Chill

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Courts frequently assess the constitutionality of government regulation on free speech by reference to the law's impact on hypothetical expression not before the court. In some instances, courts have permitted litigants whose speech is not regulated by a statute to nevertheless raise First Amendment overbreadth challenges on the basis that third-party expression might be chilled—as in, silenced. Still, in other instances, courts have invalidated government regulation on the basis of its impact upon the hypothetical expression of others. In either event, the concept of a chilling effect is a speculative and superfluous misnomer that has no place in First Amendment free speech jurisprudence. The chilling effect doctrine, which reasons that laws that chill speech are unconstitutional, makes too many false assumptions about the speakers' knowledge of the law, their ability to correctly apply the law, and their willingness to conform to the law in order to adequately capture constitutionally protected speech. For this reason, whether a law might deter putative speakers from engaging in their desired expression is an important concern, but one that should be abandoned as a measure of constitutional standing and harm.

To date, scholars have addressed the chilling effect doctrine only in relation to other aspects of constitutional law without fully contemplating its role in First Amendment jurisprudence. As a result, the relevant literature is highly fractured. By focusing solely on the chilling effect doctrine and its shaky underpinnings, this Article draws from existing scholarship to create a new, universal framework for critiquing the doctrine. Because the chilling effect doctrine arises from faulty assumptions regarding knowledge and conformity, it should be abdicated and replaced with a direct impact test premised on how hypothetical

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expression would fare under the challenged regulation.

INTRODUCTION

Chill (verb)–
: to make (someone or something) cold or cool
: to become cold or cool
: to cause (someone) to feel afraid

Merriam-Webster Dictionary (2015).

Chill–
1. hang out
2. relax
3. stop doing something

Urban Dictionary (June 15, 2002).

"[T]he fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts."[1] The potential deterrent to creativity that influenced Justice Earl Warren's dissenting opinion in *Times Film Corporation v. City of Chicago*, more than fifty years ago, has since polluted First Amendment jurisprudence through the chilling effect doctrine.[2] Now, courts frequently assess the constitutionality of government regulation on free speech by reference to a challenged law's impact on hypothetical expression that is not before the court, or the potential, eventual censorship—rather than a cognizable harm to the actual plaintiff. The idea that a particular restriction on speech might cause other individuals to silence themselves or censor their own expression was first acknowledged by the United States Supreme Court in the abovementioned *Times Film Corporation*,[3] and has since been used to justify expanding traditional notions of standing and constitutional harm in First Amendment cases.

In some instances, courts have permitted litigants, whose speech is not regulated by the statute in question, to nevertheless raise overbreadth challenges[4] on the basis that third-party expression *might* be chilled.[5] In this regard, the chilling effect doctrine serves as a gateway to expanded standing for parties whose speech is either unprotected or only marginally protected by the Constitution. In other instances, courts have invalidated government regulation on the basis of its impact upon the hypothetical expression of others. Here, the notion of "chill" serves as a substitute for constitutional injury, such that the very concept of self-censorship is itself a harm that can be remedied by the courts.

In either event, the concept of chilling effect is a speculative and superfluous misnomer that threatens the consistency of First Amendment free speech jurisprudence. It is of important concern when a putative speaker's intended speech is subject to self-censorship as a result of government regulation—but interweaving that concern into existing free

1. Times Film Corp. v. City of Chicago, 365 U.S. 43, 75 (1961) (Warren, J., dissenting).

2. *Id.*

3. *See generally id.* (majority opinion) (discussing the censorship of a movie film).

4. The overbreadth doctrine holds that a law regulating speech violates the First Amendment when a substantial number of its applications prohibit protected expression when judged in comparison to its plainly legitimate sweep. United States v. Stevens, 559 U.S. 460, 473 (2010) (citing Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

5. This Article uses the concept of "chill" or "chilling effect" to reference the pressure placed on a potential speaker by legislative enactments to remain silent. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

speech doctrine potentially interrupts the intentions of the First Amendment. To be sure, scholars have long criticized the role that chilling effect plays in analyzing free speech, noting that its immeasurable quality and focus on the hypothetical limit its efficacy in protecting actual expression. Nevertheless, scholars have failed to generate any consistent view on why the chilling effect doctrine should be abandoned—and this Article seeks to do just that. Focusing exclusively on the chilling effect doctrine and its shaky underpinnings, this Article creates a new, universal framework for critiquing the doctrine that is unrelated to pre-existing doctrinal bias. Rather than considering whether hypothetical speech retains normative value and then assessing whether the chilling effect doctrine effectively captures that expression, this Article's approach instead argues that the concept of the chilling effect doctrine was flawed from its inception because it rests on faulty theoretical judgments.

This Article therefore advocates for a potential transition in First Amendment jurisprudence from tests that analyze hypothetical situations to tests that ascertain a challenged law's direct and actual impact on speech. This Article expands upon the existing literature and argues that the chilling effect test rests upon numerous faulty assumptions unsupported by law, theory, or empirical fact. Underlying the notion that speech may be impermissibly chilled by government regulation are at least three assumptions: (1) that the speaker is aware of the law's existence; (2) that the speaker is aware that his or her speech is covered by the law or maintains a reasonable uncertainty as to whether his speech is covered; and (3) that the speaker is willing to comply with the law by both censoring his or her own speech and remaining silent as to his or her election to do so. This Article argues that each of these premises is wrong and concludes that the chilling effect doctrine should be abdicated.

Part I of this Article examines the evolution of chilling effect doctrine and how it has evolved into a substitute for both standing and injury in First Amendment cases. This Part examines not only the theoretical underpinnings of the chilling effect test, but also categorizes current judicial approaches to the standard and how it is presently being used to assess the constitutionality of governmental regulation. Part I also includes an overview of the existing literature on chilling effect and its focus on how the doctrine overlaps with other aspects of First Amendment jurisprudence.

Part II of this Article expands upon the approach to the chilling effect that is currently held by free speech scholars and unpacks the three improper premises upon which the chilling effect doctrine rests. As Part II demonstrates, the average reasonable person is likely unaware of the

vast myriad of regulations on their speech, and even further does not grasp how to apply those regulations to the nuances of their own expression. Moreover, the mere fact that courts routinely consider First Amendment challenges in both civil and criminal cases, where speech has taken place in the wake of laws prohibiting it, undercuts the notion that speech regulations actually chill speech.

Part III of this Article implements a new approach to chill and proposes that a direct impact standard should replace the chilling effect test. Rather than considering whether unknown individuals would, in theory, be chilled in their individual expressions, courts should instead focus on how the proposed speech—if the speaker chooses to present it—would fare under the challenged regulation. This approach is superior because it employs existing First Amendment standards to address actual speech, rather than relying upon unknowable assumptions and mere conjecture.

Because the concept of chilling effect is speculative, unknowable, immeasurable, and theoretically unjustifiable, this Article asserts that it should be abdicated as a measure of First Amendment standing or harm. A better perspective is one that considers a regulation's direct impact on speech, rather than whether the speech would be subject to self-censorship in the hypothetical.

I. THE LAW OF CHILLING EFFECT

The notion that laws regulating speech may act as a deterrent to expression factors into First Amendment free speech jurisprudence in two distinct ways. First, courts consider whether hypothetical chilled expression constitutes a cognizable injury sufficient to vest standing to challenge a speech regulation.[6] In this regard, courts assess whether a self-imposed chill is both actual and the result of government action before permitting facial challenges to laws regulating speech. Second, once the initial standing requirement has been satisfied, courts also consider the notion that laws may deter speech in analyzing whether the challenged regulation comports with the First Amendment. In this context, the very idea that certain speech may not exist as a result of deterrent legislation constitutes a constitutional harm that can be remedied by the courts.[7]

The development of the chilling effect doctrine has been intertwined with the components of standing and harm, and, for this reason, can be

6. To obtain standing, or the legal ability, to challenge a legislative enactment, a party must have first suffered an "injury in fact." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

7. An injury must also be capable of redress by the courts for a party to have standing to sue. *Id.*

difficult to parse. Tracing the concept to its origins proves useful in understanding how chilled expression serves as a gateway to challenging speech-related laws and a basis for striking down these regulatory enactments.

A. Development of the Chilling Effect Doctrine as a Measure of Free Speech

The phrase "chilling effect" first appeared in a Supreme Court opinion in 1961.[8] Justice Earl Warren, in his dissent from the majority opinion that upheld a Chicago ordinance requiring a permit to publicly exhibit a motion picture, posited a number of scenarios in which the speech-permitting scheme might suppress expression, rightfully or wrongfully.[9]

In his dissent, Justice Warren first observed that requiring a permit to exhibit a film would likely deter individuals from displaying obscene motion pictures, which he labeled as both intended and permissible impacts of the ordinance.[10] But, he was troubled by two additional, possible outcomes, neither of which would comport with his view of the First Amendment. In one example, a film might be improperly censored by the government when the film's presenter is denied a permit based on a false categorization of the material. Here, Justice Warren worried that speakers would be unlikely to assert a legal challenge to the permit denial due to the numerous financial and logistical deterrents to proceeding in court.[11] Equally problematic in Justice Warren's dissent was the hypothetical scenario in which the speaker, desiring to present a lawful film, did not seek a permit at all out of fear that he or she would be denied government permission.[12]

In what remains as one of the most poignant explanations of chilling effect, Justice Warren emphatically concluded: "the fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts."[13] With this, the concept of the chilling effect was born.

1. Chilling Effect and Standing

The Supreme Court later clarified the chilling effect doctrine in the

8. Times Film Corp. v. City of Chicago, 365 U.S. 43, 74 n.11 (1961) (Warren, J., dissenting) (citing Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951)). Interestingly, the phrase was derived not from prior case opinions, but from an influential law review article written by Professor Paul A. Freund of Harvard Law School. Freund, *supra*, at 539.

9. *Times Film Corp.*, 365 U.S. at 74–75.

10. *Id.* at 74.

11. *Id.* at 74–75.

