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CLOSING THE ORWELLIAN LOOPHOLE: THE PRESENT CONSTITUTIONALITY OF BIG BROTHER AND THE POTENTIAL FOR A FIRST AMENDMENT CURE

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ABSTRACT

The setting of George Orwell's *1984* is nothing short of a nightmare, a dystopian vision of a totalitarian world where democratic values exist in name only, and the near-total absence of privacy bends people's behavior, their conversations, and even their minds toward the government's will. From an American perspective, Orwell's fictional characters live under a sort of anti-Constitution. The Framers obviously did not have the benefit of his cautionary tale when they wrote the Constitution and its Bill of Rights, but their words and explanatory documents reflect the same fears.

American courts have never weighed the constitutionality of Big Brother because the government has never implemented such a surveillance program, at least not on the scale that Orwell imagined. Voters have never seriously demanded it, and the government has never before possessed the technological means to make it a reality. Now that such means are at the government's disposal, Big Brother has never been closer to realization. From GPS-tracking and satellite-communications intercepts to facial-recognition cameras and data-mining software, the government has the means to eavesdrop on virtually any facet of human life. The persistence and growth of clandestine crimes and societal threats—from mere software pirating to terrorism and drug trafficking—creates pressure and temptation for government to use this ever-

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improving technology more broadly. The latent nature of such crimes, combined with their high publicity, creates such public paranoia that citizens are often willing to trade liberty for an increased sense of security.

This Article explores two questions. First, it asks whether the United States Supreme Court's current interpretation of the Constitution protects us from Big Brother; that is, could a system of government surveillance on an Orwellian scale—instigated by another major terrorist attack in the United States—survive judicial scrutiny under current Supreme Court precedent? To answer this question, the Article evaluates potential challenges to Big Brother under the Fourth, Fifth, and First Amendments. Disturbingly, it finds that all leave open the possibility of constitutionality. In other words, under the right conditions and under current precedent, no constitutional provision stands firmly between American citizens and Big Brother.

Second, this Article asks how we can re-think the Constitution so as to guarantee that Orwell's nightmare could never come to pass. The answer lies in expanding the scope of what might be the most sacred and highly-protected of American rights: the First Amendment's right to free speech. The Article examines the possibility of expanding free speech to encompass a speaker's right to choose a private audience. Such a doctrine would close the "Orwellian Loophole" by rendering wholly unconstitutional any government effort at large-scale, suspicionless surveillance, thus ensuring that *1984* will remain fiction in the face of growing temptations to transform it into American reality.

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INTRODUCTION

> There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.
>
> . . . .
>
> The thing that he was about to do was to open a diary. This was not illegal (nothing was illegal, since there were no longer any laws), but if detected it was reasonably certain that it would be punished . . . .
>
> For some time he gazed stupidly at the paper. . . . It was curious that he seemed not merely to have lost the power of expressing himself, but even to have forgotten what it was that he had originally intended to say.[1]

George Orwell wrote *1984* more than fifty years ago, and he died within a year of its publication. He never lived to see surveillance cameras, much less cameras with facial-recognition technology. He never lived to see satellites, much less learn how they would capture spoken words from one point on earth and instantaneously bounce them to a point halfway across the globe. He never lived to see home computers, the Internet, e-mail, e-business, blogs, and myriad new forms of electronic communications, much less the explosion of "spyware" and "data mining" programs. Yet Orwell's fictional dystopia—in which he presents a direct connection between surveillance and the inability to

1. GEORGE ORWELL, 1984 6–7, 9–10 (Plume 1983) (1949).

think freely—grows more and more relevant as sophisticated surveillance tools multiply and latent societal threats create pressure on the government to use such tools.

But surely we could take comfort that this futuristic nightmare could not happen in the United States. Even if the public demanded such surveillance measures for security, even if politicians passed laws to meet this demand, surely the Constitution would protect liberty from this "insidious encroachment by men of zeal, well-meaning but without understanding."[2] Wouldn't it?

Maybe not. This Article imagines a government surveillance program of Orwellian scale, an immense technological network for monitoring the communications and movements of American citizens.[3] Unlike Orwell, however, we do not have to fantasize about the tools of this surveillance; this Article's hypothetical merely applies presently-available technology (or logical extensions of presently-available technology) on a nationwide scale. Under such a system, citizens must assume that every communication by verbal or technological means—personal conversations, phone calls, e-mails, faxes, Internet postings—is subject to government review, even though there is no way to know the criteria by which the government's computerized filtration system flags certain communications and patterns for human review.

The government's purposes in this hypothetical program are national security and safety, namely the prevention of terrorist attacks and other serious, clandestine threats to the country. It does not seek to suppress or deter speech; indeed, the system is more effective when people speak freely. Relevant speech may be used as evidence in criminal proceedings *after* a crime takes place, and other suspicious

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2. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

3. This hypothetical assumes that the new search program would supersede the Privacy Act, which prohibits any government agency from "maintain[ing a] record describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the authorized scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7) (2000) (alteration added). While the records created under the hypothetical surveillance program described above would likely fall within the Privacy Act, the applicability of the Privacy Act to this hypothetical lies beyond the scope of this Article.

communications may bring a variety of non-criminal consequences, such as increased surveillance by local law enforcement.

This hypothetical is not necessarily the legislature's most likely response to a terrorist disaster, nor are the government's methods and discipline in executing this program the most reflective of human nature. It is a common maxim that absolute power corrupts absolutely, and those in power would have absolute access to all of the formerly private information generated by this program. In this hypothetical, if absolute power corrupts even marginally and this corruption becomes known to opponents of the program, the constitutional analysis in this Article must shift considerably and courts would likely repel the government's invasion of privacy. The mission here, however, is not to evaluate the constitutional safeguards against the strongest Constitution-battering storm that would *likely* occur if the country suffered another terrorist attack. Rather, it is to evaluate the safeguards against the "perfect storm," a combination of circumstances and conditions that presents great threats to liberty but lacks the kinds of human abuse and corruption that would lead to reasonable questioning of the government's motives. It is a "stress test" for the Constitution.

Unfortunately, under the United States Supreme Court's present interpretation, the Constitution may fail this test. Even though this country ratified the Bill of Rights to guarantee our liberty from such totalitarian measures,[4] the Supreme Court's current interpretation of that document reveals a paradox: under proper circumstances, today's Court could uphold a nationwide surveillance program of Orwellian proportions. This Article explores this "Orwellian Loophole," examining the possibility that the Supreme Court would uphold Orwell's nightmare against constitutional challenges under the Fourth Amendment, the Fifth Amendment, and the First Amendment's rights to expressive association and free speech generally.

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4. *See* James Madison, Speech to the House of Representatives, Proposing the Bill of Rights (June 8, 1789) ("[I]f all power is subject to abuse that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done . . . . I do wish to see a door opened . . . to incorporate those provisions for the security of rights . . . ."), *reprinted in part in* JUHANI RUDANKO, JAMES MADISON AND FREEDOM OF SPEECH: MAJOR DEBATES IN THE EARLY REPUBLIC 34 (2004) (alteration added).

Having found a distinct possibility of constitutionality, this Article concludes by suggesting a new approach to free speech under the First Amendment: the recognition of the speaker's choice of audience as an element of the freedom of speech. It shows how this right fits within the Court's current justifications for free speech generally, protects against government surveillance, and effectively closes the Orwellian Loophole.

On a larger scale and regardless of the solution for the Orwellian Loophole, this Article also seeks to inspire courts to awaken from their current slumber on this issue. They must close this loophole, this widening crack between Fourth Amendment, First Amendment, and right-to-privacy protections where this program might hide from strong judicial scrutiny under the current interpretation of the Constitution. If they do not, the combined growth of both technological capabilities and societal fears threaten to turn Orwell's nightmare into American reality.

I. THE ORWELL ACT

After the 9/11 attacks, civil libertarians denounced reactionary legislation that granted greater surveillance powers to the government at the same time it permitted more threatening usage of the information through greater inter-agency coordination.[5] But if Americans proved willing to support the government in efforts that went as far as those measures did, what kinds of new surveillance policies and programs might Americans support if terrorists strike again in another organized, catastrophic attack from within American borders?

The extent of the response would likely be some function of the asserted needs of government agencies, the tools at the government's disposal, and the level of public outcry for stronger security, but none can doubt that the government would respond. This Article envisions an

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5. *See* Kevin Galvin, *Rights and Wrongs: Why New Law Enforcement Powers Worry Civil Libertarians*, SEATTLE TIMES, Dec. 6, 2001, at A3 (noting the concerns of civil libertarians over the recently-passed Patriot Act legislation); *see also* USA PATRIOT Act of 2001 tit. II, VII, IX, 115 Stat. 272 (codified as amended at FED. R. CRIM. P. 6 and 41 and scattered sections of Titles 18, 22, 28, 42, 47, and 50 of the United States Code) (providing for increased federal surveillance powers, state and federal government law-enforcement coordination, and inter-agency intelligence sharing).

extraordinary legislative response to the public demand for greater security, appropriately labeled the "Orwell Act."

The Orwell Act authorizes the federal government to eavesdrop upon every kind of spoken and written communication in widespread use today in the United States. The Act authorizes the government to tap every phone line, intercept every cell-phone and radio transmission, and capture every email. It may install hidden, voice-activated microphones in every public place, and it may purchase the option of placing hidden microphones in every room of every private building.[6] Voice-recognition technology matches voice samples with recorded conversations, making it possible for the government to keep a running transcript of all spoken words and the identities of the speakers. Mandatory software "backdoors" enable the government to read every document stored on every computer. A series of hidden facial-recognition cameras can record the movements of every citizen, and Global Positioning System ("GPS") trackers can record the movements of every automobile. The government's system can detect any tampering with any of these devices immediately, and such tampering constitutes a grave criminal offense.

The government collects data using an advanced computer system and shrouds the use of this data in a veil of secrecy. It introduces some communications in criminal trials. It shares other information with local law enforcement. But these uses are inconsistent and uncertain, and defendants are often left to speculate whether witnesses against them came forward on their own accord or were discovered with Orwell Act surveillance. Indeed, no one knows how much data the system collects, with some believing it collects and stores all movement and communication and others arguing that—due to the inconsistent and uncertain appearance of Orwell Act evidence in criminal trials—it collects only scattered or targeted communications at any one time. While all agree that the computer system must use some kind of program to filter through such massive amounts of information and discern the

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6. The government must buy this right due to the Takings Clause of the Fifth Amendment, U.S. CONST. amend. V, and the Supreme Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

most threatening symptoms of danger, no one outside of a handful of government employees knows which words or movements capture the system's attention at any particular time. It is, in short, the Panopticon,[7] the Leviathan,[8] the Big Brother of George Orwell's nightmares.[9]

The Orwell Act functions even better than legislators had hoped: crime evaporates in its midst, as no criminals feel secure in the face of its ever-present eyes and ears. Terrorists stay abroad; abusive husbands hold their fists; drug traffickers abandon their trade. The Orwell Act becomes Congress's D-Day in its metaphorical wars on crime, drugs, and terrorism.

But some citizens—dubbed the Anti-Orwellians—question whether this crime-free society is truly utopian, and they file lawsuits challenging the Orwell Act on constitutional grounds. The Supreme Court hears a consolidated appeal of these cases, with appellants making different objections to the Orwell Act, and the justices must answer the question that grips the nation's attention: in a country founded on constitutionally-protected freedom, can the Orwell Act survive constitutional scrutiny? What constitutional claims might protect against its threat to destroy privacy in America?

II. CLAIM NO. 1: OLD (UN)RELIABLE—THE FOURTH AMENDMENT

A. Fourth Amendment Lines to Fourth Amendment Scales

The Fourth Amendment has traditionally protected against such incursions into the private realm, at least since the Supreme Court's landmark 1967 holding in *Katz v. United States*[10] that the Fourth Amendment "protects people, not places."[11] In *Katz*, the Court ruled that police officers must comply with the Fourth Amendment's warrant

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7. *See generally* JEREMY BENTHAM, *Panopticon, in* THE PANOPTICON WRITINGS 29-95 (Verso, 1995) (1787) (describing a prison designed to give inmates the impression that they are under constant surveillance).

8. *See generally* THOMAS HOBBES, LEVIATHAN (Penguin 1985) (1651) (describing the need for an all-powerful state, or Leviathan, to preserve peace in light of the human tendency toward conflict).

9. *See generally* ORWELL, *supra* note 1.

10. 389 U.S. 347 (1967).

11. *Id.* at 351.

requirement to wiretap a payphone used by a criminal suspect.[12] More broadly, it held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[13]

Since that time, the Court seems to have engaged in a concerted effort to limit the *Katz* ruling.[14] Moreover, in the era following *Katz* but before the explosion of cases linked with *Terry v. Ohio,*[15] the Court struggled to draw clear lines in its search jurisprudence. For example, the test of whether the government conducted a "search" within the meaning of the Fourth Amendment was and remains highly malleable: it is a two-prong analysis of whether a person had a subjective expectation of privacy in the place being searched, and whether society is prepared to recognize that expectation as "reasonable" or "legitimate."[16] Certainly, such a test gives judges some leeway to make results-oriented determinations in certain cases.[17] But at least the older, pre-*Terry* approach carried some absolutes once a court found that a search took place. If there was no probable cause, the search was per se unreasonable under the Fourth Amendment.[18] Absent a warrant, the search was per se unreasonable in many situations.[19] If there was no individualized suspicion, the search was always unreasonable.[20]

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12. *Id.* at 358.

13. *Id.* at 357.

14. In doing so, the Court has created numerous addenda to those "few specifically established and well-delineated exceptions" to the warrant requirement, so many that even the current Court's (arguably) most conservative member recognizes that "the warrant requirement ha[s] become so riddled with exceptions that it [i]s basically unrecognizable." California v. Acevedo, 500 U.S. 565, 582 (1982) (Scalia, J., concurring) (alterations added).

15. 392 U.S. 1 (1968).

16. *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring).

17. For example, the Court ruled that police using binoculars and low-flying airplanes to investigate private property immediately surrounding a suspect's home were not conducting "searches" within the meaning of the Fourth Amendment even when physically walking over the same space (or, perhaps, flying at a lower altitude) would have constituted a search. California v. Ciraolo, 476 U.S. 207, 213 (1986).

18. Spinelli v. United States, 393 U.S. 410, 418–19 (1969).

19. *Katz*, 389 U.S. at 357 (explaining that "the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the

Gradually, the Court has traded this world of Fourth Amendment absolutes for a world of Fourth Amendment balancing. This newer approach evaluates Fourth Amendment reasonableness on a sliding scale, examining "all the circumstances"[21]—the nature of the search or character of the intrusion, the legitimacy of the subject's privacy expectations, and the government interests in conducting the search.[22] While this approach avoids formalism and gives courts flexibility to evaluate new types of searches, it also gives the government great ability to conduct the kind of generalized, suspicionless searches that inspired the Fourth Amendment in the first place.[23]

In fact, the Court has developed a "special needs" catch-all category for generalized searches that would otherwise face eradication under traditional Fourth Amendment analysis, such as random drug testing,[24] highway sobriety checkpoints,[25] and the mandatory DNA sampling of convicted criminals.[26] "Special needs" searches carry only one extra limitation on their use beyond the normal reasonableness analysis: their purpose must be "'[]distinguishable from the general interest in crime control.'"[27] But even this requirement is open to

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citizen and the police . . . .'" (quoting Wong Sun v. United States, 371 U.S. 471, 481–482 (1963))).

