1-1-2018

Free Speech and the Law of Evidence

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University of Georgia School of Law
Research Paper Series
Paper No. 2018-21

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To what extent does the First Amendment limit the ability of prosecutors to offer evidence of a defendant's past protected speech? As it turns out, the Supreme Court has touched on this question in only a handful of rulings, each of which it crafted to target only the distinctive facts of the case at hand. Many lower courts, however, have distilled from these decisions a sweeping, admissibility-favoring constitutional rule. According to that rule, the First Amendment imposes no limit on prosecutorial use of past-speech evidence—no matter how prejudicial—so long as it meets the minimum standard of evidentiary relevance. This approach is misguided. To begin with, it finds no support in the Court's past decisions, which in fact favor, rather than disfavor, a meaningful judicial role in evaluating the use of past-speech evidence. Even more important, a hands-off stance clashes with long-honored free-speech-supporting constitutional policies. As a result, this Article calls for judicial recognition of a new set of First Amendment protections that operate whenever challenged past-speech evidence involves expression on a matter of public concern. This build-out of existing doctrine comports with the Court's specialized protection of public-concern speech in a wide variety of settings. It also gains momentum from the Court's jurisprudence regarding constitutional review of generally applicable laws—in this case, the generally applicable law of evidence. On close examination, the doctrine in this field, and the policies that underlie it, provide strong support for an approach that imposes both procedural and substantive constraints on the use of public-concern speech to secure criminal convictions. Such an approach is offered here.

INTRODUCTION

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To what extent does the Free Speech Clause require judges to exclude proof of a criminal defendant's prior statements otherwise admissible under the rules of general evidence law? Assume, for example, that the government seeks to show that the defendant committed murder by bombing a government building. Assume also that the defendant denies any participation in the crime, but an alleged coconspirator says the defendant lit the fuse. To help prove that he did so, can the prosecutor offer testimony that the defendant once declared himself to be a member of Al Qaeda? That, even if the defendant never joined Al Qaeda, he had spoken about the justifiability of Jihad? That several weeks earlier he declared in a speech that current national policies justified violent revolution? That hours before the bombing he told a friend that the government had become intolerably misguided? Each of these items of evidence would tend to show that the defendant had a motive to engage in the bombing. As a result, they would appear to be relevant and thus admissible under the general law of evidence—or at least some judges might so rule.

The admission of any of these statements, however, would raise significant tensions with the First Amendment. Under well-settled Free Speech Clause law, after all, the government could not send the defendant to jail simply because he made these utterances or because of the views or associations that these utterances reflect. Yet revealing any one of these statements to the jury might have the same practical effect by decisively leading it to convict the defendant of the charged crime. Evidence of this kind also invites a finding of guilt based on justifications derived directly from the protected content of the defendant's past speech—reasons such as a perceived lack of patriotism, political radicalism, or potential for "off the wall" behavior. The question thus arises whether a prosecutor's use of this type of evidence—what is called here "past-speech evidence"—offends the First Amendment.

The practical problems posed by the use of past-speech evidence are far-reaching. Indeed, prosecutors offer proof of defendants' past statements on a daily basis in their efforts to secure convictions. And these prior statements—commonly called "admissions"—routinely come into evidence, even though they constitute instances of speech.[1] More subtly, but no less importantly, the analytical issues raised by the use of past-speech evidence ripple across major domains of First Amendment law. Most notably, these cases simultaneously bring into play Supreme Court jurisprudence regarding

[1] *See* FED. R. EVID. 801(d)(2).

(1) the special protections applicable to speech on matters of public concern; (2) the extent to which the Free Speech Clause can support as-applied challenges to generally applicable laws; and (3) the reach of constitutional limits that stem from so-called "First Amendment Due Process." It follows that the matters considered here both implicate and help illuminate foundational features of free-expression-law theory, doctrine and practice.

Indeed, issues regarding the government's introduction of past-speech evidence have surfaced in some of the highest-profile cases in American history, including the 1921 trial of Sacco and Vanzetti, the 1951 espionage trial of Julius and Ethel Rosenberg, and the 1969 trial of the so-called Chicago Eight.[2] Perhaps for this reason, analysts have suggested that past-speech-evidence controversies most often arise in times of "political tension."[3] Political tension, however, is a recurring component of the American experience, fueled by (among other things) anti-war protests, labor-related and other "counter-culture" movements, conflicts rooted in religious dissent, and the ever-churning challenges stirred by our nation's racial divisions. In recent years, for example, courts have faced challenges to prosecutorial use as evidence of rap-music lyrics, said to celebrate violence or drug use, authored by criminal defendants.[4]

Given these conditions, one might expect that courts and commentators by now would have worked through how evidence law and the Free Speech Clause should and do fit together. As it turns out, however, only one major scholarly article, written by Professor Peter Quint, has grappled with past-speech-evidence problems, and that piece is now more than four decades old.[5] In addition, prior judicial treatments are marked by inconsistency and a lack of analytical depth.[6] One consequence of all of this is that lawyers may

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[2] *See* Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622, 1623 n.4, 1624, 1645 (1977).

[3] *Id.* at 1678.

[4] *See, e.g.*, Andrea L. Dennis, *Poetic (in)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 (2007); Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 347-55 (2005).

[5] Another helpful treatment is Robert P. Faulkner, *Evidence of First Amendment Activity at Trial: The Articulation of a Higher Evidentiary Standard*, 42 UCLA L. REV. 1 (1994), though it largely builds on Professor Quint's earlier work. *See also* Helen A. Anderson, *The Freedom to Speak and the Freedom to Listen: The Admissibility of the Criminal Defendant's Taste in Entertainment*, 83 OR. L. REV. 899 (2004).

[6] *See* Amy Pomerantz Nickerson, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 U.C.L.A. L. REV. 841, 845 (2010) (noting "doctrinal inconsistencies and confusion").

well miss chances to register objections to the introduction of potentially excludable past-speech proof or to frame objections in proper terms.[7]

These dynamics stem in part from another curiosity: The Supreme Court has squarely confronted the sort of question considered here in only one prior case, *Haupt v. United States*.[8] In the seven decades since *Haupt*, however, free-speech doctrine has undergone a process of all-but-revolutionary change. This process has engaged the Court in building out a host of new speech-protective doctrines, especially with regard to speech on "matters of public concern,"[9] which push in favor of placing constitutional limits on the use of past-speech evidence. On the other hand, a restraintist approach might—at least at first blush—seem to find support in modern precedents that reflect judicial hesitance to vindicate as-applied challenges to so-called "generally applicable laws."[10] There is, however, a large problem with urging that the generally applicable character of evidence law precludes as-applied challenges to the introduction of past-speech evidence. The problem is that key decisions of the Court—such as *Sherbert v. Verner*,[11] *United States v. O'Brien*,[12] *Holder v. Humanitarian Law Project*,[13] and a host of First-Amendment-due-process rulings[14]—support the making of context-specific constitutional challenges to generally applicable laws. Moreover, the expression-protective features of these authorities find their driving force in policy-based reasons that carry over in powerful ways to past-speech-evidence cases. In sum, both the key authorities and their underlying logic dictate that courts must thoughtfully assess the admissibility of past-speech evidence, regardless of its relevance, pursuant to a speech-sensitive balancing analysis when prosecutors seek to use it at trial.

This Article develops these ideas in four parts. Part I canvasses the Court's rulings on past-speech evidence, demonstrating that (1) none of those rulings, apart from the well-aged decision in *Haupt*, deals squarely with the problem under investigation here and (2) despite the contrary views of many lower courts, no prior Supreme Court ruling—including *Dawson v.*

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[7] *See* United States v. Ring, 706 F.3d 460, 473 (D.C. Cir. 2013) (noting counsel's failure in lodging objection "to specify exactly what role constitutional considerations should play"); Anderson, *supra* note 5, at 901 (noting that missed opportunities sometimes arise because "the law in this area is undeveloped").

[8] 330 U.S. 631 (1947).

[9] Snyder v. Phelps, 562 U.S. 443, 453, 458 (2011).

[10] *See infra* notes 106-111 and accompanying text.

[11] 374 U.S. 398 (1963).

[12] 391 U.S. 367 (1968).

[13] 561 U.S. 1 (2010).

[14] *See infra* notes 149-182 and accompanying text.

Delaware[15]—supports exempting all relevant past-speech evidence from exclusion under the First Amendment.[16] Part II shows that the Court's post-*Haupt* rulings on expression related to matters of public concern support placing meaningful limits on the use of past-speech evidence. Part III turns to the Court's jurisprudence of generally applicable rules and demonstrates why that body of law likewise cuts in favor of, rather than against, the recognition of such constitutional limits.

Finally, Part IV considers what those limits should be. Drawing on precedents crafted in analogous contexts, it posits: (1) that trial judges should have to issue reasoned rulings, after hearing arguments away from the jury, whenever defendants object to prosecutorial use of public-concern-related past-speech proof, and (2) that appellate courts should subject adverse rulings on such objections to a form of review much more exacting than is applicable under the abuse-of-discretion standard ordinarily applied in this set of cases. Part IV goes on to reject a variety of possible substantive legal tests for assessing whether past-speech evidence is rightly subject to exclusion. The best approach, according to the synthesis developed in Part VI, is one that requires courts to weigh whether the government's interest in using any item of such evidence outweighs all the costs that introducing it would place on First Amendment concerns.

There is no pretense here that applying this standard will always be easy. Even more emphatically, there is no suggestion that defendants should routinely, or even commonly, succeed when they register constitutional objections to the use of past-speech evidence. If core First Amendment values are to receive their fair due, however, courts should afford such objections more than an unthinking, wave-of-the-hand dismissal when pubic-concern-related speech is in the picture. This Article points the way to how courts can—and, indeed, must—more thoughtfully deal with the serious constitutional problems posed by prosecutorial use of past-speech evidence.

I. THE LAW OF FIRST AMENDMENT LIMITS ON SPEECH-BASED EVIDENCE

Many trials involve the use of past speech as evidence. Most cases, however, do not concern the sort of constitutional issues focused on here. Confessions made to police officers, for example, come in the form of words. But no one would suggest that the Free Speech Clause routinely bars their admission. Other forms of speech-based evidence—for example, intercepted crime-planning communications ("Let's meet in an hour to plan the bank

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[15] 503 U.S. 159 (1992).

[16] *See infra* notes 53-59, 106 and accompanying text.

robbery.") and pre-crime inculpatory statements ("Tomorrow, I'm going to kill Mortimer!")—fall beyond the scope of this Article because they do not, even remotely, involve expression on matters of public concern.

Also outside the scope of this Article are three types of cases that *do* involve public-concern-speech evidence. First, litigants sometimes offer evidence of past speech by a government official in seeking civil law relief not against that official, but (at least in practical effect) against the government itself.[17] Courts, for example, have considered evidence of President Trump's pre-election statements about Muslims in lawsuits challenging the so-called "travel ban."[18] But an effort to secure injunctive relief from a government entity—which did not itself previously utter any words—is very different from a prosecutor's use of an individual's past speech as evidence of that very individual's commission of a crime.

Other cases involve prosecutorial use of past public-concern-related utterances made not by the criminal defendant, but by a third-party witness. In these cases, any burden placed on the speaker typically will be limited. Pro-defense witnesses, for example, might experience discomfort when prosecutors impeach them based on prior inconsistent statements they made on public issues. But any such burden on speech is far removed from a criminal conviction of a defendant supported by that defendant's own past pronouncements.

Finally, past-speech evidence might be offered not in criminal cases, but in civil proceedings. It may be that the arguments made here should carry over to the civil context,[19] especially because the Court often equates civil remedies and criminal sanctions in applying First Amendment limits.[20] Perhaps, however, close analysis will reveal reasons to treat civil and criminal cases differently in this context.[21] This Article thus leaves it to others to explore how the First Amendment bears on the use of evidence in civil trials, administrative hearings, and other noncriminal decision-making processes.

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[17] Among these cases are those in which injunctive relief is nominally, but not functionally, sought against a named government official under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908).

[18] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591 (4th Cir. 2017) (considering "numerous campaign statements expressing animus towards the Islamic faith"), *cert. granted*, 2017 WL 2722580 (U.S. June 26, 2017) (No. 16-1436).

[19] *See* Faulkner, *supra* note 5, at 15-16.

[20] *See, e.g.*, Garrison v. State of Louisiana, 379 U.S. 64 (1964); *see generally* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 993–94 (2012).

[21] *See* Dan T. Coenen, *Free Speech and the Criminal Law*, 97 B.U. LAW REV. 1529, 1563-77 (2017) (developing this idea in detail).

In sum, this Article considers—and considers only—*prosecutorial* use of *public-concern-related speech* made *by defendant-declarants*. The Supreme Court has touched on this subject in several rulings.[22] In only three cases, however, has it dealt specifically with objections to evidentiary use of such speech. And in only one case—that is, *Haupt*—did the Court confront a constitutional challenge to the use of past-speech evidence deemed relevant with respect to a disputed factual issue.

A. Haupt

The prosecution of Hans Max Haupt, a German-born naturalized American citizen, arose out of the surreptitious entry of a group of Nazi saboteurs, including Haupt's son, into the United States during World War II.[23] The indictment charged Haupt with conspiring to commit treason after his son arrived in the country. The overt acts said to support this allegation included Haupt's purchase of a car for his son's use, his helping his son get a job in a munitions plant, and his allowing his son to live in the family home.[24] At trial, Haupt argued that these actions were not motivated by a desire to aid the enemy, as the charged crime required, but instead by the natural parental impulse to help along one's child.[25] In response, the government offered proof, admitted by the trial judge, of statements "showing sympathy with Germany and with Hitler."[26] In particular, the prosecution proved that Haupt had stated that "after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, [and] that he would kill his son before he would send him to fight Germany."[27]

On appeal, Haupt argued that the government's use of these statements as evidence against him violated his First Amendment rights. Writing for a unanimous Court, Justice Black rejected this argument. In a single-paragraph treatment of the issue, he reasoned that "these statements were

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[22] *See infra* notes 97-102 and accompanying text (discussing *Wisconsin v. Mitchell*); *infra* note 258 (discussing non-criminal antidiscrimination-law cases); *see also* Barclay v. Florida, 463 U.S. 949 (1983) (deeming defendant's proven "desire to start a race war" relevant to establishing the aggravating factor of creating a "great risk of death to many persons," but focusing on defendant's non-evidence-law-based assertion that "racial motive" had improperly operated as a "non-statutory aggravating circumstance").

[23] Haupt v. United States, 330 U.S. 631, 633 (1947).

[24] *Id*.

[25] *Id.* at 641.

[26] *Id.* at 642.

[27] *Id*.

explicit and clearly were admissible on the question of intent and adherence to the enemy" because they showed "hostility to the United States."[28] At the same time, Justice Black observed that "[s]uch testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our government or quite proper appreciation of the land of birth."[29] *Haupt* thus leaves behind tricky questions. It is a knotty problem, after all, to separate statements that reflect "hostility to the United States" from statements that reflect a mere "difference of opinion with our government." In addition, the Court's terse analysis cannot fairly be viewed as doing more than resolving the discrete evidentiary dispute raised by the facts of the case. *Haupt* thus does not hold, or even suggest, that the First Amendment never blocks prosecutorial use of otherwise-relevant evidence, particularly under modern-day principles of free expression law. Indeed, *Haupt* signals—albeit while offering no particularized guidance on this point—that the introduction of past-speech evidence is "to be scrutinized with care."[30]

B. Post-Haupt *Cases*

The Court's 1984 ruling in *Abel v. United States*[31] sheds even less light than *Haupt* on the scope of constitutional limits on the use of past-speech evidence. There, the government offered proof of the membership of both the defendant and a defense witness in the Aryan Brotherhood, as well as testimony that Brotherhood members were sworn to lie on each other's behalf. The Court deemed this evidence admissible on the issue of the witness's bias and resulting lack of credibility. *Abel* is uninformative here, however, because the parties conceded that the "question is governed by the Federal Rules of Evidence"[32]—in particular, Rule 403, which provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, [or] misleading the jury." More specifically, the Court found no reversible error because the trial court had not "abused its discretion under Federal Rule of Evidence 403,"[33] especially because the "district court is accorded a wide discretion in determining the admissibility of evidence under the Federal

[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] 469 U.S. 45 (1984).
[32] *Id*. at 49.
[33] *Id*. at 53.

