



SUSPICION, DEFERENCE, AND THE FIRST AMENDMENT

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INTRODUCTION

First Amendment disputes frequently require courts to assess governmental assertions that contested expression is unacceptably dangerous. This assessment requires courts to choose when to defer to the government’s assertions of danger—and when instead to distrust those assertions. The centenary of the Supreme Court’s decision in *Gitlow v. New York*¹ invites us to revisit the role that deference has played, and could play, in Free Speech Clause theory and doctrine. And because a great deal of the First Amendment law developed since *Gitlow* is at least as much about suspicion of the government as it is about deference to the government, *Gitlow*’s centenary also invites us to consider the role that suspicion has played, and could play, in First Amendment law.

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¹ 268 U.S. 652 (1925).

Benjamin Gitlow was charged not “with the commission of any overt illegal act,” nor “with conspiracy to commit an illegal act,” nor “with advocating that anyone else go out and commit an overt illegal act.”² Instead, he and his co-defendants “advocated ideas that, if enough people agreed with them, might lead to illegalities at some point in the future.”³ In defense, Gitlow argued that the First Amendment did not permit the government to punish this advocacy absent evidence of its causal connection to “some substantive evil, consummated, attempted or likely.”⁴ A majority of the Supreme Court disagreed, deferring to the legislature’s determination that this advocacy, without more, carried sufficient potential for harm to justify its regulation.⁵ But the Court failed to explain *why* it chose to defer to the legislature’s statutory conclusion that certain speech was dangerous by its very nature.⁶

As we’ll see, a variety of principled reasons can support a court’s choice to defer to the government’s assessment of expression’s danger. So too can multiple principled reasons support a court’s choice to treat the government’s assessments instead with suspicion. As we’ll also see, courts sometimes explain their choice to be deferential, and sometimes they don’t—and courts sometimes explain their choice to be suspicious, and sometimes they don’t. But exposing and justifying these choices helps courts improve the quality of their threshold decision to defer or distrust, as well as the quality of their subsequent operationalization of that decision through the creation and application of free speech doctrine.

² MARC LENDLER, *GITLOW V. NEW YORK: EVERY IDEA AN INCITEMENT* 20 (2012).

³ *Id.*

⁴ *Gitlow*, 268 U.S. at 664.

⁵ *Id.* at 670; *see also id.* at 669 (“The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler’s scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.”). The Court distinguished advocacy from “the expression of philosophical abstraction” or “the mere prediction of future events.” *Id.* at 665.

⁶ *Id.* at 669–71.

I. DEFERENCE, EXPLAINED

Legal scholar Paul Horwitz's thoughtful work examines the "surprisingly puzzling question of how courts know whether, when, and how much to defer" to governmental (or other) actors.⁷ There he defines deference as involving "a decisionmaker (D1) setting aside its own judgment and following the judgment of another decisionmaker (D2) in circumstances in which the deferring decisionmaker, D1, *might* have reached a different decision."⁸

As Horwitz explains, courts sometimes choose to defer to those with greater "epistemic authority" such that courts trust those actors to make better, wiser, more accurate decisions.⁹ For instance, "a court might conclude that, in the common run of cases, prison administrators are less likely to err in making particular decisions within the sphere of their expertise than are courts."¹⁰ And as law professors Gary Lawson and Guy Seidman relatedly observe, courts sometimes privilege decisional "accuracy" to justify their choice to defer to an actor "in a better position than is the deferring actor to get the right answer" based on "more knowledge, more expertise or experience, a better perspective from which to glean answers."¹¹

As Horwitz further observes, a court's choice to defer to legislatures or other politically accountable actors is instead sometimes more about democracy than accuracy. This is the case when courts defer to those perceived as more democratically legitimate because they are "more closely tied to the mechanisms of political accountability that legitimize and constrain the policy choices they make."¹² Such deference "open[s] up a space for shared legal and constitutional interpretation by other actors who may be closer to the facts on the ground" and "allows courts to

⁷ Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072 (2008).