20. No case upheld the constitutionality of a generalized, suspicionless search until *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

21. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

22. Justice Scalia has been the main proponent of this three-part balancing test. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–61 (1995); Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

23. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 U. MICH L. REV. 547, 577, 582 (1999) (arguing that the Framers wrote the Fourth Amendment to protect against arbitrary, generalized searches through the requirements for warrants and probable cause).

24. *See Vernonia Sch. Dist. 47J*, 515 U.S. at 665 (finding "special needs" and upholding a school district program of random drug testing for student athletes).

25. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding state program of sobriety checkpoints to prevent drunk driving).

26. *See* United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (upholding the federal DNA Backlog Elimination Act of 2000 under a "special needs" analysis).

27. Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001) (alteration added) (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000)). The Court stated that it "consider[s] all the available evidence in order to determine the relevant primary purpose." *Id.* (alteration added). If the primary purpose includes "the threat

inconsistent interpretation. For example, the Supreme Court upheld a local law-enforcement policy of random sobriety checkpoints without any real inquiry into the purpose of that program,[28] but it struck down a program of drug checkpoints because their "primary purpose was to detect evidence of ordinary criminal wrongdoing."[29] A principled distinction between these cases is hard to find, and it seems that constitutionality rests only upon how forthcoming law-enforcement officials choose to be with regard to the purposes of the program at issue.

B. The Orwell Act Under the Fourth Amendment

Given the Court's move toward balancing, the Orwell Act could very well navigate the few remaining obstacles under today's Fourth Amendment. First, Orwell-Act opponents would have difficulty proving a subjective and legitimate expectation of privacy. Because of the Orwell Act's public nature—all citizens know they are subject to constant surveillance, and they know the means by which the government's watchful eyes and ears operate—the Court could hold that no subjective expectation of privacy exists.[30] Even if the Anti-Orwellians can show subjective expectations of privacy, they may not be able to show that such expectations are legitimate. In *United States v. Place*,[31] the Supreme Court ruled that a sniff by a dog trained to detect narcotics did not constitute a search because "the sniff discloses only the presence or absence of narcotics, a contraband item."[32] Because no one has a legitimate expectation of privacy as to his or her narcotics, and because the dog sniff can only detect narcotics, then the sniff is not a search of something in which the suspect possesses a legitimate

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of arrest and prosecution," the search "does not fit within the closely guarded category of 'special needs.'" *Id.* at 84.

28. *Sitz*, 496 U.S. at 455.

29. *Edmond*, 531 U.S. at 38.

30. The Supreme Court has given little attention to the "subjective expectations" prong since Justice Harlan first described it in his concurrence to *Katz v. United States*, 389 U.S. 347, 360–61 (1967), perhaps because it is so rarely at issue. The Court has never dealt with the kind of program at issue in the Orwell Act, however, and the very fact that the Court has never expressly disavowed it leaves open an argument that some justices could use to uphold the Act.

31. 462 U.S. 696 (1983).

32. *Id.* at 707.

expectation of privacy. These types of "binary"[33] searches have been the subject of some renewed debate on the Court[34] and among commentators, including one who poses the question of whether a computer-monitoring system that scans all computers only for illegal material could withstand constitutional scrutiny.[35]

Such reasoning militates against the legitimacy of the Anti-Orwellians' assertions of privacy expectations. In effect, Orwell-Act technology could simulate the special abilities of a drug-sniffing dog: while it is so advanced that criminal activity cannot escape its watch, it is so precise that it eliminates the majority of opportunities for human discretion and abuse. While these devices gather a huge amount of information that society would consider private, only a small amount would ever receive the attention of human law-enforcement officers. If computer filtration can limit this information to communications and movements that are illegitimate—"contraband" speech such as incitement and speech that is by its nature evidence of criminal activity—then the Court may find that these searches are binary and not open to widespread abuse.

If the Anti-Orwellians survive this preliminary analysis under the Fourth Amendment, they face the uncertain dangers of the "special-needs" balancing act. Given the events precipitating the Orwell Act, the Court will likely find the Act's primary purpose to be safety and national security rather a general interest in crime control.[36] Because the Court

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33. They are termed "binary" because they can only reveal one of two results, the presence or absence of illegal items. *See generally* Ric Simmons, *The Two Unanswered Questions of* Illinois v. Caballes*: How to Make the World Safe for Binary Searches*, 80 TUL. L. REV. 411 (2005).

34. *See generally* United States v. Jacobsen, 466 U.S. 109 (1984) (upholding a chemical field test for narcotics, with a vigorous dissent from Justices Brennan and Marshall and a skeptical concurrence from Justice White).

35. *See generally* Michael Adler, *Cyberspace, General Searches, and Digital Contraband: The Fourth Amendment and the Net-Wide Search*, 105 YALE L.J. 1093 (1996).

36. In essence, the government must argue that the Orwell Act program more closely resembles *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding highway sobriety checkpoints), and *Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004) (upholding highway checkpoints to question potential witnesses following a recent crime), than *City of Indianapolis v. Edmond*, 531 U.S. 32, 37

places great emphasis on the stated programmatic purpose of "special needs" searches,[37] the government need only state a purpose of protecting American lives from terrorist acts—with the discovery of evidence of criminal activities unrelated to terrorism merely a byproduct of an effective anti-terrorism program—and the Orwell Act could pass this low initial barrier into the "special needs" category of searches.

Once it enters this category, the unpredictable balancing of privacy interests and government needs begins. The very structure of the balancing test, however, weighs against the Anti-Orwellians. In more than twenty years of applying the "special needs" test, the Court has *never* struck down a search program after it has determined that the program targets "special needs, beyond the need for normal law enforcement."[38]

The lopsided nature of the balancing test is to blame. Generalized search programs are by nature less intrusive because no individual receives the full attention of law-enforcement authorities; indeed, the Court views a lack of officer discretion as a factor weighing against intrusiveness.[39] By this reasoning, if everyone is subject to the same program, then the intrusiveness of each search diminishes in proportion to the number of individuals exposed to the search, because

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(2000) (striking down highway drug checkpoints). If another 9/11 occurs, thus exposing national security needs and deficiencies, this task would not be difficult.

37. *See Edmond*, 531 U.S. at 41–42 (basing its holding on the "programmatic purpose" of drug checkpoints to detect criminal activity, rather than protect public safety on the highways).

38. New Jersey v. T.L.O., 469 U.S. 325, 351–52 (1985) (Blackmun, J., concurring). The Court has struck down a few programs in which the government asserted "special needs," but each of these cases was decided at the initial stage of determining whether the program confronted special needs, rather than general crime control. *See* Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001) (holding that a program requiring new mothers to submit to drug tests "does not fit within the closely guarded category of 'special needs'"); *Edmond*, 531 U.S. at 41–42 (finding no "special needs" in a police checkpoint to search cars for narcotics); Chandler v. Miller, 520 U.S. 305, 323 (1997) (holding that "special needs" did not apply to a state law requiring political candidates to submit to drug tests because "public safety is not genuinely in jeopardy").

39. *See Sitz*, 496 U.S. at 454 (noting that the lack of officer discretion added to the reasonableness of a sobriety checkpoint) (citing Delaware v. Prouse, 440 U.S. 648 (1979)).

suspicionless, standardized searches are less subject to official abuse[40] and cause less insult to personal dignity.[41] To illustrate, we accept searches of our luggage and personal belongings at airport security checkpoints because we understand that they are part of a larger, standardized search program, and we know that a security officer's perusal of our bags is not akin to an accusation of wrongdoing. If a pair of security officers approaches us at an airport restaurant and performs the same search, however, we would likely feel a greater violation of our privacy purely because we feel as if we are being singled out as worthy of suspicion.

In addition, the weight of the government interests tends to grow exponentially with the scope and effectiveness of the search program. For example, the dissenters in *Sitz* minimized the governmental needs for highway sobriety checkpoints by arguing that the checkpoints were equal to or less effective than "more conventional means."[42] If the Orwell Act is perfectly effective in stopping terrorism—as our hypothetical posits—then the clearly compelling need to combat terrorism and the highly effective means of the Orwell Act combine to place a heavy weight on the "government interests" side of the Fourth Amendment scale.

Even if the program was not especially effective in eliminating all terrorist acts, it is possible that the Court would still uphold it. Understandably, the justices would not want to take the blame or feel the guilt that would arise should another terrorist attack occur after they struck down the Orwell Act. The Court's anxiety regarding its countermajoritarian nature seems to correlate with the perceived gravity of the consequences of its interference with the other branches; as some of its most highly criticized decisions reveal (*Dred Scott*[43] and *Korematsu*[44] foremost among them), well-reasoned and probing judicial

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40. *Id.*

41. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 766 (1993) (noting evidence to support an "inference of guilt" theory; that is, the more an individual senses that he is being singled-out as worthy of suspicion, the more he perceives the search as intrusive).

42. *Sitz*, 496 U.S. at 462 (Stevens, J., dissenting).

43. Scott v. Sanford, 60 U.S. 393 (1856).

44. Korematsu v. United States, 323 U.S. 214 (1944).

review gives way to result-oriented deference when a contrary decision could result in violence or chaos.[45] When precedent leaves room to maneuver and the stakes are high, the Court tends to side with an interpretation of the Constitution that the other branches of the government believe best protects national security.

Finally, even if the Court finds that the government interest pales in comparison to any privacy interests, and it rules against the Orwell Act, Anti-Orwellians face another practical difficulty: the limitations of the exclusionary rule. While a ruling that strikes down Orwell-Act searches on Fourth Amendment grounds might bar the admission of a defendant's own recorded conversations in a court proceeding, it would not bar the admission of the evidence gained by listening to the conversations of others, because defendants have no standing to object to violations of the privacy of others.[46] For example, in the prosecution of a drug dealer, the government could collect recorded communications of all of the drug dealer's associates. Suppose an associate calls another associate and tells him that the dealer expects a new shipment to arrive at a certain time and location. The government could send officers to that location to arrest the dealer as he makes the purchase; it could convince the associates to testify against the dealer; and it could even introduce the associates' conversations against the dealer at trial (subject, of course, to the limitations of the Confrontation Clause and rules of evidence). Other exceptions to the exclusionary rule, such as attenuation[47] and the independent source doctrine,[48] give the government opportunities to use

45. Of course, one can make the argument that both *Dred Scott* and *Korematsu* are more a result of judges' racial animosity than countermajoritarian anxiety. The Court's free-speech rulings during the Red Scare—in which it upheld the government's denial of liberty based on political identity rather than racial identity—offer some support for the conclusion that there is more behind *Dred Scott* and *Korematsu* than mere racism. *See generally* Whitney v. California, 274 U.S. 357 (1927) (upholding petitioner's criminal conviction based on her membership in the Communist Labor Party of California, where the purpose of such membership was to associate with fellow members to accomplish illegal aims); Gitlow v. New York, 268 U.S. 652 (1925) (upholding petitioner's criminal conviction based on his publication of a Socialist Party manifesto that advocated the illegal overthrow of the United States government).

46. *See* Alderman v. United States, 394 U.S. 165, 171–72 (1969).

47. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963).

48. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

the fruits of unlawful searches of the defendant himself. In short, the holes in the exclusionary rule give the government little incentive to abandon such a powerful means of uncovering evidence of criminal activity.

Thus, the Fourth Amendment is a shaky foundation upon which to build a challenge to the Orwell Act. Recent changes in the Supreme Court's Fourth Amendment analysis present major obstacles to any opponents of the Act, and exclusionary-rule jurisprudence means that success on the merits does not necessarily preclude the government from utilizing Orwell-Act surveillance. Of course, opponents may still bring civil *Bivens* suits against the federal government for a deprivation of constitutional rights.[49] But such suits are a product of federal common law, rather than the Constitution; conceivably, the government could amend or abolish this recourse for Anti-Orwellians if these suits presented any serious inconvenience to the government's search efforts. Thus, for true protection against the Orwell Act, its opponents would be well-advised to look beyond the Fourth Amendment's ever-shrinking scope of protection.

III. CLAIM NO. 2: NEW (UN)RELIABLE—THE RIGHT TO PRIVACY

Rather than tying their constitutional hopes to a right with a shrinking scope of protection, perhaps it would be wiser for Anti-Orwellians to employ a right that has undergone a recent expansion:[50] the right to privacy. This "right," which falls under the "substantive force of the liberty protected by the Due Process Clause"[51] of the Fifth and Fourteenth Amendments,[52] does not explicitly appear within the

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49. *See generally* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (establishing a federal cause of action for violations of Fourth Amendment rights by federal officers).

50. I base this speculation on the outcome of one of the Court's most well-recognized decisions of the new millennium, *Lawrence v. Texas*, 539 U.S. 558 (2003), which overruled a previous decision that placed some limitations on the right to privacy, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

51. *Lawrence*, 539 U.S. at 573.

52. Because this Article envisions the Orwell Act as a federal law, the Fifth Amendment applies. The cases cited in this section discuss the right to privacy in terms of either the Fifth or Fourteenth Amendments, depending upon whether the

Constitution. But the Court has used it to strike down some laws—primarily morals legislation, at least in the post-*Lochner* era—with broad, sweeping language that could give hope to Anti-Orwellians:

> Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[53]

Based upon this paragraph alone, the Orwell Act seems like a government venture into unconstitutional waters. While constant surveillance may not dictate the "choices central to personal dignity and autonomy" in the same sense that the criminalization of one of those choices would, one could argue that individuals should be free to "define one's own concept of existence" without the government looking over their shoulders. They may argue that true dignity, autonomy, and liberty require some breathing room, some private space where people can rest assured that their lawful words and actions will not fall within the government spotlight.

But there are limits to the application of these broad-stroke principles. The Court does not apply such liberty-promoting statements consistently, and the task of convincing the Court to overrule some government action on substantive due-process grounds is not as simple as fitting it under the wide umbrella of generous dicta.[54] The Court

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claimant is fighting federal or state government, but the analysis of the right to privacy is the same.

53. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (citation omitted).

54. Certainly the decision to end one's life, for example, is a choice encompassing elements of dignity, liberty, and autonomy, but the Court declined to strike down Washington's assisted suicide law as a violation of due process. Washington v. Glucksberg, 521 U.S. 702, 735–36 (1997).

instead relies upon a two-step approach to substantive due process claims: first, the asserted right must be one of "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" and second, the Court must be able to make a "'careful description' of the asserted fundamental liberty interest."[55] Of course, not all abstract claims of rights require constitutional protection and recognition from the Court; these purported rights must, in some way, find some basis in the text of the Constitution[56] or American history and practice,[57] or perhaps some kind of reasoned consensus that the right warrants protection in an "organized society."[58]

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55. *Id.* at 720–21 (citations omitted).

