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## Millennials, Equity, and the Rule of Law: 2014 National Lawyers Convention, *How First Amendment Procedures Protect First Amendment Substance*

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Millennials, Equity, and the Rule of Law: 2014 National Lawyers  
Convention, *How First Amendment Procedures Protect First Amendment  
Substance*

**Authors**

Erik S. Jaffe, Aaron H. Caplan, Robert A. Destro, Todd P. Graves, Alan B. Morrison, Eugene Volokh, and  
David R. Stras

MILLENNIALS, EQUITY, AND THE RULE OF LAW:  
2014 NATIONAL LAWYERS CONVENTION

*HOW FIRST AMENDMENT PROCEDURES PROTECT  
FIRST AMENDMENT SUBSTANCE*

3:30 to 5:00 PM  
Friday, November 14, 2014  
Mayflower Hotel  
Washington, D.C.

*Introduction:*

ERIK S. JAFFE,  
Sole Practitioner, Erik S. Jaffe, PC; and  
Chairman, Free Speech and Election Law Practice Group

*Panelists:*

PROFESSOR AARON H. CAPLAN,  
Loyola Law School, Los Angeles

PROFESSOR ROBERT A. DESTRO,  
The Catholic University of America  
Columbus School of Law

TODD P. GRAVES,  
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Professorial Lecturer in Law, The George Washington University Law  
School

PROFESSOR EUGENE VOLOKH,  
Gary T. Schwartz Professor of Law,  
University of California, Los Angeles School of Law

*Moderator:*

HONORABLE DAVID R. STRAS,  
Associate Justice, Minnesota Supreme Court

ERIK S. JAFFE: I'm Erik Jaffe. I'm Chairman of the Free Speech and Election Law Practice Group, and our group is co-sponsoring this panel, so we would like to welcome you all here and thank you for coming, and encourage you, if you are interested in First Amendment issues and election law issues, to please get involved with the Practice Group. We could always use more people who are interested in writing or helping out, so contact me, contact Dean Reuter, whoever you like, but if this is the stuff that interests you—and I hope it does, because you are here—please get involved. We could always use more folks.

My role here today is really just to introduce the moderator. Justice David Stras is Associate Justice of the Minnesota Supreme Court. He has been so since 2010. He is going to introduce the remainder of the speakers and moderate the panel. The only other thing I will say about him, other than him being a justice, which is more than enough for folks to know his credibility, is that he is a former Justice Thomas clerk which I think is a fine, fine honor. So thank you, Justice Stras.

[*Applause.*]

JUSTICE DAVID R. STRAS: Thank you, Erik. I appreciate it. What we are going to talk about today is the First Amendment and its relationship to process; hence, the name of the panel, “How First Amendment Procedures Protect First Amendment Substance.” We have a disparate group of panelists that are going to talk about various things. So in that sense, this might be a little different than some of the panels. Some folks are going to talk about civil restraining orders. Others are going to talk about evidentiary burdens of proof, but the theme that brings it all together, these are procedures that relate to First Amendment rights. So I think we are going to get a lot out of the panel, and this is something that is litigated on a daily basis. At least before my court, we had a case a year ago dealing with civil restraining orders.<sup>1</sup> We also have our fair share of cases dealing with burdens of proof and evidentiary issues. So I think this panel is very, very timely.

We are going to start out with Professor Volokh. He is the Gary Schwartz Professor of Law at UCLA Law School. He is a prolific scholar, as you well know, who has authored a number of books and articles on the First Amendment and has a casebook on the First Amendment. In addition to teaching courses on the First Amendment, he supervises a First Amendment Amicus Brief Clinic at UCLA.<sup>2</sup> Many of you are familiar with his blog posts on *The Volokh Conspiracy*.<sup>3</sup> So I now turn it over to Professor Volokh.

PROFESSOR EUGENE VOLOKH: Thank you. Thank you very much.

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1. See generally *Rew v. Bergstrom*, 845 N.W.2d 764 (Minn. 2014).

2. *Scott & Cyan Banister First Amendment Clinic*, UCLA LAW, <https://www.law.ucla.edu/academics/clinical-and-experiential-programs/the-clinical-experience/banister-first-amendment-clinic/> (last visited Nov. 9, 2015).

3. WASH. POST, <https://www.washingtonpost.com/news/volokh-conspiracy/> (last visited Nov. 9, 2015).

[*Applause.*]

PROFESSOR EUGENE VOLOKH: This panel is about how First Amendment procedures protect First Amendment substance—an issue that is certainly not new in First Amendment law. In fact, some of the Supreme Court’s earliest cases have dealt with exactly this issue: prior restraints, injunctions, allocation of burden of proof, and the like. To focus on this issue, let us set aside the debate about the substantive scope of various speech protections. Let us assume that there is some substantively permissible speech restriction, such as libel law. Let us assume there is an obscenity exception. Let us assume there is an exception for speech that infringes copyright or for telephone harassment or something along those lines.

And let us then ask: What procedural rules constrain the definition or implementation of the exception? Just because, for example, there is a defamation exception, does that mean there can be a preliminary injunction against defamation? Does that mean you can have criminal punishment of defamation? Does it tell us anything about who must bear the burden of proof in defamation cases? And the same for the other areas. These procedural questions turn out to be tremendously important, both as a practical matter and as a conceptual matter. My job here is just to outline the basic shape of the issue and maybe identify a few modern applications.

One classic example of a First Amendment procedural rule is the prior restraint doctrine. It dates back in American case law at least to 1839<sup>4</sup> and probably earlier. Indeed, it used to be an especially important rule back when there was very limited protection against criminal punishment or against civil liability—but there would be very strong protection against injunctions. Today, there is actually weaker protection against injunctions than before, and a much stronger protection against civil and criminal liability than before, so the prior restraint doctrine is less important than it once was; but it remains significant. And again, the doctrine is about the procedure—how can libel law and similar restrictions be implemented—and not just about the substantive question of the proper scope of defamation liability.

The vagueness doctrine is another example, as is the overbreadth doctrine. The overbreadth doctrine says, “you can challenge a speech restriction on its face as overbroad, even though in other areas of constitutional law you normally would only be able to challenge the law as applied.” And the theory behind the doctrine is that First Amendment rights are so in danger of being chilled—so in danger of being deterred by overbroad restrictions—that we will allow even people whose speech might be constitutionally restrictable by a narrow law to also challenge the broader law. This sort of challenge is a way of protecting third parties whose speech might otherwise be chilled by the overbroad speech restriction.

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4. *Brandreth v. Lance*, 8 Paige Ch. 24, 24 (N.Y. Ch. 1839).

Another procedural rule relates to standing for pre-enforcement challenges; as the *Susan B. Anthony List v. Driehaus*<sup>5</sup> case just last term reaffirmed, there is pretty substantial room for such challenges.<sup>6</sup> You do not have to wait until you are being prosecuted under some speech restriction to try to get that restriction thrown out. At least in many situations, if it seems quite likely that you would be prosecuted for speaking, you do not have to risk prison in order to bring the challenge.

The allocation of the burden of proof is another important rule. As I will mention shortly, in some First Amendment cases—libel cases are a classic example—the Court has said that the plaintiff must prove the falsity of a statement; the traditional common-law rule was that the defendant must prove its truth.<sup>7</sup>

The required quantum of proof is also influenced by the First Amendment: actual malice in libel cases, for instance, must be proved by clear and convincing evidence, and not just preponderance of the evidence. That, too, is an important procedural protection.<sup>8</sup>

Same for independent appellate review. Say the question in a case is whether speech fits within a constitutionally valid restriction—whether it constitutes libel, fighting words, obscenity, and the like. That decision is to be reviewed not by deferring to the factfinder’s application of law to fact (a common standard of review in such cases), but rather through de novo review by appellate courts.<sup>9</sup>

And there might be some procedural rules as well, though the matter is not clear. For instance, even when civil liability for libel, invasion of privacy, or intentional infliction of emotional distress is permissible, might criminal liability sometimes be forbidden? The Supreme Court has not squarely confronted this.

Now on to a few quick descriptions of how these things play out today in areas where they are particularly salient. One problem that we face with the prior restraint doctrine, and there are cases coming up every year about this—there was one particularly interesting one from Texas<sup>10</sup>—is that it is not clear what constitutes an unconstitutional prior restraint.

A traditional articulation of the doctrine was that, while criminal liability or civil liability punishes speech after the fact, a prior restraint restricts speech before the fact. There is a line by Chief Justice Burger in *Nebraska Press*

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5. 134 S. Ct. 2334 (2014).

6. *Id.* at 2342.

7. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777–78 (1986).

8. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

9. See Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 *YALE L.J.* 2431, 2435–38 (1998).

10. *Kinney v. Barnes*, 443 S.W.3d 87, 101 (Tex. 2014) (holding that “while a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint, an injunction prohibiting future speech based on that adjudication impermissibly threatens to sweep protected speech into its prohibition”).

*Association v. Stuart*<sup>11</sup> that “subsequent liability chills, but a prior restraint freezes.” It is a nice-sounding line.<sup>12</sup> But at least since the 1950s, the Court has recognized at times that in fact there is not that much difference between these quintessential subsequent punishments and prior restraint. Criminal liability and civil liability deter speech before it is said. That is in fact often the purpose of such liability.

On the other hand, injunctions are usually enforced after the forbidden speech is said. There are a few situations when injunctions actually prevent speech, such as when the state seizes copies of allegedly obscene material.<sup>13</sup> But often the injunction says you will be criminally punished (for criminal contempt) if you say something. A criminal law may say the same thing. What really is the difference?

What seems to have emerged from this debate is that restraints *prior to a finding that the speech is unprotected* are likely unconstitutional. So a preliminary injunction against a person’s speech is unconstitutional because it is prior to a judgment on the merits that the speech is unprotected. Such an injunction is based only on a showing of, say, probable cause,<sup>14</sup> or a likelihood of success on the merits; that is not enough to justify restricting speech.

But what about permanent injunctions? Many courts that have dealt with this have concluded, much to the surprise, I think, of many who have been following this, that you can get an injunction against libel.<sup>15</sup> The old rule that equity will not enjoin a libel does not seem to be the rule any more, at least in many states, once there has been a finding on the merits that speech is unprotected.