12. *Id.*

13. *Id.* at 75.

standing context in *Laird v. Tatum*.[14] *Laird* stemmed from an Army surveillance program that collected data and information on localized political protests to prepare for the Army's potential role in quelling civilian unrest.[15] The Army began surveillance of protests in 1967—following riots in Detroit—and voluntarily ceased maintenance of the data three years later.[16] The information was never subsequently used in furtherance of military initiatives.[17] As a result, the Court questioned whether the plaintiffs, an unidentified class of civilians allegedly negatively impacted by the pervasive surveillance program, had asserted a sufficient constitutional injury to maintain standing.[18] In resolving that concern, the Court acknowledged that certain regulations may indeed create a deterrent, or chilling effect, upon expression that is not explicitly prohibited by the government.[19]

Balanced against the Constitution's standing requirement that a litigant suffer actual injury,[20] the Court found that the notion of speculative chill was insufficient to constitute concrete, cognizable harm.[21] As the Court observed, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[22] Because the Army had not used the information in its possession for any reason, the individuals challenging the surveillance system lacked standing to redress an injury despite their assertion of a chilling effect arising from the regime.[23]

The *Laird* decision contains two important observations about the chilling effect beyond its essential holding: first, that mere knowledge of the existence of a speech regulation is insufficient to demonstrate that speech has actually been chilled,[24] and second, that the putative speaker must be currently or prospectively subject to the regulations he or she is

14. 408 U.S. 1, 12–14 (1972).
15. *Id.* at 3–8.
16. *Id.* at 4–5, 7–8.
17. *Id.* at 9.
18. *Id.* at 10.
19. *Id.* at 11.
20. To invoke the jurisdiction of the federal courts under Article III of the Constitution, a litigant must demonstrate: (1) an injury in fact that is both concrete and actual or imminent; (2) that the injury is fairly traceable to the defendant's action or inaction; and (3) that the injury will be redressed by a favorable court decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).
21. Laird v. Tatum, 408 U.S. 1, 13–14 (1972).
22. *Id.*
23. *Id.* at 14–16.
24. *Id.* at 11.

challenging.[25] Thus, from the outset, the Court envisioned the chilling effect doctrine as containing a heightened knowledge requirement. The speaker must not merely *know* that a law exists, but must be correct in his *judgment* that his desired speech is actually covered by the law in order to assert that his chilled expression gives rise to standing.[26]

In the years since *Laird*, the chilling effect doctrine has continued to serve as a gateway to establishing First Amendment standing when coupled with actual, present harm or the credible threat of future harm.[27] In cases involving a threat of real or potential future harm to speech, courts have continued to require something more than a subjective chill and have found standing lacking in situations where the plaintiff was not directly subjected to government action.[28] Thus, *Laird*'s requirement of chill *plus* harm remains valid today.

Courts have also created a related, but distinct, standing gateway when a new regulation curtails speakers' expression.[29] Known as the anticipatory challenge exception, courts permit speakers to challenge laws that impinge upon their First Amendment rights in advance of the law's application to their expression, or even their assertion of self-imposed chill. In this instance, parties wishing to challenge a statute before its enforcement need only demonstrate a realistic "danger of sustaining a direct injury as a result of the statute's operation or enforcement."[30] Essentially, speakers are not required to "await the

25. *Id.*

26. *Id.* at 11, 13–14.

27. As a representative sample of lower court cases in which the allegation of a chilling effect was sufficient to bestow constitutional standing, see, for example, *Parsons v. United States Dept. of Justice*, 801 F.3d 701, 710–17 (6th Cir. 2015) (holding that fans of the band Insane Clown Posse had standing to challenge inclusion of their fan club in federal gang watch list based on allegation of First Amendment chill); *Cooksey v. Futrell*, 721 F.3d 226, 235–37 (4th Cir. 2013) (finding that operator of the dietary and nutrition website was sufficiently chilled so as to obtain standing when contacted by North Carolina Board of Dietetics and Nutrition and advised to bring his website into compliance with state regulations); and *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1088–90 (10th Cir. 2006) (finding that the natural history interest group with history of challenging ballot initiatives in Utah had standing to challenge the chilling effect imposed by a supermajority requirement for wildlife initiatives).

28. *See Laird*, 408 U.S. at 13–14 (noting that "[a]llegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm). *See also* Morrison v. Bd. of Educ. of Boyd Cnty., 521 F.3d 602, 610 (6th Cir. 2008) (noting that the student's claim that he had been chilled in the expression of his views on homosexuality by school policy prohibiting stigmatizing and insulting comments was too speculative in the absence of a concrete belief he would be disciplined to support constitutional standing).

29. *See, e.g.*, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342–43 (2014) (holding that a demonstration of threatened future enforcement of a law is sufficient for Article III standing).

30. O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

consummation of threatened injury to obtain preventive relief."[31] In the context of speech regulations, the threatened injury often comes in the form of criminal prosecution.[32] When contesting the constitutionality of a criminal statute, however, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights."[33] This standard enables a plaintiff to challenge the constitutionality of a criminal statute without being "required to await and undergo a criminal prosecution as the sole means of seeking relief."[34]

The difference between the chilling effect doctrine and an anticipatory challenge is subtle, but significant. While the chilling effect assesses standing based on whether the risk of self-censorship is both justifiable and real, the anticipatory challenge exception focuses instead on whether the plaintiff has alleged a credible fear of regulation.[35] In this regard, the anticipatory challenge doctrine exerts a lower standing threshold, requiring only that there exists a realistic fear of prosecution, and not an actual chill premised on government action.[36]

In the context of standing, anticipatory challenges demonstrate why and how requiring something less than outright self-censorship serves to protect First Amendment free speech rights. Although the chilling effect doctrine initially served as a gateway to Article III constitutional standing by equating self-silence with an injury in fact, it is no longer necessary for a speaker to demonstrate that he or she has censored his or her own speech to mount a First Amendment lawsuit. A credible fear of prosecution will now suffice. This weakening of the chilling effect

31. Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923), *reh'g granted*, 263 U.S. 671 (1923).

32. Consider, for example, obscenity laws and parade permit laws that contain criminal penalties for the presentation of speech. *See, e.g.*, Miller v. California, 413 U.S. 15, 27–28 (1973) (holding that no one would be prosecuted "for the sale or exposure of obscene material unless" it contains "offensive 'hard core' sexual conduct' defined by state law); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90–91 (1965) (analyzing Alabama's parade permit procedure in this seminal case on overbreadth).

33. Steffel v. Thompson, 415 U.S. 452, 459 (1974); *see* Epperson v. Arkansas, 393 U.S. 97, 100 (1968) (noting a case where a teacher was supposed to use a new textbook and teach a condemned chapter, but to do so would be a criminal offense, therefore she sought a declaration that a statute was void).

34. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (citing Doe v. Bolton, 410 U.S. 179, 188 (1973)); *see Susan B. Anthony List*, 134 S. Ct. at 2346 (holding that a demonstration of threatened future enforcement of a law is sufficient for Article III standing).

35. For an extended discussion of the role of fear in First Amendment standing, see Brian Calabrese, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445, 1456–64 (Fall 2011).

36. *Babbitt*, 442 U.S. at 298; Laird v. Tatum, 408 U.S. 1, 11–17 (1972).

doctrine in the standing context provides a roadmap for why it is time to abdicate the harm-based concept of chilling effect.

2. Chilling Effect and Harm

Once standing to raise a First Amendment challenge has been established, courts inquire whether the assumed chill on speech is itself also an injury.[37] Put simply, the very notion that speech is lost or chilled may itself be a justiciable First Amendment harm separate and apart from whether a particular party has suffered sufficient injury to raise a claim.[38] This form of analysis arises most frequently in facial challenges to a statute's potential vagueness or overbreadth. For example, in *Grayned v. City of Rockford*—a seminal case on vagueness—the Supreme Court identified excessive chill as one of the primary constitutional harms inflicted by ambiguous enactments.[39] "[W]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[40] Although the Court ultimately concluded the antinoise ordinance at issue in *Grayned* did not violate the First Amendment, its pronouncement regarding the danger that vague and overbroad laws will unjustly prohibit speech remains oft-cited and followed.[41]

As the *Grayned* Court noted, it is the uncertainty regarding how a speech regulation will be applied that creates a basis for self-censorship. In this vein, the amount of confusion regarding a law's application to a particular type of speech is directly proportional to the likelihood that the speech will be chilled.[42] The closer the speech is to a perceived regulated area, the greater the chances the speaker will silence it, even if it is actually constitutionally protected and therefore could have been presented all along.[43] Take, for example, a ban on exterior vehicle

37. Calabrese, *supra* note 35, at 1458–59. *See* Buckley v. Am. Const. Law Found., 525 U.S. 182, 198–99 (1999) (noting that the challenged badge requirement is injury to the speech itself).

38. *See, e.g.*, Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 389 (1988) ("[T]he alleged danger of [a statute regulating protected expression] is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.").

39. 408 U.S. 104, 108–09 (1972).

40. *Id.* at 109 (quoting Baggett v. Bullitt, 377 U.S. 360, 372, 377 (1964); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961)).

41. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611–13 (1973) (citing *Grayned v. City of Rockford*, 408 U.S. at 114–21, in its opinion).

42. Amy Pomerantz Nickerson, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 UCLA L. REV. 841, 870–71 (Feb. 2010).

43. *Id.* at 870.

advertising that only applies when a car is parked in such a way as to call attention to it.[44] Without a definition as to when this occurs or what criteria a law enforcement officer is to use in determining the intent of the driver in parking the car, the law could be used to target nearly any exterior advertising on cars.[45] When faced with such an ordinance, reasonable people may elect not to display advertising at all, on the grounds that they may face prosecution every time they park their vehicles. Thus, in cases challenging the ambiguity of statutory terms, the chilling effect concept actually serves as a basis for invalidating the law, because it indirectly discourages speech.

The notion of chill occupies a related, but subtly different place in the overbreadth doctrine.[46] Claims that a legislative enactment is overly broad do not necessarily assert that speakers are subject to a justifiable, self-imposed chill, but rather imply that the law itself *actually chills* protected expression by directly regulating it.[47] The difference between vagueness and overbreadth therefore lies in the entity imposing the chill: in void for vagueness cases, the concern is for a self-censorship; in overbreadth cases, the concern is for a chill arising from the terms of the statute. The Court's opinion in *Members of City Council v. Taxpayers for Vincent*, for example, emphasizes this exact point.[48]

In *Taxpayers for Vincent*, the United States Supreme Court demonstrated that a statute is only overbroad if it "inhibit[s] the speech of third parties who are not before the court," and, even then, only where it "unquestionably attaches sanctions to protected conduct."[49] In short, for a plaintiff to challenge a statute on an overbreadth basis, there must be a recognized and realistic danger that *the statute itself* will impair First Amendment protections.[50]

In any event, when courts that assess the facial validity of statutes impacting speech consider the possibility of a chilling effect, these courts are weighing whether the quantum of hypothetically suppressed expression is sufficient to strike down the law. Regardless of whether the chill arises from a speaker's own choice or the terms of the challenged

44. *See* Foti v. City of Menlo Park, 146 F.3d 629, 638–40 (9th Cir. 1998) (discussing vagueness of ordinance restricting advertising on parked vehicles).