56. Griswold v. Connecticut, 381 U.S. 479, 510 (1965) (Black, J., dissenting) ("I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.").

57. *Id.* at 493 (Goldberg, J., concurring) ("In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'") (citation omitted) (alterations in original).

58. *Id.* at 500 (Harlan, J., concurring) ("In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'") (citation omitted); *see also Casey*, 505 U.S. at 834 ("Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such 'liberty.' Rather, . . . this Court [may] exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society.") (alteration added). Chief Justice Warren's alternative holding in *Loving v. Virginia*, 388 U.S. 1 (1967), a case striking down Virginia's anti-miscegenation law, may provide an example of this line of reasoning. The Constitution mentions no right to interracial marriage, nor did American history at the time suggest any longstanding exercise of a right to marry outside one's race. Nevertheless, Warren wrote that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law." *Id.* at 12 (alteration added).

A. A Right in Search of a Definition

In this case, the Anti-Orwellians could take two approaches. First, they could define their claim within an already-established right, such as the right to marital privacy[59] or the right of an adult to engage in consensual sexual relations with another adult[60] (they may also claim that it violates their fundamental free-speech rights under the First Amendment, and this Article will deal with that issue in the next section). They would simply argue that the Orwell Act violates these rights because it infringes upon "the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."[61]

The problem with this approach is that the Orwell Act prohibits nothing. Citizens remain free to make reproductive decisions, engage in intimate relations, and raise their families as they see fit, so long as their conduct does not involve abuse, neglect, or other well-established criminal violations. The Orwell Act does not regulate these matters such that the government removes choice from the hands of the citizens; if reproductive decision-making is a constitutional right, the Orwell Act on its face does nothing to ban the exercise of that right.

This is not to say that the Orwell Act could not violate these rights with regard to specific unconstitutional applications in specific, limited contexts.[62] But such misuse of the gathered information would not render the entire Act unconstitutional; a favorable ruling would merely prohibit the government from using the information in that way. The key question then becomes whether the government, acting only as a silent observer and listening in on family life, telephone calls, and

59. *Griswold*, 381 U.S. at 486.

60. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

61. *Casey*, 505 U.S. at 857.

62. If the government began publishing and distributing lists of who was sleeping with whom using information obtained through the Orwell Act, *Lawrence* suggests that such measures would violate the right to sexual privacy. Even though same-sex sodomy carried a minor penalty in Texas, the Court noted that "the consequential nature of the punishment and the state-sponsored condemnation attendant to criminal prohibition" created a violation of the right. *Lawrence*, 539 U.S. at 576. State-sponsored publication of this information could amount to de facto "state-sponsored condemnation" akin to criminal prosecution, and thus violate this right.

important conversations, effectively deprives Americans of the free exercise of their fundamental rights. It is certainly a plausible argument, considering that the Court often uses spatial metaphors to describe the breadth of the right ("realm of personal liberty"[63] and "zone of privacy"[64] are two of the most oft-cited examples).

But it may also conclude that the mere presence of hidden surveillance equipment transmitting data to faceless computer banks miles away, with no penalty for the lawful exercise of these rights, does not amount to any meaningful deprivation of these rights at all. Women will still have the freedom to obtain abortions and couples may still engage in intimate relations. If the worst-case scenario for citizens is that some nameless, unknown strangers working for the government miles away might see transcripts or listen to recordings of the citizens practicing their lawful rights, without any authorization to disclose the information, then any purported deprivation of these rights could be too speculative to hold up in the Supreme Court.

B. Making Things Up as They Go Along

Anti-Orwellians may choose to pursue a more novel approach and argue for a "new" application of the right to privacy under substantive due process, but such an argument will hinge on the "'careful description' of the asserted fundamental liberty interest."[65] Anti-Orwellians might seek to define their right against the Orwell Act as a right to private communication, a right to physical privacy, or perhaps a right to a private life, or at least the right to a *possibility* of a private life *sometimes*. Implicit in each of these definitions are concepts of personal autonomy, dignity, and spatial freedom—the idea that "fundamental is the right to be free, except in very limited circumstances, from unwanted

63. *Casey,* 505 U.S. at 847.

64. *Griswold,* 381 U.S. at 485.

65. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted). For example, the Court examined nearly identical anti-sodomy laws in *Lawrence* and *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court labeled the asserted right as the "right to engage in homosexual sodomy" and denied the substantive due-process claim. *Id.* at 191. In *Lawrence*, the Court labeled the same asserted right as the "right to make certain decisions regarding sexual conduct," *Lawrence*, 539 U.S. at 565, and granted the substantive due-process claim.

governmental intrusions into one's privacy."[66] The opening lines of Justice Kennedy's majority opinion in *Lawrence* eloquently capture this spirit:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.[67]

Again, however, there are limits to the application of these platitudes in the surveillance context. There is no evidence that any of the above definitions of a due-process right have ever been fundamental rights. They certainly do not appear in the text of the Constitution. The Court has never recognized a general "right to privacy," period, but only privacy in certain contexts: the right to privacy in certain marital decisions,[68] or the right to privacy in sexuality,[69] or the right to watch movies and read books in private even if it may not be legal to view them in public.[70] These limitations are necessary for a functioning society. We can support a general right to free speech with few exceptions because its harms to society are minimal and its benefits great; we cannot support a general right to privacy because its potential harms are great and benefits to society as a whole arguably minimal.[71]

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66. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

67. *Lawrence*, 539 U.S. at 562.

68. *Griswold*, 381 U.S. at 485–86.

69. *Lawrence*, 539 U.S. at 578.

70. *Stanley*, 394 U.S. at 565.

71. The modern critics of a broad right to privacy run the ideological gamut, and each finds that privacy offers great dangers and minimal benefits to society in certain contexts. *See, e.g.*, AMITAI ETZIONI, THE LIMITS OF PRIVACY 183 (1999) (looking at privacy through a communitarian perspective and finding that "there are times when our commitment to privacy endangers public health and safety. In four

Of course, the Court may simply take a slightly less general approach and define the right as "the right to privacy with regard to unwarranted government surveillance." Such a definition is broad enough to apply to the Orwell Act in its entirety. It is still fairly abstract, but it might conceivably have enough specificity to avoid absurd results in future cases. The problem for Anti-Orwellians would lie in convincing the Court that such a right is fundamental. The Constitution suggests a right to be free from unwarranted government surveillance in the Fourth Amendment, but the Fourth Amendment addresses only searches and seizures. As Part II illustrates, the Fourth Amendment might not bar the Orwell Act's surveillance program. In addition, American history does not support a right to be free from unwarranted government surveillance. The government has engaged in domestic spying since the Revolutionary War,[72] and the Supreme Court itself recognized, in *United States v. United States District Court (Keith)*, that "[t]he use of . . . [electronic] surveillance . . . has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946."[73] That same case struck down a program of warrantless domestic surveillance, but it did so upon Fourth Amendment grounds—grounds that have shifted significantly since the Court decided *Keith* in 1972, due to the rise of the balancing approach and the growing judicial acceptance of evidence from warrantless searches in criminal cases.[74] In short, United States history reveals no strong tradition outlawing unwarranted government surveillance; if anything, that history—at least

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of the five areas studied here—and in several other areas mentioned along the way—the common good was being neglected to protect privacy."); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 194 (1989) ("This right to privacy is a right of men 'to be let alone' to oppress women one at a time.") (footnote omitted); RICHARD POSNER, THE ECONOMICS OF JUSTICE 309 (2d ed. 1983) (finding that the "privacy legislation movement remains a puzzle from an economic standpoint").

72. CENTRAL INTELLIGENCE AGENCY, INTELLIGENCE IN THE WAR OF INDEPENDENCE (1997), *available at* https://www.cia.gov/cia/publications/warindep/frames.html.

73. United States v. U.S. Dist. Court (Keith), 407 U.S. 297, 310 (1972) (alteration added) (citation omitted).

74. *See supra* Part II.A (describing the Court's recasting of the Fourth Amendment over the past forty years).

prior to the Court's now-dubious Fourth Amendment ruling in 1972—reveals the opposite.[75]

In sum, obstacles abound in any effort to save the nation from the Orwell Act via the right to privacy: the Court has split badly over the appropriateness of invoking the right to privacy in recent years,[76] efforts to forge new dimensions of the right to privacy are fraught with legal hurdles, and efforts to fit this claim within existing dimensions of the right to privacy may not succeed in showing a deprivation of those rights. Finally, even if the claim succeeds, the scope of the victory probably would not demand complete annihilation of the Orwell Act. More likely, the Court would rule that certain activities under the Act were unconstitutional while others could remain. The victory would be meaningful for the Anti-Orwellians, but it would serve only as a prelude to future battles over the tools and scope of government surveillance rather than a battle over the propriety of such a system itself.

IV. CLAIM NO. 3: OLD RELIABLE, SOMETIMES—THE FIRST AMENDMENT

If the Fourth Amendment and the due-process right to privacy cannot slay the Orwell Act, its opponents may look to a more creative approach utilizing the most sacred of constitutional rights: the rights to free speech and association under the First Amendment. Such an approach may seem counterintuitive considering that opponents to privacy-*enhancing* statutes, such as news reporters, often challenge them on First Amendment right-of-access or right-to-publish-information grounds.[77] Indeed, in *The Death of Privacy?*, Michael Froomkin details a frightening array of government and private surveillance technologies and efforts before asking whether a statute to *restrict* such efforts would

75. *See infra* Part IV.B.1 (outlining the history of warrantless domestic surveillance in the United States).

76. For example, the *Lawrence* case was a 6-3 decision with only five justices deciding the case on substantive due process grounds. The *Casey* case garnered only a plurality.

77. *See generally* Bartnicki v. Vopper, 532 U.S. 514 (2001) (challenging the application of the federal wiretap statute to members of the media).

pass First Amendment scrutiny.[78] But he does not discuss whether the First Amendment might actually *require* protection from surveillance, or at least from surveillance by the government.

This omission is not unwarranted. Cases challenging government surveillance on First Amendment grounds are relatively rare, and such cases rarely reach the merits of the First Amendment claim. Considering the extensive and widely condemned history of federal government surveillance throughout the Twentieth and early Twenty-First Centuries, this fact is nothing less than remarkable.[79] Nevertheless, like the right to privacy, dicta in some cases suggest that a First Amendment objection to the Orwell Act may find some success if it can reach the merits. Perhaps the most optimistic dictum comes from *Keith*, a Fourth Amendment case:

> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.[80]

Unfortunately for the Anti-Orwellians, the case did not go as far as this statement suggests; the Court merely ruled that the government must follow the warrant requirement to conduct surveillance under its powers over domestic security.[81] As discussed above, the Fourth Amendment's warrant requirement has eroded since *Katz*.[82] Despite this subsequent shift in the *Fourth* Amendment, the language above suggests a spirit of judicial suspicion of government surveillance as to the *First* Amendment—a spirit that points to the unconstitutionality of the Orwell Act. But first, the Anti-Orwellians must traverse the uncertain pretrial jungle of standing.

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78. A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1501, 1506–20 (2000).

79. *See generally* Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004).

80. United States v. U.S. Dist. Court, 407 U.S. 297, 314 (1972).

81. *Id.* at 321.

82. *See supra* Part II.A.

The standing issue presents unique problems for Anti-Orwellians because the Orwell Act does not fit the mold of most laws that fall victim to the First Amendment. By its terms, the Act does not criminalize any speech, nor does it compel any citizen to profess beliefs that he does not believe. In fact, it better serves the Act's purpose of protecting national security if all people freely profess their true beliefs, because the Orwell Act cannot protect the public from a silent terrorist. Nor does it discriminate against any particular speech on the basis of content or viewpoint, at least on its face; it captures *all* communications regardless of subject matter. In short, the Act is not directed at speech, at least under the Court's current understanding of the doctrine, nor does it regulate conduct. The Act does not truly *require* speakers to open their speech to government surveillance; it simply gives the government the power to listen. As the Court stated in *Bowens v. Roy*,[83] a case that threw out a free-exercise challenge brought by Stephen Roy to enjoin the government from using the Social Security number of his daughter, Little Bird of the Snow:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family . . . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures . . . . The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's "freedom to believe, express, and exercise" his religion. Consequently, [Roy's] objection . . . is without merit.[84]

The same reasoning applies to the Speech Clause, which is phrased in negative terms almost identical to those of the Free Exercise

83. 476 U.S. 693 (1986).

84. Id. at 699–701 (alteration added) (citation omitted).

Clause.[85] The Court has not suggested that the government has an affirmative duty to foster speech among its citizens, but only a duty not to impair it absent sufficient justification.[86] But the Orwell Act does not impair the freedom to believe, express, and exercise one's freedom of speech, at least in the Court's conventional understanding of impairment as involving some kind of law or regulation outlawing or requiring some action. The Act, quite simply, requires nothing of citizens and prohibits nothing pertaining to speech.

This is not to say that it cannot have First Amendment consequences, however. Two (somewhat overlapping) lines of cases offer some hope for the Anti-Orwellians: cases involving a "chilling effect" on the freedom of association, and cases involving a "chilling effect" on speech generally.

A. Associations on the Rocks

The term "freedom of association" does not appear in the First Amendment, but it now stands as a "clearly established" constitutional right.[87] Perhaps fortuitously for Anti-Orwellians, the first case to "establish" the right to free association, *NAACP v. Alabama*,[88] rested upon the danger of a chilling effect upon protected freedoms:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above [involving regulations having a chill upon speech] were thought likely to produce upon the particular

85. U.S. CONST. amend. I (stating that "Congress shall make no law . . . prohibiting the free exercise" of religion nor "abridging the freedom of speech").

86. The exception lies when the government opens a public forum or some analogous program designed to promote public debate, in which case it must offer access to the forum on a viewpoint-neutral basis. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 229–236 (2000) (holding that public universities must fund groups on a viewpoint-neutral basis when they exact general fees for the purpose of funding expressive student groups).

87. Fisher, *supra* note 79, at 635.

88. 357 U.S. 449 (1958).

> constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[89]

Since that time, the Court has recognized that freedom of association exists "in two distinct senses": the freedom "to enter into and maintain certain intimate human relationships" (intimate association), and the freedom "to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for redress of grievances, and the exercise of religion" (expressive association).[90] For the purposes of the Orwell Act, the first category overlaps in relevant respects with the due-process right to privacy and warrants no further discussion here.[91] The second category, however, may hold some hope for the Anti-Orwellians.

The second category has evolved to include protection for expressive groups against forced inclusion of unwanted members and restrictions upon their ability to disseminate their views, two strands that hold little weight in challenging the Orwell Act. But, according to one scholar, "the privacy of the group and its members remains the core of the right."[92] Unfortunately, if privacy remains the core of associational rights, the Supreme Court has certainly not treated it as such; it has heard only one case concerning the surveillance of expressive groups and dismissed it for lack of standing.[93] Indeed, there is a legitimate question as to whether privacy remains at the heart of freedom of association. The Supreme Court has not cited *NAACP* for the proposition that freedom of association encompasses privacy of association since 1986,[94] and it has not issued a ruling on the basis of a right to private association since

89. *Id.* at 462 (alteration added) (citation omitted).
90. Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).
91. *See supra* Part III.
92. Fisher, *supra* note 79, at 638.
93. Laird v. Tatum, 408 U.S. 1 (1972).
94. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 215 n.5 (1986).