This openness to permanent injunctions against libel actually ends up being pretty important, especially in the Internet age. A lot of Internet speakers have no money, so they are not much worried about the threat of civil liability for defamation. Often, the only way to get such speakers’ speech taken down is through an injunction, once courts find that the material is defamatory. Query whether that should justify injunctions; maybe a plaintiff should be limited to damages, even if he practically cannot recover those damages. But there might be good reason to let people seek permanent injunctions these days against people who cannot be deterred by the threat of damages.

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11. 427 U.S. 539 (1976).

12. *Id.* at 559.

13. *See, e.g., Fort Wayne Brooks, Inc. v. Indiana*, 489 U.S. 46, 65–67 (1989) (striking down an Indiana statute, providing for the seizure of materials deemed obscene in violation of RICO, on the grounds that necessary First Amendment procedural safeguards determining obscenity were absent).

14. *See, e.g., Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980).

15. *See, e.g., Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 313 (Ky. 2010); *St. James Healthcare v. Cole*, 178 P.3d 696, 705 (Mont. 2008); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 343–44 (Cal. 2007); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62–63 (Ga. 1975); *O’Brien v. Univ. Cmty. Tenants Union, Inc.*, 327 N.E.2d 753, 755 (Ohio 1975).

What about limits on criminal prosecutions? Justice Stevens actually argued that criminal obscenity laws are unconstitutional even though civil injunctions against the display of particular obscene works would be constitutional.<sup>16</sup> He did not join Justices Brennan, Marshall, and Stewart, who objected to obscenity law altogether.<sup>17</sup> Justice Stevens took the view that civil obscenity laws are permissible, but criminal laws just did not provide enough notice—you should not go to jail based on a jury's concluding that speech appeals to the prurient interest, or violates contemporary community standards, or lacks serious value because it is too hard to predict whether a jury would so find.<sup>18</sup>

But Justice Stevens lost. Criminal obscenity bans, if they are narrow enough, remain constitutional.

Likewise, though a lot of people assume that criminal libel is also unconstitutional, the Court's most recent decision on the case (in 1964) simply said criminal libel law must satisfy the *New York Times v. Sullivan*<sup>19</sup> actual malice standards, when those are applicable.<sup>20</sup> Right now, about half of the states do not have criminal libel laws.<sup>21</sup> Some have such laws, but never enforce them. But some states do enforce them; for instance, Wisconsin apparently does, and every year there are several prosecutions.<sup>22</sup> A recent study of Wisconsin criminal libel cases suggests that they are reasonable prosecutions, against speakers who deliberately lied about others, almost always on purely private matters.

Again, in the Internet age, when there are many defendant speakers who have no money, and plaintiffs often equally have no money, the only way to vindicate the person's reputation might be to have the prosecutors step in. They would need to prosecute the defendant for libel under the proper standards of proof, with the proper mental state requirements. But if the requisite elements are proved, then some modest punishment under criminal libel law, the study claims, is constitutional—and Wisconsin courts seem to agree. Query whether that is right.

The other interesting question is how far the criminal law should go in restricting speech beyond libel. A lot of recent laws having to do with things like so-called "cyber bullying," stalking, harassment, and the like, criminalize speech that might be actionable under the tort of intentional infliction of

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16. See *Smith v. United States*, 431 U.S. 291, 316–18 (1977) (Stevens, J., dissenting).

17. *Id.* at 310–11.

18. See *Pope v. Illinois*, 481 U.S. 497, 507–08, 515, 517–18 (1987) (Brennan, J., dissenting); see also *Smith*, 431 U.S. at 313–16, 319–21 (Stevens, J., dissenting).

19. 376 U.S. 254 (1964).

20. *Id.* at 279–80.

21. See Bill Kenworthy & Beth Chesterman, *Criminal Libel Statutes State by State*, FIRST AMEND. CTR. (Aug. 10, 2006), <http://www.firstamendmentcenter.org/criminal-libel-statutes-state-by-state>.

22. See generally David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL'Y 303 (2009).



emotional distress or disclosure of private facts—speech that we had long thought was at most civilly actionable, but is now potentially criminal. Might the definition of those torts be too vague or too broad for the criminal law? Or could these torts indeed be turned into crimes?

As I mentioned, actual malice in libel cases must be proved by clear and convincing evidence. Falsehood must be proved by the plaintiff, rather than the truth being proved by defendant. How much of that can be applied by analogy to other elements of other speech restrictions? For example, in copyright cases, should absence of fair use be something that the plaintiff must prove as opposed to fair use being something that the defendant must prove?<sup>23</sup> In non-advertising, non-commercial speech trademark cases, of which there are quite a few—often involving parody—should likelihood of confusion have to be shown by clear and convincing evidence and not just by a preponderance of the evidence?

And finally, let me close with one thought I had about some of these rules. One function of some of these rules (even if not the conscious purpose, and not relevant in all cases) has had to do with quality of lawyering. Better lawyers can make better arguments, and some of these rules help bring better lawyering into situations where there would otherwise be no lawyer at all, or perhaps a lawyer who is not knowledgeable enough on First Amendment law.

I have two particular examples. One is the prior restraint doctrine. Among other things, the doctrine limits injunctions, which can otherwise be gotten even when the defendant does not have a lawyer; the doctrine thus makes it more likely that a lawyer will indeed be available when a speech restriction is involved.

One of the things that I think Aaron is going to touch on is that, in a lot of these restraining order cases, the court issues a very broad order—sometimes an order such as “do not say anything about the plaintiff,” when the plaintiff is upset at what she claims is cyber stalking. “You cannot say anything about the plaintiff” is pretty clearly unconstitutional, or so it seems to me. But when such an order is issued in a civil restraining order case, there is often no defense lawyer involved. And the defendant may be unable to challenge the order, and may not even know that there is some possible constitutional ground for the challenge.

Then if the defendant is prosecuted for contempt of court for violating the injunction, at that point, in many states that follow the collateral bar rule, the injunction cannot be challenged.<sup>24</sup> You have to follow it, and the public defender that the speaker gets in that criminal prosecution is no longer able in many situations to raise a First Amendment objection.

The other example of how First Amendment procedural rules help improve the quality of lawyering comes in the overbreadth doctrine, and the related relaxed rules of ripeness, which allow a challenge to be brought by experienced

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23. See Volokh & McDonnell, *supra* note 9, at 2468.

24. See *Walker v. City of Birmingham*, 388 U.S. 307, 315–18, 320–21 (1967).

First Amendment litigators and not just public defenders. Obviously, such challenges are more likely to be brought by public defenders than by unrepresented defendants. But while many public defenders are very good criminal lawyers, many of them just do not have a lot of First Amendment experience. First Amendment law is just not something that they practice day in and day out. So when the case comes up, they may not be able to challenge the law quite as effectively.

Yet overbreadth doctrine and the relaxation of the ripeness rules make it possible for experienced First Amendment litigators—Alan Morrison, for example—to go into a state and say: “Look, there is this speech-restrictive statute. It has not yet been violated. We do not have to wait for it to be violated and then hear about it and then swoop in and give this person really good First Amendment representation. We can ourselves craft a First Amendment challenge to the statute, and bring up the best First Amendment arguments because we know what they are in a way that many public defenders do not.”

So that is a thought about one of the functions—though again, not a deliberately designed function—that at least three of these doctrines (the prior restraint doctrine, the overbreadth doctrine, and the relaxation of ripeness rules) have played in improving the quality of First Amendment lawyering before judges, including perhaps before Justice Stras.

So with that, I close, and I turn things over to my colleagues.

[Applause.]

JUSTICE DAVID R. STRAS: Thank you, Eugene. I appreciate it. And just to repeat, there are a lot of seats up front if anyone wants to move up.

PROFESSOR EUGENE VOLOKH: And we will not call on you.

JUSTICE DAVID R. STRAS: We will not call on you. I am a former law school professor. We have many law school professors up here. So we do have the ability to call on you, but we will not.

Our second speaker is Professor Caplan, who is a faculty member at Loyola Law School in Los Angeles. Just a brief look at his publication list reveals to me why he is on this panel. He has written a number of articles on the First Amendment, including a recent article on free speech and civil restraining orders in the *Hastings Law Journal*,<sup>25</sup> which I believe is going to be a large part of his talk today. Prior to joining the Academy in 2008, he was a full-time staff attorney for the ACLU in Washington. Please welcome Professor Caplan.

[Applause.]

PROFESSOR AARON H. CAPLAN: Thanks very much, Justice Stras. I am here to give a case study of a type of litigation where free speech and due process issues interact with each other in all sorts of fascinating ways. This is the area that I have been calling “civil harassment orders.” The names are different in different states, but basically we are talking about a statute that authorizes any

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25. See generally Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781 (2013).

person to go to court and get a restraining order against any other person, on the grounds that the defendant was engaged in harassment.<sup>26</sup>

How did these statutes come about? A little bit of background is in order. We can actually start with the problem of domestic violence. Before we had domestic violence restraining orders, there was a very practical problem of policing. If there is a call that there has been violence in a house, the officer who shows up faces a difficult “he-said-she-said” situation. How do I know, as the officer, who to believe? Do I really have probable cause to make an arrest in a criminal case? These difficulties led to under-enforcement, or at least to the perception that officers were being too cautious in making arrests. So enter the domestic violence restraining order, a document that makes enforcement a lot easier. As a victim, you have a civil action available, where by a preponderance of the evidence you can get an order that says the defendant has to stay so many feet away from you. At that point, enforcement becomes really easy. All you have to do is say: “Officer, look at this order. It says this person is not supposed to contact me, but he contacted me.” This is really easy to enforce and prove. In an area where there was under-enforcement, it was a pretty useful thing.

So we start with domestic violence restraining orders. The concept then gets expanded. Sometimes statutes make no-contact orders available to people who are not actually living together or romantically involved with each other. You might have a stranger who decides to stalk somebody, or you might have a really aggravating neighbor who is doing things to make your life miserable. The legislatures in some states expanded their statutes, or created new statutes, so that you can now get an injunction against someone who has harassed you, regardless of the relationship, in about half of the states.

