Freedom from Retaliation: Theorizing a Hybrid First-Fourth Amendment Anti-Retaliation Right

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Abstract: *Where a content-neutral criminal law is applied to political speech, especially speech openly critical of the government and law enforcement, both the First and Fourth Amendments to the Constitution should be relevant. Political speech ought to spark serious First Amendment worries while police enforcement raises attendant Fourth Amendment concerns. But the current doctrines encompassing retaliatory arrests only cursorily consider the weight of both Amendments. The separate view of the First and Fourth Amendment remains the dominant approach—even Section 1983 retaliatory arrest claims are squarely considered under the First, not the Fourth, Amendment. This bifurcated approach to the two Amendments is mistaken. When political speech results in police enforcement of content-neutral criminal laws, the First Amendment and Fourth Amendment ought to be considered in harmony. In such circumstances, a right to be free from retaliation ("Anti-Retaliation Right") should apply: a Fourth Amendment search or seizure resulting from political speech should be presumptively unreasonable. Such a hybrid right would both fulfill the Fourth Amendment purpose of restricting "unreasonable" executive action and bolster the First Amendment principles safeguarding the freedom of political speech.*

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INTRODUCTION

Just over 60 years ago, in the Spring of 1965, a group of civil rights protestors in Selma, Alabama attempted to march across the Edmund Pettus Bridge, a bridge named for a former Grand Wizard of the Ku Klux Klan, to protest segregation and racial injustice. On "Bloody Sunday," state troopers, county sheriffs, and a posse of locals wearing Klan hoods and waving Confederate flags beat, whipped, and tear-gassed the protestors.[1] This kind

[1] See Christopher Klein, How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement, History (last updated May 28, 2025), https://www.history.com/articles/selma-bloody-sunday-attack-civil-rights-movement [https://perma.cc/G9SH-3TNW]. The transcendent motivation in Bloody Sunday was undoubtedly racial animus and hate. I highlight the free speech and expression concerns because of their relevance to this Note's focus on criminal procedure and the Fourth Amendment—police used excessive force against the civil rights protestors at least in part because of

of retaliation for political expression is no relic of the past. Recently, police interventions at college campuses across the country[2] and detentions of people critical of the United States' policy on Israel-Palestine[3] have served as sobering reminders of the suppressive potential that criminal law enforcement still presents to the exercise of free speech.[4] The reality is that political expression, particularly unpopular political expression, is often met with law enforcement action of some kind.[5] When a person criticizes the government or expresses their political views, they should not be subject to punishment by the very government they critiqued.

The First Amendment, which protects the freedom of speech, and the Fourth Amendment, which prohibits unreasonable searches and seizures, both appear directly applicable when police respond to political speech. But after a study of constitutional law and criminal procedure, one might reasonably understand the First and Fourth Amendments as two ships passing in the night.[6] These two amendments are not considered nearly as

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their political expression. From a constitutional law perspective, Bloody Sunday might also implicate Fourteenth Amendment Equal Protection and Due Process concerns.

[2] See, e.g., Isabelle Taft, How Universities Cracked Down on Pro-Palestinian Activism, N.Y. Times (Nov. 25, 2024), https://www.nytimes.com/2024/11/25/us/university-crackdowns-protests-israel-hamas-war.html [https://perma.cc/QY2J-2V3D].

[3] See, e.g., Julia Rose Kraut & Tyler McBrien, The Trump Administration's Embrace of Ideological Exclusion and Deportation, Lawfare (July 29, 2025, 11:00 AM), https://www.lawfaremedia.org/article/the-trump-admin-s-embrace-of-ideological-exclusion-and-deportation (examining use of immigration law based on political speech); *Khalil v. Trump*, 2:25-cv-01963-MEF-MAH, 2025 WL 1649197, at *3–6 (D.N.J. June 11, 2025) (discussing, *inter alia*, petitioner's exercise of free speech); Jake Offenharz, Kathy McCormack & Michael Casey, Turkish student at Tufts University detained, video shows masked people handcuffing her, AP News (last updated Mar. 26, 2025), https://apnews.com/article/tufts-student-detained-massachusetts-immigration-6c3978da98a8d0f39ab311e092ffd892 [https://perma.cc/J99M-VQ4A] (Tufts graduate student arrested for writing an editorial critical of the university's response to the Gaza War).

[4] For an argument that recent removals to El Salvador pursuant to the Alien Enemies Act, 50 U.S.C. § 21, are unconstitutional criminal law enforcement, see Rachel A. Goldman, Trump's Agreement with El Salvador Violated the Constitution, Lawfare (July 30, 2025), https://www.lawfaremedia.org/article/trump-s-agreement-with-el-salvador-violated-the-constitution [https://perma.cc/Q2PF-LF44].

[5] See, e.g., Jaclyn Diaz, In NYC and LA, police response to campus protestors draws sharp criticism, NPR (May 8, 2024, 5:01 AM), https://www.npr.org/2024/05/08/1248935672/campus-protests-police-arrests [https://perma.cc/NH6R-9X23]; Sandhya Kajeepeta & Daniel K.N. Johnson, Police and Protests, The Inequity of Police Responses to Racial Justice Demonstrations, Thurgood Marshall Inst., Legal Defense Fund, https://tminstituteldf.org/police-and-protests-the-inequity-of-police-responses-to-racial-justices-demonstrations/.

[6] See Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 758 (1994) ("The Fourth Amendment is part of the Constitution yet is rarely taught as part of Constitutional Law. Rather it unfolds as a course unto itself, or is crammed into Criminal Procedure."). Professor Amar's 1994 observation seemingly remains true today. In the Choper, Dorf, Fallon, and Schauer Constitutional Law textbook, for example, there is no Fourth Amendment section. See Jesse H. Choper, Michael C. Dorf, Richard H. Fallon, Jr. & Frederick Schauer, Constitutional Law Cases, Comments, and Questions vii–xxxiii (14th ed. 2023).

entwined as, for example, the Fourth and Fifth Amendments[7] or the Fourteenth Amendment and the first eight amendments of the Bill of Rights.[8]

The disentangled view of the First and Fourth Amendments usually makes sense. In most Fourth Amendment cases, no protected First Amendment activity is at issue. Similarly, many First Amendment cases arise in non-criminal contexts, like libel[9] or Establishment Clause challenges to government action,[10] that generally fall beyond the Fourth Amendment's scope.[11] Even some canonical First Amendment cases that do involve law enforcement action based on speech require little consideration of the Fourth Amendment because the content-based criminal law, rather than its enforcement, is at issue.[12] For example, the classic case *Texas v. Johnson*[13] makes no mention of the Fourth Amendment, even though Johnson was arrested and prosecuted for burning an American flag as an act of political protest.[14] But cases like *Johnson* have little need to consider the Fourth Amendment because the content-based statute itself, rather than retaliatory enforcement of content-neutral laws, is at issue.[15]

However, where a content-neutral criminal law is applied to political speech, both the First and the Fourth Amendments should be relevant. Political speech, especially speech critical of criminal law enforcement, should spark serious First Amendment worries, and police enforcement

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[7] See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case.").

[8] See, e.g., Cantwell v. State of Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) ("We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment. . . .").

[9] See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (regarding Free Speech challenge to libel action).

[10] See, e.g., Lee v. Weisman, 505 U.S. 577, 580 (1992) (discussing Establishment Clause challenge to clergy at public school ceremonies).

[11] The Fourth Amendment does cover some civil circumstances, and perhaps it should cover more. But the modern Fourth Amendment doctrine has been placed almost exclusively in the criminal context. See Amar, supra note 6, at 758 ("[T]he Fourth Amendment applies equally to civil and criminal law enforcement."); cf. Camara v. Mun. Ct. of City & Cnty. of San Francisco, 387 U.S. 523, 534 (1967) (discussing administrative warrants).

[12] See, e.g., Dennis v. United States, 341 U.S. 494, 495–96 (1951) (regarding arrest and prosecution resulting in challenge to the Smith Act); United States v. O'Brien, 391 U.S. 367, 370, 376 (1968) (regarding arrest and prosecution resulting in challenge to Universal Military Training and Service Act); Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (regarding arrest and prosecution resulting in challenge to Ohio Criminal Syndicalism Act).

[13] 491 U.S. 397 (1989).

[14] Id. at 399.

[15] Id. at 403 ("If his conduct was expressive, we next decide whether the State's *regulation* is related to the suppression of free expression.") (emphasis added).

should raise attendant Fourth Amendment concerns. But the current doctrines that might protect against retaliatory arrest only cursorily consider the weight of both the First and Fourth Amendments. Justice Gorsuch, concurring in the seminal retaliatory arrest case *Nieves v. Bartlett*, asserted that "the *First* Amendment operates independently of the Fourth and provides different protections. It seeks not to ensure lawful authority to arrest but to protect the freedom of speech."[16]

This bifurcated view of the two Amendments is mistaken. When political speech results in police enforcement of content-neutral criminal laws, the First and Fourth Amendments ought to be considered in harmony. In such circumstances, a right to be free from retaliation ("Anti-Retaliation Right") should apply: a Fourth Amendment search or seizure resulting from political speech should be presumptively unreasonable.

This Note theorizes the Anti-Retaliation Right and proceeds in three parts. Part I discusses the relevant landscape of Fourth and First Amendment jurisprudence. Fourth Amendment doctrine is deferential to police decisions and offers only limited remedies while First Amendment doctrine, though usually speech-protective, permits regulation through content-neutral laws and provides only a narrow path to recovery on retaliatory arrest claims. Part II establishes the basis for a hybrid Anti-Retaliation Right. This Right is anchored in the Fourth Amendment's protection from "unreasonable" searches and seizures but looks to First Amendment principles to define unreasonable. Part III begins to define the scope of the Anti-Retaliation Right. Balancing the First and Fourth Amendments requires careful consideration of both free speech principles and law enforcement goals. To address these concerns, the Anti-Retaliation Right should operate as a strong, but rebuttable, presumption. The Fourth Amendment protects the people from "unreasonable" government action. The First Amendment must inform what is considered unreasonable when a person engaged in political speech is arrested.

I. LANDSCAPE OF THE CURRENT DOCTRINE

This Part considers how current Fourth and First Amendment jurisprudence protects, or fails to protect, people from retaliation for political speech. The Fourth Amendment's protection from unreasonable arrests is unavailing because its objective inquiry and deferential standard render meaningful relief impracticable. Attaining relief for retaliation through First

[16] 587 U.S. 391, 414 (2019) (Gorsuch, J., concurring) (emphasis in original).

Amendment doctrine is more complicated. Critically, First Amendment jurisprudence most naturally and frequently evaluates statutes, not their enforcement. Content-based statutes, which face strict scrutiny, are fatally flawed. But the standards for content-neutral statutes are more forgiving. Bringing a civil rights suit for retaliation is similarly complicated by a Fourth Amendment overlay, the no-probable-cause rule, and qualified immunity. The current doctrines thus leave a gap that enables retaliation through content-neutral criminal laws.

A. Fourth Amendment

Challenging retaliation under the Fourth Amendment will prove difficult, bordering on impossible, in most circumstances. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[17]

This section begins by discussing Fourth Amendment rights. Establishing a violation of the Fourth Amendment involves an objective probable cause inquiry deferential to police decisions, and thus the bar for lawful police action is low. Next, this section discusses how, even if a violation of a Fourth Amendment right can be shown, Fourth Amendment remedies are limited.

1. Fourth Amendment Rights

The Supreme Court has repeatedly said that "reasonableness" is the touchstone of Fourth Amendment analysis,[18] but despite the seemingly sweeping scope of "unreasonable" in the Fourth Amendment, establishing a Fourth Amendment violation is difficult. Crucially, the Fourth Amendment's Warrants Clause has not been read to require warrants in all situations—

[17] U.S. Const. amend. IV.

[18] See, e.g., Kentucky v. King, 563 U.S. 452, 459 (2011) ("the ultimate touchstone of the Fourth Amendment is 'reasonableness'") (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

police can conduct warrantless arrests[19] and searches in many circumstances, such as where "exigency" requires[20] or when an item is in plain view.[21]

To conduct a lawful warrantless arrest, an officer must have "probable cause," usually formulated as individualized suspicion of past, present, or future crime and distinguished from conclusory assertions.[22] A court's analysis of an officer's probable cause is an objective, totality-of-the-circumstances inquiry that asks whether a reasonable officer in the same circumstances would have had probable cause for the arrest.[23] This inquiry, importantly, does not ask whether the arresting officer in the present case actually suspected the arrestee of a crime or if the asserted basis for the arrest, perhaps as written on arrest documents or elicited from an officer's statements, established probable cause.[24] Put differently, courts cannot consider the officer's subjective motivation or perception of the situation at the time of arrest. In practice, then, the inquiry resembles a rational basis review of the decision to arrest that defers to the officer's choice.[25]

The expanse of Fourth Amendment jurisprudence might look radically different if not for *Atwater v. City of Lago Vista*, a case where the Supreme Court held that police can conduct full custodial arrests for any crime,

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[19] An arrest is a seizure under the Fourth Amendment. See Dunaway v. New York, 442 U.S. 200, 208 (1979) ("The term 'arrest' was synonymous with those seizures governed by the Fourth Amendment.").