Rules."[34] In addition, the Court specifically distinguished the ordinary case involving past-speech evidence. It emphasized that the "highly probative"[35] proof presented in *Abel* "was not offered to convict [the defendant Abel] of a crime," but solely "to impeach Mills' testimony."[36] In sum, *Abel* offers no guidance in assessing objections—especially First Amendment objections—to past speech offered as substantive evidence of criminal behavior.[37]

The Court's latest encounter with a free-speech-based evidentiary objection came in *Dawson v. Delaware*.[38] That case concerned a sentencing hearing that followed a jury's finding that the defendant had committed the murder of a white victim during a burglary in the wake of a prison escape. At the sentencing hearing, the trial judge admitted evidence that the defendant was a member of an Aryan Brotherhood gang at the Delaware State Penitentiary, together with a stipulation that read in its entirety: "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware."[39] On these facts, the Delaware Supreme Court upheld the jury's imposition of the death sentence. It acknowledged that this evidence did not bear on the three death-sentence-supporting aggravating circumstances on which the prosecution had relied—namely, that the murder was committed (1) by an escaped prisoner, (2) during a burglary, and (3) for monetary gain. Even so, that court concluded that the evidence tended to establish the defendant's bad character, thus appropriately counterbalancing the defendant's mitigating evidence of good character as shown by his past acts of kindness to family members and voluntary participation in drug and alcohol rehabilitation programs.[40]

Writing for eight members of the Court, Chief Justice Rehnquist overturned the state court ruling on the ground that the challenged evidence had "no bearing" on the issues in the case.[41] He emphasized at the outset that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First

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[34] *Id*. at 54.
[35] *Id*. at 55.
[36] *Id*. at 53.
[37] *Accord* Faulkner, *supra* note 5, at 36 n.221.
[38] 503 U.S. 159 (1992).
[39] *Id*. at 162.
[40] *Id*. at 163.
[41] *Id.* at 168.

Amendment."[42] In this case, however, the challenged evidence lacked significance because the two-sentence stipulation about the Aryan Brotherhood provided only minimal information,[43] and the racist nature of the Brotherhood had no meaningful connection to the defendant's commission of a white-on-white murder.[44] The Chief Justice noted that "we would have a much different case" if the State had proved "that the Aryan Brotherhood is a white racist prison gang that is associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates."[45] On the actual facts, however:

> Whatever label is given to the evidence presented, … we conclude that Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence …, because the evidence proved nothing more than Dawson's abstract beliefs. [On] the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible.[46]

Justice Thomas filed a vigorous dissent, reasoning that even "abstract beliefs" can be relevant to the issue of "bad character," which the Court's past rulings had deemed broadly provable for sentencing purposes.[47] In addition, he urged that Dawson's gang membership was relevant for reasons that went beyond establishing his "abstract beliefs." In particular, Justice Thomas urged, this evidence tended (1) to demonstrate that Dawson "had engaged in some sort of forbidden activities while in prison"; (2) to prove his "future dangerousness"; and (3) "to rebut [his] attempt to show that he was kind to others."[48] Jurors, Justice Thomas reasoned, could draw on "their knowledge of the world," and "[t]he concept of a prison gang is not so mysterious that it requires an encyclopedic definition …."[49]

Responding to these observations, Chief Justice Rehnquist questioned whether in fact "jurors would be familiar" with the nature of prison gangs[50]

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[42] *Id*. at 165.
[43] *Id*. (noting "narrowness of the stipulation").
[44] *Id*. at 166.
[45] *Id*. at 165.
[46] *Id*. at 167 (citation omitted).
[47] *Id*. at 178 (Thomas, J., dissenting).
[48] *Id*. at 171.
[49] *Id*.
[50] *Id*. at 168 (majority opinion).

and concluded that the unembellished "Aryan Brotherhood evidence … cannot be viewed as relevant 'bad' character evidence in its own right."[51] For Justice Thomas, however, this line of analysis served only to "bend traditional concepts of relevance."[52] And this bending, for him, was especially problematic because he viewed the majority opinion itself as endorsing the admissibility of past-speech evidence so long as it is relevant.[53] In fact, however, the Chief Justice never embraced that position. Rather, he simply observed that a stronger showing of relevance would "have made this a different case"[54] and "might have avoided" the constitutional problem the Court had detected.[55]

The bottom line is that the Court's three key rulings on speech-based evidence have not removed, but instead have highlighted, the doctrinal indeterminacy that pervades this subject. The Court has set forth no legal test for assessing the admissibility of past-speech evidence. Nor has it even begun to suggest how this set of cases fits within the overarching structure of its now-elaborate free-speech jurisprudence. Indeed, as we have seen, only *Haupt* concerned a constitutional objection to the admissibility of evidence that the Court viewed as having (to use the words of *Dawson*) some "bearing on the issue being tried."[56] Without question, *Haupt* holds—as *Dawson* later confirmed—that the Constitution "does not erect a *per se* barrier" against the use of past-speech evidence.[57] But this proposition is neither controversial nor enlightening as to the key question considered here: To what extent *does*

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[51] *Id*.
[52] *Id*. at 174. (Thomas, J., dissenting).
[53] *See id.* at 179-80.
[54] *Id*. at 168.
[55] *Id*. at 167. *See, e.g.*, J. Christopher Naftzger, Note, *The Admissibility of First Amendment Protected Conduct as an Aggravating Factor in Capitol Sentencing Trials After* Dawson v. Delaware, 29 WILLAMETTE L. REV. 343, 363 (1993) ("*Dawson* … did little to establish a concrete rule concerning what constitutionally protected conduct is admissible"). In addition, even *Dawson*'s pronouncement about the absence of a "per se barrier" was targeted only "at sentencing." Thus, even if that statement somehow was meant to give rise to an admission-friendly just-show-relevance principle, that principle would not necessarily apply to trial (as opposed to sentencing) proceedings in light of the especially generous rules of admissibility that have long been applied in the sentencing context. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 820-21 (1991). Standing this idea on its head, one court has raised the possibility that any limit that *Dawson* imposes on the use of evidence in sentencing proceedings might properly be deemed inapplicable to trial proceedings, thus negating the operation of the First Amendment altogether in the trial context. Boyle v. Johnston, 93 F.3d 180, 185 n.9 (5th Cir. 1996). This suggestion, however, has things exactly backwards, in light of the law's distinctive openness to evidentiary submissions in sentencing proceedings.
[56] *Id*. at 168.
[57] *Id*. at 165.

the First Amendment block prosecutorial use of a defendant's past speech at trial even if it is relevant and otherwise admissible under the rules of evidence?

C. The Lower Courts

Not surprisingly, given the pervasiveness of both communicative activity and its routine use by prosecutors as inculpatory proof, lower courts have encountered a wide array of cases in which defendants raised First Amendment objections to the use of past-speech evidence. In response, some courts—especially before *Dawson*—signaled the need for serious-minded consideration of constitutional objections regardless of evidentiary relevance.[58] But most courts, especially in recent years, have taken a different view, concluding—often based on *Dawson*—that the First Amendment never forecloses the use of past-speech evidence so long as it is relevant.[59] Given the centrality of the relevance concept to evidence law,

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[58] *See, e.g.*, Feminist Women's Health Ctr., Inc. v. Mohammad, 586 F.2d 530, 544 (5th Cir. 1978) (excluding evidence because its "evidentiary value … is far outweighed by the defendant's First Amendment interests"); U.S. Football League v. Nat'l Football League, 634 F. Supp. 1155, 1171, 1181 (S.D.N.Y. 1986) (deeming "low probative value" to be "substantially outweighed" by the defendants' "strong interest in preserving their First Amendment rights"); United States v. Johns-Manville Corp., 229 F. Supp. 440, 453 (E.D. PA 1966); Ayers v. State, 645 A.2d 22, 39 (Md. 1994) (seeming to deem past-speech evidence inadmissible unless "at a minimum it is contemporaneous with the crime" or "part of the chain of events that led to the crime"); *see also* United States v. Ring, 706 F.3d 460, 473 (D.C. Cir. 2013) (suggesting the need to "put a thumb" on the Rule 403 scale to safeguard "First Amendment concerns"); United States v. Curtin, 489 F.3d 953 (9th Cir. 2007) (Kleinfeld, C.J., concurring) ("Barring exceptional circumstances…, what people read … should not be used to prove what they intend to do"); Weit v. Cont'l Ill. Nat'l Bank & Tr. Co., 641 F.2d 457, 467 (7th Cir. 1981) (excluding evidence under Rule 403 based on "the First Amendment right to petition which *Noerr-Pennington* protects"); Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1055 (Colo. 2002) (applying strict scrutiny in assessing First Amendment objection to bookstore-purchase-record subpoena, without questioning evidentiary relevance); *see also* Nickerson, *supra* note 6, at 864 (noting that "courts have employed a variety of multipart tests" that take account of the "defendant's… First Amendment interests" in handling efforts to secure evidence about the identity of persons who have made anonymous Internet postings).

[59] *See* Anderson, *supra* note 5, at 927 (noting that "many … cases … reduce the constitutional issue to one of relevance"). *See, e.g.*, United States v. Rembert, No. 16-2695, 2017 WL 1089541 (8th Cir. Mar. 23, 2017); United States v. Pierce, 785 F.3d 832 (2nd Cir. 2015); United States v. Walters, 350 Fed.Appx. 826 (4th Cir. 2009); Dressler v. McCaughtry, 238 F.3d 908 (7th Cir. 2001); Boyle v. Johnson, 93 F.3d 180 (5th Cir. 1996) (reasoning that "*Dawson* simply requires that the evidence be relevant"); United States v. Beasley, 72 F.3d 1518, 1530 (11th Cir. 1996); United States v. Barnett, 667 F.2d 835, 844 (9th Cir. 1982); State v. Rizzo, 833 A.2d 363,445 (Conn. 2003) (holding that, even if defendant's statement

these decisions may also suggest a sensitivity to the generally applicable character of that law.[60] On this view, because the basic relevance test of admissibility applies across the board to all evidence of all kinds, there is no good reason to meddle with that rule on constitutional grounds simply because a small number of its applications involve the potentially prejudicial use of past-speech proof.

Is this unwaveringly accommodating approach to the use of relevant past-speech evidence justifiable? We have already seen that it is not justifiable as a matter of stare decisis; in particular, the Court's rulings in *Dawson* and other past cases do not command this approach. But reaching that conclusion merely highlights the more basic question as to what governing rules should operate in this set of cases. Working through this matter brings into focus three more particularized questions: First, precisely what about past-speech evidence creates difficulties with its use under Free Speech Clause principles? Second, how do constitutional doctrines developed by the Court to deal with generally applicable laws—and the policies that underlie those doctrines—intersect with disputes about the admissibility of such evidence? Third, if the First Amendment requires judges to police the use of otherwise-relevant past-speech proof, what governing limits does it impose? The remainder of this Article explores these questions.

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constituted protected speech, "[it] was still admissible because it was relevant"); State v. Moore, 927 P.2d 1073, 1090 (Or. 1996). Some lower courts also have found support for this position in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), based on the Court's observation that: "The First Amendment … does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Id.* at 489. This passage, however, in no way establishes that the First Amendment *always* requires admission of past-speech evidence so long as it is relevant. A mother might well say, for example, "I do not prohibit my ten-year-old from riding her bicycle on roadways." To make such a pronouncement, however, does not mean that the mother does not *ever* prohibit her ten-year-old from riding on roadways—for example, by weaving through traffic on Fifth Avenue or pedaling down a dark desert highway (worse yet, "a dark desert highway" to the Hotel California! *See* THE EAGLES, *Hotel California*, *on* HOTEL CALIFORNIA (Asylum Records 1976)). *Mitchell*, in any event, presented no issue about barring all First Amendment objections to relevant past-speech evidence. *See infra* notes 97-102 and accompanying text. And even if the Court somehow meant to declare—however oddly and obliquely—that all free-speech-based challenges to proffers of relevant past-speech evidence were henceforth verboten, the significance of such a proclamation deserved (and still deserves) a more thoughtful treatment than a one-sentence dictum.

[60] *See, e.g.*, Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1283 n.2, 1315, 1340-41 (2005) (noting distinctive character of cases that "just" involve evidence-related free speech issues in discussing generally applicable laws); *see also* Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 297 (2009).

II. FIRST AMENDMENT VALUES AND PAST-SPEECH EVIDENCE

Courts routinely receive in evidence out-of-court statements made by criminal defendants. These statements range from confessions obtained by law enforcement authorities to electronically intercepted conspiratorial communications to boasts made to friends about having committed a crime. Few analysts would suggest that the First Amendment requires exclusion of evidence of this kind. But that point merely raises another question: How should courts identify the types of past-speech evidence that might qualify for exclusion based on free speech principles? Working through this conundrum requires courts to direct attention to an important body of post-*Haupt* law.

In a long and strong line of modern decisions, the Court has declared that the Constitution affords "special protection" to speech that addresses "matters of public concern."[61] This protection comports with the First Amendment's core objective of ensuring the "robust debate of public issues," and all the more so because "speech concerning public affairs is more than self-expression; it is the essence of self-government."[62] Stated otherwise, protecting speech on matters of public concern advances directly the First Amendment's most salient (or at least most uncontroversial) overarching aims—namely, to foster a well-functioning participatory democracy, to legitimate the actions of government officers, and to facilitate the search for truth on matters of the highest importance to society as a whole.[63] There is a less apparent point, too. Protecting highly provocative speech on political and social matters—that is, the sort of speech that is the primary subject of investigation here—links up in a special way with ensuring that citizens are afforded the chance to pursue individual self-realization through communicative activity.[64] This is the case because not many citizens are willing to bear the social (and perhaps legal) costs of "putting themselves out there" as speech-wielding, counter-culture iconoclasts. And if they are, the very radicalism that leads them to incur such costs seems likely to be tied tightly to a core sense of self.

Against this backdrop, the Court has chosen to give "broad protection" to speech on matters of public concern.[65] It has done so in part by defining that

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[61] Snyder v. Phelps, 562 U.S. 443, 453, 458 (2011).

[62] *Id*. at 452 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

[63] KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 935-940 (19th ed. 2016).

[64] *See id*.

[65] *Snyder*, 562 U.S. at 452.

term expansively to include all expression that can "be fairly considered as relating to any matter of political, social, or other concern to the community."[66] It does not matter that the "contribution … to public discourse" of a particular item of such discourse "may be negligible."[67] It also is of no consequence that an utterance is "inappropriate or controversial"[68] or "causes contempt."[69] To the contrary, "in public debate, [we] must tolerate insulting, and even outrageous speech."[70] These principles are so vibrant that the Court has drawn on them to deem such pronouncements as "God hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," and "Pope in Hell" as embodiments of speech on matters of public concern.[71]

In addition to defining the notion of public-concern speech broadly, the Court has seized on this concept to safeguard expression in many different legal settings. The rulings stretch across defamation law[72] to public-employee-expression cases[73] to the tort of intentional infliction of emotional distress[74] to statutes that limit media reports of purportedly confidential information.[75] And along the way, the Court has declared without reservation that speech on matters of public concern "occupies the highest rung of the hierarchy of First Amendment values."[76]

Courts accordingly must take account of public-concern-speech doctrine as they grapple with First Amendment limits on the use of expression-related evidence. Indeed, that doctrine bears on the formulation of those limits in two distinct ways. First, the public-concern-speech concept provides a previously endorsed, and thus ready-to-use, touchstone for separating speech-related evidence that is worthy of First Amendment scrutiny from speech-related evidence (in the form of confessions, crime-planning

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[66] *Id*. at 444.
[67] *Id*. at 460.
[68] *Id*. at 453.
[69] *Id*. at 458.
[70] *Id*.
[71] *Id*. at 454.
[72] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
[73] Rankin v. McPherson, 483 U.S. 378 (1987).
[74] *Snyder*, 562 U.S. at 443.
[75] Bartnicki v. Vopper, 532 U.S. 514, 534-35 (2001). *See also* Morse v. Frederick, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (identifying special need to protect public-school speech if it "can plausibly be interpreted as commenting on any political or social issue").
[76] *Snyder*, 562 U.S. at 452; *see also* Engquist v. Or. Dep't of Agr., 553 U.S. 591, 600 (2008). All these decisions comport with a broader point, too: In many contexts going back many years, the Court has emphasized that speech on political and social issues rests at "the core of the First Amendment." NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (describing "highly charged political rhetoric" this way).

conversations and the like) that is not. Second, the public-concern-speech doctrine now operates with much force in many cases, including many civil cases. And if public-concern speech merits this sort of "broad protection" in our civil law, it becomes hard to see why it should receive no serious scrutiny when it is offered as evidence to secure criminal convictions that might lead to years of imprisonment or even death.[77]

One possible response to this line of analysis posits that, whether or not public-concern speech is in the picture, the government cannot be regarded as "*abridg[ing]* the freedom of speech"—as called for by the text of the First Amendment—unless it moves to *sanction* speech itself, such as by making speech with specific characteristics the actus reus of a crime. It is well-settled, however, that the First Amendment sweeps more broadly than that.[78] Indeed, *Dawson* removes any doubt on this score. As the Court there explained, "the reach of the First Amendment" often blocks the state from "criminalizing … conduct" that takes the form of speech.[79] But the Amendment "goes further,"[80] including because, in proper cases, it "prevents [the state] from employing [speech as] evidence."[81]

Dawson thus confirms what many other cases suggest—namely, that prosecutorial deployments of past-speech evidence "impair,"[82] "burden,"[83] or "affect adversely"[84] protected expression in a manner that brings the First Amendment into play. To be sure, courts might nonetheless embrace a constitutional decision rule that exempts all uses of past speech "just" or "simply" as evidence from any form of judicial second-guessing so long as that evidence surpasses the minimum threshold of relevance.[85] Such a sweeping exemption from any constitutional protection, however, is hard to square with the idea that such uses of speech impose cognizable First Amendment burdens on speaker-defendants. And this conclusion becomes even more compelling when it is recognized that prosecutorial use of past-speech evidence encroaches on free-expression rights in no fewer than three

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[77] *But cf.* United States v. Herron, No. 10-CR-0615, 2014 WL 1871909, at *2-3 (E.D.N.Y. May 8, 2014) (dismissing Court's protection of public-concern speech in *Snyder* as inapplicable in the past-speech-evidence context).

