
ARTICLES

DETAILS: SPECIFIC FACTS AND THE FIRST AMENDMENT

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I. INTRODUCTION

In an opinion that many would argue gave birth to modern free speech law, Justice Oliver Wendell Holmes, Jr. described the purpose of the First Amendment as protecting the “free trade in ideas [because] the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹ Thus was born the “marketplace of ideas” metaphor that has heavily influenced the subsequent development of free speech jurisprudence.² In another seminal opinion, Justice Louis Brandeis emphasized that “a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence” because such prohibitions interfere with the “public discussion,” which is at the heart of deliberative democracy.³ More recently, the Supreme Court has articulated the view that “[u]nder the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”⁴ These three statements constitute some of the most famous declarations of First Amendment liberty in the history of the Supreme Court. What is noteworthy about these opinions, however, is that they all focus on the freedom to articulate ideas, including opinions and doctrine. What they do not address is the treatment of facts in free speech law. It is true that the most recent case quoted above, *Gertz v. Robert Welch, Inc.*, goes on after denying the existence of false ideas to state that “there is no constitutional value in false statements of fact,”⁵ but this is a reference only to false facts. What about true facts? What is their role in the pantheon of free speech? Are they equivalent to opinions, or do facts warrant distinct First Amendment analysis? How does factual speech relate to the underlying purposes of the First Amendment? And have the answers to these questions

1. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. For examples of Supreme Court references to the metaphor in important modern free speech cases, see *Citizens United v. FEC*, 130 S. Ct. 876, 896, 906 (2010); *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188–89 (2007); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Reno v. ACLU*, 521 U.S. 844, 885 (1997); *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 850 (1995); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52, 55 (1988); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)). See generally Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. REV. 949 (1995) (contrasting the manner in which courts treat the economic marketplace and the marketplace of ideas).

3. *Whitney v. California*, 274 U.S. 357, 374–75 (1927) (Brandeis, J., concurring).

4. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (footnote omitted).

5. *Id.* at 340. *But see* *United States v. Alvarez*, 132 S. Ct. 2537, 2550–51 (2012) (holding that even false statements of fact receive some constitutional protection).

shifted in light of the rise of the Internet as the dominant modern avenue for the dissemination of speech? These are the questions that this Article explores.

It seems safe to say that most students of the First Amendment have assumed the Constitution accords the same protection to at least true facts as it does to opinions. That assumption, however, is remarkably unexplored in the literature. The only sustained attention to the questions raised here appears to be Eugene Volokh's magisterial article *Crime-Facilitating Speech*, but as the title suggests, Volokh's article is not primarily about facts as such, but rather about the potential for speech—including factual speech—to enable criminal activity and so cause social harm.⁶ Nor does Volokh focus especially on the role of the Internet. Thus, while this Article draws upon Volokh's work in some areas, its approach is quite different. Aside from Volokh, the primary references in the literature to the role of facts in First Amendment analysis appear to be a recent essay by Frederick Schauer on the topic of facts,⁷ a short article by Cass Sunstein that examined (among other things) protection for “technical data,”⁸ and a brief discussion of scientific speech by Barry McDonald in an article otherwise focused on the First Amendment protection granted to scientific research.⁹ Schauer's essay nicely demonstrates the failure of First Amendment theory to seriously engage with facts,¹⁰ but it is otherwise primarily concerned with factual falsity—indeed, Schauer explicitly acknowledges that he is not focused on the harm caused by true facts.¹¹ The Sunstein and McDonald pieces are quite specialized and do not consider the broader problem of facts at all. The question of what level of First Amendment protection should be accorded to true, factual speech thus appears to be a largely unexplored one.

Perhaps the reason for this silence is a widespread belief that factual speech is not meaningfully different from other kinds of speech, such as political opinion, artistic expression, or entertainment, all of which

6. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1103–04, 1107–08 (2005).

7. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 900–01 (2010).

8. Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 905–12 (1986). See also Allen M. Shinn, Jr., Note, *The First Amendment and the Export Laws: Free Speech on Scientific and Technical Matters*, 58 GEO. WASH. L. REV. 368, 377–95 (1990) (exploring the constitutionality, under existing doctrine, of laws restricting the export of scientific knowledge).

9. Barry P. McDonald, *Government Regulation or Other “Abridgements” of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 1025–29 (2005).

10. Schauer, *supra* note 7, at 901–08.

11. *Id.* at 907 n.56.

presumptively receive very high levels of First Amendment protection. Whatever the case in the past, however, such complacency is no longer possible with the rise of the Internet. An examination of recent litigation demonstrates that courts are struggling—across a wide range of scenarios—with the proper treatment of factual speech on the Internet and elsewhere. To understand why factual speech might pose special challenges to First Amendment jurisprudence in the Internet era, consider the following examples (some litigated, some not) of such speech:

- An antiabortion group posted personal information, including names, photographs, and home addresses, of abortion providers on its website in the form of “Wanted” posters, crossing out posters of providers who have been murdered;¹²

- A magazine published an article describing, in technical detail, how to build a hydrogen bomb in an attempt to discredit government information policy;¹³

- An individual posted onto his website a computer code that enabled a user to unlock encrypted DVDs and freely copy them;¹⁴

- An Internet radio host with links to far-right political movements posted onto his website the names and photographs of three federal judges who had issued a ruling regarding gun rights with which he disagreed, and added the following statement: “Let me be the first to say this plainly: These Judges deserve to be killed. . . . Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions.” He also posted the address of the federal courthouse where all three judges worked, along with a map showing the location of the courthouse and of bomb barriers surrounding the courthouse;¹⁵

- A newspaper published the full name of a rape victim, which it obtained from a police report made available to the press, in violation of both the newspaper’s own policies and of state law;¹⁶

- A former CIA agent traveled the world, exposing to the public the

12. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1063–66 (9th Cir. 2002) (en banc).

13. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 997–99 (W.D. Wis. 1979).

14. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 435–36 (2d Cir. 2001).

15. Peter Slevin, *Blogger’s Case May Test Limits of Political Speech*, WASH. POST, Aug. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/15/AR2009081500869.html>.

16. *Florida Star v. B.J.F.*, 491 U.S. 524, 524 (1989).

names of CIA operatives currently working in foreign countries;¹⁷

- An individual taught fellow members of a radical political group techniques for the making of explosives;¹⁸

- A website and several newspapers published the contents of classified cable communications within the United States State Department, revealing the contents of numerous classified diplomatic exchanges within the U.S. government, and with foreign diplomats;¹⁹

- A publisher published a book, titled *Hit Man: A Technical Manual for Independent Contractors*, which purports to teach readers how to become a professional assassin. A reader subsequently employed the techniques taught in the book to commit murder;²⁰

- An individual, for a small charge, mailed to others instructions on how to make PCP. The recipients then use the information to manufacture the drug;²¹ and

- Students at a public university maintained a blog, titled “The Bold and the Ruthless,” which encouraged students to explore off-limits areas of the college campus, and provided details on how to access particular, dangerous locations. An undergraduate student, while climbing a building as described by the blog, fell to his death.²²

The above is just a small sample of the myriad First Amendment controversies that have arisen over recent years regarding the dissemination of factual details. The cases and conflicts cover an enormously broad range of subject areas, including national security, political advocacy, the War on Drugs, protection of intellectual property, and issues of personal privacy. The resolutions of these disputes have also been all over the map, with some courts granting robust protection to factual disclosures, while others adopting a much more deferential stance. The doctrinal analysis employed by judges in such cases has also varied sharply, ranging from applications of the highly protective *Brandenburg* rule regarding the incitement of violent conduct,²³ to almost complete deference to the government on the

17. Haig v. Agee, 453 U.S. 280, 280 (1981).

18. United States v. Featherston, 461 F.2d 1119, 1119–21 (5th Cir. 1972).

19. Scott Shane & Andrew Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. TIMES, Nov. 28, 2010, available at <http://www.nytimes.com/2010/11/29/world/29cables.html>.

20. Rice v. Paladin Enters., 128 F.3d 233, 235–41 (4th Cir. 1997).

21. United States v. Barnett, 667 F.2d 835, 838–40 (9th Cir. 1982).

22. Jenna Johnson, *U-Va. Freshman Dies After Falling from Rooftop*, WASH. POST (Mar. 30, 2011, 6:00 PM), http://www.washingtonpost.com/blogs/campus-overload/post/u-va-freshman-dies-after-falling-from-rooftop/2011/03/30/AFEC754B_blog.html.

23. See, e.g., Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life

theory that the government is regulating conduct not speech.²⁴ The courts have not tended to see this broad range of cases as related in any way. Nonetheless, it is the thesis of this Article that they are fundamentally related because they all involve factual details. It is also the thesis of this Article that recognition of this commonality will provide important guidance to courts on how to address these sorts of difficult problems, guidance which is currently entirely lacking.

The key question posed by these situations, and explored in this Article, is how First Amendment doctrine should treat the dissemination of truthful but socially dangerous facts, and more fundamentally, how much value we should ascribe to factual speech in light of the purposes and functions of the First Amendment. In particular, should detailed, factual speech be accorded less protection than the opinions and ideas whose value is trumpeted in the judicial opinions that began this Article? My focus here is on specific facts and details, rather than on opinions, ideas, or broad generalizations—for example, the protection that should be accorded to the disclosure of scientific data regarding climate change, as opposed to statements such as “the earth is warming” or “climate change is a fraud.” It must be acknowledged, of course, that there is no clear line between these categories of speech. Factual speech is often intertwined with the exposition of ideas (such as climate data, which tends to prove that the earth is warming), and there is a continuum between specific facts and broad generalizations, which in turn cannot be clearly distinguished from ideas or opinions (again, consider the statements about climate change discussed earlier). Nonetheless, even though there will be close cases, it is the thesis of this Article that disputes involving details are meaningfully distinguishable from other free speech disputes and pose distinct analytic issues. In particular, I argue that specific facts should be treated differently from other forms of speech and should be subject to greater government regulation than ideas, because such speech plays a less central role in the process of self-governance than do ideas and, at the same time, threatens greater social harm when publicly disclosed.

Activists, 290 F.3d 1058, 1106–08 (9th Cir. 2002) (Berzon, J., dissenting) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) for the proposition that speech advocating illegal action may not be punished as incitement “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

24. See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 451–55 (2d Cir. 2001) (holding that the functional capability of a computer program that allowed users to decrypt and copy DVD movies was not within speech the meaning of the First Amendment); *Haig v. Agee*, 453 U.S. 280, 308–09 (1981) (holding that while a former CIA employee’s campaign to expose the identities of current CIA personnel contained criticism of the U.S. government, this “does not render his conduct beyond the reach of the law”).

Part II of this Article provides a typology of disputes over factual speech and describes how courts have struggled to resolve such disputes. Part III explores the difficult question of how we should value factual speech in light of free speech theory and the purposes of the First Amendment. Finally, Part IV concludes by proposing a unified approach to governmental attempts to regulate factual speech.

II. DETAILS ON DETAILS: A BROAD TYPOLOGY OF FACTUAL SPEECH

Disputes over factual speech occur in a wide variety of contexts and involve many different kinds of facts. In this part of the Article, I broadly categorize the kinds of factual speech that have been at the center of these disputes into four categories and describe controversies that have arisen within each category. The ultimate goal is to demonstrate that while these categories seem to raise quite distinct problems, and certainly have been treated as such by the courts, in fact, there are strong commonalities between these categories, suggesting that a common doctrinal approach might be useful.

A. PERSONAL DETAILS

A very large number of disputes over factual speech involve the disclosure of personal details regarding private individuals. The reasons for the disclosures vary widely, as do the harms caused or threatened by such disclosures, but similar problems nonetheless arise when courts grapple with whether or not the government can prevent or punish the publication of personal details.

Perhaps the most famous line of cases involving disclosure of personal details is a series of decisions by the Supreme Court balancing privacy concerns against the right of the press to publish information of interest to its audience. For example, in *Cox Broadcasting Corp. v. Cohn*, the Court held that the First Amendment protected a reporter's right to disclose the name of a rape victim, which he had obtained from a publicly available indictment.²⁵ It therefore dismissed a claim for invasion of privacy brought by the victim's father (the victim herself did not survive the rape). Similarly, in *Oklahoma Publishing Co. v. District Court* the Court unanimously reversed a judicial order forbidding reporters to disclose the

25. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–74, 496–97 (1975) (per curiam).

identity of a juvenile defendant in a murder trial.²⁶ The following year, in *Landmark Communications, Inc. v. Virginia*, the Court struck down a Virginia statute forbidding the disclosure of confidential details regarding ongoing ethical investigations of judges.²⁷ Again, in *Smith v. Daily Mail Publishing Co.* the Court struck down a statute forbidding newspapers from publishing the identity of juvenile defendants.²⁸ Finally, in *Florida Star v. B.J.F.* (discussed in the Introduction), the Court reversed a civil verdict against a newspaper in a suit brought by a rape victim based on the newspaper's publication of her full name, in violation of a state statute.²⁹

In each of the above cases, the Court was faced with a claim that the publication of personal details about an individual resulted in a serious intrusion on legitimate privacy rights, thereby causing significant harm to the individual. Nonetheless, in each of the cases the Court held that the First Amendment protected the disclosure of private facts, and therefore barred an *ex ante* prior restraint on publication and *ex post* civil or criminal punishment. The Court has never held that publication of private details can never be punished—indeed, it has gone out of its way to deny any such sweeping rule.³⁰ However, the consistency of the Court's rulings, even in as sympathetic a case as *Florida Star*, strongly suggests that—at least as long as the Court views the details disclosed as being of legitimate public concern—First Amendment protection for disclosure of such details is virtually absolute. The Court's most recent foray into this area, *Bartnicki v. Vopper*, tends to confirm this view. In *Bartnicki* the Court reversed a civil verdict against a radio station that played the contents of an illegally intercepted cell phone conversation over the air, even though the station had reason to know that the conversation was illegally intercepted (the station had no role in the actual interception).³¹ Because the topic of the conversation was a matter of public concern, the Court concluded that the interest in disclosure outweighed any legitimate privacy concerns.³² Note that in *Bartnicki*, unlike in previous cases, the information disclosed was originally obtained illegally—albeit the illegal activity was not by the speaker—but this did not alter the Court's protection of the speech.

The Supreme Court thus appears to have settled on a fairly clear rule providing strong protection for disclosure of private details. In fact,

26. *Oklahoma Publ'g Co. v. Dist. Court*, 430 U.S. 308, 308–12 (1977).
27. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 831, 837–45 (1978).
28. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 98–99, 104–06 (1979).
29. *Florida Star v. B.J.F.*, 491 U.S. 524, 524 (1989).
30. *Id.* at 532–33.
31. *Bartnicki v. Vopper*, 532 U.S. 514, 517–18 (2001).
32. *Id.* at 534–35.

however, the law in this area is far less straightforward than it would appear. For one thing, the Court remains unclear about the appropriate treatment of disclosure of private details not of public concern, and about how to determine if particular details are or are not of legitimate public concern. Also, all of the cases decided by the Court have involved media defendants, leaving unresolved the treatment of disclosure by nonmedia entities. Moreover, the Court has been quite unclear about the proper doctrinal analysis in cases such as these. In some cases, such as *Landmark Communications* and *Bartnicki*, the Court has suggested that the proper analysis is a straightforward balancing test.³³ In others, including *Florida Star* and *Daily Mail*, it has said that “state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”³⁴ These are obviously very different tests, with very different implications for future cases. As a consequence, there remains great uncertainty about the degree of constitutional protection that the Court believes should be accorded to the publication of personal details.

The privacy cases are the most well-known examples of disputes regarding personal details, but they are far from the only such disputes. In another line of cases, courts have been faced with situations in which disclosure of personal details about individuals posted on the Internet places those people at risk of violence from (usually unknown) third parties. Notably, the ubiquity and anonymity of the Internet played a crucial role in raising the danger posed by the speech at issue and so clearly pushed the courts to deny First Amendment protection. Probably the most famous of these disputes is *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists* (“*ACLA*”).³⁵

In *ACLA*, a group of antiabortion activists created and distributed “Wanted” posters featuring personal information, including home and work addresses, and in some cases, photographs of individuals who provided abortion services and accused those individuals of “Crimes against Humanity.”³⁶ These posters were also posted on the group’s website, entitled “The Nuremberg Files,” with the names of doctors who had been wounded by attackers shown in gray, and the names of doctors who had

33. *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 842–43 (1978); *Bartnicki*, 532 U.S. at 533; *id.* at 536–37 (Breyer, J., concurring).