[20] See, e.g., *King*, 563 U.S. at 460 ("One well-recognized exception applies when 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.") (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

[21] See, e.g., Arizona v. Hicks, 480 U.S. 321, 326 (1987) ("'It is well-established that under certain circumstances the police may *seize* evidence in plain view without a warrant.'") (emphasis in original) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality opinion)).

[22] See *Dunaway*, 442 U.S. at 213 ("The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the "reasonableness" requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.").

[23] See Illinois v. Gates, 462 U.S. 213, 230–31 (1983) (establishing "totality-of-the-circumstances" inquiry); Whren v. United States 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.") (emphasis in original).

[24] Many cases could illustrate this point. In *Whren v. United States*, for example, the Court infamously held that an officer's (subjective) racial profiling to justify a traffic stop did not undermine the (objective) establishment of probable cause when the officer saw the minor violation. 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); see also, e.g., Devenpeck v. Alford, 543 U.S. 146, 154–55 (2004) ("Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest.") (emphasis in original).

[25] Whether this standard sufficiently protects "the right of the people to be secure . . . against unreasonable searches and seizures" is a much larger question out of the scope of this Note. U.S. Const. amend. IV. However, as it relates to protection of speakers arrested for their political speech, the Fourth Amendment standard is under-protective.

regardless of the penalty it carries.[26] Accordingly, police can arrest for any violation of the law as long as there is probable cause—an arrest for murder and an arrest for driving without insurance are not categorically different under the Fourth Amendment's reasonableness analysis.[27] In *Atwater*, Gail Atwater was pulled over and neither she nor her two young children had their seatbelts on.[28] She was handcuffed, driven to the police station, booked, photographed, left in a cell for an hour, released on a 310-dollar bond, and ultimately charged with driving without her seatbelt fastened, failing to secure her children's seatbelts, driving without a license, and failing to provide proof of insurance.[29] She challenged her arrest under the Fourth Amendment on the grounds that the misdemeanor seatbelt violation, which carried a maximum 50-dollar fine, could not justify the seizure—it was "unreasonable."[30] The Court disagreed: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[31]

Atwater means that the underlying crime's severity and penalty play no part in a court's evaluation of an arrest's reasonableness.[32] In the context of retaliatory arrests, this holding has tremendous consequences. As Justice Gorsuch put it in *Nieves v. Bartlett*, "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."[33] The path not taken in *Atwater*—consideration of the underlying crime in evaluating

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[26] 532 U.S. 318, 354 (2001). Handcuffing is a strong indicium of an arrest, though not a necessary condition. A person's submission to a show of authority and restriction of freedom of movement, even absent handcuffing, can still be an arrest. See Torres v. Madrid, 592 U.S. 306, 311, 315–16 (2021) (Fourth Amendment seizures include "show[s] of authority" that restrain liberty or intentional applications of "physical force"); see also California v. Hodari D., 499 U.S. 621, 624 (1991) ("To constitute an arrest, however—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.").

[27] For example, the Department of Justice's 2024 investigation into the Lexington, Mississippi Police Department documents a pattern of full custodial arrests for such minor incidents as "driving without insurance," "parking in a wheelchair accessible space," and loitering. Dep't of Just., Investigation of the Lexington City Police Dep't & the City of Lexington, Mississippi 1, 2 (2024) (disclosure: I worked on this investigation).

[28] *Atwater*, 532 U.S. at 324.

[29] Id.

[30] Id. at 325–26.

[31] Id. at 354.

[32] For more on *Atwater*'s consequences, see Richard S. Frase, What Were They Thinking? Fourth Amendment Unreasonableness in *Atwater v. City of Lago Vista*, 71 Fordham L. Rev. 329 (2002); Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 108–13 (2004) (discussing *Atwater*).

[33] Nieves v. Bartlett, 587 U.S. 391, 412 (2019) (Gorsuch, J., concurring in part and dissenting in part).

reasonableness—might have permitted the Fourth Amendment to better account for use of minor misdemeanors in retaliation for political speech.

If an arrest is undertaken in an "extraordinary manner" that is "unusually harmful" to the arrestee's "privacy or . . . physical interests," the *means* of arrest, though not the fact of the arrest, might be unreasonable under the Fourth Amendment.[34] For example, use of deadly force might qualify as an unreasonable manner of seizing a person, even if a seizure using less-than-lethal force might be justified.[35] Although the unreasonable means carve-out might be relevant to an individual retaliation case, the difference between these "extraordinary" arrests and "ordinary" arrests is largely irrelevant because any arrest, not only the most extraordinary arrests, can chill speech.[36]

2. Fourth Amendment Remedies

If a claimant can overcome these barriers and establish a violation of the Fourth Amendment, a difficult task, three remedies are potentially available. First, if the person arrested or searched[37] becomes a criminal defendant charged with a crime, they can challenge the admissibility of illegally searched or seized evidence through the exclusionary rule.[38] However, the exclusionary remedy is of no use to a person never charged with a crime or where no evidence was seized because of the retaliatory arrest. Second, a plaintiff may file a suit for damages under Section 1983 (against a state official) or through a *Bivens* cause of action (against a federal official) claiming a violation of Fourth Amendment rights.[39] Third, past Fourth

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[34] Atwater v. City of Lago, 532 U.S. 318, 354 (2001).

[35] See Graham v. Connor, 490 U.S. 386, 396 (1989) (determining if a use of force was a reasonable seizure "requires careful attention to the facts and circumstances, . . . including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"); Tennessee v. Garner, 471 U.S. 1, 8–9 (1985) (reasonableness of seizure depends on "whether the totality of the circumstances justified a particular sort of . . . seizure").

[36] Cf. Terry v. Ohio, 392 U.S. 1, 16–17 (1968) ("[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity'. It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse resentment, and it is not to be undertaken lightly.").

[37] Because most police retaliation cases are retaliatory arrest cases, this Note largely does not focus on searches. However, to qualify as a search, law enforcement action must either violate a person's reasonable expectation of privacy or involve a physical trespass. See Florida v. Jardines, 569 U.S. 1, 5 (2013); Carpenter v. United States, 585 U.S. 296, 304–05 (2018).

[38] See Mapp v. Ohio, 367 U.S. 643, 649 (1961).

[39] See, e.g., Kisela v. Hughes, 584 U.S. 100 (2018) (Section 1983 suit against state official for Fourth Amendment violation); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (implied cause of action for damages against federal official for Fourth Amendment violation).

Amendment violations may provide standing for a plaintiff to seek injunctive relief preventing future Fourth Amendment violations,[40] so long as the plaintiff faces a substantial, "credible threat" of enforcement.[41]

Consider again the circumstances in *Texas v. Johnson*.[42] Johnson was arrested for burning an American flag while protesting the Republican National Convention in Dallas, Texas and charged with a violation of Texas Penal Code Section 42.09(a)(3), which prohibits intentional desecration of "venerated objects," including the American flag.[43]

How might Johnson have fared if he challenged his arrest under the Fourth Amendment? On the merits of his Fourth Amendment claim, he likely loses. After seeing Johnson burning the American flag, a reasonable officer would have individualized, articulable suspicion that Johnson knowingly desecrated a qualifying venerated object. The officer therefore had probable cause to arrest Johnson under Section 42.09(a)(3).[44] Note that the motivations and perceptions of the officer who actually arrested Johnson are irrelevant. Even if the officer had told Johnson that he was arresting him because of the political statement, the arrest was objectively reasonable because of the probable cause. Without an indication that the manner of arrest was unreasonable, perhaps through excessive use of force, Johnson's arrest for this misdemeanor while engaged in political protest could not be considered unreasonable under the Fourth Amendment.

Even if Johnson could prove a Fourth Amendment violation, the remedies available are all unavailing. The exclusionary rule would do little to help Johnson since the allegedly improper arrest did not yield dispositive evidence. He might seek damages or an injunction under Section 1983. But the damages claim would likely fail at the threshold because of the probable cause, and the officer would likely have a strong qualified immunity defense

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[40] Cf. City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (evaluating standing relief-by-relief).

[41] See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014) (clarifying the standard for probabilistic standing).

[42] 491 U.S. 397 (1989).

[43] *Johnson*, 491 U.S. at 399–400. Tex. Pen. Code Ann. § 42.09 (1989) provides in full:

§ 42.09. Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:

(1) a public monument;

(2) a place of worship or burial; or

(3) a state or national flag.

(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

[44] Tex. Pen. Code Ann. § 42.09(a)(3) (1989).

that could be raised at each stage of the litigation. Such barriers to relief would make Johnson's suit for damages against the individual officer increasingly expensive to pursue, possibly even more than the value of damages for the retaliatory arrest.[45] Based solely on his arrest for burning the flag, Johnson would likely lack standing for injunctive relief.[46] As the *Johnson* hypothetical demonstrates, the Fourth Amendment, standing alone in its current doctrinal form, is an ineffective shield from retaliatory police action.

B. First Amendment

Current First Amendment doctrine, like Fourth Amendment doctrine, is a poor mechanism to challenge retaliation. The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . ."[47] This section begins by discussing First Amendment challenges to criminal statutes. First Amendment doctrine seemingly skews speech-protective, especially when that speech is political. However, when a person is arrested under a content-neutral criminal law, the same speech-protective instinct gives way to criminal procedure's deference to police decision-making. This section next analyzes First Amendment retaliatory arrest claims against individual government officers under Section 1983. Retaliatory arrest claims, drawing on Fourth Amendment logic, are nearly categorically barred by the no-probable-cause rule.

1. Challenging Criminal Statutes

Some criminal statutes provide content-based restrictions on protected speech.[48] These are relatively easy cases that trigger strict judicial scrutiny.

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[45] See, e.g., Kisela v. Hughes, 584 U.S. 100 (2018) (holding qualified immunity barred Fourth Amendment claim); cf. Camreta v. Greene, 563 U.S. 692, 698 (2011) (holding Supreme Court can review prevailing officer's appeal after grant of qualified immunity). For a more detailed discussion of the problem of repeated appellate review of qualified immunity decisions, see Alexander Reinert, Asymmetric Review of Qualified Immunity Appeals, 20 J. Empirical Legal Studs. 4 (2023); Joanna C. Schwartz, Qualified Immunity's Selection Effects, 114 Nw. U. L. Rev. 110 (2020).

[46] Cf. City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (past instance of excessive force did not establish standing for prospective relief barring police practice of using chokeholds).

[47] U.S. Const. amend. I.

[48] Some content-based statutes address speech considered uncovered by the First Amendment, such as "fighting words," see, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942), "true threats," see, e.g., Virginia v. Black, 538 U.S. 343, 344 (2003), and obscenity, see, e.g., Miller v. California, 413 U.S. 15 (1973). Statutes within these uncovered categories will survive a First Amendment challenge if the regulation is rationally related to a legitimate government interest (rational basis review). See Frederick Schauer, Out of Range: On Patently Uncovered Speech, 128 Harv. L. Rev. F. 346, 349 (2015) ("Still . . . materials found to be obscene under the *Miller v. California* definition of obscenity may be regulated by the government for any number of reasons, many of which are pretty

The Texas flag desecration statute under which Johnson was prosecuted, for example, criminalizes symbolic expressive speech—burning an American flag—and was thus held unconstitutional in *Texas v. Johnson*.[49] Content-based criminal statutes must overcome "the most exacting scrutiny" to be constitutional;[50] they must be narrowly tailored to a compelling governmental interest.[51] At least in the context of content-based statutes, this strict scrutiny is seemingly "strict in theory but fatal in fact."[52]

Content-neutral statutes that implicate political speech raise more difficult questions. Usually, a challenge to a criminal statute will arise as a First Amendment defense to a criminal prosecution and therefore constitute an as-applied challenge, a contention that as applied to this particular defendant, the criminal law is unconstitutional.[53] Some statutes can be challenged on their face under the First Amendment "overbreadth"

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lame, just as with many of the reasons that are used to justify regulation under any other application of rational basis scrutiny.").

[49] *Johnson*, 491 U.S. at 420. Recently, President Trump issued an executive order to "restore respect and sanctity to the American Flag and prosecute those who incite violence or otherwise violate our laws while desecrating this symbol of our country . . . ." Exec. Order No. 14341, 90 Fed. Reg. 42127 (Aug. 28, 2025). The order states that *Texas v. Johnson* did not hold flag-burning constitutionally protected in all circumstances. Further, such conduct can be regulated if it is likely to incite imminent lawless action or amounts to fighting words. Exec. Order No. 14341 at 42127. The baseline characterization of *Johnson* is correct, and each of the circumstances listed would fall into an exception to the general rule against punishment for flag-burning. See generally *Chaplinsky*, 315 U.S. at 568 (holding fighting words are unprotected speech); Brandenburg v. Ohio, 395 U.S. 444 (1969) (establishing rule for regulation of speech that incites imminent unlawful conduct). Critically, the order presents the precise problem identified in this Note: it directs the Attorney General to "enforce, to the fullest extent possible" violations of "*content-neutral* laws" through flag-burning. Exec. Order No. 14341 at 42127 (emphasis added).

[50] Boos v. Barry, 485 U.S. 312, 321 (1988).

