. v. Sullivan* provides the answer. There, Alabama had a common law regime of legal rights with respect to reputation.<sup>95</sup> The *New York Times* article about Commissioner Sullivan infringed on the legal rights Alabama law conferred on him.<sup>96</sup> The Supreme Court held that Alabama’s system of legal rights in reputation was unconstitutional.<sup>97</sup> The reason was that the substance of Alabama’s rules — creating a right to reputation protected from harm caused by false statements made even without knowledge of their falsity and without reckless disregard for their truth or falsity — violated the First Amendment.<sup>98</sup>

*Shelley v. Kraemer*,<sup>99</sup> the modern foundation of state action doctrine, has the same form, although that form is rarely recognized as

---

<sup>91</sup> I suspect we would want to replace the loaded term “censorship” with a less loaded one, to make it clear that some speech limitations, imposed by intermediaries or “the government,” might be justified under some defensible theory of the First Amendment.

<sup>92</sup> See 376 U.S. 254, 265 (1964).

<sup>93</sup> For a discussion of whether the rule of law is state or federal, see *infra* note 104, which discusses the implications of field preemption.

<sup>94</sup> Crawford, *infra* pp. 2365–78.

<sup>95</sup> See *Sullivan*, 376 U.S. at 267.

<sup>96</sup> See *id.* at 263.

<sup>97</sup> See *id.* at 264.

<sup>98</sup> See *id.*

<sup>99</sup> 334 U.S. 1 (1948).

such.<sup>100</sup> There, Missouri had a common law rule allowing restraints on the alienation of real property except in situations where the restraints excluded too large a group from the ability to purchase the property.<sup>101</sup> The Supreme Court first found state action in the Missouri rule, then held that rule unconstitutional.<sup>102</sup>

I have focused here on the substantive holding of *Shelley v. Kraemer*. The only coherent interpretation of that holding is that state property rules are unconstitutional when they have a substantially disparate impact on racial minorities.<sup>103</sup> Now return to the Verizon problem. The user disadvantaged by Verizon's policy notes that Verizon is relying on its background property rights, presumably under state law, to choose how to make its facilities available. That is, the user's claim would be that the background property law, which does not treat Verizon as a common carrier, violates the First Amendment. How? The background law is the ordinary law of property, treating Verizon no differently than it treats an ordinary homeowner or a cake maker, who can choose whom to serve subject only to statutory nondiscrimination rules, which are, by hypothesis, absent in Verizon's case. The ordinary law of property is a content-neutral set of rules if ever there was one.

Still, content-neutral rules are not per se constitutional under the First Amendment. As a matter of stated doctrine, and occasional application, content-neutral rules violate the First Amendment when they have a substantial disparate impact on the ability of certain speakers to disseminate their messages, unless those rules serve a counterbalancing important interest (including, in the present context, the interest in preserving wide discretion in property owners to direct the use of their property). We can now recast the user's challenge: it is not to Verizon's policy of regulating access but to the background rules of property law that fail to impose common-carrier obligations on Verizon.

I have no doubt that today's courts would reject the user's challenge, probably on state action grounds ("Verizon is neither a state actor nor pervasively intertwined with one"), without recognizing the real structure of the challenge. And I have little doubt that, were they to see the challenge in the correct way, today's courts would find that the background law of property does not violate the First Amend-

---

<sup>100</sup> The analysis of *Shelley* in the text is derived from Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988).

<sup>101</sup> See *id.* at 387 (citing RESTATEMENT OF PROP. § 406 cmts. i-j (1944)).

<sup>102</sup> See *Shelley*, 334 U.S. at 18-21.

<sup>103</sup> Tribe has offered a different interpretation of the substantive holding. On his reading, the Supreme Court held Missouri's rule unconstitutional because it singled out racial minorities for adverse treatment. See LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 260 (1985). As I have argued elsewhere, that analysis rests on what is probably a misdescription of Missouri law in the 1940s. See Tushnet, *supra* note 100, at 387 n.25.

ment's modest restrictions on content-neutral regulations.<sup>104</sup> Still, framing the issue in the Verizon case in state action terms brings out the real structure of the First Amendment arguments, which are over the constitutionality of specific content-neutral property rules.

Notice that I have framed the constitutional issue with reference to a *user's* challenge to the discriminatory practice Verizon would like to institute. The case Crawford discusses of course involves *Verizon's* challenge to a proposed regulatory scheme. Another classic case shows that the two challenges are in fact symmetrical. *Miller v. Schoene*<sup>105</sup> was a challenge to a Virginia statute authorizing the state to destroy certain infected cedar trees so that the infection would not spread to nearby apple trees. The cedar tree owners argued that the destruction was a taking of their property without just compensation.<sup>106</sup> Rejecting the challenge, then—Justice Stone, writing for a unanimous Court, observed that “the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity.”<sup>107</sup> He continued, “It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked.”<sup>108</sup> Note, though, precisely what the state's choice would have been had it “done” nothing. It would have been a choice to allow the cedar tree owners to exercise their ordinary property right to use their trees as they wished. The statute authorizing the trees' destruction and the common law property rule were subject to exactly the same constitutional test.<sup>109</sup> So too with the common-carrier challenges, whether brought by Verizon or the user.<sup>110</sup>

---

<sup>104</sup> Field preemption, suggested in the telecommunications field by *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959), might have some real bite here. Field preemption would imply that state law could not define Verizon's background property rights. Those rights would then flow from federal law, and the relevant law would appear to be federal common law, which the courts could construct to categorize Verizon as a common carrier. The constitutional question would then flip: instead of asking whether the First Amendment barred the application of content-neutral rules of background property law, we would be asking whether it barred the application of content-neutral rules defining who is a common carrier. But, of course, in invoking the field preemption doctrine, we would have to determine the “field” that is preempted, which almost certainly would not be “telecommunications.”

<sup>105</sup> 276 U.S. 272 (1928).

<sup>106</sup> *See id.* at 277.

<sup>107</sup> *Id.* at 279.

<sup>108</sup> *Id.*

<sup>109</sup> *See* TRIBE, *supra* note 103, at 56, 304 n.60; *cf.* Rebecca Tushnet, *infra* pp. 2423–25 (asking, “Can the Government Avoid Exploiting Emotion?”).

<sup>110</sup> *See* Crawford, *infra* pp. 2378–88 (discussing the application of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), to Verizon's challenge).



Once again, we see how general constitutional law is inextricably connected with First Amendment issues that one might have tried to deal with using only First Amendment doctrine and theory.

#### V. CONCLUSION

The Articles in this Symposium deal with the First Amendment's application to the new information economy. They are in that sense examples of First Amendment scholarship. I have suggested, though, that their perspectives can be better understood and perhaps enriched by placing them in the larger frame of constitutional scholarship generally. Ideas developed in discussions of judicial review, preemption, the treaty power, and the state action doctrine — all those, I believe, can illuminate First Amendment problems that seem, but may not be, distinctive.<sup>111</sup> Whether I am right about that or not, the Articles in this Symposium provide ample material to reflect on both the form and substance of contemporary First Amendment scholarship.

---

<sup>111</sup> Within First Amendment scholarship itself, one can observe a similar phenomenon in discussions of whether the new information economy presents a set of post-Internet problems so distinctive as to make it difficult to apply “pre-Internet” First Amendment doctrine to them. Compare Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1004 (2000) (suggesting that existing doctrine needs only to be “tweak[ed]” to be acceptable), with David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing for Internet exceptionalism).