34. *Florida Star*, 491 U.S. at 533 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

35. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1059–60 (9th Cir. 2002) (en banc).

36. *Id.* at 1063–65.

been killed by antiabortion violence struck through.³⁷ A group of doctors who had been named on these posters brought a civil lawsuit under the federal Freedom of Access to Clinics Entrances Act (“FACE”) and Racketeer Influenced and Corrupt Organizations Act (“RICO”) statutes, seeking damages and an injunction shutting down the website.³⁸ The district court found for the plaintiffs, and a sharply divided en banc Ninth Circuit affirmed. The six-judge majority held that despite the lack of any explicit threatening language in ACLA’s speech, given the context (including prior violence against abortion providers named in similar posters), the speech constituted “true threats” against the doctors because the speech was intended to intimidate them.³⁹ As such, the speech fell completely outside the First Amendment and could be suppressed. Five dissenting judges sharply disagreed with this conclusion.⁴⁰ The lead dissent, authored by Judge Kozinski, argued that ACLA’s speech could not constitute a threat because there was no indication on the facts of the case that ACLA itself, or anyone associated with ACLA, was intending or even threatening to commit violence.⁴¹ Instead, the fear of violence came from unknown third parties, who might use the information disseminated by ACLA to identify targets. Such speech, however, is governed by the Supreme Court’s *Brandenburg* test for incitement, according to the dissent, and that test was clearly not satisfied in this case.⁴² The dissent also emphasized the public and political nature of the speech here and suggested that in these circumstances, the threshold for denying speech First Amendment protection should be even higher.⁴³

A situation very similar to the *ACLA* case, albeit in a different political context, was faced by the Seventh Circuit in *United States v. White*.⁴⁴ The defendant in this criminal case, William White, ran a white supremacist website called Overthrow.com. After the criminal conviction of another white supremacist, Matthew Hale, White posted on his website the following statement: “everyone associated with the Matt Hale trial has deserved assassination for a long time.”⁴⁵ White also named some

37. *Id.* at 1065.

38. *Id.* at 1062–63 n.1.

39. *Id.* at 1079–80, 1085–86.

40. *Id.* at 1077.

41. *Id.* at 1091–92 (Kozinski, J., dissenting).

42. *Id.* at 1092.

43. *Id.* at 1099.

44. *United States v. White*, 610 F.3d 956, 956–57 (7th Cir. 2010). The Seventh Circuit upheld White’s conviction in October 2012. *See United States v. White*, 698 F.3d 1005 (7th Cir. 2012).

45. *White*, 610 F.3d at 957.

individuals who, in his view, were involved in the prosecution.⁴⁶ Then on September 11, 2008, White identified on his website the name of the foreman of the jury that convicted Hale, a link to a photograph of that individual, and many personal details including the juror's name, address, and phone numbers.⁴⁷ White was indicted for solicitation of murder. The district court dismissed White's indictment on First Amendment grounds, but the appellate court reversed. Critically, the court held that speech soliciting murder was unprotected under the First Amendment because it constituted "[s]peech integral to criminal conduct."⁴⁸ The court also emphasized that because solicitation was an inchoate offense, the crime was complete once White's statements were posted on his website, and that the public nature of White's speech was not a defense to the charge.⁴⁹

Yet another dispute similar to *White* and *ACLA*, albeit one that has not yet produced a judicial opinion on the application of the First Amendment, involves the right-wing Internet radio host Hal Turner and three judges of the Seventh Circuit. The case arose when the judges—Frank Easterbrook, Richard Posner, and William Bauer—issued a decision rejecting a Second Amendment challenge to a Chicago gun-control statute.⁵⁰ Angered by this ruling, Turner posted the following statement on his blog: "Let me be the first to say this plainly: These Judges deserve to be killed. . . . Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions." He also posted the names of the three judges, their photographs, their work address, and maps of the federal building where they worked, which indicated the location of "anti-truck bomb barriers."⁵¹ Turner was indicted under a federal statute making it a crime to threaten federal judges in retaliation for their work, and was eventually (after two hung juries) convicted by a New York City jury in August of 2010.⁵² Throughout his prosecution, Turner insisted that his speech was merely political rhetoric

46. *Id.*

47. *Id.* at 957–58.

48. *Id.* at 960 (citing *United States v. Williams*, 553 U.S. 285, 297 (2008)).

49. *Id.*

50. The case was *NRA v. City of Chicago*, 567 F.3d 856, 857–60 (7th Cir. 2009), in which the Seventh Circuit held, based on Supreme Court precedent that it concluded was binding, that the Second Amendment was not "incorporated" into the Fourteenth and so did not restrict state or local laws. The decision was ultimately reversed by the Supreme Court. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3020, 3026 (2010).

51. *See* *United States v. Turner*, No. 09-542, 2009 U.S. Dist. LEXIS 81135, at *1–2 (N.D. Ill. Sept. 8, 2009) (describing the facts and the granting motion to transfer venue in the prosecution of Turner to New Jersey); Peter Slevin, *supra* note 15.

52. Jen Sabella, *Hal Turner GUILTY: Blogger Convicted After Threatening Judges over Chicago Gun Ban*, HUFFINGTON POST (May 25, 2011, 6:44 PM), http://www.huffingtonpost.com/2010/08/13/hal-turner-guilty-blogger_n_681881.html.

that was protected by the First Amendment. Turner has appealed his conviction and oral argument was heard before the Second Circuit on May 15, 2012, but as of this writing (October 2012) no published judicial opinion has addressed this claim.⁵³

While no case with facts as stark as the *ACLA*, *White*, and the Hal Turner episodes has yet reached the Supreme Court, similar issues have arisen in at least two of the Court's prominent First Amendment cases. The first is *NAACP v. Claiborne Hardware Co.*⁵⁴ The case arose from a boycott organized in a Mississippi town by a civil rights organization, directed at white-owned businesses that allegedly engaged in racial discrimination. The business owners sued the boycott organizers, and won an injunction and civil damages in the state courts on the theory that the organizers had agreed to use force to enforce the boycott.⁵⁵ Among the actions taken by the boycott organizers, which were cited by plaintiffs and the state courts as the basis for liability, were speeches given by Charles Evers, a local NAACP leader. In these speeches, Evers stated that if any members of the African-American community were found violating the boycott, "we're gonna break your damn neck."⁵⁶ In addition, there was evidence in the record that boycott organizers collected the names of boycott violators, and then read those names aloud and distributed them within the community. There was also evidence of retaliation, including occasional acts of violence, against violators.⁵⁷ Nevertheless, the U.S. Supreme Court unanimously reversed the state court judgment on First Amendment grounds.⁵⁸ Regarding Evers's speeches, the Court held that his language did not satisfy the *Brandenburg* standard for incitement because it did not incite immediate violence, and there was no evidence in the record that Evers had any direct role in authorizing or directing violence.⁵⁹ In addition, critically, the Court clearly held that the boycott organizers' actions in collecting and disclosing within the community the identities of boycott violators was itself speech and was activity protected by the First Amendment.⁶⁰ This speech did not lose constitutional protection "simply

53. Peter J. Sampson, *Imprisoned North Bergen Shock Jock's Lawyers Argue His Trial Wasn't Fair*, BERGEN RECORD, May 15, 2012, available at http://www.northjersey.com/news/crime_courts/crime_courts_news/051512_Imprisoned_North_Bergen_shock_jocks_lawyers_argue_his_trial_wasnt_fair.html?c=y&page=1.

54. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

55. *Id.* at 889–90, 894–95.

56. *Id.* at 900 n.28, 902 (footnote omitted) (citation omitted) (internal quotation marks omitted).

57. *Id.* at 903–05.

58. *Id.* at 886–87.

59. *Id.* at 928–29.

60. *Id.* at 909–10, 925–26.

because it may embarrass others or coerce them into action.”⁶¹ The Court thus seemed to accord very high, almost absolute, protection to the publication of such personal details, even when such publication subjected the identified persons to acts of retaliation and violence from third parties.⁶²

The result in *Claiborne Hardware* might be contrasted with the Court’s holding in another case decided just the year earlier: *Haig v. Agee*.⁶³ Philip Agee was a former CIA operative who became disillusioned with the CIA’s conduct. Beginning in 1974, Agee traveled around the world revealing the names of undercover CIA agents and published two books doing the same. As a result, the identities of hundreds of CIA personnel were revealed, and several individuals were killed.⁶⁴ In 1979, the State Department revoked Agee’s U.S. passport, and he brought suit claiming that the revocation violated his First Amendment rights (he also brought statutory and Fifth Amendment claims). The Supreme Court rejected all of Agee’s claims and allowed the revocation.⁶⁵ The exact grounds for the Court’s rejection of Agee’s free speech claims, however, are rather unclear, especially since the claim was dismissed in barely a few sentences. At several points in the opinion, the Court suggested that Agee’s First Amendment claim had no basis because the government was responding to his “actions” or his “conduct” rather than his speech,⁶⁶ without ever specifying what “conduct”—other than Agee’s speech and publications disclosing the names of CIA personnel—was at issue in the case. Elsewhere, however, the Court appears to concede that Agee was being punished for his speech, but then held that Agee’s speech was unprotected, citing the Court’s famous dictum from *Near v. Minnesota* that “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”⁶⁷ The Court did not explain, however, what doctrinal test it was employing in reaching this conclusion, or the extent of the First Amendment exception it was seemingly creating (except perhaps to suggest that the exception was

61. *Id.* at 910.

62. *See* *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.”).

63. *Haig v. Agee*, 453 U.S. 280 (1981).

64. *Id.* at 283–84 n.3, 285 n.7.

65. *Id.* at 306, 309–10.

66. *See id.* at 309 (quoting *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965)); *id.* at 304–06 (distinguishing earlier decisions restricting the government’s power to revoke passports on the grounds that those decisions protected beliefs, but not conduct).

67. *Id.* at 308–09 (quoting *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)).

focused on national security concerns).

The above cases are, of course, far from a complete list of disputes centered around the disclosure of personal details,⁶⁸ but they give a fair sense of the types of issues that have arisen in this area. What is noteworthy about these cases is the doctrinal confusion they demonstrate. As already discussed, the privacy cases leave many unanswered questions about the scope of protection for disclosure of private facts, and even about the appropriate analysis in such cases. The cases involving disclosure of personal details leading to threats of violence are even less coherent. Each of the five cases discussed above—*ACLA*, *White*, *Turner*, *Claiborne Hardware*, and *Agee*—posed essentially identical problems: speech disclosing the names and other personal details of individuals, with or without an explicit call for violence against those individuals, but in a situation where the disclosure poses a serious risk of such violence from third parties. Yet judicial treatment of these common facts has been all over the map, both doctrinally and in terms of actual protection afforded. Doctrinally, two cases (*ACLA* and *Turner*) treated such speech as unprotected threats. Another, *White*, treats it as unprotected solicitation.⁶⁹ One case (*Claiborne Hardware*), along with an influential and powerful dissent in another (*ACLA*), treated the speech as highly protected speech subject to the powerful *Brandenburg* test. And one (*Agee*) treats the speech as either not speech at all, or as completely unprotected speech, with little or no explanation. In terms of results, only one of the cases (*Claiborne Hardware*) actually granted First Amendment protection to the speech. However, two other decisions (*ACLA* and *Agee*) generated powerful dissents arguing quite convincingly that based on extant doctrine the majority wrongly denied the speech First Amendment protection.⁷⁰ In short, judges have proven themselves to be extremely inconsistent in evaluating such disputes and appear to have no consensus on the most basic question of whether such speech even qualifies for significant constitutional protection.

68. See, e.g., *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418–20 (1971) (overturning an injunction against distribution of pamphlets accusing a named individual of unethical practices, specifically, encouraging panic selling in a racially integrated community); *Volokh*, *supra* note 6, at 1098–99 n.18 (citing cases upholding limits on newspapers’ right to publish the names of crime witnesses).

69. *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010).

70. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1088–89 (9th Cir. 2002) (Reinhardt, J., dissenting); *id.* at 1089–1101 (Kozinski, J., dissenting); *id.* at 1101–21 (Berzon, J., dissenting); *Agee*, 453 U.S. at 320 n.10 (Brennan, J., dissenting).

B. DETAILED INSTRUCTIONS FOR CRIMINAL OR DANGEROUS BEHAVIOR

Another significant group of disputes over the disclosure of factual details has arisen out of the publication or sale of detailed instructions on how to engage in criminal or dangerous behavior. The social concerns raised by such speech are, of course, quite different from the concerns over privacy and third-party violence that we saw implicated in the personal details cases. Nonetheless, these cases raise very similar, difficult questions regarding the protections that should be accorded to dangerous factual details.

Perhaps the best known, even infamous, modern decision regarding instructions is *Rice v. Paladin Enterprises*,⁷¹ decided by the Fourth Circuit in 1997. In 1983, Paladin Enterprises, a commercial publisher, published a book titled *Hit Man: A Technical Manual for Independent Contractors* (“*Hit Man*”). *Hit Man* purports to provide detailed instructions on how an individual can become a professional assassin, including instructions on constructing weapons, actually committing murder, escaping without leaving clues, disposing of a dead body, and so forth. In 1993, a man named James Perry murdered several individuals, by closely following many of the instructions in *Hit Man* (Perry had been hired to commit the murders by a relative of two of the victims). After Perry and his employer were caught, and a copy of *Hit Man* was found in Perry’s home, relatives of the victims brought a civil suit against Paladin Enterprises and sought damages on the theory that *Hit Man* had assisted in the commission of these murders (for the purposes of the motions litigated in this case, Paladin had stipulated that it not only knew, but also intended, that *Hit Man* be used to commit crimes, albeit not this specific crime). The district court dismissed the suit on First Amendment grounds, but in a lengthy opinion the Fourth Circuit reversed.⁷² Critical to the court’s reasoning was the sharp distinction it drew between “abstract advocacy,” which is protected by the First Amendment, and detailed instructions of the sort found in *Hit Man*.⁷³ The court held that the *Brandenburg* incitement test is limited to abstract advocacy, and so did not need to be met to uphold a verdict on the facts of this case.⁷⁴ Detailed instructions such as those in *Hit Man*, on the other hand, were “tantamount to legitimately proscribable nonexpressive conduct”⁷⁵ because such speech constituted aiding and abetting. Elsewhere,

71. *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997).

72. *Id.* at 242–43.

73. *Id.* at 249.

74. *Id.* at 262, 264–65.

75. *Id.* at 243.

the court describes Paladin's behavior as a "speech act" that aided and abetted murders,⁷⁶ and that like "teaching the techniques of sabotage," it is entirely outside the First Amendment.⁷⁷ Interestingly, in reaching this conclusion the court took no account of the ten-year gap between the original publication of *Hit Man* and the murders at issue, nor the fact that there was no personal relationship at all between Perry and Paladin other than the original sale of the book, much less the sort of agreement that typically constitutes the basis for secondary liability. Instead, the fact that *Hit Man* "directly and unmistakably urges concrete violations of the laws against murder and murder for hire and coldly instructs on the commission of these crimes," and was published with the intent to facilitate crime, simply made the book beyond the constitutional pale.⁷⁸

The facts of *Rice* undoubtedly present an extreme example of detailed instructions, especially given Paladin's remarkable stipulations. In fact, however, the problem of speech instructing dangerous or illegal behavior is a fairly common one. In addition to *Rice*, consider for example the tragic episode that was described earlier of the University of Virginia undergraduate who fell to his death while following instructions on a blog for climbing secure university buildings.⁷⁹ Obviously one difference between that scenario and the facts of *Rice* was that the Virginia bloggers had no intent to cause a death. Presumably, however, the speakers did intend that readers would engage in the dangerous and illegal (under trespass law) behavior that led to the accident. Moreover, the problem of instructions is not necessarily limited to instructions for illegal behavior, since instructions on dangerous (but legal) behavior can just as easily lead to tragic consequences. One important question left open in *Rice* is whether liability can be imposed for instructions when the speaker does not intend for harm to occur to anyone, or when the activity being described is not illegal.

In fact, even in the context of detailed instructions on how to engage in illegal behavior, the precise First Amendment treatment of such speech is far less clear than the *Rice* court acknowledges. On the one hand, there are any number of cases in which courts have upheld convictions of individuals who provide detailed instructions on how to commit crimes, finding such speech to be flatly unprotected. For example, in *United States*

76. *Id.* at 248, 249.

