

TERRORIST ADVOCACY AND EXCEPTIONAL CIRCUMSTANCES

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INTRODUCTION

One of the striking links connecting many of the recent terrorist attacks around the world is the pervasive influence of the late radical cleric Anwar al-Awlaki. Al-Awlaki's online lectures and tracts have been identified as a major influence on many committing terrorist attacks, from Dzhokhar Tsarnaev to the San Bernardino attackers to Omar Mateen. Much of his speech, however, cannot be characterized as low-value incitement, true threats, or speech tantamount to criminal conduct. Rather, it is simply abstract advocacy of lawless action.

This sort of terrorist advocacy is clearly protected under longstanding First Amendment principles; to hold otherwise would violate the central tenet that the best remedy for dangerous ideas is counterspeech rather than suppression.¹ But First Amendment protection also has practical limits. What if, for example, counterspeech proves to be ineffective, and tens of thousands of lives are lost in attacks perpetrated by those influenced by terrorist advocacy? To all but the most extreme First Amendment absolutists, some theoretical tipping point exists at which the actual and potential harms associated with such speech are so severe that direct government regulation is warranted. That is to say, prevailing circumstances may be so exceptional as to dictate a radical departure from even the most foundational First Amendment principles.

This Article explores the question of how courts should account for the potential emergence of these exceptional circumstances in the context of terrorist advocacy. And this question is particularly pressing as news of potential and actual terrorist attacks continues to dominate the headlines. Indeed, several scholars have argued not only that a First Amendment tipping

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1. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 419 (1989); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

point has already been reached with respect to terrorist advocacy, but also that present circumstances—specifically, the rise of the internet and social media—represent a fundamentally changed reality that warrants a broad reevaluation of First Amendment doctrine.²

Even if one disagrees with these scholars' assessment of the present moment, there may come a time in the future when such a tipping point appears imminent. And in this situation, courts confronted with a content-based regulation of terrorist advocacy can take two different approaches. One possibility is simply to apply strict scrutiny and uphold any surviving regulations, which is the approach formally dictated by present doctrine. The other possibility is to reevaluate and redraw the contours of current free speech doctrine—an approach advocated by scholars such as Cass Sunstein and Eric Posner.³

I argue that strict scrutiny analysis—rather than broad modification of the existing doctrinal framework—should *always* be the initial means of accounting for these sorts of exceptional circumstances. By adhering to strict scrutiny in these cases, courts send an important message that valid government regulation of abstract advocacy is truly exceptional and that prevailing doctrine is sticky and not easily changed. Furthermore, such an approach affords courts some space to carefully consider whether the present circumstances are truly indicative of a fundamentally changed reality or merely a troublesome outlier. Although broad doctrinal modification may ultimately be inevitable, adhering initially to narrow strict scrutiny analyses prevents courts from prematurely committing to a fundamentally rebalanced First Amendment doctrine that all may come to regret in a more placid future.

This Article proceeds as follows. Part I discusses the harmful effects of terrorist advocacy and outlines the present doctrinal treatment of such speech. Part II discusses the issue of exceptional circumstances and highlights the two approaches courts might take to account for them: applying strict scrutiny to the case at hand or broadly reformulating the First Amendment's doctrinal boundaries. Part III sets forth my central thesis: courts should adhere to case-by-case strict scrutiny analysis, rather than broad doctrinal reformulation, as the initial means of accounting for exceptional circumstances with respect to terrorist advocacy. This approach reflects the vital importance of caution and incrementalism whenever a potential reduction in First Amendment protection is contemplated, as these narrower analyses act as an intermediate stopping point for courts to carefully consider whether any broad doctrinal reformulation is ultimately warranted. Part IV sets forth some thoughts as to how strict scrutiny should be calibrated to serve this role effectively, focusing in particular on the U.S. Supreme Court's decision in *Holder v. Humanitarian Law Project*.⁴

2. See *infra* Part II.

3. See *id.*

4. 561 U.S. 1 (2010).

I. TERRORIST ADVOCACY AND ITS TREATMENT UNDER PRESENT DOCTRINE

A staggering number of recent terrorist attacks in the United States and abroad share one common thread: the influence of the extremist cleric Anwar al-Awlaki. Before his death in 2011, al-Awlaki was directly or indirectly tied to a wide range of actual and attempted terrorist attacks, including the Fort Hood shootings,⁵ the stabbing of British Member of Parliament Stephen Timms,⁶ a 2010 attempt to bomb Times Square,⁷ and a 2009 attempt to blow up a Northwest Airlines plane with plastic explosives.⁸ And after his death, al-Awlaki's influence seemed to expand rather than diminish;⁹ terrorist acts inspired by his teachings include the 2013 Boston Marathon bombing,¹⁰ the 2015 shootings in San Bernardino,¹¹ the 2016 Orlando nightclub shootings,¹² the 2011 killing of five soldiers at a military installation in Tennessee,¹³ the 2016 attack at Ohio State University,¹⁴ and the 2016 bombings in New York and New Jersey.¹⁵

5. See David Johnston & Scott Shane, *U.S. Knew of Suspect's Tie to Radical Cleric*, N.Y. TIMES (Nov. 9, 2009), <http://www.nytimes.com/2009/11/10/us/10inquire.html> [https://perma.cc/K23N-3LRJ].

6. See Vikram Dodd, *Roshonara Choudhry: Police Interview Extracts*, GUARDIAN (Nov. 3, 2010, 6:49 PM), <https://www.theguardian.com/uk/2010/nov/03/roshonara-choudhry-police-interview> [https://perma.cc/7NAX-5TWS].

7. See Scott Shane & Mark Mazzetti, *Times Sq. Bomb Suspect Is Linked to Militant Cleric*, N.Y. TIMES (May 6, 2010), <http://www.nytimes.com/2010/05/07/world/middleeast/07awlaki.html> [https://perma.cc/S5P5-Y6ZT].

8. See Scott Shane, *Inside Al Qaeda's Plot to Blow Up an American Airliner*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/anwar-awlaki-underwear-bomber-abdulmutallab.html> [https://perma.cc/V7VP-MLKL].

9. See Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES (Aug. 27, 2015), https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html?_r=0 [https://perma.cc/T9VV-CFJM] (“[Al-Awlaki’s] pronouncements seem to carry greater authority today than when he was living, because America killed him.”).

10. See *id.*

11. See Greg Miller, *Al-Qaeda Figure Seen as Key Inspiration for San Bernardino Attacker*, WASH. POST (Dec. 18, 2015), https://www.washingtonpost.com/world/national-security/al-qaeda-figure-seen-as-key-inspiration-for-san-bernardino-attacker/2015/12/18/f0e00d80-a5a0-11e5-9c4e-be37f66848bb_story.html [https://perma.cc/2UZJ-NJZ7].

12. See Adam Goldman et al., *FBI Had Closely Scrutinized the Orlando Shooter Before Dropping Investigation*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/world/national-security/fbi-had-closely-scrutinized-the-orlando-shooter-before-dropping-investigation/2016/06/13/838e9054-3177-11e6-8ff7-7b6c1998b7a0_story.html [https://perma.cc/ZG4H-BDDE].