What do these no-contact orders have to do with speech? Two primary things. First, the definition of harassment often allows for a finding of harassment based just on speech. Where speech itself is deemed harassment, it becomes a basis for liability. Second, the remedy can implicate free speech. Depending on how these orders are written, they might say that you cannot talk about this person or you cannot utter words containing certain content specified in the order. Now, I think a true no-contact order—one that says “do not contact this person” or “do not come within 200 feet of this person”—is not properly viewed as a speech restriction. However, there is a serious prior restraint problem with orders that say, “do not say anything on the Internet about this person.” This kind of order is targeted at speech containing particular content. I was very honored to have Professor Volokh represent me as an amicus in a case that is in front of the Georgia Supreme Court that involves exactly that kind of order.<sup>27</sup>

So how does due process interact with freedom of speech in this type of litigation? I can identify four different ways.

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26. *See id.* at 783.

27. *See Chan v. Ellis*, 770 S.E.2d 851 (Ga. 2015).

First is the vagueness doctrine. Vagueness, as any of you criminal defense lawyers know, is not limited to the free speech context. It was originally a due process concept relating to criminal law. If a criminal law is so vague that you cannot really tell whether you are going to be in legal trouble or not, that is a constitutional problem.

The vagueness in civil harassment laws depends how they are written, but most have serious vagueness problems. My favorite one is from Wyoming. I am going to leave out some subsections, but everything I read will be from the Wyoming statute. Under that law, harassment occurs “if, with intent to harass another person”—<sup>28</sup>

[*Laughter.*]

PROFESSOR AARON H. CAPLAN:—“the person engages in a course of conduct reasonably likely to harass that person”—

[*Laughter.*]

PROFESSOR AARON H. CAPLAN:—“including but not limited to . . . [c]ommunicating . . . in a manner that harasses; . . . [or] engaging in a course of conduct that harasses another person.”<sup>29</sup>

Thank you, legislature, that really helps.

Vagueness raises a particular problem in First Amendment cases that does not occur in your run-of-the-mill criminal law vagueness case. Where speech is involved, we are worried about a chilling effect.<sup>30</sup> It is bad enough that people do not know whether their conduct is lawful. It is considered worse if you do not know whether your *speech* is lawful, because it will cause you to engage in self-censorship. I am not sure how we assign vagueness points to the difference between ordinary vagueness and free speech vagueness. I doubt any judges think to themselves, “gee, if this case did not involve speech, I would say this statute is a 3.5 on the vagueness scale, but since it is a speech case, I think it is a 4.7 on the vagueness scale.” But even if it cannot be precisely measured, there is a recognition that vagueness causes an extra type of harm when it contributes to a chilling effect.

The prior restraint doctrine is a second issue that involves procedural protections for free speech. If a plaintiff in a civil harassment case is able to convince the judge that harassment has occurred, the result will be an injunction. Depending on how the injunction is written, it might put certain speech off limits. Professor Volokh is absolutely right that there are a lot of different formulas to describe what is a prior restraint. I think of a prior restraint as a law that makes it illegal to speak without permission. If you have to go to the censor

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28. WYO. STAT. ANN. § 6-2-506(b) (2015).

29. *Id.* § 6-2-506(b)(i)–(iv).

30. See Caplan, *supra* note 25, at 810–11 (stating that “a vague statute affecting expression has a chilling, self-censoring effect on speakers”) (citing *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997); *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

and get permission before publishing, or you have to go to the judge to lift an injunction before speaking, you can in effect be punished for speaking without permission. That explains why an injunction that says “you cannot say anything about this person” is a classic prior restraint.

One line that helps separate a legitimate no-contact order from an invalid prior restraint is the distinction between speaking *to* the victim and speaking *about* the victim. Certainly, if someone is stalking you, calling you, sending you e-mails, sending you texts, sending you letters, and showing up at your home or work, we are concerned about the unwanted contact. The content of the speech contained in those calls, e-mails, texts, letters, and personal visits does not matter: it is equally alarming if the person says “I love you” or “I hate you.” As a result, an order to stop all contact will be a content-neutral regulation of conduct, and not a prior restraint on the content of speech. To be sure, an order limiting contact will limit the defendant’s opportunity to speak to the victim, but this is an acceptable collateral consequence of a restriction on conduct. By contrast, an order specifying what a person is allowed to say *about* a person is a restriction of speech per se, not on the conduct of engaging in unwanted contact. Much speech about a person is directed to third parties, or to the world at large on the Internet. Speech like that is not directed to the victim.

The distinction between speech to a person and speech about a person arises in a category of civil harassment cases that are basically defamation cases in disguise. In these cases, a plaintiff might say: “I am being harassed when the defendant says or writes terrible things about me.” The plaintiff might subjectively feel harassed, whatever that means, but the alleged wrongdoing is actually defamation: saying false things that injure reputation. Under *New York Times v. Sullivan*,<sup>31</sup> and all of the cases that came after it, we do not want defamation to be an easy claim to win. There are many constitutionally derived limits on the tort. It should not be possible to avoid these limits by saying, “oh, this is not a defamation action, it is a harassment action.” If this reframing is allowed, the case becomes easier to win, frustrating the goal of *New York Times v. Sullivan*.

What makes civil harassment cases easy to win? This brings us to a third relevant aspect of due process: namely, the way procedures in ordinary civil trials typically do not govern in civil harassment cases. The domestic violence restraining order was designed to be easy to obtain, and there are some good reasons for that. They are designed so that pro se litigants can obtain them. The hearings are often ex parte, especially at the opening stage that corresponds to a temporary restraining order. There is no jury, and the procedures are fast. Judges typically churn through the civil harassment docket quickly. The things that we would usually rely on to make sure that judges are deciding things correctly are put in peril.

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31. 376 U.S. 254 (1964).

What do we usually rely on? We usually rely on lawyers giving the judge an accurate description of what the law is. If the cases are handled pro se, nobody is going to raise this highfalutin vagueness argument about how the statute does not give fair notice, or a technical argument about prior restraints. Instead, the untrained pro se will choose less legally persuasive arguments, like: “Oh, no, I did not say that,” or, “she deserved it,” or whatever. So the judges often do not have the presentations from the lawyers that might help them. We also rely on the appeals process to preserve accuracy of trial courts, but this is an area where there are very few appeals. A lot of this has to do, once again, with the fact that it is pro se. But another factor making appeals difficult is that the orders are often, but not always, of a fixed duration, so they can be mooted out on appeal before an appellate decision can be made on the merits.

This brings us to the fourth area where procedural protection interacts with free speech. If an appeal of a civil harassment order is taken, it will benefit from a First Amendment procedural novelty: the doctrine of independent review. A line of Supreme Court cases says that on the appeal of a free speech case, the reviewing court must conduct an independent review of the crucial speech-related facts.<sup>32</sup> Hence, if a defendant argued below that certain speech should not be considered harassment because it is constitutionally protected, the protected status of that speech can be revisited on appeal. Trial court findings on that topic are not entitled to the usual deference that appellate courts give to trial court factual findings or findings involving mixed questions of law and fact. So on those occasions when speech-related harassment is appealed, there is a little quantum of extra procedural opportunity that you would not have in another kind of case.

So that is a quick outline of some of the ways that procedure meets speech in civil harassment litigation. I look forward to talking to you more about it in the Q&A.

[*Applause.*]

JUSTICE DAVID R. STRAS: Thank you, Aaron. That was enlightening. Our next speaker is Todd P. Graves, who is a lawyer in private practice with the law firm of Graves Garrett. Before joining the firm, he served as the United States Attorney for the Western District of Missouri. He represents individuals and businesses nationwide before federal and state courts and administrative agencies, and his areas of expertise include white-collar criminal defense, political speech and election law, internal investigations, regulatory compliance, and complex commercial litigation. I will turn it over to Mr. Graves.

[*Applause.*]

TODD P. GRAVES: Thank you. I appreciate that. I am sort of bringing the practitioner’s perspective to this. I do not spend a lot of time thinking about the broad principles as much as dealing with the nitty-gritty of it, and in the last two years, we have handled speech cases, especially in campaign finance realms,

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32. See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

probably in a half a dozen or more states. And one of the conclusions that I have come to is that in many election law cases, there are no effective procedures to vindicate constitutional rights.

In the election law context, in the practitioner's world, the government shoots first and asks questions later, and there is sort of a general background now that I perceive among some judges, many prosecutors, and many enforcement officials, that money is bad and that it should be prohibited. There is this new term that popped up in the last few years called "dark money."<sup>33</sup> It is legal money, but it is "dark" in some ways, and that term is thrown around quite a bit.

And another thing that complicates it—we often deal in state law matters rather than in federal law matters, or FEC matters, and state laws are a mess. One of the reasons they are a mess is every legislator has something that happened to them in the last election that they want to make illegal in the next election.

[*Laughter.*]

TODD P. GRAVES: And it goes both ways. So they are freelancing. They are not using model legislation. They are not coherent, they are trying to draft legislation that deals with something that they have a bone that they have to pick, and to say it as boldly and bluntly as I can, many state law regulators, ethics commissions, accountability boards, whatever you want to call it—political practice commissioners—are zealots in this area, and they have a particular opinion of the way the law should be. And the contra, the flip side of that is many of my clients, whether they are a C3, C4 candidate, whatever, they are also zealots in the matter. They not only think it is legal, they think it is their constitutional God-given right to participate. I happen to agree with them, but to participate in this way. So it is not like a murder case. No one says murder should be okay. They say, "well, my client did not really do that, but we all agree murder is bad." In this case, you have got the government official saying, "this is bad," and you have got the practitioner saying, "this is good. This is what our government is about," and so they are kind of like ships passing in the night, and especially when you get to the state level. Especially when you get outside the ethics commission-type enforcement environment and you get into state-level prosecutors, oftentimes they have no idea about the nuances of the law.

I have had a prosecutor tell me, "you know, I do not know about all that stuff you are talking about, but we just kind of think this is bad, and it should not be allowed." More than one time, I have had a dope prosecutor, someone who normally has a dope case, then someone puts a file on their desk and now they

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33. See Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 905 (2014) (defining "dark money" as "money spent by sources that are virtually untraceable"); Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J. L. ETHICS & PUB. POL'Y 383, 458 (2013) (discussing the increased use of "dark money" in elections).

are a campaign speech prosecutor. That is something that in the real world you deal with. Frequently, these cases are ginned up by the opposition, by political opponents. Then they are weaponized with an assist from the media. So you have got a very short period of time that you are dealing with, before an election and these allegations are coming forward.