77. *Id.* at 249–50 (quoting *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting)).

78. *Id.* at 263.

79. See Johnson, *supra* note 22.

v. Featherston, the Fifth Circuit upheld the conviction of two individuals for teaching the making or use of explosive devices, knowing or having reason to know that the devices would be used in furtherance of civil disorder.⁸⁰ The court held that the speech in this case satisfied the “clear and present danger” test as interpreted in *Dennis v. United States* and was therefore unprotected.⁸¹ Oddly, the court failed to even cite the incitement test of *Brandenburg v. Ohio*,⁸² even though *Brandenburg* predated *Featherstone* by three years and *Brandenburg* is generally considered to have displaced *Dennis*. In *United States v. Buttorff*, the Eighth Circuit upheld the conviction of individuals, members of the anti-income tax movement who gave presentations in which they advised members of the audience on how to fill out W-4 forms to avoid income tax withholding.⁸³ While the basis for the court’s rejection of a First Amendment decision is not crystal clear, the court appears to distinguish between protected “advocacy” and specific instructions on how to commit crimes. The court also described the defendants’ speech as “sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.”⁸⁴ The Ninth Circuit, in *United States v. Barnett*, cited *Buttorff* for the proposition that the First Amendment does not protect speech that instructs on how to commit a crime.⁸⁵ On this basis, the court denied First Amendment protection to an individual who sold by mail order detailed instructions on how to manufacture PCP.⁸⁶ Finally, in *United States v. Raymond*, a noncriminal case, the Seventh Circuit upheld an injunction against yet more antitax activists, this time forbidding them from distributing written materials that set forth a “Program” which purported to give detailed advice on how to avoid paying income taxes.⁸⁷ Unlike in *Barnett* and *Buttorff*, however, the court did not conclude that such speech is entirely unprotected. Instead, it applied the *Brandenburg* incitement test and limited the injunction to speech that (as required by *Brandenburg*) was directed toward inciting imminent and likely illegal conduct.⁸⁸

The results in the above cases stand in contrast to other decisions that

80. *United States v. Featherston*, 461 F.2d 1119, 1120–23 (5th Cir. 1972). The defendants were members of an organization called “Black Afro Militant Movement” in Florida in the early 1970s and provided the instruction to fellow members. *Id.*

81. *Id.* at 1122–23 (quoting *Dennis*, 341 U.S. at 509).

82. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam).

83. *United States v. Buttorff*, 572 F.2d 619, 622–24 (8th Cir. 1978).

84. *Id.* at 624.

85. *United States v. Barnett*, 667 F.2d 835, 842–43 (9th Cir. 1982).

86. *Id.* at 844.

87. *United States v. Raymond*, 228 F.3d 804, 806–07, 815–16 (7th Cir. 2000).

88. *Id.* at 815–16.

do recognize First Amendment defenses on seemingly similar facts. Thus, in *United States v. Dahlstrom*, the Ninth Circuit reversed the convictions of organizers of a tax shelter in part on First Amendment grounds.⁸⁹ The court held that because the defendants only provided instructions on how to set up the tax shelter and did not actually participate in setting it up, the First Amendment as interpreted in *Brandenburg* would require a showing that the defendants were advocating “imminent lawless action,” a showing which was not made in the record.⁹⁰ Similarly, in *United States v. Freeman*, the court (in an opinion by then–Ninth Circuit Judge Kennedy) recognized a potential First Amendment defense for (yet another) “tax protester of sorts” who urged individuals to violate the tax laws and provided specific instructions on how to fill out forms to avoid tax liability.⁹¹ The court concluded that because there was evidence that the defendant’s speech did not cross the *Brandenburg* threshold for incitement, he was at least entitled to a jury instruction on the First Amendment (though not on two other counts in which the defendant participated in filling out false forms). Finally, in *McCoy v. Stewart*, the court vacated the conviction of a former gang member who provided general advice to current gang members on how to run a gang, including instructing them on specific types of gang activities and encouraging them to participate in these activities.⁹² The court concluded that the defendant’s speech did not satisfy the *Brandenburg* standard because it did not incite specific criminal acts that were likely to occur imminently.⁹³ As such, the speech constituted mere “abstract advocacy,” not unprotected incitement.⁹⁴

As with the personal details cases, what jumps out from even a cursory examination of the judicial decisions analyzing speech disclosing detailed instructions for criminal or dangerous activity is the inconsistency and contradictions among the cases. Admittedly, most of the cases deny constitutional protection for the speech at issue—though by no means all, since the *Dahlstrom*, *Freeman*, and *McCoy* cases accorded quite strong protection to such speech. But even within the group of cases that ultimately deny protection, strong analytic differences exist. Some cases, such as *Rice*, *Buttorff*, and *Barnett*, treat detailed instructions (at least for criminal activity) as entirely unprotected speech, and indeed as a species of conduct deeply intertwined with the crime itself. In *Featherston*, on the

89. *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983).

90. *Id.* at 1428.

91. *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985).

92. *McCoy v. Stewart*, 282 F.3d 626, 631–33 (9th Cir. 2002).

93. *Id.* at 631–32 & n.5.

94. *Id.* at 631.

other hand, the court granted a middling level of protection to speech under the watered-down, *Dennis* version of the “clear and present danger test.” And in *Raymond* (as in the cases granting First Amendment protections to such speech), the court applied the highly speech-protective *Brandenburg* test. As with the personal details cases, it is very difficult to reconcile the reasoning or results of these decisions in any meaningful way. The *McCoy* court attempted to articulate a limiting principle by suggesting that the key distinction lay between “abstract advocacy” of illegal activity in the future and incitement of imminent, specific illegal acts.⁹⁵ In fact, however, this explanation is most unconvincing, because the advocacy that was found unprotected in *Rice* and *Featherston* was no more likely to produce imminent illegal action than the advocacy in *McCoy* (remember, an entire decade passed between the publication of *Hit Man* and the murders that led to the *Rice* litigation). Ultimately then, despite the *McCoy* court’s best efforts, it seems clear that the *Brandenburg* imminence and likelihood requirements are not adequate or well suited to resolve the basic conundrum posed by these cases: What level of First Amendment protection is appropriately accorded to these sorts of detailed instructions?

C. SCIENTIFIC AND TECHNICAL DETAILS

The third group of factual details cases constitutes efforts to suppress the publication of scientific or technical details that, while accurate and not inherently illegal, can be used in socially harmful ways. In many of the cases, though by no means all of them, the details at issue are made up of software code published on the Internet, and so these types of cases nicely illustrate why the advent of the Internet has raised the stakes so significantly in this area.

Probably the most famous modern case regarding technical details is *Universal City Studios, Inc. v. Corley*, decided by the Second Circuit in 2001.⁹⁶ The litigation arose when a group of movie studios sued Eric Corley, the publisher of a magazine and website directed at computer hackers, to prevent Corley from posting on his website a program called “DeCSS,” and from providing hyperlinks on his site to other sites from which DeCSS could be downloaded.⁹⁷ DeCSS, developed by a Norwegian teenager, permitted users to decrypt DVDs containing movies and extract from encrypted DVDs a computer file that could be freely played, copied,

95. *Id.*

96. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

97. *Id.* at 435–36.

and transmitted (the encryption scheme used by studios to protect DVDs is called CSS, hence the name DeCSS).⁹⁸ Obviously, the potential financial losses studios faced if their DVDs could be freely copied were very significant, so the studios sought an injunction, pursuant to the antitrafficking provisions of the Digital Millennium Copyright Act (“DMCA”) of 1998, to prevent Corley from posting DeCSS to his site. Corley raised a First Amendment defense, claiming that computer code constituted protected speech, and therefore application of the DMCA to him violated the Constitution. The court began its analysis by conceding that computer code is speech because it communicates information and instructions, and that the First Amendment has long been interpreted to protect scientific information, including “dry information” and instructions (though not necessarily instructions to commit crimes).⁹⁹ Ultimately, however, the court concluded that the DMCA and injunction issued by the district court in this case were not unconstitutional because they were directed not to the communicative aspect of computer code, but rather to the functional aspects of code; that is, the decision to deny protection turned on the fact that computer code does not merely communicate information, but it actually does something when executed.¹⁰⁰ As such, the impact of the DMCA on speech is purely incidental, and so the applicable standard of review was not strict scrutiny but the relatively deferential form of intermediate scrutiny the Supreme Court has held should apply to content-neutral and incidental restrictions on speech, a standard that was easily satisfied in this case.¹⁰¹ Several aspects of the court’s analysis here are worth noting. First, there is the assumption (based on numerous citations) that factual and scientific speech is protected on the same terms as political speech and ideas. Moreover, the court was willing to extend this logic even to computer code, surely a highly technical and nontraditional form of speech. Ultimately, however, the court also seemed to recognize that because of its functional aspects, such speech poses substantial risks of significant social harm, and so should be subject to greater regulation than other speech. The particular doctrinal route taken to achieve that goal—labeling the injunction an incidental restriction on speech—might perhaps be questioned (especially as to the restriction on posting hyperlinks), but the overall balance drawn in the opinion is clear enough and certainly justifiable.

98. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 311–12 (S.D.N.Y. 2000).

99. *Corley*, 273 F.3d at 436, 445–49.

100. *Id.* at 451.

101. *Id.* at 454 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

Another case with facts very similar to *Corley*, in which the California Supreme Court upheld an injunction against the posting of DeCSS, was *DVD Copy Control Ass'n v. Bunner*.¹⁰² Interestingly, however, the Court's analysis differed quite dramatically from that of the Second Circuit. Like *Corley*, the *Bunner* case arose when a website owner sought to post DeCSS to his site, and movie studios and others (acting through the organization they created to administer CSS) sought an injunction against such actions. This time, the legal basis for the claim was not the DMCA but rather California trade-secret law, but the essence of the complaint was the same. Like the Second Circuit, the California Supreme Court began its analysis by acknowledging that scientific and technical information, including computer code, was protected by the First Amendment (indeed, the Court cited the *Corley* case for this proposition).¹⁰³ The Court concluded, however, that because the injunction here targeted not the content of the code posted, but rather the fact that it was obtained illegally (via misappropriation of trade secrets), it was subject to lesser scrutiny. In response, Bunner cited the U.S. Supreme Court's *Bartnicki v. Vopper* decision for the proposition that the First Amendment does not permit the government to prevent the dissemination of even illegally obtained information, so long as the speaker was not himself involved in the original illegality.¹⁰⁴ The California Supreme Court, however, distinguished *Bartnicki*. Quoting the U.S. Supreme Court's opinion, it held that *Bartnicki* did not apply to "disclosures of trade secrets or domestic gossip or other information of purely private concern."¹⁰⁵ DeCSS was not speech on a matter of public concern, the only sort of speech protected by *Bartnicki*, because DeCSS itself communicates only highly technical ideas, of interest only to a small number of "computer encryption enthusiasts."¹⁰⁶ Put differently, Bunner "did not post [DeCSS] to comment on any public issue or to participate in any public debate,"¹⁰⁷ and he remained free under the injunction to discuss the merits and politics of DVD encryption without posting the actual DeCSS code, and so his speech was unprotected.

The *Bunner* Court thus reaches precisely the same conclusion as the Second Circuit in *Corley* via a very different doctrinal path. Instead of treating the sought-after regulation as an incidental restriction on speech, it implicitly concedes that the restriction directly restrains a form of speech,

102. DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 17–20 (Cal. 2003).

103. *Id.* at 10 (citing *Corley*, 273 F.3d at 445–47).

104. *Id.* at 12–13, 15 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001)).

105. *Id.* at 15 (quoting *Bartnicki*, 532 U.S. at 533).

106. *Id.* at 16.

107. *Id.*

but it concludes that the specific speech at issue here—computer code—is of lower First Amendment value than ideas or even other scientific facts.¹⁰⁸ Again, however, the court’s reasoning might be questioned. The fact that computer code is highly technical, and comprehensible only to a small community of experts, is of course true. But the same is true of most scientific publications, even those written in “plain” English. Laymen are no more capable of understanding a physics article, or even a highly empirical economics article, than they are code. Yet such speech has always been considered protected by the First Amendment for good reason (as we shall see). Why then is computer code different? The Court fails to explain, but is clearly driven by an instinct that this form of speech is particularly dangerous to society.

The reasoning in the *Corley* and *Bunner* may be contrasted with the analysis in *United States v. Mendelsohn*.¹⁰⁹ Like the DeCSS cases, *Mendelsohn* involved software, but this time in the pre-Internet era. Mendelsohn and his accomplice Bentsen mailed (across state lines) a computer disk containing software that assisted users in running illegal bookmaking operations.¹¹⁰ The recipient (unfortunately for the defendants) was an undercover police officer, and so a prosecution under federal law followed, accompanied by the expected First Amendment defense. The Ninth Circuit easily rejected the defense. While conceding that software was potentially speech protected by the First Amendment, the court focused on the fact that here the defendants did not “use [the software] to instruct bookmakers in legal loopholes or to advocate gambling reform.”¹¹¹ Rather, the software was “an integral and essential part of ongoing criminal activity”¹¹² and so fell entirely outside the First Amendment. Note that the *Mendelsohn* court—like some of the detailed instructions decisions (which indeed *Mendelsohn* cites)—treats the speech being prosecuted as almost a species of conduct because of its close relationship to criminal activity.¹¹³ It thus leaves open the possibility that software used for legal purposes might well be protected by the First Amendment. That, of course, presents difficult questions, which this court ducks: First, how do we analyze “dual use” software, such as DeCSS, which can be used for both legal and illegal purposes? Second, and more generally, why it is that advocacy of illegal conduct is highly protected under *Brandenburg*, but technical speech

108. *See id.*

109. *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990).

110. *Id.* at 1184.

111. *Id.* at 1185.

112. *Id.* at 1186.

113. *See id.*

assisting such conduct is entirely unprotected?

In *CFTC v. Vartuli*, another case involving software-as-speech, the Second Circuit took a step even beyond *Mendelsohn* and *Bunner* in limiting the scope of constitutional protection.¹¹⁴ In *Vartuli*, the court affirmed (for the most part) an injunction and sanctions against an individual and a firm who were distributing a computer program that provided instructions to investors on how to profitably trade in currency futures. According to the CFTC, the regulatory agency which oversees those markets, the program was fraudulently marketed.¹¹⁵ In response to the defendants' First Amendment defense, the court concluded that suppressing the marketed program (called "Recurrence") did not abridge speech at all. The reason, the court explained, was because although Recurrence produced language, "[t]he language at issue here was to be used in an entirely mechanical way, as though it were an audible command to a machine to start or to stop."¹¹⁶ Citing two articles by Kent Greenawalt, the court concluded that such a use of language, to provide mechanical instructions that were to be implemented without thought, did not advance any of the possible purposes of the First Amendment: "[T]he pursuit of truth, the accommodation among interests, the achievement of social stability, the exposure and deterrence of abuses of authority, personal autonomy and personality development, or the functioning of a democracy."¹¹⁷ As such, the court concluded that the distribution of Recurrence did not constitute constitutionally protected speech, and so could be freely regulated. The court ends its constitutional analysis by suggesting that perhaps not all orders that are mechanically followed—such as orders by political or religious leaders—were necessarily unprotected,¹¹⁸ but it failed to explain why such orders might be distinguishable from the orders generated by Recurrence. And at no point did the court even consider the possibility that Recurrence itself, not just the linguistic commands generated by it, might constitute protected speech, as other courts (including the Second Circuit itself in *Corley*, decided just a year later) have presumed.

The leading cases involving regulation of software have thus tended to provide very limited protection for technical speech. It would be a mistake, however, to assume that the courts are unanimous in this view. An

114. *CFTC v. Vartuli*, 228 F.3d 94, 94 (2d Cir. 2000).

115. *Id.* at 113.

116. *Id.* at 111.

117. *Id.* (citing Kent Greenawalt, *Speech and Crime*, 4 AM. B. FOUND. RES. J. 645, 784 (1980); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989)).