13. See Devlin Barrett & Arian Campo-Flores, *Investigators See Radicalization in Chattanooga Shooter*, WALL ST. J. (July 21, 2015), <https://www.wsj.com/articles/investigators-see-radicalization-in-chattanooga-gunman-1437510290> [https://perma.cc/AVC7-UAEQ].

14. See Mitch Smith & Richard Pérez-Peña, *Ohio State Attacker May Have Been 'Inspired' By Al Qaeda*, F.B.I. SAYS, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/us/ohio-state-university-attack-abdul-razak-ali-artan.html> [https://perma.cc/F6LT-6CGN].

15. See Ellen Nakashima, Mark Berman & William Wan, *Ahmad Rahami, Suspected New York Bomber, Cited Al-Qaeda and ISIS*, OFFICIALS SAY, WASH. POST (Sept. 21, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/new-york-bombing-suspect-charged-with-using-weapons-of-mass-destruction> [https://perma.cc/B3YZ-XR8E].

In most of these cases, al-Awlaki neither played any active role in planning the attacks nor specifically encouraged the attackers to do what they did; indeed, many of the incidents occurred well after his death. Rather, his influence came primarily through tracts and lectures posted online, in which he exhorted Muslims—in the abstract—to go to war with perceived enemies of Islam.¹⁶ For example, in one video, al-Awlaki stated:

Don't consult with anybody in the killing of Americans. Fighting the devil doesn't require consultation or prayers seeking divine guidance. They are the party of the devils. Fighting them is what is called for at this time. We have reached a point where it is either us or them.¹⁷

In other videos, al-Awlaki “explain[ed] why you should never trust a non-Muslim; how the United States is at war with Islam; [and] why Nidal Hasan, who fatally shot 13 people at Fort Hood, and Umar Farouk Abdulmutallab, who tried to blow up an airliner over Detroit, were heroes.”¹⁸ As Alexander Tsesis observed, “al-Awlaki’s videos typically do not call for specific or immediate violence but speak of the perceived enemies of Islam in dehumanizing terms and justify killing them whenever necessary.”¹⁹

Through these online materials, al-Awlaki served as a driving force in the now-familiar radicalization narrative. In the aftermath of terrorist attacks or attempts, it has become nearly inevitable that investigation would ultimately reveal the substantial role that al-Awlaki’s teachings played in the attacker’s path to radicalization.

Take, for example, the case of Roshonara Choudhry, who was convicted in 2010 for stabbing British Member of Parliament Stephen Timms. In a subsequent police interrogation, Choudhry stated that she downloaded and watched “[m]ore than a hundred hours” of al-Awlaki’s lectures, that she learned from his lectures that Muslims “shouldn’t allow the people who oppress us to get away with it,” and that this caused her to carry out her attack.²⁰

Al-Awlaki’s online teachings played a similar role in influencing, for example, Dzhokhar Tsarnaev (the Boston Marathon bomber),²¹ Omar Mateen (the Orlando nightclub shooter),²² and Rizwan Farook (one of the San Bernardino shooters).²³ Indeed, according to a U.S. counterterrorism official,

16. See Robert Mackey, *Anwar al-Awlaki in His Own Words*, GUARDIAN (Sept. 30, 2011, 12:32 PM), <https://www.theguardian.com/world/2011/sep/30/anwar-al-awlaki-video-blogs> [<https://perma.cc/HAX7-2ZFM>].

17. See The Telegraph, *Anwar al-Awlaki Encouraging Attacks on the US*, YOUTUBE (Sept. 30, 2011), <https://www.youtube.com/watch?v=54tioVOU2qI> [<https://perma.cc/2EBU-VNWK>].

18. See Shane, *supra* note 9.

19. Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1169 (2013).

20. See Dodd, *supra* note 6.

21. See Shane, *supra* note 9.

22. See Goldman et al., *supra* note 12.

23. See Miller, *supra* note 11 (describing how Farook “immersed [himself] in Awlaki’s teachings for years”).

“If you were to look at people who had committed acts of terrorism or had been arrested and you took a poll, you’d find that the majority of them had some kind of exposure to [al-Awlaki].”²⁴ As one terrorism expert described it, “[al-Awlaki] has a timeless and even universal message of radicalization and resistance that is completely separate to whatever organization he hitched his fortunes to until the time of his death.”²⁵

Given all of the violence and bloodshed that has resulted from al-Awlaki’s online teachings, to what extent can the government regulate this sort of speech? As an initial matter, the government has substantial freedom to regulate any speech that falls within one of the designated categories of low-value speech.²⁶ The most relevant category here is incitement: under *Brandenburg v. Ohio*,²⁷ the government is free to regulate advocacy of lawless action only when it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁸ Other potentially relevant categories of low-value speech include true threats—which the Court has defined as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”²⁹—and speech tantamount to criminal conduct, such as aiding and abetting a crime.³⁰

Thus, to the extent al-Awlaki’s statements fit within any of these categories of low-value speech, the government would have considerable flexibility to regulate them based on their content. The vast majority of his teachings, however, do not fall within any of these categories. Take, for example, his

24. Josh Meyer, *Anwar al-Awlaki: The Radical Cleric Inspiring Terror from Beyond the Grave*, NBC NEWS (Sept. 21, 2016), <http://www.nbcnews.com/news/us-news/anwar-al-awlaki-radical-cleric-inspiring-terror-beyond-grave-n651296> [<https://perma.cc/7S2F-YC9F>]; see also Shane, *supra* note 9 (reporting that discoveries of al-Awlaki’s influence “have become routine,” holding true “in dozens of cases”).

25. See Miller, *supra* note 11.

26. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”).

27. 395 U.S. 444 (1969) (per curiam).

28. *Id.* at 447. *Brandenburg* is generally read as a categorical rejection of the Court’s previous approach to dangerous advocacy, replacing that more deferential approach with a highly speech-protective blanket rule. See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION* 232 (1988) (calling *Brandenburg* “the perfect ending to a long story”); Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 657 (2009) (“[T]he *Brandenburg* test has provided the governing standard in this area for four decades and is often hailed as the final word on the government’s power to restrict criminal advocacy.”). As scholars have noted, however, the Court never technically overruled many of those earlier, more deferential cases, thus potentially leaving courts some room to depart from *Brandenburg* in certain cases. See, e.g., Ronald K.L. Collins & David M. Skover, *What Is War?: Reflections on Free Speech in “Wartime,”* 36 RUTGERS L.J. 833, 849 (2005) (observing that “*Schenck* and its offspring remain binding law” and that “*Brandenburg* is readily distinguishable” because “it did not involve a prosecution for speech that interfered with war efforts”); Healy, *supra*, at 660 (observing that *Brandenburg* does not make clear “whether it applies during war as well as peace” or “whether it overrules the Cold War case of *Dennis v. United States*”).

29. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

30. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *Rice v. Paladin Enters.*, 128 F.3d 233, 244 (4th Cir. 1997).

abstract exhortation regarding the “killing of Americans” quoted above.³¹ Such speech does not qualify as incitement under *Brandenburg*. Any lawless action taken in response to this statement is highly unlikely to be “imminent” under the Court’s strict reading of that requirement. Rather, the statement is, at worst, “advocacy of illegal action at some indefinite future time,” which is protected.³² The statement also would not likely qualify as a true threat, as the speaker is not directly threatening a specific person or group but merely calling for others to take up violent action in the abstract.³³ Nor would it be sufficiently specific to constitute speech tantamount to criminal conduct, like aiding and abetting a crime.³⁴

Rather, this sort of speech is best described as abstract advocacy of lawless action³⁵ (specifically, acts of terroristic violence), and I will refer to such speech as “terrorist advocacy.” Such advocacy operates via persuasion—that is, it persuades others to undertake actions that are socially harmful. And setting aside for the moment any potential complications raised by *Humanitarian Law Project* regarding “coordinated” terrorist advocacy—which I will discuss in greater detail below³⁶—the Court has generally made clear that such speech is entitled to full First Amendment protection under the longstanding principle that the dangers of abstract advocacy are best addressed by counterspeech rather than direct government regulation.³⁷ Any

31. See *supra* note 17 and accompanying text.

32. *Hess v. Indiana*, 414 U.S. 105, 107–09 (1973) (per curiam) (finding no imminence where defendant, at an antiwar protest, stated, “We’ll take the fucking street later” or “We’ll take the fucking street again,” since “at worst, [the speech] amounted to nothing more than advocacy of illegal action at some indefinite future time”); see also Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 667 (2017) (“The incitement doctrine applies only to imminently dangerous statements and is hence of limited value to combat internet terrorist incitement.”).

33. See Lyriisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 158 (2011) (“[T]he distinction between a threat and an incitement is as follows: a threat involves a speaker saying to a victim, ‘I will do you harm,’ and an incitement involves a speaker saying to third parties, ‘You ought to harm someone (or something).’”).

34. Cf. *Rice*, 128 F.3d at 248–50 (deeming the defendant’s book unprotected speech because it “aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder (replete with photographs, diagrams, and narration) so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer”).

35. As the *Brandenburg* Court itself stated, “The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (per curiam) (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1981)).

36. See *infra* Part IV. Some have read *Humanitarian Law Project* to permit content-based regulation of abstract terrorist advocacy coordinated with foreign terrorist organizations, but the opinion itself stopped short of reaching this conclusion. See *infra* Part IV.

37. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 419 (1989); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). As many have observed, there are strong reasons to doubt that counterspeech through the marketplace of ideas actually works to counteract such harm. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16–17; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1041. But even if this is the case, the American free speech tradition broadly favors laissez-faire approaches given its

content-based restrictions on such speech are therefore evaluated under strict scrutiny—an onerous standard of review that, at least in the free speech context, effectively preordains a finding of unconstitutionality.³⁸ Thus, in practical terms, the First Amendment broadly prohibits the government from regulating terrorist advocacy based on its content.³⁹

II. ACCOUNTING FOR EXCEPTIONAL CIRCUMSTANCES

What happens, however, if counterspeech proves to be ineffective? Let's say, for example, that abstract terrorist advocacy has led to increasingly frequent terrorist attacks on U.S. soil, such that tens of thousands of lives are being lost.⁴⁰ Is the government still handcuffed from regulating such speech? For all except the most extreme of First Amendment absolutists, there is some practical limit to First Amendment protection.⁴¹ That is, at some theoretical tipping point, the harms associated with even the most highly protected abstract advocacy are so severe that direct government regulation—and perhaps broad doctrinal revision—is constitutionally warranted.⁴²

Indeed, some scholars have suggested that this tipping point has already been reached with respect to terrorist advocacy. Cass Sunstein, for example, has argued that present circumstances call for an expanded definition of low-value incitement that would allow the government to regulate explicit incitement of violence that poses a genuine risk to public safety, even if that risk is not imminent.⁴³ And Eric Posner has called for a law that would,

strong and longstanding aversion to any government management of public discourse. *See, e.g.,* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (stating that the government should assume that “information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them”); Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 586 (2004) (“The Court had long been a guardian against letting the state assume the role of guardian over the minds of the people.”).

38. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1313 (2007) (“In free speech cases, the Supreme Court most commonly applies a version of strict scrutiny that is ‘strict’ in theory and fatal in fact.”).

39. *See* David A. Strauss, *Persuasion, Autonomy, and the Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991) (“[T]he government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech.”). *But see infra* Part IV (discussing the argument that *Humanitarian Law Project* permits regulation of coordinated terrorist advocacy).

40. To keep things simple, we can assume for present purposes that such speech is independent advocacy, which would clearly fall outside of the scope of *Humanitarian Law Project*. *See infra* Part IV.

41. *See, e.g.,* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).

42. *See* Strauss, *supra* note 39, at 360 (“[T]he persuasion principle can be overridden if the consequences of permitting the speech are sufficiently harmful.”).

43. *See* Cass R. Sunstein, *Islamic State’s Challenge to Free Speech*, BLOOMBERG (Nov. 23, 2015, 12:38 PM), <https://www.bloomberg.com/view/articles/2015-11-23/islamic-state-s-challenge-to-free-speech> [<https://perma.cc/N9YE-VHEZ>].

among other things, criminalize “access[ing] websites that glorify, express support for, or provide encouragement for ISIS”—a law that, as Posner notes, would require significant modification of existing First Amendment doctrine to be constitutional.⁴⁴

Scholars such as Geoffrey Stone, however, have forcefully rejected these proposals. As Stone observed, “We have a long history in the United States of compromising our First Amendment freedoms in the face of perceived danger and then later recognizing that we had overreacted, often with dire consequences for individual freedom and for our democracy.”⁴⁵ From this perspective, the present fear of terrorist advocacy is no different than similar fears that arose during prior times of national stress, such as the fear of weakening a nascent government in the late eighteenth century, the fear of undermining the war effort during World War I, or the fear of Communism during the Cold War—all of which produced regrettable legislation such as the Sedition Act, the Espionage Act, and criminal syndicalism statutes.⁴⁶ Thus, any present action by the Court to soften First Amendment protections may similarly be recognized, in a more placid future, as a damaging and regrettable overreaction.

That being said, even Stone recognizes the existence of some theoretical tipping point at which direct regulation of terrorist advocacy may become necessary.⁴⁷ I tend to agree with Stone that this tipping point has not yet been reached. But even so, a time may well come when courts will have to grapple with circumstances sufficiently severe to justify content-based regulations of abstract terrorist advocacy—a result that would run counter to long-established and deeply ingrained First Amendment principles.

This theoretical tipping point represents a recognition that currently prevailing conditions are somehow exceptional compared to the typical contexts in which First Amendment doctrine has been applied—indeed, so exceptional as to justify a radical departure from the robust constitutional protection broadly afforded to abstract advocacy. In the context of terrorist advocacy, it represents a recognition that the present harm caused by such advocacy is far greater than what may have been contemplated in the formulation of current First Amendment standards.

These exceptional circumstances might be a product of the specific political and cultural conditions of the present day—conditions that may be quite different in the near future. For example, although extraordinary regulation of terrorist advocacy might be justified by the particularly

44. Eric Posner, *ISIS Gives Us No Choice But to Consider Limits on Speech*, SLATE (Dec. 15, 2015, 5:37 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html [https://perma.cc/9LAX-T8HD].