1984.[95] As for the lower courts, some "have held political surveillance claims justiciable where the surveillance targeted a particular group or individual."[96]

The Orwell Act does not target particular groups or individuals on its face, nor does it "exclud[e] a person from a profession or punish[] him solely because he is a member of a particular political organization or because he holds certain beliefs,"[97] which the First Amendment freedom of association prohibits. On the other hand, the Supreme Court has not allowed the government to "inquire about an individual's beliefs and associations"[98] for the purpose of giving or withholding a benefit unless it can show "a substantial relation between the information sought and a subject of overriding and compelling state interest."[99] In addition, an organization may assert an interest in keeping the confidentiality of its membership list if the confidentiality is "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection" of the Constitution[100]—that is, if compelled disclosure "is likely to affect adversely the ability of [the organization] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."[101]

The Orwell Act would inevitably reveal information regarding citizens' expressive associations. With cameras, microphones, and email, computer, and phone monitoring, it is unlikely that citizens could hide their associations from the government while still remaining active members of those groups. The reality of this inevitable disclosure could provide Anti-Orwellians (or, more specifically, Anti-Orweillian expressive organizations) with two arguments: first, that the surveillance amounts to compelled disclosure for the purpose of giving or

95. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984) (upholding a trial court's issuance of a protective order in discovery to protect the identities of donors to an unconventional spiritual group).

96. Fisher, *supra* note 79, at 655.

97. Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971) (alterations added).

98. *Id.*

99. Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 546 (1963).

100. NAACP v. Alabama, 357 U.S. 449, 466 (1958).

101. *Id.* at 462–63 (alteration added).

withholding benefits, and second, that it "chills" their "collective effort to foster" beliefs through lawful advocacy.

The first claim is the more dubious of the two. While the government "inquires into" associations in the sense that they inquire into *all* communication through general surveillance, it does not make this inquiry of associations directly. The government asks no questions; it merely observes. Under such an expansive reading of *NAACP*, the government in that case would have been prohibited from discovering the identities of the NAACP's members by indirect methods; for example, if a citizen came to the attorney general's office and said, "My neighbor told me he is a member of the NAACP," the attorney general would have to close his ears. Furthermore, *NAACP* relied at least in part upon evidence that the disclosed members were subject to private reprisals,[102] whereas the Orwell Act does not authorize disclosure to private individuals and our hypothetical does not envision abuse of this information by public officials. In addition, the government neither confers nor withholds benefits on the basis of the Orwell Act, at least in the traditional sense of economic or employment opportunities. The surveillance may lead to consequences—the federal government may increase local surveillance of suspicious people or use data against suspects in criminal trials—but it is a stretch to consider the freedom from increased government suspicion a "benefit" that the government "withholds" as a result of citizens' associational ties.

The second claim holds more promise for Anti-Orwellians in that constant government surveillance would likely discourage membership in anti-government organizations.[103] Putting aside the question of whether the government surveillance actually chills expressive association, the Anti-Orwellians face other difficulties in establishing a claim under *NAACP*—namely, that a court could easily distinguish the *NAACP* case on its facts. *NAACP* was a case involving compelled disclosure of an organization's member list. While citizens

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102. *Id.* at 462–63 (noting that known NAACP members were subject to private retaliation and stating that "[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold") (alteration added).

103. Such surveillance could also discourage expression of anti-government beliefs generally, and I will address this chilling effect further in the next section on pure, non-associational free speech.

are "compelled" to reveal their associations under the Orwell Act in the sense that the realities of government surveillance make it impossible to hide them, the Act requires no affirmative disclosure to the government. It adds no direct relationship between organizations and the government.

In sum, a claim that the Orwell Act violates citizens' rights to engage in expressive association carries hope in principle, but the claim may fall short in the details. Case law also suggests that surveillance in itself does not abridge the right to expressive association unless it involves targeted surveillance of certain groups.[104] The government's efforts regarding general surveillance blend into the Anti-Orwellians' second claim under the First Amendment: that the Orwell Act chills free speech generally.

B. Speech on the Rocks

1. A Brief Historical Perspective

The history of domestic surveillance in response to citizens' exercise of their First Amendment rights is not a proud one. It is divisible into two categories with different degrees of government *mens rea*: surveillance of individuals because of their messages themselves,[105] and surveillance of individuals because their messages suggest that they may pose a threat to national security given external events.[106] The first category treats speech as harmful in itself, at least to the government in power, and surveillance in such circumstances constitutes political espionage. The second category treats speech as a symptom, a convenient means for criminal profiling based on ideology.

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104. *See generally* Fisher, *supra* note 79.

105. The Watergate scandal is perhaps the most well-known example of the past century.

106. This category of surveillance is probably more common than the first, and is exemplified by modern government technological surveillance such as the FBI's CARNIVORE program (which scans Internet traffic for patterns and key words or phrases) and the NSA's alleged ECHELON program (which, according to some commentators, intercepts global communications and filters them electronically to assess potential threats to national security). Lawrence D. Sloan, *Echelon and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1470–79 (2001).

The government's early efforts at widespread domestic surveillance fell into the profiling category. Following an outbreak of terrorist bombings in 1919, the FBI created "[d]ossiers detailing the political beliefs of [communists] and other radicals" and arrested thousands of them in the 1920 "Palmer Raids."[107] These efforts continued to concentrate on suspected communists (as well as fascists and other extremists) immediately prior to World War II, and communists remained a point of focus through the first thirty years of the Cold War.[108] Surveillance of those of Middle Eastern descent in the days following the terrorist attacks of 9/11 certainly belongs in this category.

After World War II, the government also began surveillance in the political espionage category: "FBI investigations covered 'the entire spectrum of the social and labor movement in the country,'" all for "pure intelligence" purposes.[109] The FBI's investigation of Martin Luther King, Jr. offers the most infamous example of this type of surveillance.[110] In these cases, the FBI did more than just keep a watchful eye on dissidents: it infiltrated dissident groups, sent "poison-pen letters intended to break up marriages," "encourag[ed] gang warfare," and operated "on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence."[111]

Amid this history of nationwide efforts at surveillance, Anti-Orwellians cannot help but feel dismay at the relatively small number of free-speech cases addressing the issue of government surveillance. The Supreme Court has heard only one First Amendment challenge to a systematic government surveillance program, and it dismissed the case for lack of standing.[112] Justice Thurgood Marshall, sitting as Circuit Justice, heard one case addressing surveillance at one specific event, and

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107. Fisher, *supra* note 79, at 629 (alterations added).

108. *See id.* at 630–31.

109. *Id.* at 630 (quoting SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES REPORT, S. REP. NO. 94-775, 94TH CONG., 2d Sess., Book III, at 449 (1976) [hereinafter "Intelligence Report"] *available at* http://www.cointel.org).

110. *Id.* at 631.

111. *Id.* (citing Intelligence Report, Book III, at 3 (alteration added)).

112. Laird v. Tatum, 408 U.S. 1, 15 (1972).

he ruled for the government on the merits.[113] Lower courts have rarely dealt with the issue since those two Supreme Court rulings in the early 1970s, and few cases reached the merits.[114] This could, of course, be attributed to a reduction in government domestic surveillance following the Watergate scandal. But domestic surveillance increased following the terrorist attacks of 9/11; since that time, federal courts have heard only a handful of cases alleging that federal government surveillance created a "chilling effect" on speech.[115]

This discouraging history may result from the nature of surveillance itself, in that subjects may not know they are under surveillance and thus have no motivation to seek an injunction to stop it. But it may also result from the tallest pretrial hurdle for "chilling effect" cases: standing. Even if the Anti-Orwellians can meet these standing requirements, the question of the appropriate level of scrutiny remains.

2. Standing, and Falling

Under traditional standing requirements, the Court requires that plaintiffs show (1) "injury in fact"—that is, a "concrete and particularized" legal harm that is "actual or imminent, not 'conjectural' or 'hypothetical'"—that (2) arises from "the challenged action of the defendant" and (3) is "likely" to be "redressed by a favorable decision."[116] In chilling-effect cases, the first two requirements are the sticking points: chilling-effect harms are difficult to prove, and even if they exist, a court may decide that they arise not from actions of the defendant, but from "speculative apprehensiveness" that amounts to a "subjective 'chill.'"[117]

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113. Socialist Workers Party v. Attorney Gen., 419 U.S. 1314, 1320 (1974).

114. Eric Lardiere, Comment, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. REV. 976, 993 (1983).

115. *See* ACLU v. Nat'l. Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Hatfill v. Ashcroft, 404 F. Supp. 2d 104 (D.D.C. 2005); Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), *vacated*, 449 F.3d 415 (2d Cir. 2006); Elnashar v. U.S. Dept. of Justice, No. 03-5110, 2004 WL 2237059 (D. Minn. Sept. 30, 2004), *aff'd*, 446 F.3d 792 (8th Cir. 2006); Al-Owhali v. Ashcroft, 279 F. Supp. 2d. 13 (D.D.C. 2003).

116. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted).

117. *Laird*, 408 U.S. at 13.

In addition, "chilling-effect" claims carry an inherent contradiction that works against standing. When plaintiffs claim that government action "chills" their speech, they essentially claim that they lack the courage to speak out against the government because they fear negative repercussions. Yet the very act of bringing a public lawsuit against the government is an act of courage in defiance of those repercussions; if a harm truly existed, if these plaintiffs were truly "chilled," then they would not have brought suit in the first place. Further, the Supreme Court has refused to give plaintiffs in chilling-effect cases the ability to assert standing on behalf of less-courageous non-parties to a lawsuit: "if [the plaintiffs] themselves are not chilled, but seek only to represent those 'millions' whom they believe are so chilled, [they] clearly lack that 'personal stake in the outcome of the controversy' essential to standing."[118]

Even if the Anti-Orwellians could overcome this inherent difficulty, the challenge of showing a concrete and particularized chill remains. The likelihood of success in this element may depend upon the nature of repercussions for certain speech. Obviously, the more concrete the deterrent against lawful speech, the more concrete the chill in the eyes of the Court.

i. "Mere" Surveillance

In *Laird v. Tatum*,[119] the Supreme Court addressed government surveillance of dissident groups with the stated purpose of "collect[ing] . . . information about public activities that were thought to have at least some potential for civil disorder."[120] Several protesters brought a class action to enjoin the government from conducting such surveillance, arguing that it chilled their lawful speech. Unlike prior chilling-effect cases, the surveillance program was not "regulatory, proscriptive, or compulsory in nature";[121] the plaintiffs were challenging the "mere existence, without more, of a governmental investigative and

118. *Id.* at 13 n.7 (alterations added) (citation omitted).
119. 408 U.S. 1 (1972).
120. *Id.* at 6 (alteration added).
121. *Id.* at 11.

data-gathering activity."[122] The Court dismissed their claim for lack of standing, holding that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[123]

The *Laird* requirements apparently render "mere surveillance" automatically inadequate to create standing. But *Socialist Workers Party v. Attorney General*,[124] decided just two years after *Laird*, suggests otherwise. Justice Marshall, sitting alone as Circuit Justice, reviewed the grant of a preliminary injunction requiring the government to cease its efforts to conduct surveillance of a Socialist gathering. Marshall made a dubious distinction between that case and *Laird*, ruling that "the Court was merely distinguishing earlier cases, not setting out a rule for determining whether an action is justiciable or not" when it found that the surveillance at issue was not "regulatory, proscriptive, or compulsory in nature."[125] He asserted that the key issue in *Laird* was simply the plaintiffs' failure to assert any chill at all beyond a fear of future misuse of information by the government.[126] In the case at hand, however, the plaintiffs *did* assert a specific chill—that some Socialists would stay home rather than attend the meeting if the government watched it, thus causing injury to all members of the group regardless of whether or not each member felt an actual chill.[127]

Under this reasoning, the fatal mistake of the plaintiffs in *Laird* was their failure to specify some future gathering or protest where government surveillance would cause potential attendees to stay home.[128] Marshall may have simply transferred the harshness of the *Laird* chill requirements from the standing portion of the case to the merits: he ruled that the Socialists were unlikely to succeed on the merits, claiming that

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122. *Id.* at 10.

123. *Id.* at 13–14 (alteration added).

124. 419 U.S. 1314 (1974).

125. *Id.* at 1318 (citation omitted).

126. *See id.*

127. *Id.* at 1319.

128. *Cf.* ACLU v. Nat'l. Sec. Agency, 438 F. Supp. 2d 754, 769 (E.D. Mich. 2006) (finding standing to allege a chilling effect when the plaintiffs—newspaper reporters—asserted a "concrete profession-related injur[y]" in that sources refused to speak with them over the telephone due to known government wiretapping) (alteration added).

the balance of the "competing interests" weighed in favor of the government, and he struck down the injunction.[129]

Despite Justice Marshall's lenient application of precedent regarding standing, *Laird* remains the Supreme Court's only en banc ruling to address the issue of standing in mere surveillance cases. If the Court in the future rejects Justice Marshall's interpretation of *Laird* as simply distorting the holding beyond recognition, then standing poses a major problem in mere surveillance cases. First, plaintiffs must show an actual chill. Second, they must show that the government, rather than the plaintiffs' own minds, causes the chill; that is, they must show an objective chill, rather than a subjective one.

Showing an actual, measurable chill from mere surveillance has its practical difficulties. If there truly *is* a chilling effect from such a vast system of unavoidable surveillance, then few people would feel secure in coming forward to challenge it. Even if the Anti-Orwellians could find such plaintiffs, the question remains: does surveillance, without more, actually keep people from talking freely?

The Orwell Act's namesake certainly believed that was the case, and other scholars concur. British philosopher Jeremy Bentham described the power of "mere surveillance" in his 1787 work, "Panopticon,"[130] in which he envisioned a prison with cells forming a circle around a guard tower.[131] Each cell has a window facing the guard tower to eliminate privacy; furthermore, the lighting arrangement makes it impossible for prisoners to see when guards are watching them and when they are not.[132] The result, according to modern philosopher Michel Foucault, is total control over the inmates without physical coercion:

> A real subjection is born mechanically from a fictitious relation . . . . He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them spontaneously upon himself; he

129. *Socialist Workers Party*, 419 U.S. at 1319.

130. BENTHAM, *supra* note 7, at 29-95.

131. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 200 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

132. *Id.* at 200–01.

> inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection. By this very fact, the external power may throw off its physical weight; it tends to the non-corporal; and, the more it approaches this limit, the more constant, profound and permanent are its effects: it is a perpetual victory that avoids any physical confrontation and which is always decided in advance.[133]

These philosophers recognized that the loss of subjective privacy conditions the human mind toward submission, and unpredictable surveillance can be just as effective in controlling human behavior as visible locks and chains.