118. *Id.* at 112.

important counterexample is the district court's decision in *Bernstein v. U.S. Department of State*, which established important precedent in this area.¹¹⁹ Bernstein was a mathematics graduate student at UC Berkeley, who worked in the field of cryptology. As part of his research, Bernstein developed an encryption algorithm (called "Snuffle") which he described in an English-language paper and in software source code, both of which he sought to publish. He was informed by the U.S. government, however, that Snuffle, including both his paper and his software code, constituted munitions under the Arms Export Control Act, and so could not be disclosed to foreign nationals without a license.¹²⁰ Bernstein sued, and the United States moved to dismiss his lawsuit, claiming (among other things) that he had no colorable constitutional claim with respect to the software (regarding Bernstein's academic paper, the government, after years of litigation, concluded that it was not in fact covered by the Act). The court rejected the government's reasoning. It began its analysis by holding unambiguously that computer source code constitutes speech, albeit in a nonverbal language, and is fully protected by the First Amendment.¹²¹ In addition, the court flatly rejected the view that such code loses protection because it has functional aspects to it, noting that "[i]nstructions, do-it-yourself manuals, recipes, even technical information about hydrogen bomb construction . . . are often purely functional; they are also speech."¹²² The court also rejected the argument that as speech gains higher functionality, it correspondingly receives less constitutional protection, stating that the "logic of this proposition is dubious at best. Its support in First Amendment law is nonexistent"¹²³ (note that *Bernstein* predates both *Corley* and *Bunner*, both of which appeared to accept aspects of this argument). Finally, the court reinforced its conclusion by noting that software code, like literature and music, is copyrightable, suggesting again that it should be treated as analogous to other forms of protected communication.¹²⁴ In short, the *Bernstein* court rejected essentially every doctrinal argument that other courts have accepted in reducing protection for software, and instead granted software the highest level of First Amendment protection.

Finally, another case that grants a very high level of protection to speech constituting scientific or technical details, albeit not in the context

119. *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426 (N.D. Cal. 1996).

120. *Id.* at 1428–30.

121. *Id.* at 1434.

122. *Id.* at 1435 (citation omitted).

123. *Id.* at 1436.

124. *Id.*

of software, is *Board of Trustees of Leland Stanford Junior University v. Sullivan*.¹²⁵ The issue in the case was the constitutionality of a clause, contained in a government contract to fund medical research, which forbade publication of preliminary research results without government approval. The court struck down the clause as a prior restraint.¹²⁶ While the case ultimately turned on the doctrine of unconstitutional conditions, from our perspective the critical part of the court's reasoning was its conclusion that "the First Amendment protects scientific expression and debate just as it protects political and artistic expression."¹²⁷ As such, the holding appears to adopt the view (in tension, as we have seen, with other cases) that technical and scientific details are indistinguishable from the sorts of artistic or political speech that receive the highest level of First Amendment protection.

The cases dealing with scientific and technical details thus reveal the same sorts of uncertainties as the earlier cases that we examined. Some courts appear to view such speech, because of its functionality and distance from ideological debate, to be entitled to less (or even no) First Amendment protection. Other cases, on the other hand, treat the speech as fully protected. And in all the cases, we see courts struggling to balance whatever level of constitutional protection they believe is called for against the substantial social harms that such speech can threaten (except perhaps in *Sullivan*, because the actual social harm was trivial or nonexistent).

D. NATIONAL SECURITY DETAILS: MILITARY AND DIPLOMATIC SECRETS

The final category of factual speech that we consider is details that are associated with national security concerns. These cases raise particularly difficult questions regarding the treatment of factual speech not only because of the very substantial risks posed by disclosure of such details, but also because such details are often highly relevant to the sorts of political dialog that are at the core of the First Amendment's protections.

Perhaps the earliest, and most famous, discussion by the Supreme Court of the problem of such factual details occurred not in a holding, but in a very famous dictum. The issue before the Court in *Near v. Minnesota ex rel. Olson*, was the constitutionality of an injunction, adopted pursuant to a statute, forbidding a newspaper from publishing malicious, scandalous,

125. Bd. of Trs. of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 472 (D.D.C. 1991).

126. *Id.* at 474–75, 479.

127. *Id.* at 474.

or defamatory stories about public officials (the Court ultimately struck down the injunction as a prior restraint).¹²⁸ In discussing the limits of the principle it was announcing, the Court noted that limits on speech during wartime may be greater than during peace, and that “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”¹²⁹ This dictum thus establishes the basic principle that certain kinds of military secrets are subject to greater regulation than other speech, including at times even prior restraints. It should be noted, however, that the scope of the *Near* dictum is somewhat vague. On the one hand, the reference to transports and troops suggests that the Court’s focus is on factual details—actual tactical military secrets. On the other hand, the reference to obstruction of recruiting services—and the accompanying citation to Justice Holmes’s infamous opinion in *Schenck v. United States*¹³⁰—suggests a broader principle: that even ideas may be suppressed during wartime to advance the war effort. Thus, *Near* does not truly resolve whether military facts as such should be subject to greater regulation.

The most famous instance in which the scope of the *Near* dictum was actually tested in the Supreme Court was undoubtedly the *Pentagon Papers* case, which came to the Court in 1971 in the middle of the Vietnam War.¹³¹ The case arose when Daniel Ellsberg, a former Pentagon official, leaked to two leading newspapers (the New York Times and the Washington Post) the contents of a top secret Defense Department study of the rise and conduct of the war in Indochina. When the newspapers began publishing excerpts from the papers, the government sought injunctions against further publication by either newspaper. The litigation thus directly raised the question of whether speech composed of detailed military and diplomatic secrets, obtained illegally from the government (albeit not by the publishing papers), should be subject to greater regulation than ideological statements such as expressing opposition to the Vietnam War for philosophical reasons (which by 1971 were universally understood to be fully protected, *Schenck* and the *Near* dictum notwithstanding). The Court, by a 6-3 vote, denied the injunctions, holding that the extremely high standard required to justify a prior restraint had not been met in this case.¹³²

128. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 701–03 (1931).

129. *Id.* at 716.

130. *Id.* (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

131. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

132. *Id.* at 714.

Interestingly, at no point in their opinions did any of the Justices in the majority suggest that the factual nature of the subject matter being published should influence their analysis, and even the dissenting opinions did not explicitly make this point—though Justice Blackmun did cite *Schenck* for the proposition that speech may be subject to greater restrictions during wartime.¹³³ The closest any of the Justices came to such a position was Justice Harlan’s statement, in dissent, recognizing that there is a special need for confidentiality and secrecy in the course of diplomatic negotiations, and suggesting that the judiciary may owe deference to senior executive branch officials’ judgment that a particular disclosure threatens the national interest.¹³⁴ The majority, however, seemed quite unconvinced by such arguments, again suggesting that it saw no distinction between military secrets and ideological speech, for constitutional purposes. Admittedly, there is some ambiguity about the precise scope of the holding in the case because of the prior restraints doctrine—at least two of the Justices in the majority (Justices White and Stewart) suggested that criminal prosecution of the newspapers for publication of such secrets may be permissible.¹³⁵ At a minimum, however, the *Pentagon Papers* litigation would seem to establish that there is no blanket First Amendment exception for secret military or diplomatic details.

The result in the *Pentagon Papers* litigation might be contrasted to the result in *United States v. Progressive, Inc.*,¹³⁶ another famous litigation concerning military secrets. The *Progressive* litigation began when Howard Morland, a freelance journalist, sought to publish an article in *Progressive* magazine with the self-descriptive title *The H-Bomb Secret: How We Got It, Why We’re Telling It*.¹³⁷ The government sought an injunction against publication of the article, on the grounds that the article disclosed information—some of it not in the public domain—that would provide substantial assistance to foreign nations seeking to develop thermonuclear weapons, and therefore publication of the article violated the Atomic Energy Act.¹³⁸ The district court concluded that Morland’s article did in fact probably contain information not in the public domain, and that in any event his article combined information in ways which could substantially assist a country seeking to build a hydrogen bomb.¹³⁹ As such, it granted a

133. *Id.* at 761 (Blackmun, J., dissenting).

134. *Id.* at 756–57 (Harlan, J., dissenting).

135. *Id.* at 733–40 (White, J., concurring).

136. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 990 (W.D. Wis. 1979).

137. *Id.* at 991.

138. *Id.*

139. *Id.* at 993–94.

preliminary injunction against publication.¹⁴⁰ In a crucial passage, the court explained the basis for its decision, “[T]his Court can find no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue.”¹⁴¹ The court distinguished the *Pentagon Papers* decision on the (frankly dubious) grounds that in that case only “historical data relating to events that occurred some three to twenty years previously” was at issue, and that in any event the government in that case had not advanced any convincing arguments as to why disclosure would harm the national interest.¹⁴² The *Progressive* case, the court concluded, was instead covered by the *Near* dictum since “publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.”¹⁴³

Throughout its opinion, the court emphasized that the government, and the court itself, was only concerned with the publication of “certain technical material” or “technical details,”¹⁴⁴ and that it was only those details that could constitutionally be subject to a prior restraint. In short, and in stark contrast to the *Pentagon Papers* Court, the district court in *Progressive* seemed to fully adopt the view that technical details, because they are not central to “informed debate” and because they threatened grave harm to the national interest, should receive less First Amendment protection than other speech.¹⁴⁵

Another important case from the same era that appears to endorse a distinction between technical details and other speech for First Amendment purposes is the Ninth Circuit’s important decision in *United States v. Edler Industries, Inc.*¹⁴⁶ As in *Bernstein*, the dispute in this case arose from export controls on munitions and other technologies with military uses. Here, Edler was convicted of providing unclassified technical data regarding certain industrial techniques for use in missile technology to two French firms without obtaining the necessary government permits (Edler

140. The litigation was ultimately dismissed as moot after another article was published describing similar materials, and ultimately the government dropped its objections to publishing Morland’s article.

141. *Id.* at 994.

142. *Id.*

143. *Id.* at 996.

144. *Id.* at 994, 997.

145. *Id.* at 994.

146. *United States v. Elder Indus., Inc.*, 579 F.2d 516 (9th Cir. 1978).

requested the permits, but was denied them).¹⁴⁷ Edler claimed that its conviction violated the First Amendment because Edler was not exporting any actual equipment, it was merely providing the French firms with technical knowledge. The court began its analysis by assuming (without deciding) that “the First Amendment furnishes a degree of protection for its dissemination of technological information.”¹⁴⁸ Note that even at this point of the opinion, the court appears to harbor doubts about whether such technical speech is entitled to full constitutional protection. Even assuming the Constitution did apply, the court concluded that the statute was not inherently unconstitutional. To resolve any constitutional concerns, the court adopted a narrow interpretation of the statute’s ban on the export of technical data, limiting it to “only the exportation of technical data significantly and directly related to specific articles on the Munitions List.”¹⁴⁹ The court concluded that “[a]s construed, [the statute] and the regulations do not interfere with constitutionally protected speech. Rather, they control the conduct of assisting foreign enterprises to obtain military equipment and related technical expertise.”¹⁵⁰

Note the familiar analytic leap adopted by the court. By limiting the scope of the restriction to “technical data” related to munitions, the court suggested that the statute did not restrict speech at all, only conduct.¹⁵¹ As in many cases previously discussed, the court is equating disclosure of specific factual details with conduct. But of course, as in many of those cases, including *Haig v. Agee* and *Rice v. Paladin Enterprises*, the difficulty with the court’s reasoning is that the actual “conduct” being prosecuted in *Edler* was pure speech, the sharing of technical information. No actual products were delivered by Edler. Essentially, as in the software cases, the court appears to believe that such technical speech, because of its functional uses, should be treated differently from other speech and more like conduct outside the First Amendment.

The final example this Article will consider of military or diplomatic secrets is the recent Wikileaks scandal, in which a website published a massive number of classified diplomatic cables leaked from within the United States Department of State, thereby causing deep embarrassment to this nation’s diplomatic relationships.¹⁵² Like the *Pentagon Papers* case,

147. *Id.* at 518–19.

148. *Id.* at 520.

149. *Id.* at 521.

150. *Id.*

151. *See id.*

152. *See* Shane & Lehren, *supra* note 19.

the WikiLeaks incident raises starkly the question of the extent to which the government has the power to prevent the publication of classified information containing specific, detailed diplomatic or military secrets, given the First Amendment. However, because the government did not seek to enjoin publication of the WikiLeaks cables, nor to date has it instigated any criminal prosecutions, no court has had to rule on this question. It should be noted that the rise of the Internet undoubtedly has determined these choices—unlike in the days of the Pentagon Papers, the United States has no practical capacity to enjoin the WikiLeaks website since it is located abroad, and in any event once the information had been posted to that site trying to control its further spread was hopeless.¹⁵³ The WikiLeaks episode demonstrates that the problem of disclosure of military or diplomatic facts is still very much a live problem in the modern era, and that the underlying constitutional issues have not yet disappeared. They would, for example, appear front and center if the government does decide to pursue criminal prosecutions of either the New York Times (which had prior access to the cables and published articles describing them) or (more likely) any individuals associated with WikiLeaks, notably Julian Assange, the founder of WikiLeaks.¹⁵⁴ The episode also demonstrates, however, the ways in which the Internet has fundamentally modified the terms of the debate by making actual suppression of data well-nigh impossible, and ensuring extraordinarily broad, almost instantaneous, dissemination of any disclosed information.

E. OVERLAP AND COMMON PROBLEMS

In the preceding part of this Article, I have described a wide variety of cases in which the government has attempted, with various degrees of success, to restrict the disclosure of factual details of different sorts. To provide a framework in which to organize this otherwise bewilderingly broad range of disputes, I have organized the cases into four broad categories. In closing, however, it is important to recognize that the framework and classification presented above is necessarily an imprecise and indeed artificial one. In fact, there is huge overlap between the different types of cases discussed, and many of the classified cases could

153. Not that this prevented the government from making some absurd attempts to limit the damage. See David de Sola, *U.S. Agencies Warn Unauthorized Employees Not to Look at WikiLeaks*, CNN, Dec. 3, 2010, http://articles.cnn.com/2010-12-03/us/wikileaks.access.warning_1_wikileaks-website-memo-documents?_s=PM:US.

154. See Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, N.Y. TIMES, Dec. 1, 2010, <http://www.nytimes.com/2010/12/02/world/02/legal.html>.

just as easily have been placed in one or more other categories.

Consider for example *Haig v. Agee*, the case involving disclosure of the identities of CIA agents. I treat it as a case involving personal details. It could just as easily, of course, have been classified as a case about military and diplomatic secrets. Or consider the *Progressive* litigation—instead of treating it as a case about military facts, it could have been analyzed as a case about technical and scientific facts. The same can be said about *Edler*'s analysis of technical data related to munitions. Similarly, many of the cases classified as dealing with instructions for criminal or dangerous conduct, including notably *Barnett* (instructions to make PCP) and *Featherston* (instructions to make explosives), could easily have been placed within the category of scientific and technical facts—indeed, *Featherston* might even be considered a case involving military secrets. Finally, the DeCSS cases (*Corley* and *Bunner*), while classified as involving scientific or technical facts, in fact could also be analyzed as providing instructions for criminal behavior—to wit, breaking DVD encryption, in violation of the DMCA.

In short, the classification system provided earlier masks great overlaps between the chosen categories of cases and great uncertainties regarding the borders of the categories. This overlap and imprecision, however, is not a source of concern; it is rather strong evidence that for all their variety, the cases discussed raise a common, broader problem in free speech jurisprudence, and so should be analyzed as a group. In all of the cases and disputes, the fundamental problem posed is whether factual speech, containing very specific details about individuals, activities, technical processes, or military or diplomatic matters, is fundamentally different for First Amendment purposes from more abstract literary, artistic, or political / ideological speech. Across different types of factual speech, we can see in the cases common patterns, with some courts treating facts as a form of “conduct” subject to greater regulation, some treating such speech as less (or not) protected because such speech is allegedly far removed from the core purposes of the First Amendment, and some courts granting even the most technical or detailed facts full First Amendment protection. What is needed, and what no commentator has yet attempted, is a comprehensive analysis and framework for such cases. In the rest of this Article, I will seek to provide at least the beginnings of such an analysis.

III. FIRST AMENDMENT THEORY AND THE VALUE OF DETAILS

In order to have a theory regarding the place of factual details in the

hierarchy of free speech law, one must first have a theory of free speech. In other words, to assess the value of a particular kind of speech, one must first identify the scale against which the valuation is to be made. This is of course not the place to try and expound a definitive and full-fledged theory regarding the purposes of the First Amendment (if that were possible), but a brief explanation of my premises seems in order. Very simply, I proceed on the assumption that the primary, if not necessarily the only, underlying function of the Free Speech Clause of the First Amendment is to facilitate political dialogue, and more generally, to enable the process of democratic self-governance in the United States.