[51] See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (holding bias-motivated crime statute not narrowly tailored).

[52] This phrase was coined by legal scholar Gerald Gunther in 1972 in the context of Equal Protection. Gerald Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. F. 1, 8 (1972) ("The Warren Court embraced a rigid two-tiered attitude. Some situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict in theory and fatal in fact . . . ."); see Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1268, 1269 (2007) ("[Strict scrutiny] provides 'the baseline rule' under the First Amendment for assessing laws that regulate speech on the basis of content"). But see Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'"); Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 804 (2006) (arguing the same).

[53] See, e.g., Cohen v. California, 403 U.S. 15, 17–18 (1971) ("Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution."). For a discussion of the Supreme Court's use of the terms "facial challenge" and "as-applied challenge," see Scott A. Keller & Misha Tseytlin, Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto, 98 Va. L. Rev. 301, 308–12 (2012).

doctrine,[54] though such challenges are supposedly disfavored.[55] Instead of arguing that the statute is unconstitutional as applied to their own conduct, the petitioner in an overbreadth challenge contends that the statute would be unconstitutional as applied to *someone else's conduct*.[56] But the statute can be saved from an overbreadth challenge if it can be severed, essentially narrowly construing the statute to avoid the First Amendment issue.[57]

In defending the constitutionality of a content-neutral statute, the government can generally mount two counterarguments: (1) enforcing the statute was necessary to prevent an imminent incitement to violence,[58] or (2) the statute regulates nonspeech (conduct) with only incidental impacts on speech.[59]

Content-neutral statutes may survive an as-applied First Amendment challenge if enforced to prevent imminent incitement of violence.[60] But the bar for the government to prevail here is high. The *Brandenburg* standard requires that the speech "[was] directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[61] Even in *Collin v. Smith*, for example, a Nazi rally through a heavily Jewish town did not qualify under the high bar of imminent incitement to violence.[62] In this category, First Amendment doctrine is highly speech-protective. Even hateful speech is permitted so long as it does not imminently incite violence. Notably, not all free speech cases will trigger a potential *Brandenburg*

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[54] See Broadrick v. Oklahoma, 413 U.S. 601, 613–14 (1973) (discussing facial overbreadth challenges).

[55] See Sabri v. United States, 541 U.S. 600, 609 (2004) ("[W]e have recognized the validity of facial attacks alleging overbreadth . . . in relatively few settings . . . .").

[56] See Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853 (1991); see also, e.g., Barr v. Am. Ass'n Pol. Consultants, 591 U.S. 610 (2020) (plurality opinion) ("[i]nvalidating and severing the government debt-exception fully addresses the First Amendment injury").

[57] See Fallon, supra note 56. As Fallon explains in much more detail, narrowing and severing statutes are technically different. Narrowing occurs before the ultimate conclusion about the constitutionality of the statute, essentially functioning like an avoidance canon compelling interpretation in a way that avoids the First Amendment issue. For an example of narrowing, see DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988). Severing, on the other hand, occurs after a portion of the statute has been judged unconstitutional, and eliminates the unconstitutional sub-section while preserving the other portions of the statute. For an example of severing, see Ayotte v. Planned Parenthood of New England, 546 U.S. 320 (2006). This technical difference is not crucial here: the upshot is that criminal laws with a potential First Amendment problem will be interpreted, through narrowing or severing, in ways that preserve as much of the statute as possible and avoid the First Amendment issue.

[58] See Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

[59] See United States v. O'Brien, 391 U.S. 367, 376–77 (1968); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296–98 (1984).

[60] See *Brandenburg*, 395 U.S. at 447–49.

[61] Id. at 447.

[62] See Collin v. Smith, 578 F.2d 1197, 1203–04 (7th Cir. 1978).

question because *Brandenburg* applies to speech inciting imminent unlawful actions.[63]

Where regulation of conduct impacts speech, the *O'Brien* test allows the regulation if it advances an important governmental interest; is unrelated to the suppression of speech; and is no broader than necessary.[64] If the regulation is related to speech suppression, it triggers strict scrutiny.[65] Meanwhile, the *O'Brien* test for conduct regulation is more searching than rational basis review but a lower standard than strict scrutiny. The *O'Brien* test applies to time-place-manner statutes—those that place neutral regulations on free speech in public fora. For example, a city's regulation of sound amplification is a content-neutral manner restriction, narrowly tailored to the significant government interest in quiet and order in the city, and leaving ample alternative means of expression. Thus, under the *O'Brien* test, such a statute is facially permissible under the First Amendment, even if it might burden political speech.[66]

Any regulation might theoretically burden speech, and accordingly content-neutral statutes will be construed in ways that preserve some regulation while their content-based counterparts will be evaluated under strict judicial scrutiny. In short, although First Amendment doctrine is usually extremely protective of political speech, even hateful speech, content-neutral criminal statutes remain difficult to challenge. Facial challenges are highly disfavored, and statutes will be construed to avoid constitutional problems. Where the statute regulates conduct with an impact on speech, claimants must satisfy the *O'Brien* standard, which favors the regulation so long as it is truly content-neutral. Thus, First Amendment jurisprudence is, in principle, highly speech protective; but in application, it allows content-neutral regulation that can suppress political speech.

2. Retaliatory Arrest Claims

The tension between necessary regulation and the importance of political speech is acute in the context of retaliatory arrests. Criminal law

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[63] See David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 338 n.10 (1991) ("Although this [*Brandenburg*] standard literally applies to all speech advocating unlawful action, in fact, it probably applies only to speech that has a political component.").

[64] See O'Brien, 391 U.S. at 376–77; see also *Clark*, 468 U.S. at 296–99.

[65] See O'Brien, 391 U.S. at 376–77. *Texas v. Johnson* is an example of this carve-out to the *O'Brien* test. The Texas flag desecration statute regulated conduct but was related to speech suppression and therefore triggered strict scrutiny. Texas v. Johnson, 491 U.S. 397, 406–10 (1989) (explaining why *Johnson* fell outside the *O'Brien* test).

[66] Cf. Ward v. Rock Against Racism, 491 U.S. 781, 798–800 (1989) (upholding content-neutral noise regulation).

enforcement will necessarily require consideration of speech,[67] so content-neutral criminal laws begin from a presumption of permissibility. But the Court has repeatedly stated that "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech."[68] And as Justice Gorsuch wrote in the most recent major retaliatory arrest case, *Nieves v. Bartlett*, "[t]he freedom to speak without risking arrest is 'one of the principal characteristics by which we distinguish a free nation.' "[69] In spite of this rhetoric, retaliatory arrest doctrine is decidedly pro-enforcement: retaliatory arrest claims will be barred where an arresting officer had probable cause, a low threshold.[70] A person who experienced retaliatory law enforcement can sue a local or state officer for damages under Section 1983 with a First Amendment retaliation claim.[71] To state a Section 1983 retaliatory arrest claim, the plaintiff must demonstrate that they (a) experienced an adverse action sufficient to chill the speech of an ordinary person; (b) based on protected speech; and (c) that the speech caused the adverse action.[72] Notably, the Court's decision in *Egbert v. Boule* seemingly foreclosed a *Bivens* cause of action against federal officers for First Amendment retaliation.[73]

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[67] See Nieves v. Bartlett, 587 U.S. 391, 402 (2019) ("protected speech is often a wholly legitimate consideration when deciding whether to make an arrest"); Reichle v. Howards, 566 U.S. 658, 668 (2012) ("the officer may decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat").

[68] *Nieves*, 587 U.S. at 398 (quoting Hartman v. Moore, 576 U.S. 250, 256 (2006)).

[69] Id. at 412–13 (quoting Houston v. Hill, 482 U.S. 451, 463 (1987)).

[70] As discussed previously and as Justice Gorsuch notes in *Nieves*, substantive criminal law is so expansive that establishing probable cause for some crime is not difficult. See Nieves v. Bartlett, 587 U.S. 391, 412 (2019) (Gorsuch, J., concurring) ("In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."). Accordingly, because of the low bar for probable cause and expansive reach of substantive criminal law, the no-probable-cause rule severely limits plaintiffs' ability to recover on First Amendment retaliation claims.

[71] See id. at 391–93.

[72] See, e.g., Murphy v. Smith, 143 F.4th 914, 918 (8th Cir. 2025 (applying retaliatory arrest test); Frey v. Town of Jackson, 41 F.4th 1223, 1232 (10th Cir. 2022) (same). Though *Nieves* did not so clearly articulate the three-pronged test, the Court looked to the same three elements to establish a retaliatory arrest claim. The Court stated that "[i]f an official takes adverse action against someone based on forbidden motive," meaning "engaging in protected speech," then the injured person may bring a First Amendment retaliatory arrest claim. *Nieves*, 587 U.S. at 398. Concurring in *Gonzalez v. Trevino*, Justice Alito similarly laid out the elements of a First Amendment retaliatory arrest claim: "[T]he plaintiff must demonstrate that he engaged in protected speech and that his speech was a 'substantial' or 'motivating' factor in the defendant's decision to take action against him." 602 U.S. 653, 662–63 (2024) (Alito, J., concurring) (quoting Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

[73] See Egbert v. Boule, 596 U.S. 482, 498 (2022) ("We also conclude that there is no *Bivens* cause of action for Boule's First Amendment retaliation claim.").

Under the adverse action prong, the Court has recognized that prosecutions and arrests are sufficiently chilling of speech to constitute adverse actions[74] but has never opined on the permissibility of retaliatory use of force or investigation claims. However, circuit courts of appeals across the country, when faced with the question, generally agree that retaliatory use of force claims are cognizable.[75] Circuit courts are more split on whether retaliatory investigation claims are sufficiently chilling to qualify as adverse.[76]

Further, the Court has specified that protected speech must be the but-for cause of the adverse action.[77] To operationalize this causation problem in retaliatory arrest cases, the Court has adapted the "no-probable-cause" rule, which requires a plaintiff to prove the absence of probable cause for the

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[74] See, e.g., Hartman v. Moore, 576 U.S. 250, 256 (2006) (retaliatory prosecution); Nieves v. Bartlett, 587 U.S. 391, 402 (2019) (retaliatory arrest).

[75] See, e.g., Batyukova v. Doege, 994 F.3d 717, 730–31 (5th Cir. 2021) (rejecting retaliatory use of force claim on causation prong); Coady v. Steil, 187 F.3d 727, 733 (7th Cir. 1999) (evaluating qualified immunity in retaliatory force case); Molina v. City of St. Louis, 59 F.4th 334, 338 (8th Cir. 2023) (permitting retaliatory force claim for person who shouted "[g]et the fuck out of my park" before officers launched tear-gas canister at him); Lopez v. City of Glendora, 811 Fed. App'x 1016, 1018–19 (9th Cir. 2020) (rejecting qualified immunity on retaliatory force claim); Hall v. Merola, 67 F.4th 1282, 1294 (11th Cir. 2023) ("We see no reason why Hall cannot rely on the use of force to satisfy the "adverse action" prong [of his First Amendment retaliation claim].").

[76] See *Hartman*, 547 U.S. at 262 n.9 ("Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us); Brief for Petitioner at 11–18, J.T.H. v. Missouri Dep't of Soc. Servs. Children's Div., 39 F.4th 489 (8th Cir. 2022) (No. 22-509), *cert. denied sub nom.* J.T.H. v. Spring Cook, 143 S. Ct. 579 (2023) (denying certiorari on question of retaliatory investigation); compare Pierce v. Texas Dep't of Crim. Just., Inst. Div., 37 F.3d 1145, 1150 (5th Cir. 1994) (rejecting retaliatory investigation claim); Colson v. Grohman, 174 F.3d 498, 512–13 (5th Cir. 1999) (investigation is a harm that is "not actionable under our First Amendment"); Rehberg v. Paulk, 611 F.3d 828, 850 n.24 (11th Cir. 2010) ("No § 1983 liability can attach merely because the government initiated a criminal investigation."), with Lacey v. Maricopa Cnty., 649 F.3d 1118, 1132 (9th Cir. 2011) ("[E]xtremely intrusive investigation that did not culminate in an arrest . . . could chill the exercise of First Amendment rights"); White v. Lee, 227 F.3d 1214, 1239 (9th Cir. 2000) (recognizing retaliatory investigation claim); Johnson v. Collins, 5 Fed. App'x 479, 482–83, 485 (7th Cir. 2001) (holding qualified immunity did not bar retaliatory investigation claim); Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000) (recognizing retaliatory investigation); Pendleton v. St. Louis Cnty., 178 F.3d 1007, 1010–11 (8th Cir. 1999) (same). This Note focuses more heavily on retaliatory arrests than investigations. Of course, investigations might be used in retaliation for political speech. As discussed, however, in the First Amendment context, whether investigations can qualify as adverse actions remains unclear. Similarly, whether an investigation qualifies as a Fourth Amendment "search" and, subsequently, whether that search is "unreasonable," will also be a difficult question. Arrests and uses of force, which are unquestionably Fourth Amendment seizures, are more paradigmatic of the hybrid Anti-Retaliation Right discussed herein.