In the year following the 9/11 terrorist attacks, scholars founded the peer-reviewed journal *Surveillance and Society* for the purpose of exploring the "rapidly developing field of analysis and theory" it calls "surveillance studies."[134] While the growth of this field of academic exploration offers Anti-Orwellians some hope of using empirical studies to prove a chill, those studies today remain scarce.[135] But common sense informs us that we adapt our speech to our audience. Just as many people would hesitate to curse in front of their young children, people may feel uneasy engaging in dissident speech within earshot of the State's law-enforcement authorities—particularly when the State knows the identity of the potential speaker, and that speaker does not enjoy the crowd support present in a rally or protest. But the Orwell Act does even more: even if the government conducts "mere surveillance," the implicit

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133. *Id.* at 202–03.

134. *See* David Lyon, *Surveillance Studies: Understanding Visibility, Mobility, and the Phenetic Fix*, 1 SURVEILLANCE & SOC'Y 1, 1 (2002).

135. *See* Jennifer K. Robbennolt & Julia C. Walker, *Societal Expectations of Privacy: The Courts Struggle to Identify What Activities Constitute a Search*, MONITOR ON PSYCHOL., Apr. 2002, *available at* http://www.apa.org/monitor/apr02/jn.html ("A fertile area for future research will be to examine additional factors that may influence expectations of privacy."). The authors encourage further research in this area: "Whether, and in what ways, expectations of privacy change in response to technological developments . . . are interesting questions to be pursued." *Id.* (alteration added).

threat of later disclosure may cause speakers to limit their speech to those words that would not embarrass them should their conversations become public. In this respect, we might restrict our cursing not only in the presence of our children or other people for whom such language would be inappropriate, but at *all times*, because the presence of a recorded copy of those words carries the implicit possibility of future disclosure.

Political-process sunshine laws and campaign-financing disclosures operate on this same principle: if politicians know their actions may be open to public examination, they are less likely to engage in unethical behavior that others may easily uncover as a result of the laws. Of course, these laws are imperfect with regard to shaping politicians' behavior towards greater integrity. Because the laws do not open all political transactions and communications to the public eye, politicians may still make corrupt deals behind closed doors. The Orwell Act, on the other hand, may be a perfect law with regard to shaping behavior away from criminal activity. After all, if the Orwell Act makes criminal communication impossible *everywhere*, it may effectively eliminate such speech and perhaps crime altogether.

But the impact of surveillance is not limited to deterrence of criminal activity. Researchers have noted the impact of surveillance since at least 1897, when Norman Triplett found that the sheer presence of fellow riders caused bicyclists to pedal faster than when they rode alone;[136] in other words, the known presence and observation of others caused a shift in behavior toward what that particular group of observers might find appropriate or impressive. In a 1965 survey of studies on the impact of surveillance, Robert Zajonc noted that "[t]he presence of others may provide cues as to appropriate or inappropriate responses."[137] The works of both scholars suggest the possibility that people under known government surveillance may subconsciously tailor their behavior to ensure its suitability for government observation.

Of course, both of these scholars examined face-to-face surveillance, encompassing a kind of interaction between the watcher and the watched that is not present in the Orwell Act. The government

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136. Norman Triplett, *The Dynamogic Factors in Pacemaking and Competition*, 9 AM. J. PSYCHOL. 507, 533 (1898).

137. Robert B. Zajonc, *Social Facilitation*, 149 SCIENCE 269, 274 (1965) (alteration added).

may argue that people do not actually change their behaviors in response to known passive surveillance. An examination of Internet behavior is a prime example. Despite well-publicized information regarding the lack of online privacy, "69 million Americans go online each day and engage in various activities," including activities they would be ashamed to do in public (such as viewing pornography).[138] Thus, "[p]eople seem to be of . . . two minds . . . . They worry about the possibility of monitoring, but then they dismiss the concerns and proceed without thinking about it."[139] Current online behavior in the face of potential passive surveillance may be distinguishable from expected behavior under the Orwell Act: a publicized nationwide surveillance effort by the government would certainly foster a greater public perception of immediate and certain non-privacy than today's scattered news reports regarding the non-privacy of the Internet. But, over time, even this perception may fade due to the ubiquity of the surveillance. Just like the numb citizens of Orwell's *1984*, people may change their behavior, actions, and thoughts without realizing it, because surveillance would become a constant, a part of life no different than breathing. The definitions of "privacy" and "chill" might subtly change, as well, and thus people (including justices on the Supreme Court) may question whether their behaviors in the face of surveillance had shifted at all.

Even if the Anti-Orwellians could prove a chill, *Laird* suggests that they must still prove that the chill results from government surveillance rather than their own minds—in other words, they must prove that they are not the "principle[s] of [their] own subjection."[140] In a system in which surveillance carries no concrete consequences for lawful activity, this demand may prove too much. While the government surveillance would certainly be the "but-for" cause of the chill, the Court may find that the chill does not result from any reasonable fear of future, concrete harm. It could hold that this fear instead results from the demons of the Anti-Orwellians' own minds, and that the irrational paranoia that creates a chill for some people cannot justify overturning an act of Congress that protects all people.

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138. Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 10 n.6 (2004).

139. *Id.* at 76 (citations omitted) (alteration added).

140. FOUCAULT, *supra* note 131, at 203 (alterations added).

ii. Surveillance with the Threat of Admission in Criminal Trials and Increased Attention from Law Enforcement Officials

Cases alleging a chill based on the threat that prosecutors may admit recorded conversations in criminal trials have not reached the Court since *Katz* required warrants for wiretaps.[141] The danger of increased attention from law enforcement based on the interception of "suspicious" activity or communications became the subject of First Amendment challenges in *ACLU v. National Security Agency*,[142] a case before the Federal District Court for the Eastern District of Michigan, and *Reporters Committee for Freedom of Press v. American Telephone & Telegraph Co.*,[143] a case before the Court of Appeals for the District of Columbia. In *Reporters Committee*, journalists sought an injunction to stop a government practice of asking for and obtaining phone call records from telephone companies based on both the First and Fourth Amendments, with First Amendment claims for both the public generally and reporters specifically. Their First Amendment claim was essentially that of a chilling effect: they argued that "if journalists were compelled to identify their sources, informants would refuse to furnish information in the future, and . . . this would interfere with the free flow of information protected by the First Amendment."[144]

The court rejected the plaintiffs' claims in no uncertain terms, and its discussion of a First Amendment challenge against official investigation bodes ill for Anti-Orwellians. It ruled that the First Amendment gives no one the right to "immunize themselves from good faith investigation"[145] and that the "[First] Amendment guarantees no freedom from such investigation."[146] It also read *Laird* as requiring any chilling effect to arise from "the present or future exercise, or threatened exercise, of coercive power."[147] Then, in a statement that would destroy the Anti-Orwellians' hope of success in this claim, the court addressed

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141. *See supra* Part II.A (discussing the *Katz* decision and the subsequent crumbling of its foundational principles).

142. 438 F. Supp. 2d 754 (E.D. Mich. 2006).

143. 593 F.2d 1030 (D.C. Cir. 1978).

144. *Id.* at 1049–50.

145. *Id.* at 1051.

146. *Id.* at 1052 (alteration added).

147. *Id.*

the relationship between Fourth and Fifth Amendment investigative limits and First Amendment limitations on chilling free speech:

> To the extent an individual insists that he must shield himself from the prospect of good faith investigation and operate in secrecy in order to exercise effectively particular First Amendment liberties, he must find that shield and establish that secrecy within the framework of Fourth and Fifth Amendment protections. This is not to say that the First Amendment never gives rise to any privacy-type interests apart from those secured by the Fourth and Fifth Amendments. It does mean, however, that such interests are overridden in criminal cases by the public's interest in effective law enforcement investigation at least insofar as they go beyond protections already afforded by the Fourth and Fifth Amendments.[148]

Thus, under *Reporters Committee*, allegations of chill based on fear of future or present criminal investigation depend entirely upon the constitutionality of the investigation itself. If the Fourth and Fifth Amendments do not protect the speaker, neither does the First.

Most recent cases involving government surveillance connected to the "War on Terrorism" appear to adopt the *Reporters Committee* approach. In *Al-Owhali v. Ashcroft*,[149] the U.S. District Court for the District of Columbia ruled that post-9/11 provisions allowing for monitoring of attorney-client communications did not give a suspect standing for asserting a "chilling effect."[150] The District of Minnesota took a similar stance in *Elnashar v. U.S. Department of Justice*.[151] In that case, the FBI received a tip regarding Elnashar's suspicious speech and initiated an investigation.[152] The district court threw out his claim of a chilling effect, noting that Elnashar "alleges at most that he is

148. *Id.* at 1054.

149. 279 F. Supp. 2d. 13 (D.D.C. 2003).

150. *Id.* at 28.

151. No. 03-5110, 2004 WL 2237059 (D. Minn. Sept. 30, 2004), *aff'd*, 446 F.3d 792 (8th Cir. 2006).

152. *Id.* at *7.

aggrieved by the threat of 'future secret actions' by the FBI and the DOJ."[153]

ACLU is the only district court case since 9/11 to rule that government surveillance did give rise to a First Amendment violation, and unlike *Reporters' Committee*, it did not specifically require a finding of a Fourth Amendment violation in order to find First Amendment standing. But neither is it necessarily inconsistent with the *Reporters Committee* approach. The district court found a violation of the First Amendment only after holding that the government had violated the Fourth Amendment, and those violations were linked: "The President of the United States . . . has undisputedly violated the Fourth [Amendment] . . . and accordingly has violated the First Amendment [r]ights of these Plaintiffs as well."[154] Thus, it may have merely moved the *Reporters Committee* analysis to linking Fourth Amendment violations to the merits of a First Amendment claim, rather than the standing to bring it.

In short, provided the government does not inform citizens of what types of speech, profession, nationality, etc., will bring increased surveillance, case law treats the threat of future surveillance no differently than mere surveillance. This makes some sense: after all, if citizens do not know exactly what types of speech will bring future attention, or what that future attention will look like, then their claim remains just as speculative as when the government asserts that it will not take any action at all.

A different case would exist, however, if the government was more forthright with its use of Orwell-Act information. In *Bantam Books, Inc. v. Sullivan*,[155] the Court found that the actions of the "Rhode Island Commission to Encourage Morality in Youth" were unconstitutional violations of the First Amendment. The Commission, which was a creation of the Rhode Island state legislature, reviewed literature and notified local book and magazine distributors of materials it found "objectionable for sale, distribution, or display to youths under

153. *Id.* at *8.

154. ACLU v. Nat'l. Sec. Agency, 438 F. Supp. 2d 754, 776 (E.D. Mich. 2006) (alterations added).

155. 372 U.S. 58 (1963).

18 years of age."[156] Its notification went beyond mere suggestion: it thanked distributors for their cooperation and reminded them of Rhode Island obscenity laws.[157] Book distributors took these notices seriously, and one bookseller testified that he returned the objectionable books to publishers because he wanted to "avoid becoming involved in a 'court proceeding' with a 'duly authorized organization.'"[158] The Court found that the mere suggested threat of future action, in this case, was enough to create standing and invalidate the Commission's actions:

> It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed "objectionable" and succeeded in its aim.[159]

While the case seems to give the Anti-Orwellians a solid ground for a challenge based upon threat of future action, the facts of the case pose problems due to the language of the Orwell Act. First, the Court in *Bantam Books* did not look at the distributors' standing to challenge the Commission's activities, but rather the standing of the book publishers who were harmed by their inability to find distributors in Rhode Island.[160] Second, the Court did not rule that the notices themselves created a chill that would give the distributors standing to challenge the suit. Instead, the Court looked to the Commission's surveillance and threats of future actions as indicative of the true purpose of the actions: to effectively suppress objectionable publications.[161]

Anti-Orwellians can make no similar argument regarding the Orwell Act. Congress did not pass the Act to suppress speech, but to

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156. *Id.* at 61.
157. *Id.* at 62.
158. *Id.* at 63.
159. *Id.* at 66–67.
160. *Id.* at 61.
161. *Id.* at 72.

monitor it in an effort to detect future terrorist attacks. The Act may have the purpose of deterring terrorism, but terrorism and dissident speech are different animals under the Constitution. The Orwell Act does not seem to present a case of political-espionage surveillance (in which the government seeks to deter the speech of those opposed to its policies), and thus any threats of future action relate to the suppression of *terrorism*, not the suppression of *dissident speech*.[162]

iii. Standing be Damned: The Overbreath Doctrine

Given the above difficulties with regard to standing, the Anti-Orwellians could attempt to circumvent the standing requirement by application of the overbreadth doctrine. To strike down a law on the basis of overbreadth, the Court need not have a plaintiff before it who meets the traditional requirements for standing.[163] When plaintiffs allege that a statute is overbroad and thus in violation of the First Amendment, they need only show that the "threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions,"[164] and that such a law punishes a "'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'"[165]

At first glance, this doctrine appears promising. The Orwell Act is absolutely overbroad within the common meaning of the term; its technology captures *all* constitutionally-protected speech, regardless of whether that speech implicates national security concerns. Once again, however, the non-prohibitive nature of the Orwell Act stands in the way of a strong challenge. In the Court's traditional overbreadth

162. This distinction may falter if the government decides to publish its criteria for determining when speech warrants suspicion or to notify suspects when their speech warrants government attention. These actions would contradict the government's alleged purpose of the Orwell Act; after all, if the government truly sought to investigate potential terrorists, it would serve no purpose to forewarn those suspects about how to avoid attention or alert them once that attention arrives. Thus, so long as the government hides its methods for filtering the information and designating certain speech as suspicious, the Anti-Orwellians may have difficulty overcoming the standing requirement.

163. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

164. Virginia v. Hicks, 539 U.S. 113, 119 (2003).

165. *Id.* at 118–19 (quoting *Broadrick*, 413 U.S. at 615).

jurisprudence, plaintiffs challenge some criminal or regulatory proscription that leaves open the possibility that it will ban or chill a substantial amount of lawful First Amendment activity.[166] Because the Act imposes no penalties for behavior that might include legitimate First Amendment expression,[167] the Court is unlikely to administer the "strong medicine"[168] of the overbreadth doctrine.

3. Level of Scrutiny

If the Anti-Orwellians can show standing, the determination of what level of judicial scrutiny to apply to the Act may decide its constitutionality. The surveillance itself is clearly both viewpoint- and content-neutral, in that it monitors all communications without exception. Thus, the government would argue that the law merely regulates the *manner* of speech; that is, it requires any speech to be made in a manner observable by the government. Such time, place, and/or manner restrictions receive intermediate scrutiny, as defined by *United States v. O'Brien*:[169]

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166. *See, e.g.*, Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574–76 (1987) (holding that a directive banning "all First Amendment activities" in a Los Angeles airport terminal to be unconstitutionally overbroad); Schad v. Mt. Ephraim, 452 U.S. 61, 72 (1981) (holding an ordinance banning all live entertainment within a municipality to be unconstitutionally overbroad because the municipality had "not adequately justified its substantial restriction of protected activity").