In recent decades, scholars and jurists have focused on three primary theories, or justifications, underlying the Free Speech Clause of the First Amendment.¹⁵⁵ The first is that free speech is protected in order to advance truth, a thought most famously expressed in Justice Oliver Wendell Holmes's "marketplace of ideas" metaphor.¹⁵⁶ Second, certain scholars, including notably Thomas Emerson and Edwin Baker, have argued that the principle value of free speech is that it advances individual autonomy and self-fulfillment.¹⁵⁷ Finally, as I will discuss in more detail shortly, the Supreme Court itself as well as a wide variety of leading scholars as diverse as Robert Bork and Cass Sunstein have argued that the primary role of the First Amendment in our society is to advance principles of democratic self-governance and a participatory democracy.¹⁵⁸ I believe that the self-governance theory of the First Amendment best explains its history and its structure. It should be noted, however, that my analysis of factual speech does not depend critically on this assumption. As we shall see,

155. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1022–26 (6th ed. 2009) (discussing the "marketplace of ideas," "self-governance," and "self-fulfillment" rationales); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 763–66 (17th ed. 2010) (discussing the "truth," "self-government," and "autonomy" philosophical justifications for free speech protection); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 502–03 (2011) (discussing the norms of "individual autonomy, self-expression, [and] self-fulfillment").

156. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

157. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47–69 (1992) (arguing that speech is protected because it "promotes both the speaker's self-fulfillment and the speaker's ability to participate in change"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) (explaining freedom of expression's role in "the achievement of self-realization"); Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1158–85 (2003).

158. See CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121–65 (1993) (contending that free speech is a "precondition" for democracy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–21 (1971) (arguing that freedom of speech is central to "democratic organization").

many of my basic conclusions, including critically the insight that factual speech is meaningfully different, for First Amendment purposes, from ideas or entertainment, are consistent with any of these theories.¹⁵⁹ For now, however, the focus of my analysis is on self-governance as the core value driving our protection of free speech. This is because the self-governance theory is the most widely accepted among scholars and jurists, and it provides important insights into many free speech controversies, including the proper treatment of detailed factual speech. This is not the place to provide a full-scale defense of self-governance; it is sufficient to note, as I have discussed elsewhere, that there are good practical reasons to prefer the self-governance approach to its two primary competitors.¹⁶⁰ Further support for this position is provided by Jim Weinstein's thorough, and thoroughly convincing, extended defense of the self-governance theory.¹⁶¹ Finally, in the Supreme Court, recognition of the role of free speech in nurturing participatory, democratic government dates back to the first articulation of that idea in Justice Brandeis's famous and extraordinarily influential separate opinion in *Whitney v. California*,¹⁶² and has been repeatedly invoked since then.¹⁶³

Indeed, it is noteworthy that in recent years the Supreme Court has continued to regularly endorse the self-governance approach. In the 2011 Term, the Court relied heavily on the link between democracy and the First Amendment in one of its most important First Amendment decisions. In *Knox v. Service Employees International Union, Local 1000*, the Court held that the manner in which an agency-shop union collected from nonmembers dues that were used for political purposes violated the First Amendment.¹⁶⁴ In so holding, the Court emphasized "the close connection between our Nation's commitment to self-government and the rights

159. See *infra* notes 198–205 and accompanying text.

160. I discuss these approaches, and why they ultimately are less convincing than the self-governance rationale, in ASHUTOSH BHAGWAT, *THE MYTH OF RIGHTS* 79–81 (2010).

161. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) [hereinafter Post, *Participatory Democracy*] (discussing the value of democratic self-governance); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 670 (1990) [hereinafter Post, *Constitutional Concept*] (same); Weinstein, *supra* note 155, at 493–97.

162. *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring), *overruled in part* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

163. See Ashutosh Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in CONSTITUTIONAL LAW STORIES, 383, 403–06 (Michael C. Dorf ed., 2d ed. 2009) (identifying Supreme Court opinions endorsing a self-governance approach to free speech); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2732 (2010) (Breyer, J., dissenting) (same).

164. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2295–97 (2012).

protected by the First Amendment,”¹⁶⁵ and on that basis concluded that requiring individuals to support political speech with which they disagreed was a particularly objectionable interference with their constitutional rights.

Two decisions from the 2010 Term show the same pattern. In *Snyder v. Phelps*, the Court was faced with claims of intentional infliction of emotional distress and intrusion upon seclusion brought against a religious group which had staged a virulent protest at the plaintiff’s son’s funeral.¹⁶⁶ In holding that the First Amendment provided a defense to these claims, the Court again relied critically upon its conclusion that the religious group’s speech was on “a matter of public concern.”¹⁶⁷ This mattered because “[s]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection,’”¹⁶⁸ and “speech concerning public affairs is more than just self-expression; it is the essence of self-government.”¹⁶⁹ The Court went on to explicitly recognize that not all speech is equally valuable from the perspective of the First Amendment, and that speech relevant to public debate and the democratic process was at the core of the First Amendment’s protections.

In *Borough of Duryea, Pennsylvania v. Guarnieri*, the Court considered how to analyze a claim by a public employee claiming retaliation by his employer for actions that he claimed were protected by the Petition Clause of the First Amendment (in particular, filing a union grievance and a civil rights lawsuit).¹⁷⁰ The Court concluded that the Petition Clause claim, like claims by public employees brought under the Free Speech Clause of the First Amendment, could proceed only if the employee’s petitions were on “matters of public concern.”¹⁷¹ This is because “the right to speak and the right to petition are ‘cognate rights,’”¹⁷² and “[b]oth speech and petition are integral to the democratic process.”¹⁷³ Interestingly, even Justice Scalia, who dissented from the majority’s importation of the “public concern” test into Petition Clause jurisprudence, agreed that the test was appropriate for free speech claims “because it is

165. *Id.* at 2288.

166. *Snyder v. Phelps*, 131 S. Ct. 1207, 1213–14 (2011).

167. *Id.* at 1217.

168. *Id.* at 1215 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (Powell, J., concurring)).

169. *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)) (internal quotation marks omitted).

170. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2492–94 (2011).

171. *Id.* at 2497.

172. *Id.* at 2494 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

173. *Id.* at 2495.

speech on matters of public concern that lies ‘within the core of First Amendment protection.’”¹⁷⁴ Indeed, the votes and statements of the Justices in *Guarnieri* indicate that all of the current Justices accept the basic premise that the First Amendment’s Free Speech Clause is preeminently concerned with the democratic process, and that speech relevant to self-governance receives greater protection than other forms of speech.¹⁷⁵

The implications of the self-governance theory are complex. At a minimum, it suggests that the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.”¹⁷⁶ But it is important not to stop there; the process of self-governance is far broader than merely electoral campaigns. Most obviously, the free speech protected by the First Amendment includes “the public exchange of ideas that is integral to deliberative democracy.”¹⁷⁷ But even that does not go far enough. As Tabatha Abu El-Haj has persuasively demonstrated in a recent article, historically and in the present day, electoral politics has always been only a part, albeit an important part, of the process of self-governance.¹⁷⁸ Other activities, such as petitioning the legislature, “street politics,” jury service, and any number of other politically motivated or significant activities with only a glancing relationship to elections as such have always played, and always will play a critical role in making self-governance a true, working reality.¹⁷⁹ As I have pointed out elsewhere, this more inclusive understanding of self-

174. *Id.* at 2505 (Scalia, J., dissenting) (quoting *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 600 (2008)).

175. *See id.* at 2501 (Thomas, J., concurring) (expressing agreement with Justice Scalia’s views on the Speech and Petition Clauses). The Court’s statements in this regard might seem to be in tension with its holdings in *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2471 (2011) and *United States v. Stevens*, 130 S. Ct. 1577, 1584–86 (2010), declining to recognize new categories of unprotected speech (violent video games in *Brown*, depictions of animal cruelty in *Stevens*) based on the lack of value of such speech. *Brown* and *Stevens*, however, merely hold that speech may not be denied *all* constitutional protection based on its purported low value. They do not question the proposition that speech relevant to the democratic process is at the core of the First Amendment, and therefore receives the greatest level of protection even when there are strong, countervailing social interests in regulation.

176. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citation omitted) (quoting another source) (internal quotation marks omitted).

177. *Guarnieri*, 131 S. Ct. at 2495.

178. Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 3 (2011).

179. *Id.* at 40–41, 63–68. *See also* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 575–88 (2010) (discussing freedom of assembly in the United States from the colonial through antebellum eras); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 642–44, 700–01, 730–34 (2002) (discussing the freedom of association at various points in U.S. history).

governance as encompassing a myriad of activities relevant to politics, value formation, and political organization (including notably assembly and association with one's fellow citizens) is essential today, but was especially essential in earlier eras of our history when large numbers of adult citizens lacked the franchise but still surely qualified as *citizens* entitled to participate in the process of self-governance.¹⁸⁰ Any theory of free speech built on self-governance must take into account the capaciousness of the concept of self-governance and provide the highest level of protection to all speech that is relevant to any aspect of self-governance.

What then of details? As a start, it should be obvious that many factual details are highly relevant to self-governance, however defined. Most obviously, scientific and technical details can play an essential and central role in political debate. Suppression or censorship of climate science research would, for example, have a devastating effect on the ongoing national debate over climate change and the proper regulatory response to it. Nor could meaningful discussion of topics such as human cloning or other biomedical regulation proceed without access to detailed scientific or technical information. More generally, an educated and knowledgeable electorate, it seems uncontroversial to assert, is essential to a functioning system of self-government in the modern world, where public policy issues often implicate extremely complex scientific and technical questions. In such a world, speech concerning scientific and technical details will often play a central role in democratic discourse. Similarly, speech containing military or diplomatic secrets, such as the contents of the Pentagon Papers¹⁸¹ or of the diplomatic cables disclosed by WikiLeaks,¹⁸² can be highly relevant to political debate and to other forms of self-governance such as protest and petitioning. After all, if citizens are to be able to supervise and control their government, it is essential that they know what the government is doing, especially the problematic things that it does. Yet it is those very types of activities that governments are likely to want to keep secret, often by classifying them. To deny all constitutional protection to factual speech merely because the government has chosen to designate the included information as top secret would substantially undermine democratic discourse.

Thus, scientific or technical speech and military or diplomatic secrets are two species of factual speech that are very often highly relevant to self-governance and democratic discourse. On its face, however, the other

180. Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 993 (2011).

181. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 717 (1971).

182. See *supra* notes 131–35 and accompanying text.

forms of details identified above—personal details and instructions for criminal or dangerous behavior—seem to have far less to do with the political sphere. In fact, however, even here the story is more complex. As Eugene Volokh points out, even descriptions of how to commit crimes, such as describing gaps in airport security or describing how to disable copyright protections on DVDs, can be relevant to public debate, because it can provide citizens with valuable information about the merits or demerits of particular government policies.¹⁸³ Just as knowledge of what the government does aids citizens in assessing the competence and efficacy of its elected leaders and other government officials, similarly knowledge of what the government doesn't want citizens to know can play a role in public deliberations about government and in self-governance more generally.

Indeed, even personal details, seemingly the most distant type of specific facts from political debate, can sometimes be relevant to self-governance. Most obviously, personal details about political or social leaders that reveal personal failings (or strengths for that matter) are directly related to decisions by citizens to trust or distrust, follow or oppose, such leaders.¹⁸⁴ Personal details can also facilitate forms of self-governance aside from speech, such as protesting and petitioning. Thus, that seemingly most private of personal details (a home address) might well be needed to organize a protest directed at a public, or even a private, figure. Consider, for example, the 2009 protests at the homes of executives of the insurance giant American International Group (“AIG”) in response to reports of generous bonuses paid to employees after AIG received a massive federal bailout.¹⁸⁵ On this reasoning, even the personal information regarding abortion providers at issue in the *ACLA* litigation, or the names and work addresses of the judges posted by Hal Turner, might be necessary to enable legitimate political activity, such as protests and demonstrations.

So neither details as a whole, nor any of the specific categories of details identified earlier, are categorically unrelated to self-governance, and entitled to no, or substantially reduced, First Amendment protection. But one should not make too much of this. In the realm of ideas, whether political, cultural, or what have you, the self-governance theory dictates essentially absolute constitutional protection against targeted (that is,

183. Volokh, *supra* note 6, at 1119 (discussing airport security); *id.* at 1151–53 (discussing DeCSS and the *Bunner* decision).

184. *See id.* at 1171 (making a similar point).

185. John Christoffersen, *Activists Protest Bonuses at AIG Executives' Homes*, HUFFINGTON POST (Mar. 21, 2009), http://www.huffingtonpost.com/2009/03/21/activists-protest-bonuses_n_177669.html.

content-based) suppression. This is because once self-governance is understood sufficiently broadly, *all* ideas are relevant to it. The concept of self-governance is not limited to merely debating public policy and preparing to vote but rather encompasses all activities that form and shape the values and beliefs of the sovereign people, and all activities through which those people seek to influence and / or control their government. Any effort by the government to suppress ideas is inconsistent with this division of authority between the sovereign people and its agents, government officials. The same, however, cannot be said of specific facts. First of all, as noted at the very beginning of this paper, the Court has explicitly recognized a distinction between facts and ideas when falsity is at issue—false facts are said to have limited or no constitutional value,¹⁸⁶ while the very idea of false ideas is rejected.¹⁸⁷ But more generally, with respect to many, many specific facts, their relationship to any form of self-governance is tangential at best, and even when the relationship exists, it is often less direct than with respect to pure ideas. The most obvious example of this is “domestic gossip” or other personal details regarding individuals unrelated to governance of any sort, which the Supreme Court has strongly (and correctly) suggested are entitled to lower levels of constitutional protection.¹⁸⁸ The Court has similarly recognized that a factual claim regarding the creditworthiness of a small, private business (albeit, a false claim) is also of lower First Amendment value, because it is not on a “matter of public concern” and so has little relationship to self-governance.¹⁸⁹ This is not to say that these sorts of details are necessarily entirely unprotected—indeed, whether correctly or not, the Supreme Court has specifically rejected that view¹⁹⁰—but only that such speech is surely entitled to less protection than, say, political ideas.

Even with respect to details that are related to issues of public concern, such as technical details on a subject that is currently the subject of a public policy debate, there are still reasons to think that such speech is less central to public debate and self-governance than ideas. Consider, for example, the specific content of the DeCSS code that was at issue in cases

186. In the recent *Alvarez* decision, in striking down the Stolen Valor Act, a majority of Justices seemed to reject the idea that false facts have *no* value, but a majority of Justices (adding the dissenting and concurring votes) also appeared to agree that such speech is of reduced (the dissent would have said no) constitutional value. See *United States v. Alvarez*, 132 S. Ct. 2537, 2553–54 (Breyer, J., concurring, joined by Kagan, J.); *id.* at 2561 (Alito, J., dissenting, joined by Scalia, J. and Thomas, J.).

187. See *supra* text accompanying note 4.

188. See *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (noting that domestic gossip is “of purely private concern”).

189. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985).

190. *Id.* at 760 (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

such as *Corley* and *Bunner*, or the specific technical details regarding the H-bomb at issue in the *Progressive* litigation. Or consider such specific personal details as the identity of witnesses in criminal cases. As noted earlier, Eugene Volokh argues that such details must be protected, because they contribute to public debate. In particular, he argues that without such details, the public will be less able to assess the credibility of speakers' claims regarding matters that undoubtedly are matters of public concern, such as the existence of crime or the efficacy of government policies.¹⁹¹ But to say that such details contribute somewhat to self-government is not to say that this contribution is essential. And it would certainly be an overstatement to suggest that such details play anything like as central a role as ideas, or more general facts.

To take the DeCSS and H-bomb examples, presumably the key speech relevant to self-governance is a debate about the wisdom of laws seeking to suppress information that can be used to commit crimes, and the general knowledge that DVDs can be easily decoded, or that the knowledge on how to build hydrogen bombs is publicly available. The actual details of how one might crack a DVD, or how one might build a bomb, may help strengthen arguments, but they are not an essential part of this debate. This is especially so since most such technical details are completely opaque to the vast majority of citizens who lack a scientific education.¹⁹² Of course, such details can be translated by experts into language comprehensible to voters, but it seems unlikely that most citizens have much interest in those sorts of details in the first place. Again, this is not to say that such technical details, or personal details for that matter, are completely outside the ambit of the First Amendment. But it does suggest that they are not as central to the values underlying the First Amendment, and so not as highly protected, as ideas or more general facts.