[77] See Nieves v. Bartlett, 587 U.S. 391, 402 (2019).

arrest.[78] Probable cause will bar a retaliatory arrest claim unless a plaintiff can prove a "*Nieves* exception."[79]

The *Nieves* exception applies in circumstances where the claimant's conduct is of the sort that officers ordinarily decline to arrest for, even with the requisite probable cause.[80] The Court's quintessential example is jaywalking—even when police witness jaywalking, and thus have probable cause, they usually choose not to make an arrest.[81] When a person engaged in political speech is arrested for jaywalking, the inference that their speech caused the arrest is therefore much stronger.[82]

In *Gonzalez v. Trevino*,[83] the Court clarified that jaywalking is not the only circumstance that can justify a *Nieves* exception, and plaintiffs do not need direct comparator evidence to demonstrate a *Nieves* exception.[84] Rather, plaintiffs can present any evidence that they were arrested in "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."[85] The *Nieves* exception requires plaintiffs to prove either that someone else who engaged in similar conduct was not arrested at all or that the crime for which the claimant was arrested is one where officers usually opt not to arrest. Plaintiffs therefore must prove a difficult negative: the lack of an arrest under comparable circumstances. Arrests produce documentation, records, and, perhaps, body-worn camera video, but the lack of arrest triggers none of the same formal police procedures. Plaintiffs might try to request discovery from the police

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[78] Id. at 402.

[79] Because probable cause is not the standard for uses of force and investigations, the no-probable-cause rule likely does not attach to these claims. Notably, in *Graham* the Court stated, "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Graham v. Connor, 490 U.S. 386, 396 (1989) (establishing constitutional standard for reasonable uses of force). In *Batyukova v. Doege*, the Fifth Circuit suggested that "[t]here is some uncertainty as to whether [*Graham*] precludes a First Amendment retaliation claim based on an officer's excessive use of force during a seizure." 994 F.3d, 717, 730 (5th Cir. 2021). The Fifth Circuit ultimately avoided this question. Id. at 730 n.5. The Supreme Court has yet to squarely address a retaliatory use of force claim or a retaliatory investigation claim. See Hartman v. Moore, 547 U.S. 250, 262 n.9 (2006) ("Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us); cf. *Batyukova*, 994 F.3d at 730 (discussing uncertainty whether *Graham* forecloses First Amendment retaliation claim).

[80] See *Nieves*, 587 U.S. at 404.

[81] Id. at 407. Critically, after *Atwater*, the fact that jaywalking is a non-violent misdemeanor does not preclude an arrest on that basis. See Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001) (holding the Fourth Amendment does not bar arrests for misdemeanors).

[82] Cf. Nieves v. Bartlett, 587 U.S. 391, 407 (2019).

[83] 602 U.S. 653, 655 (2024) (per curiam).

[84] *Gonzalez*, 602 U.S. at 655.

[85] Id. at 655 (quoting *Nieves*, 587 U.S. at 406).

department, but the *Nieves* question applies at the threshold, and the case will be dismissed unless the plaintiffs can overcome the no-probable-cause rule.[86]

If a plaintiff can show the lack of probable cause or establish a *Nieves* exception, they will also have to overcome qualified immunity. Thus, plaintiffs must demonstrate that the officer actually violated the First Amendment and that the violation was clearly established.[87] Because the no-probable-cause rule blocks most retaliation claims at the threshold, it prevents new clearly established law from developing. Therefore, overcoming qualified immunity in retaliation cases, as in most cases, will prove challenging.[88]

To illustrate the difficulty of challenging retaliatory law enforcement under content-neutral criminal laws, consider again *Texas v. Johnson*, now

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[86] Even if a claim survives a motion to dismiss, the bar for receiving discovery in cases alleging police or prosecutorial misconduct is high. In *United States v. Armstrong*, the Court rejected respondents' claims for discovery about allegedly racially discriminatory prosecution practices at a prosecutor's office. 517 U.S. 456, 458 (1996). According to the *Armstrong* Court, to receive discovery, the respondents must show "'some evidence tending to show the existence' of the discriminatory" practice. *Armstrong*, 517 U.S. at 469. Armstrong provided "affidavits from two of the attorneys on the defense team" and a "study showing that of all cases involving crack offenses that were closed by the Federal Public Defender's Office in 1991, 24 out of 24 involved black defendants." Id. at 480 (Stevens, J., dissenting). Despite strong support for finding discrimination, the Court rejected Armstrong's evidence. Id. Notably, the *Nieves* Court cites to *Armstrong* when explaining its exception to the no-probable-cause rule, indicating that *Armstrong*'s high standard would likely apply when seeking discovery in support of a *Nieves* exception. Nieves v. Bartlett, 587 U.S. 391, 407 (2019); cf. *Gonzalez*, 602 U.S. at 665 (Alito, J., concurring) (citing *Armstrong* while discussing the *Nieves* exception). But see *Nieves*, 587 U.S. at 418 (Gorsuch, J., concurring) ("[E]nough questions remain about *Armstrong*'s potential application that I hesitate to speak definitively about it today.").

[87] See, e.g., Kisela v. Hughes, 584 U.S. 100, 103–04 (2018) (holding qualified immunity barred Fourth Amendment excessive force claim).

[88] Some jurists have suggested that qualified immunity should apply differently in First Amendment retaliation cases, but this view has not yet taken hold beyond dissenting opinions and dicta. See Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J., respecting denial of certiorari) ("[W]hy [should] university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting."); Gonzalez v. Trevino, 42 F.4th 487, 507 (5th Cir. 2022) (Oldham, J., dissenting) (quoting *Hoggard*, 141 S. Ct. at 2422 (statement of Thomas, J., respecting denial of certiorari) ("It's not at all clear that we should apply the same qualified immunity inquiries for First Amendment cases, Fourth Amendment cases, split-second-decision-making cases, and deliberative conspiracy cases."), *vacated and remanded*, 602 U.S. 653 (2024); Villareal v. City of Laredo, 94 F.4th 374, 406–07 (5th Cir. 2024) (en banc) (Willett, J., dissenting) ("Those who arrested, handcuffed, jailed, mocked, and prosecuted Priscilla Villarreal, far from having to make a snap decision or heat-of-the-moment gut call, spent *several months* plotting Villarreal's takedown, dusting off and weaponizing a dormant Texas statute never successfully wielded in the statute's near-quarter-century of existence. This was not the hot pursuit of a presumed criminal; it was the premeditated pursuit of a confirmed critic.") (emphasis in original), *cert. granted, judgment vacated sub nom.* Villarreal v. Alaniz, 145 S. Ct. 368, 406–07 (2024).

with slightly altered facts.[89] Instead of an arrest and prosecution under the content-based statute struck down in *Johnson*, imagine that Johnson, still burning the American flag in protest, was arrested for violating the Dallas County burning ordinance, a content-neutral law that attaches minor fines for lighting fires in certain public places or in certain ways.[90] Suppose Johnson performed his demonstration on the steps of the Dallas City Hall, which is across the street from a park and therefore within 300 feet of a "recreational area," a violation under the ordinance.[91] Also assume that the officer's decision to arrest Johnson was unquestionably motivated by animus toward Johnson's political speech.

The Fourth Amendment analysis remains mostly the same, and the Fourth Amendment still provides Johnson little recourse. There was probable cause that Johnson violated the burning ordinance, and under *Atwater*, police can lawfully arrest for violation of any law, even this minor violation that attaches only fines.[92] The arrest was therefore "reasonable" under the Fourth Amendment's totality-of-the-circumstances inquiry. Even if there was a Fourth Amendment violation, Johnson has no viable remedy. There was no evidence seized, so the exclusionary rule is of no use. Johnson would not have standing to sue for prospective relief without a clearer showing that he intends to protest in this way again.[93] A suit for damages is also unlikely to succeed. The officer will have a strong argument for qualified immunity on the grounds that it was not clearly established that arresting a protestor under the burning ordinance violates the Fourth Amendment,[94] and Johnson cannot show that the municipality is liable for the officer's independent decision to arrest him.[95] At a minimum, the qualified immunity issue will be litigated at each stage.

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[89] Cf. Texas v. Johnson, 491 U.S. 397, 413 n.8 (1989) ("We . . . emphasize that Johnson was prosecuted *only* for flag-desecration—not for trespass, disorderly conduct, or arson.").

[90] Dallas County, like most municipalities, has regulations about lighting fires in public places. These restrictions include permit requirements, environmental considerations, and restrictions on the proximity to certain kinds of buildings. See Outdoor Burning, Dallas County, Texas, https://www.dallascounty.org/departments/fire/outdoor.php (last visited Sep. 3, 2025).

[91] Specifically, the ordinance states "[t]he burn site must be at least 300 feet from any residential, recreational, commercial or industrial area." Id.

[92] See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

[93] Put differently, he cannot show an ongoing constitutional violation since the arrest, a Fourth Amendment seizure, has ended. Cf. City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983).

[94] Note here that even *Texas v. Johnson* itself does not clearly establish this violation. *Johnson* was a First Amendment case, not a Fourth Amendment case, and therefore does not clearly establish the Fourth Amendment violation. See *Johnson*, 491 U.S. at 414. Moreover, *Johnson* invalidated the statute at issue but said nothing about the reasonableness of the officers' conduct. See id. at 413 n.8.

[95] To establish the municipality's liability, Johnson would need to demonstrate that an actual policy caused the constitutional violation; a decision by a final policymaker caused the violation; the final policymaker ratified a subordinate's decision to violate the Constitution; or the municipality has a custom

The First Amendment route is equally unavailing. Johnson could begin by challenging the Dallas ordinance itself. But unlike the statute in *Texas v. Johnson*, there is no facial First Amendment issue with the content-neutral burning ordinance. Since the ordinance regulates conduct, it must survive the *O'Brien* test.[96] The ordinance is unrelated to the suppression of speech; advances the important governmental interest in public safety; and is no broader than necessary because it limits its application to within 300 feet of recreational areas. The ordinance would therefore survive the *O'Brien* test.

Instead of attacking the ordinance, Johnson might challenge the officer's conduct in arresting him by suing the officer in his individual capacity for damages under Section 1983. The existence of probable cause bars Johnson's suit unless he can prove a *Nieves* exception.[97] He would need to show that officers ordinarily opt not to arrest people burning fires within 300 feet of the park, even with probable cause. Mounting this evidence will prove difficult and costly, and the evidence might not exist. There are likely no police records from the non-arrests. Johnson would therefore have to rely on firsthand accounts of the non-arrests. But this would require another person to attest that they broke the law but were not arrested. These third parties would risk both formal repercussions, like their own investigation or arrest, and informal consequences, like reputational harm and the potential of becoming embroiled in Johnson's litigation. Others who were lucky enough not to face the same consequence as Johnson might fear further retaliation if they speak out. And *Nieves* sets such a high bar that the cost of proving the negative may exceed Johnson's potential damages. Even if Johnson could state a claim, the officer would have a qualified immunity defense, though after the real *Texas v. Johnson* decision, a court may determine that the violation was clearly established.

Note how in this Johnson-redux, we *know* that the officer intended the arrest as retaliation, yet that seemingly critical fact never entered into the analysis. The objective inquiries prohibit consideration of the officer's actual intent. But most retaliation cases will not be so clean. If the hypothetical Johnson, who knows the officer retaliated against Johnson for his political speech, has such a challenging path to redress, plaintiffs in murkier

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of constitutional violations. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978); Pembaur v. City of Cincinnati, 475 U.S. 469, 480–84 (1986); City of Canton v. Harris, 489 U.S. 378, 389 (1989).

[96] The other First Amendment doctrines noted earlier are inapposite to this hypothetical. Johnson's challenge to the statute relates to his own conduct, which falls within the First Amendment's protection, and therefore does not trigger an overbreadth issue. Likewise, Johnson's speech does not constitute unlawful conduct and thus does not fall within *Brandenburg*.

[97] See Gonzalez v. Trevino, 602 U.S. 653, 655 (2024).

circumstances face nearly insurmountable obstacles. Between the limits of the Fourth Amendment's objective inquiry, the mismatch with First Amendment law's focus on statutes, and procedural protections for law enforcement, like qualified immunity and the no-probable-cause rule, few protections against retaliatory arrests remain.

II. CONSTITUTIONAL BASIS FOR THE ANTI-RETALIATION RIGHT

In *West Virginia Board of Education v. Barnette*, Justice Jackson famously proclaimed that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[98] Retaliatory arrests permit circumvention of this fixed star through enforcement of content-neutral criminal laws to suppress political speech. Situated within the broader landscape of First Amendment doctrine, the retaliatory arrest paradigm highlights the fundamental tradeoff between regulation and free speech. Usually, political speech wins the day in First Amendment jurisprudence. The jurisprudence tolerates hateful and harmful speech to safeguard expression of political speech. Not so for retaliatory arrests.

Retaliatory arrests present what the Court in *Employment Division v. Smith* called a "hybrid situation" at the intersection of multiple constitutional provisions.[99] Retaliatory arrests trigger Fourth Amendment concerns because an arrest is a seizure, and the Fourth Amendment proscribes "unreasonable" seizures. But these circumstances also implicate the freedom of speech, and thus the First Amendment. As discussed, neither doctrine alone can resolve the question. Instead, an "Anti-Retaliation Right," built on First and Fourth Amendment principles in concert, should attach: a Fourth Amendment search or seizure resulting from political speech should be presumptively unreasonable.