[78] *See, e.g.*, NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that forced disclosure of membership list abridged members' speech rights even though those disclosures did not subject them to governmentally imposed criminal or civil sanctions).

[79] Dawson v. Delaware, 503 U.S. 159, 168 (1992).

[80] *Id*.

[81] *Id*. *See* Anderson, *supra* note 5, at 929 (emphasizing this point)

[82] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

[83] Shelton v. Tucker, 364 U.S. 479, 485 (1960).

[84] *NAACP*, 357 U.S. at 462.

[85] Volokh, *supra* note 60, at 1315, 1340.

separate ways: (1) by exposing defendants to conviction based on the factfinder's unfairly prejudicial consideration of such speech; (2) by subjecting defendants to convictions based on such speech even in the absence of unfair prejudice; and (3) by chilling provocative expression both by defendants and by others as well.

A. Unfair Prejudice.

The government's use of past-speech evidence burdens that speech, first and foremost, because that evidence might well come to weigh on the minds of jurors for legally impermissible reasons. Trials are complex affairs. Jurors find themselves in an unfamiliar setting. Judges provide them with instructions before, during and after the submission of evidence. Jurors must sift through large amounts of information. But when they learn that the defendant is a Nazi or a Klansman, that information is likely to stick in their minds. Such evidence—at least for most of us—is jarring, hurtful and deeply disturbing. Thus, "[i]n a case such as this, a jury is 'unlikely to be neutral with respect to the content of [the] speech,' posing 'a real danger of [its] becoming an instrument for the suppression of … vehement, caustic, and sometimes unpleasant expression.'"[86]

Whenever a trial court admits past-speech evidence, it is—like all evidence—admissible only for specific purposes. As the Introduction to this Article shows, for example, such evidence might help to show that the defendant committed a criminal act by suggesting an underlying motive for engaging in that behavior. Jurors, however, might view motive-related evidence as showing something more—a lack of honor, reason or restraint, future unpredictability, or outlandish foolishness.[87] They might conclude, in other words, that the defendant is bad, radical, or weird, and deserving of punishment for that reason.[88] The mysteries of psychological analysis make it difficult to say that all jurors in all circumstances will ignore such appraisals of character in the decision-making process, including when they are instructed to do so. Indeed, that is a major reason why the use of character evidence has long been subjected to far-reaching limitations under

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[86] Snyder v. Phelps, 562 U.S. 443, 458 (2011).

[87] *See, e.g.*, FED. R. EVID. 404. *See also* Quint, *supra* note 2, at 1657 (noting "particular dangers" of juries' assessments of this kind because of their built-in "majoritarian" cast and lack of sensitivity to systemic free speech values).

[88] *See, e.g.*, Stuart Fischoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCHOL. 795, 795-98 (1999) (noting expert testimony that juries use rap lyrics to reach guilty verdicts improperly because of "negative personality trait associations conjured up by the inflammatory lyrics").

general evidence-law principles.[89] Nor can community-representing juries be counted on to avoid improper condemnation of political and social dissidents. The radical nature of the speech of such persons, after all, itself brands them as outliers within the very communities from which those jurors are drawn. To be sure, some community members will share or sympathize with the world views of steely-edged naysayers. The more likely it is that prospective jurors will do so, however, the more likely it is that they will be excluded from jury service from the outset through the use of peremptory strikes.

Most important of all, to the extent that speech-driven character-related considerations improperly come into play in the course of the jury's work, the burden placed on protected speech is both obvious and profound. The difficulty, as Justice Holmes once declared, is that "defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow."[90] Professor Quint captured this concern in these words:

> Whenever evidence of unpopular but protected speech or association is introduced against a criminal defendant, the jury may make improper use of that evidence by penalizing the exercise of First Amendment rights. In a criminal trial, the jury as a constituent of the court exercises the power of the state. Hence the improper penalization of protected speech by a jury violates the First Amendment to the same extent as analogous action by any other governmental entity.[91]

The essential idea is that the use at trial of past-speech evidence often creates a perilously high danger of unfair prejudice to the defendant—unfair in the sense that the factfinder will consider the evidence for reasons that (1) go beyond its proper use as evidence and (2) disadvantage the defendant because of protected beliefs, associations, or statements. In other words, the introduction of past-speech evidence places a burden on speech by threatening to generate an improperly obtained conviction. Indeed, the inherent tendency of past-speech evidence to generate prejudicial use means

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[89] *See* Quint, *supra* note 2, at 1647, 1666 (developing the point that "limiting … instructions are ineffective as a prophylactic technique" including by quoting Justice Jackson's observation that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigated fiction"); *see generally* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions*, 9 LAW & HUM. BEHAV. 37 (1985).

[90] Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

[91] Quint, *supra* note 2, at 1641.

that all cases involving its use present the very same danger highlighted in *Dawson*—namely, that decisions adverse to criminal defendants will be driven by reasons that should have "no bearing on the issue being tried."[92]

B. "Fair prejudice"

As the foregoing analysis suggests, Professor Quint focused on the danger of unfair prejudice in arguing for careful judicial review of prosecutorial use of past-speech evidence. So, too, have other analysts.[93] In taking this tack, however, these observers have failed to highlight another key point—namely, that the use of past-speech evidence burdens expression rights even if a jury considers it in wholly Simon-pure fashion. To review the basics: Because only relevant evidence is admissible at trial, the admission of past-speech evidence means that the judge has found it to be probative as to some factual issue in the case. As a result, to the extent that a factfinder considers the evidence only for this purpose, the factfinder will not have used it in a way that is unfairly prejudicial. Even in these circumstances, however, past speech is (to say the least) being used *against* the defendant. And for this reason, prosecutorial use of past-speech evidence is problematic "in and of itself."[94] In other words, one burden on expression that arises from the use of past-speech evidence involves what we might call "fair prejudice," and this burden comes to bear on defendants in two separate ways. First, the burden arises because, once past-speech evidence is admitted, the jury can and should consider that evidence as tending to show the defendant's guilt. In other words, use of the evidence is *bad* for the defendant, and that bad result arises only because the defendant in the past engaged in protected speech.

Second, in some cases the use of past-speech evidence—even in the absence of unfair prejudice—will burden the defendant in the most profound of ways, because it will prove decisive to the jury's finding of guilt. In these

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[92] Dawson v. Delaware, 503 U.S. 159, 168 (1992). To be sure, some analysts will argue that prosecutorial use of "unfairly prejudicial" evidence that has some (though perhaps only minimal) relevance is more justifiable than the use of "unfairly prejudicial" evidence that, as the majority seemed to see things in *Dawson*, fails to cross the relevance line. But, regardless of this point, the *burden* placed on the defendant's speech in both cases is the same—that is, the disadvantage that arises because the jury may rely on that speech for unfairly prejudicial, and thus impermissible, purposes.

[93] *See, e.g.*, Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 324-26 (2005); Faulkner, *supra* note 5, at 20 ("[B]y far the greatest danger is that the truth-seeking function … will be compromised ….").

[94] Dennis, *supra* note 4, at 40.

cases, use of the evidence stands in the starkest tension with the core First Amendment principle that, when the government considers taking action against an individual, that individual "should not have the … question decided against him because of constitutionally protected conduct."[95] The difficulty is that, if past-speech evidence is the "straw that breaks the camel's back" in generating a successful prosecution, the government will have secured the defendant's punishment "because of" the defendant's past protected speech in a direct and obvious sense.[96]

For most lawyers and judges, it would be too extreme to say that this but-for-causation problem requires in all cases the exclusion of relevant past-speech evidence. But that does not change the fact that this but-for-causation exists. To be sure, many judges may deem the burden that arises from the "fair prejudice" effects of using past-speech evidence—including because of its potential but-for-causation effects—as far less worrisome than the burden that arises from the risk of "unfair prejudice." Even if that view of things is sound, however, the "fair prejudice" problem is real. And as a result, the "fair prejudice" burden on speech should count for something—and perhaps count significantly—as courts work to accommodate individual rights and societal needs as they come into conflict in these cases.

C. Chilling Effects

A third burden imposed by prosecutors' leveraging of past-speech evidence involves chilling effects. In particular, using public-concern speech as inculpatory evidence threatens to stifle such speech not only by criminal defendants themselves, but by social outsiders of all stripes. Notably, the chilling-effects problems posed by authorizing the evidentiary use of speech as evidence are very different from the problems posed by prohibiting speech in an outright way. This is so because a person who makes statements that are themselves entirely legal may be slow to consider the prospect that those statements could be used as inculpatory evidence in a later proceeding that does not involve prosecution for the statements themselves. The Court itself made this point in *Wisconsin v. Mitchell*,[97] deeming it "speculative" that a would-be speaker might think through things in this way. *Mitchell*, however,

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[95] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977).

[96] Put another way, in such a case, the conviction not only "may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects." Street v. New York, 394 U.S. 576, 594 (1969). In fact, the conviction *did rest* on such expression in a decisive "but for" sense.

[97] 508 U.S. 476, 489 (1993).

involved an issue entirely different from the one considered here and thus offers no meaningful guidance on the proper formulation of constitutional rules concerning the admissibility of past-speech evidence.

The Court in *Mitchell* confronted a facial challenge to a statute that required sentence enhancements for crimes motivated by bias regarding the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry."[98] The case thus did not present any issue regarding the propriety of introducing speech-based evidence in an actual case to prove a prohibited discriminatory intent. Instead, the defendant argued that chilling-effects concerns, coupled with the First Amendment overbreadth doctrine, required invalidation of the challenged law in its totality because some prosecutors might sometimes be permitted to introduce protected-speech evidence about a defendant's biased views.[99] Put another way, *Mitchell* involved an attack on each and every application of a hate-crime statute—a very common form of substantive law—based on an effort, novel in the extreme, to utilize the overbreadth doctrine.[100] Viewed from a wider angle, the Court in *Mitchell* did nothing more than reach the most predictable of results: It concluded that the potential use of past-speech evidence in some cases did not warrant the wholesale invalidation of all forms of state and federal antidiscrimination laws.[101] In taking this step, the Court never suggested that actual prosecutorial use in an actual case of politically or socially charged speech as evidence creates no risk whatsoever of generating problematic chilling effects.

Nor should it have. As noted earlier, the Court in *Mitchell* observed that outright prohibitions on speech will generate greater chilling-effect problems than trial-process rules that give rise to the possibility that speech might someday be used as evidence. But that does not mean that the evidentiary use of protected speech creates no chilling effects at all.[102] At least some potential speakers will contemplate the risk of a future evidentiary use of

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[98] *Id*. at 480.

[99] *Id*. at 488.

[100] The argument was highly adventurous because the overbreadth doctrine authorizes the facial invalidation of a statute when it has a substantial range of invalid applications. In *Mitchell*, however, the challenger did not argue that the hate crime law was overbroad in this traditional sense. Instead, he argued that the statute was rightly viewed as overbroad because it might have the practical effect of causing the introduction into evidence of protected-speech activity even if the statute itself properly outlawed only properly proscribable behavior.

[101] *Id.* at 487 (reasoning that hate-crime laws are not functionally distinguishable from other antidiscrimination statutes).

[102] *See* Nickerson, *supra* note 6, at 872 (noting, in this regard, that "the absence of empirical evidence of chilling effect" has not negated Court's recognition of such effects); Quint, *supra* note 2, at 1645-46 (developing the same point).

their statements, especially if they are repeat players in the criminal justice system or already enmeshed in litigation. Others may hesitate to engage in boundary-pushing commentary by a generalized (but still accurate) wariness that legal disadvantages lie in wait for boat-rocking agitators who do not hold their tongues. And that generalized wariness, in turn, might well emanate in part from prosecutorial use of past speech as evidence.

Chilling effects may be particularly acute for specialized communities of speakers. In recent years, for example, the use of rap-music lyrics as evidence has generated widespread media coverage. Rap artists, like others, follow the news, especially news that involves their own field of endeavor. Thus, the risk arises that some artists will water down the edginess of their lyrics because they know those lyrics might later be used as evidence against them. Indeed, other legal analysts (who know much more about rap music than I do) have concluded that this risk is very real.[103]

Against this backdrop, it is not surprising that thoughtful commentators—including no less of a First Amendment luminary than Thomas Emerson—have concluded that the evidentiary use of past speech causes problematic chilling effects.[104] Moreover, the danger presented by these effects has only

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[103] *See* Dennis, *supra* note 4, at 5 (noting "negative impact [that use of rap music as evidence] will have on the production and quality of art"); *id.* at 40 (same); Jason E. Powell, Note, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 499 (2009) (citing views of practicing lawyers that "using rap lyrics as evidence … will lead to mundane, unprovocative art"); *id.* at 515 ("When courts use creative devices as evidence of their creator's knowledge or intent to commit a crime, the result is a chilling effect," including "a chilling effect on the rap music genre").

[104] *See* THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 405-07 (1970) (asserting that "expression may be seriously inhibited when the speaker knows that what he says can be used against him at a later time if some unforeseen action ensues, can be taken into account by a jury in determining his state of mind in performing a subsequent act, or can perhaps be the decisive factor in a jury's general verdict against him"); Anderson, *supra* note 5, at 901 (urging that "the potential for a chilling effect on listeners' rights under the First Amendment" based on the compelled provision of evidence "is very real"); Faulkner, *supra* note 5, at 12; Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 890 (1988) (citing the prospect of individuals' fears that "constitutionally protected statements would come back later to haunt them"); Nickerson, *supra* note 6, at 847; Quint, *supra* note 2, at 1645-46; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 926 n.325 (1970); Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872, 894 (1970). For some judicial treatments, see Dawson v. Delaware, 503 U.S. 159, 169 (1992) (Blackmun, J., concurring) (noting "the potential chilling effect that consideration of First Amendment concerns at sentencing might have"); United States v. Ring, 706 F.3d 460, 473 (D.C. Cir 2013) (noting that "'chilling' concerns" resulting from evidentiary use "are especially powerful where political speech is involved"); *but see also* Dressler v. McCaughtry, 238 F.3d 908, 915 (7th Cir. 2001) (downplaying "potential chilling effect").

risen in recent decades with the explosion of modern communications technologies. Of particular significance, acts of expression today routinely take place on the Internet, thus locking them into a retrievable form, and even brief rants can be captured on hand-held cellphones and similar easy-to-use devices. The practical point is that the making of speech in permanently recorded way makes that speech much easier for prosecutors later to discover and deploy when the need arises.[105] This reality, in turn, compounds the risk that would-be speakers will be deterred from flying the flag of dissent at full mast, precisely because they know that their chosen words will be available for use by the government, including as evidence, at a later time.