There is little ability to challenge this. So many times when I describe these cases to my friends who are in a more academic environment, or friends in the Federalist Society, they will say: “Well, that is not appropriate. That cannot be allowed.” And they are right. We are not going to get a hearing. It is happening, and it is being allowed, and that is what we deal with.

These cases and the *Susan B. Anthony*<sup>34</sup> case—a great case Professor Volokh mentioned—but this is before a probable cause finding. *Susan B. Anthony* had a probable cause finding.<sup>35</sup> In the FBI lexicon alone, there are three levels of investigation, and only the third level involves a grand jury.<sup>36</sup> There is an informal investigation, a formal investigation, and a grand jury investigation that is also opened up in the U.S. Attorney’s office, and you do not get a probable cause finding until the end of a grand jury investigation. So you are dealing in a realm where there is no judge to protect you in many cases.

The other thing that we run into, as this becomes a more contentious area of the law, we have gone from maybe two or three years ago, we had civil fights that we were having. Now you are having a criminal fight over an area of the law that is not settled. Much of it is federal constitutional law. There are definitely—just read the recent Supreme Court opinions,<sup>37</sup> and some of them seem to be much more liberal in allowing speech than maybe a constitutional opinion of just a few years ago. So it is a murky area, express advocacy, non-express advocacy, all of that, and you have got a criminal enforcement action taking place.

The stakes are very high, and in state court, if you have confusing laws, high stakes, important outcomes, and you also have the abstention doctrines,<sup>38</sup> the

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34. 134 S. Ct. 2334 (2014).

35. *Id.* at 2339.

36. See A BRIEF DESCRIPTION OF THE FEDERAL CRIMINAL JUSTICE PROCESS, FBI, [https://www.fbi.gov/stats-services/victim\\_assistance/a-brief-description-of-the-federal-criminal-justice-process](https://www.fbi.gov/stats-services/victim_assistance/a-brief-description-of-the-federal-criminal-justice-process) (last visited Nov. 11, 2015).

37. See *Elonis v. United States*, 135 S. Ct. 2001, 2008–09, 2012 (2015) (holding that a finding of intent, rather than mere negligence, is required to convict under federal extortion and threats law, reversing the Third Circuit’s holding, which held that the negligent transmission of a communication containing a threat to another person through interstate commerce is sufficient); see also *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338, 2343–45 (2014) (reversing and remanding the Sixth Circuit’s finding of non-justiciability because the political advocacy organization-petitioner had alleged a sufficient imminent injury from a credible threat of pre-enforcement of a “false statement statute” prohibiting “false statements” made “during the course of a political campaign” against them).

38. See Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811, 832–33 (1991) (writing that abstention encompasses a



various abstention doctrines. So the federal courts are not going to get involved, and they are certainly not going to get involved very quickly.

So against that backdrop, you have a quantum of proof, a burden—there is no burden of proof. There is no quantum of proof because it is an investigation, and at the same time—and this happens every day—you have patterned leaks from the prosecution, the investigation authorities, and you have timing issues and very little time.

I had a case this last election cycle where forty days before the general election, I had an FBI agent in a statehouse going up and down the hallway asking where the Lieutenant Governor's office was because he had a few questions to ask him, and if you do not think that hits the press and has a real effect, then you are not living in the real world.

The other thing you deal with, many of you, some of you may have been involved in campaigns. Campaigns last fifty, sixty days. It is high compression. A lot is going on. You have some kind of subpoena drop or an investigation leaked, and suddenly, you have lawyers telling people not to talk, the campaign manager, “well you cannot talk to anybody you work with,” and that is just not practical. And again, the procedural protections just do not play out.

The other thing that you run into is you have donor fears, personal fears in a campaign finance investigation. They fear that they are going to be investigated personally. They fear that their relationships and communications—who here has not written an e-mail that they really would rather not read themselves again, let alone have other people read? They fear disclosure and retribution, which has clearly happened at the end of some campaigns in the last few years based on their contributions or their involvement,<sup>39</sup> and one of the things that is very real also is the understanding of the organization and the weak points of a particular political movement. That is important information.

We just had caucus elections in Congress, and those were behind closed doors, and those were behind closed doors for a reason, because they want to keep private those sorts of weak points and disagreements in some cases.

Against all of this, courts are highly reluctant to wade into that charged environment, especially in a very political and tense time. Anytime you get one of these cases before a court, you may have a judge that is the paragon of judicial virtue, and you bring one of these political cases in, and oftentimes they sort of revert to what they thought before they went on the bench. Strange questions

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variety of doctrines involving “the outright rejection or postponement by a federal court of its jurisdiction ‘even though Congress has vested jurisdiction in the federal courts to hear the cases in question’”) (quoting M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 233 (1980)).

39. See, e.g., Stephanie Condon, *Target Apologizes for Controversial Political Donation*, CBS NEWS (Aug. 5, 2015, 2:46 PM), <http://www.cbsnews.com/news/target-apologizes-for-controversial-political-donation/>; John Koblin, *George Stephanopoulos Apologizes to Viewers on Clinton Donations*, N.Y. TIMES (May 15, 2015, 8:00 AM), [http://www.nytimes.com/politics/first-draft/2015/05/15/george-stephanopoulos-apologizes-to-viewers-on-clinton-donations/?\\_r=0](http://www.nytimes.com/politics/first-draft/2015/05/15/george-stephanopoulos-apologizes-to-viewers-on-clinton-donations/?_r=0).

are asked, and I do not even think they know they are doing it, but they are moving back to their comfort level. And they are not viewing these quite as dispassionately as perhaps they would a case on class actions.

Another thing—that is one segment of my topic, but the other thing I was asked to talk about—was the big stick that the government carries. When you are in any kind of investigation when speech is involved or any kind of government enforcement, you are dealing with government resources versus private resources, and the magnitude of what can be brought to bear is very different. Oftentimes, you have candidates, when they are dealing with a government investigation; they cannot or will not fight. Again, elections are won by small shifts. They cannot take up this battle thirty days before an election. They have to essentially give in or back away from it. They do not want that on their record. They do not want that on their public tombstone.

When you do get into a full-blown investigation, it can be highly intrusive and overbroad. Search warrants. There are search warrants that are now being used in these types of cases. People are waking up at 7 AM in the morning. There are government agents and sheriff's deputies standing outside their door because of a campaign speech matter, because of a donation matter. Those search warrants are sought in an ex parte, much like was discussed a moment ago, secret environment so there is no one to give the counterpoint when the search warrant is sought.

Another thing that this society has to address is a paper case. So if you are going in on a search warrant on a gun, this is black-letter law. You cannot look in a drawer that the gun would not fit in. When you are going in with a search warrant on a campaign finance violation, any piece of paper you have is fair game because it might contain the information they are looking for.<sup>40</sup> So records, checkbooks, and family records are hauled out of these houses, and people's lives are sorted through. Oftentimes, they will go in on a campaign finance violation and do an investigation over here, and they will end up finding what have you, something on the computer that is not appropriate, and people are convicted for things that have nothing to do with campaign finance violations. And there is no practical redress for this. Again, long before a probable cause determination, long before you have an identifiable judge involved, these cases play out.

Subpoenas issued by a grand jury, federal grand juries particularly I know of, and state grand juries, the grand jury foreman signs them ahead of time and puts them in a drawer. It is not like there is a real considered action as to whether that subpoena can be drawn.

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40. See David Futterman, *The Warrant Requirement*, 81 GEO. L.J. 862, 870–71 (1993) (explaining that a warrant may include a “catchall phrase” where the officer may seize an entire class of items, as long as there is probable cause supporting the seizure of the items).

Bank records. If bank records are sought, by law, you cannot be notified that those bank records have been sought.<sup>41</sup> So there may be a candidate, or a 501(c)(4), that have had their bank records pulled, and they have no idea of that.

E-mail providers. Again, often there is no notice.<sup>42</sup> Investigators will have years of e-mails that the campaign activist does not even know about.

Moving to the other area, the IRS cases that we are seeing, we represent NorCal Tea Party Patriots in one of the lawsuits against the IRS. We have the case in Cincinnati, and they ask ridiculous questions about associations and intent—intent of what you are going to do in the future—and those are very intrusive to someone participating in the political process.

And against all this, everything I have talked about up until this point is defense, how you play defense on these cases, but sometimes we want offensive redress. We want to go in and hold someone accountable long after the fact, and there are procedural difficulties when you are trying to defend, but when you are talking about the government, when you are trying to go on the offense, it is nearly impossible.

Use the IRS case as an example.<sup>43</sup> Without a doubt, the Inspector General found that the dissenting groups were targeted by the taxing authority for political speech reasons.<sup>44</sup> The government Inspector General found that. Anyone in a law school class would say, “well, that cannot be allowed.” But to try to do something about that, to try to weave through the procedural roadblocks to seek legal vindication of an important constitutional right may be impossible. Two of the cases in D.C., the IRS cases, have been basically kneecapped already, and the one that we are dealing with in Cincinnati, there are significant procedural roadblocks that we are trying to negotiate.<sup>45</sup>

Finally, in closing, what I would like to say is a year later—let us all think about Tom DeLay. He won.<sup>46</sup> He was completely vindicated, and I think he

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41. See 12 U.S.C. § 3409(a) (2012) (authorizing banks to delay notice to a customer if the presiding judge or magistrate finds that notice may hamper the investigation).

42. See 18 U.S.C. § 2703(b) (2012) (authorizing disclosure, without providing notice to the customer, of electronic communications if the governmental entity requesting disclosure has a warrant), *vacated as unconstitutional by* United States v. Davis, 754 F.3d 1205 (11th Cir. 2014), *opinion vacated en banc* 573 F. App'x 925 (11th Cir. 2014), and *en banc in part* 785 F.3d 498 (11th Cir. 2015), *cert denied* No. 15-146, 2015 WL 4600402 (Nov. 9, 2015).

43. See *NorCal Tea Party Patriots v. IRS*, No. 1:13-CV-341, 2015 WL 1487112, at \*1 (S.D. Ohio Apr. 1, 2015) (alleging the IRS of partisan targeted scrutiny practices based upon the group's political predisposition).