This part will expand on the Anti-Retaliation Right. First, it will discuss hybrid rights generally by examining seminal caselaw in the area. Second, it will discuss an alternate version of the Right anchored in the First Amendment. Thinking through this counterfactual highlights the propriety of rooting the Right in the Fourth Amendment, which focuses on executive action, rather than the First Amendment, which focuses on legislative action. Next, this part will expand on the Fourth Amendment principles informing

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[98] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[99] Emp. Div. v. Smith, 494 U.S. 872, 881–82 (1990).

the Right. Finally, this part will consider the First Amendment concerns for political speech that illuminate the meaning of "unreasonable" in the Fourth Amendment—searches and seizures based on political speech undercut important First Amendment principles and should be presumptively unreasonable.

A. Theorizing a Hybrid Right

A hybrid right roots from a single constitutional text. But like any textual interpretation, the text must be read against the backdrop of the surrounding provisions.[100] Hybrid rights, then, are a way to interpret one constitutional text in light of others: the "single-text-viewed-in-light-of-the-whole-document theory of hybrid rights."[101] As Professor Dan Coenen, a leading expert on hybrid rights, puts it, "[t]he bottom line is that hybrid rights are simply rights."[102] Other scholars define the hybrid right similarly.[103] For example, Professors Kerry Abrams and Brandon Garret define such rights as those "that, when read together, magnify each other."[104] Hybrid rights critics, on the other hand, argue that hybrid rights are unmoored from constitutional text and create confusing and cryptic outcomes.[105]

The Court's hybrid rights jurisprudence has led to several controversial and famous decisions. This section considers five decisions notable for their employment of hybrid rights analysis. First, this part discusses three controversial examples: *Griswold v. Connecticut*,[106] *Roe v. Wade*,[107] and *Obergefell v. Hodges*.[108] Then, it explores *Employment Division v. Smith*[109] and *Roaden v. Kentucky*,[110] which exemplify hybrid rights in the First and Fourth Amendment contexts. Together, these examples illustrate the

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[100] Cf. Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 6 (2012) (discussing "old hat" practice that courts "read . . . document[s] as a whole").

[101] Dan T. Coenen, Reconceptualizing Hybrid Rights, 61 B.C. L. Rev. 2355 (2020).

[102] Id.

[103] See, e.g., Bruce Ackerman, Robert Bork's Grand Inquisition, 99 Yale L.J. 1419, 1425–26 (1990) (book review) (hybrid rights reflect "reflective equilibrium" between "particular clauses" and "general principles").

[104] Kerry Abrams & Brandon L. Garrett, Cumulative Constitutional Rights, 97 B.U. L. Rev. 1309, 1311 (2017).

[105] See, e.g., Timothy Sandefur, Gay Marriage Decision: Right for the Wrong Reasons. Dissents: Wrong for Worse Reasons., Found. for Econ. Educ. (June 26, 2015), https://fee.org/articles/gay-marriagedecision-right-for-the-wrong-reasons-dissents-wrong-for-worse-reasons ("The problem comes at the confluence of the Due Process of Law and Equal Protection Clauses.").

[106] 381 U.S. 479 (1965).

[107] 410 U.S. 113 (1973).

[108] 576 U.S. 644 (2015).

[109] 494 U.S. 872 (1990).

[110] 413 U.S. 496 (1973).

contours of hybrid rights analysis and show how hybrid rights analysis is particularly appropriate for the Anti-Retaliation Right because it involves criminal law and the Fourth Amendment.

1. Griswold v. Connecticut, *Roe v. Wade*, and *Obergefell v. Hodges*

Griswold, *Roe*, and *Obergefell* represent three classic, but controversial, expressions of hybrid rights analysis. In *Griswold*, the Court concluded that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[111] These penumbras "create zones of privacy," derived in part from the First Amendment's implied right of association, the Third Amendment's prohibition on quartering soldiers in homes during peacetime, the Fourth Amendment's protection from unreasonable searches and seizures, the Fifth Amendment's protection against self-incrimination, and the Ninth Amendment's broad protection of rights not enumerated in the Constitution's text.[112] The *Griswold* right of privacy, per Justice Douglas's majority, is "older than the Bill of Rights," preexisting the Constitution and emerging through the various Amendments.[113] The Connecticut criminal statute imposing fines and imprisonment on "any person who uses any drug, medicinal article or instrument for the purpose of preventing conception" therefore violated the constitutional (hybrid) right to privacy.[114]

Relatedly, in *Roe v. Wade* the Court extended the *Griswold* right to privacy to include a constitutional right to abortion.[115] Notably, *Roe* again involved a state criminal law, this time one punishing abortion.[116] The Court concluded:

> [The] right to privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of right to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[117]

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[111] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
[112] Id. at 484.
[113] Id. at 486.
[114] Id. at 480, 486.
[115] Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
[116] Id. at 113–15.
[117] Id. at 153.

Critics of the *Roe* decision, even before its overruling in *Dobbs*, focused on the hybridization of the privacy right, echoing traditional criticism of hybrid rights.[118] For example, John Hart Ely, commenting on *Roe*, criticized *Griswold*'s hybrid analysis as "vague and open-ended."[119] Professor Akhil Amar similarly commented that "Justice Blackmun [in *Roe*] seems almost uninterested in the precise textual location of the abortion right he announces."[120]

When the Court overruled *Roe* in *Dobbs*, discontent with *Roe*'s hybrid inquiry shone through Justice Alito's majority opinion. Echoing the criticism of hybrid rights as atextual, Justice Alito wrote that "[t]he Constitution makes no reference to abortion . . . ."[121] His opinion further highlights how the *Casey* Court, revisiting *Roe* in 1992,[122] repositioned the right to abortion within the Fourteenth Amendment's Due Process Clause, "abandon[ing] any reliance on a [hybrid] privacy right."[123]

In *Obergefell*, Justice Kennedy's majority opinion applied a hybrid rights framework to identify a constitutional right to same-sex marriage, rooted in privacy and dignitary notions from the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[124] According to Justice Kennedy, "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles."[125] Ultimately, the "interrelation of the two principles furthers our understanding of what freedom is and must become."[126]

Like Justice Alito in *Dobbs*, Justice Thomas's dissent in *Obergefell* critiques Justice Kennedy's focus on dignity: "[t]he flaw in that reasoning, of course, is that the Constitution contains no 'dignity' Clause . . . ."[127] Justice Thomas distinguishes *Obergefell* from three other right-to-marriage cases—*Loving v. Virginia*, *Zablocki v. Redhail*, and *Turner v. Safley*—on the grounds that "[t]hose precedents all involved absolute prohibitions on

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[118] Cf. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 845 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."), *overruled by Dobbs*, 597 U.S. 215.

[119] John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 929 n.69 (1973).

[120] Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 774 (1999).

[121] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

[122] *Casey*, 505 U.S. at 846.

[123] *Dobbs*, 597 U.S. at 279.

[124] Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

[125] Id.

[126] Id.

[127] Id. at 735 (Thomas, J., dissenting).

private actions associated with marriage."[128] Specifically, he highlighted how in *Loving*, the plaintiffs faced criminal prosecution purely on the basis of their marriage.[129] Similarly, *Zablocki* struck down a law that criminalized marriage where a party was delinquent in child support obligations.[130] Finally, the incarcerated plaintiffs in *Turner* were denied any opportunity to marry absent the prison superintendent's permission.[131] The plaintiffs in these other cases faced a complete bar on marriage, in two of them through the threat of criminal prosecution, and Justice Thomas therefore considered their situations materially different from the circumstances of *Obergefell*.[132]

Griswold has never been formally overruled and still represents the acme of hybrid rights analysis. *Griswold*, *Roe*, and *Obergefell* each apply hybrid rights analysis to identify transcendental principles—namely, privacy and dignity—that emerge through multiple constitutional provisions. *Griswold* and *Roe* both involved challenges to criminal laws applied in seeming contravention of another constitutional principle, and Justice Thomas's dissent in *Obergefell* further emphasizes the importance of criminal law enforcement. These cases and their use of hybrid analysis have been controversial, and as highlighted by *Dobbs*, the hybrid foundations of a decision could become a reason for the Court to view the hybrid rights precedent as relatively weak or poorly reasoned.[133] However, hybrid rights related to arrests and political speech begin on much firmer ground than these seminal cases. Unlike, for example, the notion of dignity undergirding *Obergefell*, protection from executive suppression of political speech has more easily identifiable textual hooks in the First Amendment ("Congress shall make no law . . . abridging the freedom of speech")[134] and Fourth Amendment ("The right of the people to be secure from . . . unreasonable . . . seizures, shall not be violated").[135]

2. Employment Division v. Smith

Like *Griswold*, *Roe*, and *Obergefell*, *Smith* was a relatively controversial application of hybrid rights. Smith was fired by a drug rehabilitation organization after ingesting peyote for religious purposes and was

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[128] Id. at 730 (Thomas, J., dissenting).
[129] Id. (Thomas, J., dissenting) (citing Loving v. Virginia, 388 U.S. 1, 2–3 (1967)).
[130] Id. (Thomas, J., dissenting) (citing Zablocki v. Redhail, 434 U.S. 374, 387 (1978)).
[131] Id. (Thomas, J., dissenting) (citing Turner v. Safley, 482 U.S. 78, 82 (1987)).
[132] See id. at 730–31 (2015) (Thomas, J., dissenting).
[133] Cf. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 267 (2022) (discussing factors weighing in favor of overruling *Roe v. Wade*).
[134] U.S. Const. amend. I.
[135] U.S. Const. amend. IV.

subsequently denied unemployment compensation because using peyote violated Oregon criminal law.[136] The question at the Supreme Court was whether Oregon could constitutionally apply its "neutral, generally applicable regulatory law" proscribing peyote to Smith's religious exercise.[137] The Court held that Oregon could apply its criminal law to Smith without violating the First Amendment.[138]

However, Justice Scalia's majority opinion goes further, stating that "[t]he 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, such as freedom of speech and of the press."[139] For Justice Scalia's *Smith* majority, "[t]he present case does not present such a hybrid situation" because it only involves a stand-alone Free Exercise claim.[140] However, notwithstanding recent challenges to *Smith*,[141] the case stands for the broader proposition that neutral criminal laws that burden multiple constitutional principles do present such a hybrid situation. In combination with the previous discussion of *Griswold, Roe*, and *Obergefell*, then, a theme emerges: application of neutral criminal laws where other constitutional principles are at issue can compel a hybrid rights analysis.

3. Roaden v. Kentucky

Unlike *Smith*, which involved the application of a content-neutral criminal law, *Roaden* involved a content-based anti-obscenity statute.[142] Roaden was prosecuted for exhibiting an obscene film at his theater, but because he conceded the film's obscenity at trial, the potential First Amendment question about the anti-obscenity statute itself was not before the Court.[143] Roaden also moved to suppress the film on the ground that it was illegally seized.[144] The lower courts rejected the motion to suppress, but

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[136] Emp. Div. v. Smith, 494 U.S. 872, 874–75 (1990).
[137] Id. at 880.
[138] Id.
[139] Id. at 881 (citations omitted).
[140] Id. at 883.
[141] Several members of the current Court have called to reconsider *Smith*. Most notably, in *Fulton v. City of Philadelphia*, Justice Barrett, joined by Justice Kavanaugh, found petitioner's arguments to overrule *Smith* "convinc[ing]" and indicated her view that "the textual and structural arguments against *Smith* are more compelling." 593 U.S. 522, 543 (2021) (Barrett, J., concurring).
[142] Roaden v. Kentucky, 413 U.S. 496, 496–98 (1973).
[143] Id. at 497 n.1.
[144] Id. at 500.

the Supreme Court concluded that the warrantless seizure was unreasonable under the Fourth Amendment.[145]

Chief Justice Burger's majority opinion reflects a strong hybrid First-Fourth Amendment analysis. The opinion begins with the overture that "[t]he Fourth Amendment proscription against 'unreasonable . . . seizures', . . . must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material."[146] For the Court, the "common thread" of on-point case law was that all the seizures involved material that at least arguably fell within First Amendment protection.[147] Therefore, the Court reasoned that the warrant requirement "is to be accorded the most scrupulous exactitude" because "[n]o less a standard could be faithful to First Amendment freedoms."[148] The Court concluded that "leaving the protection of those freedoms to the whim of the officers" was "constitutionally impossible."[149]

Roaden's Fourth Amendment hybridization is, according to Coenen, relatively uncontroversial.[150] He further posits that even "[c]ritics of other forms of hybrid-rights analysis might respond by saying that the Fourth Amendment presents a special case" because of the textual ambiguity in "unreasonable."[151] Similarly, the First Amendment regularly informs many other procedural protections.[152] As Coenen documents, the Court considers First Amendment principles in, for example, vagueness doctrine, the private interest prong of the *Mathews v. Eldridge* procedural due process test, evaluations of licensing schemes' procedural adequacy, and reviews of defamation actions against public officials and figures.[153]

Perhaps hybrid rights, tied more generally to principles not textually enumerated in the Constitution, rest on shaky ground. But hybrid rights

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[145] Id. at 506.