None of this means that most Internet speakers now will routinely steer clear of sharing extremist views in forms they otherwise would freely put to work. That is neither the case nor the point. The point instead is that there is reason to suspect that *some* speakers will hold back in *some* circumstances to *some* degree, in part because what they say might later be used as evidence against them. And that is what a chilling effect is.

III. FREE SPEECH, EVIDENCE, AND GENERALLY APPLICABLE LAWS

As the foregoing discussion shows, prosecutorial use of past-speech evidence places a burden—indeed, a complex, multi-part burden—on protected expression. Even so, perhaps this burden should not give rise to any meaningful constitutional restraint. We have seen, for example, that lower courts have read *Dawson* to foreclose the imposition of free-speech-based limits on the use of relevant past-speech. But we also have seen that this reading of *Dawson* is misguided.[106] Is there another line of argument that thoughtful prosecutors might put forward as they urge courts to take a strictly hands-off approach to these cases? One can imagine an argument that goes like this: Generally applicable evidence law is not subject to Free Speech Clause challenge precisely because it is generally applicable in character. This is the case because generally applicable laws are in their nature far-removed from laws that target speech itself, in part because their widespread operation against non-speakers provides assurance that they were adopted for salutary reasons wholly unrelated to the burdening of constitutionally protected behavior.

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[105] *See* Dennis, *supra* note 4, at 40-41 (emphasizing "exceedingly public" nature of the Internet and that "[l]aw enforcement and prosecutors will train their sights on … widely accessible types of creative expression").

[106] *See supra* notes 50-57 and accompanying text.

The poster child for this line of reasoning is *Employment Division v. Smith*.[107] There, the Court relied on the generally applicable character of the law at issue to reject an as-applied Free Exercise Clause challenge to a ban on peyote use raised by an individual who had ingested peyote as a sacramental act. Nor does *Smith* stand alone. The Court has relied on the generally applicable character of challenged laws to resist their invalidation in a number of non-free-exercise cases.[108] Indeed, the Court in one earlier ruling—albeit both controversially and confusingly—hinted that this same approach should apply in free-expression context.[109]

These authorities provide ammunition for those who oppose placing constitutional limits on prosecutorial use of relevant past-speech proof because evidence law is generally applicable in character. That body of law, after all, does not target speech. Instead, it deals with all forms of evidence. In addition, the purposes of evidence rules have nothing to do with "the suppression of free expression";[110] rather, those rules, focus on ensuring the fair, orderly, and well-informed resolution of factual disputes.[111]

Indeed, the law of evidence is generally applicable in a special way. This is so because the typical generally applicable law (such as the peyote ban at issue in *Smith*) has a one-way-street quality in that the burdens it imposes do not extend to the government. Put another way, such a law exposes ordinary citizens, and only ordinary citizens, to the limits and sanctions that the government has imposed. The law of evidence, in contrast, simultaneously gives benefits to and puts burdens on both private citizens and the government itself, including by subjecting all parties in any trial to the rule that all relevant evidence is presumptively admissible against them. This dynamic might cause courts to hesitate to place First Amendment limits on the operation of evidence rules in a way that disadvantages only the state.

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[107] Emp't Div. of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

[108] *See* Exxon Corp. v. Eagerton, 462 U.S. 176, 194 (1983) (applying the Contracts Clause); s*ee also* Washington v. Davis, 426 U.S. 229 (1976) (refusing to apply heightened Equal Protection Clause scrutiny solely because of a law's minority-disadvantaging effects).

[109] Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

[110] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[111] In addition, some policy reasons that support the Court's ruling in *Smith* seem applicable in the past-speech-evidence context. Thus, just as in *Smith*, applying a bright-line generally-applicable-law rule in this context would ease the decision-making task and complicate judicial efforts to smuggle personal considerations into the decision-making process. Indeed, one might say that the *Smith* principle should control *a fortiori* in this setting. On this view, Mr. Smith's spiritually inspired peyote use was itself the gravamen of the charged criminal offense. In free-expression-evidence cases, in contrast, speech comes before the factfinder as just "one link in a long chain of evidence." *See, e.g.*, Dressler v. McCaughtry, 238 F.3d 908, 915 (7th Cir. 2001).

Those judges might reason that, given the two-way-street nature of the law of evidence, it is inappropriate to install a one-way-street constitutional restriction that limits the prerogatives only of government prosecutors. At the very least, some judges might say, the only properly recognized constitutional limit in this field should focus (a la *Dawson*) on evidentiary relevance, because such a limit reinforces—rather than undermines—the long-recognized generally applicable principle that all relevant proof is presumptively admissible at trial.

This line of argument may have a surface appeal. But it suffers from a fatal flaw. The problem is that the argument fails to take account of the full body of the Court's generally-applicable-law jurisprudence—and, even more important, the policy concerns that have driven the Court's key precedents in this field. Indeed, four separate components of the Court's doctrine undermines the no-review position founded on the generally applicable nature of evidence-law rules: (1) the Court's past declaration that laws challenged on free speech grounds (in contrast to laws challenged on free-exercise grounds, as in *Smith*) are not immune from constitutional attack based on their generally applicable character;[112] (2) the Court's particular insistence that generally applicable laws that place "direct-in-effect" (as opposed to "incidental") burdens on protected speech require close judicial scrutiny; (3) the Court's insistence, even in the *Smith* case, that otherwise operative limits on judicial review do not apply when the challenged law, even though generally applicable, requires "individualized" governmental determinations about "eligibility" issues; and (4) the Court's longstanding endorsement—including in cases that involve the government's handling of evidence—of speech-protective "First Amendment due process" restrictions.

It merits emphasis that none of these four means of avoiding *Smith*'s generally-applicable-rule logic in this context is farfetched; indeed, each one has its origins in settled precedent and has much to be said in its favor. Even more important, the underlying reasons that have given rise to each of the

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[112] Putting to one side the Court's ruling in the *Cohen* case, *see infra* notes 117-122 and accompanying text, the one arguable exception to this proposition was recognized in a line of cases culminating in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). There the Court dealt with the application to a bookstore of a municipal ordinance that mandated a year-long closure of any business site on which "lewd activity" occurred—in this case, primarily acts of prostitution. The Court held that this law was not subject to any form of First Amendment review, but its reason for doing so was that the target of the government's action was the lewd conduct, which had "nothing to do with books or other expressive activity." *Id.* at 707. In contrast, in past-speech-evidence-cases, the burden that is placed on the declarant-defendant stems directly from that individual's engagement in past, protected speech itself. Accordingly, *Arcara* is beside the point here.

lines of precedent support the case for meaningful First-Amendment-based scrutiny in dealing with past-speech evidence. In sum, four already-established bodies of generally-applicable-law doctrine, especially when viewed as a whole, offer powerful justifications for imposing significant constitutional limits on the evidentiary use of past protected expression.

A. O'Brien *and Generally Applicable Rules of Evidence*

As we have seen, some judges might seek to immunize evidence law from as-applied attacks because of its generally applicable character. There is, however, a front-and-center problem with this line of analysis: In contrast to its approach to free-exercise cases, the Court long has refused to apply a rule of automatic validation to generally applicable laws in applying the Free Speech Clause.

This story begins with *United States v. O'Brien*.[113] There the Court upheld the conviction of a draft-card-burning war protester under a law that, in generally applicable fashion, prohibited the mutilation of documents issued by the Selective Service System. Taking an approach fundamentally different from that of *Smith*, however, the Justices did not reject the constitutional challenge simply because the mutilation ban was generally applicable in character. Instead, the Court undertook a case-specific balancing analysis, inquiring whether the government interests offered in support of this statute qualified as "substantial" and whether there existed an adequate "less restrictive" alternative for advancing those interests.[114] In short, the Court directed what it later described as "intermediate scrutiny" at the speech-specific application of the statute to the defendant.[115] Nor does *O'Brien* stand alone. In later cases—including controversial post-*Smith* cases involving the claimed free-speech rights of nude dancers—the Court has continued to apply this intermediate-scrutiny style of review to Free Speech Clause challenges to generally applicable laws.[116]

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[113] 391 U.S. 367 (1968).

[114] *Id.* at 380-82.

[115] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661–62 (1994).

[116] In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), for example, the Court encountered a challenge to a generally applicable ban on nudity in public places, as applied to an erotic dancer who performed at a nightclub. All nine Justices accepted the premise that nude dancing embodied protected speech. Having joined the Court in doing so, however, Justice Scalia went on to advocate that the Court should abandon the *O'Brien* approach in light of *Smith*, thus rendering the nudity ban automatically immune from First Amendment challenge. *Id.* at 579-80 (Scalia, J., dissenting). *See also* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001) (advocating the same approach). Every other member of the Court, however, employed the *O'Brien* methodology. *See* Dan T. Coenen, *Free Speech*

There is, however, more to the story because of the Court's opinion in *Turner Broadcasting v. FCC.*[117] There, Justice Kennedy asserted that under present-day doctrine "a generally applicable law *may or may not be* subject to heightened scrutiny under the First Amendment."[118] In support of this seeming retreat from *O'Brien*, however, Justice Kennedy cited only one case, *Cohen v. Cowles Media, Inc*.[119] In that case, the Court rejected a First Amendment challenge to a promissory-estoppel-based damages judgment entered against a reporter who had breached an agreement to keep secret a news-source's identity. Moreover, in doing so, the Court emphasized that the state promissory-estoppel law was "generally applicable" in nature.[120] As Professor Eugene Volokh has properly explained, however, the Court focused on the generally applicable character of promissory-estoppel law in rebuffing a Free *Press* Clause argument, rather than a Free *Speech* Clause argument, advanced by the defendant-reporter.[121] In other words, the Court ruled that the general applicability of the promissory-estoppel cause of action meant that the reporter, regardless of his role as a member of the press, was entitled to no greater First Amendment protection from liability for promise-breaking than any other promise-breaking speaker. As for any separate Free Speech Clause challenge, Volokh has further (and again soundly) explained that the Court's ruling was extremely narrow. It held at most that the reporter, precisely because he promised not to communicate the source's identity, had voluntarily waived any Free Speech Clause right he otherwise might have been able to invoke to escape the state's restriction on speech.[122]

The foregoing analysis signals that *O'Brien*'s intermediate-scrutiny approach remains fully operational in cases that involve free-speech-based challenges to the generally applicable law of evidence because—to say the least—involuntarily becoming a criminal defendant does not bespeak a voluntary waiver of one's Free Speech Clause rights. At the same time, the operation of the *O'Brien* test in this context does not ensure that courts will invoke that test to block the admission of past-speech evidence. Indeed, many commentators have argued that the *O'Brien* standard has proven so

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and Generally Applicable Laws: A New Doctrinal Synthesis, 102 IOWA L. REV. ___ (forthcoming 2017/2018; draft on file with author) (collecting other cases as well, including the Court's follow-up nude-dancing case, City of Erie v. Pap's A.M., 529 U.S. 277 (2000), at pp. 36, 42-43 of draft).

[117] 512 U.S. 622 (1994).

[118] *Id.* at 640.

[119] *Id*. at 622.

[120] *Id*. at 623.

[121] Volokh, *supra* note 60, 1294-96.

[122] *Id.* at 1297.

toothless in actual operation that it affords no meaningful protection to speakers in any context at all.[123] This depiction, however, overstates the limitations of *O'Brien*-style review. The key point is that the *O'Brien* standard requires courts to apply a level of scrutiny described by the Court itself as "intermediate," and the Court has invoked intermediate scrutiny in many cases to limit the operation of speech-burdening laws.[124]

So, why has the Court refused to overrule *O'Brien* in the wake of *Smith*? The basic reason is that judicial protection of an "uninhibited, robust, and wide-open" freedom of expression lies at the heart of our democratic system.[125] And the sort of expression involved in past-speech-evidence cases puts that concern at its zenith precisely because those cases involve the burdening of speech on matters of public concern.[126] For this reason, by way of example, past-speech-evidence cases raise very different considerations than the nude-dancing cases in which the Court found no violation of the *O'Brien* test.

No less important, past-speech-evidence cases present more pressing concerns than even *O'Brien* itself, although that case also involved speech on a matter of public concern. Why? Because, as others have noted, the speaker in *O'Brien* had many ways to communicate his message without burning his draft card—including by decrying the Vietnam War in front of the very same sympathetic crowd, while burning other objects, including even an exact replica of his draft card.[127] In contrast, when (for example) "gangsta rappers" find themselves pressured to water down song lyrics, something far more problematic is occurring because the result of doing so involves a fundamental shift in *the content* of the intended message—perhaps to the point that the resulting lyrics no longer qualify as gangsta rap at all.

In sum, notwithstanding the Court's hands-off free-exercise ruling in *Smith*, the hands-on free-speech ruling in *O'Brien* remains good law, and applicable in this setting in a particularly powerful way. As we soon will see, a form of judicial scrutiny even stricter than the one recognized in

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[123] *See, e.g.*, Larry A. Alexander, Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory, 44 HASTINGS L. J. 921, 945 (1993).

[124] *See* Coenen, *supra* note 116, at 43-45.

[125] New York Times v. Sullivan, 376 U.S. 254, 270 (1964). *See generally* Coenen, *supra* note 116, at 35-36 (developing this idea).

[126] *See supra* notes 61-77 and accompanying text. Another distinction arises out of the special concern of the religion clauses with ensuring that government institutions take a neutral view of religious institutions and practices. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 60 (1985). *See generally* Coenen, *supra* note 116, at 34 (developing this distinction).

[127] *See, e.g*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 983 (2d ed. 1988).

O'Brien would seem properly to apply to prosecutorial efforts to use past-speech evidence. At the least, however, *O'Brien* signals that the operation of evidence rules should have to survive a meaningful form of judicial review, notwithstanding their generally applicable character, when the government seeks to use those rules to introduce past-speech proof against criminal defendants.

B. Past-Speech Evidence and Direct-in-Effect Burdens on Expression

Another line of Free Speech Clause authority confirms that judges should thoughtfully police prosecutorial use of past-speech evidence, whether or not it qualifies as relevant. This body of doctrine teaches that generally applicable laws require especially "demanding" scrutiny[128] when the application of such a law imposes not just an *O'Brien*-type "incidental" burden on speech, but a burden that qualifies as direct in effect.[129]

The point is illustrated by *Holder v. Humanitarian Law Project*,[130] which involved an as-applied Free Speech Clause challenge to a federal statute that prohibited the provision of "material support" to any government-listed terrorist group. Following this statute's enactment, a nonprofit organization sued to block the law's operation to the extent it precluded the organization from training a terrorist group's members about peaceably pursuing the group's underlying aims.[131] According to the organization, this application of the law violated the First Amendment because the training the organization sought to engage in plainly involved protected speech. The government's counterargument centered on the claim that the statute was subject to, and satisfied, the *O'Brien* test. In its view, the material-support law qualified as generally applicable because most of its applications—for example, its applications to defendants charged with transferring weapons or cash to terrorists—did not involve training or other forms of expression.[132] Thus, according to the government, the applicable legal standard was *O'Brien*'s speech-control-friendly intermediate-scrutiny test.