167. The Orwell Act does penalize any tampering with the tools of surveillance, and Anti-Orwellians could make an argument that this penalty chills legitimate free speech. This argument is weak for two reasons. First, the Court has already ruled that the destruction of governmental or government-issued property is not protected speech in and of itself when "Congress has a legitimate and substantial interest in preventing [its] wanton and unrestrained destruction" and the prohibition is narrowly tailored to serve that purpose. United States v. O'Brien, 391 U.S. 367, 380, 382 (1968) (alteration added). In our hypothetical, there is no indication that the penalty for tampering or destroying these devices is broader than necessary to protect them. Second, any purported chill upon protected speech as a result of the anti-tampering provisions is circular in that it is premised upon the illegitimacy of the surveillance program in the first place; it is not the anti-tampering provisions specifically that chill speech, but rather the existence of such devices at all.

168. *Broadrick*, 413 U.S. at 613.

169. 391 U.S. 367 (1968).

> [A] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[170]

Later cases added a further requirement, originally given in Justice Harlan's concurring opinion to *O'Brien*: the restriction may not "ha[ve] the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate."[171] In other words, the restrictions must "leave open ample alternative channels for communication of the information."[172]

Under that test, the Orwell Act stands a mild chance of survival, particularly if the existence of a chilling effect is a close issue for the Court. Certainly, the government has the constitutional authority to defend against terrorist attacks, and the prevention of violence is the utmost government interest. The issue lies in the narrow tailoring requirement: whether the Act's suspicionless surveillance program chills far more speech than is necessary to prevent terrorism and whether a suspicion-based surveillance program accomplishes the same task with

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170. *Id.* at 377 (alteration added). Although *O'Brien* concerned speech in a public forum, the Court has also applied intermediate scrutiny (in some form) to restrictions upon speech on privately-owned property. *See* City of Los Angeles v. Alameda Books, 535 U.S. 425, 448 (2002) (stating that a "zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate . . . scrutiny") (Kennedy, J., concurring); City of Ladue v. Gilleo, 512 U.S. 43, 58–59 (1994) (striking down a city ordinance banning residential signs because it did not leave alternative channels for communication, an element of the intermediate scrutiny test; also noting that "more temperate measures" could be constitutional). Although the Court applies intermediate scrutiny to such regulations, it sometimes takes account for the fact that the speech takes place upon private property by finding a lower government interest than such regulations upon speech on public property. *See id.* at 58.

171. *See O'Brien,* 391 U.S. at 388–89 (Harlan, J., concurring) (alteration added).

172. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

less of a chilling effect. Unfortunately for Anti-Orwellians, the *O'Brien* test does not require the "least restrictive . . . means."[173] Even if it did, the government may argue that terrorism is a latent threat, whose practitioners by nature conceal their plans until immediately before the moment of action, and thus a suspicion-based system cannot effectively handle the problem.

In this situation, the Anti-Orwellians would argue for strict scrutiny because the repercussions of the general surveillance—an increase in particular surveillance—arise out of the government's content- and viewpoint-based distinctions between different kinds of speech. Even if the Court found that increased attention from law-enforcement authorities based on the content or viewpoint of the speech might warrant strict scrutiny, however, the government may make one further counterargument based on free-speech zoning cases. It could argue that its content and/or viewpoint distinctions are the result of "profiling" surveillance, and the justification for it is akin to the justification for zoning laws that restrict movie theaters and bookstores from selling sexually explicit materials in certain areas of a city.[174] In the zoning cases, the speech itself was lawful and the government could not ban it, but the "secondary effects" of this speech were negative and fell within the government's power to regulate.[175] Therefore, the Court ruled, the government may regulate the location of sexually explicit expression under intermediate scrutiny so long as it does not "effectively deny[] . . . a reasonable opportunity" to engage in the speech.[176] Similarly, under the Orwell Act, the government could argue that it may listen to communications—constructively "zoning" all communications as open to government ears—in an effort to anticipate and prevent adverse secondary effects of those communications (the execution of terrorist acts that require such communications).

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173. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

174. *See, e.g.*, *Alameda Books*, 535 U.S. at 448–49 (reversing a grant of summary judgment against a city's zoning ordinance restricting the locations where businesses offering sexually explicit materials could operate); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (upholding a city's zoning ordinance restricting the locations where such businesses could operate).

175. *Alameda Books*, 535 U.S. at 448.

176. *Renton*, 475 U.S. at 54 (alteration added).

Profiling surveillance does carry some distinguishable features, some calling for greater scrutiny than "secondary effects" cases and some calling for lesser. The speech at issue in profiling surveillance is generally political, and thus warrants the highest protection under the First Amendment. Sexually explicit expression falls within the First Amendment, but unlike political speech, "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[177] Yet the fact that political speech is somewhat more worthy of First Amendment protection than sexually explicit speech does not wholly distinguish the cases. Both types of speech warrant the same general analysis under the First Amendment, and any distinction based on the value of the speech should be offset by the fact that the regulations at issue in the pornography zoning cases are far more restrictive of speech than mere surveillance. Indeed, the zoning cases actually outlaw the use of buildings for presentations of some speech outside certain specified locations, whereas surveillance carries no direct limitation on speech.

Thus, two arguments support the application of intermediate, rather than strict, scrutiny. The Supreme Court could find that the Orwell Act's incidental impact on speech is "not substantially broader than necessary" to meet the urgent need of public safety because intermediate scrutiny does not demand the "least restrictive means" of achieving the purpose of the legislation.[178] Therefore, the Court could uphold its constitutionality. The First Amendment fails to close the loophole, and Anti-Orwellians strike out again.

V. CLAIM NO. 4: AMALGAMATED CLAIMS

While none of these individual claims may be sufficient to strike down the Orwell Act, the existence of overlapping constitutional claims may strengthen the claim as a whole. The Court suggested this possibility in *Employment Division, Department of Human Resources of*

177. Young v. Am. Mini Theatres, 427 U.S. 50, 70 (1976) (plurality opinion).

178. *See Ward*, 491 U.S. at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.").

Oregon v. Smith.[179] The majority distinguished prior precedent in striking down a defendant's claim that the State violated the Free Exercise Clause: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[180] The implication, at least for Free Exercise claims, is that multiple claims increase the likelihood of success even if such claims by themselves would not be adequate.

While the Court has not extended this dictum outright, it applied this principle to a similar situation in *Stanley v. Georgia*.[181] Stanley had been arrested for possessing obscene materials in his home. Stanley could not make a free-speech claim alone, because obscenity does not receive First Amendment protection.[182] Nor could he make a pure Fourth Amendment or right-to-privacy claim: the police entered Stanley's home pursuant to a search warrant for bookmaking, and they did not exceed the scope of the warrant in their search.[183] But his asserted right to read and watch obscene materials in the privacy of his own home implicated the justifications of both rights and created a whole constitutional challenge that was greater than the sum of its parts:

> This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.[184]

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179. 494 U.S. 872 (1990).

180. *Id.* at 881.

181. 394 U.S. 557 (1969).

182. Roth v. United States, 354 U.S. 476, 485 (1957).

183. *Stanley*, 394 U.S. at 558.

184. *Id.* at 564. The Court cited *Winters v. New York*, 333 U.S. 507, 510 (1948), to support the idea that the relative "social worth" of the information at issue does not effect the analysis.

The Orwell Act is a strong candidate for this kind of "amalgamated" claim. The Anti-Orwellians may lose a Fourth Amendment challenge to the Act—but the issue would be close. The Anti-Orwellians may lose a Fifth Amendment challenge to the Act—but the issue would be close. The Anti-Orwellians may lose First Amendment challenges asserting their rights to expressive association and freedom of speech—but the issues would be close. If the Court views the claims collectively rather than taking a "divide and conquer" approach, it may face difficulty upholding the Act. The Act may not violate the technical prohibitions of these three amendments, but it certainly violates the spirit of each of them. In this situation, the Court may take a stand against this totalitarian measure and preserve the liberty the Framers sought to guarantee.[185]

But such hopes require a serious leap of faith for Anti-Orwellians, particularly in an atmosphere of fear in the wake of another devastating terrorist attack. Judges are human and may reasonably fear personal guilt and public accountability if more innocent civilians lose their lives. Thus, while the amalgamated claim could be stronger than each separate claim, it would still leave much discretion to the Court to hold the Act constitutional. To protect us from the Orwell Act, we need more than mere trust in the detached wisdom of the judiciary; we need a new category of First Amendment protection that lends clarity, predictability, and minimal judicial discretion to claims of suspicionless surveillance.

185. The district court in *ACLU v. Nat'l. Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006), may have implicitly used this type of reasoning. The court there struck down NSA wiretapping on First Amendment, Fourth Amendment, and separation-of-powers grounds. *Id.* at 773–79. The analysis, particularly with regard to the First and Fourth Amendments, is conclusory and light on citations to any precedent after 1972. *See id.* at 773–76 (finding that the program is "obviously in violation of the Fourth Amendment" and "accordingly has violated the First Amendment" with little extended explanation beyond including long block-quotations from older cases). As such, the court may have been attempting to close the Orwellian Loophole through the unstated amalgamation of the plaintiffs' claims in a situation where no single constitutional provision squarely addresses them.

VI. FASHIONING A NEW FIRST AMENDMENT FREEDOM

A. The First Amendment as a Proper Home for Strong Protection

George Orwell's nightmarish vision was the antithesis of freedom, showing the danger that people may "become soulless automatons, and will not even be aware of it."[186] America, the self-proclaimed "land of the free," has not yet adopted surveillance on an Orwellian scale. But the fact that our Constitution, as interpreted by the courts, might tolerate such a program challenges the very notion of freedom in America. If this Orwellian Loophole remains, if the Constitution does not protect us from such measures, then how committed is our nation to the ideals of liberty? And how tenuous is the freedom that we currently enjoy?

Many options exist to close this loophole, from tightening Fourth Amendment constraints to expanding the right to privacy to reviving the Ninth Amendment.[187] But freedom of speech was Orwell's primary concern, and, chilling-effect cases notwithstanding, "[w]e *believe* there is something special about free speech."[188] If our Constitution is to carry strong protection against Big Brother, the First Amendment seems an appropriate place to keep it secure.

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186. Erich Fromm, *Afterword to* ORWELL, *supra* note 1, at 257.

187. The Ninth Amendment provides that "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. It is possible to read the above language as merely stating the truism that citizens retain those rights they did not surrender with the ratification of the Constitution. *See* Griswold v. Connecticut, 381 U.S. 479, 529–30 (1965) (Stewart, J., dissenting). It is also possible, however, to read that language as creating the implication that there are other rights, unstated in the Constitution, which are equally worthy of constitutional protection. *See id.* at 486–99 (Goldberg, J., concurring). *See generally* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005) (arguing that, prior to the New Deal, the Ninth Amendment played a significant role in protecting individual freedom and limiting federal power).

188. FREDERICK F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 6 (1982) (alteration added).

B. Past and Proposed Possibilities

1. The Right to Speak Anonymously

What kind of a right would be broad enough to encompass the Orwell Act's most dangerous measures, but narrow enough to avoid withering through abstraction? The Supreme Court suggests one solution in a handful of cases construing a First Amendment right to speak anonymously. In *Talley v. California*,[189] the Court struck down a Los Angeles ordinance requiring all handbills to bear the name of the person responsible for writing or distributing them. The Court examined the history of anonymous pamphleteering by oppressed groups before declaring that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."[190] The Court reaffirmed this principle in a more recent case, noting that "[a]nonymity is a shield from the tyranny of the majority"[191] and holding that a state abridged a pampleteer's "right to remain anonymous"[192] or "right to publish anonymously"[193] by punishing her for distributing an anonymous pamphlet.

These "right-to-anonymity" cases do not go far enough for Anti-Orwellian hopes, however. Such cases tend to utilize a "marketplace of ideas" rationale for free speech, as evidenced by the Court's reliance on the importance of anonymous pamphleteering throughout history. While the Orwell Act certainly harms the marketplace of ideas in its chilling effect on certain types of speech, it does much more. It invades the realm of purely private speech, such as musings in a diary or essay that will never come before the eyes of another and thus never reach the marketplace of ideas. It also invades speech that is purely emotive, devoid of *ideas* in the traditional sense. The government may already keep watch over much of the speech that enters the marketplace of ideas; indeed, even anonymous pamphleteers evince no intent to keep the contents of their speech from the government, only their identity.

189. 362 U.S. 60 (1960).

190. *Id.* at 65.

191. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (alteration added).

192. *Id.*

193. *Id.* at 362.

In addition, the "right-to-anonymity" cases involve government attempts to coerce disclosure of a speaker's identity, and the speakers in those cases preferred to remain anonymous for fear of extralegal (as opposed to law-enforcement) reprisal. In *Bates v. City of Little Rock*,[194] for example, the NAACP sought to keep its membership lists confidential because members carried a collective "fear of community hostility and economic reprisals that would follow public disclosure" as required by the government.[195] The Orwell Act, in contrast, involves no forced disclosure and no sharing of a speaker's identity with the larger community. The government merely discovers the identity by its independent efforts, and it does not share that identity with private parties. Speakers would not be ostracized by the community; they may only face secret surveillance by government agents.

Finally, the right to anonymous speech can cover only so much, for the simple fact that almost all everyday speech is *not* anonymous, nor is it intended to be. Restaurant patrons discussing politics, friends catching up on the latest events, spouses declaring their love for each other—none of this speech is anonymous, yet none of the speakers wish to include government listeners in their conversations.

2. Freedom From Overbroad Governmental Information Gathering

Professor Daniel Solove suggests another approach for those cases in which plaintiffs cannot prove a chilling effect, yet they are unquestionably subject to large-scale government surveillance.[196] In such situations, Solove argues that courts should borrow from Fourth Amendment requirements of "particularity" for search warrants, as well as First Amendment requirements against overly broad subpoenas, to fashion a new First Amendment right: a right against information-gathering programs that are not narrowly tailored to fit the government's interest.[197] In essence, Solove calls for intermediate scrutiny of far-reaching surveillance activities, and demands Fourth-Amendment

194. 361 U.S. 516 (1960).

195. *Id.* at 524.

196. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. (forthcoming 2007) (manuscript on file with author).

197. *Id.* at Part IV.A.2 (manuscript at 38–41).

procedural requirements such as warrants and probable cause for such information-gathering activities unless the government can show a compelling reason why these requirements should not apply.[198]

While this approach is a novel way to tackle the Orwellian Loophole, and it would not require a radical rethinking of the First and Fourth Amendments, it also carries some of the weaknesses of more traditional approaches. First, the efforts to forge this new right as mere extensions of provisions relating to the warrant requirement and protections against overbreadth with regard to subpoenas rest on tenuous grounds. The Fourth Amendment's particularity requirement for warrants remains fairly strong,[199] but the number of cases to which the warrant requirement itself applies is shrinking.[200] In addition, the Supreme Court has rarely heard First Amendment claims with regard to subpoenas, and it has never ruled that the First Amendment alone outweighs the public interest in information-gathering via the subpoena power. Courts may be hesitant to draft a new right on the basis of two rights resting on shaky grounds; it is effectively an amalgamation of two flimsy metals.