The more tangential relationship between some specific details and self-governance is not unique to the examples cited above. Consider, for example, the cases involving disclosure of the names of rape victims. That a rape has occurred, that the assailant has been caught (or not), and many of the details surrounding crimes are surely highly relevant to public debate and self-governance, since they are an essential part of any assessment of criminal law or of the government's efficacy in enforcing it. The identity of the victim, however, even if of interest to the public, seems of peripheral importance at best in advancing democratic processes. Or consider the

191. See *supra* note 183 and accompanying text; Volokh, *supra* note 6, at 1151–53, 1156–58.

192. See Sunstein, *supra* note 8, at 908–09 (making a similar argument).

ACLA and *White* cases, and the prosecution of Hal Turner, where the identities and specific personal details of individuals were revealed in a context placing them at risk of harm. As discussed above, there is no doubt that at times disclosure of such details can be essential to self-governance, when, for example, such details are used to organize protests, enable communications, and so forth. However, it is just as clear that quite often—notably in the *White* case where the identity and personal details of a juror were revealed—the connection between such details and democracy is quite distant. And even when personal identities are potentially relevant—as in the case of the AIG executives mentioned earlier, and perhaps the abortion providers in *ACLA* as well as the judges identified by Hal Turner—the nature and extent of the disclosure matters in assessing its relevance to self-governance. Most obviously, the information about bomb barriers posted by Turner quite clearly did not contribute to self-governance at all. Similarly, one might question whether the photographs and home addresses of the abortion providers posted by the *ACLA* were truly relevant to any legitimate political acts, even if the location of abortion facilities is relevant in organizing protests and demonstrations that are obviously core forms of political participation. In short, while personal details sometimes play a key role in forms of self-governance, the relationship is often far more distant.

This conclusion is even more true of the second category of details discussed in Part II, instructions for criminal or dangerous behavior. Other than the occasional case of civil disobedience, it is not immediately clear why such details should ever play an important role in self-governance. As discussed earlier, in principle, disclosure of such details might enhance discussion of the relevant crime or behavior, and the efficacy of the government's response to it—for example, illustrating how easy it is to make PCP might be an argument against the “War on Drugs.”¹⁹³ But again, in general, disclosure of the specific details plays only a small part in the debate, as opposed to the general fact that it is possible to manufacture drugs using commonly available materials. Or again, does one really need to know the details of how to successfully commit a murder as a part of one's role as a citizen? There are reasons to be skeptical. As with personal details, but even more so, such specific facts might sometimes play an important part in self-governance, as for example in organizing an illegal protest (consider the examples from the Arab Spring)¹⁹⁴ or other acts of

193. See *supra* text accompanying note 183.

194. See generally Anupam Chander, *Jasmine Revolutions*, 97 CORNELL L. REV. 1505, 1520–23 (2012) (providing multiple examples of the use by demonstrators during the Arab Spring of cell phones

civil disobedience; but in most instances, the democratic value of such information is trivial or nil.

The situation with respect to scientific and technical details is somewhat more nuanced. As discussed earlier, some forms of scientific and technical speech, such as detailed climate science studies, can play an absolutely central role in self-governance.¹⁹⁵ And indeed, in principle any such speech, including the details of how to build a hydrogen bomb, might become relevant to public debate. But for reasons already discussed, it will often be the case that specific technical details themselves play a relatively limited role in public debate or other forms of self-governance, even if the general fact that such details exist might be crucial.¹⁹⁶ In other words, it is impossible to draw any broad generalizations about the relationship between scientific and technical speech and self-governance, and so contextual assessment of specific speech becomes unavoidable.

Finally, when one considers military or diplomatic secrets, a similar uncertainty emerges. On the one hand, details about the ongoing activities of the government (as were revealed in the Pentagon Papers and the WikiLeaks cables) can play a central role in self-governance by providing citizens with knowledge essential to assessing and holding their government accountable. On the other hand, one might seriously question whether Agee's disclosure of the names of CIA operatives, or the disclosure by WikiLeaks of the names of individuals who collaborated with the United States in Afghanistan, really contributed significantly toward self-governance, even if general knowledge of the existence and actions of such individuals might. And again, to use the *Near* hypothetical, even if the public needs to know that troop ships are sailing to distant lands, and perhaps even needs to generally know the scale of troop deployments, does disclosure of the "sailing dates of transports"¹⁹⁷ really advance self-governance significantly? Quite clearly it does not.

In short, the relationship between details and self-governance is a complex one. There are times when disclosure of details contributes directly and substantially to self-governance, in which instances full First Amendment protection is essential. At times, disclosure has little or no tangible relationship to self-governance, as in domestic gossip and (perhaps) the identities of rape victims, in which case substantially reduced

to instigate and organize demonstrations by sharing information).

195. See *supra* text accompanying notes 180–82.

196. See *supra* text accompanying notes 191–92.

197. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

scrutiny is arguably in order. And at yet other times, details do contribute somewhat to activities related to self-governance, including public debate, but they do so less directly and less centrally than other forms of speech, including notably abstract ideas and more general facts. In these situations, a more nuanced and calibrated approach seems called for.

Of course, this analysis is built on the assumption that the primary, if not the only, value underlying the First Amendment's Speech Clause is the furthering of democratic self-governance. Adopting an approach to free speech that emphasizes the search for truth or individual self-fulfillment and autonomy, or perhaps both, however, does not necessarily change my conclusions fundamentally. This is because, even under those approaches, much (though not all) speech constituting specific, detailed facts is still likely to advance the underlying purposes of the First Amendment less clearly and directly than speech conveying ideas or cultural values. As such, even under these approaches, details should be considered to often lie outside the core of the First Amendment's protections.

Consider, for example, the "search for truth" as a theory of the First Amendment. At first glance, one might think that truthful, factual speech must always advance the search for truth, since after all what are facts but "truth." In fact, however, a closer look suggests some nuance. The most famous historical defenses of this approach are undoubtedly John Milton's critique of press licensing in the *Areopagitica*,¹⁹⁸ John Stuart Mill's defense of free speech in *On Liberty*,¹⁹⁹ and Justice Holmes's dissent in *Abrams v. United States*.²⁰⁰ A closer look at these arguments, however, reveals an interesting point, which is that when describing "truth," each of these iconic writers is in fact not talking about factual truth, but rather true ideas. Thus Milton laments the effect of censorship on "the discovery that might be yet further made both in religious and civil wisdom."²⁰¹ Mill similarly calls for "freedom of opinion, and freedom of expression of opinion," arguing that both "true" and "false" opinions are worthy of protection, the former for obvious reasons and the latter because it forces believers in the "received opinion" to reexamine their beliefs.²⁰² And Holmes, in his *Abrams* dissent, is crystal-clear that what he is discussing (and deploring) is

198. See JOHN MILTON, *AREOPAGITICA* 48 (J.C. Suffolk ed., Univ. Tutorial Press 1968) (1644).

199. See JOHN STUART MILL, *On Liberty*, in *THE BASIC WRITINGS OF JOHN STUART MILL: ON LIBERTY, THE SUBJECTION OF WOMEN AND UTILITARIANISM* 2, 58–59 (Classic Books Am. 2009) (1859).

200. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that the truth is best tested through the "free trade in ideas").

201. MILTON, *supra* note 198, at 48.

202. MILL, *supra* note 199, at 58–59.

“[p]ersecution for the expression of opinions,” while calling for “a free trade in ideas.”²⁰³ What all of this suggests is that the marketplace of ideas and “search for truth” metaphors are not referencing factual truth at all, they are referencing ideological truth. And this in turn suggests that the core protection provided by the First Amendment is for opinions, whether false or true. Of course, factual speech will often have relevance, even central relevance, to the marketplace of ideas, just as it does for self-governance (consider for example the ideological debate over global warming). But it seems just as clear that some details are unlikely to advance ideological debate much. And finally, it also seems likely that many of the same kinds of factual speech that are least relevant to self-governance, such as domestic gossip and dangerous, highly technical information, are also least likely to be relevant to the marketplace of ideas.

What then of autonomy and self-fulfillment? This rationale for protecting speech is harder to generalize about because of its somewhat slippery nature. After all, in principle for some individuals any kind of speech, from obscenity to the disclosure of dangerous, personal information, might greatly advance their autonomy and sense of self-worth (consider in this regard Philip Agee’s campaign to reveal the identities of CIA operatives, or the ACLU’s desire to publicize the personal details of abortion providers). Even here, however, it does seem likely that for most individuals, most of the time, speech constituting specific, dry facts is less likely to be central to their self-identity and desires than ideological or cultural speech. People get passionate about politics, about culture, and about beauty. How many people are passionate about chemical formulae or people’s home addresses? Admittedly, however, there is some uncertainty here—after all, for better or for worse many people are passionate about domestic gossip.²⁰⁴ The most that can be said is that even autonomy-based theorists are unlikely to argue that speech must be protected whenever it is personally highly valued by the speaker (or for that matter listener), because this would denude essentially all modern free speech law. Some limits are necessary, and it seems likely that under any such restricted approach many kinds of purely factual speech are unlikely to be seen as lying within the core of the constitutional values advanced by the First Amendment. To take just one example, one prominent recent proposal to

203. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

204. See, e.g., A.G. Sulzberger, *In Small Towns, Gossip Moves to the Web, and Turns Vicious*, N.Y. TIMES, Sept. 19, 2011, available at <http://www.nytimes.com/2011/09/20/us/small-town-gossip-moves-to-the-web-anonymous-and-vicious.html?scp=1&sq=internet%20gossip%20small%20town&st=cse>.

restrict autonomy theory is Seana Shiffrin's "thinker-based approach."²⁰⁵ Pure facts, however, surely fall far from the core in such an approach since they do not reflect thought much, if at all. Indeed, an autonomy-based approach to speech that emphasizes thinking or other intellectual functioning is likely, in the end, to merge in substantial ways with the marketplace-of-ideas understanding of the search for truth, and in turn with self-governance. This suggests that the choice of First Amendment theory may be less critical to the analysis of factual speech, or for that matter of free speech generally, than might seem to be the case.

For all of these reasons, it seems clear that specific, factual details are often more peripheral to First Amendment values than ideas or more general facts. Details, however, often do have some relevance to self-governance (as well as the search for truth and autonomy, though I will henceforth emphasize self-governance, both because it is in my view the strongest free speech theory, and because of the great overlap, noted above, between the three theories). For this reason, it seems clear that details cannot be placed entirely outside the purview of the First Amendment, raising the question of why their relative value matters. The reason, in short, is that whatever their value, details can often cause very substantial social harm. As the cases discussed in Part II illustrate, details can compromise privacy, create fear, facilitate crime, harm national security, and so on. Such harms, moreover, are far more likely to flow from details than from either ideas or general facts, which might lead indirectly to socially harmful behavior but are far less likely to have a direct link to concrete harm. It is this combination of greater risk of harm and lesser value that suggests that a more modulated and nuanced approach is needed toward the regulation of detailed speech than the blunderbuss and confusion of current doctrine. In the next part, I outline the beginnings of a possible such approach.

IV. REGULATION OF DETAILS: FINDING THE BALANCE

Current First Amendment doctrine, as enunciated by the Supreme Court, suggests that attempts to regulate factual speech usually should receive quite searching judicial scrutiny, and so should generally be invalidated. This conclusion follows from the shape of modern doctrine. First of all, the Court has never explicitly drawn a doctrinal distinction between factual speech and ideas, or held that factual details are of lower

205. See generally Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011) (developing a "thinker-based" autonomy theory for freedom of speech).

First Amendment value than ideas or general facts.²⁰⁶ As a result, the same doctrinal rules that apply to regulations of ideas apply to the regulation of details. Under that doctrine, laws seeking to directly suppress details will almost always be content-based regulations of speech since they must specify which factual details may not be disclosed, and so will generally be subject to strict scrutiny²⁰⁷—a standard which is almost always fatal.²⁰⁸ If instead regulation is targeted at details whose disclosure, it is feared, will incite criminal activity or violence by third parties, then doctrinally the proper standard of review would be the *Brandenburg* rule, under which speech may not be punished as unprotected incitement “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁰⁹ This test has never been found to have been satisfied by the Supreme Court. Finally, if details, or at least details involving matters of public concern, are sought to be suppressed because of concerns about invasion of privacy or other social harms short of violence, the test the Court has applied appears to have been (though, as noted above, the Court has been far from clear on this) a form of heavily weighted balancing which has inevitably resulted in protecting the speech at issue.²¹⁰ Under any of these tests, the strong assumption would seem to be that regulations of details are invalid absent an extremely high showing of harm and lack of regulatory alternatives. It is only in the unusual circumstances when regulation of details is triggered by some neutral, non-speech-related factor, such as illegality in the original release of the details²¹¹ or the functional aspects of software,²¹² that regulation will be

206. It is true that in *Feist Publications, Inc. v. Rural Telephone Service, Co.*, 499 U.S. 340, 363–64 (1991), the Court did hold that, as a matter of copyright law, facts alone and compilations of facts lacking originality may not be copyrighted, thereby suggesting that facts are perhaps of less value than original ideas; but this is of course not the same thing as holding that facts are less protected by the First Amendment.

207. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (holding that a California law restricting the sale or rental of violent videogames to minors failed to pass the strict scrutiny standard).

208. As Gerald Gunther memorably put it (albeit in the context of equal protection), strict scrutiny is “‘strict’ in theory and fatal in fact.” Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). See also *Brown*, 131 S. Ct. at 2738 (“It is rare that a regulation restricting speech because of its content will ever be permissible.”) (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 818 (2000)) (internal quotation marks omitted).

209. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

210. See *supra* notes 25–33 and accompanying text.

211. See *DVD Copy Control Ass’n v. Bunner*, 75 P.3d 1, 10–12 (upholding an injunction against a website operator’s posting of “DeCSS” because it misappropriated the plaintiff’s trade secret in violation of California law).

212. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 453–58 (2d Cir. 2001) (upholding an injunction against website owner’s posting of “DeCSS” because it applied to the program’s

subject to a more forgiving constitutional standard of review under current doctrine.

Although modern doctrine would seem to be extremely hostile to attempted regulation of factual details, as the discussion in Part II reveals, lower courts, and even at times the Supreme Court, have in fact been far more lenient than doctrine would seem to permit. The reason for this, however, is because when faced with such regulations, courts have tended to twist or even ignore that doctrine. Thus in the *ACLA* case, the Ninth Circuit labeled the speech at issue a “true threat”²¹³ even though, as the dissent pointed out, a more honest application of doctrine would seem to call for the *Brandenburg* test,²¹⁴ and the Hal Turner prosecution followed a similar path.²¹⁵ In *White*, on the other hand, the Seventh Circuit treated essentially identical speech as unprotected “solicitation.”²¹⁶ In none of these cases did the court explain why it is that calls for violence were unprotected, even though in *Brandenburg* itself and in *Claiborne Hardware*, calls for violence were granted protection under a very strict legal standard. In fact, however, the distinction, though not acknowledged by the courts, was almost certainly the existence of details. Is it possible that the *ACLA* court would have found unprotected a general call to murder abortion doctors, without the addition of the providers’ names, photographs, and personal information on *ACLA*’s website?²¹⁷ And similarly, would Hal Turner have been prosecuted if he had not added personal details about the judges he opposed, along with the map of the courthouse?²¹⁸ In *White*, in fact, the defendant’s website had for a time called for the assassination of individuals involved with the Matthew Hale trial (and indeed named a few of them), but he was only prosecuted when he added personal details regarding a specific juror to the site.²¹⁹ Thus, in each case, the existence of details was critical, but current doctrine provides no means to recognize this factor. Similarly in the *Agee* case, the Supreme Court avoided the obvious implication of its doctrine (that *Agee* was being punished for the content of his speech) by announcing by fiat that *Agee*’s disclosure of details was not speech at all, but rather conduct.²²⁰ This

functional capability to “instruct a computer to decrypt CSS”).

213. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1085 (9th Cir. 2002) (en banc).

214. *See supra* notes 35–43 and accompanying text.

215. *See supra* notes 50–53 and accompanying text.

216. *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010).

217. *See Planned Parenthood*, 290 F.3d at 1063–65.

218. *See Slevin, supra* note 15.