⁸ *Id.* at 1073. For a related but different definition of deference, see GARY LAWSON & GUY I. SEIDMAN, *DEFERENCE: THE LEGAL CONCEPT AND THE LEGAL PRACTICE* 9 (2020) (defining deference as "the giving by a legal actor of some measure of consideration or weight to the decision of another actor in exercising the deferring actor's function"); *id.* at 122 (disagreeing with Horwitz that deference "necessarily requires some measure of displacement of judgment, and not mere consideration of another's position").

⁹ Horwitz, *supra* note 7, at 1068.

¹⁰ *Id.* at 1091.

¹¹ LAWSON & SEIDMAN, *supra* note 8, at 95.

¹² Horwitz, *supra* note 7, at 1082–83.

bring responsiveness into the law by taking themselves out of the equation.”¹³ In other words, courts sometimes choose to defer to politically accountable actors’ decisions not because those decisions are necessarily wiser or more accurate but instead because those actors’ decisions reflect the choices of the people’s elected representatives.¹⁴

Sometimes courts’ choice to defer instead turns on avoiding what Horwitz calls “administrative costs,” a choice that prioritizes courts’ time and other scarce resources.¹⁵ As Lawson and Seidman explain, “a full system of complete, non-deferential review is simply beyond the capacity of, or at least beyond a sensible allocation of resources within, all but the simplest legal systems.”¹⁶ Courts’ decision to engage in this “economic deference” can be “cheaper and easier than non-deferential review over a nontrivial range of cases.”¹⁷

Lawson and Seidman added to Horwitz’s list of reasons why a court might sensibly choose to defer to governmental assertions of expression’s danger, noting that courts sometimes choose to defer for prudential or strategic reasons—as is the case, for example, if they fear the public’s (or other powerful actors’) backlash to their own decisions.¹⁸

Courts’ choice to defer to governmental determinations of danger often determines the outcome in First Amendment disputes.¹⁹ As Lawson and Seidman counsel, “[f]ocusing on the precise categories [of justifications for deference] can lead

¹³ *Id.* at 1066.

¹⁴ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) (“[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”); *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Holmes, J., dissenting) (urging judicial deference to legislatures’ policy judgments “when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best”).

¹⁵ Horwitz, *supra* note 7, at 1091.

¹⁶ LAWSON & SEIDMAN, *supra* note 8, at 100.

¹⁷ *Id.* at 103.

¹⁸ *Id.* at 151–52.

¹⁹ *E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (upholding, under deferential review, statute that prohibited the sale to minors of material deemed obscene based on its appeal to minors).

all of these actors to clearer thinking.”²⁰ When courts explain and defend that high-stakes choice—whether it be for epistemic, legitimacy, cost-avoidance, prudential, or some other reason—their intentionality and transparency in revealing and defending their theory of deference can improve the quality of their threshold decision to defer or not to defer.

That a court’s decision to defer does not always reflect its trust of that governmental actor to make a better decision doesn’t mean that a court’s choice to defer is unprincipled—far from it. The multiplicity of available justifications instead adds to the reasons to expect courts to justify their choice to defer to other government actors’ assessment of contested expression’s potential for danger. For example, if a court chooses to defer to a governmental actor on epistemic grounds—that is, because the court believes that actor has greater expertise and is likely to make a more accurate decision than the court—then that court should expose its reasons for concluding that the knowledge possessed, or processes used, by that government actor will actually lead to wiser, more accurate decisions.²¹ Similarly, if a court chooses to defer to a politically accountable government actor because it believes that actor has greater democratic legitimacy, the court should explain the circumstances that support its confidence in that actor’s responsiveness to the public.²²

Related to questions of when and why to be deferential are questions of *how* to operationalize deference, once chosen. Courts operationalize deference (and, as we’ll see, suspicion) when they choose among available First Amendment rules,

And the Court generally operationalizes its suspicion of the government by applying strict scrutiny: this choice, in turn, is almost always outcome-determinative in the challenger’s favor. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380, 395–96 (1992) (invalidating, under strict scrutiny, city ordinance prohibiting the display of symbols arousing “anger, alarm, or resentment” based on race or other protected class status).