The Court, however, concluded that *Humanitarian Law Project* differed from *O'Brien* in a key respect. In *O'Brien*, the Court observed, the speech of the draft card burner had nothing to do with establishing the elements of the

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[128] *See infra* note 136 and accompanying text.
[129] The term "direct in effect" is my own. *See* Coenen, *supra* note 116, at 29-30.
[130] 561 U.S. 1 (2010).
[131] *Id.* at 21–22.
[132] *Id.* at 26.

charged crime.[133] This was the case because conduct in the form of draft card mutilation was criminalized, for one and for all, entirely apart from anyone's engagement in expression.[134] In *Humanitarian Law Project*, however, free speech values were threatened to a greater extent because it was the nonprofit's planned expressive activity itself—that is, its communication of information through the expressive activity of teaching—that gave rise to the very "material support" that the statute banned in its application to this case. Thus, the Court concluded, the material-support statute imposed a direct-in-effect, and not just an "incidental," burden on this particular would-be speaker.[135] And this conclusion, in turn, led the Court to apply a mode of review to the as-applied challenge that was "more demanding" than the intermediate-scrutiny approach of *O'Brien*.[136]

All of this brings an important question into view: When a court applies the rules of evidence to put before the jury a defendant's past profession of radical political beliefs or the like (as it did, for example, in *Haupt*), are those rules operating more like the draft-card-burning law at issue in *O'Brien* or more like the material-support statute at issue in *Humanitarian Law Project*? The answer is that evidence rules are operating more like the material-support statute. After all, just as in *Humanitarian Law Project*, the government in past-speech-evidence cases seeks to use against the defendant the *expressive characteristics* of the defendant's past speech. Put another way, the speaker-disadvantaging impact generated by the problematic proof arises precisely because of, and not (as in *O'Brien*) in spite of, the fact that the defendant's actions involve communicating information or ideas to others. Thus, when the government uses past-speech evidence against a defendant-speaker it is—entirely unlike in *O'Brien*—doing so specifically because of "the content … of the message conveyed."[137] For this basic reason, the burden placed on speakers by way of the use of their speech as evidence is far different, because it is far more direct, than the burden placed on the speaker in *O'Brien*. And so it would seem to follow that these cases

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[133] United States v. O'Brien, 391 U.S. 367, 381-82 (1968).

[134] *Id*.

[135] *Humanitarian Law Project*, 561 U.S. at 4 (reasoning, in this regard, that "the conduct triggering coverage under the statute consist[ed] of communicating a message").

[136] *Id*. at 27-28. Notably, this approach was far from unprecedented. In *Humanitarian Law Project* itself, the Court relied on earlier cases involving close scrutiny of breach-of-the peace statutes as applied to protected speech. *Id.* (discussing *Cohen v. California*, 403 U.S. 15 (1971)). *See also* Coenen, *supra* note 116, at 19-22 (discussing intentional-infliction-of-emotional-distress cases).

[137] Snyder v. Phelps, 562 U.S. 443, 457 (2011).

should require a more-than-intermediate-scrutiny mode of constitutional review, in keeping with the Court's logic in *Humanitarian Law Project*.

C. Past-Speech Evidence and Sherbert.

Both *O'Brien* and *Humanitarian Law Project* show that otherwise applicable limits on the ability to mount constitutional challenges to generally applicable laws do not apply to Free Speech Clause challenges. Even assuming that *Smith*'s broad free-exercise-related prohibition on challenging generally applicable laws somehow operated in Free Speech Clause cases, however, the Court in *Smith* itself recognized an important exception to the no-review doctrine it propounded. That exception emanated from the Court's earlier free-exercise ruling in *Sherbert v. Verner*,[138] and—even if *Smith* somehow had relevance in this context—the case is strong that the *Sherbert* exception, rather than the *Smith* rule, would operate in past-speech-evidence cases. More specifically, the policy concerns that drove recognition of the *Sherbert*-based exception suggest that courts confronted with objections to past-speech-evidence should have to take account of First Amendment concerns in ruling on admissibility.

Sherbert arose out of a sincere Sabbatarian's free-exercise challenge to the state's refusal to grant her unemployment-compensation benefits after she lost her job because she refused to work on Saturdays.[139] The state argued that the case presented no free-exercise problem because refusals to work for "personal reasons," whether religious or not, precluded the award of unemployment benefits.[140] In other words, because the relevant eligibility rules were generally applicable, Ms. Sherbert could not mount a free-exercise challenge to their operation.

In an opinion authored by Justice Brennan, the Court disagreed, reasoning that "any incidental burden on the free exercise of appellant's religion" had to be "justified by a 'compelling state interest ….'"[141] Twenty-seven years later, the Court had the chance to overrule *Sherbert* in *Smith*. But it declined to do so. Instead, the Court concluded that its newly minted prohibition on free-exercise scrutiny did not extend to *Sherbert*-like cases. According to Justice Scalia, this exception to the *Smith* rule made sense because "the *Sherbert* test … was developed in a context that lent itself to individualized

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[138] 374 U.S. 398 (1963).
[139] *Id.* at 399–401.
[140] *Id.* at 419 (Harlan, J., dissenting).
[141] *Id.* at 402–03.

governmental assessment of the reasons for the relevant conduct."[142] State decision-makers, in other words, had to consider, as a matter of state law, a variety of "eligibility criteria" in connection with "the particular circumstances behind an applicant's unemployment" in each individual case.[143] In sum, *Sherbert*, as recast in *Smith*, establishes the principle that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[144]

Smith's treatment of *Sherbert* raises an important question: Even assuming that evidence rules might otherwise be subject to *Smith*'s line-in-the-sand limit on judicial review of generally applicable laws, does that limit or does the *Sherbert*-based exception properly apply in this context? The answer to this question hinges on the policy concerns that underlie the Court's treatment of *Sherbert* in *Smith*. And those policy concerns favor recognition of an "expressive hardship" exception to otherwise generally applicable rules of evidence.

To begin with, if determinations made by the government ever "invite consideration of the particular circumstances" or "an individualized government assessment … of reasons," it is in the context of judicial rulings on the admissibility of evidence.[145] This is so because each and every evidentiary ruling is uniquely based on the particular evidence offered, the purpose for which it is offered, and the overall context into which it fits. In addition, the law of evidence establishes "eligibility criteria" in a key functional sense. For relevant evidence to be eligible for admission under the Federal Rules, for example, it must not be unduly prejudicial, must be free of claims of privilege, and must not be subject to exclusion as hearsay or improper character evidence.

Indeed, a straightforward syllogistic argument is available based on the Court's declaration, based on *Smith* and *Sherbert*, that a state "may not refuse … without compelling reason" to recognize a constitutional hardship exception "in circumstances in which individualized exemptions from a general requirement are available."[146] In this context, a "general

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[142] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).

[143] *Id*.

[144] *Id*. Notably, lower courts have applied the *Sherbert* exception in a wide range of settings far-removed from the unemployment-compensation context. *See, e.g.*, Ward v. Polite, 667 F.3d 727, 730 (6th Cir. 2012) (applying *Sherbert* to "exemption-ridden policy" regarding counselor reassignments); Fraternal Order of Police Newark Lodge 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.) (police department no-beard policy).

[145] *Smith*, 494 U.S. at 884.

[146] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).

requirement" dictates that relevant evidence is admissible. But there exist many "individualized exemptions" with respect to that rule triggered by privileges, hearsay limits, and the like. Thus it follows that courts "may not refuse" to apply a First Amendment exception to the relevance rule "without compelling reason."[147]

What is more, there is a special justification for carrying over *Sherbert*'s "individual government assessment" principle to past-speech-evidence cases: In these cases, the court is almost sure to find itself assessing the prejudicial effect of the proffered speech as part of its evidence-law calculus in any event. In our building-bombing hypothetical, for example, the defendant almost certainly would lodge an objection based on "unfair prejudice" pursuant to Federal Rule of Evidence 403.[148] Against this backdrop, it seems wrong-minded to decline to bring a consideration of *constitutional* prejudice into the evaluative framework. After all, when judges are considering the prejudicial effects of proffered evidence in any event, it hardly seems too meddlesome to call on them to take account—just as the Court did in *Sherbert*—of the specialized First Amendment considerations at play in the case.

As with *O'Brien* and *Humanitarian Law Project*, there may be reasons for concluding that the principle of *Sherbert* does not control prosecutorial attempts to use past-speech evidence in an on-all-fours sense. But also, just as with *O'Brien* and *Humanitarian Law Project*, the policy-based thematic drift of *Sherbert* as refined in *Smith* bears directly on the set of problems under consideration here. And that thematic drift supports the conclusion that courts should engage with—rather than ignore—Free Speech Clause values as they make "an individualized government assessment" in evaluating objections to past-speech evidence.

D. Past-Speech Evidence and First Amendment Due Process

The preceding discussion reveals that the policies that underlie the Court's work with generally applicable laws—including its decisions in *O'Brien*, *Humanitarian Law Project*, *Sherbert*, and even *Smith*—support the imposition of meaningful First Amendment limits on prosecutorial use of past-speech evidence. Some analysts, however, might try to push these cases to one side by claiming that "substantive" legal restrictions and "procedural" rules of evidence necessarily fall into separate juridical categories. This view of things is dubious from the start because "thoughtful legal observers

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[147] *Id.*
[148] FED. R. EVID. 403.

… have recognized that there is no bright line between procedure and substance in whatever legal context one encounters the dichotomy."[149] But even if one embraces this distinction with all-out enthusiasm, there is a powerful reason not to exempt evidence law from Free Speech Clause challenge based on its generally applicable character. The reason stems from another set of constitutional limits—focused squarely on procedural, rather than substantive, law—that rein in the operation of many generally applicable rules. These limits center on what Professor Monaghan famously has called "First Amendment due process."[150]

Consider *New York Times v. Sullivan*.[151] In that case, the Court held that speech about public officials cannot support a defamation action unless the defendant acts with "actual malice."[152] But the Court did not stop there. It also held that the burden of proof as to actual malice must rest on defamation-case plaintiffs and that those plaintiffs must prove such malice with "convincing clarity."[153] Obviously, state laws that provide for a preponderance-of-the-evidence burden-of-proof standard are generally applicable in nature. After all, that standard applies routinely in tort actions—indeed, in almost all civil actions of any kind.[154] The Court in *Sullivan*, however, threw the preponderance-of-the-evidence standard out the window. Relying on the First Amendment, it compelled states to depart from this generally applicable procedural rule to ensure that free-expression values receive the level of protection the Constitution requires.

One might say that *Sullivan* sheds little light on our subject because it targets only the distinctly speech-centered subject of defamation law. This

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[149] *See, e.g.*, Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1926–27 (2006).

[150] *See generally* Henry P. Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518 (1970). As the label suggests, this doctrine draws simultaneously on substance-centered free speech values and non-substance-centered procedural due process values. As a result, the doctrine may get a lift from *Smith* because there the Court recognized that its non-review approach to generally applicable laws should sometimes give way in cases that involve the "hybrid" operation of two constitutional rights. *Smith*, 494 U.S. at 881–82. Nor is this hybrid-rights approach at odds with the constitutional text, at least in this context. In *Roaden v. Kentucky*, 413 U.S. 496 (1973), for example, the Court, in applying the Fourth Amendment, declared that "we examine what is 'unreasonable' in light of the values of freedom of expression." *Id.* at 504. It seems no less appropriate to say courts should likewise look at those same "values of freedom of expression" in determining what process is "due" as they evaluate the adequacy of state-specified procedural rules, including rules of evidence.

[151] 376 U.S. 254 (1964).

[152] *Id.* at 279–80.

[153] *Id.* at 285–86.

[154] *See* 21B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 5122 (2d ed. 2005).

claim is faulty, however, because the Court has invoked the Free Speech Clause to require departures from generally applicable rules of procedure in a broad array of rulings,[155] including many rulings that have nothing to do with the law of defamation.[156] In cases of particular relevance here, for example, the Court has wielded the tool of First Amendment due process to require appellate tribunals to review trial-court findings de novo regardless of the review standard put in place by generally applicable procedural rules.[157] In light of these authorities, it is not surprising that other analysts—including Professor Quint—have focused their attention on First-Amendment-due-process principles in urging courts to place free-expression-based limits on prosecutorial use of past-speech evidence.[158]

There is (as we soon will see) much merit in this approach. But analysts who have relied on it have failed to note that there is an analytical fly in the ointment. The problem is that it is one thing to say that courts *can* override

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[155] *See* Waters v. Churchill, 511 U.S. 661 (1994) (noting that "we have often… held some procedures… to be constitutionally required in proceedings that may penalize protected speech"); Faulkner, *supra* note 5, at 13, 21 (noting that First Amendment due process applies in "numerous areas"). *See, e.g.*, Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180 (1968) (imposing more exacting rules than otherwise would apply regarding the issuance of temporary restraining orders when they target parades or similar free speech activities); Freeman v. Maryland, 380 U.S. 51, 57–60 (1965) (holding that a film licensing system will avoid "constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system," including by ensuring expedited judicial review); Stanford v. Texas, 379 U.S 476, 485 (1965) (requiring heightened particularity in warrants when materials to be seized are speech-related); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963) (requiring special procedural rules regarding state control of obscenity); Marcus v. Search Warrants of Prop., 367 U.S. 717, 731–33 (1961) (imposing special requirements for securing warrants regarding seizures of speech-related materials). Lying in the same vein are the rulings that apply First Amendment overbreadth doctrine, because that doctrine alters traditional jurisdictional rules of standing. *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

[156] Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S 274 (1977) (adopting burden-of-proof-shifting methodology to deal with mixed-motive speech cases); Speiser v. Randall, 357 U.S. 513, 525 (1958) (imposing burden of proof on the government in applying disallowance of tax exemptions to dissident taxpayer-speakers); *see also* Scales v. United States, 367 U.S. 203, 229 (1961) (requiring "clear proof" of required specific intent not just to join a revolutionary organization but also to accomplish its unlawful aims); Noto v. United States, 367 U.S. 290, 299–300 (1961) (requiring judicial assessment of such proof "strictissimi juris," lest "one … might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share").

[157] Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 514 (1984) (requiring use of de novo review "in reviewing a determination of actual malice"); Yates v. United States, 354 U.S. 298, 328 (1957) (endorsing "rigorous standards of review" in incitement-related Smith Act prosecutions).

[158] Quint, *supra* note 2, at 1641; *accord, e.g.*, Faulkner, *supra* note 5, at 13.

generally applicable process-centered rules, but a very different thing to say that they *must* do so—or even that they must think hard about doing so—in any particular context, including when working with the law of evidence.[159] This point takes on a sharper focus when one recalls that the principle of First Amendment due process differs in a significant way from the principles laid down in *O'Brien*, *Humanitarian Law Project*, and *Sherbert*. This is the case because, if a challenged government action falls within the reach of those three precedents, it automatically triggers specialized scrutiny; indeed, if either *Humanitarian Law Project* or *Sherbert* applies, the challenged government action is subject to strict—not just intermediate—constitutional review.

The law of First Amendment due process, however, operates in a different way because there are large numbers of generally applicable procedural rules that apply both equally and non-controversially in free-speech-related cases. Courts, for example, have never professed to apply intermediate or strict scrutiny—or, indeed, any level of First Amendment scrutiny at all—to civil pleading requirements, jury selection procedures, the requisite level of jury consensus, indictment-specificity rules, the probable-cause charging requirement (and on and on), even if the case centers on speech-related activity. The point is that many procedural rules have never been understood to trigger elevated as-applied Free Speech Clause review. Put another way, if a First Amendment overlay on generally applicable rules of evidence is to find its moorings in authorities such as *Sullivan*, the establishment of that overlay will require a special singling out of the law of evidence because the Court has created only a here-and-there, exceptional-situation, hodge-podge set of First Amendment due-process limits.[160]

This is not to say that there is no basis for recognizing a free-expression limit on generally applicable evidence law rooted in First Amendment due process. Far from it.[161] It is to say, however, that proponents of using this

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[159] Professor Quint, for example, may have glossed over this point when he wrote, without qualification, that "procedural guarantees must be applied with special strictness when First Amendment rights are at stake." Quint, *supra* note 2, at 1641.

[160] Waters v. Churchill, 511 U.S. 661, 670, 671 (1994) (plurality opinion by O'Connor, J.) (noting that "not every procedure that may safeguard protected speech is constitutionally mandated"; that "[w]e have never set forth a general test to determine when a procedural safeguard is required"; that only "some procedural requirements" are mandated by the First Amendment; and that "[n]one of us have discovered a general principle to determine where this line is to be drawn").