45. *Id.* at 639.

46. *See supra* note 4 (defining the overbreadth doctrine).

47. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("[T]he threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.").

48. 466 U.S. 789, 800–01 (1984).

49. *Id.* at 800 n.19.

50. *Id.* at 801; s*ee also* Laird v. Tatum, 408 U.S. 1, 13–14 (1972) (noting that the harm must be a result of the executive or legislative action).

enactment, the notion that some speech might not exist because of governmental overreaching constitutes a cognizable, constitutional harm.

B. Current Doctrinal Approaches to Chilling Effect

While *Laird*, *Grayned*, and their progeny are useful when conceptualizing the chilling effect doctrine in situations where either standing or constitutional harm is at issue, a review of recent appellate cases from the prior decade is instructive—especially when assessing how courts apply chilling effect in a broader sense. Although chilling effect is used to assess speech across a variety of spectrums, speech that is presented by extremely favored speakers on one end of the spectrum—as in, contributors to political candidates—and extremely disfavored speakers on the opposite end—as in, prisoners and targets of government investigations—tend to trigger the doctrine more frequently. An assessment of recent decisions in these contexts generates important observations about how the courts interpret and make use of the chilling effect doctrine.

1. Prisoner Speech Cases

In the context of speech promulgated by inmates in confinement, courts have specifically engrafted a chilling effect requirement into the substantive First Amendment doctrine.[51] In other words, chilling effect is used not merely as a basis for finding standing or as one measure among many for constitutional injury, but it is affirmatively required as an element of asserting a *prima facie* First Amendment violation.[52]

This is particularly true where speech by prisoners forms the basis of a claim of retaliation, or when an inmate alleges that the content of his or her expression has generated an adverse response by prison officials.[53] Using this test, courts have rejected constitutional challenges to prison

51. *See, e.g.*, Grenning v. Klemme, 34 F. Supp. 3d 1144, 1153 (E.D. Wash. 2014) (holding that the inmate challenging mail restrictions must demonstrate that his speech was chilled to show a constitutional violation).

52. *See, e.g.*, Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009) (holding that a viable claim of First Amendment retaliation entails five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) the inmate's protected conduct and that the adverse action (4) chilled the inmate's exercise of his First Amendment rights and (5) did not reasonably advance a legitimate penological purpose); Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000) (holding that to establish a claim of First Amendment retaliation, a plaintiff must prove (1) that he was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct).

53. *Brodheim*, 584 F.3d at 1269.

transfers following an inmate's exercise of his or her free speech rights[54] and to restrictions on sending mail between inmates of different penal institutions.[55] Nevertheless, even though chilling effect is elevated to a substantive requirement, courts do not require inmates to demonstrate a complete and total chill on their speech to state a First Amendment case.[56] Rather, courts focus on whether an ordinary person of reasonable firmness would be chilled by the alleged retaliation instead of whether the particular inmate was, in fact, chilled.[57] Thus, while chilling effect is an affirmative element of proving a constitutional violation for inmates, the test is an objective, rather than a subjective, one.[58]

2. Government Surveillance Cases

Constitutional challenges to governmental surveillance programs also provide a strong illustration of how the chilling effect doctrine is used in practice. For example, in *Clapper v. Amnesty International USA*, the Supreme Court imposed a heightened chilling effect standard on cases involving government surveillance programs.[59] Various individuals, lawyers, and human rights organizations brought suit in *Clapper* to enjoin enforcement of the foreign persons surveillance provisions in the Foreign Intelligence Surveillance Act ("FISA").[60] These individuals alleged that, because they feared surveillance under FISA, they were required to undertake expensive, burdensome, and time-consuming measures to conceal their innocuous and routine communications from the government.[61] The Supreme Court rejected this allegation and held that this sort of self-concealment was insufficient to confer standing based on the chill concept—finding, instead, that the individuals themselves devised the concealment plans; FISA did not require them.[62] In so doing, the Court reiterated that a subjective fear, even one that is legitimate and "nonparanoid," is insufficient to confer standing based on chilling effect

54. Hurd v. Garcia, 454 F. Supp. 2d 1032, 1048 (S.D. Cal. 2006).

55. Vester v. Rogers, 795 F.2d 1179, 1183 (4th Cir. 1986).

56. Rhodes v. Robinson, 408 F.3d 559, 562, 568 (9th Cir. 2004) (amending Rhodes v. Robinson, 380 F.3d 1123, 1131 (9th Cir. 2004)).

57. Pena v. Greffet, 922 F. Supp. 2d 1187, 1223 (D. N.M. 2013).

58. *Id.*

59. Clapper v. Amnesty Intern'l USA, 133 S. Ct. 1138, 1152 (2013). For a comprehensive treatment of standing concepts in government surveillance cases, including the role of chilling effect in establishing both standing to sue and redressable injury, see Scott Michelman, *Who Can Sue Over Government Surveillance?*, 57 UCLA L. REV. 71 (2009).

60. *Clapper*, 133 S. Ct. at 1140.

61. *Id.* at 1150–51.

62. *Id.* at 1151.

in surveillance cases.[63]

The *Clapper* Court implied that there must be some nexus between the government's regulation and the chilling effect itself; in other words, the *government* must impose the chill, not the speaker.[64] Further, the government action must be the cause of the chill, such that if the incentive to silence oneself existed before the challenged enactment, standing ceases to exist.[65] Because the speakers in *Clapper* could not demonstrate that their concealment efforts arose because of FISA in some way, they lacked standing to attack FISA's foreign surveillance provisions.[66]

In the wake of *Clapper*, lower courts have interpreted the decision to require not merely a possible chilling effect on communication, but instead a "certain impending injury" (i.e., an injury that will definitely occur in a very short period of time) to establish constitutional standing.[67] Although the *Clapper* opinion arose from a challenge to a governmental surveillance program, some courts have extended the "certain impending injury" requirement to more general First Amendment litigation.[68] But it remains to be seen whether the Supreme Court agrees with this extension of the certain injury principle.[69] For the time being, *Clapper* implies that pre-enforcement challenges to speech-related laws will be less successful in the absence of a certain and imminent threat of prosecution.[70]

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63. *Id.*

64. *Id.*

65. *Id.* at 1152.

66. *Id.* at 1152–53.

67. *See, e.g.*, Citizen Center v. Gessler, 770 F.3d 900, 910 (10th Cir. 2014) (finding that plaintiffs did not have standing to challenge vote-tracking procedure because plaintiffs could not demonstrate that individuals would not vote if they knew their votes were being traced).

68. *See, e.g.*, Afifi v. Lynch, 101 F. Supp. 3d 90, 108–09 (D.D.C. 2015) (finding that self-inflicted injury does not confer standing); Brady Campaign to Prevent Gun Violence v. Brownback, 110 F. Supp. 3d 1086, 1102–03 (D. Kan. 2015) (dismissing lawsuit challenging Kansas Second Amendment Act on grounds that anti-gun violence organization did not allege actual or certain injury arising from the law); Johnson v. Dist. of Columbia, 71 F. Supp. 3d 155, 162–63 (D.D.C. 2014) (dismissing facial challenge to Washington D.C. law, which made it a crime to falsely deny ownership of an animal, on grounds that animal rights activist who disclaimed pets as property faced either certain impending injury or a reasonable belief he would be subjected to prosecution); *but see* Fikre v. Fed. Bureau of Investigation, 142 F. Supp. 3d 1152, 1164 (D. Or. 2015) (finding that a naturalized citizen of Eritrean descent had standing to challenge his placement on the FBI's no-fly list).

69. There exists a current split of authority amongst the lower courts on whether *Clapper*'s heightened standing requirement applies solely to surveillance programs, where national security may be at issue, or instead applies more generally to all cases in which standing is premised upon a chilling effect on speech. *Compare supra* note 59 (discussing the *Clapper* decision) *with* Const. Party of Penn. v. Aichele, 757 F.3d 347, 371–72 (3d Cir. 2014) (holding that *Clapper* is limited to surveillance programs and finding, in light of that narrow reading of *Clapper*, that non-major political parties had standing to challenge ballot access laws).

70. Clapper v. Amnesty Intern'l USA, 133 S. Ct. 1138, 1152–53 (2013).

3. Election Law Cases

In the context of governmental action to expose campaign communications and other election-related speech, courts have made use of the chilling effect concept not only to support determinations that constitutional standing and constitutional harm exist, but also to justify extending discretionary jurisdiction to adjudicate speech interests.[71] For example, in *Perry v. Schwarzenegger*, the Ninth Circuit issued an order blocking the discovery of internal campaign communications related to the same-sex marriage debate, despite questioning whether the remedy was legally appropriate.[72] It did so in large part based upon the chilling effect that disclosure of campaign communications would have on future political participation.[73]

In other cases, courts have assumed—without much discussion—that limits on campaign contributions impose a chilling effect on donors' willingness to contribute.[74] For example, in *Seaton v. Wiener*, the court made a blanket finding that "[t]he return of 'excess' donor contributions, however, has a chilling effect on speech and burdens the exercise of First Amendment freedoms," absent any discussion of how realistic or concrete the chilling effect was.[75] Thus, in the election law context, courts essentially appear to presume chilling effect and ascertain the law's potential impact without proof to demonstrate that the regulation, in theory, deters expression.[76]

Comparing the use of chilling effect in prisoner, surveillance, and election law cases produces three significant observations about the doctrine itself. First, when it is used to demonstrate constitutional standing to challenge a speech-related regulation, the standard for demonstrating chilling effect remains quite high. Particularly when the *Clapper* "certain impending injury" test is used, the chilling effect

71. *See, e.g.*, Iowa Right to Life, Inc. v. Tooker, 717 F.3d 576, 594–601 (8th Cir. 2013) (invalidating, under the First Amendment, portions of Iowa campaign finance law requiring corporations to limit contributions to political candidates and comply with ongoing reporting requirements about its contributions and intent).

72. 591 F.3d 1147, 1156 (9th Cir. 2009).

73. *Id.*

74. *See, e.g.*, SpeechNow.Org v. Fed. Elections Comm'n, 599 F.3d 686, 693–96 (D.C. Cir. 2010) (holding that statutory contribution limits violate the First Amendment because it prevented plaintiffs from donating in excess of proscribed limits).