45. Geoffrey R. Stone, *ISIS, Fear, and the Freedom of Speech*, HUFFINGTON POST (Dec. 22, 2015, 3:19 PM), http://www.huffingtonpost.com/geoffrey-r-stone/isis-fear-and-the-freedom_b_8864050.html [https://perma.cc/G8C9-B7L9].

46. *See id.*

47. *See id.* (“[T]he better part of wisdom is not to toss away our hard-bought freedoms in the absence of truly *compelling* necessity.”).

dangerous brand of terrorism of the present day, that uniquely virulent and widespread brand of terrorism may well be absent ten years from now given shifting geopolitical, cultural, and sociological factors. As such, the present context might be framed as a discrete moment of national crisis—like a formal war—requiring special exceptions to First Amendment doctrine that may no longer apply in more typical times of peace.⁴⁸

But exceptional circumstances might also reflect deeper social or technological changes that are more far-reaching and permanent in nature. If and when the tipping point has been reached with respect to terrorist advocacy, that moment may be a harbinger of a “new normal”: a fundamental shift that is unlikely to change in the foreseeable future and thus may justify more permanent doctrinal change. And with respect to terrorist advocacy, the obvious candidate for this sort of game-changing circumstance is the broad emergence of the internet and social media—technological advances that were certainly not on the radar of the *Brandenburg* Court in 1969 and are unlikely to go anywhere in the foreseeable future.

Indeed, both Sunstein and Posner premised their calls for broad doctrinal revision on a judgment that the present dangers surrounding terrorist advocacy are both exceptional in scope and indicative of fundamentally changed circumstances wrought by the rise of the internet and social media. Sunstein, for example, observed that social media “can dramatically amplify the capacity of speech in one place to cause violence elsewhere at some uncertain time,”⁴⁹ and as he had argued in an earlier article, “[w]hen messages advocating murderous violence are sent to large numbers of people, it is possible to think that the *Brandenburg* calculus changes.”⁵⁰ And Posner argued that unlike “the old days,” when “radicals handed out crudely mimeographed leaflets at street corners,” the widespread circulation of media via the internet creates “radicalization echo chamber[s].”⁵¹ Thus, in his view, “[i]t is the change in technology, more than the change in the nature of foreign threats, that has given rise to a historic and unprecedented danger from foreign radicalization and recruitment.”⁵² To Sunstein and Posner, current First Amendment doctrine is ill-suited for a contemporary social and technological context that is fundamentally different from the context in

48. This broadly reflects the academic debate regarding the scope of *Brandenburg* described above. As scholars have observed, the highly speech-protective *Brandenburg* standard may be viewed merely as a peacetime standard, and a more deferential standard—such as the standard applied in *Dennis v. United States*, 341 U.S. 494 (1951), which has never been overruled—might be applied during times of war. See *supra* note 28 and accompanying text.

49. Sunstein, *supra* note 43.

50. See Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 370 (arguing that *Brandenburg* “offers unclear guidance on the express advocacy of criminal violence via the airwaves or the Internet”); see also Tsesis, *supra* note 32, at 657–58 (observing that “[t]errorist incitement is not new, but social networks have vastly increased the span of its influence,” enabling people to “upload videos, articles, and emails from internet cafes, home computers, or portable devices that can later be accessed anywhere in the world”).

51. Posner, *supra* note 44.

52. *Id.*

which the doctrine was developed.⁵³ As a result, the broad doctrinal balance previously struck between protecting speech and advancing important regulatory interests must be reevaluated and revised.⁵⁴

What doctrinal options are available to courts if and when they are confronted with these sorts of exceptional circumstances? Courts can ultimately take one of two approaches. On the one hand, they might simply adhere to the existing doctrinal framework, which mandates that all content-based restrictions on protected speech are subject to strict scrutiny,⁵⁵ and rely on the strict scrutiny standard to accommodate the emergence of any exceptional circumstances. Strict scrutiny is, of course, an onerous standard, particularly when applied in speech cases, where it has largely lived up to its “fatal in fact” reputation.⁵⁶ But the stringent nature of the standard fits Ashutosh Bhagwat’s description of strict scrutiny as a “safety valve” to deal with hard cases—a way to give courts an “out” to uphold infringements on core constitutional rights in these very sorts of exceptional circumstances.⁵⁷ Thus, when confronted with a content-based regulation of terrorist advocacy, courts can simply apply strict scrutiny, evaluating whether—under the present circumstance—the regulation is narrowly tailored to serve a compelling government interest and represents the least speech-restrictive means of advancing the regulatory interest in question.⁵⁸

On the other hand, courts might follow the path suggested by Sunstein and Posner and fundamentally redesign the contours of First Amendment doctrine to account for exceptional circumstances.⁵⁹ For example, they might expand the definition of low-value incitement,⁶⁰ create a new category of

53. See Sunstein, *supra* note 50, at 371 (observing that *Brandenburg* “was designed for what was, with respect to communications, a quite different world” and that “[t]he degree of danger from counsels of murder has increased with the rise of the Internet”); see also Posner, *supra* note 44.

54. See Lidsky, *supra* note 33, at 164 (arguing that *Brandenburg*’s imminence requirement should be modified “so that it does not preclude liability for social-media incitement”).

55. See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

56. See *supra* note 38 and accompanying text; Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (characterizing strict scrutiny as “‘strict’ in theory and fatal in fact”).

57. Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 961–62 (1998); see also *id.* at 972 (observing that strict scrutiny “appears to function as an ‘exigent circumstances’ exception to otherwise clear and highly rights-protective constitutional rules,” which is “invoked in ‘hard cases’ where a reviewing court sees a strong conflict between constitutional values and societal interests”).

58. See, e.g., *Playboy Entm’t Grp.*, 529 U.S. at 813.

59. See *supra* notes 43–44 and accompanying text.

60. Some scholars have characterized the *Brandenburg* test as, in essence, an application of the strict scrutiny standard with respect to a particular subset of speech. See, e.g., Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 930 (2009) (“The *Brandenburg* test . . . could be viewed as defining what regulations are sufficiently narrowly tailored to the government’s interest in preventing violence.”); Healy, *supra* note 28, at 689 (arguing that “*Brandenburg* should be understood as an application of strict scrutiny”). I take no position on this issue, as it does not affect my analysis here; for present purposes, it suffices to say that the *Brandenburg* standard—even if conceptualized as a special application of strict scrutiny—operates in a broad and categorical

low-value speech, or adopt broad or narrow readings of key precedents like *Brandenburg*.⁶¹ This sort of broad doctrinal reformulation is not unprecedented in constitutional decision-making,⁶² and the general rationale for applying this approach to terrorist advocacy is clear: if we do in fact live in a fundamentally different, technologically connected world as compared to the *Brandenburg* era, wholesale doctrinal rebalancing—rather than the patchwork application of strict scrutiny—might be the most sensible option.

