AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Free Speech/Advocacy

**Barr v. American Association of Political Consultants, Inc., 140 S.Ct. 2335** (2020)

*The American Association of Political Consultants claimed that the First Amendment was violated by federal laws that forbade them form making robocalls that concern election related issues while permitting robocalls designed to collect debts owed or guaranteed by the federal government. They filed a lawsuit against attorney general, who when the case reached the Supreme Court was William Barr, asking the courts to declare the federal policy on robocalls on unconstitutional content-based restriction on free speech. A lower federal court rejected this claim, but that decision was reversed by the Court of Appeals for the Fourth Circuit. Barr, on behalf of the United States, appealed to the Supreme Court of the United States.*

 *The Supreme Court by a 6-3 vote declared the federal scheme unconstitutional and by a 7-2 vote declared that the government debt exception should be severed from the general ban on robocalls. Justice Brett Kavanaugh’s opinion declared that the government had unconstitutionally discriminated against speakers who wished to make robocalls on matters other than government debt, but that this unconstitutional discrimination was best corrected by retaining the federal law that prohibited all robocalls. Why does Kavanaugh think federal law made a content distinction that merits strict scrutiny review? Why does Justice Stephen Breyer disagree? Who has the better of the argument? Why does Kavanaugh think the government debt provision severable. Why does Justice Neil Gorsuch disagree? Who has the better of that argument? Notice how polite Kavanaugh and Gorsuch are to each other. Contemporary judicial opinions more often engage in “trash talk.” Can you discern any patterns in the respect to which the justices treat opinions they disagree with?*

 *Breyer’s opinion highlights an interesting problem that justices sometimes face. Breyer maintained the entire federal law on robocalls was constitutional. Nevertheless, he voted to severability as the second-best option. Why was Breyer put in this position? Was his solution the first best solution?*

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8) announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8) join, and in which Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8) joins [in part]

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Six Members of the Court today conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment. Applying traditional severability principles, seven Members of the Court conclude that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute.  As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech. The judgment of the U. S. Court of Appeals for the Fourth Circuit is affirmed.

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The Court's precedents allow the government to “constitutionally impose reasonable time, place, and manner regulations” on speech, but the precedents restrict the government from discriminating “in the regulation of expression on the basis of the content of that expression.”  Content-based laws are subject to strict scrutiny. By contrast, content-neutral laws are subject to a lower level of scrutiny. . . . The initial First Amendment question is whether the robocall restriction, with the government-debt exception, is content-based. The answer is yes.

As relevant here, a law is content-based if “a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”  For example, “a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.”

. . . . [T]he legality of a robocall turns on whether it is “made solely to collect a debt owed to or guaranteed by the United States.” A robocall that says, “Please pay your government debt” is legal. A robocall that says, “Please donate to our political campaign” is illegal. That is about as content-based as it gets. Because the law favors speech made for collecting government debt over political and other speech, the law is a content-based restriction on speech.

. . . . This statute singles out calls “made solely to collect a debt owed to or guaranteed by the United States,” not all calls from authorized debt collectors. . . . The law here focuses on whether the caller is *speaking*about a particular topic. . . . The law here “does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers.” . . .

The Government concedes that it cannot satisfy strict scrutiny to justify the government-debt exception. We agree. The Government's stated justification for the government-debt exception is collecting government debt. Although collecting government debt is no doubt a worthy goal, the Government concedes that it has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like.

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. . . . Congress's addition of the government-debt exception in 2015 does not cause us to doubt the credibility of Congress's continuing interest in protecting consumer privacy. After all, the government-debt exception is only a slice of the overall robocall landscape. This is not a case where a restriction on speech is littered with exceptions that substantially negate the restriction. On the contrary, even after 2015, Congress has retained a very broad restriction on robocalls. . . . Congress's growing interest (as reflected in the 2015 amendment) in collecting government debt does not mean that Congress suddenly lacks a genuine interest in restricting robocalls. . . .

We agree with the Government that we must invalidate the 2015 government-debt exception and sever that exception from the remainder of the statute. . . .

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. . . . [A]bsent a severability or nonseverability clause, a court often cannot really know what the two Houses of Congress and the President from the time of original enactment of a law would have wanted if one provision of a law were later declared unconstitutional. The Court's cases have instead developed a strong presumption of severability. The Court presumes that an unconstitutional provision in a law is severable from the remainder of the law or statute. . . .