That fact alone would not be enough to find Solove's proposal inadequate for the task at hand; after all, this Article argues that no presently-recognized right is sufficient to the task. Solove's choice of scrutiny, however, may also be incapable of protecting us from the Orwell Act. As noted in Part IV.B.3, *infra*, intermediate scrutiny is too malleable and precarious a standard for genuine protection in the wake of another 9/11. It may fit well for threats less latent than sleeper-cell terrorism, or threats that do not touch Equal Protection concerns so closely (at least in the case of terrorism by those of a certain ethnic descent or religious belief system), but it does not provide adequate protection when the problem is hidden and the stakes are high. Solove's

198. *Id.* at Part IV.B.1 (manuscript at 41–44) (arguing that the First Amendment should require the government to show "a substantial interest" and "narrowly tailored" means of accomplishing it, including whether conformity with Fourth Amendment procedural requirements is practicable).

199. *See* Groh v. Ramirez, 540 U.S. 551, 562–63 (2004) (holding that because an officer "did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly 'unreasonable' under the Fourth Amendment").

200. *See supra* Part II.A (discussing the demise of the warrant requirement).

call for Fourth Amendment procedures unless there is a compelling reason why such procedures would be impracticable may solve this problem, but this solution amounts to a new standard of review that is foreign to both the First and the Fourth Amendments. It may be overly optimistic to expect the Supreme Court to apply intermediate scrutiny in this novel manner and attach procedural requirements that apply to fewer and fewer government actions in the pure Fourth-Amendment context, let alone a First-Amendment context. If we cannot find a new manner of examining the problem, one that mandates the application of traditional strict scrutiny without hampering legitimate criminal investigations, then we are left where we began: with a Constitution that may allow the implementation and survival of Big Brother.

C. A New Possibility

Thus, we must find a new approach, one that fills the gaps in those First Amendment doctrines that are already well-established. It must render a chilling effect irrelevant, for such a claim would always rest on the shaky grounds of standing and speculative evidence. It must be broad enough to apply to all Americans, not merely those who are members of groups engaging in political speech. And, to receive the assurance of the highest First Amendment protection, it must create a paradigm in which government surveillance is an act directed at speech itself, rather than its secondary effects or its time, place, and manner. To fashion a First Amendment right that would exclude government ears from everyday conversations, we must look at the First Amendment from a more fundamental perspective. We must look to the terms of the First Amendment itself, and reexamine three fundamental questions: what is the meaning of "speech," what is the meaning of "freedom," and what is the meaning of "abridging"?

1. "Speech" and Audience

While the anonymous speech cases prove inadequate to fill the gap, they hint at a crucial element of a new theory: the relationship between the speaker, the verbal content of the speech, and the audience.

Sociologist Erving Goffman wrote of the importance of audience in his 1959 classic, *The Presentation of Self in Everyday Life*.[201] He found that individuals tend to "play[] a part" for their observers, a part that depends upon the individual, the audience, and the setting.[202] Even if they play that part without true conviction at first—for example, new military recruits who feign enthusiasm and discipline because they are afraid of punishment—the feigning ends over time and repeated practice in the role, because they begin to *believe* that the role is genuine.[203] Goffman thus implies a connection between the speaker, the speech, the setting, and the audience that cannot be severed; we cannot evaluate the message without looking to these other factors, because the message is a function of all of them. "Message," then, encompasses more than words or conduct by the speaker—it includes the audience.

Logic verifies the importance of audience. The President may address the topic of faith-based initiatives at two meetings, one with religious conservatives and one with avowed atheists, and he may use the exact same words, oratorical style, and body language at both events. Nevertheless, each speech carries vastly different meaning based solely on the members of the audience. A Neo-Nazi march through Skokie carries different meaning than the same march through Duluth. The question "will you marry me?" serves the same function regardless of whether it takes place at a romantic restaurant or a private apartment or on the Jumbotron at Lambeau Field, but the differences in setting and audience change the nature and impact of the communication; that is, the content of the communication shifts with its context, and the identity of the audience is a primary element of that context. The identity of the audience correspondingly affects the identity of the speaker, her ethos. In Goffman's terms, it restricts the speaker's choice of what "part" she wishes to "play" in expressing herself and thereby limits the ultimate content of the messages she can convey.

Other works in the natural and social sciences further support a close connection between the observer, the observed, and the content and

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201. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

202. *Id.* at 17–24 (alteration added).

203. *Id.* at 20.

meaning of the resulting message.[204] In the field of psychology, for instance, aspiring researchers receive warning that they can "unknowingly affect the outcome of a study by influencing the behavior of the research participants," often by the mere fact of observation and the observer's expectations.[205] One oft-cited example of these consequences of observation is the Hawthorne Effect, a term derived from the results of a series of studies at the Western Electric Company's Hawthorne Works in Chicago from 1927 to 1932.[206] The studies monitored the work output of employees at the Works (with their knowledge of the observation), implemented various changes to their work environment, and noted that the workers' output improved regardless of the precise changes implemented.[207] After a period of time, this change in workers' output became permanent: "something in the reconditioning of the group must [have been] regarded as the permanent

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204. *See generally* D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002) (describing the existence and impact of "observer effects" that make truly objective and accurate analysis and fact-finding difficult due to the relationship between the observer and the person or thing under observation).

205. GALE ENCYCLOPEDIA OF PSYCHOLOGY 143 (Susan Gall ed., 1996). For example:

> Studies have shown that animals . . . may act differently depending on the expectations of the experimenter. For example, when experimenters expected rats to learn a maze-running task quickly, the rats tended to do so; on the other hand, animals expected not to learn quickly showed slower learning. This difference in learning resulted even when the animals were actually very similar; the experimenter's expectations seemed to play a causal role in producing the differences.

Id. For our purposes, this study suggests that people under surveillance may shape their behavior and speech to fit their perceived expectations of the government in carrying out the Orwell Act.

206. *See* Risinger et al., *supra* note 204, at 20 n.90 (2002) (noting use of the term "Hawthorne Effect" to characterize the results of the study). *See generally* ELTON MAYO, THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION 52–94 (Viking Press, 5th Prtg. 1966) (1933) (describing studies at the Hawthorne Works).

207. MAYO, *supra* note 206, at 63 ("It had become clear that the itemized changes experimentally imposed . . . could not be used to explain the major change—the continually increasing production.").

achievement."[208] In short, the "interest of developing a new form of scientific control . . . incidentally altered the total pattern" of the workers' behavior.[209] More disturbingly, the workers operated under the illusion that the company subjected them to *less* supervision than before, not more,[210] even though they knew that their individual outputs were subject to increased observation as a part of the study.[211] Each worker was, in a sense, "the principle of his own subjection."[212]

If audience is an element of speech that affects the behavior and message of the speaker, then these studies suggest that "mere surveillance" does much more than the Court has previously suggested. As long as people know they are under surveillance, then the government inserts itself into the audience of all communications. By changing the speakers' respective audiences in all communications, the government essentially changes the speakers' communications; it distorts the meaning of their message, and their experience of interaction. Private talks between friends no longer carry the same meaning by the mere fact they are no longer private talks between friends. The government's attendance changes the meaning of the communication, even if the words remain the same. Furthermore, the conditioning that accompanies years of expression subject to known observation may subconsciously condition speakers toward a pattern of behavior designed to please the full audience—including the uninvited observer—as well as the intended audience.

2. "Freedom" and the Choice of Audience

Merely recognizing that the audience is a part of speech itself is only the first step, and it does not answer the ultimate question of whether a widespread government surveillance program violates the First Amendment. If we accept that the government is subtly changing the meaning of speech through the passive surveillance of it, we must still

208. *Id.* at 69 (alteration added).

209. *Id.* at 70.

210. *Id.* at 75 ("Their opinion [regarding a sense of less supervision] is, of course, mistaken: in a sense they are getting closer supervision than ever before, the change is in the quality of the supervision.") (alteration added).

211. *Id.* at 57.

212. FOUCAULT, *supra* note 131, at 203.

ask whether "freedom" within the meaning of the First Amendment encompasses the freedom from such intrusions; that is, what freedoms do or should we have when it comes to the audience for our speech?

As Professor John Garvey notes, the First Amendment and the due process clauses of the Fifth and Fourteenth Amendments hold a unique place in the constitutional framework because they offer constitutional freedoms as well as constitutional protections.[213] For example, a state cannot take away the right to an abortion in certain situations under the Fourteenth Amendment, nor can it require abortions. The First Amendment's freedom of association "protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships."[214] The government cannot require entry into these protected relationships, nor can it prohibit entry. The Second Amendment, on the other hand, only restricts the government from abridging the people's right to keep and bear arms. The government does not have the power to ban all weapons under the Second Amendment, but the Second Amendment is silent as to whether the government could require people to carry them. At the heart of constitutional freedoms (as opposed to protections), then, is *choice*—the freedom to say, do, or believe something as well as the corresponding freedom not to say, do, or believe it.[215]

The Supreme Court has clearly defined speech as a constitutional freedom, rather than a mere protection. People maintain the choice to speak or remain silent; outside of relatively rare circumstances (such as witnesses in court proceedings), the government cannot compel speech.[216] The Court views this right broadly: not only does it bar the government from compelling direct speech, but in many circumstances it bars the government from compelling indirect speech via mandatory donations for political and ideological causes from people who fundamentally disagree with those causes.[217] In addition, people

213. John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1757–58 (1981).

214. Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987).

215. *Id.*

216. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down a West Virginia law requiring schoolchildren to salute the flag).

217. Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990).

maintain the right to choose which words to use in their communications, from the eloquent to the profane: "[T]he usual rule [is] that governmental bodies may not prescribe the form or content of individual expression."[218] As for a person's chosen method for communicating his message, the government may only restrict it through reasonable time, place, and manner regulations. Even these regulations face intermediate scrutiny, and they must leave open other channels for the communication.[219] In short, First Amendment protection for the freedom of speech entails protection for the essential choices involved in communication: to speak or remain silent, which words to use (or whether to use words at all), and the chosen method of expression.

Each of the above choices directly relates to the speaker's message. While the speaker cannot control her message once it reaches others, she can control its content, its form, its style, and even whether to convey a message at all. The choice of direct audience is at least as fundamental as those already receiving great protection from the Court, for two reasons. First, as shown above, the mere presence of an audience can change the message: the same speech to religious conservatives and to atheists may differ in message solely based on the makeup of the audience. Second, the choice of audience interacts with these other choices that are essential to conveying a message. If a speaker first chooses a direct audience—for example, the choice to give a speech at a high-school graduation—that choice will play a large role in dictating all of the other choices fundamental to speech, such as the chosen words and method of communication. If a speaker first makes another choice—say, the choice of certain words to use to express her message—that choice will play a large role in determining that speaker's choice of audience. Cohen's choice of the words "Fuck the Draft" to convey his displeasure with conscription[220] restricted his choice of audience; he might have felt that it was effectively shocking for passersby in the courthouse, but it is unlikely he would have deemed it equally effective in a private dinner with his grandparents.

Thus, the choice of audience is inextricably intertwined with other choices that currently rest within the constitutional freedom of

218. Cohen v. California, 403 U.S. 15, 24 (1971) (alteration added).

219. *See supra* notes 169–172 and accompanying text.

220. *Cohen*, 403 U.S. at 16.

speech. It stands to reason, then, that choice of audience warrants the same protection from government interference. Of course, that choice does differ from other choices relating to speech; unlike the choice of what to say or whether to speak, the choice of audience is often outside the speaker's control. A speaker may want a national audience but find that it is impossible; his words only reach the passersby on the street (or those who stumble upon his Internet blog). Similarly, he may wish to speak only to those in his field of vision, without realizing that there is someone else within earshot.

These distinctions fall away, however, when we remember Goffman: audience is a part of speech only insofar as it remains within the subjective awareness of the speaker and/or the listener, because it affects the part that the speaker plays and the experience of the listener. If Cohen wore his jacket to the courthouse and his grandmother walked by him, seeing only the back of the jacket—neither person aware of the identity of the other—then the message remains the same: a shocking protest from an unidentified person in a symbolic location. If their eyes happen to meet, the message as to those listeners changes according to the context of their relationship, the roles that they have played toward each other throughout their lives. The choice, then, is subjective as well as objective: for both the speaker and the audience, it is the choice to play a certain role that depends upon the identity and interaction of both, and this choice warrants the same protections as other fundamental choices related to speech.

This is not a drastic break from the Supreme Court's existing First Amendment jurisprudence. Though the chilling-effect cases may appear to have painted this proposed right into a corner, some precedent shows that it would not take a major shift for the Court to save it. Such a rescue would merely stand as a logical extension of other lines of precedent. This precedent includes the Court's cases involving local restrictions upon door-to-door solicitation for non-commercial purposes.[221] These cases ultimately stand for the proposition that the government abridges a speaker's freedom of speech when it interferes

221. For a detailed description of this long line of cases up to 1980, see *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628–32 (1980) (describing ten cases in detail and noting that these cases recognize "the reality that without solicitation the flow of such information and advocacy would likely cease").

with her choice of audience, though they do not phrase their holdings with this language. Take, for example, the Court's decision in *Riley v. National Federation of the Blind of North Carolina*,[222] a case striking down a North Carolina law that, in relevant part, criminalized door-to-door solicitation of charitable contributions by professional fundraisers who did not obtain a license to solicit and who retained an "unreasonable" amount of the actual donations as a fee for their fundraising efforts.[223] The Court struck down this portion of the law as a violation of the First Amendment because "[w]hether one views this as a restriction of the charities' ability to speak, or a restriction of the professional fundraisers' ability to speak, the restriction is undoubtedly one on speech, and cannot be countenanced here."[224] This holding treats the issue as if its resolution is obvious, but it does not address the underlying question: why? What speech-related choice did North Carolina abridge with this requirement? It certainly was not the choice of the speakers' message; professional fundraisers and charities could say the same messages in a different location or in a different manner (for charities, using volunteer or low-fee fundraisers; for fundraisers, by reducing their fees to a "reasonable" amount). Nor was it the choice to speak or not to speak; there was no compelled speech in this part of the law, and there was no compelled silence in the sense of broad bans on certain messages generally. Further, the law did not silence certain speakers on the basis of their messages rather than the context in which they delivered them.

The effect of the law and the rationale of the case point largely to a different choice: the speakers' choice of a certain audience for their messages. The law was not purely directed at speech, but it was directed at a charity's ability to reach a certain audience with that speech. In effect, the fatal flaw of the law was its abridgement of a charity's choice to reach a North Carolina audience: "This chill and uncertainty [of the law] might well drive professional fundraisers out of North Carolina . . . which will ultimately 'reduc[e] the quantity of

222. 487 U.S. 781 (1988).
223. *Id.* at 784–86.
224. *Id.* at 794 (citations omitted) (alteration added).

expression.'"[225] Because "free and robust debate cannot thrive if directed by the government,"[226] the Court applied "exacting First Amendment scrutiny"[227] to this deprivation of a charity's and a fundraiser's choice of audience.