75. 22 F. Supp. 3d 945, 949 (D. Minn. 2009). *See also* Green Party of Conn. v. Garfield, 616 F.3d 213, 243 (2d Cir. 2010) (finding, without analysis, that chilling effect justified standing to state campaign finance reform law).

76. *SpeechNow.Org*, 599 F.3d at 695 (focusing First Amendment analysis on whether the government retained a substantial interest in limiting campaign contributions without discussing whether or how the restriction deterred speech).

doctrine requires plaintiffs to be mind readers or fortune tellers.[77] In few other realms of law does a case rise or fall based solely on predictions of the future, making the chilling effect doctrine an outlier in its reliance upon future events to dictate present outcomes.[78]

Second, although no court has explicitly said so, the invocation of the chilling effect concept appears tethered in some way to the strength of the First Amendment right being asserted. Where the right of free speech is strong—for example, in election law cases involving the right of political expression—chilling effect is almost always presumed.[79] In such cases, plaintiffs challenging restrictions on their speech need not demonstrate that their speech or others' speech has actually been chilled to prevail.[80] And third, where the First Amendment right is less defined—like in prisoner or surveillance cases—the standard of proof required to demonstrate a sufficient chilling effect is quite demanding.[81] As such, in practice, the chilling effect concept is both fluid and dependent on context, making it difficult to apply and even harder to understand.

C. Scholarly Response to the Chilling Effect Doctrine

The chilling effect doctrine occupies an important place in First Amendment jurisprudence because it both defines the threshold for adjudicating speech-related interests and also quantifies when a law that burdens expression is constitutionally intolerable. Yet, in recent literature, scholars have addressed the chilling effect doctrine only in relation to other aspects of constitutional law without fully contemplating its role as a stand-alone doctrine. Over the past two decades, at least four schools of thought have emerged on the normative role that chilling effect ought to play in conceptualizing the free speech clause.

One school of thought, which encompasses constitutional law scholars who favor bright-line, categorical approaches to regulating expression,

77. *See supra* text accompanying notes 67–68 (discussing the *Clapper* decision).

78. In contrast, compare the "certain impending injury" test with FED. R. EVID. 407, which specifically excludes subsequent remedial measures, as evidence of wrongdoing in products liability cases, or to the myriad of state jury instructions that prevent juries from considering possible future sentences in adjudicating guilt in criminal cases. *See, e.g.*, City of Parma Heights v. Dingman, No. 70769, 1997 WL 218259, at *6–7 (Ohio Ct. App. May 1, 1997) (discussing jury instructions).

79. *See, e.g.*, *Seaton*, 22 F. Supp. 3d at 947–48 (discussing how plaintiffs identified "various ways in which the statute at issue [had] previously restrained, or currently "chill[ed]," his or her First Amendment freedoms").

80. *See, e.g.*, *SpeechNow.Org*, 599 F.3d at 693–96 (withholding discussion on whether or how the contested statute actually restricted speech).

81. *See, e.g.*, Clapper v. Amnesty Intern'l USA, 133 S. Ct. 1138, 1152–53 (2013) (holding that "a subjective fear of surveillance does not give rise to standing").

has criticized the chilling effect test on the basis that it is speculative and difficult to apply.[82] This perspective, led by Frederick Schauer, stops short of advocating for the abandonment of the standard, but nonetheless notes that this practice is prone to error because it cannot be empirically measured.[83] In Schauer's view, the chilling effect doctrine embodies a normative rule that the overdeterrence of protected speech generates a more severe harm than the extension of speech rights to expression that should not be protected.[84] Treated as such, Schauer argues that the chilling effect doctrine actually reinforces the exclusion of valueless speech from First Amendment protection.[85] To reach this conclusion, Schauer makes a number of logical leaps to support this assertion. First, he argues that under the chilling effect doctrine, laws that contain vague or ambiguous terms are unconstitutional because they may unnecessarily deter protected speech.[86] Second, and as a result, legislatures must work to draft speech-related laws with greater categorical precision, particularly where—as in the case of obscenity—the underlying regulated speech is unprotected.[87] Thus, under Schauer's analysis, the chilling effect forces the creation of category-based restrictions on speech—favoring a normative outcome.[88]

Schauer's view may have some merit in terms of normative value, but it constitutes an incomplete treatment of chilling effect. Although Schauer thoughtfully examines the incentives and outcomes generated by a consideration of the possible chilling effect of a statute, his analysis

82. *See, e.g.*, Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978) (leading the first school of thought). Schauer's article was the first to fully examine the concept of chilling effect and is therefore often cited as the seminal authority on the topic. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 888 (2000). For additional critiques of the speculative nature of the chilling effect doctrine, see, for example, Bertrall L. Ross, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917, 937 (2015) ("The Court has consistently invoked [] chilling effects to justify rejecting blurry standards and empirical judgments in favor of sharper, categorical rules that privilege speech rights."); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 155 (2007) ("Determining the existence of a chilling effect is complicated by the difficulty of defining and identifying deterrence. It is hard to measure the deterrence caused by a chilling effect because it is impossible to determine with certainty what people would have said or done in the absence of the government activity."). The Supreme Court, too, has acknowledged that the chilling effect doctrine is merely a prediction about how speakers will behave and that, at some point, courts may lack confidence in its assumptions. Broaderick v. Oklahoma, 413 U.S. 601, 615 (1973).

83. Schauer, *supra* note 82, at 694–95.

84. *Id.* at 688.

85. *Id.* at 690.

86. *Id.* at 704.

87. *Id.* at 690, 704.

88. *Id.* at 704.

wholly fails to justify—or even consider—why nonexistent speech should be factored into First Amendment analysis in the first place.[89] Schauer, at most, argues in favor of the results of the doctrine and not necessarily in favor of the concept itself.[90]

First Amendment scholars that advocate against governmental regulation of speech, and in favor of an open marketplace of ideas, represent a second school of thought on the opposite end of the spectrum as Schauer.[91] These scholars tend to support the notion that the chill concept is harmful, but forego a robust analysis into whether, and how, the chilling effect actually protects speech.[92] For example, recognized privacy expert Neil Richards agrees with Schauer's hypothesis that it is better, from a normative perspective, to overextend First Amendment protection to speech that should not be covered than to overdeter valued speech.[93] But, Richards disagrees with the notion that chilling effect supports categorical regulation of expression.[94] Richards instead argues for expansion of the chilling effect doctrine to create fear-based standing in intellectual privacy cases where individual speech and association are subject to governmental review.[95] He does so by proposing a balancing test that weighs the right of free speech against the government's interest in observing, recording, and cataloging communication.[96]

Yet, Richards fails to explain how expanding the chilling effect doctrine would best serve to protect speech that is presently subject to covert surveillance and, in fact, concedes that individual determinations of whether speech is actually chilled will not be easy under his proposed framework.[97] Amy Pomerantz Nickerson argues, in line with Richards, that recognizing chill as a harm protects the underlying value of freedom of expression, but she fails to point to an example where the chilling effect doctrine saved such speech.[98]

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89. *Id.* at 690–704.

90. *Id.*

91. *See, e.g.*, Amy Pomerantz Nickerson, *Coercive Discovery and the First Amendment: Towards a Heightened Discoverability Standard*, 57 UCLA L. REV. 841, 869– 72 (Feb. 2010) (likening chilling effect to the concept of overdeterrence in criminal law and arguing that the concept of chill itself constitutes harm, in that an idea that has normative value and would otherwise be expressed is permanently silenced).

92. *Id.*

93. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1964 (2013).

94. *Id.*

95. *Id.* (discussing fear-based standing). For further discussion of fear-based standing, see Part I.A.1.

96. Richards, *supra* note 93, at 1964.

97. *Id.*

98. Pomerantz Nickerson, *supra* note 91, at 869–70.

For Richards and Pomerantz Nickerson, the chilling effect protects the ideas of speech and privacy, *not* the regulated communications themselves. As such, both scholars view the doctrine through an outcome-determinative lens, desiring to save solely the speech they view as having normative value. In an earlier article, Fred Zacharias actually predicted this problem by observing that the chilling effect doctrine fails to distinguish, in either type or degree, the speech that the doctrine chills.[99] Thus, the concept leaves open the possibility for normative disagreement as to when courts should care that categories of speech (e.g., obscenity, defamation, or political expression) may be restricted in advance—yet another flaw with the chilling effect doctrine.[100]

Led by Christopher Slobogin, another school of thought has argued that the type of self-censorship embodied in the chilling effect doctrine arises from individual choice—not government action—and that speakers must wait until they have experienced a concrete First Amendment injury to sue.[101] Slobogin draws upon the Supreme Court's opinion in *Clapper* for support: "[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[102] Under this view, all self-imposed censorship constitutes the "subjective chill" warned against in *Laird*, unless the speaker is facing imminent and certain governmental action against his expression.[103] Slobogin's theory, then, is that the chilling effect doctrine is too expansive to be valid because it permits speech to be considered by the court far in advance of a justiciable controversy.

Slobogin's approach is fundamentally flawed to the extent that his critique actually proves the existence of the chilling effect he disputes. To inflict harm on one's self, there must be some harm to actually inflict, and Slobogin's analysis implies this without expressly acknowledging the implications of this assumption. Rather than taking issue with the

99. Fred C. Zacharias, *Flowcharting the First Amendment*, 72 CORNELL L. REV. 936, 990 (1987).

100. *Id.*

101. Christopher Slobogin, *Standing and Covert Surveillance*, 42 PEPP. L. REV. 517, 542–43 (2015). Although Slobogin's points relate solely to political speech that is censored based on the existence of secret national security surveillance programs, his point is relevant to any speech that may be subjected to self-censorship. *See also* Matthew A. Wasserman, *First Amendment Limitations on Police Surveillance: The Case of the Muslim Surveillance Program*, 90 N.Y.U. L. REV. 1786, 1795 (2015) ("This chilling effect is, at least to a large degree, a self-inflicted injury. But its self-inflicted nature makes it no less damaging.").

102. Slobogin, *supra* note 101, at 542 n.138 (citing *Clapper*, 133 S. Ct. at 1151).

103. Laird v. Tatum, 408 U.S. 1, 13–14 (1972).

concept of chill generally, Slobogin instead focuses on the party imposing the chill and argues that only censorship directly imposed by the government rises to the level of a constitutional violation.[104] This analysis is particularly unsatisfying because it implicitly identifies the distinct possibility of self-censorship, but then dismisses that factor in determining constitutional standing.