219. *White*, 610 F.3d 957–58.

220. *Haig v. Agee*, 453 U.S. 280, 309 (1981).

pattern continues with respect to other sorts of details.

Thus in *Rice v. Paladin Enterprises*, the court avoided application of *Brandenburg* to the book *Hit Man* by drawing two distinctions: First, that *Brandenburg* protected only “abstract advocacy,” not speech which “urges concrete violations” of law and provides instructions on how to violate the law of the sort in *Hit Man*.²²¹ Second, because the publishers of *Hit Man* specifically intended that their speech be used to commit crimes.²²² Neither of these distinctions, however, has any basis in *Brandenburg* or any other Supreme Court opinion, and neither makes much sense as a matter of policy. The line between abstract and concrete urges to action seems a very malleable one, and it is not at all clear why a speaker’s motive should be relevant to whether speech is protected, especially given the difficulty of proving that sort of motive. In truth, what bothered the court about *Hit Man* was the specificity of the instructions provided in the book—that is, the details—but it had no clear doctrinal basis to emphasize that factor as the distinguishing one.²²³ And in a slew of other cases discussed earlier,²²⁴ courts have permitted regulation of instructions on how to commit crimes by holding that such speech is unprotected, without explaining how such an exception can be reconciled with *Brandenburg*, since the core problem with such instructions is that they incite illegal behavior by third parties. Finally, in *Corley*, the best known of the DeCSS cases, the court avoided *Brandenburg* or strict scrutiny by holding that the DMCA regulates only the functional, nonspeech elements of code, even though the act (and the injunction in that case) banned not only posting DeCSS code, but also including links to other (foreign) websites that posted the code.²²⁵ Even if the court’s conclusion with respect to DeCSS itself may be defensible, it is difficult to see how a link is anything more than pure speech, informing readers where sought-after information is available.

Two points emerge from the above discussion. First, it is clear that courts in recent years have been struggling to avoid what they see as the unacceptable consequences of applying modern First Amendment doctrine

221. *Rice v. Paladin Enters.*, 128 F.3d 233, 263–65.

222. *Id.* at 265–66.

223. Arguably, the court was searching for such a distinction between facts and advocacy when it emphasized the instructional nature of *Hit Man*. If so, my analysis suggests a clarification of the *Rice* court’s holding, which should be extended to future cases. See Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases*, 27 N. KY. L. REV. 1, 43 (2000) (suggesting that it was the detailed nature of the instructions in *Rice* that led the court to weaken the imminence requirement of *Brandenburg*).

224. See *supra* notes 71–95 and accompanying text.

225. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 451 (2d Cir. 2001).

faithfully to speech constituting factual details. Second, it is also clear that while current doctrine did not permit those courts to speak in these terms, the driving force behind their decisions to deny protection to speech was not the general facts and abstract ideas expressed in the relevant speech (no matter how reprehensible they might have been), it was the inclusion of specific details. All of this suggests that the time has come to reformulate extant doctrine in this area, including in particular the full application of *Brandenburg* and other highly speech-protective tests to speech constituting factual details.

It would seem logical to begin our reconsideration by recognizing the fundamental point developed above, which is that from the point of the First Amendment, not all details are created equal. Some factual speech is central to the process of self-government,²²⁶ and so deserving of the highest constitutional solicitude, while other such speech is far more peripheral. First Amendment doctrine must take this distinction into account if it is to balance the fundamental need to ensure that no interference is permitted into the processes of self-governance against the social needs which have driven courts to the convolutions laid out earlier. The question, of course, is how. I begin by considering the feasibility of simply adopting one of the two most prominent, extant approaches toward incorporating the self-governance insight into First Amendment law, and then proceed to propose a third way.

For almost a quarter century, Robert Post has championed an approach to free speech which emphasizes “public discourse” as the key forum within which the process of self-governance occurs, and so the core of what the First Amendment should protect.²²⁷ In his seminal 1990 article on the concept of public discourse, Post defended his approach both for its explanatory power with respect to the Court’s doctrine and for its superiority to the Court’s own preferred “public concern” test, which Post attacked as incoherent.²²⁸ Perhaps then, the concept of public discourse can provide a basis to assess regulation of detailed speech: details expressed as a part of public discourse receive close to complete First Amendment protection, while details expressed elsewhere are subject to far greater

226. If instead of self-governance, one grounded one’s analysis in the search for truth, or individual autonomy, some small adjustments would have to be made regarding which details are more or less protected by the First Amendment, though those adjustments are likely to be minor given the great overlap, noted earlier, between these theories; in any event, the basic analysis remains the same.

227. See Post, *Participatory Democracy*, *supra* note 161, at 482 (“[T]he best possible explanation of the shape of First Amendment doctrine is the value of democratic self-governance”); Post, *Constitutional Concept*, *supra* note 161, at 667–79.

228. Post, *Constitutional Concept*, *supra* note 161, at 667–79.

regulation if their dissemination poses the risk of significant social harm.

In fact, however, this approach would substantially both underprotect and overprotect speech constituting factual details. As Eugene Volokh has recently and convincingly argued, limiting protection to public discourse leaves unprotected many forms of speech which are, by any definition, central to self-governance, including teacher-student speech and political discussions among friends.²²⁹ I have also argued elsewhere that much of the core work of self-governance occurs in the context of private, sometimes intimate, associations of citizens and that speech within those associations must therefore receive the highest level of First Amendment protection.²³⁰ The sharing and assessment of factual details will inevitably be a significant part of such exchanges since as discussed above, such details can often play a pivotal role in speech enabling self-governance. Consider, for example, a closed meeting of scientists discussing their recent findings on climate change, or some other topic intimately linked to public policy. Yet the public discourse approach would seem to provide little or no protection to such speech, leaving the self-governance theory in a shambles. The only way to avoid this result would seem to be to expand the definition of “public discourse” to cover all such communications, but that expansion would deprive the concept of all analytic capacity, eliminating its usefulness. Under any sensible definition of public discourse, then, an approach emphasizing public discourse as the heart of the First Amendment’s scope underprotects speech.

It also, paradoxically, overprotects speech, a problem that has been greatly exacerbated by the rise of the Internet as the dominant modern mode of communication. Consider, for example, the *ACLA* and *White* cases, and the Hal Turner prosecution. In each of these cases, the critical fact that made the First Amendment issues so difficult was that there was no evidence that the speaker intended to engage in violence, or had any direct association with potential perpetrators of violence. If such evidence had existed, the cases would have been trivial because the defendants would have been subject to direct prosecution for making threats, or conspiring to make threats, and any speech would have clearly been unprotected either as “true threats,” or as speech “used as an integral part of conduct in violation of a valid criminal statute.”²³¹ The fear raised by the

229. Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 571–74 (2011).

230. Bhagwat, *supra* note 180, at 981.

231. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) (quoting *New York v. Ferber*, 458 U.S. 747, 761–62 (1982)) (internal quotation marks omitted).

speech was that it would instigate violence by unknown third parties—hence why under current law the speech should probably be analyzed under *Brandenburg*.²³² There seems little doubt, however, that each of the three websites at issue in these cases was a part of public discourse, albeit of a distasteful variety. They were, after all, making political communications directed at a broad and dispersed public audience. But in this context, the risk raised by such speech clearly rises in direct proportion to its public nature because as the audience grows, more potential bad actors are provided the dangerous details. This inverts the general presumption, underlying Post’s analysis: that public discourse is more valuable, and poses fewer risks, than private speech.²³³ Consider also the WikiLeaks scandal, or for that matter (to use a pre-Internet example) the *Pentagon Papers* case. In each of those instances, but especially with respect to WikiLeaks, the harm caused by the disclosure of military and diplomatic secrets is enormous precisely because of the public nature of the disclosure. And again, the greater the scope of the disclosure, and the greater the public discussions elicited by the disclosures, the greater the harm. Indeed, the same is true of facts of little relevance to self-governance, such as domestic gossip or the identity of rape victims; in each case, it is the very public nature of the disclosure that intensifies the harm. And in the age of the Internet, such disclosure can very quickly become almost universal. Any sensible doctrine must, it would seem, take this fact into account, and so cannot provide across-the-board protection to public statements.

What then of the Supreme Court’s own favored test, focusing on whether the speech is on a “matter of public concern”?²³⁴ The Court has developed a complex, multi-factored, and highly open-ended definition of such speech, and clearly held that such speech receives a higher level of protection than speech “on purely private matters”²³⁵—though it has also emphasized that speech not “of public concern” is not entirely unprotected.²³⁶ Since this test is already a part of existing doctrine in areas such as speech by government employees and speech constituting a tort, it could fairly easily be imported into a test addressing regulation of factual details. This is a quite plausible solution to the conundrum posed here, and there is nothing inherently wrong with relying on the phrase “public

232. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

233. See Post, *Participatory Democracy*, *supra* note 161, at 482; Post, *Constitutional Concept*, *supra* note 161, at 667–79.

234. See, e.g., *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011) (describing the “matter of public concern” test); *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011) (same).

235. *Snyder*, 131 S. Ct. at 1215.

236. See *supra* note 190 and accompanying text.

concern” as a gage of constitutional value. The difficulty, however, is that there are many serious weaknesses in the way in which the Court has formulated its modern public concern doctrine, making reliance on that phrase as currently understood highly problematic. Most significantly, because the Court has failed to clearly define the meaning of public concern, it has created a test of abiding vagueness.²³⁷ Indeed, Robert Post points out that vagueness and incoherence may be intrinsic in the concept of public concern because the phrase incorporates two quite distinct ideas: First, a “normative” concept which focuses on whether the speech “refers to matters that are substantively relevant to the processes of democratic self-governance.”²³⁸ Second, a “descriptive” concept that focuses on whether the speech is “about issues that happen actually to interest the ‘public.’”²³⁹ The Court has consistently failed to choose between these alternatives, even though in specific circumstances they can point in very different directions.

Another problem is that in defining public concern, the Court has made the motivation of the speaker a relevant consideration, so that selfishly motivated speech is less likely to be found of public concern.²⁴⁰ As Eugene Volokh has pointed out, however, this is a dubious approach.²⁴¹ It is far from clear why the value of speech should turn on the motives of a specific speaker, or even how to determine such motives. Certainly from the perspective of self-governance, speech uttered with completely self-centered motives might substantially advance democratic goals, by educating citizens or otherwise. Moreover, this is especially true of factual details. One could easily imagine factual speech that is published with selfish motives—scientists who wish to advance their careers, or a newspaper or website which wishes to attract advertising—which may nonetheless contribute centrally to self-governance. Similarly, surely the regulatory treatment of WikiLeaks should not turn on whether it is a for-profit or nonprofit organization.

Finally, insofar as the public concern test emphasizes its “descriptive” element and focuses on the actual interests of the public, there is a deep circularity to the test. While private speech—such as the intraoffice

237. See Volokh, *supra* note 6, at 1166–73 (exploring uncertainties surrounding public concern test).

238. Post, *Constitutional Concept*, *supra* note 161, at 670.

239. *Id.* at 672 (citation omitted).

240. See *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (holding that a questionnaire distributed by an employee to an office coworkers that expressed the employee’s dissatisfaction with her proposed transfer was not a matter of public concern).

241. Volokh, *supra* note 6, at 1170 & n.279, 1192–93.

communications in *Connick v. Myers*²⁴² or the credit report in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*²⁴³—might be found to be not of public concern, almost by definition when speech is addressed broadly (and finds a broad audience) it would seem to be of public concern. Yet as discussed earlier, it is often the case that details cause the most harm when disseminated broadly. The public concern test, at least as currently formulated, would seem to lead to high levels of protection, even for speech quite tangential to self-governance, in exactly those situations where regulation is most desperately needed.

Ultimately then, what is needed is a direct focus on self-governance. Factual details should receive protection in proportion to their contribution to self-governance. This approach could be stated as a reformation of the public concern test, focusing on what Post calls the normative rather than the descriptive aspects of that test. Or it could be stated as a new test. Regardless, under this approach, factors such as whether the speech was a part of public discourse and the extent of the public interest in the speech would be relevant to the ultimate determination, but they would be neither sufficient nor necessary. Of course, this raises the question of what speech is relevant to self-governance. A full exploration of that question is not possible here; indeed, there are reasons to doubt if we could ever completely define the sphere of speech relevant to self-governance. But some preliminary thoughts seem in order. First and foremost, the scope of protection must reflect the broad scope of the concept of self-governance that the First Amendment envisions, which moves far beyond electoral politics or even public policy as such, but rather includes such things as value formation, education, and organization.²⁴⁴ As a consequence, protection cannot be restricted to speech regarding governments, as Robert Bork recommended,²⁴⁵ or even to speech touching on matters of public policy more generally. On the other hand, just because a subject is of interest to the public does not make it relevant to self-governance—celebrity gossip, for example, seems very far removed from the concerns driving the First Amendment, unless the celebrity is also a political or

242. *Connick*, 461 U.S. at 138.

243. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

244. See Bhagwat, *supra* note 180, at 997–98 (describing the role of the First Amendment in protecting forms of democratic participation such as petitioning, assembly, association, and education); Post, *Constitutional Concept*, *supra* note 161, at 671–72 (“[T]he first amendment safeguards public discourse not merely because it informs government decisionmaking, but also because it enables a culturally heterogeneous society to forge a common democratic will.”).

245. See Post, *Constitutional Concept*, *supra* note 161, at 671–72 (discussing and rejecting argument made by Robert Bork in *Neutral Principles*, *supra* note 158, at 27).

opinion leader. Finally, emphasis must be put on the collective nature of self-governance. This means not only that speech constituting public discourse is presumptively relevant to self-governance, but also that the courts must focus, in assessing speech, on whether the speech is part of a collective project of value formation or directed at forming associations with and / or shaping the values of fellow citizens. When that is the case, even when the subject matter is far from governmental policies, as narrowly defined, self-governance is very much in play.

Even with this broad approach, however, there will be many instances of factual speech that have no, or only a distant relationship to self-governance. And there will also be close cases, where the relationship is uncertain, or is indirect but real. Clearly some difficult judgments will be necessary, and certainly there should be a presumption that public discourse and matters of interest to the public are relevant to self-governance. Nor am I suggesting that relevance to self-governance become a general First Amendment test used to assess the value of all speech. But with respect to factual details, as opposed to opinions, ideas, or general facts, some distinctions must be drawn if the social harms associated with such details are to be controlled.

The shape of a new doctrine, recognizing the distinct issues and problems associated with regulation of speech constituting factual details, begins to emerge from the above discussion. First and foremost, the Court's current, highly protective doctrine must remain in place and must be faithfully followed (a bigger challenge, seemingly) with respect to factual details which are directly related to self-governance, and so fall within the core of the First Amendment's protections. The history of the past century of First Amendment doctrine has led to a broad social consensus that, in general, we as a society are will to risk the harms threatened by such speech because that risk is greatly outweighed by the threat to our system of government posed by regulation in this area. Nothing in the discussion here challenges that conclusion.

The more difficult, and interesting, question is how to treat factual details outside that core. Here, a clarification is necessary. It may well be (indeed it is very likely to be the case) that a particular speech, publication, or website will contain elements of both highly protected and less protected speech, including details. Thus ACLA's website, insofar as it condemned abortion, and even insofar as it identified the location of abortion clinics,²⁴⁶

246. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1085 (9th Cir. 2002) (en banc).

undoubtedly constituted speech at the core of the First Amendment, and similarly for Hal Turner's condemnation of the Seventh Circuit judges.²⁴⁷ However, the addition of peripheral, personal details, and in Turner's case the location of bomb barriers, was almost certainly outside that core protection. When that is so, the government must retain the power to regulate, and punish, those dangerous details, even when it cannot touch the rest of the speech, just as the inclusion of opinion within otherwise defamatory speech does not shield the defamation from liability. Otherwise, restrictions on dangerous details would be too easy to evade.