Although the above discussion represents a somewhat simplified version of these issues,⁶³ this basic framework sheds some light on how courts should broadly approach cases dealing with terrorist advocacy, which I turn to in the next Part.

III. A PROPOSED APPROACH TO TERRORIST ADVOCACY

So how should courts proceed when confronted with exceptional circumstances—that is, an outsized degree of actual or estimated harm—with respect to terrorist advocacy?⁶⁴ In the abstract, the optimal approach will depend heavily on the origin and nature of the circumstances in question.

manner that is clearly distinct from the case-by-case nature of traditional strict scrutiny. *See, e.g.*, Farber, *supra*, at 930.

61. I include here any argument that the more deferential, pre-*Brandenburg* approach to dangerous advocacy is technically still good law and that *Brandenburg* should be read narrowly based on its facts. *See* Tsesis, *supra* note 32, at 707 (“The *Brandenburg*-based argument against the regulation of terrorist advocacy lacks contextual nuance of the multivalent dangers involved.”); *supra* note 28 and accompanying text; *cf.* Collins & Skover, *supra* note 28, at 853 (observing that “given the times and the prevailing government mindset, . . . *Schenck* could have a constitutional come-back”); Healy, *supra* note 28, at 660 (“*Brandenburg* does not tell us whether there is anything about the current terrorist threat that would make its protections inapplicable.”).

62. *See* Bhagwat, *supra* note 57, at 984–86 (discussing a wide range of constitutional cases that exhibit a “pattern of repeated discomfort with results, leading to reformulation of doctrine”).

63. For example, exceptional speech-based harms might be the product of many different causal factors, all of which may fall on different points along the spectrum between highly idiosyncratic and context-specific on the one hand and fundamental and far-reaching on the other. Furthermore, if courts choose to redesign First Amendment doctrine in response to exceptional circumstances, they can do so at various levels of breadth: they might radically reformulate the basic contours of the *Brandenburg* test, or they might merely carve out a very narrow exception to the test, leaving it largely intact.

64. Any time courts face an argument that exceptional circumstances exist, they may exhibit systemic biases that overweigh the more concrete and targeted regulatory interests in question compared to the more abstract and dispersed benefits of free speech. *See, e.g.*, David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. (forthcoming 2017) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3010383 [<https://perma.cc/ML8V-224N>]; Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 744 (2002); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 72–73 (1987). There are thus strong reasons to favor doctrinal approaches that limit judicial discretion *ex ante* in evaluating these sorts of cases. *See* Han, *supra* (manuscript at 17); Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 295–96. I do not delve into these issues for present purposes, as my analysis here focuses primarily on how courts should proceed when exceptional circumstances warranting some sort of doctrinal accommodation do in fact exist.

Because strict scrutiny analysis operates on a retail, case-by-case basis,⁶⁵ it would more naturally fit situations where the circumstances in question are an obvious outlier—that is, where the exceptional harm is the product of a narrow and unique set of circumstances unlikely to reoccur in the future. On the other hand, broad doctrinal reformulation would more naturally fit situations where the exceptional circumstances are not outliers but rather a product of deeply rooted social or technological changes that fundamentally alter the basic balance between speech protection and the government’s regulatory interests.

All of this is complicated, however, by epistemic limitations. Particularly when a novel set of exceptional circumstances emerges, it is often difficult—if not impossible—for courts to know whether those circumstances represent an outlier or are indicative of a fundamentally changed reality. A general approach to terrorist advocacy must therefore take this uncertainty into account, weighing the pros and cons of adhering to strict scrutiny versus broad doctrinal reformulation in this context.

With this in mind, I propose that strict scrutiny analysis—rather than broad doctrinal reformulation—should *always* be the first-line test to account for these sorts of exceptional circumstances. That is, any time courts confront, for the first time, an argument that present circumstances require that a content-based regulation of terrorist advocacy be upheld, they should evaluate that regulation under strict scrutiny—and uphold it under that standard if warranted—rather than resort immediately to broad revision of First Amendment doctrine. Any doctrinal reformulation should occur only *after* courts have, through the case-by-case application of strict scrutiny, accumulated sufficient experience and exposure to confidently conclude that such reformulation is indeed necessary.

*A. Strict Scrutiny as the First-Line Test to
Account for Exceptional Circumstances*

Whenever courts are confronted with an argument that exceptional circumstances justify a departure from established First Amendment principles in regulating terrorist advocacy, they should adhere—at least initially—to strict scrutiny as the means of analysis. Applying this stringent standard serves an initial purpose of ensuring that courts evaluate any such arguments with a very high bar, thus weeding out all but the most compelling of arguments. Furthermore, adhering to the narrower strict scrutiny analysis—rather than undertaking broad doctrinal revision—would limit any harm produced by an erroneous determination that such exceptional circumstances exist.

65. See, e.g., Farber, *supra* note 60, at 931 (contrasting broad, categorical approaches with the “case-by-case application of strict scrutiny”). Of course, any time a court strikes down or upholds a speech regulation under strict scrutiny, that decision may influence similar analyses in the future. But such analysis ultimately focuses on the particular statute in question and on the particular surrounding circumstances in contrast to a broad doctrinal reformulation such as expanding the *Brandenburg* test.

Suppose, for example, that a court upholds a content-based restriction of terrorist advocacy in a decision later deemed by all to be clearly erroneous. If the statute was erroneously upheld by instituting broad changes to First Amendment doctrine—like relaxing *Brandenburg*'s strict standard for incitement—then the resulting harm would be expansive, extending well beyond the scope of the statute itself. Furthermore, any such harm would be difficult to remedy, as nothing short of a judicial pronouncement reversing the doctrinal revision would suffice. If, however, the statute in question was erroneously upheld under the narrower strict scrutiny approach, then any resultant harm would be comparatively limited, and much of the damage may be reversed by simply repealing the statute.⁶⁶

For present purposes, however, let's stipulate that exceptional factual circumstances justifying content-based regulation of terrorist advocacy *do* indeed exist. Upholding such regulations under strict scrutiny—rather than by, say, modifying the contours of low-value incitement—serves an important messaging function to courts, legislatures, and the public, and it promotes caution and incrementalism by giving courts space to consider potential reductions in speech protection on a case-by-case basis.

In upholding a content-based regulation of protected speech under strict scrutiny, a court conveys the truly exceptional nature of both the circumstances in question and the court's actions. As I noted above, strict scrutiny has generally lived up to its "fatal in fact" reputation in the context of free speech, thus breeding a general understanding among courts and legislatures that any regulation triggering the standard will effectively be dead on arrival.⁶⁷ Given this baseline, in the extremely rare event that a court *upholds* a regulation under strict scrutiny, it also sends a strong message that the case at hand is truly exceptional—an outlier within the vast realm of unconstitutional content-based speech regulations.⁶⁸ No such message is communicated, however, if courts, when confronted with exceptional circumstances, immediately resort to doctrinal reformulation.