²⁰ LAWSON & SEIDMAN, *supra* note 8, at 170.

²¹ *Id.* at 169 (“[I]f the principal justification for precedent in a context is thought to be drawing upon the wisdom of the past, thinking in terms of epistemological deference may sharpen attention to the need to consider carefully whether the processes of decision-making that led to prior decisions are well calculated to produce wisdom. And if one focuses on the economic features of deference as devices to reduce decision costs, that focus may prescribe how a system of precedent should function in order to generate those cost savings.”).

²² See *infra* notes 45–47 and accompanying text (discussing *Caroleene Products*’ suspicion of the political branches’ actions that disadvantage those with insufficient numbers or popularity to protect themselves through traditional political remedies like lobbying and voting).

and when they apply those rules to new fact patterns. For instance, the Court generally operationalizes its choice to defer to the government by applying rational-basis review—a doctrinal choice that almost always drives the dispute’s outcome in the government’s favor.²³ Courts’ transparency in revealing their theory of deference (and suspicion) can also improve their subsequent operationalization of that choice when creating and applying doctrine.²⁴

This brings us to *Gitlow*.

II. DEFERENCE, UNEXPLAINED

Benjamin Gitlow brought a Free Speech Clause challenge to his conviction “for the statutory crime of criminal anarchy,” that is, for “advocat[ing], advis[ing], or teach[ing] the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, . . . or by any unlawful means”²⁵ In earlier cases, the Supreme Court had considered First Amendment challenges to the application of statutes that prohibited “certain acts involving the danger of substantive evil, without any reference to language itself.”²⁶ In those cases, the Court had asked whether the contested expression had the requisite tendency to cause unacceptable harm—in other words, whether its “natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent”²⁷ In contrast, *Gitlow* involved the application of a statute in which the legislature had already identified certain speech as having the requisite tendency to cause

²³ See *supra* note 19. And sometimes the Court’s choice of intermediate scrutiny rather than strict scrutiny reflects a form of deference. See *Free Speech Coal. v. Paxton*, 145 S. Ct. 2291, 2316 (2025) (applying intermediate rather than strict scrutiny to age-verification requirements “because they embody a constitutional judgment—made by generations of legislators and by the American people as a whole—that commands our respect”).

²⁴ See Horwitz, *supra* note 7, at 1068 (observing that courts’ failure “to seriously theorize about the nature and scope of deference and the proper occasions for its use” leaves them poorly positioned to assess “competing claims of deference”).

²⁵ *Gitlow*, 268 U.S. at 654; see also LENDLER, *supra* note 2, at 116 (“The New York legislature had made a doctrine, not an act, illegal. Sanford wrote that a legislative judgment in the interest of public safety carried a strong presumption of validity. So if a charge involved publication of the banned doctrine, the courts had no role in applying a clear and present danger test or, in fact, any test at all. The legislature had already determined that the doctrine was a crime.”).

²⁶ *Gitlow*, 268 U.S. at 670–71.

²⁷ *Id.*

unacceptable harm.²⁸ In the Court's view, the legislature's before-the-fact determination of that expression's danger deserved judicial deference:

[W]hen the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.²⁹

The Court offered no explanation for its choice to defer to the legislature's assessment of danger, other than to recite "the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare."³⁰ More specifically, the majority explained that legislatures have the power to protect the

²⁸ See HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 154 (Jamie Kalven ed., 1988) (explaining that Justice Sanford's majority opinion described "two types of speech cases: first, those such as *Gitlow* where the statute proscribes a given class of speech; and second, those such as *Schenck* where the statute forbids a class of actions and says nothing about speech. In cases of the first type, argues Sanford, the legislature itself has found the danger of the category of speech and there is no reason to reconsider its judgment in the particular case.").