[161] Professor Quint, for example, has argued that the *Sullivan* burden-of-proof rule supports "a rule of exclusion" in past-speech evidence cases because of the "more compelling" individual interests at stake in criminal, as opposed to civil, proceedings. Quint, *supra* note 2, at 1660; *see id.* at 1660 n.132.

approach to justify Free Speech Clause policing of the generally applicable rules of evidence must offer an argument that reaches well beyond simply uttering the mantra of "First Amendment due process." Is it possible to construct such an argument? In fact, many past rulings of the Court signal that it is. Consider the following:

1. Under the *Noerr-Pennington* doctrine, courts must exempt from the general application of the antitrust statutes collective efforts by otherwise-competing businesses to secure jointly self-serving government lawmaking.[162] In footnote 3 of *United Mine Workers v. Pennington*,[163] the Court noted that this principle would not necessarily preclude the use of evidence of such collective efforts in proving more nefarious forms of collusion, such as price-fixing.[164] But the Court also observed that "it would be within the province of the trial judge to admit this evidence *if* he deemed it probative and *not unduly prejudicial*."[165] This passage thus supports imposition of a First Amendment limit on judicial use of past-speech evidence even if it is deemed to be relevant.[166]

2. In *Abrams v. United States*,[167] the Court upheld the convictions of five defendants under the Espionage Act for disseminating pamphlets containing "disloyal, scurrilous and abusive" statements about the nation's involvement in World War I. The case, however, has since come to stand for the libertarian views expressed in the "classic opinion" of the great dissenter, Justice Oliver Wendell Holmes.[168] Holmes's analysis focused on the idea that the defendants' words did not rise to the level of proscribable incitement. But in a little-noticed sentence regarding the defendants' past statements, Justice Holmes also asserted that "no one has a right even to consider [them] in dealing with the charges before the Court."[169] And a principle under which "no one has a right *even to consider*" a defendant's past protected speech signals that, at least in some cases, such speech may not be used as evidence.

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[162] *See, e.g.*, Faulkner, *supra* note 5, at 669.
[163] United Mine Workers v. Pennington, 381 U.S. 657 (1965).
[164] *Id.* at 670 n.3 (citations omitted).
[165] *Id.* (emphasis added).
[166] *See* Feminist Women's Health Ctr., Inc. v. Mohammad, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (deeming evidence properly excluded based on "prejudice" concerns under footnote 3, given "the defendant's First Amendment interests").
[167] 250 U.S. 616 (1919).
[168] Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 469 n.51 (1985).
[169] *Abrams*, at 630 (Holmes, J., dissenting).

3. *Gibson v. Florida Legislative Investigation Committee*[170] arose out of a legislative committee's effort to require the presentation of evidence—in the form of an official listing of a local NAACP branch's members—in connection with an investigation of ties between that organization and the Communist Party. After an NAACP official refused to supply this material, he was held in contempt. The Court, however, overturned the penalty, stating that: "It is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[171] The Court went on to declare that "the Committee has not 'demonstrated so cogent an interest in obtaining and making public' the membership information … as to 'justify the substantial abridgment of associational freedom….'"[172] Plainly, judicial proceedings, no less than legislative proceedings, can "intrude[] into the area of constitutional rights"—indeed, intrude so greatly that they deprive the defendant of liberty or life. And so it is hard to see why similar prosecutorial efforts to elicit evidence of public-concern speech should not be subject to much the same sort of speech-sensitive judicial balancing that the Court undertook in *Gibson*.[173]

4. As Professor Quint detailed, the Court has invoked First Amendment due process principles to install specialized constitutional rules not only as to the required quantum of evidence (as in *Sullivan*), but also as to the minimum sufficiency of evidence, in free-speech-related cases.[174] Although these rulings technically do not concern the admissibility of evidence, they operate to strip evidence of the probative effect it otherwise would have. As

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[170] 372 U.S. 539 (1963).

[171] *Id.* at 546.

[172] *Id.*

[173] *See* Quint, *supra* note 2, at 1663 n.142 (detailing why, in light of differing burdens, "the First Amendment interest is, if anything stronger" in criminal proceedings than in legislative proceedings with regard to questions of evidence use); *see also* Anderson, *supra* note 5, at 933 (emphasizing particularly "great" speech-burdening effect when challenged evidence "may be responsible for a conviction").

[174] *See, e.g.*, Quint, *supra* note 2, at 1654 (discussing *Noto* and *Scales* cases and the "unusually rigorous" proof requirements they impose for demonstrating constitutionally required specific-intent requirements). *See also* Virginia v. Black, 538 U.S. 343 (2003) (rejecting evidentiary presumption regarding an inference of intent to intimidate from expressive action standing alone). Notably, lower courts have built on these precedents in speech-protective ways. *See* Quint, *supra* note 2, at 1656 (discussing the First Circuit's *Spock* case as displacing generally applicable "restrictions on the sufficiency of the evidence to impose special First Amendment limitations"); *id.* at 1654–55 (reflecting similarly on the Ninth Circuit's *Hellman* decision).

common sense suggests, rules that denude evidence of probative significance are little different as a practical matter from rules that exclude evidence from consideration by the factfinder. Accordingly, the recognition of First Amendment due process limits in the former context lends support to recognizing similar limits in the latter.

5. In *Branzburg v. Hayes*,[175] Justice Powell—in supplying the decisive fifth vote in support of the majority's ruling—endorsed a First Amendment balancing rule designed to override the generally applicable principle that permits grand juries to require the presentation of all relevant evidence.[176] More specifically, he concluded that when significant free speech concerns present themselves (as when a reporter seeks to avoid disclosing the name of confidential source), the judge must "strik[e] a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony … on a case-by-case basis."[177] Again, the analogy to cases involving prosecutorial use of past-speech evidence is apparent: If the government must run the gauntlet of a balancing-based speech-protective rule when it seeks to compel the presentation of relevant evidence in the grand jury context, common logic suggests that it should have to do so no less when it seeks to compel the presentation of such evidence in the criminal trial itself.[178]

6. Finally, the Court's ruling in *Dawson* supports endorsement of a meaningful judicial role in policing evidentiary use of past public-concern-related speech. To be sure, the focal point of the Court's reasoning in *Dawson* was that the challenged evidence lacked relevance to the issues under consideration by the jury. On the better view, however, the Court required something more than ordinary evidentiary relevance,[179] while also emphasizing the prejudicial nature of the challenged Aryan Brotherhood

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[175] 408 U.S. 665 (1972).

[176] *See* Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1951, 1954 (2006) (arguing that Justice Powell's balancing-test-endorsing opinion embodies the holding in *Branzburg* because he supplied the critical fifth vote).

[177] *Branzburg*, 408 U.S. at 710 (1972) (Powell, J., concurring). *See also* Nickerson, *supra* note 6, at 846 (noting that "most appellate courts have adopted the case-by-case approach" of Justice Powell).

[178] *See* Quint, *supra* note 2, at 1664 (noting that "the First Amendment interests favoring exclusion of a defendant's protected speech at trial seem substantially stronger than the interests favoring exclusion of similar material from consideration by the grand jury" because of the prospect of actual conviction at trial).

[179] *See* Faulkner, *supra* note 5, at 42 (arguing that *Dawson* required that "[e]vidence must be *really* relevant to be admitted over a First Amendment objection" and that "the conclusion of irrelevance in *Dawson* was a fiction"); *id.* at 39 n.233 (describing *Dawson* as involving "super-normal relevance scrutiny"); Nickerson, *supra* note 6, at 859 n.76 (same).

proof due to its focus on the defendant's "morally reprehensible" beliefs.[180] In any event, judicial endorsement of a constitutional rule that ties exclusion of past-speech evidence solely to a finding of relevance makes little, if any, sense as a matter of First Amendment policy. It is, after all, the presence of a prejudicial impact on the exercise of free speech rights—and not the problem of evidentiary irrelevance—that gives rise to a First Amendment problem in past-speech-evidence cases.[181] In addition, a relevance-only approach to admissibility would invite the odd result of (1) precluding on constitutional grounds the use of irrelevant past-speech proof that presents only very limited dangers of free-expression-related prejudice, while (2) allowing the use of evidence that presents the most far-reaching dangers of free-expression-related prejudice so long as it surmounts a minimal threshold of relevance. Simply put, it is strange—if not anomalous—to reject any weighing of evidentiary prejudice in this First Amendment context when it is that very prejudice that alone brings the First Amendment into play.[182]

At the least, *Dawson* swept away a key argument for blocking recognition of First Amendment limits on past-speech evidence—namely, the argument that any particular application of the rules of evidence is rightly exempt from Free Speech Clause challenge because of those rules' generally applicable nature. This is so because the Delaware courts had concluded—with good reason—that the Aryan Brotherhood proof that the Supreme Court deemed inadmissible under the Free Speech Clause *was relevant* under the generally applicable rules of state evidence law. Accordingly, with *Dawson*, the horse is out of the barn. There no longer is any doubt that there exist some First Amendment limits on otherwise-operative general rules of evidence law. Courts thus must now flesh out the dimensions of those limits in light of underlying First Amendment values.

E. Potential Counterarguments

The foregoing discussion supports three conclusions: (1) arguments for broadly rejecting constitutional challenges to the admission of past-speech proof based on cases such as *Haupt*, *Dawson* and *Mitchell*, or on the general applicability of rules of evidence, are not sustainable; (2) constitutional

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[180] Dawson v. Delaware, 503 U.S. 159, 167 (1992); *see* Faulkner, *supra* note 5, at 38 (noting that, while *Dawson* "ostensibly rested on relevance grounds," the holding of "constitutional error can only be explained in terms of prejudice").

[181] *See supra* notes 78-105 and accompanying text.

[182] *See* Faulkner, *supra* note 5, at 9 (finding "reason to suppose that a majority [in *Dawson*] would embrace a balancing approach which would flexibly protect First Amendment values").

precedent and policy—including with regard to the proper evaluation of generally applicable laws—support, rather than undercut, recognition of a meaningful judicial role in policing the use of past-speech evidence; and (3) any such meaningful assessment must take account in a thoughtful way not only of relevance-related considerations, but also prejudicial effects.

Others will look to find missteps in this line of analysis. They might say, for example, that the authority-based arguments set forth above seek to place square pegs in round holes. On this view, the question considered here is far removed from the questions dealt with in *O'Brien*, *Humanitarian Law Project*, and *Sherbert* because those cases involved substantive legal restrictions, and not "just" the use of speech as evidence.[183] These critics might add that the Court in those cases subjected challenged laws to traditional forms of means-ends analysis that are ill-equipped for use in making contextual judgments about the admissibility of evidence.[184] To say that neither *O'Brien* nor *Humanitarian Law Project* nor *Sherbert* is on all fours with past-speech-evidence cases, however, is to miss the key point—namely, that the analytical pull of each of these precedents dictates that courts must do more than pay mere lip-service to free-speech values in this field. And this is all the more the case when one takes account of these precedents as a collective whole, together with the Court's libertarian jurisprudence regarding speech on matters of public concern.

Skeptics might also make arguments of policy. They could say, for example, that past-speech evidence is important because it is probative, often on matters (such as a defendant's state of mind) that are otherwise difficult to prove. They might add that judges, if given the chance, will accord too much weight to free-speech-related "prejudice," thus frustrating the state's vital interest in securing proper criminal convictions. These points, however, are overdrawn. Any proper judicial assessment of past-speech evidence necessarily will involve judicial consideration not only of potential prejudicial effects, but also of probative value and prosecutorial needs, with the consequence that much, if not most, past-speech evidence will be admitted. We expect judges in other contexts to apply operative evidence rules in a fair-minded fashion. There is, accordingly, no sound reason to

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[183] *See supra* note 85 and accompanying text.

[184] Complexity rears its head in part because judges cannot vindicate First Amendment values in this context in one fell swoop. They cannot, for example, craft the sort of bright-line solution used in *Sherbert*, where the Court announced that all sincere Sabbatarians simply could not be, on that basis, excluded from receiving workers compensation benefits. But that hardly means that courts cannot deal with First Amendment evidence problems just as they deal with other objections to concededly relevant evidence—that is, by taking account in context of both evidentiary relevance and competing values.

conclude that these same judges, in applying constitutional limits on past-speech evidence, will suddenly fall into a misplaced mindset that fixates myopically on the risk of prejudicial effects.

Critics might advance another objection—namely, that the contextual weighing of the costs and benefits of proffers of past-speech evidence, under some inevitably fuzzy First Amendment rule, will unduly complicate evidence law and place a new layer of complexity on the already-challenging adjudication of criminal cases. The premise of this argument is shaky. For example, as previously noted, federal courts already must engage in the trial-complicating balancing of probative value and unfair prejudice in applying Rule 403. Enriching this analysis to take special account of free-speech concerns thus does not seem like a game-changer in terms of administrative tribulations. There is a deeper point, too. Time and again, the Court has indicated that, when vital constitutional interests are at stake, concerns about "administrative convenience" must give way.[185] Even more fundamentally, the great mass of constitutional law supports a basic proposition of overarching salience here: The goal of protecting core constitutional rights is not to be sacrificed on an altar built of easy-to-apply rules.[186]

Indeed, in a seminal public-concern-speech case, *Connick v. Myers*,[187] the Court emphatically endorsed a context-specific—and frustratingly tough-to-operationalize—balancing approach. There the Court confronted the question whether a terminated public employee could succeed on a First Amendment claim when the firing allegedly resulted in part from her engagement in public-concern speech.[188] In deciding such a case, the Court declared, the analytical task required "full consideration of the government's interest,"[189] as well as the precise "nature of the employee's speech"[190] and

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[185] *See, e.g.*, Riley v. Nat'l Fed'n for the Blind, 487 U.S, 781, 795 (1988) (noting that "the First Amendment does not permit the State to sacrifice speech for efficiency"); Carey v. Population Servs., Int'l, 431 U.S. 678, 691 (1977) ("[T]he prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights."); Craig v. Boren, 429 U.S. 190, 198 (1976) (rejecting "administrative ease and convenience as sufficiently important objectives to justify gender-based classifications").

[186] *See, e.g.*, Cty. of Allegheny v. ACLU, 492 U.S. 573, 606 ("It is perhaps unfortunate, but nonetheless inevitable, that the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases.").

[187] 461 U.S. 138 (1983).

[188] *Id.* at 141–42.

[189] *Id.* at 150.

[190] *Id.*

"the context" in which the government decided to act.[191] Also significant was whether the speech "touched upon matters of public concern in only a most limited sense"[192] or involved such matters "more substantially."[193] The Court acknowledged that "such particularized balancing is difficult,"[194] but it also insisted that a more wooden approach was unacceptable in light of "the enormous variety of fact situations" that such cases present.[195] As with public-concern speech in the public-employee context, so too with public-concern speech that the government seeks to use as evidence. In both settings, judges can and "must reach the most appropriate possible balance of the competing interests"[196] after taking account of "the whole record."[197]

Finally, disciples of a hands-off approach might seek to leverage the prior work of First Amendment theorists, most notably then-Professor and now-Justice Elena Kagan. According to Justice Kagan's pre-appointment scholarship, free-speech doctrine should center not so much on guarding against the speech-burdening effects of government actions as on policing those actions for impermissible speech-suppressive motives.[198] Building on this theme, analysts might reason that the framers of the Federal Rules of

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[191] *Id.* at 147–48.
[192] *Id.* at 154.
[193] *Id.* at 152.
[194] *Id.* at 150.
[195] *Id.* at 154.
[196] *Id.*
[197] *Id.* at 148. In a post-*Connick* ruling that again concerned speech on matters of public concern, a case-deciding four-Justice plurality even more pointedly explained that, while "lack of [a more particularized] test is inconvenient, this does not relieve us of our responsibility to decide the case" with the result that the Court had to answer "the question on a case-by-case basis." Waters v. Churchill, 511 U.S. 661, 671 (1994). Indeed, there are special reasons to say that courts should carry over a *Connick*-like balancing approach to past-speech-evidence cases. First, public employees choose to be public employees—and thus to assume the speech-related limits that attend that role. Criminal defendants, in contrast, do not choose to be criminal defendants. Second, in support of endorsing government flexibility in cases such as *Connick*, the Justices have emphasized the difference between government actions as an "employer" (with concomitantly greater authority to manage speech) and as a "sovereign" (with concomitantly lesser authority to manage speech). *Id.* at 671-74. Without question, when the state marshals evidence in a criminal prosecution, it is acting not as an employer, but as a sovereign. *See also* Nickerson, *supra* note 6, at 885-86 (noting special claim for case-by-case assessments when criminal subpoenas or civil discovery mandates involve the surrender of evidence concerning speech on matters of public concern).
[198] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (asserting that the free speech law's "primary, though unstated, object" is "the discovery of improper governmental motives"); *see also* Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401, 418 (1995).

Evidence and kindred bodies of state law obviously did not act with the motive of targeting unpopular speakers. It follows, so the argument goes, that the introduction of past-speech evidence merits no special judicial attention, regardless of any speech-burdening impact that the use of such evidence might produce in particular cases.