44. *But see* INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION 8 (May 14, 2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

45. See *NorCal Tea Party Patriots*, 2015 WL 1487112, at \*1. Some of the procedural roadblocks include the IRS's claim that it cannot provide the requested discovery because tax returns are protected from disclosure. *Id.*

46. See Ed O'Keefe, *Tom DeLay Conviction Overturned by Texas Court*, WASH. POST (Sept. 19, 2013), <http://www.washingtonpost.com/news/post-politics/wp/2013/09/19/tom-delay-conviction-overturned-by-texas-court/>.

would probably tell all of us that it is very hollow. An investigation many times in political speech cases, campaign finance cases, if it is done the wrong way, the investigation is the harm, the allegation is the harm, long before there is a probable cause finding. Again, as I said before, in the academic context, the answer is clear. They cannot do that. In the real context, sometimes they can do that, and you can suffer those consequences.

[Applause.]

JUSTICE DAVID R. STRAS: Thank you. Our next speaker is Professor Destro, who is a Professor of Law and founding Director of the Interdisciplinary Program in Law and Religion at The Catholic University of America, Columbus School of Law. Among other notable accomplishments, Professor Destro once served as a Commissioner on the United States Commission on Civil Rights. His work spans a pretty broad swath of First Amendment law, including the religion clauses, but also includes the right to free speech as well. Please welcome Professor Destro.

[Applause.]

PROFESSOR ROBERT A. DESTRO: Well, thank you. It is great to be here. Let me first thank a couple of the people on the panel for giving me the opportunity to participate. I want to thank Eugene [Volokh] for inviting me to participate, and the members of the panel for including me in the discussion of a very important topic.

Let me begin with my experience as co-counsel in the *Susan B. Anthony*<sup>47</sup> case. In that case, we saw “in real time” what “First Amendment Due Process” really means. My remarks will draw from my lawyer’s “real time” experience in First Amendment litigation.

I thought that Aaron [Caplan]’s presentation on civil orders, civil harassment orders [set the stage very well]. I know that everybody laughed when we talked about the Wyoming definition of harassment as any action taken “with intent to harass another person . . . the person engages in a course of conduct reasonably likely to harass that person,”<sup>48</sup> but in real life, as I have told my students, “you cannot make most of this stuff up.” The reality is far more strange than anything the fertile mind of a law professor can dream up.

So my modest contribution today is going to be to focus on the importance of good lawyering in First Amendment cases. Professor Caplan’s discussion of the civil harassment proceedings underscores the wisdom of the late Justice Brennan’s observations in *Speiser v. Randall*,<sup>49</sup> that “the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents.”<sup>50</sup>

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47. 134 S. Ct. 2334 (2014).

48. WYO. STAT. ANN. § 6-2-506(b) (2015).

49. 357 U.S. 513 (1958).

50. *Id.* at 520.

I would like to make three basic points drawn from my own experience as a professor who teaches both constitutional law and legal ethics, and as an advisor to churches: “The church as a regulated industry” is the way I would describe it. My view is that the most basic due process issues are the ones that occur during the pleading, advising, discovery, and pretrial motion stages.

The first of the three points is the most important, so I will discuss it last. It is that ineffective assistance of counsel is as much an evil to be prevented or avoided in First Amendment cases as it is in criminal cases. Second, practicing lawyers often do not understand the process by which constitutional facts are pleaded and proved in First Amendment cases. Third, and lastly—and perhaps non-controversially—the problem begins with the way we teach Constitutional Law 101.

As I said: I will discuss these issues in reverse order.

Let me start by asking a question: *What are the basic skill sets that students should acquire in Constitutional Law 101?* I think that nearly all of us in the room today would agree that many students find constitutional law to be a difficult subject. Many find it extraordinarily difficult to grasp what Justice Brennan described as “the complex of strands in the web of freedoms which make up free speech.”<sup>51</sup> They also find it very difficult to understand the relational nature of constitutional disputes captured so well in Robert Jackson’s three-part analysis in *Youngstown Sheet & Tube v. Sawyer*.<sup>52</sup>

First- and second-year law students, at least in my experience, prefer rules. As we try to teach analysis, history, and our thoughts about the roles of judges in a democratic republic, they are using commercial outlines to teach themselves the rules. Unless they have been given an opportunity to work on a real case, or at least to work on a hypothetical that is based on a real case, they are not going to really understand the complexity of the first part of Robert Jackson’s observation that “constitutional lawsuits are the stuff of power politics in America,” but many of them will have virtually no understanding of the important role that lawyers and plain old civil procedure play in the process.<sup>53</sup> Jackson put it well at the end of that quote when he said, “the politics of power is a most important and delicate function, and adjudication of litigation is its technique.”<sup>54</sup>

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51. *Id.*

52. 343 U.S. 579 (1952). Justice Jackson, in concurrence, suggests that constitutional power disputes between the executive and legislative branches should be analyzed in the context of three situations: (1) “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum”; (2) “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only reply upon his own independent powers”; and (3) “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Id.* at 635, 637 (Jackson, J., concurring).

53. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 287 (1941).

54. *Id.* at 288.

Any experienced constitutional litigator knows that standards of review are not black-letter rules. They are instructions to lower courts and trial counsel on how to draft pleadings, conduct discovery, and present evidence. This is why Professor Philip Bobbitt, a number of years ago, suggested that we might want to re-conceptualize what a constitutional law textbook should look like.<sup>55</sup> Right now, they are collections of heavily edited cases that are often short on the facts, and they emphasize what appear to the untutored to be black-letter rules. He suggested that we might want to consider reimagining law school textbooks along the lines of business school casebooks, and that way to teach people how to deal with real cases.<sup>56</sup>

Viewed from this perspective, a case like *Iqbal v. Ashcroft*,<sup>57</sup> is not simply, as most students learn it, a civil procedure case involving the sufficiency of a pleading under Rule 8; it is a statement by the Court about the nature of the evidence that must be pleaded and proved in order to make a case to impose civil liability under the Constitution on a senior officer of the United States.<sup>58</sup> Nor is *United States v. Lopez*<sup>59</sup> a case about the nature and extent of congressional power under the Commerce Clause.<sup>60</sup> That is one issue. It is, to be sure, a Commerce Clause case, but to a trial lawyer, it is or should be about the jurisdictional facts that show, by a preponderance of the evidence, whether the defendant or his goods have moved in or utilized instrumentalities of interstate commerce.<sup>61</sup> Cases such as *Iqbal* and *Lopez* are much easier to understand—and to teach—if they are put into the procedural posture in which they arose. A series of short problems that asked the students and professors to view the case from a litigator's perspective or an advisor's vantage point would go a long way to improving and defining learning outcomes in constitutional law.

I might add, in view of Todd [Graves's] comments about the often surreal real world environment, learning about how real cases are litigated would also eliminate, I would think, what a Maryland judge asked me in a trial many years ago: “Why are you quoting the Constitution of the United States? This is Western Maryland.”

[Laughter.]

PROFESSOR ROBERT A. DESTRO: Let me give you an example of what I am suggesting. One of the first exercises I give my students in constitutional law is to write a letter to James Madison on behalf of William Marbury

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55. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982) (suggesting that there are indeed five “archetypes” of constitutional argument—an historical argument, a textual argument, a structural argument, and a prudential argument—instead of the traditionally exclusive “doctrinal argument[s]” grounded in mere precedent).

56. See *id.*

57. 556 U.S. 662 (2009).

58. See *id.* at 685–86.

59. 514 U.S. 549 (1995).

60. See *id.* at 558–59.

61. *Id.* at 566–67.

demanding the delivery of the commission that had been signed and sealed but not delivered before John Marshall left his office that night. Their initial reaction is to be nonplussed. They thought that *Marbury v. Madison* was about the power and duty of the judicial branch to say what the law is.<sup>62</sup> Well, it is about that, but it is also about William Marbury, his commission, and the remedies that might be available to him under the circumstances.<sup>63</sup>

The second point is related to the first: practicing lawyers just do not understand the process by which one puts a constitutional case together. In a nutshell, the second point is that the way we teach constitutional law has a profound effect on the way it is practiced, and this is a problem [that each of our panelists has identified].

Students need to understand how the cases they are reading got to the court. In order to do that, they have to think like lawyers. This means that we have to train them to think more about their clients than about the rules of law that they are trying to establish.

So imagine, if you will—I want you to do a little thought experiment with me—that the year is 1993, and you are standing, as I was, in front of a room not unlike this, full of lawyers who represent churches and religious organizations. All of them are trial lawyers. My job was to explain to them why churches were losing nearly every time they raised the First Amendment as an affirmative defense in cases involving sexual misconduct by clergy and other employees. Fast forward to 2005. You are the lawyer at the Christian Legal Society who is considering what stipulations might be drafted in order to make the case go a little faster and be litigated a little cheaper. Should we agree that the University of California’s Hastings Law School policy<sup>64</sup> was really an “all comers policy” that it is neutral both on its face and as applied, or should we start the long, slow slog through the depositions of the dean and the others who crafted the policy? Fast forward again to 2014, and you are advising a group of religiously-affiliated universities here in Washington, D.C. who are looking at new legislation that is going to penalize them for being religious organizations and teaching their views of biblical morality.

In every one of these cases the “due process” issues arise early and often. The lawyer must explain exactly what it is that the client needs to do and, basically, to show them how to do it.

I am going to close by making the last point, and that is that ineffective assistance of counsel is as much an evil to be avoided in First Amendment cases as it is in all others. I will give you a quick example that is taken from the record

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62. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

63. *Id.* at 138.

64. *See* *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 668 (2010) (rejecting a First Amendment challenge to the University of California-Hastings College of Law’s policy requiring official student organizations to accept all students regardless of their status or beliefs). The Supreme Court upheld the school’s policy noting that it was a “reasonable, viewpoint-neutral condition on access to the student-organization forum.” *Id.* at 669.

of one of the most significant Establishment Clause cases in the last fifty years: *Zelman v. Simmons-Harris*.<sup>65</sup>

At issue was the constitutionality of a school voucher program that allowed a limited number of low-income kids in the Cleveland school district to attend private and parochial schools anywhere in the state.<sup>66</sup> At the time it was challenged, the Supreme Court had drawn a distinction between cases in which government programs aid the schools directly and cases in which the parents got the money.<sup>67</sup> That was the rule.

One would think that stipulations on which the trial court based its ruling in the summary judgment motion would have been clear on this point. They were not. At best, the record was fuzzy concerning how the voucher program actually worked, and the lawyers writing the amicus briefs had to explain it. There are two briefs<sup>68</sup> where that “follow the money” story is told, but it is not in the record.