Furthermore, adhering to the strict scrutiny framework promotes a general understanding that existing doctrine is sticky and not easily changed. This is a particularly important message to communicate in the context of speech regulation, in which the dangers of government distortion and manipulation of the marketplace of ideas are of central concern.⁶⁹ By contrast, if courts

66. This is the difference between, for example, upholding a present-day Espionage Act by reinstating *Schenck*'s deferential "clear and present danger" standard versus upholding it because, given present circumstances, this particular statute was narrowly tailored to serve a compelling government interest. *Cf. Schenck v. United States*, 249 U.S. 47 (1919). An error in the former approach would create far more harm than an error in the latter.

67. *See supra* note 38 and accompanying text.

68. *See Fallon, supra* note 38, at 1292 ("[T]he compelling interest formula gave content to the notion that preferred rights were indeed preferred and that strict scrutiny was truly strict.")

69. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from

were to respond to an exceptional case of terrorist advocacy by, say, immediately modifying the *Brandenburg* definition of incitement, such action would engender a broad sense that First Amendment doctrine is provisional and fluid.

It is particularly vital that courts communicate both of these messages to other courts, legislatures, and the public anytime that a reduction in First Amendment protection is being contemplated. Any failure on the part of courts to convey the highly exceptional nature of such cases and to reaffirm the integrity of the existing doctrinal framework may encourage state actors to challenge existing doctrinal boundaries more aggressively and open the door to widespread dilution of First Amendment protection. Using strict scrutiny to account for exceptional circumstances effectively communicates these messages; immediate wholesale rebalancing of First Amendment doctrine does not.

Furthermore, given the epistemic limitations faced by courts—particularly in novel factual contexts—initially relying on strict scrutiny to address exceptional circumstances would prevent courts from prematurely committing to a fundamentally rebalanced First Amendment doctrine that all may come to regret in a more placid future. It is certainly possible that fundamentally changed social and technological conditions will eventually require broad recalibrations of First Amendment doctrine, like reformulating the definition of low-value incitement.⁷⁰ But even if such doctrinal rebalancing is ultimately warranted, strict scrutiny analysis plays a vital role as an intermediate step on the path to such rebalancing. It gives courts some space to carefully consider whether the present circumstances are truly indicative of a fundamentally changed reality or merely a troublesome outlier.

Underlying my argument is a broad principle of epistemic humility and incrementalism. As Stone noted, the United States has had a long track record of erroneously underprotecting speech during times of national stress, and such errors have worked to erode fundamental First Amendment values.⁷¹ Given these stakes, courts should proceed cautiously whenever they contemplate a broad categorical reduction in speech protection. As Vincent Blasi has observed, “The first amendment . . . should be targeted for the worst of times”—that is, “those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.”⁷²

Thus, even when courts may strongly believe, in a case of first impression, that fundamentally changed circumstances justify broad doctrinal revision with respect to terrorist advocacy, it remains vital that they adhere to strict

the marketplace.”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 422, 426 (1996).

70. See *infra* Part III.B.

71. See Stone, *supra* note 45.

72. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

scrutiny as the means of accounting for such circumstances. The value of strict scrutiny in this context is that it does not force courts to account for exceptional circumstances by evaluating doctrine on a wholesale level. Instead, it allows courts to decide cases narrowly, on a case-by-case basis.⁷³ Over time, courts may accumulate sufficient experience and data through these case-by-case analyses to ultimately conclude (or confirm) that fundamental social and technological changes do indeed require, say, a rebalanced and expanded definition of incitement. But the important thing is that they will have done so in a more gradual and circumspect manner, which befits an incredibly weighty decision to contract the scope of First Amendment protection—a decision that may not be easily reversible.

Strict scrutiny thus acts not only as a safety valve to account for exigent circumstances but also as an intermediate stopping point that provides courts with both time and data points to evaluate whether more far-reaching doctrinal rebalancing is needed. Adhering to this more incremental approach gives courts space to ensure that they are not falling into the trap encapsulated by the well-worn maxim that “hard cases make bad law”⁷⁴—they can consider, in a more thoughtful and deliberate manner, whether any exceptional circumstances are merely outliers or whether they reflect a fundamentally changed reality.

*B. Instituting Broad Doctrinal Change When
Warranted by Strict Scrutiny Analysis*

Although courts should initially adhere to strict scrutiny analysis to account for exceptional circumstances, this does not mean that strict scrutiny should be the *exclusive* means of accounting for such circumstances. Although doctrinal stability and cautious incrementalism are of paramount value with respect to speech regulation, they are not the only considerations, and, under some circumstances, broad doctrinal revision may become necessary to preserve the structural integrity of the overarching doctrinal framework.⁷⁵

The highly onerous nature of the strict scrutiny standard functions as the primary doctrinal bulwark of the First Amendment’s protection of free speech. The fact that all content-based regulations of protected speech are effectively rendered dead on arrival under that standard has a powerful effect on both legislatures and courts: lawmakers and government officials will

73. See Bhagwat, *supra* note 57, at 973 (describing “strict scrutiny balancing” as “defin[ing] a right to include an internal, ad hoc limit which is established by the governmental interest in a particular case”).

74. *Id.* at 986 (“An isolated case or occasional instance of discomfort cannot be enough of a basis to reconsider a rule, for all of the reasons that hard cases are said to make bad law—permitting such easy reconsideration would eliminate most of the benefits of stability and predictability that rules provide.”).

75. *Cf. id.* at 984–85 (“[T]he existence of many hard cases might suggest the need to reconsider a constitutional rule as well as common law rules. There are clearly instances in which the Court has, and should, reconsider its constitutional doctrine in light of ongoing discomfort with the doctrine’s consequences.”).

tend to steer clear of such regulations absent extraordinary circumstances,⁷⁶ and courts have little room to exercise the sort of open discretion that is dangerous to free speech values.⁷⁷ Furthermore, as discussed above, this “fatal in fact” baseline for strict scrutiny ultimately highlights the truly exceptional and extraordinary nature of any rare case in which a regulation survives such scrutiny.

Let’s assume, however, that over time, courts have routinely upheld many content-based regulations of terrorist advocacy under strict scrutiny, holding in each case that the regulation was justified given the exceptional circumstances involved. The more that content-based regulations survive strict scrutiny in this manner, the more that the power and messaging function of that standard become diluted. State actors may no longer assume that strict scrutiny represents a death sentence for content-based speech regulations, and thus may be far more willing to roll the dice with such regulations.⁷⁸ And as courts grow more and more accustomed to upholding regulations under strict scrutiny—even if these decisions are doctrinally justified in each particular case—they may naturally begin to perceive the standard as something substantially less than “fatal in fact” and become more willing to uphold content-based speech regulations in cases involving far less compelling circumstances.⁷⁹

In other words, the power of strict scrutiny is derived largely from the rarity with which it is satisfied: for strict scrutiny to function effectively as the primary protector of First Amendment values, it must be a standard that can be met *only* in the most extraordinary of circumstances. This power fades when regulations survive such scrutiny on a frequent and routine basis, and this dilution can spread to all applications of the standard throughout First Amendment doctrine.⁸⁰ And at a certain point, this systemic harm may outweigh the benefits of caution and incrementalism inherent to a case-by-case strict scrutiny approach.

76. Cf. Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1316 (2014) (“It is easy enough to write an administrative manual that prohibits treating speakers differently because of what they say, regardless of motivation.”).