²⁹ *Gitlow*, 268 U.S. at 670; see also *id.* at 671 (distinguishing the Court's "clear and present danger" test as having "no application to those [cases] like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character") (citations omitted); LENDLER, *supra* note 2, at 117 (describing the *Gitlow* decision as "offering a different approach: A legislature could determine in advance which words 'by their very nature involve danger to the public peace.' The distance between the appearance of those words and any consequences was immaterial.").

³⁰ *Gitlow*, 268 U.S. at 668 (citation omitted); see also *id.* at 657–58 (describing the defendants' writings as "advocat[ing], in plain and unequivocal language, the necessity of accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism' based on the 'class struggle' and mobilizing the 'power of the proletariat in action,' through mass industrial revolts developing into mass political strikes and 'revolutionary mass action,' for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a 'revolutionary dictatorship of the proletariat,' the system of Communist socialism").

public welfare in general,³¹ and the “foundations of organized government” in particular.³²

But here the Court skipped an essential step: *Why* should courts defer to legislatures’ ex ante determination that certain speech poses an unacceptable threat to the public welfare or the fate of democracy? Did New York’s legislature have greater knowledge than the judiciary about the relationship between that advocacy and harm? Did the legislature’s political accountability to the public confer its assessments with greater legitimacy? Was there some other reason? The majority offered no explanation:

By enacting the present statute, the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. This determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. And the case is to be considered “in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare,” and that its police “statutes may only be declared unconstitutional where they are arbitrary and unreasonable attempts to exercise authority vested in the State in the public interest.”³³

The majority thus announced—but did not justify—its choice to defer to the legislature’s determination that advocating government overthrow through unlawful means (even absent any likely, much less actual, harm) was intolerably dangerous.

To be fair, *Gitlow* was decided when the Court had yet to develop a vocabulary of deference and suspicion, as Justices Holmes and Brandeis were then only just beginning to offer answers to the question of why the First Amendment protects

³¹ *Id.* at 667 (“That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question.”).

³² *Id.* (“And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State.”); *see also id.* at 668 (“In short, this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.”).

³³ *Id.* at 668–69 (citations omitted).

speech.³⁴ Indeed, their dissent in *Gitlow* itself failed to engage with, much less criticize, the majority's unexplained deference.³⁵

Where the Court started, of course, is not where it ended. Over the next century—perhaps starting with Justice Brandeis's 1927 concurrence in *Whitney v. California*³⁶—the Supreme Court largely rejected *Gitlow*'s categorical deference to legislatures' anticipation of expression's dangerous tendencies.³⁷ And with good reason. As political scientist Marc Lendler recounts,

Gitlow-type agitation and other forms of advocacy that involve illegal means have generally been permitted in this country since the early 1930s. The movement toward overthrow of the constitutional order has been negligible. What *is* inevitable is that a speech-rights doctrine that allows legislatures, juries, and judges to decide which

³⁴ See, e.g., *Abrams v. United States*, 250 U.S. 616, 628–31 (1919) (Holmes, J., dissenting) (sketching the beginnings of the enlightenment theory of the Free Speech Clause); *Whitney v. California*, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (sketching the beginning of the democratic self-governance theory of the Free Speech Clause).