Justice O’Connor’s concurring opinion tells you how important those facts were.<sup>69</sup> She said, and I quote:

[G]iven the emphasis the Court places on verifying that parents of voucher students in religious schools have exercised “true private choice,” I think it is worth elaborating on the Court’s conclusion that this inquiry should consider all reasonable educational alternatives to religious schools that are available to parents. To do otherwise is to ignore how the education system in Cleveland actually functions.<sup>70</sup>

The remainder of her opinion, her concurring opinion, and her vote were not based on theory. Her vote was based on the plain old facts of the case. In making that point, she took a sideways swipe at Justice Souter, who dissented, by saying, “it places in broader perspective alarmist claims about implications of the Cleveland program and the Court’s decision in these cases.”<sup>71</sup>

So I end by telling you: “Look, due process starts [and ends] with good lawyering.” Not everybody who gets out of law school is qualified to litigate a constitutional case, but many who see it as the “stuff of power politics” want badly to do so. I would suggest here that the Federalist Society might make a great contribution to the improvement of “due process” in First Amendment cases by sponsoring some CLE courses on how to litigate constitutional cases. We need it. Thanks.

[*Applause.*]

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65. 536 U.S. 639 (2002).

66. *Id.* at 643–45.

67. *See id.* at 649.

68. Brief for Individual Freedom et al. as Amici Curiae Supporting Petitioners at 3–5, *Zelman*, 536 U.S. 639 (2001) (No. 00-175); Brief for Nat’l School Boards Ass’n et al., as Amici Curiae Supporting Respondent at 2, *Zelman*, 536 U.S. 639 (2001) (No. 00-1751).

69. *Zelman*, 536 U.S. at 672 (O’Connor, J., concurring).

70. *Id.* at 663.

71. *Id.* at 668.



JUSTICE DAVID R. STRAS: Thank you, Professor Destro. Anchoring our group today is Alan Morrison, who is the Associate Dean for Public Interest and Public Service at George Washington University Law School. For most of his career, Dean Morrison worked for the Public Citizen Litigation Group, which he co-founded in 1972 and directed for over twenty-five years. Among other courses, he teaches civil procedure and election law, and I think it is fair to say that there are very few areas of civil rights law in which he does not have at least some experience. I will turn it over to him.

[Applause.]

PROFESSOR ALAN B. MORRISON: So I want to begin by telling you how I start my civil procedure class and my constitutional law class. I tell my students I am going to change the name of the law school, and they look at me, and I say, “I want to change the name of this place from the law school to the fact school because facts,” as Bob [Destro] just mentioned, “really do matter in everything we see and do in the law.”

And so the question I want to address today is: how do we show or prove facts in First Amendment litigation? Sometimes it is easy when the plaintiff has a case like *United States v. O’Brien*.<sup>72</sup> You know that he burned the draft card.<sup>73</sup> That is not a problem of proving it. You know you want to make a contribution above certain limits. That is easy to prove. What is harder to prove and, thinking about proving is, how does the government prove its justification, or how do you, as opposing the government, try to respond when the government asserts certain interests as being their justification.

I am going to take the easy way out and talk about a case that I am currently litigating in the D.C. Circuit *en banc* that was heard late September called *Wagner v. FEC*.<sup>74</sup> This is a case in which Congress has passed a statute to 2 U.S.C. § 441(c)—recently re-codified as 52 U.S.C. § 30119—in which it forbids any individual who has a contract with the Federal Government from making a contribution in connection with any federal election to the President, Member of Congress, political party, political committees, ideological or otherwise.<sup>75</sup> You cannot make any contributions whatsoever. It applies to challengers. It applies to minor parties. It applies to candidates and everybody.

Under the federal system, the only candidates for federal office are the President and Members of Congress, but they have no authority under federal law to write any contracts. Occasionally, Congress will pass a bill that has a contract in it, but that is by far the exception. Most contracts are written and

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72. 391 U.S. 367, 369–72, 377–78 (1968) (finding that while the burning of a draft card constitutes speech according to the First Amendment, the indictment for burning the card was not an unconstitutional abridgment of his rights because there is a compelling government interest in efficiently conducting the draft).

73. *See id.* at 369.

74. 793 F.3d 1 (D.C. Cir. 2015).

75. *Id.* at 3.

approved by administrative officials at the agencies under very complicated and detailed laws dealing with government contracts.<sup>76</sup>

I have three plaintiffs. One of them was a law professor who had a consulting contract with the Administrative Conference of the United States for which she was paid \$12,000 for writing a 144 page paper and attending about ten meetings. The other two are former employees of USAID who took retirement and then were rehired as government contractors, sitting next to the very people they sat next to before, doing essentially the same kind of work that they did before when they were employees. They were allowed to make contributions then, but now that they are contractors, they cannot make contributions.

Corporations with government contracts, which are what I always thought were the major persons affected by this law, cannot make contributions themselves, but they can set up political committees. Their political committees have to bear the name of the corporation, and the corporation can solicit and pay for the solicitation of stockholders and officers of the corporation who can give to the political committee, and the political committee can make all the contributions that the corporation cannot. So the Boeing PAC, for example, can make contributions just like everybody else can, and of course, so can the officers, the shareholders, and of course, if you happen to have a limited liability corporation of which you are the sole stockholder and sole employee, you can make the contributions. Even though you have an LLC that has the contract with the government, it cannot make the contributions, but you can.

This law applies only to government contracts. It does not apply to grants, even though today, the Federal Government spends much more money on grants. There are many more grants that affect it, but it does not cover grants at all, and of course, it does not cover contributions that are rounded up by people who would like to be ambassadors and who actually make large donations through their bundling and get to be ambassadors. That is okay as long as they do not do it to get a contract.

There is an equal protection claim in this case, but I want to frame this as a First Amendment analysis, and I am going to assume that strict scrutiny does not apply, and that all that has to be shown is the appearance of corruption. The question is, how can the government prove the appearance of corruption? Now, in some cases, such as *McConnell v. FEC*,<sup>77</sup> in the part of the case that dealt with the party rules, there was actually a lot of testimony before Congress as to what

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76. See 48 C.F.R. §§ 1.101, 1.301(a) (2014) (outlining the standards for all government contracts and enabling administrative agencies to supplement the Federal Acquisition Regulations with additional regulations and procedures).

77. 540 U.S. 93 (2003), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). In *McConnell*, the Court held that the part of the Bipartisan Campaign Reform Act that attempted to eliminate the use of soft money—that is, money given to a political party to influence elections—was constitutional as the restriction on First Amendment political speech was minimal vis-à-vis the legitimate government interest in preventing the corruption of the election process. *Id.* at 138–40.

was going on, why the sponsors of the law wanted to expand the coverage to allow only certain kinds of contributions to be made by the parties.<sup>78</sup> Members of Congress, who are actually experts in this area, testified about it. And then there were some people, like lobbyists and others, who, as some want to say, committed truth by telling what they really were doing with this money when they gave it to the political parties. So in that case, you actually had some evidence.

The problem was, in this case, this law that I am talking about was not some recent amendment to the U.S. Code. This law was passed back in 1940 at a time when there were very few government contracts, although there were enough to be worried about. Coercion was already prohibited at this time, and there was some evidence of scandals, mostly people who were being asked to contribute to the Democratic Party or to buy advertisements of the Democratic Party book who were buying books at way above the market price of the books, and that was plainly an effective contribution. Nobody ever considered at the time actually putting a limit on contributions. They just said you cannot do it at all, and if you read the legislative history, there are some wonderful quotes in there from members who quote Justice Holmes who said, “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>79</sup> They thought that applied to government contracts, you have no constitutional right to have a government contract, and you certainly do not have a right to speak if you have a government contract, and we can penalize you by putting you in jail.<sup>80</sup> All right.

So the question then is, do you have to show—you the government—have to show some kind of scandals, and if so, what kind of scandals? Well there is no evidence of this, of course, because there is the law that has been in effect for many years. Although I have to tell you this, a number of my colleagues, including some of them who teach government contracts, were unaware of this law until I called it to their attention. In fact, they were much more worried about being sued over the law than they are worried about being a plaintiff in the lawsuit and having the FEC discover that they actually made contributions at a time when they were not supposed to be making them.

So how do we try to show this? Or, does the government have to show anything at all? Can they just simply say that there is an appearance of corruption? Or, do they have to have some evidence of this? The “this” being, of course, that contracts that will be awarded directly by federal employees or indirectly through Congress through the appropriation process, will be influenced by an otherwise contribution by a would-be contractor

We had a couple of people who had been witnesses, one who had run the government contracts program. He filed a declaration. He was deposed, and in

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78. *See id.*

79. *See McAuliffe v. Mayor of New Bedford*, 29 N.E.2d 517, 517 (Mass. 1892).

80. *See H.R. Rep. No. 93-1*, pt. 3, at 270 (1973).

the end, he said: "Sure. Anything is possible." There was no way we can rule out the possibility that somebody someday may have made a contribution that might have this indirect effect, that may have gotten them a government contract.

So the big question was, what does the FEC have to do to prove this? The FEC took the position that it could take legislative notice of legislative facts, and by that, it meant that it could cite newspaper reports, television stories, criminal cases that mostly were found in newspapers or other places like that, and that it did not have to put on any live witnesses that we could examine and cross-examine. The FEC did not have to put anybody on to be deposed. It did not have to put any affidavits in, and that these were all legislative facts in the context of the First Amendment.

I assumed that the facts were accurate; that is to say, the FEC reported what was there. The difficulty is they are only relevant if they have comparable situations to what we are talking about here, and the problem was you could not tell from the reports of most of these cases whether the situation was comparable for several reasons. First, it was because the laws on how contracts are let are very different in the states, which is where these examples came from, and municipalities. Second, the campaign finance laws were very different in these situations. And third, often you could not tell who the contribution came from. In many of the cases, the contributions came from people who, under the FEC scheme, would be allowed to make contributions, that is, the shareholders and officers, and not the individual contractors as well.