77. See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) (observing that in a two-tier scrutiny system, “outcomes can be determined at the threshold without the need for messy balancing,” and “[i]f strict scrutiny is applied, the challenged law is never supposed to survive”).

78. See Bhagwat, *supra* note 57, at 1005 (arguing that ad hoc strict-scrutiny-based exceptions “create systematic incentives for government officials to concoct claims of exigency to support repressive actions, because as long as the claims are plausible, the relevant officials can argue honestly and convincingly, both to the public at large and to themselves, that they are acting consistently with the Constitution”).

79. See *id.* at 993 (observing that ad hoc strict scrutiny balancing “produces a tendency . . . for exceptions which were designed to be limited to extreme circumstances, to expand over time, and to undermine even the core of the individual liberties protected by the Constitution”).

80. See David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 411 (2015) (“Watering down the strict scrutiny standard [in one context] impairs its efficacy as a predictable near-categorical standard elsewhere.”).

To frame this in another way, if content-based regulations of terrorist advocacy survive strict scrutiny on a frequent and routine basis, this suggests that the circumstances underlying them are *not* in fact idiosyncratic outliers but are rather indicative of something more fundamental and lasting. And once this becomes reasonably clear, broad doctrinal revision—such as a redefinition of low-value incitement—makes more sense than routine holdings that content-based regulations meet strict scrutiny.⁸¹ Reformulating doctrine under these circumstances would restore strict scrutiny to its designated role as a highly onerous, near-categorical protector of core speech values, and it would do so in a context where the risk of error in instituting such doctrinal revision is significantly diminished.

So at what point should case-specific strict scrutiny analysis give way to wholesale doctrinal revision? The optimal balance between caution and incrementalism on the one hand and preserving a robust strict scrutiny standard on the other is difficult to identify in the abstract, as it will vary based on the particular circumstances and type of speech in question. As I noted above, however, strict scrutiny should *always* be the initial means of evaluating novel cases involving content-based regulation of abstract terrorist advocacy. In such cases, the value of caution and deliberation and the risk of erroneous judgments are at their maximum, and the risk of systematically diluting strict scrutiny is relatively limited.⁸² But over time, as courts uphold more such regulations under strict scrutiny, the scales will start to tip in the other direction until broad doctrinal revision is preferable. Although it is difficult to generalize beyond this, it is vital that courts recognize this broad dynamic in working through these cases.

IV. A FEW OBSERVATIONS REGARDING STRICT SCRUTINY

Given that my proposed approach revolves around the central importance of strict scrutiny in evaluating exceptional circumstances, I want to close with a few observations regarding the standard itself. Needless to say, for strict scrutiny to play the role outlined above, it must be calibrated and applied in a careful and meaningful manner.

On the one hand, it must be rigorous and nondeferential in nature, to ensure that content-based regulations of protected speech survive only in truly exceptional circumstances. As I noted above, if courts uphold such regulations frequently and routinely, they risk diluting the strict scrutiny standard, which would threaten systemic harm to First Amendment protections across the board.⁸³

On the other hand, the standard cannot truly be “fatal in fact.” If courts strike down statutes under strict scrutiny automatically, then the standard

81. *Cf.* Bhagwat, *supra* note 57, at 984 (observing that “it is implicit in the common law process of decisionmaking that courts learn from experience, and modify rules over time in response to new facts and perhaps even new hypotheticals,” and arguing that “the existence of many hard cases might suggest the need to reconsider a constitutional rule”).

82. *See supra* note 65 and accompanying text.

83. *See supra* Part III.B.

cannot play its vital role as a safety valve—a necessary means of relief in exigent circumstances.⁸⁴ Furthermore, a truly “fatal in fact” strict scrutiny standard cannot act as a useful intermediate step towards broad doctrinal revision.⁸⁵ In this role, strict scrutiny is valuable because it produces and encourages meaningful thought and consideration on the part of courts in weighing regulatory interests against speech considerations. A categorically fatal strict scrutiny standard would thus provide little value: in the face of a foregone conclusion, courts would have little incentive to grapple seriously with the potentially difficult issues posed in a given case.⁸⁶ Strict scrutiny must therefore impose an onerous but meaningful and achievable burden on the government.

Beyond that, it is difficult to generalize about how the standard should apply, as it is ultimately a highly fact-specific inquiry. For present purposes, however, I want to offer a few thoughts on the Court’s 2010 decision in *Humanitarian Law Project*, since that case might appear to be a natural reference point for my discussion here.

In *Humanitarian Law Project*, the Court upheld an application of a federal statute that prohibited “knowingly provid[ing] material support or resources to a foreign terrorist organization.”⁸⁷ In relevant part, the statute defined “material support” to include “training” and “expert advice or assistance,” and it expressly excluded “religious materials.”⁸⁸ The Court appeared to apply strict scrutiny in upholding an as-applied challenge to the statute,⁸⁹ but in doing so, it gave substantial deference to the legislative and executive branches—far more deference than is typically afforded under strict scrutiny⁹⁰—given the national security and foreign affairs aspects involved.⁹¹

Although *Humanitarian Law Project* may appear to be an obvious point of comparison here, I think it should provide only limited guidance to the question of regulating abstract terrorist advocacy. As an initial matter, the *Humanitarian Law Project* Court strongly emphasized that the material-support statute did *not* cover independent advocacy, but rather only material support provided “under the direction of, or in coordination with foreign

84. See *supra* note 57 and accompanying text.

85. See *supra* Part III.A.

86. See Han, *supra* note 80, at 399–400.

87. Holder v. Humanitarian Law Project, 561 U.S. 1, 2 (2010) (quoting 18 U.S.C. § 2339B (2006)).

88. 18 U.S.C. § 2339A(b)(1).

89. Although the *Humanitarian Law Project* Court indicated that a standard of review more demanding than intermediate scrutiny applied, it otherwise left the standard vague. See *Humanitarian Law Project*, 561 U.S. at 20–22. On two subsequent occasions, however, Chief Justice Roberts—who wrote the majority opinion in *Humanitarian Law Project*—stated that the *Humanitarian Law Project* Court was in fact applying strict scrutiny. See Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015); McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).

90. See, e.g., Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 179 (2015) (observing that the *Humanitarian Law Project* Court’s deference was “the very opposite of ‘strict scrutiny’”).

91. See *Humanitarian Law Project*, 561 U.S. at 28–29.

groups that the speaker knows to be terrorist organizations.”⁹² Indeed, the Court went out of its way to state that it “in no way suggest[s] that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.”⁹³ Why the Court so insistently highlighted this distinction is obvious: as Robert Post and Amanda Shanor observed, “[n]o court would allow speakers to be thrown in jail *merely* for publishing independent pamphlets supporting Hamas,” and “it would be shocking if the Court were to exercise similar deference [as the *Humanitarian Law Project* Court] in the context of truly independent speech.”⁹⁴ Thus, *Humanitarian Law Project* likely holds little force with respect to content-based regulations of independent terrorist advocacy.