³⁵ See *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting); see also LENDLER, *supra* note 2, at 120 (“The dissent has also been criticized for not directly addressing Sanford’s contention that once the legislature has designated a specific doctrine as harmful, courts have no role in examining circumstances.”). Holmes’s failure to object to the majority’s unexplained deference may not be so surprising given the “thirty-year battle Holmes and later Brandeis fought against the liberty-of-contract justices, rooted in the right of majorities, as expressed through their representatives, to be given a wide benefit of the doubt. . . . This, not speech rights, was Holmes’s great battle during his time on the Court, and some of his First Amendment views cannot be understood outside that context.” LENDLER, *supra* note 2, at 99; see also *id.* at 120 (describing Holmes as “sh[ying] away from overturning laws, as opposed to verdicts, perhaps a residue of the liberty-of-contract battles. Even his *Abrams* dissent did not question the constitutionality of the hideously repressive 1918 amendments to the Espionage Act.”).

³⁶ 274 U.S. 357, 372–80 (1927); see also Ashutosh A. Bhagwat, *The Story of Whitney v. California: The Power of Ideas*, in CONSTITUTIONAL LAW STORIES 383, 398–99 (Michael C. Dorf ed., 2d ed. 2009) (describing the Court’s 20th-century rejection of categorical deference to governmental assessments of expression’s danger); Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 276–83 (2009) (same).

³⁷ E.g., *Stromberg v. California*, 283 U.S. 359 (1931) (applying the First Amendment to protect the display of a red flag expressing support for Communism); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (applying the First Amendment to protect advocacy of illegal action except where the government can show that the contested expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).

words might lead to future harm will wind up jailing Eugene Debs [a five-time Presidential candidate sentenced to years in prison for his speech criticizing the military's draft].³⁸

The story of the First Amendment doctrine that developed over the century that followed *Gitlow* thus includes the story of the Court's learning curve about the consequences of its choices to defer to governmental assessments of expression's danger. Over the summer of 1919, Holmes himself famously experienced a learning curve of his own about expression's value.³⁹ So too did Justice Stone, who joined the *Gitlow* majority's unexplained deference in his first year on the Court but offered a particularly influential theory of deference and suspicion thirteen years later.⁴⁰

Even so, the Court's learning curve has been neither linear nor smooth. The Court returned to a deferential approach to governmental assessments of expression's danger at times during World War II⁴¹ and again during the Cold War.⁴² Later 20th-century examples of the Court's intermittent return to deference include *Branzburg v. Hayes*,⁴³ where the majority rejected calls for suspicion of law enforcement subpoenas that forced journalists to disclose their confidential sources:

It is said that currently press subpoenas have multiplied, that mutual distrust and tension between press and officialdom have increased, that reporting styles have changed, and that there is now more need for confidential sources, particularly where

³⁸ See LENDLER, *supra* note 2, at 120.

³⁹ See generally THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013).

⁴⁰ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴¹ E.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940) (deferring to public school district's decision to punish students for refusing to salute the flag: "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."), *overruled by* *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

⁴² See, e.g., *Dennis v. United States*, 341 U.S. 494, 509–11 (1951) (rejecting defendants' First Amendment challenge to their criminal conviction for advocating the overthrow of the government); see also LENDLER, *supra* note 2, at 138 ("In his concurrence [in *Dennis*], Frankfurter leaned on legislative determination and its heavy presumption of constitutionality. That had been a central point for Sanford, but it was also a common one for Frankfurter.").

⁴³ 408 U.S. 665 (1972); see also Helen Norton, *Reinvigorating the Press Clause with Negative Theory*, KNIGHT FIRST. AMEND. INST. (Dec. 6, 2023), <https://knightcolumbia.org/blog/reinvigorating-the-press-clause-through-negative-theory> (discussing related issues).

the press seeks news about minority cultural and political groups or dissident organizations suspicious of the law and public officials. These developments, even if true, are treacherous grounds for a far-reaching interpretation of the First Amendment fastening a nationwide rule on courts, grand juries, and prosecuting officials everywhere.⁴⁴

Yet the majority failed to explain *why* suspicion of the government's unchecked use of these subpoenas would be any more "treacherous" an interpretation of the First Amendment than its more deferential choice. Do law enforcement officials issuing such subpoenas have greater epistemic authority? Greater democratic legitimacy? Would judicial suspicion unacceptably burden the courts' resources? Something else? As in *Gitlow*, the majority didn't tell us.