[146] Id. at 501.

[147] Id. at 504. The other cases relied on for this point in Roaden include Marcus v. Search Warrants of Prop. at 104 E. Tenth St., Kansas City, 367 U.S. 717 (1961), Quantity of Copies of Books v. State of Kansas, 378 U.S. 205 (1964), and Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968), each of which involved seizures of allegedly obscene materials.

[148] Roaden v. Kentucky, 413 U.S. 496, 504 (1973).

[149] Id. at 504–05.

[150] See Coenen, supra note 101, at 2368.

[151] Id. at 2369–70.

[152] Id.

[153] See id. at 2370–71; see, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (requiring higher burden of proof in public official and public figure defamation cases); Smith v. Goguen, 415 U.S. 566, 573 (1974) (requiring higher standard under vagueness doctrine when First Amendment is at issue); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (adopting burden-shifting framework for mixed-motive speech cases).

jurisprudence demonstrates a particular concern with the intersection of criminal law and other constitutional protections, particularly First Amendment principles. The *Roaden* Court rightly concluded that "unreasonable" in the Fourth Amendment must be read alongside the First Amendment principles implicated by warrantless seizures. Like other important hybrid rights cases, *Roaden* uses one constitutional text, the First Amendment, to fill in gaps in another, the Fourth Amendment. The Anti-Retaliation Right, following directly from *Roaden* and other hybrid rights jurisprudence, interprets the Fourth Amendment's proscription on "unreasonable" searches and seizures by looking to First Amendment principles.

B. Counterfactual: Putting the First Amendment First

The Fourth Amendment prohibits "unreasonable" searches and seizures, and based on the First Amendment, a retaliatory arrest is unreasonable; together, this creates the Anti-Retaliation Right. The Anti-Retaliation Right is best understood as a Fourth Amendment protection informed by First Amendment principles, rather than the inverse.

Theorizing the Anti-Retaliation Right might instead begin with the First Amendment, and thinking through this counterfactual highlights the Right's critical gap-filling function. In this alternate formulation, the Right might be understood as addressing whether enforcement of neutral criminal statutes "abridge[s] the freedom of speech." As Professor Richard Fallon articulates, "individual government officials who discriminate on the basis of race or religion violate the Constitution even when no law or policy purports to compel them to do so."[154] Individual officers may violate the First Amendment when they apply neutral criminal statutes, effectively transforming neutral laws into content-based statutes.[155] This is the logic of current retaliatory arrest doctrine. Ultimately, the resulting anti-retaliation principle is, at least at a high level of abstraction, the same as beginning the analysis with the Fourth Amendment: adverse police action resulting from political speech should be presumptively impermissible.

But the First Amendment-forward framing is a poor fit. The First Amendment is what Professor Matthew Adler characterizes as a "right against rules"; the First Amendment protects people's free speech from

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[154] See Richard Fallon, Facial Challenges, Saving Constructions, and Statutory Severability, 99 Tex. L. Rev. 215, 216 (2020).

[155] See Nieves v. Bartlett, 587 U.S. 391, 398 (2019) ("'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006)).

certain *kinds* of government regulation.[156] As Adler explains, in *Texas v. Johnson*, the Court did not hold that Johnson has a right to burn the flag, immune from any regulation, but rather held that the content-based criminal statute was an unconstitutional abridgement of the freedom of speech under the First Amendment.[157] In this way, the Court's rules about rules, like strict scrutiny, rational basis review, and First Amendment overbreadth, create a framework to consider whether a rule was applied unconstitutionally.

Fallon distinguishes the Constitution's rules against executive action from the aforementioned general rules, most notably the Fourth Amendment's protections from unreasonable searches and seizures.[158] When police apply a neutral criminal statute to political speech, the importance of the distinction between Fourth Amendment protections from certain executive action and First Amendment protections from certain legislative regulation becomes apparent. In retaliatory arrest cases, the neutral criminal statute is not truly at issue, and First Amendment statutory construction principles likely resolve the facial First Amendment challenge because the statute could be construed to prohibit its unconstitutional application while preserving the statute on its face.

When a police officer arrests someone for political speech under a content-neutral law, the *executive* action burdens the individual's free speech interests. Beginning with the First Amendment, which focuses on legislative action, would miss a central problem the Anti-Retaliation Right responds to: executive actors who circumvent the First Amendment by enforcing neutral criminal laws in retaliation for political speech.[159]

C. The Proper Course: Beginning with the Fourth Amendment

Framing the Anti-Retaliation Right as an interpretation of the Fourth Amendment using First Amendment principles makes more sense than beginning with the First Amendment. Several important Fourth Amendment

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[156] See Matthew D. Adler, Rights Against Rules: The Moral Structure of American Constitutional Law, 97 Mich. L. Rev. 1 (1998); see also Fallon, supra note 154, at 241; Nicholas Quinn Rosenkranz, The Subjects of the Constitution, 62 Stan. L. Rev. 1209, 1250 (2010) ("[T]he First Amendment, unlike the rest of the Bill of Rights, is written in the active voice. It has an express subject, and thus a clear answer to the *who* questions.").

[157] See Adler, supra note 156, at 3.

[158] See Fallon, supra note 154, at 241.

[159] Little scholarship has addressed the Fourth Amendment implications of First Amendment protected speech. Karen Pita Loor, for example, argues that "in the Fourth Amendment balance of the totality of the circumstances, plaintiff activists' engagement in protected activity would weigh positively for their cases. This critique is distinct from the scholarship that focuses on how courts handle the protestors' *First Amendment* claims that police are chilling their speech." Karen Pita Loor, The Expressive Fourth Amendment, 94 S. Cal. L. Rev. 1311, 1315 (2021).

concerns warrant greater discussion in this anti-retaliation context. First, the Fourth Amendment's roots in political dissident cases suggest that hybrid analysis is particularly apt. Additionally, following from the discussion of executive versus legislative action, criminal procedure rules risk becoming "conduct rules" that sanction certain police behavior. Absent an Anti-Retaliation Right, current doctrine might translate into affirmative permission to arrest because of political speech. And relatedly, the Right responds to a fundamental misconception that the Fourth Amendment provides an affirmative right for police to take certain actions.

1. (Some) Fourth Amendment History

Considering the Fourth Amendment's background reveals the appropriateness of using a hybrid analysis to address issues of retaliation for political speech. Critically, the cases inspiring the Fourth Amendment were hybrid free speech-law enforcement situations involving political dissidents punished by the English crown.

The Fourth Amendment's underlying focus on privacy[160] is motivated by a historic concern about private *political* views. The Fourth Amendment was largely informed by two British 1760s cases that became famous in the American colonies (*Entick v. Carrington* and *Wilkes v. Wood*) and the Boston *Writs of Assistance Cases*.[161] *Entick* and *Wilkes* are particularly demonstrative of the anti-retaliatory principles underlying the Fourth Amendment.[162] Both Entick and Wilkes wrote political pamphlets critical of the King's ministers, were subjected to searches and seizures of their books

[160] See William Stuntz, Privacy's Problem and the Fourth Amendment, 93 Mich. L. Rev. 1016, 1021 (1995) ("[A]lthough the constitutional doctrines that regulate the police protect a number of values or interests, one—privacy—tops the list."); see also Katz v. United States, 389 U.S. 347 (1967) (establishing reasonable expectation of privacy test); Carpenter v. United States, 585 U.S. 296 (2018) (applying *Katz* test).

[161] See William J. Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L.J. 393, 397 (1995); Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765) (overview of search and seizures of political writings critical of the King); Wilkes v. Wood, 19 Howell's State Trials 1153 (C.P. 1763) (same); see also Boyd v. United States, 116 U.S. 616, 626 (1886) (relying on *Entick*, *Wilkes*, and *Writs of Assistance* for historical understanding of 4A); see also Amar, supra note 6, at 772 (discussing *Wilkes*).

[162] Though there seems to be widespread agreement about the importance of *Entick* and *Wilkes*, there is greater debate about the centrality of the *Writs of Assistance*. *Compare* Amar, supra note 6, at 772 (arguing writs of assistance were "almost unnoticed in debates over the federal Constitution and Bill of Rights") *with* Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 Wm. & Mary L. Rev. 97, 223–28 (1993) (arguing disputes over writs were critical to Founding Era understandings of searches and seizures); see also Stuntz, supra note 161, at 397 (discussing same). For purposes of this discussion of First and Fourth Amendment principles, the debate over the *Writs of Assistance* is unimportant.

and papers, and ultimately won damages in trespass suits against the officers.[163]

Professor William Stuntz observes that "*Entick* and *Wilkes* are classic First Amendment cases in a system with no First Amendment, no vehicle for direct substantive judicial view."[164] In both cases, a critic of the English government was subject to a search and seizure to suppress their political speech. Executive officers physically removed Entick's and Wilkes's political writings, which included criticism of the King. Their ensuing suits for trespass, the analog to a modern Section 1983 claim of a Fourth Amendment violation, resulted in significant damages. Although the modern system has both the Fourth and First Amendment, the lessons of *Entick* and *Wilkes* persist. They highlight how political speech issues lie at the core of historic Fourth Amendment concerns about executive actions. The "unreasonable" actions that motivated the Fourth Amendment were, at least in part, suppression of political speech critical of the government. *Entick* and *Wilkes* might be read to have inspired both a procedural protection from unreasonable searches and seizures in the Fourth Amendment and, indirectly, a substantive guard against the abridgement of free speech located in the *First* Amendment.[165]

This reminder from early Fourth Amendment history, while not dispositive, highlights the importance of protection for political speech to Fourth Amendment analysis. The Fourth Amendment's historic concern for protecting critical political speech, in combination with the forthcoming concerns about decision rules collapsing into conduct rules and the affirmative view of the Fourth Amendment, supports the Anti-Retaliation Right.

2. Conduct and Decision Rules

When the technical and legalistic rules restricting Fourth Amendment remedies are misheard as rules permitting certain enforcement practices, the result is a misconception that the conduct was permissible in the first place. The Anti-Retaliation Right further guards against this crucial mistake about conduct and decision rules of criminal procedure.

The distinction between conduct rules, which address the general public, and decision rules, which address the officials that apply them, derives from

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[163] See Amar, supra note 6, at 1177 & n.209, and sources cited therein; see also Stuntz, supra note 161, at 397.

[164] Stuntz, supra note 161, at 397.

[165] See id.

philosopher Jeremy Bentham.[166] In the criminal context, substantive criminal law provides a set of conduct rules for the general public; whereas, criminal procedural rules and canons of statutory construction are decision rules that guide courts' application of the rules.

Legal scholars have altered this framework to make an important observation about the criminal procedure context and the difference between rules for those enforcing the law—police—and those interpreting the law—courts. As Professor Carol Steiker puts it, "constitutional criminal procedure is a species of substantive criminal law for cops."[167] Accordingly, criminal procedure conduct rules instruct police on the constitutional legitimacy of their practices, and decision rules guide courts about the consequences of unconstitutional conduct.[168] But because police are attuned to the court's decision rules, technical criminal procedure holdings that limit remediation in essence act as conduct rules that bless the underlying policing.[169]

The issue, then, is that the gap in First and Fourth Amendment law that permits retaliatory arrests and restricts remedies, while not intended as an endorsement of the underlying conduct, becomes just that to officers on the ground. To illustrate the point, recall the earlier *Texas v. Johnson* redux where Johnson was arrested under a neutral law for burning the flag near the park.[170] Suppose now that the police officer unreasonably beat Johnson, unquestionably (for sake of this hypothetical) violating the Fourth Amendment through the use of excessive force. Johnson sought damages, but the Court held that although the officer violated the Fourth Amendment, the violation was not clearly established, and the officer was thus entitled to qualified immunity.

The determination that the use of force was unreasonable—that Johnson's Fourth Amendment rights were violated—is a conduct rule that should signal the officer's actions were unconstitutional. But in this hypothetical, Johnson ultimately receives no remedy because of the clearly established prong of qualified immunity, a technical decision rule for courts.

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[166] See Jeremy Bentham, A Fragment on Government and An Introduction to the Principles of Morals and Legislation 430 (Wilfrid Harrison ed., Basil Blackwell & Mott, Ltd. 1948) (1776 & 1789).

[167] Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2533 (1996).

[168] See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 626 (1984); Steiker, supra note 167, at 2533 (quoting id. at 626).

[169] Steiker, supra note 167, at 2533–34. This builds on Dan-Cohen's observation of an "acoustic separation" between the general public governed by conduct rules and the officials governed by decision rules. Dan-Cohen, supra note 168, at 630–34. Steiker argues that because police have "a more accurate and sophisticated understanding of the Supreme Court's ever-changing constitutional adjudication in criminal procedure," the acoustic separation is weaker. Steiker, supra note 167, at 2532.

[170] See supra Part II.B.