Still other academics, primary among them Leslie Kendrick, have argued that the chilling effect doctrine is faulty because it fails to embody the notion of a putative speaker's intent that is so integral to the dividing line between protected and unprotected expression.[105] In Kendrick's view, the primary flaw with the doctrine is its inability to perfectly include speech in the gray areas entitled to "breathing space,"[106] and it instead excludes speech that is unprotected because of its lack of constitutional value.[107] Like Schauer, Kendrick believes that the chilling effect doctrine serves to reinforce preexisting rules regarding the type of speech that is protected by the First Amendment and the type of speech that is not.[108] But Kendrick focuses solely on the deterrence of bad motives by speakers and not by the content of the speech itself.[109]

The resulting First Amendment landscape is highly fractured. The legal academy seems uniform in its belief that the chilling effect doctrine is imperfect at best, but has failed to generate any consistent view on why that is. This Article fills a void in the literature by examining in detail the numerous faulty assumptions upon which the chilling effect doctrine rests.

II. THE FAULTY ASSUMPTIONS UNDERLYING THE CHILLING EFFECT

When faced with a law banning or restricting free speech in some way, affected speakers have multiple options, only one of which is self-censorship. With regard to chilling effect, it is true that a person may elect to keep his or her mouth shut rather than face the risk that he or she will be a target of governmental intervention. A well-meaning and trusting person may also assume that if the government has foreclosed his

104. Slobogin, *supra* note 101, at 543.

105. Leslie Kendrick, *Speech, Intent and The Chilling Effect*, 54 WM. & MARY L. REV. 1633 (Apr. 2013). Kendrick also criticizes the chilling effect doctrine on the ground that it lacks empirical support and calls for more robust social science in the field of self-censorship.

106. Kendrick, *supra* note 105, at 1637. As Kendrick observes, courts have utilized the term "breathing space" to mean the absence of a chilling effect—in other words, a space in which speech can exist without being regulated. *Id.*

107. *Id.* at 1636–39. *See also* Broaderick v. Oklahoma, 413 U.S. 601, 611–12 (1973) ("It has long been recognized that the First Amendment needs breathing space . . . .").

108. Kendrick, *supra* note 105, at 1636–39.

109. *Id.*

or her speech, he or she ought not to have said it all along, and he or she may self-censor out of a sense of duty to follow the law. Speakers may also impose a chilling effect on themselves after conducting a balancing test; perhaps the speech they wish to utter is not all that important to them, and perhaps the public's interest in suppressing the speech is stronger than the individual motive in saying it. Individuals may therefore arrive at a place of self-chill for a variety of reasons and based upon wide-ranging and diverse sets of values, not all of which are against free speech.

But, it is equally possible that persons wishing to exercise their right of free expression will not tolerate oppressive outcomes. A person, for example, may choose to speak even in the face of governmental regulation and assume the risk that he or she might be prosecuted for his or her speech or sued by the government to enjoin it. If he or she chooses this option, there is the possibility that the government will seek redress, but it is also possible that the government will ignore the speaker's expression or forego its legal remedies. In the event that the speaker continues to speak without governmental intervention, his or her civil disobedience emboldens others to similarly speak against the law, thus increasing the likelihood that similar speakers will also forego self-censorship.

One strategy, then, to defeat any theoretical chilling effect imposed by governmental regulation is to flood the speech marketplace with the exact type of speech the government forbids—thereby decreasing the likelihood that the government will be able to prohibit, prosecute, or eliminate speech of its kind. In this way, overcoming the chilling effect can be contagious, and the chill dissipates as the speech proliferates.

A speaker may also opt to file his own preemptive lawsuit, arguing that he or she has a reasonable fear of government redress to justify his or her anticipatory challenge. Here, too, he or she is taking a risk that he or she will lose the court case and forfeit an opportunity to offer the speech, but the speaker is in the process of eliminating the possibility that he or she will be prosecuted or forced to defend his or her speech in court. In addition, the speaker may also lobby his or her elected representatives and engage in public debate designed to alter or repeal the speech-related law. As such, self-censorship is not a necessary outcome of governmental regulation of speech, but is merely one possible reaction putative speakers may have when faced with restrictions on their desired expression. Chilling effect is therefore far from a necessary component of free speech. In fact, chilling effect constitutes only one narrow subset of the possible outcomes of a speech regulation.

To accept that a person would engage in self-censorship, one must

accept at least three logical assumptions: (1) that the person is aware of a law that prohibits or restricts speech; (2) that the person correctly understands how the law applies to his desired speech; and (3) that the person is willing to conform his or her behavior to the regulation, rather than speaking and thus risking government retaliation or availing himself or herself of other legal and legislative remedies. As will be discussed below, each of these assumptions lacks justification in law or fact. Thus, at its roots, the chilling effect doctrine is premised upon unsupportable conjecture.

A. Knowledge of the Law

The notion that putative speakers are aware of the laws governing their expression is embedded within the concept of the chilling effect.[110] In this regard, any subjective chill necessarily begins with an understanding of the myriad forms of legislation that may impact speech. From federal criminal law to local municipal ordinances, and from state licensing requirements to content-based administrative regulations, there are numerous laws that may directly or indirectly burden expression. To have an understanding of whether a person's speech is lawful, the speaker must first be aware of all sources' restrictions on his or her message. In other words, the chilling effect doctrine embodies how a speaker will educate himself or herself about all possible laws regulating speech before deciding whether to present his or her message.

The nature of modern communication—where people's expressive lives are lived partially online and partially in real time—supports a context-based approach to the knowledge inquiry. While it is true that the Internet facilitates a large dissemination of people's information, obtaining the requisite knowledge of the law can prove insurmountable in real-life situations.[111]

Take, for example, the case of the suburban housewife who, having made a sizeable contribution to her cousin's school board campaign, stakes a sign in her front yard to demonstrate her support. Would such a speaker be aware that, as election speech, federal election law would govern her contribution?[112] Would she be aware of the intricacies of the

110. The Supreme Court admitted as much in *Laird v. Tatum*, 408 U.S. 1, 11–17 (1972).

111. Riley v. California, 134 S. Ct. 2473, 2484 (2014) (noting that cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy"); Reno v. Amer. C.L. Union, 521 U.S. 844, 850–51 (1997) (describing the architecture and capabilities of the internet).

112. *See, e.g.*, McCutcheon v. Fed. Elections Comm'n, 134 S. Ct. 1434, 1442 (2014) (citing limitations on contributions to political campaigns imposed by the Federal Election Campaign Act of 1971 and the Bipartisan Campaign Reform Act of 2002).

Federal Elections Commission's regulations on campaign speech? Would she even have access to local ordinances regulating the size and color of her yard sign and the time period during which she could display it?[113] Would she further be aware that she could report her donation to the local elections board on an itemized expense report?[114] How would this housewife know to seek out what the law says if she is wholly unaware that the law even regulates her expression? These questions demonstrate the knowledge gap that is likely to exist between a speaker's desired expression and the panoply of laws that potentially regulate it.

Consider, further, the plight of an inner-city minister who organizes an impromptu prayer gathering at the site of a violent shooting. Would the minister be aware of the need for a parade permit under his local city ordinance?[115] Would he know that the law prohibits blocking the sidewalk or that the park board requires all parks to close after dark?[116] How would the minister acquire this knowledge in the midst of a tragic situation that demands an immediate response? Again, the example demonstrates how an individual person is likely uninformed about the laws that govern his or her speech.

While these situations may, in some sense, seem cliché, they exemplify the very real likelihood that most speakers have little understanding of the laws that regulate their expression. In fact, as regulation of speech expands across jurisdictions, the likelihood decreases that individuals will be aware of the diverse range of laws governing their conduct.

Contrast these scenarios with the minefield of online communication, in which awareness of regulated speech seems almost ubiquitous. High-profile security breaches to data systems at Target and Home Depot, to name a few, and Edward Snowden's leak of the federal government's

113. *See, e.g.*, Dimas v. City of Warren, 939 F. Supp. 554, 557–58 (E.D. Mich. 1996) (striking a city ordinance which prohibited property owners from posting political yard signs within forty-five days prior to any election).

114. *See, e.g.*, OHIO REV. CODE ANN. § 3517.08 (West 2005) (mandating that reports of campaign finance activity be filed with the Secretary of State). Campaign finance reports lodged with the Secretary of State in Ohio can be found at http://www.sos.state.oh.us/sos/CampaignFinance/Search.aspx.

115. The City of Birmingham, Alabama's parade permit procedure was the subject of the Supreme Court's seminal case on overbreadth, *Shuttlesworth*, 394 U.S. at 148. Although the ordinance on the books at the time was declared unconstitutional, the City of Birmingham to this day requires a permit to conduct a parade, display, or public gathering. Instructions for Parade Permit Applications, http://www.birminghamal.gov/download/traffic_engineering/PARADE%20PERMIT%20APPLICATIONS.pdf (last visited Oct. 2, 2016).

116. *See, e.g.*, CINCINNATI, OHIO, MUNICIPAL CODE, § 1703-9 (2012) (noting Park Board Rule 21, which proscribes evening closing times for municipal public parks).

massive digital surveillance program have raised popular awareness that almost all digital communication is potentially subject to disclosure.[117] In their groundbreaking article, *Free Speech*, Anupam Chander and Uyen Le make a compelling case that, because online privacy is all but eviscerated, "the chilling effect has already arrived."[118] Because individuals now believe that the government regulates every text, email, and social media post through a lens, these individuals already have knowledge that their expression is subject to potentially limitless surveillance and disclosure.[119]

But the general understanding that the government might watch people's digital lives does not support the chilling effect doctrine's assumption that speakers are aware of all regulations governing their speech. Merely because people generally recognize that their social media posts and text messages might be later used against them, they are not necessarily cognizant of the vast legal restrictions that apply to online communication.[120] While people might have some understanding that their digital exchanges are not wholly private, there is often a lack of the means and sophistication to determine all the possible laws that these individuals will need to navigate to engage in lawful expression.

Moreover, as was the case in *Laird*, the government may compile and categorize individuals' communication without ever using it against them, thereby reducing the likelihood that they will become aware of the

117. Robin Sidel, *Home Depot's 56 Million Cards Breach Bigger than Target's*, WALL ST. J. (Sept. 18, 2014), http://www.wsj.com/articles/home-depot-breach-bigger-than-targets-1411073571; Robin Sidel, *Target to Settle Claims over Data Breach*, WALL ST. J. (Aug. 18, 2015), http://www.wsj.com/articles/target-reaches-settlement-with-visa-over-2013-data-breach-1439912013; *Edward Snowden: Leaks that Exposed US Spy Programme*, BBC NEWS (Jan. 17, 2014), http://www.bbc.com/news/world-us-canada-23123964.