The Court's power and preference to partially invalidate a statute in that fashion has been firmly established since [*Marbury* v. *Madison* (1803).](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1801123932&pubNum=0000780&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) There, the Court invalidated part of § 13 of the Judiciary Act of 1789.  The Judiciary Act did not contain a severability clause. But the Court did not proceed to invalidate the entire Judiciary Act. As Chief Justice Marshall later explained, if any part of an Act is “unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are not repugnant to the constitution of the United States.” . . .

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 The Court's presumption of severability supplies a workable solution—one that allows courts to avoid judicial policymaking or *de facto* judicial legislation in determining just how much of the remainder of a statute should be invalidated. The presumption also reflects the confined role of the Judiciary in our system of separated powers—stated otherwise, the presumption manifests the Judiciary's respect for Congress's legislative role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional. Furthermore, the presumption recognizes that plaintiffs who successfully challenge one provision of a law may lack standing to challenge *other*provisions of that law.

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Before severing a provision and leaving the remainder of a law intact, the Court must determine that the remainder of the statute is “capable of functioning independently” and thus would be “fully operative” as a law. But it is fairly unusual for the remainder of a law not to be operative.[9](https://1.next.westlaw.com/Document/I327bdc5dbf5e11eab1faf5a0aee61ce8/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad7403700000176145dc5dbff0441e2%3FNav%3DCASE%26fragmentIdentifier%3DId819771d6cd611ea96bae63bc27a1895%26startIndex%3D21%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&list=CASE&rank=28&grading=na&sessionScopeId=2777de45a367353ef8b27c891249989c9c2ffcab1126bd08d3ed670315695b54&originationContext=previousnextdocument&transitionType=SearchItem&contextData=%28sc.Search%29&listPageSource=d1852cff17d865b07f2904492b383694#co_footnote_B00102051399028)

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Since 1934, the Communications Act has contained an express severability clause: “If any provision of *this chapter* or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.” . . . Enacted in 2015, the government-debt exception added an unconstitutional discriminatory exception to the robocall restriction. The text of the severability clause squarely covers the unconstitutional government-debt exception and requires that we sever it.

. . . . Even if the severability clause did not apply to the government-debt provision at issue in this case (or even if there were no severability clause in the Communications Act), we would apply the presumption of severability. And under that presumption, we likewise would sever the 2015 government-debt exception, the constitutionally offending provision.

With the government-debt exception severed, the remainder of the law is capable of functioning independently and thus would be fully operative as a law. Indeed, the remainder of the robocall restriction did function independently and fully operate as a law for 20-plus years before the government-debt exception was added in 2015.

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One final severability wrinkle remains. This is an equal-treatment case, and equal-treatment cases can sometimes pose complicated severability questions. The “First Amendment is a kind of Equal Protection Clause for ideas.”  And Congress violated that First Amendment equal-treatment principle in this case by favoring debt-collection robocalls and discriminating against political and other robocalls. When the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all. . . .

When, as here, the Court confronts an equal-treatment constitutional violation, the Court generally applies the same commonsense severability principles described above. If the statute contains a severability clause, the Court typically severs the discriminatory exception or classification, and thereby extends the relevant statutory benefits or burdens to those previously exempted, rather than nullifying the benefits or burdens for all. In light of the presumption of severability, the Court generally does the same even in the absence of a severability clause. . . .

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Plaintiffs insist, however, that a *First Amendment* equal-treatment case is different. According to plaintiffs, a court should not cure “a First Amendment violation by outlawing more speech.” The implicit premise of that argument is that extending the robocall restriction to debt-collection robocalls would be unconstitutional. But that is wrong. A generally applicable robocall restriction would be permissible under the First Amendment. Extending the robocall restriction to those robocalls raises no First Amendment problem. So the First Amendment does not tell us which way to cure the unequal treatment in this case. . . .

Justice GORSUCH suggests that our decision provides “no relief” to plaintiffs.  We disagree. Plaintiffs want to be able to make political robocalls to cell phones, and they have not received *that* relief. But the First Amendment complaint at the heart of their suit was unequal treatment. Invalidating and severing the government-debt exception fully addresses that First Amendment injury. Justice GORSUCH further suggests that plaintiffs may lack standing to challenge the government-debt exception, because that exception merely favors others. But the Court has squarely held that a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others. Justice GORSUCH also objects that our decision today “harms strangers to this suit” by eliminating favorable treatment for debt collectors.  But that is necessarily true in many cases where a court cures unequal treatment by, for example, extending a burden or nullifying a benefit.