In reality, however, the distinction is blurry. Police are finely tuned to courts' decisions about their conduct, so the decision rule refusing to grant Johnson relief signals that the officer's conduct was unproblematic in the first place.[171]

In the context of retaliatory arrests, the Court's restrictive retaliatory arrest doctrine seems like a technical decision rule. Probable cause defeats most Section 1983 retaliatory arrest claims because it attenuates the causal relationship between First Amendment animus and adverse law enforcement action.[172] This causal relationship is complex precisely because "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest."[173] The decision rule that plaintiffs cannot recover for retaliatory arrests where the officer had probable cause translates to a conduct rule: the officer's arrest of the plaintiff was constitutional and permissible, notwithstanding the plaintiff's political speech.[174] Near-categorical bars on retaliation claims from the no-probable-cause rule therefore present the precise problem that Steiker identified. For officers on the ground, the decision rules act like conduct rules sanctioning speech-suppressive conduct.

The Anti-Retaliation Right represents a step towards properly communicating conduct rules. At a minimum, the Right's departure from the no-probable-cause rule and opposite presumption against reasonableness would encourage more accountability for law enforcement action that contravenes free speech principles. The conduct-decision rule distinction also reinforces the value of centering the Fourth Amendment, not the First Amendment. Focusing the analysis on the statute would further distance the officer's conduct from the violation. The Anti-Retaliation Right's Fourth Amendment focus moves closer to resolving the underlying issue of collapsing conduct and decision rules. Properly communicating what conduct is constitutional serves the crucial function of curbing government overreach, and the Anti-Retaliation Right's presumption against suppression of political speech would help clarify what conduct is unconstitutional.

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[171] See Steiker, supra note 167, at 2534 ("[T]he police are very apt to 'hear' the decision rules that the Supreme Court makes (and that lower federal and state courts apply) and thus adjust their attitudes about what behavior 'really' is required by the Court's conduct rules.").

[172] Cf. Nieves v. Bartlett, 587 U.S. 391, 401 (2019).

[173] Id. (quoting Reichle v. Howard, 566 U.S. 658, 668 (2012)).

[174] Cf. id. at 421 (Sotomayor, J., dissenting) ("There is no basis in § 1983 or in the Constitution to withhold a remedy for an arrest that violated the First Amendment solely because the officer could point to probable cause that some offense, no matter how trivial or obviously pretextual, has occurred.").

3. "Right" to Arrest

A related but distinct concern is the misconception that the Fourth Amendment, by its own force, empowers or permits arrests. The Fourth Amendment prohibits unreasonable searches and seizures. But the Fourth Amendment exceptions suggest a "right" to arrest for certain conduct. This gloss between "authority" and "right" is a critical misunderstanding of the Fourth Amendment. For example, in *Graham v. Connor* the Court innocuously states "[o]ur Fourth Amendment jurisprudence has long recognized that the *right* to make an arrest or investigatory stop necessarily carries with it the *right* to use some degree of physical coercion or threat thereof to effect it."[175]

The Anti-Retaliation Right responds to this misconception. When a person is engaged in political speech, the police have no right to arrest them. They may have lawful *authority*, granted through statutory law, but the conflict is not between two coequal constitutional rights. Rather, the individual has a right, under the Fourth Amendment, to be free from unreasonable searches and seizures. The search or seizure may be justified, but only in the bounds of what is reasonable. Critically, the Fourth Amendment imparts no right to arrest on the officer. The Anti-Retaliation Right, then, returns the balance to the negative liberty view by beginning from the assumption that police action based on political speech is unreasonable. In the specific context of retaliatory arrest, not only does the Fourth Amendment grant no affirmative right to arrest, but the First Amendment further prohibits the abridgement of free speech.

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[175] Graham v. Connor, 490 U.S. 386, 396 (1989) (emphasis added). For other examples where courts suggest a "right" to conduct law enforcement, see Mincey v. Arizona, 437 U.S. 385, 392 (1978) ("We do not question the right of the police to respond to emergency situations."); Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth, 891 F.2d 1087, 1093 (3d Cir. 1989) ("The right of the police to enter and investigate in an emergency . . . is inherent in the very nature of their duties as peace officers, and derives from the common law.") (quoting United States v. Barone, 330 F.2d 543, 545 (2d Cir. 1964); Wayne v. United States, 318 F.2d 205, 213 (D.C. Cir. 1963) ("I can see no escape from the logic of the Government's argument that the police had a right—if not a duty—to assume that . . . ."); United States v. Guidry, 2013 WL 5427973, No. 6:13-CR-0167-01, at *4 (W.D. La. Sep. 26, 2013) ("[T]he police had a lawful right of access to the item."); United States v. Trullo, 809 F.2d 108, 118 (1st Cir. 1987) (Bownes, Cir. J., dissenting) ("Police officers must have the right to protect themselves."); Jordan v. Shea, 208 N.W. 2d 235, 237 (Mich. Ct. App. 1973) ("Therefore, the officers clearly had a right to arrest."); People v. Kite, 423 N.E. 2d 524, 531 (Ill. App. Ct. 1981) ("The police had a right to enter Tello's residence; and once lawfully inside, they had a right to arrest him.").

D. Filling in the Gaps of "Unreasonable"

Two classic expressions of First Amendment principles, self-governance through free speech and the persuasion principle, demonstrate why police action based on political speech ought to be presumptively unreasonable. Enforcement of content-neutral law to suppress political speech is no less harmful to self-governance or violative of the First Amendment persuasion principle than content-based regulation, and the Anti-Retaliation Right would reinforce both First Amendment values.

Protecting political speech unquestionably lies at the heart of the First Amendment.[176] In his classic dissent in *Abrams v. United States*, Justice Holmes brought the "marketplace of ideas" metaphor into American Free Speech Clause discourse: "the best test of truth is the power of thought to get itself accepted in the competition of the market."[177] Justice Brandeis espoused a similar idea, though without expressly invoking the marketplace, in his famous *Whitney v. California* concurrence:[178]

> [The Framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing

[176] The marketplace of ideas metaphor originated in a series of seventeenth-century debates between English philosophers John Milton and John Stuart Mill. See Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1, 2–5 (1984); John Milton, Areopagitica (London 1644), *reprinted in* 2 Complete Prose Works of John Milton 486 *passim* (E. Sirluck ed. 1959); John Mill, On Liberty, *in* On Liberty and Considerations on Representative Government 1, 13–48 (R. McCallum ed., 1948). The obvious and oft-repeated critique of the "marketplace" metaphor is that it fails to account for "market failures" in the First Amendment arena. Still, the metaphor is a powerful starting point and frames other important ideas. For greater discussion of the marketplace of ideas, see Ingber, supra; C.E. Baker, Human Liberty and Freedom of Speech 12–24 (1989).

[177] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[178] 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

> majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[179]

Justice Brandeis's "remedy" to disagreeable, even contentious and inflammatory speech, is "more speech, not enforced silence."[180] Speech repression should nearly never be the answer: "Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom."[181] On its face, Brandeis's influential view, combined with Justice Holmes's metaphor of the marketplace of ideas, supports the Anti-Retaliation Right—the response to political speech should be more speech, not repression through arrests.

These themes underly two prominent First Amendment theories that demonstrate the vital role of the Anti-Retaliation Right in upholding First Amendment principles: Alexander Meiklejohn's absolute self-governance view and Professor David Strauss's persuasion principle.[182]

1. Self-Governance

Alexander Meiklejohn articulated the view that quasi-absolute free speech is critical to "democratic self-governance."[183] Under Meiklejohn's view, personal engagement with political ideas and discussion is the only truth to self-governance. Thus, political discourse is so entwined with democratic self-governance as to require absolute protection under the First Amendment. The Court's statement in *Garrison v. Louisiana* that "speech concerning public affairs is more than self-expression; it is the essence of self-governance" captures the Meiklejohn view.[184] Or, as Justice Brennan summarized it, Meiklejohn believed that "[f]reedom of expression in areas

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[179] Id. at 375.

[180] Id. at 377.

[181] Id.

[182] The two theories are not hermetically sealed. Strauss discusses Meiklejohn's theory as a potential, but ultimately insufficient, justification for the persuasion principle. See Strauss, supra note 63, at 350–52.

[183] This is a tremendous understatement of the complexity of Meiklejohn's work. For further exploration of his work, see generally Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Alexander Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245 (1961); Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (1965); Rodney A. Smolla, 1 Smolla & Nimmer on Freedom of Speech 2:49–50 (1994); Ingber, supra note 176; Patricia R. Stembridge, Adjusting Absolutism: First Amendment Protection for the Fringe, 80 B.U. L. Rev. 907 (2000).

[184] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); see also Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969) (quoting same).

of public affairs is an absolute."[185] The Meiklejohn view may be critiqued as overly extreme—as Justice Frankfurter argued in *Dennis v. United States*, "[a]bsolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."[186] But it rightly observes the potential problem with government suppression of political speech, as distinct from all speech.[187]

The Anti-Retaliation Right buttresses the Meiklejohn self-governance conception of the First Amendment.[188] To begin, the political speech interests protected by the Right fall within Meiklejohn's narrow band of political speech qualifying for absolute protection.[189] For Meiklejohn, the First Amendment "does not protect a 'freedom to speak'" but rather "protects the freedom of those activities of thought and communication by which we 'govern.'"[190] And Meiklejohn's notion of free speech "implies and requires what we call 'the dignity of the individual.'"[191] Accordingly, understanding the core of First Amendment protections through Meiklejohn's self-governance view informs what is "unreasonable" under the Fourth Amendment. The executive should not, through enforcement of neutral criminal laws, be allowed to search or seize people in a way that erodes the self-governance principles of free speech.

This argument might be inverted into First Amendment-forward language: Congress cannot abridge the free speech inherent in self-governance through neutral criminal law. Under this formulation, however, basic First Amendment statutory interpretation would apply, and neutral criminal laws would be construed to avoid First Amendment issues. The First Amendment-forward framing misses the *executive* action inhibiting the First Amendment. Executive enforcement of criminal law to undermine free speech is at least as corrosive to self-governance as legislation that has the

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[185] William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1, 12 (1965) (same).

[186] Dennis v. United States, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring).

[187] See Smolla, supra note 183.

[188] Notably, Meiklejohn adopts a hybrid analysis to derive his self-governance theory. In his seminal article *The First Amendment is an Absolute*, he writes that "[a]part from the First Amendment itself, the passages of the Constitution which most directly clarify its meaning are the Preamble, the Tenth Amendment, and Section 2 of Article I. All four provisions must be considered in their historical setting, not only in relation to one another but, even more important, in relation to the intention and structure of the Constitution as a whole." Meiklejohn, *The First Amendment*, supra note 183, at 253.

[189] Within the "forms of thought and expression" that "must suffer no abridgment," Meiklejohn identifies, *inter alia*, "[p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues . . . ." Meiklejohn, *The First Amendment*, supra note 183, at 257.

[190] Id. at 255.

[191] Id.

same effect.[192] Under Meiklejohn's theory of the First Amendment, the protection of free speech is necessary to preserve self-governance; this principle does not turn on the exercise of executive versus legislative power. Executive action, including police action, that impinges exercise of free political speech ought to be presumptively unreasonable to safeguard the free speech necessary for self-governance.

2. The Persuasion Principle

Strauss identified an alternative motivating First Amendment principle, the "persuasion principle."[193] He argues that "the government may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech."[194] Strauss identifies specific First Amendment doctrines that operationalize the persuasion principle, even if they do not explicitly invoke it, such as political censorship doctrine, *Brandenburg* restrictions on speech advocating unlawful conduct, defamation, campaign finance regulations, offensive speech, and commercial speech.[195] In each context, First Amendment law disfavors government regulations based on the persuasiveness of the speech. Strauss considers several potential justifications for the persuasion principle, but ultimately concludes that a Kantian view of autonomy motivates it.[196] He argues that "[v]iolating the persuasion principle is wrong" because when the government violates the principle, it "involve[s] a denial of autonomy in the sense that they interfere with a person's control over her own reasoning process."[197] Suppressing persuasive speech intrudes on an individual's ability to reason through and control their political thoughts.

Just as the Anti-Retaliation Right supports the Meiklejohn position, the Right aligns with Strauss's persuasion principle. Consider, as a starting point, a statute that forbids criticizing the police. The statute obviously violates the persuasion principle. People listening to speech criticizing the police should be free to make up their mind about the issue, and government censorship would deprive them of the autonomy to agree or disagree with the points. The legislature might retort that such criticism leads to a lack of

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[192] Perhaps the dignitary harm from executive enforcement makes executive enforcement worse than legislative action.

[193] See David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334 (1991).

[194] See Strauss, supra note 63, at 334.

[195] Id. at 338–45.

[196] Id. at 353–54.

[197] Id. at 354.

trust in police or sows discontent. Under the persuasion principle, however, these rationales, though meant to address a legitimate public harm, are forbidden reasons that rest on the persuasiveness of the speech. The statutory suppression of speech critical of the police clearly violates the persuasion principle.