118. Anupam Chander & Uyen Le, *Free Speech*, 100 IOWA L. REV. 501, 546 (2015).

119. *Id.* at 546–47. The view that individuals are aware they are subject to digital surveillance is not universally accepted. *See* Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581 (Jan. 2011) (noting that people are generally unaware that their cell phones can be tracked). For example, Matthew Tokson points out that people are generally unaware that their cell phones are routinely subjected to geographic tracking. Tokson also argues that judicial understanding of what people know and do not know about government surveillance serves as an improper measure of their reasonable expectations of privacy under the Fourth Amendment. *Id.* The argument is equally persuasive here, where knowledge of government regulation on speech may be lacking in individual cases.

120. *See, e.g.*, 18 U.S.C. § 249 (2009) (punishing hate crimes of violence based upon express or implied discriminatory intent); 18 U.S.C. § 2257 (2006) (mandating record-keeping and labeling for all digital depictions of actual sexual conduct, including images and videos exchanged between consenting adults in private). As I have highlighted in other work, the general public lacks awareness of the complex federal regime regulating and in some situations criminalizing private adult sexting. Jennifer M. Kinsley, *First Amendment Sexual Privacy: Adult Sexting and Federal Age-Verification Legislation*, 45 N.M. L. REV. 1, 35 (2014).

surveillance scheme in the first place.[121] Essentially, knowledge that particular consequences may flow from speech does not constitute the same knowledge that regulations preclude speech at its inception. As a result, it is a fallacy to assume, as the chilling effect doctrine does, that speakers—either online or in person—will always know the law.

Those who disagree will likely point to the fact that knowledge of the law is presumed in other contexts. It is true, for instance, that an individual accused of a crime cannot mount a defense on the basis that he was not aware of the law.[122] Indeed, the entire criminal code is premised upon the notion that people will educate themselves about what the law forbids and adjust their conduct accordingly. Yet, the vast majority of criminal law regulates conduct that individuals have no constitutional right to undertake. There is no legitimate legal right to speed down the highway, to engage in a bar-room brawl, or to sexually assault a classmate. In these instances, imposing a theoretical obligation on an individual to investigate and know the law before engaging in unlawful conduct places no real burden on the individual exercising a protected right.

This is untrue, though, in the context of free speech, where a fundamental right is always at stake.[123] It imposes an improper burden on speakers to assume that they will seek out the existence of laws governing their messages and maintain up-to-date knowledge of all federal, state, and local regulations on speech to justify their speech before it is even presented. In this way, the knowledge assumption actually turns the First Amendment on its head. By engrafting the requirement that speakers educate themselves about the existence of the law in advance of speaking, the chilling effect doctrine imposes a form of prior restraint—to paraphrase the old adage: *learn* before you leap.[124] In this regard, the knowledge assumption embedded within the chilling effect doctrine actually works against the free speech protections it is

121. Laird v. Tatum, 408 U.S. 1, 7–8. (1972).

122. *See, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971) ("[I]gnorance of the law is no defense.").

123. De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.").

124. This view of the knowledge assumption comports with Blackstone's initial description of prior restraints, which advocated that speech should occur unrestricted and that consequences could only flow from existing speech, not suppressed speech. 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52. ("Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.").

intended to serve.

B. Knowledge of How the Law Applies

It is one thing to know that a law exists; it is quite a different thing to know that a law applies to hypothetical expression. Understanding how a particular speech regulation might apply to proposed speech that does not exist yet can be a murky inquiry. Indeed, laws regulating speech are often imprecise and fail to identify the exact universe of expression they are intended to cover.[125] Some scholars have labeled this "breathing space" as a necessary evil; when laws do not clearly apply to speech of marginal or questionable First Amendment validity, they embody the constitutional preference for free speech rather than silenced speech.[126] The resulting ambiguity, though, can make it difficult for putative speakers to understand the way in which their speech is impacted.

A speaker is not without options for investigating the application of law to his message. For example, an individual can speculate as to how a law will be interpreted prospectively by reviewing prior judgments to determine the bounds of the law's application. Studying prior cases in this way can lead to more informed judgments, but a full understanding of the law's nuances often requires a lawyer's, and not a layperson's, interpretation.[127] Not all would-be speakers maintain the resources or wherewithal to incur the costs of legal representation to convey a message.[128] And, even when a speaker consults a lawyer to provide an educated guess about a particular law's application, the lawyer might still guess incorrectly.[129] As another option, a speaker might seek a declaration from the courts as to whether his or her speech is covered by

125. This problem arises more acutely in cases of vagueness, where a regulation does not contain sufficient definitions or guidelines to adequately convey what type of speech is impacted, see, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), but it can also occur when a regulation is so broad that it appears to target all possible speech of a particular variety or originating from a particular speaker. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (striking down portions of Child Pornography Prevention Act that would have criminalized legitimate works of art and science involving teenage sexuality as substantially overbroad).

126. Kendrick, *supra* note 105, at 1637.

127. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 324 (2010) (noting that the law does not require speakers to retain a campaign finance attorney).

128. Ross, *supra* note 82, at 937.

129. For example, First Amendment lawyer Paul Cambria generated what has come to be known as "the Cambria list" to apprise his clients of material likely to be found obscene. The list includes depictions that have been expressly acquitted in some jurisdictions, meaning that, at least with regard to certain sexually explicit content, Cambria guessed incorrectly about the application of law to speech. *See* Frontline, *Prosecuting Obscenity*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.html (last visited Dec. 19, 2016).

a particular regulation—but this proposition is often expensive, time-consuming, and risky.[130] Alternatively, a speaker could ask the government if it intends to target his or her speech, in effect asking for an advisory opinion before either speaking or litigating.[131] Faced with these less-than-ideal choices, the chilling effect doctrine assumes that speakers will necessarily conclude that their speech is at risk of known speech regulations that target it.

Unfortunately, this too is a false assumption. The sheer volume of criminal cases premised upon speech suggests that speakers who are unaware of a law's application to them nevertheless tend to put forth expression in an undaunted and unedited way.[132] There is no risk of a shortage of expression in today's age of social media, where anyone with a cell phone and an Internet connection is an instant journalist.

Moreover, First Amendment jurisprudence conflicts with the chilling effect's treatment of knowledge. On the one hand, the chilling effect assumes that speakers know that a law applies to their speech—or they

130. Virginia v. Hicks, 539 U.S. 113, 119 (2003) (observing that case-by-case litigation as to the application of overly broad laws to speech imposes both a "burden" and a "risk" on speakers).

131. Because it resembles a prior restraint in both process and outcome, this approach is particularly problematic from a constitutional standpoint. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 60 (1965) (striking down legislation that required advanced approval from a government commission in order to publicly exhibit motion pictures on the grounds that it improperly imposed a prior restraint). Courts have also been reluctant to accept government representations that it will not prosecute certain forms of speech that are clearly covered by a challenged law on the basis that the government is fluid and not bound by the current administration's executive decision-making. For example, Judge Sloviter had the following observation about the government's interpretation of the Communication Decency Act:

> The government makes yet another argument that troubles me. It suggests that the concerns expressed by the plaintiffs and the questions posed by the court reflect an exaggerated supposition of how it would apply the law, and that we should, in effect, trust the Department of Justice to limit the CDA's application in a reasonable fashion that would avoid prosecution for placing on the Internet works of serious literary or artistic merit. That would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's *Ulysses* as obscene.

132. There have been many high-profile prosecutions of online posts in recent years, including, for example, misdemeanor charges against a suburban mother who created a fake MySpace page to ridicule a child who ultimately committed suicide. Scott Michels, *Neighbor Guilty in MySpace Hoax Case*, ABC NEWS (Nov. 26, 2008), http://abcnews.go.com/TheLaw/Technology/story?id=6338498. Even the Supreme Court has considered a criminal case arising from the posting of online expression. *See* Elonis v. United States, 135 S. Ct. 2001 (2015). But perhaps the best example of the principle that speech exists even in the face of laws banning it can be found in the Michigan vulgarity law, which—until its repeal is effective on March 14, 2016—states: "Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor." Mich. Pen. Code 750.337 (1931). It is highly likely, based on reasonable social norms and expectations and the realities of human interaction, that this law is violated on a daily basis in Michigan.

make an incorrect guess that it does. Absent this assumption, a chill will not result because the speaker would not be aware of the need for self-silencing. But recent Supreme Court case law suggests the opposite conclusion.[133] As the Court's *Citizens United* decision demonstrates, speech regulations that require outside research or expert opinions generate an unjustifiable burden on expression, regardless of whether a chill exists.[134] In essence, the chilling effect doctrine assumes that speakers will undertake the appropriate inquiry to understand how the law applies to them, while prevailing First Amendment jurisprudence reaches the exact opposite conclusion.

There exists a further wrinkle in how the chilling effect concept anticipates knowledge with respect to third-party censors. In certain contexts (i.e., newspapers and online comment features), intermediaries provide opportunities for speakers to engage in a particular type of speech without directly speaking. It is the unfortunate reality that regulatory speech laws may also encourage these types of speech enablers to censor the speech that they provide.[135] For example, in the civil context, tort regimes that create liability for speech providers may shift the chill that, in theory, exists on speech from government regulation to private censorship, essentially converting speech platforms into speech police. This is the case with popular social media websites like Facebook and Twitter, whose terms and conditions permit them to remove offending posts and photographs even without the consent of the individual who posted them.[136] In many instances, these terms and conditions are premised upon an understanding of the types of speech the law both permits and forbids. Third-party intermediaries, therefore, frequently serve as censors, even though (at least in the online context) they are shielded from liability for enabling the expression.[137]

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133. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 324 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.").

134. *Id.*; *see* Ross, *supra* note 82, at 937 (noting that there are chilling concerns if a speaker is left "unable to determine whether his speech his protected without the assistance of a lawyer").

135. *See, e.g.*, 18 U.S.C. § 2252(a) (2012) (creating a safe-harbor affirmative defense to possession of child pornography when the individual possesses less than three images and promptly destroys them or submits them to appropriate law enforcement officials).

136. *See, e.g.*, FACEBOOK COMMUNITY STANDARDS, https://www.facebook.com/communitystandards (last visited Dec. 19, 2016) (containing guidelines for when Facebook will remove posts and photographs); TWITTER TERMS OF SERVICE, https://twitter.com/tos?lang=en (last visited Dec. 19, 2016) (noting the terms of service).