Moreover, Justice GORSUCH's approach to this case would not solve the problem of harming strangers to this suit; it would just create a different and much bigger problem. His proposed remedy of injunctive relief, plus *stare decisis*, would in effect allow all robocalls to cell phones—notwithstanding Congress's decisive choice to prohibit most robocalls to cell phones. That is not a judicially modest approach but is more of a wolf in sheep's clothing. That approach would disrespect the democratic process, through which the people's representatives have made crystal clear that robocalls must be restricted.

Justice GORSUCH suggests more broadly that severability doctrine may need to be reconsidered. But when and how? As the saying goes, John Marshall is not walking through that door. And this Court, in this and other recent decisions, has clarified and refined severability doctrine by emphasizing firm adherence to the text of severability clauses, and underscoring the strong presumption of severability. The doctrine as so refined is constitutionally well-rooted, and can be predictably applied. True, there is no magic solution to severability that solves every conundrum, especially in equal-treatment cases, but the Court's current approach as reflected in recent cases . . .  is constitutional, stable, predictable, and commonsensical.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8), concurring in the judgment.

I agree with much of the partial dissent's explanation that strict scrutiny should not apply to all content-based distinctions. In my view, however, the government-debt exception . . .  still fails intermediate scrutiny because it is not “narrowly tailored to serve a significant governmental interest.”  Even under intermediate scrutiny, the Government has not explained how a debt-collection robocall about a government-backed debt is any less intrusive or could be any less harassing than a debt-collection robocall about a privately backed debt. . . . The Government could have employed far less restrictive means to further its interest in collecting debt, such as “secur[ing] consent from the debtors to make debt-collection calls” or “plac[ing] the calls itself.”  Nor has the Government “sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like.” *Ante*, at 2347.

Nevertheless, I agree that the offending provision is severable. . . .

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8) and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8) join, concurring in the judgment with respect to severability and dissenting in part.

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The problem with [the majority’s] approach, which reflexively applies strict scrutiny to all content-based speech distinctions, is that it is divorced from First Amendment values. This case primarily involves commercial regulation—namely, debt collection. And, in my view, there is no basis here to apply “strict scrutiny” based on “content-discrimination.”

To appreciate why, it is important to understand at least one set of values that underlie the First Amendment and the related reasons why courts scrutinize some speech restrictions strictly. The concept is abstract but simple: “We the People of the United States” have created a government of laws enacted by elected representatives. For our government to remain a *democratic* republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion. The object of that transmission is to influence the public policy enacted by elected representatives. . . .

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From a democratic perspective, however, it is equally important that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse. As a general matter, the strictest scrutiny should not apply indiscriminately to the very “political and social changes desired by the people”—that is, to those government programs which the “unfettered interchange of ideas” has sought to achieve.  Otherwise, our democratic system would fail, not through the inability of the people to speak or to transmit their views to government, but because of an elected government's inability to translate those views into action.

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This account of well-established principles at the core of the First Amendment demonstrates the problem with the plurality's approach. To reflexively treat all content-based distinctions as subject to strict scrutiny regardless of context or practical effect is to engage in an analysis untethered from the First Amendment's objectives. And in this case, strict scrutiny is inappropriate. Recall that the exception at issue here concerns debt collection—specifically a method for collecting government-owned or -backed debt. Regulation of debt collection does not fall on the first side of the democratic equation. It has next to nothing to do with the free marketplace of ideas or the transmission of the people's thoughts and will to the government. It has everything to do with the second side of the equation, that is, with government response to the public will through ordinary commercial regulation. To apply the strictest level of scrutiny to the economically based exemption here is thus remarkable.

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If, as I have argued, the First Amendment does not support the mechanical conclusion that content discrimination automatically triggers strict scrutiny, what role might content discrimination play? The plurality is correct when it quotes this Court as having said that the government may not discriminate “ ‘in the regulation of expression on the basis of the content of that expression.’ ”  If, however, this Court is to apply the First Amendment consistently with the democratic values embodied within that Amendment, that kind of statement must reflect a rule of thumb applicable only in certain circumstances.

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That said, I am not arguing for the abolition of the concept of “content discrimination.” There are times when using content discrimination to trigger scrutiny is eminently reasonable. Specifically, when content-based distinctions are used as a method for suppressing particular viewpoints or threatening the neutrality of a traditional public forum, content discrimination triggering strict scrutiny is generally appropriate.

. . . . [T]his case is not about protecting the marketplace of ideas. It is not about the formation of public opinion or the transmission of the people's will to elected representatives. It is fundamentally about a method of regulating debt collection.