Some of these, of course, were bribes, criminal convictions under federal laws of different things, and the FEC said, "Well, this is a scandal, and that is a scandal, and we can use those to do the same thing." And so the real question is who should have the burden of showing what, in a case involving the First Amendment? Should the court be allowed simply to do what judges do in nonjury cases from time to time? This was ultimately a question of law. Take it for what it is worth, whatever that means. In fairness to the FEC—and I hate to be too fair to the FEC—this was seventy years ago that the law was passed, and so we did not know what was happening. It is hard to prove a negative over that period of time, but the basic question is, can Congress do this at all? Do they have the authority to make these kind of broad laws, and then what do you do about over-inclusion and under-inclusion? Why are grants not covered? Does Congress have to explain why the grants are not covered? Does the FEC? And what about corporations? If corporate PACs can make contributions, who has the burden of proof, and what do we mean by proving that there is no appearance of impropriety as well?

My favorite example in the case, and this is what the FEC said to my clients as to why the ban is okay. You are not completely forbidden from doing anything. You cannot make a contribution, but you can have a fundraiser. You can have the fundraiser at your house, and you can invite anybody you want, and they can bundle all the contributions you want. And indeed, you can actually contribute \$1,000 toward the cost of the fundraiser, invitations, food, and so

forth, but you cannot write a check for \$10. That is the rule that is supposed to guard against the appearance of corruption.

The question is, who has to justify what in this case, or should we just simply say that the government has to come forward with real evidence by real people to show the danger in the First Amendment? Or, some would say: “Is that a cop-out? Are you just assuming, essentially, strict scrutiny without being willing to call it that?” My own view is that this is the First Amendment, and that when government is trying to show that something bad is likely to happen, it ought to have to come forward with something more than rumors and newspaper reports and speculation. After all, we know from the *Bose*<sup>81</sup> case that courts will independently review findings of fact, but those findings of fact are only as good as the evidence that comes in, in the front end, to prove them.

Thank you very much.

[*Applause.*]

JUSTICE DAVID R. STRAS: Thank you, Alan. So I tried really hard to figure out a question that could apply to all five panelists, and I think I have come up with a question that could apply to three of them, and certainly, the others are free to interject as well. And by the way, after I ask my one question, please feel free to line up and get ready to ask questions because we will be taking questions from the audience.

This question comes from the conference call that we had before this panel when we were trying to decide what to name the panel. The question is: what role does procedural due process play, if any, in these types of questions? Professor Volokh said, “Well, not at all.” I found that interesting because I wrote an opinion last year dealing with orders for protection, and one of the hardest parts of the opinion was actually stating what the district court had to do on remand.<sup>82</sup> In the due process cases, we have the guidance of *Mathews v. Eldridge*<sup>83</sup> in terms of what procedures need to be provided.<sup>84</sup> But in the First Amendment context, there is really no similar guidance from the Supreme Court. So when we are talking about burdens of proof and additional procedures, what are the procedures required in First Amendment cases? How do the courts decide what procedures should apply to these types of claims?

[*Pause.*]

JUSTICE DAVID R. STRAS: Anyone.

PROFESSOR ALAN B. MORRISON: Am I in the three or the two?

[*Laughter.*]

JUSTICE DAVID R. STRAS: You might be in the three, actually.

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81. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

82. *See generally* *Rew v. Bergstrom*, 845 N.W.2d 764 (Minn. 2014).

83. 424 U.S. 319 (1976).

84. *See id.* at 335 (creating a due process analysis that balances interests by considering three factors: (1) the private interest of the parties affected; (2) the risk that the administrative procedures would erroneously deprive the private interest; and (3) the government’s interest).

PROFESSOR ALAN B. MORRISON: All right. Well, as I have indicated, I do think that we ought to start thinking about proving issues of fact by the way we prove them in the old-fashioned way, at least in the first instance, and maybe we should have some greater relaxation at the edges, but we at least ought to try to get witnesses on the stand, or at least at deposition, to say things that people can cross-examine them about instead of trying to cross-examine a law review article or a learned treatise of some kind, or a newspaper article. I think we need to get back to thinking about that.

I have written a piece in the *Lewis & Clark Law Review* about that issue in connection with the Brandeis brief,<sup>85</sup> which I got to be looking at, and I wrote it in connection with trying to prove facts in the context of same-sex marriage cases and how they go about proving various kinds of discrimination and justifications. I found myself very uneasy with how facile some of the efforts were to prove various kinds of issues that were on both sides of the case and how one should go about proving them. So I think that although the due process clause is not often spoken of in evidentiary terms, I do think it has some resonance, and we ought to think about it a little bit more.

PROFESSOR AARON H. CAPLAN: One of the things I actually like about *Mathews v. Eldridge*<sup>86</sup> is not so much its three-part test, because that does not guide you to many conclusions. But I do like the basic idea that we have a sliding scale, that the more serious the deprivation of liberty or property, the more procedures we are going to have. The application is very case-specific, so it is hard to draw any great principles, but at least I am willing to say I like the idea that the more serious the deprivation, the more procedures we should have.

I also like the idea that depriving someone of his or her freedom of speech is pretty serious. So if you put those two together, I cannot tell you exactly where that leads, but these two general principles are worth building into the discussion.

It is interesting that Professor Morrison mentioned the marriage cases, because that is something I was thinking about when he was speaking. In the wave of litigation that was happening four or five years ago, pretty much all of the cases challenging marriage laws were decided on summary judgment, and in that posture the government won. But in the first two cases that actually went to trial, the plaintiffs won. When the government, or the interveners who were defending the law, actually needed to put on witnesses and say what the government interest is, the judges who actually heard that testimony said: “Wow! That is really not persuasive.” So I want to second his motion to get more witnesses involved.

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85. Alan B. Morrison, *The Brandeis Brief and 21st Century Constitutional Litigation*, 18 LEWIS & CLARK L. REV. 715, 717–19 (2014) (exploring the types of evidence and the level of scrutiny that may be required in analyzing the constitutionality of statutes dealing with issues such as same-sex marriage).

86. *Mathews*, 424 U.S. at 334.

PROFESSOR ROBERT A. DESTRO: Well, I would certainly second that. The example that I gave at the end, if you are in the process of advising a client who is going to have to defend themselves in a same-sex benefits case, you are going to have to sit down with that client and figure out what they are going to say on the stand, and you are going to have to look at very seriously what the government's asserted interest is, and you are going to have to depose a number of people in order to find out how it is going to be administered. That is why I used the *Christian Legal Society*<sup>87</sup> case as an example, because the case turned eventually on a stipulation that basically proved the case.

So I think that the idea is when we teach con law, we teach it in terms of standards of review and any rational basis, but we never think of that in terms of evidence. What is the basis? Why should we defer? And what do you mean when you say the interest is compelling? There needs to be evidence on all of those things. Otherwise, all the Court is doing is citing rules.

I will give you one last example. We did a series of—we did some research a number of years ago on prison cases—and what we found is that every single time the formulation of the compelling state interest test was compelling state interest and no less burdensome alternative. That meant that the state lost, that when you looked at the cases where there was actually evidence and the state won, they never mentioned the normal standards of review. So when you actually look and see about how these cases work, cases on which there is really good evidence come out differently. I think Aaron just made that point.

PROFESSOR EUGENE VOLOKH: So I think that is quite true of the cases where the issue turns on factual evidence. There is this broader, interesting question of what procedures you use to discover the evidence and what procedures you can use to restrict speech in light of the evidence.

Should permanent injunctions, for example, be allowed in libel cases? The Pennsylvania Supreme Court says no, under the Pennsylvania Constitution.<sup>88</sup> The California Supreme Court and several others say yes.<sup>89</sup> The Texas Supreme Court says you cannot have an injunction against a future speech—even an injunction prohibiting specific statements—but you can have an injunction to take down existing speech.<sup>90</sup>

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87. 561 U.S. 661, 676–78 (2010).

88. See *Willing v. Mazzocone*, 393 A.2d 1155, 1158 (Pa. 1978) (holding that a permanent injunction prohibiting a protester from demonstrating with defamatory signs against a law firm violated Pennsylvania's Constitution because it abridged the protester's First Amendment right to free expression).

89. See *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 353 (Cal. 2007); see also *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 309 (Ky. 2010) (adopting the “modern view” that defamatory speech may be enjoined after a determination that it is false); *Retail Credit Co. v. Russell*, 218 S.E.2d 54, 62–63 (Ga. 1975) (affirming an order for injunctive relief to enjoin defamatory behavior); *Carter v. Knapp Motor Co.*, 11 So.2d 383, 385 (Ala. 1943) (granting injunctive relief, in the absence of adequate remedy at law, for a charge of continuing defamation).

90. *Kinney v. Barnes*, 443 S.W.3d 87, 89 (Tex. 2014).

But what kind of facts could one come up with to support one or another such approach, one way or the other? There certainly are interesting factual questions about what tends to cause an undue chilling effect and what does not. Yet it would be very hard to imagine the social science evidence that would demonstrate that.

So I do not know how to think about factual evidence here. Using *Mathews v. Eldridge* might be an interesting idea. I do not think any of those First Amendment cases—many of which, have roots before *Mathews*—actually use it. But, as Aaron points out, it is hard to see where *Mathews* exactly will get you because that is the nature of *Mathews*.

So I do not know if there is a general answer to how courts should resolve these questions: when you should change the burden of proof; when you should raise the quantum of proof; when you should allow criminal liability; or when you should allow third-party standing. There certainly has been no shared pattern for dealing with these things.

JUSTICE DAVID R. STRAS: Fair enough. Questions from the audience?

ATTENDEE: Hail Hans von Spakovsky who served on the FEC. I do have a procedural question for you. I always thought it was a little odd that, as you know, jurisdiction over going after violations of federal campaign laws are divided between the FEC and the Justice Department. The FEC has jurisdiction over civil violations. The Justice Department has jurisdiction over criminal violations. And my question is this. People have criticisms of the FEC, but the one criticism you never hear about the FEC is that it is engaged in a partisan prosecution, and that is because it takes a bipartisan agreement. You have to have commissioners of both parties agree to pursue an investigation, and that is not true with the Justice Department. The party controlling the White House has the ability, if it wants to, it can engage in partisan criminal prosecutions, and I wonder whether you all think that that should be stopped and whether responsibility for criminal prosecutions also should be shifted over to the FEC from the Justice Department.

PROFESSOR ALAN B. MORRISON: Well, I will answer that question. I do not think the FEC should have criminal prosecution authority. It would be a bad idea. There would probably never be another criminal prosecution, no matter what the facts were, but am I right that the Justice Department at least ordinarily will not bring a criminal prosecution unless it has been referred to it by the FEC?

ATTENDEE: That is incorrect.