137. 47 U.S.C. § 230(c) (1998) (immunizing providers and users of interactive computer services from civil liability for content generated by other information content providers).

While the notion of third-party censorship may present a concern in the tort context,[138] it provides weak support for the ongoing use of the chilling effect test. The fact that a particular speaker may exclude categories of expression based on his or her own understanding of how laws will be applied likely does not necessarily chill expression. The Internet is replete with alternative avenues of communication, and it is difficult to envision even illegal expression being removed from every single website that exists.[139] Thus, those speakers who are subjected to third-party censorship are unlikely to censor their own online expression. Accordingly, even when the chilling effect doctrine relies upon the knowledge of third parties as the source of the potential chill, the doctrine makes unsupported assumptions about hypothetical behavior.

C. Willingness to Conform

Because the chilling effect doctrine assumes that the speaker—having properly assessed the law and its application to his or her expression—will not engage in speech, the concept is premised on the notion that the speaker will willingly conform his or her expressive conduct to the law as he or she understands it. At least in the context of lawsuits that presently exist or have been litigated in the courts, this notion seems almost silly. For a speech-related dispute to be resolved by a tribunal, a speaker must either have presented his or her speech and undergone criminal prosecution,[140] or must have desired to present his or her speech so deeply that he filed a civil lawsuit against the government just to assert his or her right to do so.[141] In each of these scenarios, a speaker has not realistically been chilled. Rather, he or she has asserted his or her right to speak through the panoply of legal remedies available to him or her. Thus, at least with regard to the existence of free speech litigation, the

138. *See* Chander and Le*, supra* note 118, at 523–24 (noting censorship issues in private liability regimes).

139. For example, child pornography is replete on the Internet despite aggressive efforts by law enforcement, prosecutors, and legislators to eliminate sexually explicit images of children online. Although the precise quantity of illegal child pornography available on the World Wide Web is unknown, studies have estimated that at least one million distinct images of children engaged in sex acts remain in cyberspace. Richard Wortley & Stephen Smallbone, *The Problem of Internet Child Pornography*, CTR. FOR PROBLEM-ORIENTED POLICING (2006), http://www.popcenter.org/problems/child_pornography/print/.

140. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 159 (1969) (reversing the defendant's conviction for conducting a parade without a permit on grounds that local parade permit ordinance violated the First Amendment).

141. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 493–95 (1965) (invalidating the definition of subversive organization in Louisiana Subversive Activities and Communist Control Law after plaintiffs filed civil suit to enjoin prosecution under the act).

notion of a chilling effect is a misnomer.

The frequency with which people assert their First Amendment right to free speech further belies the notion that speakers actually comply with speech-related regulations. A study by the Newseum Institute suggests that a majority of Americans are aware that the First Amendment, by name, protects their freedom of speech.[142] Pop culture is brimming with references to the freedom to speak one's mind without government influence.[143] Data reported by the Administrative Office of the United States Courts suggests that as much as 15 percent of all litigation in federal district court is related to the First Amendment.[144] Thus, while people may not necessarily know or have access to the vast web of government regulations that govern their speech, they are most certainly aware, in some general sense, that they have a constitutional right to engage in free speech.

Focusing on the costs and risks associated with litigation tells only part of the story about the likelihood that people will seek to vindicate their free speech rights rather than voluntarily forego them. It is true that judicial review, either in the criminal or civil context, is one mechanism by which individuals might raise First Amendment challenges, and it is equally true that litigation is expensive and perhaps unsuccessful.[145]

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142. Terence P. Jeffrey, *Newseum: Only 19% Know 1st Amendment Guarantees Freedom of Religion*, CNS NEWS (July 6, 2015, 10:37 AM), http://www.cnsnews.com/news/article/terence-p-jeffrey/newseum-only-19-know-1st-amendment-guarantees-freedom-religion.

143. For example, John Goodman's character in the cult-classic film *The Big Lebowski* famously remarks "I've got news for you: the Supreme Court has roundly rejected prior restraint." THE BIG LEBOWSKI (Working Title Films 1998). A popular episode of the adult cartoon *The Simpsons* also features a discussion of the right to free speech after Bart, the lead character, "moons" the American flag at school. Scott Bomboy, *What We Can Learn About the Constitution from the Simpsons*, NAT'L CONST. CTR. (Jan. 13, 2015), http://blog.constitutioncenter.org/2015/01/what-we-can-learn-about-the-constitution-from-the-simpsons/.

144. Statistics collected from the civil cover sheet form required to be filed with all incoming lawsuits indicate that, out of 263,874 civil cases terminated in 2014, 16,828 dealt with non-specified civil rights claims and challenges to the constitutionality of state statutes. *Federal Judicial Caseload Statistics*, U.S. CTS. http://www.uscourts.gov/report-names/federal-judicial-caseload-statistics (last visited Sept. 19, 2016). Although data is not available as to what portion of the civil rights and state constitutional challenges raised First Amendment claims, it is clear from the federal civil cover sheet form that this category does not include claims related to voting rights, employment discrimination, housing discrimination, or disability rights, because those types of cases are listed under separate categories. *See* U.S. DIST. CT. FORM JS 44, http://www.uscourts.gov/forms/civil-forms/civil-cover-sheet (last visited Sept. 19, 2016). Thus, it is fair to assume that at least a substantial percentage of the 16,828 cases involve First Amendment issues.

145. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 324 (2010); Virginia v. Hicks, 539 U.S. 113, 119 (2003).

But speakers have at least one additional option when faced with a potential chill on their expression: legislative lobbying. A review of Congressional attempts to sanitize sexually explicit speech on the Internet demonstrates that lawmakers are receptive to revising their regulations to comport with the First Amendment.[146] In yet another example, a grassroots political campaign helped defeat the Stop Online Piracy Act ("SOPA")[147] and the Protect Intellectual Property Act ("PIPA"),[148] which were controversial pieces of proposed federal legislation that, according to free speech advocates, would have extended liability for innocent intellectual property violations and potentially shuttered websites containing otherwise protected expression.[149] The regulation of speech, after all, is the result of a democratic process in which putative speakers and their advocates are welcomed to participate.[150] These examples represent only a few of the many scenarios in which voters have helped shape speech-related laws through political participation.

Given that speakers are generally aware of their right to engage in free expression, and have a number of mechanisms for challenging regulations on their expression, the chilling effect doctrine's reliance on an assumption of compliance is misplaced.

III. A NEW APPROACH TO CHILL

When the chilling effect concept is broken down into its analytical assumptions, the doctrine collapses. Individuals cannot be expected to know and understand all of the possible regulations on their expression, particularly in light of the fact that free speech is a fundamental right.[151] Moreover, requiring speakers to take active steps to uncover all possible regulations in advance of speaking imposes too harsh of a burden on the

146. Although it was the courts and not necessarily individual lobbying efforts that lead to the invalidation of early Congressional enactments targeting sexually explicit speech online, Congress's numerous revisions and reenactments—including both the Communications Decency Act and the Child Pornography Prevention Act and their various amendments—were all the subject of intense political campaigns led by pro-family organizations. *See, e.g.*, 143 CONG. REC. S2308 (1997) (statement of Sen. Daniel Coats) (citing brief in support of the Act filed by Focus on the Family, the Religious Alliance Against Pornography, and similar morality-based organizations).

147. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

148. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011).

149. Julianne Pepitone, *SOPA Explained: What It Is and Why It Matters*, CNN MONEY (Jan. 20, 2012, 12:44 PM), http://money.cnn.com/2012/01/17/technology/sopa_explained/.

150. Ross, *supra* note 82, at 919–20; *see* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501–02 (1975) (arguing in favor of balancing public interest in restricting speech and the public harm speech causes in assessing First Amendment protection).

151. De Jonge v. State of Oregon, 299 U.S. 353, 364 (1937).

speaker. Applying speech-related laws to hypothetical speech often requires the assistance of a lawyer, and, as stated, even lawyers might guess incorrectly.[152] Litigants who bring First Amendment cases before the courts clearly assert a right on behalf of their clients not to comply with speech restrictions. Assessing whether one hypothetical speaker has engaged in self-censorship is an impossible task, at best.

A better approach is one that considers how proposed speech would fare under the challenged regulation by assessing the direct impact of the law on expression. This approach is derived from Justice Anthony Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books*,[153] which is widely considered to constitute the opinion of the Court.[154] At issue in *Alameda Books* was whether an ordinance that restricted the location of adult bookstores was targeted at secondary effects—crime, devalued property, litter, and the like—created by such businesses, or instead targeted the content of the speech presented by sexually explicit enterprises.[155] In resolving this inquiry, Justice Kennedy was clear that the government cannot reduce the availability of protected expression under the guise of reducing the undesired effects of that expression.[156] Rather, the question must be one of outcomes: how will the targeted speech fare once the challenged regulations are applied?[157]

Justice Kennedy's focus on how speech would fare after the zoning restrictions were imposed is of great utility in resolving the problems created by the chilling effect doctrine. Instead of focusing on whether putative speakers would know of the law's existence, anticipate its application to their expression, and engage in self-censorship, courts

152. Kendrick, *supra* note 105, at 1653–54.

153. 535 U.S. 425, 445 (2013) (Kennedy, J., concurring).

154. *See, e.g.*, Daytona Grand, Inc. v. City of Daytona Beach, 490 F.3d 860, 880 (11th Cir. 2007) (holding that Justice Kennedy's concurring opinion in *Alameda Books* was resolved on the narrowest ground and therefore constitutes the holding of the Court); World Wide Video of Washington, Inc. v. City of Spokane, 368 F.3d 1186, 1193 (9th Cir. 2004) (same); Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 722 (7th Cir. 2003) (same).

155. *Alameda Books*, 535 U.S. at 429–33.

156. *Id.* at 449–50 (Kennedy, J., concurring). Justice Kennedy made similar statements in his majority opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. '[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . . The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973))).

157. *Alameda Books*, 535 U.S. at 450 (Kennedy, J., concurring).

should instead assess how the law would treat a putative speaker's speech when the speaker presented it. Would the law criminalize the expression or allow it? Would the speaker be subject to prior restraint, requiring official governmental permission to engage in the expression? Would these outcomes survive First Amendment scrutiny? In essence, instead of assuming that a speaker will self-censor, courts instead should assume that a speaker *will* speak, *and then* determine whether the First Amendment will tolerate the outcome. The inquiry should therefore focus on the outcome of a law's application to hypothetical speech, and not whether such speech is likely to exist or be chilled. As such, a test that analyzes the speech regulation's direct impact, rather than its ability to chill hypothetical expression, is more consistent with the First Amendment.