One problem with this analysis is that controversy surrounds the effort to cast free speech law as properly centered on addressing improper government motives. Thus, many scholars have argued that real-world effects—as opposed to government purposes—should take center stage in First Amendment analysis.[199] Indeed, then-Professor Kagan acknowledged that effects-based analysis has driven some significant features of free-speech doctrine,[200] and the Court itself has declared that the "abridgement of [free-expression] rights, *even though unintended*, may inevitably follow from varied forms of government actions."[201]

In any event, an overwhelming difficulty marks the effort to block contextual judicial assessments of past-speech evidence even if one endorses a purpose-centered view of the Free Speech Clause. The difficulty arises because even Justice Kagan emphasized that (1) impermissible speech-punishing motives oftentimes lie not in the enactment of laws, but in their application,[202] and (2) to ensure that such impermissible purposes do not harm protected speakers, courts properly have devised many "prophylactic" constitutional decision rules.[203] Adopting such a rule in this context seems especially justifiable because, as previously shown, the risk is acute that juries confronted with past-speech evidence will latch onto it precisely (and improperly) because the defendant's statements veer away from conventional norms.[204] And, in this setting, if courts are to deal with this danger, they have no choice but to do so by employing a prophylactic pre-admission policing mechanism. This is the case for a simple reason: Even if juror motives were otherwise readily subject to discovery (which they are not), post-trial challenges to verdicts are precluded by settled rules that

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[199] *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996). *See generally* Kagan, *supra* note 198, at 413 (acknowledging that "most descriptive … as well as most normative discussions of the doctrine [focus] on the effects of a given regulation").

[200] *See* Kagan, *supra* note 198, at 427.

[201] NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 461 (1958) (emphasis added); *see also Waters*, 511 U.S. at 670 (plurality opinion of O'Connor, J.) ("The First Amendment creates a strong presumption against punishing protected speech, even inadvertently.").

[202] *See* Kagan, *supra* note 198, at 457, 459, 462-63.

[203] *Id*. at 457.

[204] *See supra* notes 86-92 and accompanying text.

broadly prohibit the second-guessing of juror thought processes and discussions.[205] In sum, for all these reasons, a purpose-centered conception of free-speech theory supports, rather than undermines, a constitutional requirement that trial judges engage in meaningful pre-admission assessments of proffers of past-speech proof.

A foundational aspect of free-speech policy confirms the correctness of this approach. At the heart of First Amendment law lies the idea that speakers should not suffer government-imposed burdens because of the *viewpoints* they express.[206] Yet the risk of penalizing speakers on this prohibited basis is at a high ebb in past-speech-evidence cases because (as illustrated by the hypothesized building-bomber case) the essential problem is that the defendant may end up being convicted precisely because of the repugnance of the viewpoint the defendant has espoused.[207] In short, to the extent that First Amendment law embodies special concerns about viewpoint discrimination—which it most emphatically does[208]—that law also should reflect a serious concern about the use of viewpoint-expressive speech offered by prosecutors at trial.

The bottom line is that First Amendment precedent and policy dictate that courts should take a contextual approach to proposed prosecutorial use of past-speech evidence, with the goal of carefully assessing the competing concerns presented by the facts of the particular case. In this process, courts will have to lay down rules that give meaningful protection to First Amendment values. The remainder of this Article considers what those rules should be.

IV. RULES FOR EVALUATING THE USE OF PAST-SPEECH EVIDENCE

What rules should courts deploy to ensure that free-speech rights are adequately protected in past-speech evidence cases? Three separate rules—one concerning trial procedure, one concerning appellate procedure, and one

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[205] *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 864–65 (2017) (summarizing rules that provide "jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations … or annoyed by litigants seeking to challenge the verdict").

[206] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (describing viewpoint discrimination as "an egregious form of content discrimination"); *accord*, *e.g.*, Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009).

[207] *See supra* note 90 and accompanying text (discussing Justice Holmes's opinion in *Abrams*).

[208] *See* Matal v. Tam, 137 S. Ct. 1744, 1762 (2017) (Alito, J., for four members of the Court); *id.* at 1765, 1768 (Kennedy, J., for four other members of the Court).

concerning the operative legal standard for testing admissibility—merit recognition.

A. Trial Procedure

The Court has long insisted that trial judges use specialized procedural rules in assessing the admissibility of evidence potentially subject to exclusion pursuant to constitutional commands. In *Jackson v. Denno*,[209] for example, the Court laid down process-based requirements for dealing with objections to the evidentiary use of confessions, including that the trial court conduct "an adequate evidentiary hearing productive of reliable results."[210]

Taking much the same approach, the Court should insist that trial judges deploy two mechanisms of procedural care when they confront objections to past-speech evidence. First, those judges should process those objections in carefully conducted proceedings that occur outside the presence of the jury.[211] As with confessions, the hot-button character of protected-speech evidence suggests that juries should be shielded from any contact with it unless and until the court deems it admissible.[212] In addition, the risk exists that, as lawyers discuss the admissibility of such evidence, the impact of that evidence on the minds of jurors will be heightened—perhaps heightened greatly—even if the trial judge in the end decides to exclude it. In short, holding hearings away from the jury will help to reduce both factfinder confusion and prejudicial impact. This requirement also will steer the judicial mind in the direction of assessing past-speech evidence with the heightened measure of care that it rightly deserves.

Second, trial judges should have to set forth on the record their reasons for deciding to admit or exclude the challenged evidence.[213] The advantages created by taking this approach are apparent. The need to give reasons fosters analytical discipline and discourages laxity in the decision-making process. It reminds the trial judge that "indispensable"[214] and "preferred"[215] speech-related freedoms are at stake in the case. The giving of reasons also facilitates well-informed appellate review. Finally, such a requirement

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[209] Jackson v. Denno, 378 U.S. 368 (1964).
[210] *Id.* at 394.
[211] *Accord* Faulkner, *supra* note 5, at 21; Quint, *supra* note 2, at 1666.
[212] *See, e.g.*, United States v. Carignan, 342 U.S 36, 38 (1951); United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965).
[213] *Accord* Dennis, *supra* note 4, at 34; Faulkner, *supra* note 5, at 21; Quint, *supra* note 2, at 1666.
[214] NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 461 (1958).
[215] Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

simply slows things down, thus counteracting within the judge the same tendency that juries might bring to the consideration of this evidence—that is, the too-easy inclination to assume that, simply because the evidence has some form of relevance, it should help to guide the decision of the case.

B. Appellate Review

No less than trial judges, appellate tribunals should adhere to special procedures in dealing with questions that concern past-speech evidence—in particular, by abandoning the highly deferential mode of review applicable to trial court rulings made under Federal Rule of Evidence 403.[216] As we have seen, the Court already has put in place rules that mandate de novo appellate review of trial-court actions that endanger free-speech values,[217] and it has taken this same approach in other constitutional contexts as well.[218] Of particular importance here, the Court has endorsed de novo review in other public-concern-speech settings.[219] As a result, with powerful justification, some scholars have called for de novo review of trial court decisions that authorize prosecutorial use of past-speech evidence in the face of First Amendment objections.[220]

All things considered, another approach might prove to be even better. Under it, appellate courts would not engage in full-scale de novo review, but they still would steer far wide of employing the traditional abuse-of-discretion standard. This style of review might be captured in terms such as "extremely confined" or "short leash" deference. Such an approach would give trial courts some wiggle room to authorize prosecutorial use of past-speech evidence free from de novo second-guessing. It also might generate positive results for two reasons. First, it would reduce the risk of over-deterring the admission of proper past-speech evidence, particularly as trial judges anticipate the risk of reversal under specialized double-jeopardy rules

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[216] *See supra* notes 33-34 and accompanying text; United States v. Ring, 706 F.3d 460, 471-72 (D.C. Cir 2013) (indicating that, under Rule 403 review, appellate courts "must be 'extremely wary' of second-guessing" trial court rulings).

[217] *See supra* note 157 and accompanying text.

[218] *See* Lilly v. Virginia, 527 U.S. 116 (1999) (plurality opinion) (declaring, in applying the Confrontation Clause, that "as with other fact-intensive mixed questions of constitutional law… [i]ndependent review is necessary").

[219] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 388 (1987); Pickering v. Bd. of Ed., 391 U.S. 563, 578 n.2 (1968).

[220] Faulkner, *supra* note 5, at 21; Quint, *supra* note 2, at 1667; s*ee also* Anderson, *supra* note 5, at 936, 940.

that permit post-verdict appeals only by defendants, and not by government prosecutors.

Second, a short-leash-deference approach would respond to the practical challenges presented by requiring trial courts to bring a fact-specific balancing approach to this set of cases. One difficulty baked into the use of such an approach is that it inevitably will generate different assessments by different judges, with the likely consequence of producing full-blown retrials in extremely close cases as a result of de-novo-review-based appellate-court reversals. Some analysts will see this outcome as salutary. In their view, the Constitution speaks with one voice to all courts, and the essential purpose of appellate review is to correct legal errors, especially in constitutional cases. On another view, however, the central goal of extending meaningful constitutional controls to past-speech-evidence cases is more systemic in nature. Seen from this vantage point, the key aim of devising controls in this field is to ensure that trial judges work with care to protect the free-expression values that prosecutorial proffers of past-speech evidence tend to threaten. Perhaps a "no deference at all" rule would work better than a "short-leash deference" rule to advance the cause of trial-court attentiveness. But common sense suggests that such a minor difference in appellate techniques will not make much of a practical difference on this score. On the other hand, a short-leash-deference approach—by giving a modest benefit of the doubt to assessments made by trial judges—will avoid the need for full-scale retrials in close-to-coin-flip cases, while taking account of whatever advantages trial judges might have because they are on the scene when the evidence is offered in real time for consideration by the jury.

Finally, a rule of short-leash deference, precisely because it is short-leashed, is unlikely to undercut the key aim of developing meaningful limits on the admission at trial of relevant past-speech evidence. After all, the use of probing, rather than deeply deferential, scrutiny will allow appellate courts to develop an ever-increasingly coherent body of doctrine that marks the boundaries of permissible trial-court action. No less important, this form of highly probing (even if not de novo) review will amply empower appellate tribunals to police the oversights and missteps of any single trial judge in the handling of any particular past-speech-evidence case.

C. The Test of Admissibility

The final question concerning judicial fashioning of past-speech-evidence doctrine is the most central of all: When a court encounters a First Amendment challenge to the use of such evidence, what governing standard

should it apply in ruling on the admissibility question? Many answers to this question are possible. Courts could, for example, apply a rule of automatic exclusion once they decide that public-concern-related speech is at issue.[221] Such an approach, however, would run headlong into the Court's ruling in *Haupt*, as well as the Court's pronouncements in *Dawson* and *Mitchell*.[222]

Another possibility would be to embrace a rule of near-automatic exclusion. Rules of this kind have a place in constitutional law.[223] Indeed, the discourse of strict scrutiny—put to work in both *Humanitarian Law Project* and *Sherbert*—offers support for applying such an approach here. Adopting a rule of near-automatic exclusion, however, would raise a variety of problems. To begin with, neither the direct-in-effect-burden line of decisions typified by the *Humanitarian Law Project* nor the compulsory-exemption rule of *Sherbert* fit together hand-in-glove with past-speech-evidence cases.[224] In addition, such an approach would raise tensions with the Court's open-stanced view of using past-speech evidence in *Haupt* and its rejection of a comparable pro-expression standard in *Connick.*[225] Most important, such a methodology would tip the balance heavily against the use of past-speech evidence—sometimes, highly relevant past-speech evidence—notwithstanding strong policies that support not only acquittal of the innocent but also conviction of the guilty.[226]

In sum, rules of automatic or near-automatic exclusions would unduly favor defendants and disfavor government prosecutors. As a result, courts might take exactly the opposite approach, by holding that relevant past-speech evidence is never subject to First Amendment objection or that it is excludable in only "rare" or "extraordinary" instances. These approaches, however, would not take fair account of First Amendment freedoms rightly recognized by the Court as both "precious" and "vulnerable"[227]—just as surely as rules of automatic or near-automatic exclusion would not take fair

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[221] *See, e.g.*, *Conspiracy and the First Amendment*, *supra* note 104, at 894-95 (suggesting that protected past-speech evidence should automatically be excluded in conspiracy prosecutions).

[222] Such an inflexible approach also would not fit together well with the contextual balancing framework set forth and defended in the public-concern speech cases typified by *Connick*. *See supra* notes 187-97 and accompanying text.

[223] *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978) (recognizing a "virtually *per se* rule of invalidity" in facial-discrimination dormant Commerce Clause cases).

[224] *See supra* notes 85, 110-12, 183-84 and accompanying text.

[225] Connick v. Myers, 461 U.S. 138, 149 (1983).

[226] United States v. Nixon, 418 U.S. 683, 708–09 (1974) (emphasizing the "twofold" purpose of the criminal justice system, including that "guilt shall not escape").

[227] NAACP v. Button, 371 U.S. 415, 433 (1963).

account of countervailing societal interests. Among other things, these pro-prosecution standards would (as we already have seen) create discordance with modern precedents that pointedly call for "broad protection" of speech on matters of public concern.[228] Indeed, an extraordinary-cases-only approach would not only fail to provide such speech with "broad protection"; it would render First Amendment scrutiny in this context little more than an empty shell.

One might critique this position by asserting that there is a special justification for endorsing a no-objections-ever or extraordinary-cases-only pro-prosecutorial approach. The argument is that trial judges can deal with the problems presented by past-speech evidence by delivering thoughtful cautionary instructions, so as to limit its improper use. We already have seen, however, the built-in-difficulties of this approach.[229] In addition, there is a special problem with relying on cautionary instructions to deal with past-speech evidence because those instructions in their nature cannot ameliorate burdens on expression that stem from either "fair prejudice" or chilling effects. The whole point of such instructions, after all, is to invite juries to consider past-speech evidence, while avoiding—but avoiding only—the *unfairly prejudicial* use of such evidence in the process of deliberating in the particular case.

Given the difficulties raised by moving to either polar position—that is, by embracing either an overwhelmingly pro-government or overwhelmingly pro-defendant approach to admissibility—some analysts have tried to steer a middle course. One synthesis would require judges to focus on the type of past-speech evidence offered by the prosecution. Courts, for example, might declare that past speech that embodies art (or perhaps musical art or perhaps rap-musical art) would enjoy categorical (or nearly categorical) protection from prosecutorial use as evidence.[230] Because such an approach would give more favorable treatment to some speech over other speech based on its

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[228] *See supra* note 65 and accompanying text.

[229] *See supra* note 89 and accompanying text.

[230] *See, e.g.*, Michael Gregory, *Murder Was the Case That They Gave Me: Defendant's Rap Lyrics As Evidence in a Criminal Trial*, 25 B.U. PUB. INT. L.J. 329, 356 (2016) (arguing that rap lyrics should not be admissible unless the lyrics virtually "parallel the crime alleged"); Powell, *supra* note 103, at 523 (noting that one "solution would be to [exclude] rap lyrics … unless they make some specific reference to a crime that only a guilty party would know about"); *id.* at 524-25 (advocating "a per se ban on rap lyrics in criminal proceedings" because of "the potential chilling effect on the genre, accompanied by the fact that lyrics will not make or break the prosecution's case"); *see also* Anderson, *supra* note 5, at 902, 942-43 (proposing a "more restrictive framework for the admission of evidence relating to the defendant's taste in music or other entertainment" under which "the showing of relevancy should be more rigorous").

artistic (or other) content, however, it is hard to square with the Court's often-expressed aversion to content-based categorization in dealing with the regulation of protected speech.[231]

Perhaps in an effort to dodge this problem, Professor Quint floated the idea that speech-tied evidence might be grouped into three categories based not so much on the content of expression as on its form. According to this approach, past-speech evidence might be subject to a least-protected-to-most-protected tripartite division depending on whether it involves (1) activity in the form of actual statements by the defendant (for example, by professing "I endorse Nazism."); (2) activity in the form of expressive association by the defendant (for example, by joining the Nazi Party); and (3) activity in the form of taking in others' expressive work (for example, by attending a Nazi-sponsored rally or reading *Mein Kampf*).[232] This way of thinking about past-speech evidence has value, and courts should pay it heed as they navigate this set of cases. In the end, however, even Professor Quint did not advocate adoption of three distinct legal tests separately tethered to each of these three forms of speech-related activity. And wisely so. As Justice Kagan once observed, modern First Amendment law has spawned "technical, complex classificatory schemes" under which "categories have multiplied" and "distinctions grown increasingly fine."[233] To a large extent, this building-out of free speech doctrine reflects the inevitably rich complexities of life. With regard to past-speech evidence, however, there is little reason to conclude that endorsing a three-part analytical-pigeonholes approach would be worth the candle. The main reason why is that courts can make use of an overarching legal standard that fully allows them to take account of these (and other) contextual differences without the need to formulate rigid and confining analytical categories.