PROFESSOR ALAN B. MORRISON: It is not correct. Okay. I apologize. I thought most of them came that way.

PROFESSOR EUGENE VOLOKH: So it is an interesting question, what the policy should be. Another question is: is there a constitutional basis for saying that certain prosecutions can only be brought by nonpartisan or bipartisan bodies? That would be a very strange rule under existing constitutional doctrine. I am not saying it necessarily will be the wrong rule, but it would be quite unusual, I think.



Some procedural guidelines like that are kind of taken off the table, in part, because of tradition. Traditionally, prosecutions are brought by executive agents who are responsible to a political official or a particular party. So that is an interesting question, and it may be more a matter of statutory design than constitutional command.

PROFESSOR ALAN B. MORRISON: The opposite position is the one that the executive branch took in *Morrison v. Olson*.<sup>91</sup>

PROFESSOR EUGENE VOLOKH: Yes.

PROFESSOR ALAN B. MORRISON: —when they said that all prosecutions had to be done by the President, or under the President. They could not give it to somebody else. That case was independent counsel.

JUSTICE DAVID R. STRAS: All right. I want to make sure Todd [Graves] has a chance to respond.

TODD P. GRAVES: In my experience, I would not want to see that taken over by the FEC because of the failings, or the shortcomings, in prosecution by the DOJ when they happen. I do not think they are either Republican or Democrat from the top. Those actors are very careful about what they do, and out of 100,000 people, it really is only a few handfuls that are actually political, one way or the other.

I think the real danger, in the DOJ, is the guy who is laboring in anonymity, and suddenly, he gets to make this decision. It is made, oftentimes, at a very low level, by someone who does not have a good understanding of the campaign finance issues. That is the danger, more than the Republicans want to get the Democrats and the Democrats want to get the Republicans. I think many times it is, sort of, the government official kind, that wants to get people who are spending a lot of money in politics, is more of a danger.

JUSTICE DAVID R. STRAS: All right. Did you want to—

PROFESSOR ROBERT A. DESTRO: Just one little point, and that is, picking up on Todd [Graves's] point. Having been involved in a case like *Susan B. Anthony* that has a lot of political angles to it, a lot of the problems we saw actually are better understood as legal ethics—prosecutorial discretion—questions, rather than problems of proof. The prosecutors did not actually care that they could not prove the case. They had their guy, and they were going to have his pelt on the wall. So these legal ethics questions—why are the prosecutors picking this case, and do they have the facts to do it?—are critical components of the due process issue. It is amazing to me that the low level of attorney competence often explains how First Amendment cases get screwed up.

JUSTICE DAVID R. STRAS: Next question.

NICK ROSENKRANZ: Nick Rosenkranz, Georgetown Law School. Several panelists have made reference to ways in which the First Amendment is unique,

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91. 487 U.S. 654, 696–97 (1988) (upholding the constitutionality of legislation that vests the appointment of independent counsel for investigating the executive branch in a U.S. Court of Appeals Special Division).

doctrinally unique and then theoretically unique. For example, the overbreadth doctrine, third party standing doctrine, things like this. And as a matter of the rationale for the First Amendment, this idea of chill, that we are particularly concerned about chill in the First Amendment context and maybe more than in other contexts.

The panelists, though, have not made mention of the unique grammar and text of the First Amendment. So the First Amendment unlike the other Amendments to the Bill of Rights, written in the active voice and says, “Congress shall make no law.”<sup>92</sup> Is there some relationship between the unique text of the First Amendment, on the one hand, and some of these unique doctrines that we have heard you talk about on the other hand?

JUSTICE DAVID R. STRAS: Anyone want to take that one?

PROFESSOR EUGENE VOLOKH: Much as I admire my co-blogger Nick’s work on this, I am a little skeptical about it for a couple of reasons. One is, actually, a lot of these things are filtered through the Fourteenth Amendment. Of course, the great bulk of First Amendment cases consist of cases involving restrictions on state and local law. And so there, the relevant provision is either that no state shall deny people a due process of law or that no state shall deprive people of liberty.

PROFESSOR ALAN B. MORRISON: [*Speaking off mic.*]

PROFESSOR EUGENE VOLOKH: Fair enough. I am not sure that that should matter, but maybe Nick might disagree. But in any event, it is the same language that applies, that incorporates the First, Second, Fourth, and such Amendments.

Also, one thing that struck me in doing the very limited historical research I have done on original meaning of the First Amendment—which I have done in the area of symbolic expression, civil liability, and the scope of the freedom of the press clause—is that (though you see some arguments to the contrary made in the Sedition Act debate), lots of people during that era viewed the First Amendment as very similar to state constitutional provisions on speech and press (mostly press, a lot more press than speech). And those provisions were written grammatically quite differently from the First Amendment. In fact, in many ways, they were written quite similarly to other constitutional protections in those state constitutions.

So that is what makes me hesitant to think that the particular text of the First Amendment as such—notwithstanding the similar treatment of the similar provisions of the state constitution, and the similar filtering of that through the Fourteenth Amendment—should affect the way we think about First Amendment procedures.

PROFESSOR ALAN B. MORRISON: I would also add that textual focus would mean that the President and the courts could issue rules and make decisions based on anti-First Amendment values, and I think that is a danger.

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92. U.S. CONST. amend. I.

PROFESSOR ROBERT A. DESTRO: I am going to disagree with you just a little bit on that one.

PROFESSOR ALAN B. MORRISON: Go ahead.

PROFESSOR ROBERT A. DESTRO: I think one of the easier ways to look at that question is via legislative jurisdiction. The fight over the meaning of the First Amendment was first anticipated in *McCulloch v. Maryland*.<sup>93</sup> Under John Marshall's reading in *McCulloch*, if the government could create a "Bank of the United States," it could, by parity of reasoning, have a "Church of the United States."<sup>94</sup> For exactly that reason, the Framers and supporters of the First Amendment in the States wanted assurances that Congress could use its powers to do that kind of thing. And that is why I think Hamilton's point about the federal government not having a "particle of spiritual jurisdiction"<sup>95</sup> is a good way to think about the First Amendment.

Consider this jurisdictional question as it relates to the expansion of the "administrative state" into the intricacies of press, church, political party, and the political process itself and saying: "Here is how you have to do business. Here is who you have to hire. Here is what you can and cannot say. You have to have . . ."—et cetera. So I will leave it at that.

JUSTICE DAVID R. STRAS: All right. We will take one more question, and we will have to have brief answers because we have only three minutes left.

MICHAEL FRANCISCO: Michael Francisco in the Colorado Attorney General's Office. My question is about proving this state interest, these facts that you have talked about. It seems like there is a number of sources to do that. You could point to what other courts have said a state interest is in a particular law. You could look to legislative history. You could hire an expert, or the lawyers could just make it up and argue. And I am wondering if you would comment on kind of the comparative value on different sources for proving a state interest.

PROFESSOR ALAN B. MORRISON: Well, I guess I would say as far as prior cases are concerned, if they made it up there, too, or if the lawyers in that case made it up, that would not—it is just repeating the same problem of the past.

I think the legislative history is useful in some cases, and we should not disregard it. Whatever Justice Scalia thinks about it as a general proposition,<sup>96</sup> I think in some cases, it is useful and more useful than anything else because at least it is contemporaneous with the explanation for why they were doing it.

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93. 17 U.S. (1. Wheat.) 316 (1819), *superseded by constitutional amendment*, U.S. CONST. amend. XVI.

94. *Compare id.* at 331–33 (holding that the Constitution impliedly grants Congress the power to establish a national bank when it is an appropriate means of exercising its enumerated powers); *with* U.S. CONST. amend. I (prohibiting Congress from establishing a state religion).

95. THE FEDERALIST NO. 69 (Alexander Hamilton).

96. *See* *Graham Cty Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring) (arguing that legislative history should not play a role in the Court's interpretation of a statute).

But as I say, I would prefer to have something closer to what we would see in a trial, maybe not exactly the same. I do not have any problem with expert witnesses into social sciences. They were put forth, as Robert [Destro] said, in the same-sex marriage cases, and they were debunked seriously by the other side and disregarded by the judges. But at least they have had an effort up there, and I am in favor of seeing those kind of witnesses on both sides of the controversy when there are disputes about whether a law would have one effect rather than the other.

PROFESSOR AARON H. CAPLAN: I want to pull in *Carolene Products*<sup>97</sup> into the comments that were just made. Nowadays, most of the discussion of that case is about the famous footnote. The merits are discussed less often, partly because it is actually very difficult to figure out from the opinion what was being argued. Here is what I think was going on. The Carolene Products Company wanted to have a trial to decide whether Congress's findings about the dangers of filled milk were rational, or if instead the law was just passed as a favor to the dairy industry. The Supreme Court said the company did not get to have a trial about that.

A lot of my students think that the reasoning *Carolene Products* actually goes too far. "If every single Member of Congress had been bribed, why should I not be able to put on evidence of that?" *Carolene Products* seems to say you cannot. So that is what you are up against—or that is what makes it easy for lawyers to go in and make up assertions about the government's interests and the proof supporting them.

PROFESSOR EUGENE VOLOKH: Let me just add one area of concern. I like the idea of evidence being introduced at trial. It sounds much like normal trials.

But the next step from that is, okay, this particular one trial judge has heard evidence on whether same-sex marriage is a good idea or whether some gun control policy is a good idea or whether some other economic, social, whatever facts are or are not the case, and now we review that for clear error because he got to see those experts and squint at them and said, "Ooh, I think you are lying. I think you cheated on that"—

[*Laughter.*]

PROFESSOR EUGENE VOLOKH:—"I think your statistics are just bad." Sure, in these situations we do not have deference to the legislature, and the decision is left to the courts. But I certainly do not want the process to be, "Well you happened to draw this trial judge who happened to draw this conclusion, and now we review that for clear error." That may be perfectly sensible as to, well, did this person pull the trigger or not—but not so good, it seems to me, as to these legislative facts. The Supreme Court ought to be able to review those.

PROFESSOR ALAN B. MORRISON: Reverse votes.

PROFESSOR EUGENE VOLOKH: Exactly, exactly.

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97. 304 U.S. 144 (1938).

JUSTICE DAVID R. STRAS: All right. I am under strict orders to keep this on time, so please thank our panelists for their wonderful presentations today.

[*Applause.*]