We can see an even closer example of the Court's implicit protection of a speaker's choice of audience in *Buckley v. Valeo*,[228] a case striking down several provisions of the Federal Election Campaign Act (FECA) of 1971. The Court began by noting that it "has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment."[229] This statement makes little sense without consideration of the choice of audience as a part of the freedom of speech. Speech, in and of itself, is free; there is no tax on mere talking. Directing that speech in a manner that captures a broad audience, however, is not. If the above-quoted characterization of the law is to have some meaning, it must be referring to the speaker's choice of audience.

Such an interpretation also clarifies the several holdings in the case. The Court struck down the expenditure limits on candidates, campaigns, and non-candidate individuals and groups advocating election or defeat of a candidate (that is, the speakers themselves) because they would "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, *and the size of the audience reached*."[230] It upheld the restriction upon the amount that individuals can donate directly to candidates because it was essentially a restriction upon speech enablers rather than the speakers themselves; it required candidates to seek contributions from more individuals to obtain the funds to reach their chosen audiences, but this alone was not enough to show "any dramatic adverse effect on the funding of campaigns and political associations"[231] that would

225. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam)) (first alteration added).

226. *Id.* at 791.

227. *Id.* at 789.

228. 424 U.S. 1, 19 (1976).

229. *Id.* at 16.

230. *Id.* at 19 (emphasis added) (alteration added).

231. *Id.* at 21.

"undermine to any material degree the potential for robust and effective discussion."[232] Thus, candidates still retained the "unfettered opportunity to make their views known"[233] to their chosen audience, and the public enjoyed the "'unfettered interchange of ideas for the bringing about of political and social changes.'"[234]

It also explains the Court's application of "exacting scrutiny"[235] to FECA's public disclosure requirements for campaign financing. These requirements "appear[ed] to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist,"[236] and the government interests—the protection of the democratic process—were "sufficiently important"[237] to survive that scrutiny. In short, *Buckley* also supplies precedent for applying strict scrutiny not only when the government takes action restricting a speaker from reaching his intended audience, but also when the government takes action requiring a speaker (in this case, someone engaging in the speech-act of donating to a political campaign) to reach a *larger* audience than the speaker may have intended. Of course, given that the Court upheld this particular FECA provision, the possibility remains that the Court applied strict scrutiny in name only and instead took a results-oriented approach akin to *Korematsu*. Nevertheless, the language of strict scrutiny survives its dubious application in *Buckley*, and it shows that the Court is willing to give its strongest constitutional protection against government interference with a speaker's choice of audience.

3. From Limiting Choice to Abridging Pure Speech

The precedent above supports the idea of choice of audience as speech, but it does not confront the problem that has thwarted many of the previously discussed claims: the fact that the Orwell Act provides no concrete, non-speculative penalties for any kind of speech directed toward any particular audience. As a result, this new approach remains

232. *Id.* at 29.

233. *Id.* at 52–53.

234. *Id.* at 49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964)).

235. *Id.* at 64.

236. *Id.* at 68 (alteration added).

237. *Id.* at 66.

vulnerable to arguments that some forms of government surveillance belong, at most, in the category of laws that have an incidental impact on speech and thus face only intermediate scrutiny. As noted previously, the Court's relaxation of narrow-tailoring requirements in this standard of review leaves courts with too much room to maneuver, and this lower standard might save the Orwell Act. Thus, even if audience is an element of speech, and even if the choice of that audience is one that is fundamental to the exercise of free speech, this new approach must finally answer the ultimate question: does government surveillance actually abridge the freedom of speech in a way that would subject it to strict scrutiny? In other words, does this new approach allow us to view laws that provide for government surveillance as laws *directed* at speech, rather than merely laws that have an *indirect impact* on speech?

The government could certainly argue that the law is not directed at speech, and, at first blush, that argument carries great weight. The intent of the lawmakers was clearly the preservation of national security, with no designs on suppressing speech; among those people that the law was designed to stop, loose lips are actually the key to detection. In addition, people still maintain a choice of audience. They can speak to whomever they want. They can speak to no one at all. Government agents are not physically standing over their shoulders and inevitably changing the makeup of the audience and nature of their messages, and the government could argue—as in the chilling-effect cases—that any limitation on the parts available for speakers to play, or difference in the meaning of communications for speakers and listeners, is self-imposed. In short, "mere surveillance" provides no coercion whatsoever, and the government cannot be held responsible for people's psychological impressions of it.

To combat this argument, a new approach must put the choice of audience in starker terms, recognizing that the power to choose an audience includes the power to exclude, the power to speak outside the presence of the government. In this light, when the government invades a speaker's direct audience through known surveillance, it eliminates a speaker's ability to choose a private audience—it creates a sort of "medium ban" on private speech. But this kind of ban goes even further than a mere ban on the means of transmitting certain messages; it effectively eliminates the very possibility of such messages through any means of communication. Given the relationship between audience and

message, the inability to choose a private audience bans whatever impact a message may gain by the fact that it is beyond government ears, and thus wholly eliminates certain communications that would carry a slightly different meaning if made in the absence of surveillance.

The mere fact that the government does not utilize coercion is irrelevant, because the Orwell Act accomplishes the same ends that coercion would in the absence of such technology. If the government simply required, upon the threat of criminal prosecution, that people disclose all communications they make to the government, no one could say that the threat of government coercion did not abridge the freedom of speech as we have defined it. The simple fact that the government has perfected a system that renders coercion unnecessary should not save a system that has the same basic impact upon the freedom of speech. In addition, the fact that the government had no intention to abridge the freedom of speech should not save its surveillance program from strict scrutiny. If the audience is an element of speech itself, then the government's constant inclusion in that audience is not a mere "time, place, and manner" restriction—it is the wholesale elimination of certain content, and it is directed at speech itself regardless of governmental motives to use it for other purposes. In this way, if a speaker cannot communicate confidentially due to government surveillance, the government has effectively and directly abridged her freedom of speech.

D. The New Constitutional Freedom in Practice and Theory

Of course, this framework would not give citizens the absolute right to dictate the makeup of their audiences, just as the First Amendment does not give speakers an absolute right as to the substance of their messages and the forms in which they convey them. But it would provide a First Amendment right against government interference with a speaker's chosen audience, secure in the ample protection of strict scrutiny, because it amounts to interfering with the speaker's choice in conveying his message. This would mean that the government could not scan emails, tap telephones, or record conversations without probable cause (the minimum showing required to significantly restrict other constitutional freedoms, such as one's physical liberty, in criminal investigations). While the government's interest in crime prevention and detection is almost always compelling, probable cause could in most

cases allow surveillance to pass a "least-restrictive-means" analysis, assuming the surveillance was limited to methods that were reasonably likely to bear evidence of criminal activity. If the government must show probable cause to take away a person's physical liberty and place him in custody, which can lead to curtailment of other constitutionally protected choices (such as the choice to vote or abstain from voting), it should require probable cause to conduct surveillance—a search, for Fourth Amendment purposes—that eliminates his choice of a private audience.

It is this choice of a *private* audience that would limit the scope of this constitutional protection. The right would have no impact on police presence at large rallies for crowd-control purposes, because the nature of those events is public: the government cannot interfere with the speaker's message through its attendance if the speaker's audience is the public generally. But when the speaker chooses to communicate in a setting that evinces a desire for an audience smaller than the general public, the government could not alter the makeup of the audience through its unwanted attendance in an official capacity.

This does not mean that the government must promote speech; one could not argue that the government interferes with her choice of audience because it does not let her address the Senate at will. Nor does it mean that it must abandon FCC decency standards or require agents of the government to wear earplugs and blindfolds as they go about their daily lives, lest they witness or overhear others' semi-private communications. The government would not have to foster speakers' wishes for a certain audience to hear a certain message. It simply could not actively and purposefully interfere with that choice once the choice has been made, absent a showing that doing so amounts to the least restrictive means of achieving a compelling governmental interest.

Applying this principle to *ACLU v. National Security Agency*[238]—the most recent case with claims analogous to those the Anti-Orwellians make in this hypothetical—we find that such broad surveillance must fall, but for reasons different from those cited by the district court. The plaintiffs in that case were news reporters, lawyers, and academics who challenged the NSA's post-9/11 policy of

238. 438 F. Supp. 2d 754 (E.D. Mich. 2006). For a description of the holding in this case, see *supra* text accompanying note 154.

intercepting telephone and Internet communications to and from people in the Middle East, without a warrant.[239] Such an invasion of these plaintiffs' audience would certainly implicate their First Amendment right to choose an audience, as defined above, and it would warrant strict scrutiny. The government could not meet that analysis under the facts of this case. While the governmental interest is probably compelling, the facts of the case showed no evidence that this surveillance was the least restrictive means to accomplish that end; the government made no showing that the same ends could not be met through different means (such as the use of informants or obtaining a warrant for wiretaps against those individuals whom it had probable cause to suspect of terrorist involvement). Under this new First Amendment principle, the decision in this case would be brief, certain, and well-grounded. It would not require the twenty-eight pages of dubious analysis employed by the district court to strike down the program, nor would it require the unique facts the case presented.[240]

In this way, a First Amendment right against government interference with a speaker's chosen audience closes the Orwellian Loophole. But it also fits within a larger free-speech principle, regardless of the argument for protecting free speech. Frederick Schauer has catalogued the most oft-used justifications for heightened protection

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239. *Id.* at 758.

240. For example, the plaintiffs avoided the standing problem by the unique fact that those Mid-East contacts upon which they relied for their professional livelihood actually refused to speak with them as a result of the program. *Id.* at 767. Those contacts were not American citizens or parties to the suit, and thus the court did not have to evaluate the reasonableness of their fears of surveillance. It was their chill, not the plaintiffs', that was at issue; as the court noted, "*Laird* does not control this case." *Id.* at 768. As to the court's reasoning with regard to the Fourth and First Amendments, it ignores the possibility of special needs or other exceptions to the warrant requirement in finding that the program is "obviously in violation of the Fourth Amendment." *Id.* at 775. For the reasons expressed in Part II, *supra*, such a finding is not nearly as "obvious" as the district court believed. Further, the district court's First Amendment holding expressly depended upon its finding of a Fourth Amendment violation. *Id.* at 776. From the language of the decision, it is difficult to know whether the district court would have found a violation of the First Amendment had it not found a violation of the Fourth Amendment. As a result, one should not read the decision as standing for strong First Amendment protection against government surveillance, but rather as precedent for analytically questionable Fourth Amendment protection from it.

of free expression, finding that they fall into four major categories: an "argument from truth" (that is, to find truth we must have a free exchange of ideas),[241] an "argument from democracy" (that is, free speech serves the function of republican governance by promoting a dialogue between citizens and their elected leaders),[242] an argument that free speech is an "intrinsic good" (that is, it enables us to fulfill our potential as human beings and leads to happiness),[243] and a closely related argument that it promotes individuality, dignity, and autonomy (that is, it provides a vehicle for defining ourselves).[244] Each of these justifications for supporting a strong right to free speech generally also supports the specific right against government surveillance of that speech.

First, this extension of the First Amendment receives support from the "marketplace-of-ideas" or Millian "argument-from-truth" justifications for free speech because it adds to the diversity of audiences, and therefore the diversity of messages. If people naively cling to beliefs because "they have never thrown themselves into the mental position of those who think differently from them, and considered what such persons may have to say,"[245] then removing the government as observer can only add to the number of messages available to them because it adds to the choices available to speakers in conveying their messages.

For example, imagine a fair that showcases speakers from a wide variety of viewpoints, with small gatherings around each. Wandering from speaker to speaker and listening to each carries different meaning when one does it alone than when one does so with a uniformed police officer following at her shoulder. She will likely think about the police officer's presence, and so will the speakers she visits. They may change their messages (to make them either more anti-law-enforcement or less), she may subconsciously change the way she receives the messages, and, even if neither changes, the mere presence of the officer changes the opportunities available to the speakers in conveying their messages because they have no choice but to include the government in their

241. *See* SCHAUER, *supra* note 188, at 15–25.
242. *Id.* at 35–40.
243. *Id.* at 49–50.
244. *Id.* at 60–72.
245. JOHN STUART MILL, ON LIBERTY 36 (Hackett Pub. Co. 1978) (1859).

audiences. Thus, instead of hearing a number of viewpoints on a variety of subjects, each speaker's message travels through the filter of the law-enforcement officer's presence, where it gives new meaning to the words from the perspective of both speaker and listener. Removing this filter may enable one to come closer to a true understanding of the speaker's intended message because the speaker has a fuller array of choices available to him in conveying this message—or, at least, an understanding of his message untainted by the intrusion of an unwanted and unintended member of his audience.

This right also receives self-evident support from what Schauer describes as the argument from democracy, an approach derived from the philosophy of Alexander Meiklejohn.[246] Massive surveillance has been a common characteristic of some of the most totalitarian regimes in human history, with good reason: it is a convenient tool for detecting and controlling ideas threatening to the ruling powers. In addition, the threat of government surveillance may perform one of two functions: it might discourage people from spreading ideas that may imperil those in power, or it may transform the way listeners perceive these ideas so that they appear less attractive or more extreme than they would without government surveillance. Meiklejohn's theory calls for a First Amendment that allows "citizens . . . so far as possible, [to] understand the issues which bear upon our common life,"[247] offering the traditional New England town meeting as the epitome of a democratic free-speech principle in action. While "government" is in some sense present in Meiklejohn's "town meeting" analogy, the government itself is the intended audience at such a meeting, and it carries no implicit threat of coercion or future investigation. In situations in which citizens seek to exclude coercive authorities from their discussions of issues, this exclusion can only add to variety and understanding. Thus, a right against government interference with the speaker's audience can only promote Meiklejohn's vision of democracy.

Finally, this right also promotes the two remaining goals of self-actualization and individuality because it gives the individual a private

246. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (arguing that free and open public discussion protects self-government by educating both the citizenry and its elected leaders).

247. *Id.* at 88–89 (alteration added).

space, and it gives her control over when to step outside of it and who to include when she does. If "communication and the use of language are vital components of humanity,"[248] then a government audience that changes the meaning of speech removes a part of our very existence; we lose some control over our ability to express ourselves in every situation, and thus we "become soulless automatons."[249]

CONCLUSION

Our Constitution should not sanction this transformation, this enablement of the government to effectively poison the souls of a free people. Nevertheless, modern precedent has given birth to the Orwellian Loophole; it has nourished it; it has left it ready for us to unleash when the right combination of circumstances make it seem attractive. But the First Amendment offers hope of defeating this emerging threat to democratic values, if the Court will recognize that a speaker's choice of audience is as fundamental to speech as the speaker's choice of words, choice of medium, and choice to speak at all, and that this choice is just as capable of changing the meaning of speech. This recognition would not guarantee that the United States would never slide into dystopia. But it would give some assurance that we will not someday awake from dreams of permanent national security, only to find ourselves living the Orwellian nightmare.

248. SCHAUER, *supra* note 188, at 54.
249. Fromm, *supra* note 186, at 257.