What about purely abstract terrorist advocacy made in coordination with a foreign terrorist organization? Although some have read *Humanitarian Law Project* as upholding the government’s ability to regulate such speech,⁹⁵ the opinion itself is somewhat obscure on the issue. In rejecting the plaintiffs’ vagueness challenge, the Court recognized that the statute covered “advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.”⁹⁶ But with respect to the First Amendment challenge, the Court upheld the statute only as applied to the plaintiffs’ provision of training regarding how to peaceably resolve disputes and petition international organizations for relief.⁹⁷ It notably declined to do so regarding the plaintiffs’ proposed “political advocacy” on behalf of foreign terrorist organizations and held only that their proposals “are phrased at such a high level of generality that they cannot prevail in this preenforcement challenge.”⁹⁸

Humanitarian Law Project thus leaves some room to distinguish coordinated abstract advocacy from the coordinated provision of fact-based

92. *Id.* at 21.

93. *Id.* at 34.

94. Post & Shanor, *supra* note 90, at 180.

95. See, e.g., Owen Fiss, *The World We Live in*, 83 TEMP. L. REV. 295, 296 (2011) (stating that *Humanitarian Law Project* “upheld the authority of Congress to criminalize political advocacy on behalf of foreign terrorist organizations”); Tsesis, *supra* note 32, at 675 (arguing that *Humanitarian Law Project* “indicates why there is a compelling interest to act against social media postings that seek to cooperate, legitimate, recruit, coordinate, or indoctrinate on behalf of [foreign terrorist organizations]”).

96. *Humanitarian Law Project*, 561 U.S. at 19.

97. *Id.* at 31–33.

98. *Id.* at 33 (observing that “plaintiffs do not specify their expected level of coordination with the [organizations] or suggest what exactly their ‘advocacy’ would consist of”); see also Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT’L L. REV. 519, 532 (2011) (“[T]he Court expressly did not reach whether the Constitution would permit a ban on *coordinated* political advocacy if engaged in with a designated foreign terrorist group.”). But see Fiss, *supra* note 95, at 302–03 (characterizing this “reprieve” as “only an illusion” given that “the entire opinion emphasized the distinction between coordinated and independent advocacy”).

and technical “training” and “expert advice,”⁹⁹ and this distinction accords with longstanding First Amendment principles. In undertaking its less-than-rigorous application of strict scrutiny, the *Humanitarian Law Project* Court relied heavily on courts’ limited ability to assess the empirical judgments necessary to substantiate the government’s asserted causal chain linking the regulated speech and the harms in question¹⁰⁰: for example, the extent to which peaceable “training” and “expert advice” provided to foreign terrorist organizations can nevertheless advance those organizations’ unlawful activities¹⁰¹ and the extent to which the provision of such support would raise “foreign policy concerns involving relationships with our Nation’s allies.”¹⁰²

Abstract terrorist advocacy, however, creates social harm via a causal mechanism with which courts are intimately familiar: persuasion. Indeed, the appropriate treatment of harmful persuasion via advocacy is the singular issue that inaugurated the modern era of First Amendment jurisprudence.¹⁰³ The Court grappled with this issue throughout the early to mid-twentieth century until its decision in *Brandenburg*.¹⁰⁴ Terrorist advocacy is ultimately no different from any other dangerous advocacy the Court has confronted: it operates by persuading others to commit socially harmful acts. Furthermore, as David Strauss observed, the Court has consistently adhered to the principle that absent “extraordinary circumstances, the government may not restrict speech because it fears, however justifiably, that the speech will persuade those who hear it to do something of which the government disapproves.”¹⁰⁵

Thus, courts have less reason to defer to legislative or executive judgments with respect to abstract terrorist advocacy. They are far more competent to evaluate evidence and make judgments where the causal mechanism for the harm in question is persuasion by advocacy rather than the exploitation of purely factual “training” or “expert advice,”¹⁰⁶ and longstanding precedent

99. The statute defines “training” as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.” 18 U.S.C. § 2339A(b)(2) (2012). It defines “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized knowledge.” *Id.* § 2339A(b)(3).

100. *See Humanitarian Law Project*, 561 U.S. at 29 (observing that the case “implicates sensitive and weighty interests of national security and foreign affairs” and that “when it comes to collecting evidence and drawing factual inferences in this area, ‘the lack of competence on the part of the courts is marked,’ and respect for the Government’s conclusions is appropriate” (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981))).

101. *See id.* at 29–34.

102. *Id.* at 29.

103. *See generally, e.g.,* *Abrams v. United States*, 250 U.S. 616 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

104. *See* Healy, *supra* note 28, at 656 (observing that the question of “whether the government can prohibit speech that encourages others to break the law” was “at the heart of the Supreme Court’s first major speech cases in the early twentieth century and was the focus of significant debate” until *Brandenburg*). *See generally, e.g.,* *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927).

105. Strauss, *supra* note 39, at 334.

106. *Cf.* Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 271 (2005) (distinguishing between “knowledge-based speech” and “persuasive political speech” and arguing that “*Brandenburg*, focused on advocacy, has little to say about purely knowledge-based communication”).

makes clear that content-based regulations of such advocacy are subject to a far more onerous application of strict scrutiny than that used by the *Humanitarian Law Project* Court.¹⁰⁷ The government should therefore carry a significantly higher evidentiary burden for justifying content-based regulations of terrorist advocacy than it did in *Humanitarian Law Project*.

V. CONCLUSION

As violent and deplorable acts inspired by abstract terrorist advocacy continue to multiply both here and abroad, courts will increasingly face a difficult question: do present circumstances justify a substantial departure from core First Amendment principles, such that the government can directly regulate such advocacy? In addressing this question, one need only look at our nation's long track record of overzealous and regrettable speech regulation during perceived times of national crisis to appreciate the paramount importance of caution, deliberateness, and epistemic humility. Courts, legislatures, and the public can easily get caught up in the tyranny of the present: circumstances that, in the heat of the moment, seem exceptional and fundamentally "game-changing" may reveal themselves to be less severe and more evanescent when evaluated at a more sober distance.¹⁰⁸

It is therefore vital that courts approach this issue with restraint, initially adhering to narrow strict scrutiny analysis in evaluating such cases. Addressing terrorist advocacy in this case-by-case manner gives courts the time and space to deliberate, accumulate experience, and work through the question of whether the exceptional circumstances presented are mere outliers or indicators of more fundamental and long-lasting changes. It may be that a categorical reduction in First Amendment protection of terrorist advocacy becomes inevitable, as fundamental technological changes allow such speech to produce harms far beyond those contemplated by the present doctrine. But if history has taught us anything, this sort of far-reaching doctrinal rebalancing should be the product of substantial deliberation and made at a sober distance, as free speech protections, once eroded, are not easily restored.

107. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 412–18 (1989); Post & Shanor, *supra* note 90, at 180–81 (“Whatever its self-proclaimed level of scrutiny, *Humanitarian Law Project* is inconsistent with the far more forceful constitutional protections that courts normally apply to public discourse.”).

108. Cf. Bhagwat, *supra* note 57, at 1010 (“[M]any purportedly hard cases turn out in retrospect not to have been hard at all, because the claimed social emergency was exaggerated or nonexistent—even though courts lack the institutional capacity or the independence to be able to tell the difference at the time.”).