I would examine the validity of the regulation at issue here using a First Amendment standard that (unlike strict scrutiny) does not strongly presume that a regulation that affects speech is unconstitutional. However, given that the government-debt exception does directly impact a means of communication, the appropriate standard requires a closer look at the restriction than does a traditional “rational basis” test. A proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so. . . . We have typically called this approach “intermediate scrutiny,” though we have sometimes referred to it as an assessment of “fit,” sometimes called it “proportionality,” and sometimes just applied it without using a label.

Applying this Court's intermediate scrutiny analysis, I would begin by asking just what the First Amendment harm is here. As Justice KAVANAUGH notes, the government-debt exception provides no basis for undermining the general cell phone robocall restriction.  Indeed, looking at the government-debt exception in context, we can see that the practical effect of the exception, taken together with the rest of the statute, is to put *non*-government debt collectors at a disadvantage. Their speech operates in the same sphere as government-debt collection speech, communicates comparable messages, and yet does not have the benefit of a particular instrument of communication (robocalls). While this is a speech-related harm, debt-collection speech is both commercial and highly regulated. The speech-related harm at issue here—and any related effect on the marketplace of ideas—is modest.

What, then, is the justification for this harm? The purpose of the exception is to further the protection of the public fisc.  That protection is an important governmental interest. Private debt typically involves private funds; public debt typically involves funds that, in principle, belong to all of us, and help to implement numerous governmental policies that the people support.

Finally, is the exception narrowly tailored? Its limited scope shows that it is. Congress has minimized any speech-related harm by tying the exception directly to the Government's interest in preserving the public fisc. . . .

For the reasons described above, I would find that the government-debt exception does not violate the First Amendment. A majority of the Court, however, has concluded the contrary. It must thus decide whether that provision is severable from the rest of the statute. As to that question, I agree with Justice KAVANAUGH's conclusion that the provision is severable. Accordingly, I respectfully concur in the judgment with respect to severability and dissent in part.

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I327bdc5dbf5e11eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I327bdc5dbf5e11eab1faf5a0aee61ce8) joins as to Part II, concurring in the judgment in part and dissenting in part.

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. . . . [T]the TCPA's rule against cellphone robocalls is a content-based restriction that fails strict scrutiny. The statute is content-based because it allows speech on a subject the government favors (collecting its debts) while banning speech on other disfavored subjects (including political matters). The statute fails strict scrutiny because the government offers no compelling justification for its prohibition against the plaintiffs’ political speech. In fact, the government does not dispute that, if strict scrutiny applies, its law must fall.

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With a First Amendment violation proven, the question turns to remedy. Because the challenged robocall ban unconstitutionally infringes on their speech, I would hold that the plaintiffs are entitled to an injunction preventing its enforcement against them. This is the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future. Preventing the law's enforcement against the plaintiffs would fully address their injury. And going this far, but no further, would avoid “short circuit[ing] the democratic process” by interfering with the work of Congress any more than necessary.

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. . . . Many have questioned the propriety of modern severability doctrine, and today's case illustrates some of the reasons why. To start, it's hard to see how today's use of severability doctrine qualifies as a remedy at all: The plaintiffs have not challenged the government-debt exception, they have not sought to have it severed and stricken, and far from placing “unequal treatment” at the “heart of their suit,” they have never complained of unequal treatment as such. . The plaintiffs point to the government-debt exception only to show that the government lacks a compelling interest in restricting their speech. It isn't even clear the plaintiffs would have standing to challenge the government-debt exception. They came to court asserting a right to speak, not a right to be free from other speakers. Severing and voiding the government-debt exception does nothing to address the injury they claim; after today's ruling, federal law bars the plaintiffs from using robocalls to promote political causes just as stoutly as it did before. What is the point of fighting this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?

A severance remedy not only fails to help the plaintiffs, it harms strangers to this suit. Just five years ago, Congress expressly authorized robocalls to cell phones to collect government-backed debts. Yet, today, the Court reverses that decision and outlaws the entire industry. It is highly unusual for judges to render unlawful conduct that Congress has explicitly made lawful—let alone to take such an extraordinary step without warning to those who have ordered their lives and livelihoods in reliance on the law, and without affording those individuals any opportunity to be heard. This assertion of power strikes me as raising serious separation of powers questions, and it marks no small departure from our usual reliance on the adversarial process.

Nor does the analogy to equal protection doctrine solve the problem. That doctrine promises equality of treatment, whatever that treatment may be. The First Amendment isn't so neutral. It pushes, always, in one direction: against governmental restrictions on speech. Yet, somehow, in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be allowed to speak more freely and, instead, more speech will be banned.

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