Another middle-way approach would constitutionalize the Rule 403 standard, already applicable in federal courts, for balancing probative value against the risk of unfair prejudice. In other words, the non-constitutional rule set forth in the Rules of Evidence would morph into a constitutional rule applicable in all federal and state prosecutions as a matter of entrenched First

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[231] See Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

[232] Quint, *supra* note 2, at 1668–71, 1673–76, 1672–73. Some judges have moved, if haltingly, in this direction. *See, e.g.*, Guam v. Shymanovitz, 157 F.3d 1154 (9th Cir. 1998), overruled in United States v. Curtin, 489 F.3d 935 (9th Cir. 2007) (en banc); *id.* at 963 (Kleinfeld, C.J., concurring) (distinguishing the case at hand from *Haupt* because *Haupt* involved "what a defendant said … not what he merely read"); Anderson, *supra* note 5, at 937 (arguing for closer judicial scrutiny of speech "consumption" evidence because mere "curiosity may drive us to try different materials").

[233] Kagan, *supra* note 198, at 515.

Amendment doctrine.[234] One problem with this proposal is apparent: Rule 403 was neither formulated to deal specifically with past-speech-evidence cases nor constructed in an effort to restate Free Speech Clause limits.[235] No less important, this magical transformation of Rule 403 would put in place a First Amendment limit fairly subject to criticism as being too lax. In particular, Rule 403 specifies that probative value must "clearly outweigh" the risk of unfair prejudice, and courts have emphasized this admission-friendly phrasing in refusing to exclude speech-related proof in the past.[236] Indeed, for this reason, the Rule 403 standard might prove so feckless in practice that it would not differ from an extraordinary-cases-only rule of inadmissibility in any functional way.[237]

Professor Quint sought to work through these challenges by proposing a constitutional rule that would "reverse the ordinary test" of admissibility embodied in Rule 403.[238] In other words, judges would have to exclude past-speech evidence "unless the government can establish that the probative value of the evidence substantially outweighs its prejudicial dangers."[239] This approach has something to be said for it, in part because it would afford past speech a meaningful measure of judicial protection.[240] But it also suffers from problems of its own. To begin with, the starting point for Professor Quint's reversed-presumption approach lies in the text of Rule 403; again, however, there is no apparent reason why a constitutional limit should find its origins in this non-constitutional evidence rule. Another difficulty with this reversed-presumption standard is that it seems to rest on too circumscribed a view of "prejudice." The reason why is that the concept

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[234] *Cf.* Herbert v. Lando, 441 U.S. 153, 174, 177 (1979) (relying on "firm" application of FED. R. CIV. P. 26(b) and 26(c) to protect First Amendment interests regarding discovery of newsroom thought processes in the defamation context).

[235] Prejudice-related questions, for example, could arise under Rule 403 if the prosecution's proof touched upon a defendant's past liaisons with prostitutes. Such evidence, however, has nothing to do with past speech, speech-related prejudice concerns, or speech-related chilling effects.

[236] *See, e.g.*, United States v. Moore, 732 F.2d 983, 989 (D.C. Cir. 1984) ("The language of this rule tilts … toward the admission of evidence in close cases.").

[237] *See, e.g.*, Faulkner, *supra* note 5, at 6 (deeming Rule 403 review "constitutionally inadequate" in part because "it weighs the balancing process towards … admission"); *id.* at 24 (adding that even reforming Rule 403's test to equalize the roles of probative value and prejudicial effect would "not provide sufficient protections of First Amendment rights").

[238] Quint, *supra* note 2, at 1662.

[239] *Id.* (emphasis deleted).

[240] *See* CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5195 (2009 Supp.) (characterizing Quint's position that "the First Amendment imposes restrictions on the use of political speech and associations in criminal prosecutions" as "persuasively argued").

of prejudice under Rule 403 focuses on a factfinder's use of the evidence for impermissible purposes—to infer guilt, for example, because defendants are bad people, troublemakers, oddballs, or irritants.[241] As previously demonstrated, however, prior-speech evidence burdens First Amendment rights for reasons that reach beyond this single form of prejudicial effect.[242] The key point is that the reversed-presumption test sharply differentiates between "fair" and "unfair" uses of evidence because Rule 403 by its terms focuses only on the risk of "unfair prejudice." But, as we have seen, "fair" prejudice also gives rise to a burden that should weigh in the balance when speech on matters of public concern is at issue.[243]

In the end, composing the precise wording of a legal formula for gauging the admissibility of relevant past-speech evidence is less important than embracing the basic principle that the First Amendment requires courts to evaluate the evidentiary use of such speech in a meaningful way. With this point in mind, perhaps the best course is to avoid stating any operative limit in the technical jargon of the law—such as jargon that speaks about a "presumption"[244] (far less the "reverse" of a preexisting presumption[245]) or that tracks the lawyerly phraseology of Rule 403. Courts also would do well to steer clear of metaphorical allusions that speak, for example, about "placing a thumb … on the prejudice and confusion side of the … scale."[246] Instead, the best approach—because it is the most comprehensive and direct—would articulate the controlling proposition in more unadorned, if less picturesque, terminology. Such a formulation might read something like this: "When an objection is made to proffered evidence that involves speech on a matter of public concern, the court must balance with care the relevance of the evidence against the threatened burden on First Amendment rights. In doing so, the court must take full account of the constitutional centrality of those rights and recognize that the threatened burden on them reaches

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[241] *See* FED. R. EVID. 403, advisory committees note (indicating that "prejudice" is "unfair" if it has "an undue tendency to suggest decision on an improper basis"); Old Chief v. United States, 519 U.S. 172,180 (1997) (defining "prejudice" as concerning dangers that the factfinder will be "lure[d] .. into declaring guilt on a ground different from proof specific to the offense charged"). *But see* Imwinkelried, *supra* note 104, at 888-93 (suggesting that judges may consider extrinsic social policies in making Rule 403 admissibility determinations).

[242] *See supra* notes 93-105 and accompanying text.

[243] *See id.*

[244] Faulkner, *supra* note 5, at 6, 21 (deeming past-speech evidence "presumptively prejudicial"); *accord*, Donohue, *supra* note 93, at 233.

[245] *See supra* note 238 and accompanying text.

[246] United States v. Ring, 706 F.3d 460, 473 (D.C. Cir. 2013).

beyond the risk of unfair prejudice to the objecting party in the factfinding process."[247]

Other formulations along these lines can be, and no doubt will be, framed by judges and commentators.[248] It bears emphasis, however, that—whatever guiding standards emerge over time—the development of the law in this area will depend most of all on the contextual adjudication of concrete disputes on a case-by-case basis. As courts navigate that process, the key point is this: They must attend not only to the immediate pressures to admit relevant evidence, but also to the enduring and systemic concerns that drove ratification of the First Amendment.

D. Applications

Limitations of time and space preclude a detailed treatment in this Article of how these principles will operate in practice. As it turns out, however, much good work along these lines already exists. Andrea Dennis, for example, has thoughtfully grappled with the special problems presented by rap-music evidence.[249] Robert Faulkner has focused in similar fashion on the intersection of *Noerr-Pennington* principles and evidence law.[250] Peter Quint's pathbreaking article likewise has considered past-speech evidence in the form of high-octane political dissent.[251] Courts should take care to consider these helpful treatments as they work their way through past-speech-evidence cases.

Courts also should attend to accepted paradigms and well-reasoned precedents. In *Ring v. United States*,[252] for example, the government offered evidence of the defendant's past-speech activity in the form of campaign contributions to show that he used them to secure access to officeholders whom he later would try to bribe.[253] This ruling is defensible, but only because the evidence concerned contributions made to candidates of a mainstream party. If the proof showed, for example, that the defendant had channeled funds to Nazi Party candidates, so as to gain access to their

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[247] For a similar suggestion, see Nickerson, *supra* note 6, at 877 (requiring "a showing more demanding than mere relevance" to gain court-ordered disclosure of speech-related evidence).

[248] *See, e.g.*, Dennis, *supra* note 4, at 30-31 (embracing a "balanced approach" under which courts "focus on the unfairly prejudicial nature" of rap lyrics); *id.* at 33 (adding that "[j]udges should approach the admissibility determination from the vantage point … of the lyricist").

[249] Dennis, *supra* note 4.

[250] *See* Faulkner, *supra* note 5, at 29-35.

[251] Quint, *supra* note 2.

[252] 706 F.3d 460 (D.C. Cir. 2013).

[253] *Id.* at 472-74.

officeholder friends, a different case would arise even though the proof's relevance in each case might seem to be the same. In terms of the risk of prejudice, after all, it is one thing to support the campaigns of Republicans and Democrats. It is quite another thing to send money to Nazis.

Another point of proper judicial attention involves dividing proffered past-speech evidence into its component parts. It might well be, for example, that a trial judge can and should admit evidence of a defendant's gang membership, together with proof of the gang's commitment to cross-gang killings, to establish the motive for an alleged murder.[254] But the same judge might simultaneously exclude proffered evidence of the defendant's writing of gang-related rap song lyrics that tend to show the defendant's motive far more tenuously, and to do so in the form of artistic social commentary. The key point is that past-speech evidence oftentimes will be divisible into separate parts. As a result, trial judges should look for chances to admit highly relevant past-speech evidence without excluding related, but only marginally relevant, past-speech proof.

Revisiting the first paragraph of this Article brings into focus a recurring problem raised by past-speech evidence—that is, the problem of how to evaluate such evidence when it is offered to prove a defendant's state of mind. At the trial of Julius Rosenberg, for example, prosecutors presented evidence that the defendant had expressed a preference for Communist systems of government in order to establish an underlying motive for passing secrets to the Soviets, so as to prove that secret-passing by the defendant in fact had occurred.[255] Proof of a preference for one form of government over another, however, links up only in the loosest way with committing acts of espionage,[256] and the acute risk of unfair prejudice in such a case—which occurred at the height of the Red Scare era—is not hard to see.[257] In telling contrast, the Court in *Haupt* dealt with past-speech evidence offered for a very different purpose. There, the prosecution did not tender the defendant's prior statements merely to prove an underlying motive, so as to suggest circumstantially that the defendant engaged in the actus reus of the offense. Instead, it offered the proof to establish (probably in the only way possible) a mens rea element fixed by the statutory prohibition itself—namely, that the

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[254] Notably, the court might reason either that membership in a murderous gang is not a matter of public concern or, alternatively, that the relevance of such evidence outweighs the risk of prejudice it poses.

[255] Quint, *supra* note 2, at 1634-36.

[256] *Id.* at 1668-70.

[257] *Id.* at 1639 (noting the "grave dangers of prejudice" that arose because the Rosenbergs' trial "came in the heart of the Cold War period").

defendant acted with a specific intent to aid the enemy. In addition, the evidence in *Haupt* involved much more than an expressed preference for one form of government over another; indeed, the father's declaration that he would kill his son if he fought against Germany signaled a no-holds-barred form of focused enmity that reached far beyond simply endorsing an unpopular point of view. For these reasons, the Court's ruling in *Haupt* is reconcilable with the mode of analysis put forward here. There is good reason to conclude, however, that the Second Circuit's ruling in *Rosenberg* did not take fair account of the free-speech values at stake in the case.[258]

Even precedents that do not involve evidence issues might prove useful to courts as they undertake context-sensitive balancing in this set of cases. In *Connick*, for example, the Court rightly emphasized that judges should distinguish between speech that lies in the heartland of the First Amendment and speech that travels near to the outer edges of the public-concern concept. Other considerations—such as the recency or non-recency of the speech,[259] its isolated or non-isolated character,[260] its distinctive potential for creating or not creating prejudicial effects,[261] its packaging in forms that are or are not

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[258] One set of cases that brings the background-motive/intent-element distinction into sharp relief involves efforts to prove a prohibited discriminatory mental state as part of criminal or civil proceeding brought under the antidiscrimination laws. *See generally* United States v. Cannon, 750 F.3d 492, 508 (5th Cir. 2014) (collecting illustrative cases). Many of these cases involve the evidentiary use of racist or sexist speech that has occurred as part the prohibited action—as when, for example, a defendant utters racial slurs while engaging in a violent assault. In such cases, confirmatory evidence (such as the defendant's membership in a racist organization or past expression of racist views) may also be allowed into evidence on the basis that it, too, is relevant. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (observing that "stereotyped remarks can certainly be evidence that gender played a part" in an employment decision challenged under an anti-discrimination law). As Professor Quint has explained, use of past-speech evidence to prove a statutorily required discriminatory intent is typically far less problematic than the use of such speech to show an underlying motive so as to help prove that the defendant engaged in actions he denies having taken. Why? Because "fewer inferential steps are required" to prove an illicit "intent" directly from speech, as opposed to proving indirectly the defendant's commission of an act by using speech to establish an underlying-motive-related state of mind, which in turn provides only one circumstantial basis for concluding that commission of the act by the defendant occurred. Quint, *supra* note 1, at 1670-71. Moreover "speech is often the only … evidence bearing on the question of intent," as opposed to the question of whether the defendant committed the actus reus of the crime that is the subject of the charge. *Id. See also* Anderson, *supra* note 5, at 935 (sharply distinguishing between these two types of cases).

[259] *See* Dennis, *supra* note 4, at 33. *See, e.g.*, People v. Scott, 927 P.2d 288 (Cal. 1996) (excluding evidence of rap lyrics found in defendant's home a year before the charged murder).

[260] *See id.*

[261] *See* Dennis *supra* note 4 (discussing problems in this regard presented by rap-music evidence).

"frequently exaggerated or polemical,"[262] and its immediate or more attenuated relevance to contested factual issues[263]—also should weigh in the decisional balance.[264] The key point is that courts must strike that balance with thoughtfulness—thoughtfulness that should increase if, as is suggested here, courts must work to craft case-specific justifications for their rulings only after considering evidentiary objections in focused hearings conducted outside the presence of the jury.

CONCLUSION

As noted by a leading authority on the subject: "Writers have sometimes urged courts to use … the First Amendment to limit the use of evidence. Judges do not seem enthusiastic about doing this."[265] This assertion is both true and troubling. In declining to scrutinize past-speech evidence with care, lower courts have both over-read key Supreme Court precedents and undervalued the free speech interests that these cases present. Of particular importance, those courts have paid too little attention to modern developments in the First Amendment field, particularly with regard to aggressively protecting speech on matters of public concern and thoughtfully evaluating as-applied challenges to speech-impairing generally applicable laws. This Article points the way to an improved approach. The installation of meaningful, but nonburdensome, procedural requirements will foster decision-making care as judges assess past-speech-related evidentiary objections. And a vitalized substantive standard for assessing admissibility—one that takes account of all the burdens on speech imposed by such evidence—will help to ensure that courts, in this set of cases, afford our most fundamental liberties their fair due.

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[262] *See* Quint, *supra* note 2, at 1609; *see also* Dennis, *supra* note 4, at 25 (questioning recurring admission of rap-music evidence because rappers "are akin to fiction writers").

[263] Dennis, *supra* note 4, at 33 (focusing on close connectivity of prior-speech evidence to, for example, a particular crime-connected modus operandi); Quint, *supra* note 2, at 1670-71 (distinguishing "general political views from views of greater specificity bearing on the alleged offenses"); *id* at 1674 (discussing in this vein specificity-laden past speech, such as an address calling on listeners to block traffic on a bridge to show the speaker's intentional, as opposed to unintentional, engagement in that behavior); *id* at 1674..

[264] Quint, *supra* note 2, at 1676. Another relevant factor might be the extent to which the defendant has "opened the door" to an investigation of such matters as his political beliefs through the offering of his own evidence or arguments in the case.

[265] 22A CHARLES ALLEN WRIGHT & MICHAEL H. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5195 (4th ed. 2014).