So now the following question arises: How should courts evaluate regulation of those noncore factual details? Here, some modesty is in order. The reality is that no single standard can capture the vast variety of situations in which the government might seek to regulate details to avert real or perceived social harms. First of all, the types of details that are potentially subject to regulation vary enormously in character and value. Such details include everything from celebrity gossip (with little or no relationship to self-governance) to personal details such as those in *ACLA* or *White* (with some potential relevance) to the types of diplomatic and military secrets at issue in the WikiLeaks scandal (which have a great deal of relevance to public policy)—even if some of the specific details (such as the names of individuals working with the United States) might be considered outside the “core” of First Amendment protection. Furthermore, there is also huge variation in the types of social harms threatened by disclosure of details. Again these run the gamut from potential death, in contexts such as *ACLA* and WikiLeaks, to substantial financial losses in situations such as disclosure of DeCSS, to mere embarrassment in the case of gossip. Any sensible approach in this area must calibrate the degree of First Amendment protection to variations in both the value of the regulated speech, and the strength of the government's interest in regulating that speech. What seems clear is that neither the extremely speech-protective approach employed toward ideas (which I have argued should be retained only for factual details directly related to self-governance), nor the extreme deference that the Court employs with respect to regulation of nonexpressive conduct,²⁴⁸ (and in practice applies to noncontent-based regulations even of expressive conduct),²⁴⁹ seem appropriate here. Instead,

247. See *United States v. Turner*, No. 09-542, 2009 U.S. Dist. LEXIS 81135, at *1–2 (N.D. Ill. Sept. 8, 2009).

248. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (applying rational basis review to Congress's Filled Milk Act).

249. See Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 792 (documenting the weakness of the *O'Brien*

something in-between is needed, a sliding-scale / balancing approach that varies the burden placed on the government to justify its regulation. This balancing should depend not only on the value of the regulated speech and the impact of the regulation on that speech, but also should clarify that all true facts are presumptively protected, and so the government bears the burden of justifying their suppression.

Building on current doctrine, that approach is probably best encapsulated in the test the Court currently applies to truthful, nonmisleading commercial speech, which I understand to incorporate a substantial element of balancing, albeit weighted balancing.²⁵⁰ Under current law, in order to justify a regulation of commercial speech, “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. . . . [that is, t]here must be a ‘fit between the legislature’s ends and the means chosen to accomplish those ends.’”²⁵¹ This test, a form of intermediate scrutiny, has been applied with a fair bit of vigor in recent years,²⁵² but retains enough nuance to “ensure not only that the State’s interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.”²⁵³ Logically, importing the commercial speech doctrine to the regulation of details not directly relevant to self-governance makes some sense because in both instances, the courts are being asked to analyze regulations of speech that has some substantial value, but which clearly falls outside the core of the First Amendment’s protections. This test, a fairly demanding form of intermediate scrutiny, is best read to permit regulation of speech when serious harms are threatened and the regulation directly mitigates the risk of such harms, but not for trivial purposes. It also would appear to permit greater regulation by placing fewer demands on the government (that is, ensuring that regulation is “proportional” to need and value), as the speech

test applied to such regulations).

250. Those who do not share this understanding of the test should read my proposal as one for weighted balancing, however such a test may be titled.

251. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667–68 (2011) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989)).

252. *See, e.g., id.* (holding that a Vermont statute restricting the sale, use and disclosure of pharmacy records that showed individual prescribing practices of doctors did not survive this form of intermediate scrutiny); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366–77 (2002) (holding that speech-related provisions of the Food and Drug Administration Modernization Act of 1997 did not survive this form of intermediate scrutiny); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–71 (2001) (holding that certain regulations restricting tobacco advertising promulgated by the Attorney General of Massachusetts did not survive this form of strict scrutiny).

253. *Sorrell*, 131 S. Ct. at 2668.

being regulated becomes more and more distant from the processes of self-governance. And, most importantly, this approach abandons the very strict imminence and probability requirements of the *Brandenburg* test, reducing the burden on the government to merely demonstrating that there is a significant likelihood that the regulation will abate a substantial social harm.

There are two substantial, though linked, objections to this approach: that the test I advocate is excessively vague and indeterminate, and that consequently, judges will not be able to consistently administer the test. There is no doubt that the commercial speech test, like any standard that incorporates an element of balancing, is inevitably open-ended and asks a lot of judges. In particular, it entrusts judges with the concededly difficult task of assessing how direct the relationship is between specific factual speech and the processes of self-governance, and it also requires judges to assess the magnitude of social harm threatened by that speech. Neither are easy tasks, and there will inevitably be difficult value judgments needed. Finally, in determining if any particular regulation should be upheld, some degree of comparison of the value of speech and social harm becomes necessary, inevitably raising incommensurability problems.²⁵⁴ These are all real concerns, and undoubtedly will introduce an element of uncertainty to the law. They are not, however, fatal in my view. One important mitigating factor is that under my proposed approach to regulation of factual speech, details that are even arguably at the core of the First Amendment's protections—because they relate directly to self-governance—continue to receive extremely high protection free of any balancing test. Intermediate scrutiny, and an element of balancing, will enter the picture only after a determination has been made that the regulated speech is not in that core, thereby substantially decreasing the stakes if judges fail at times to provide sufficient protection for speech or are inconsistent in doing so. Second, some solace can be found in the fact that courts have applied intermediate scrutiny-type tests for many decades, in many areas of law including free speech²⁵⁵ and equal protection,²⁵⁶ and certainly have not done so in such a

254. See generally Hastings Law Journal Editorial Board, *Foreword to Symposium, When Is a Line as Long as a Rock Is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication*, 45 HASTINGS L.J. xvii, xvii (1994) (“The Symposium address[es] the various methods the Supreme Court does and should use in constitutional decision making.”).

255. See generally Bhagwat, *supra* note 249 (providing a comprehensive assessment of intermediate scrutiny).

256. See, e.g., *United States v. Virginia*, 518 U.S. 515, 515–18 (1996) (involving the admission of women to Virginia Military Institute); *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (involving an Oklahoma law allowing the sale of certain alcoholic beverages to women at age eighteen but only allowing men to do so at age twenty-one).

manner as to eviscerate constitutional protections. Finally, it may well be that some degree of uncertainty in this area is inevitable. The cases and situations discussed in this Article raise fundamental questions about how to reconcile social needs with our constitutional commitment to free expression. When speech directly relevant to the basic purposes of the First Amendment is at issue, our modern practice has been to protect speech, even at the cost of substantial social harm. As we move toward more peripheral speech, however, some element of compromise is inevitable, and so some degree of variability is inevitable. Indeed, as the discussion of cases in Part II illustrates, judges are clearly already making these judgments, albeit *sub rosa* and perhaps even unconsciously. The path I propose would require judges to make those judgments explicit and to defend them in the course of announcing their decisions. That seems, at the least, a substantial improvement over the current state of affairs, even if the solution is not ideal from the point of view of predictability.

Under my proposed approach, most (though by no means all) of the cases discussed earlier would probably have been decided the same way, but without the distortion (or at times simply ignoring) of doctrine that courts have in the past engaged in to justify their results. Thus, in situations like the *ACLA* and *White* cases and the Hal Turner prosecution, there seems little doubt that given the magnitude of the social harm posed by the disclosures of personal details there—immediate, severe fear of harm, and a meaningful risk of actual harm on the part of the victims—and given the rather peripheral link between self-governance and those details, prosecution of such speech is certainly warranted.²⁵⁷ Similarly, there seems little doubt that the government was justified in acting against Philip Agee in response to his disclosure of the names of CIA agents.²⁵⁸ Again, the harm (there not merely theoretical) was very high, and the link between self-governance and the identities of specific operatives seems small. On the other hand, in *Claiborne Hardware* the Court was almost certainly correct to protect the speech. The speech punished there was uttered in the context of organizing a political protest and boycott, so sat at the very heart of the First Amendment's protections, and the identification of the names of boycott violators was itself a central part of those activities,²⁵⁹ unlike in

257. The question of what particular criminal charge that should be laid against such speech is outside the scope of this paper, though I am inclined to think that the solicitation approach adopted in *White* is probably the best fit. My point is that any First Amendment defense to such a prosecution should be rejected, on the grounds that the factual details contained in the speech are unprotected, and so may be punished.

258. See *Haig v. Agee*, 453 U.S. 280, 283–84 (1981).

259. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889–90 (1982).

the other cases. Furthermore, the link between the speech and actual harm was much more tangential there than in the other cases discussed.

Finally, while *Rice v. Paladin Enterprises* poses a more difficult question, the court probably also decided that case correctly. The strongest factor favoring the court's decision to deny protection was, of course that the contents of the book *Hit Man* were extremely far removed from self-governance, especially the details regarding how to plan a murder. On the other hand, the link between the book and actual harm is also rather distant, suggesting that the harm side of the ledger weighs in favor of protection. It should be noted, however, that for the purposes of the summary judgment motion being reviewed in *Rice*, the defendant had actually stipulated that "through publishing and selling *Hit Man*, it assisted [the murderer] in particular in the perpetration of the" murders at issue.²⁶⁰ Given this concession, the link between the speech and the harm was probably sufficiently close to justify denying protection to the speech. If, however, the defendants had been able subsequently to raise serious questions about whether the murder that triggered that lawsuit was really caused by the book, then that conclusion should have been subject to reconsideration.

This is not to say that all of the cases were correctly decided. For example, the Court was probably wrong to prevent newspapers from being prosecuted for the disclosure of the names of rape victims.²⁶¹ Those are cases where the harm posed to the privacy of those victims is quite substantial, and again the relevance to self-governance of the names of those victims seems remote. Similarly, in cases other than *Rice* involving instructions to engage in crime, where defendants were directly providing specific instructions to potential criminals, the value of the speech remains low,²⁶² but the link to social harm is much more direct than in *Rice*. As a consequence, decisions, such as *Dahlstrom*,²⁶³ *Freeman*,²⁶⁴ and *McCoy*,²⁶⁵ granting substantial constitutional protection to such speech seem clearly wrong.

260. *Rice v. Paladin Enters.*, 128 F.3d 233, 241 (4th Cir. 1997).

261. *See Florida Star v. B.J.F.*, 491 U.S. 524, 524 (1989).

262. I do not mean to suggest that the speech in *Rice* and the other criminal instruction cases had no value. Certainly, there is an ideological element to *Hit Man's* advocacy of a criminal lifestyle, *see Rice*, 128 F.3d at 241, just as in tax evasion cases there is a clear ideological element to defendant tax protestors' speech, *see e.g.*, *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985) (though it is hard to find much value in the recipe to manufacture PCP at issue in *United States v. Barnett*, 667 F.2d 835, 842–44 (9th Cir. 1982)). My point is simply that the inclusion of specific, detailed instructions in the speech did not much advance those ideological elements of the speech.

263. *United States v. Dahlstrom*, 713 F.2d 1423, 1423–28 (9th Cir. 1983).

264. *Freeman*, 761 F.2d at 551–52.

265. *McCoy v. Stewart*, 282 F.3d 626, 631–33 (9th Cir. 2002).

Moving to the scientific and technical speech cases, courts were similarly probably correct to deny coverage to speech, such as the specific code constituting DeCSS,²⁶⁶ where the link to crime is close and the tie between that specific code and self-governance is distant (the same would be true of the other cases involving software directly connected to crime). On the other hand, the courts were probably also correct to conclude that a situation such as that posed by the *Bernstein* litigation is quite different. The encryption algorithm Bernstein sought to publish had clear scientific value which might well have been relevant to public policy debates regarding privacy and secrecy, albeit the specific algorithm probably does not sit within the “core” of speech relating to self-governance. But more importantly, there was a far less direct link between the government’s censorship efforts directed at Bernstein and any identifiable social harm.²⁶⁷

The final category of details identified earlier, diplomatic and military secrets, unsurprisingly poses the most difficult set of problems. These cases typically involve speech which is in general highly relevant to self-governance, since it provides citizens with crucial information about the actions and failings of their government, even if some of the specific details contained in the speech (such as the identities of named individuals in the WikiLeaks cables) do not fall within the core of protected speech. On the other hand, disclosures of specific military and diplomatic facts, of course, also threaten extremely serious harms to national security, and to the lives of individual soldiers and others. Some care is therefore essential in resolving these cases.

Some conclusions do seem clear, however. First, most such information must receive the highest level of protection, even when some harm to national interests is threatened. That is the abiding lesson of the *Pentagon Papers* litigation,²⁶⁸ and more recent disputes such as the *New York Times*’s disclosure of the Bush Administration’s warrantless wiretapping program, which elicited a controversial threat of prosecution from then Attorney General Alberto Gonzales.²⁶⁹ Second, though, it also seems essential to provide less protection to the disclosure of very detailed and sensitive military or intelligence-related facts, such as the sailing times of troop ships, the specifics of which add little to public debate or other

266. See e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434–36 (2d Cir. 2001).

267. See *Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426, 1426–36 (N.D. Cal. 1996).

268. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam).

269. Walter Pincus, *Prosecution of Journalists Is Possible in NSA Leaks*, WASH. POST, May 22, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100348.html>.

forms of self-governance. Thus the *Progressive* court's decision to deny protection to detailed explanations of how to construct a hydrogen bomb²⁷⁰ seems correct, as does the narrow result in the *Edler Industries* case.²⁷¹ WikiLeaks is a much more difficult problem, involving as it does speech of generally great value, but which threatens great harm. Ultimately, it seems relatively clear that most of the contents of the WikiLeaks cables are at the core of the First Amendment, and so their disclosure cannot be punished without satisfying the *Brandenburg* test. However, certain specific details, such as the identities of individuals cooperating with the United States in hostile states, are a very different matter. Those details contribute little or nothing to self-governance, and obviously cause great harm to the named individuals and to the national interests of the United States.²⁷² As such, punishment for disclosure of those details seems entirely consistent with the First Amendment.

V. CONCLUSION

Currently, First Amendment theory and doctrine are generally characterized by what Jim Weinstein and others call the "all-inclusive approach," under which it is presumed that unless speech can be placed within one of the few, carefully defined categories of "low-value" speech, all speech is presumed to receive equal, and rigorous, constitutional protection.²⁷³ There are strong arguments in favor of this approach,²⁷⁴ but it creates a serious problem. The reality is that in adjudicating individual cases, judges cannot help but implicitly recognize that not all speech is created equal. Some speech—for example, advocating political opinions, no matter how objectionable—is clearly entitled to well-nigh absolute constitutional protection. But at other times, when serious social harm is threatened and the speech seems more peripheral, some accommodation of constitutional values and social needs seems necessary. The difficulty is that outside of the low-value categories, current doctrine and theory do not provide judges with the tools needed to make those judgments, resulting in the distortion of doctrine and outcomes arrived at by fiat. None of this is conducive to a predictable body of law or to the development of law in a consistent and logical manner.

270. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 990–96 (W.D. Wis. 1979).

271. *United States v. Elder Indus., Inc.*, 579 F.2d 516, 518–21 (9th Cir. 1978).

272. *See* text accompanying notes 151–54.

273. Weinstein, *supra* note 161, at 491–92.

274. *See* Volokh, *supra* note 229, at 584–94 (nicely summarizing the arguments in favor of the approach).

In this Article, I have argued that regulation of speech constituting specific, factual details is an area of law which suffers from these faults. Details, I have argued, are meaningfully different from opinions, ideas, and even general facts, in their relationship to the values underlying the First Amendment. Some details, such as certain kinds of science, some sorts of personal details (especially concerning political or social leaders), and some kinds of military or diplomatic secrets, are central to the process of democratic self-governance and so are deserving of the highest levels of First Amendment protection. Other details, however, such as domestic gossip and certain kinds of technical facts, are quite peripheral to self-governance, and so occupy a lower place in the First Amendment hierarchy. Furthermore, as the cases discussed in this Article illustrate, disclosure of details can cause or risk great social harm, including harms to privacy, harms to national security, and even violence against individuals. This is an area of free speech law, therefore, in which a more nuanced approach than the absolutism of the all-inclusive approach is needed.

I have proposed here one possible doctrinal route to reconciling the important, competing interests that come into play when the government seeks to suppress details, a route which aims to preserve the core democratic values of the First Amendment while also permitting courts to guard against serious social harms when these values are less directly implicated. In particular, I propose to continue to provide the highest level of constitutional protection to details directly relevant to the process of self-governance, but apply a more forgiving test, drawn from the modern commercial speech doctrine, to details less central to the First Amendment. It may be that my particular proposal is imperfect, and fails to adequately protect either free speech interests or society, or perhaps both. Be that as it may, what does seem clear is that some change in the law is necessary here, in order to reintroduce coherence and honesty, and provide some guidance to courts as they struggle to resolve these extremely difficult cases. This Article seeks, therefore, to begin a dialogue, both about the appropriate analysis of factual speech, and more generally about the long-term viability of the all-inclusive approach to free speech in the era of the Internet.