What if, instead of a statute banning criticism of the police, officers arrested people at a protest against the police on other, neutral grounds (perhaps trespass or nuisance)?[198] This might seem like a less blatant violation of the persuasion principle, and at least some of the time, an officer's individual animus motivates the arrest. An officer might lose his temper in the face of criticism and arrest the critic. Often, though, the enforcement will result from concern about the speech's persuasiveness—the officer arresting the critic, or the decision-maker instructing officers to enforce content-neutral law to suppress speech, might fear listeners will agree with the criticism. The harm to autonomy from the suppression is the same, no matter if it comes from neutral criminal law enforcement rather than legislative action. Strauss looks to individual autonomy as the basis for the persuasion principle: every person ought to make their own choices about the persuasiveness of political ideas. Suppression of persuasive speech is just as damaging to individual autonomy when it arises from executive as from legislative action. Government officials, aware that content-based statutes would be unconstitutional, could circumvent the First Amendment through content-neutral law enforcement and still ensure persuasive political speech remains suppressed. Suppression of potentially persuasive political speech through retaliatory arrests harms listeners' dignity in much the same way as content-based statutes censoring persuasive speech.

The Anti-Retaliation Right both protects political speech necessary for self-governance from suppression and respects the autonomy of listeners by restricting the suppression of persuasive speech. Critically, these First Amendment values inform what is a reasonable Fourth Amendment search or seizure: suppression of political speech through criminal law enforcement should be presumptively unreasonable.

III. DEFINING THE RIGHT

From the foregoing analysis, several guideposts emerge to craft the Anti-Retaliation Right. First, current doctrine, especially the no-probable-cause

[198] See, e.g., Burbridge v. St. Louis, 2 F.4th 774, 778, 781 (8th Cir. 2021) (documentary filmmaker covering protests against the police borough § 1983 claims for, *inter alia*, First Amendment retaliation).

rule for retaliatory arrest claims, is under-protective of political speech. Second, political speech deserves a strong presumptive protection, subject to override only in exceptional circumstances, because of its necessity to self-governance and the dignitary harms of persuasion-based government speech suppression. The weight of First Amendment protection for political speech compels a standard that errs on the side of promoting political speech and distrusts government suppression of speech.[199] Still, balancing public safety and free speech is an issue at the heart of both the First and Fourth Amendments, and any formulation of the Anti-Retaliation Right must leave breathing room for true issues of public safety.

The (initial) formulation of the Anti-Retaliation Right is as follows: a Fourth Amendment search or seizure resulting from political speech is presumptively unreasonable. To overcome the presumption, the government bears the burden of demonstrating that (a) the speech was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," adopting the *Brandenburg* standard,[200] or (b) the political speech was a pretextual cover for unlawful activity.

The initial presumption in favor of political speech is, by this point, self-evident. The first carve-out attempts to account for the reality that some law enforcement is necessary, even when it burdens speech. Invoking the *Brandenburg* standard, rather than the *Nieves* no-probable-cause rule, harmonizes the Anti-Retaliation Right with First Amendment doctrine.[201] In the narrow circumstances addressed here—application of neutral criminal

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[199] For a greater elaboration of the idea of government distrust and free speech, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

[200] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[201] *Brandenburg* itself can be critiqued on its facts—perhaps *Brandenburg* satisfies its own standard. In *Brandenburg*, a Ku Klux Klan leader was convicted under Ohio's Criminal Syndicalism statute for "advocating . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." Ohio Rev. Code Ann. § 2923.13. He phoned a reporter for the local news station and invited him to a KKK rally that showed a film with hooded figures making derogatory statements about Black and Jewish people. The Court focused on the political views espoused by the Klansman, but paid scant attention to whether the film might "incite or produce imminent lawless action." *Brandenburg*, 395 U.S. at 444–45, 447–48. Likewise, in *Collin v. Smith*, the Court permitted a Nazi rally in a Jewish neighborhood of Illinois, determining that the circumstances were not the "very narrow circumstances" where "a government may proscribe content on the basis of imminent danger of a grave substantive evil." Collin v. Smith, 578 F.2d 1197, 1202 (7th Cir. 1978). Both decisions questionably apply the *Brandenburg* standard. Other quasi-*Brandenburg* protections for hate speech, such as the cross-burning circumstances of *R.A.V. v. City of St. Paul*, present related, complicated questions about the reach of free speech protections. See R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) (invalidating Minnesota's Bias-Motivated Crime Ordinance after petitioner allegedly burned a cross on a Black family's lawn). However, in the narrow but important scenario where a person is arrested for political speech, requiring imminence rather than some lower standard places a higher burden on the government and presumptively protects the speech.

laws to political speech—the *Brandenburg* standard makes sense. Requiring the serious exigency of imminent lawless activity, rather than a lower bar like the *O'Brien* time-place-manner test or probable cause, strikes the proper balance to protect political speech and address public order concerns.[202] Absent an imminent and sufficiently serious danger, adverse action for political speech infringes the self-governance and persuasion principles of the First Amendment and, accordingly, such arrests should be presumptively unreasonable.

The second carve-out, pretext, addresses the possibility that political speech might be a shield used to guard against criminal liability.[203] This inquiry should weigh the non-trans-substantive concern about the underlying criminal law, any time-lag between the political speech and adverse action, and the nature of the political expression involved. As an extreme example, the Unabomber's manifesto[204] was undoubtedly a political expression, but the seriousness and tragedy of his serial murders obviously warranted law enforcement action. Likewise, if a person shoplifted while incidentally wearing a T-shirt with a political slogan on it, the government should be able to overcome the Right's presumption. Here, the underlying criminal law is relatively less important and the expression is also far weaker. But a jaywalker leaving a protest, the Court's paradigmatic example for an exception to the no-probable-cause rule, should be presumptively protected by the Anti-Retaliation Right because their political expression is strong and temporally proximate to the arrest, but the underlying criminal law is infrequently invoked and relatively unimportant.[205] This inquiry would necessarily involve case-by-case analysis and factual development. Still, the burden on courts and litigants, particularly the government bearing the burden of persuasion, would be warranted because First Amendment principles require that the government clear a high bar when attempting to suppress political speech.

Several other realities of federal constitutional litigation mitigate the potential that the Right will lead to vexatious litigation or overly deter ordinary law enforcement. Most importantly, this Right is just one change in a sea of untouched procedural rules for constitutional litigation. In suits

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[202] Cf. New York v. Quarles, 467 U.S. 649 (1984) (*Miranda* exception for public safety); Kentucky v. King, 563 U.S. 452 (2011) (warrant exception for exigency).

[203] Cf. Gonzalez v. Trevino, 602 U.S. 653, 663 (Alito, J., dissenting) (expressing concern that "a driver with an anti-police bumper sticker on his car could claim that any traffic stop was due to his protected speech").

[204] See Theodore Kaczynski, Industrial Society and its Future (1971).

[205] Cf. Nieves v. Bartlett, 587 U.S. 391, 407 (2019) (discussing jaywalking example); Gonzalez v. Trevino, 602 U.S. 653, 668 (2024) (Alito, J., concurring) (same).

against individual officers, litigants would still need to overcome qualified immunity. The clearly established prong of qualified immunity already accounts for both concerns and will remain a powerful shield from liability for law enforcement. Likewise, in suits against federal officers, *Egbert v. Boule*, which rejected *Bivens* claims for First Amendment retaliation, would remain instructive to courts and likely restrict any Anti-Retaliation Right issues to state and local officers.[206] This asymmetry in the Anti-Retaliation Right is unfounded, especially since the Right builds on First and Fourth Amendment principles that applied from the outset to federal actors, but the reality of *Bivens* litigation lessens some potential concerns about expansive invocation of the Right. Suits against municipalities remain subject to the higher standard of demonstrating a policy or custom leading to the violation.[207] Similarly, rules about pre-enforcement injunctions[208] and federal court abstention during on-going state criminal proceedings[209] further restrict the reach of the Right. Against the backdrop of these other doctrines, the Anti-Retaliation Right should operate as a strong presumption that police action based on political speech is impermissible, and rebuttable where the government can prove either imminent incitement to unlawful action or pretext.

CONCLUSION

Current First and Fourth Amendment doctrines fail to account for how neutral criminal law enforcement can suppress political speech. Fourth Amendment challenges fail to account for animus based on speech and First Amendment statutory constructions will save statutes from facial challenges. Retaliatory arrest doctrine's no-probable-cause rule is under-protective of political speech, even though First Amendment doctrine is usually overprotective of political speech, permitting even hate speech.

In response, this Note has theorized an Anti-Retaliation Right. This Right starts from the basic premise that law enforcement action based on political speech should be presumptively unreasonable. The Fourth Amendment's language, "unreasonable," ought to be defined by the First Amendment's protection for political speech.

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[206] See Egbert v. Boule, 596 U.S. 482, 498–501 (2022).

[207] See Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); City of Canton v. Harris, 489 U.S. 378 (1989).

[208] Cf. City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (evaluating standing relief-by-relief); Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).

[209] Cf. Younger v. Harris, 401 U.S. 37 (1971).

The reality of the threat to political speech should not go underappreciated. American substantive criminal law has expanded to the point that if police wait long enough, they will likely have probable cause to arrest anyone.[210] Let us not forget, sixty years ago, Klansmen, aided by local law enforcement, beat and pepper-sprayed protestors because of their speech in Selma's Bloody Sunday. Martin Luther King, Jr. was arrested multiple times between 1956 and 1964, the height of the Civil Rights Movement, for violations of content-neutral criminal laws like tax evasion[211] and driving thirty miles per hour in a twenty-five miles per hour zone.[212] At our country's Founding, the famous cases motivating our Fourth Amendment involved seizures of political dissidents' private papers.[213] The contemporary threat of the executive neutralizing political opponents with arrests, investigations, and uses of force still looms large.[214] As just one salient example, a recent Executive Order explicitly instructed the Attorney General to prosecute flag-

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[210] See Nieves v. Bartlett, 587 U.S. 391, 412 (2019) (Gorsuch, J., concurring) ("In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."); cf. Navarette v. California, 572 U.S. 393, 404–14 (2014) (Scalia, J., dissenting) ("Had the officers witnessed the petitioner violate a single traffic law, they would have had cause to stop the truck . . . .").

[211] State of Alabama v. M.L. King, Jr., Nos. 7399 & 9593, Stan. Univ., The Martin Luther King, Jr. Rsch. & Educ. Ctr., https://kinginstitute.stanford.edu/state-alabama-v-m-l-king-jr-nos-7399-and-9593.

[212] Martin Luther King, Jr. Research & Educ. Ctr., King arrested for speeding; MIA holds seven mass meetings, https://kinginstitute.stanford.edu/king-arrested-speeding-mia-holds-seven-mass-meetings [https://perma.cc/J783-YC9W].

[213] See Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765) (search and seizures of political writings critical of the King); Wilkes v. Wood, 19 Howell's State Trials 1153 (C.P. 1763) (same); see also Boyd v. United States, 116 U.S. 616, 626 (1886).

[214] See, e.g., Peter Nicholas, Trump Administration swiftly enacts retribution against political enemies, NBC News (Jan. 26, 2025), https://www.nbcnews.com/politics/donald-trump/trump-administration-swiftly-enacts-retribution-political-enemies-rcna188763 [https://perma.cc/5QUD-VUBU]; Zachary B. Wolf, Trump's retribution sends a chilling message to dissenters, CNN (Apr. 12, 2025), https://www.cnn.com/2025/04/12/politics/trump-krebs-khalil-taylor-crackdown-dissent-what-matters/index.html [https://perma.cc/HAP4-VPWD]; Jake Offenharz, Kathy McCormack & Michael Casey, Turkish student at Tufts University detained, video shows masked people handcuffing her, AP News (Mar. 26, 2025), https://apnews.com/article/tufts-student-detained-massachusetts-immigration-6c3978da98a8d0f39ab311e092ffd892; Jake Offenharz, Immigration agents arrest Palestinian activist who helped lead Columbia University protests, AP News (Mar. 9, 2025), https://apnews.com/article/columbia-university-mahmoud-khalil-ice-15014bcbb921f21a9f704d5acdcae7a8 [https://perma.cc/J99M-VQ4A]; Dep't of Just., Investigation of the Ferguson Police Department 24 (2015) ("[Ferguson Police Department's] approach to enforcement results in violations of individuals' First Amendment rights. FPD arrests people for a variety of protected conduct: people are punished for talking back to officers, recording public police activities, and lawfully protesting perceived injustices."); U.S. Dep't of Just., Investigation of the City of Phoenix & the Phoenix Police Dep't 21 (2024) ("[Phoenix Police Department] officers unlawfully arrest or use force in response to criticism, insults, or perceived disrespect during daily encounters. Often, within seconds, officers react with force to verbal slights.").

burning using all applicable "content-neutral laws."[215] The Constitution protects free speech, especially political speech, from retaliatory executive action, and the executive should not be able to use content-neutral laws to circumvent First Amendment protections.

The hallmark of a free society is the ability to speak about the issues of the day or criticize the government without fear of repression or punishment. Current constitutional doctrines, however, fail to adequately protect political speakers from government retaliation through enforcement of content-neutral criminal laws. This Note has advanced a simple premise, rooted in First and Fourth Amendment principles, to fill that gap. When a person is arrested or otherwise punished for political speech, the Anti-Retaliation Right should apply. In order to safeguard valuable First Amendment principles, a Fourth Amendment search or seizure based on a person's political speech should be considered presumptively unreasonable.

[215] Exec. Order No. 14341, 90 Fed. Reg. 42127 (Aug. 28, 2025); see also supra note 49 and accompanying text.