Combining the knowledge-related assumptions[158] with the behavior-related assumptions,[159] there are six possible categorical results, outlined in Table 1,[160] where regulation confronts speech.

First, a speaker's desired speech might (1) be unprotected by the First Amendment, (2) be incorrectly assumed to be subjected to a law prohibiting it when no law actually precludes it, and (3) be presented anyway, despite the speaker's perception that it is unlawful.[161] In this instance, the First Amendment is not violated if the speaker is ultimately prosecuted because the speech itself was not subject to constitutional protection at the outset.

Second, a speaker might (1) desire to communicate unprotected speech, (2) correctly assume the law prohibits his speech, and (3) desire to present it anyways.[162] Here, too, courts should be unconcerned if the speech is prohibited, because the suppression of the expression is a constitutionally-permissible outcome.[163]

Third, a speaker might (1) offer unprotected expression, (2) incorrectly guess as to the application of the law to his speech, and (3) impose a self-chill.[164] This is the most constitutionally-permissible outcome because the law has served its desired function of prohibiting unlawful speech *before* it occurs. If there is a place where chilling effect means anything

158. *See supra* Part II.A–B (discussing the knowledge-related assumptions).

159. *See supra* Part II.C (discussing the behavior-related assumptions).

160. *Infra* tbl. 1.

161. *Infra* tbl. 1, l. 1.

162. *Infra* tbl. 1, l. 2.

163. Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 56 (2011).

164. *Infra* tbl. 1, l. 3.

at all, it is here: where speech-prohibitive regulations actually silence impermissible speech.

From a First Amendment standpoint, one of the greatest concerns involves expression that is fully constitutionally protected. For instance, the First Amendment might protect the speaker's desired expression, the speaker may correctly assume that it is not covered by a law prohibiting other expression, and the speaker might present the speech.[165] This result is consistent with Schauer's view of the concept of chilling effect: by encouraging greater specificity in the drafting of legislation, the chilling effect doctrine ensures that speech that is protected will be left unregulated and, essentially, "unchilled."[166] Only in the gray area—where a speaker that desires to present protected expression, but is chilled either by his or her misunderstanding or correct interpretation that a law prohibits his or her speech—is the outcome constitutionally problematic.[167]

But a consideration of this category of chilled speech requires excessive mental gymnastics. The court must first envision the hypothetical speech to determine if it is protected by the First Amendment. Then, the court must assess whether putative speakers would understand that the law covers their speech and would make correct assumptions about how the nuances of the regulation apply to their expression. In the process, courts may dismiss cases in which the challenged regulation does not actually apply to the desired expression on standing grounds. Courts may also make incorrect judgments about how a law might apply to non-existent speech, particularly when a case arises before a statute has been enacted.

There are simply too many unsupported assumptions in applying the chilling effect doctrine to imagined speech from imagined speakers. Dissecting the chilling effect doctrine in this way exposes precisely why an outcome-based approach is superior to the existing doctrine. A simpler approach is one in which the speech is assumed to exist and then subjected to the relevant form of existing First Amendment scrutiny. This test—based upon the direct impact of the regulation on existing speech—would eliminate the guesswork implicit in determining whether a regulation chills too much speech or too many speakers.

To test the boundaries of the direct impact approach, consider again the example of the suburban housewife supporting her cousin's

165. *Infra* tbl. 1, l. 4.

166. *See supra* text accompanying notes 82–90 (discussing the first school of thought led by Schauer that favors categorical approaches to regulation).

167. *Infra* tbl. 1, ll. 5–6.

schoolboard campaign by posting a yard sign.[168] Assume a local ordinance prohibits her speech because it effectively bans signs on private property other than signage necessary to identify the residence or business prohibits. Ordinary chilling effect analysis would permit the housewife to file a lawsuit before assembling her yard sign, claiming that she is afraid to violate the law and has, resultantly, censored her own speech. The housewife's self-imposed chill would therefore likely be sufficient to confer standing to challenge the sign restriction. But the chilling effect doctrine is less useful in protecting speech when the analysis shifts to whether there is a sufficient constitutional harm to invalidate the ordinance. Applying an overbreadth analysis, the housewife can only prevail if she can show that the ordinance would prohibit a substantial amount of protected speech, or, in other words, that the ordinance is substantially overbroad.[169] This shifts the burden to the housewife to demonstrate that other property owners desire to erect political or religious signs, or signs communicating an expressive message beyond identifying the nature of the residence.[170] She must therefore rely upon the non-existent and allegedly self-censored speech of others to demonstrate why her own speech ought to exist.[171] And she might not be successful in this endeavor.[172]

Employing the direct impact test derived from Justice Kennedy's *Alameda Books* opinion would actually produce a more speech-protective result in this case.[173] Under the direct impact test, the court would look only to the housewife's proposed speech and would then determine whether the ordinance imposes a lawful or unlawful burden upon that speech. In other words, the court would assume that the speech in question exists, and then ask how that speech fares under the regulation.

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168. *See supra* text accompanying notes 112–114 (referring to a housewife's likely lack of knowledge of laws governing her expression).

169. United States v. Williams, 553 U.S. 285, 292–93 (2008).

170. *See, e.g.*, Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 584–85 (2002) (discussing the plaintiff's burden in demonstrating substantial overbreadth).

171. *See, e.g.*, *id.* (holding that the plaintiffs failed to demonstrate that the Child Online Protection Act was substantially overbroad in its reliance on the application of community standards to online speech); *see also* Hill v. Colorado, 530 U.S. 703, 731–32 (2000) (rejecting an overbreadth challenge to the ordinance that created an eight-foot buffer zone around individuals at health care facilities on grounds that the speech it targeted was properly prohibited).

172. In *Free Speech Coal. Inc. v. Attorney General U.S.*, 787 F.3d 142 (3d Cir. 2015), *vacated*, 825 F.3d 149 (3d Cir. 2016), for example, the plaintiffs were unsuccessful at demonstrating that a substantial amount of speech would be prohibited by the challenged law (18 U.S.C. § 2257), although it was clear that the plaintiffs' own speech had been subject to a chilling effect.

173. *See supra* text accompanying notes 153–157 (explaining Justice Kennedy's opinion and the direct impact text).

This approach would take the place of looking to non-existent hypothetical speech and then determining if the quantum of suppressed speech is sufficiently substantial to strike down the law. Here, the housewife would prevail in invalidating the ordinance because the ordinance imposes a prior restraint on her protected political expression absent a compelling government interest or appropriate procedural safeguards.[174] Thus, borrowing from Justice Kennedy's outcomes-based approach in *Alameda Books*, her speech would not fare well under the ordinance.[175]

As this example demonstrates, the direct impact test has significant advantages over the chilling effect test. First, it focuses on individual, measurable speech rather than collective, unknowable speech. It empowers individual litigants to challenge speech-restrictive regulations without the added burden of hypothesizing how other speakers might react to the law in question. Second, the direct impact test eliminates the assumptions of knowledge and conformity that underlie the chilling effect doctrine, thereby increasing the likelihood that a speech regulation will be struck down.[176] Rather than requiring that putative speakers proactively censor themselves based upon laws they may or may not know exist to find a law invalid, the direct impact test instead assumes speech exists and assesses whether that speech is (a) protected by the First Amendment, and (b) subject to governmental regulation that violates the First Amendment based on existing overbreadth, vagueness, prior restraint, or time, place, and manner scrutiny.

Opponents of the direct impact test might question its focus on individual expression and worry that the unknowable—but surely existent—set of speakers who self-censor in the wake of government regulation will be left out of the analysis. This fear, though, is unnecessary. If a court strikes a challenged enactment because its direct impact on speech contravenes the First Amendment, the path will be cleared for all speakers—even those who have hypothetically silenced themselves—to engage in free expression. The direct impact test, therefore, protects speakers who feel a chilling effect even if the court does not expressly consider their speech in its analysis.

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174. *See* Freedman v. Maryland, 380 U.S. 51, 59 (1965) (holding that prior restraint regimes must contain the procedural safeguards of prompt issuance and prompt judicial review to pass constitutional muster); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 324 (2010) (holding that laws that burden political speech are subjected to strict scrutiny and cannot be upheld absent a compelling government interest).

175. City of Los Angeles v. Alameda Books, 535 U.S. 425, 450 (2013); *see supra* text accompanying notes 153–157 (explaining Justice Kennedy's opinion and the direct impact text).

176. *See supra* Part II (discussing the faulty assumptions underlying the chilling effect).

The direct impact test might also be critiqued on the basis that it undercuts the vagueness and overbreadth doctrines, but this too is unfounded. A court may still invalidate an overbroad or vague law based on how existing speech would fare under its regulations.[177] To be sure, it is not necessary to generate a master list of hypothetical speakers and imaginary speech to assess whether a law is constitutional. Rather, the law's impact on existing, real, tangible, and measurable speech is sufficient for determining a law's constitutionality. As such, even if the chilling effect doctrine is replaced with the direct impact test, the traditional concepts of vagueness and overbreadth would still remain intact.

CONCLUSION

Whether a law might deter putative speakers from engaging in their desired expression is an important concern, but one that should be abandoned as a measure of constitutional standing and harm. Rather than assuming that hypothetical speech would be deterred under a challenged regulation, and then assessing whether the quantum of suppressed speech offends the First Amendment, courts should instead assume that the hypothesized speech will exist regardless, and then determine whether the impact of the regulation on that speech is constitutionally tolerable. A test that measures speech based solely on the former rests upon too many unsupported assumptions about the knowledge, analytical abilities, and behavior of the putative speaker. As a result, the judiciary would be wise to abdicate speculation and conjecture in favor of a standard that assesses the direct impact of challenge restrictions on speech. Thus, when it comes to the chilling effect doctrine, courts should—for lack of a better term—just *chill*.

177. Justice Kennedy's decision in *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 234 (2002), is indicative of the point. In *Ashcroft*, the Court struck down the Child Pornography Prevention Act in part on the basis of its impact on legitimate works of art and not by reference to imaginary speech not yet in existence. *Id.* at 255.

TABLE 1: Chilling Effect Outcomes

Is the speech constitutionally protected?	**Did the speaker guess correctly as to the law's application?**	**Did the speaker engage in a self-imposed chill?**	**First Amendment Violation?**
No	No	No	**No**
No	Yes	No	**No**
No	No	Yes	**No**
Yes	No	No	**No**
Yes	No	Yes	**Yes**
Yes	Yes	Yes	**Yes**