III. SUSPICION, EXPLAINED

So too can courts improve the quality of their choice to *distrust* (rather than defer to) governmental assessments of danger when they identify and defend the reasons for that choice—in other words, when they reveal their theory of suspicion. Why might the government's assessments deserve courts' suspicion? *United States v. Carolene Products*' footnote four famously offers one theory, suggesting that courts should distrust political actors' choices when meaningful political checks on those choices—like lobbying and voting—are unavailable.⁴⁵ This can be the case when government punishes those who don't command political majorities and thus can't protect themselves through traditional political remedies: examples include members of "discrete and insular" minority groups,⁴⁶ as well as the politically unpopular (like criminal defendants and those engaged in dissenting or unorthodox expression).⁴⁷

⁴⁴ *Branzburg*, 408 U.S. at 699.

⁴⁵ *Carolene Products*, 304 U.S. at 152 n.4.

⁴⁶ *Id.* (suggesting judicial suspicion of statutes that reflect "prejudice against discrete and insular minorities" because those laws "tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

⁴⁷ *Id.* (suggesting judicial suspicion of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal," like restrictions on the rights to vote, speak, and peaceably assemble).

In earlier work, I proposed a supplementary theory of suspicion for Free Speech Clause disputes.⁴⁸ There I drew from ethicist and political scientist Russell Hardin's observations that one's choice to distrust—to be suspicious of—another actor is largely informed by one's past experience of “the motivation of the potentially trusted person to attend to the truster's interests and his or her competence to do so.”⁴⁹ In my view, Hardin's insights suggest that courts' principled choice to be suspicious requires them to ask whether, rather than assume that, the government is acting in a context where we have reason to worry about its self-interested or pernicious motives, its clumsiness, or its ignorance.⁵⁰ Courts can offer principled justifications for their suspicion of the government when they point to the triggers that activate their distrust—triggers that can include evidence of the government's untrustworthy motives, of its limited information or expertise regarding certain matters, or its vulnerability to cognitive and other biases in certain settings.⁵¹

To be sure, one might propose other principled theories of suspicion. Again, my point here is not to insist on any particular theory of suspicion (or deference) over all others, but instead to emphasize the value and importance of courts' transparency in exposing their theory of suspicion (or deference), whatever that theory is.

To illustrate the value of this transparency, think of *NAACP v. Alabama*, where the Court's suspicion was triggered by the government's pernicious motives: Alabama officials sought to drive the NAACP from the state by forcing the organization to disclose its members' identities at a time and in a place where that disclosure would expose those members to violence both economic and physical.⁵² The Court then operationalized its suspicion by creating new doctrine recognizing an implied

⁴⁸ Helen Norton, *Distrust, Negative First Amendment Theory, and the Regulation of Lies*, 4 J. FREE SPEECH L. 595 (2023).

⁴⁹ Russell Hardin, *Distrust: Manifestations and Management*, in *DISTRUST* 3, 8 (Russell Hardin ed., 2004).

⁵⁰ See Norton, *supra* note 48, at 602.

⁵¹ See *id.* at 615–16.

⁵² 357 U.S. 449, 460–62 (1958); see also TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63*, at 222 (1988) (describing Alabama's efforts as the “pioneer action” among “twenty-five separate lawsuits challenging [the NAACP's] right to operate in the South, most of them filed by hostile states and municipalities”).

First Amendment freedom of association.⁵³

The government's speech-silencing motives again triggered the Court's suspicion a few years later in *New York Times Co. v. Sullivan*.⁵⁴ There, Alabama officials brought defamation claims against civil rights advocates and the New York Times for writing and publishing a fund-raising solicitation describing government crack-downs against peaceful civil rights protests.⁵⁵ This litigation was among a series of targeted, and financially devastating, defamation lawsuits that sought to drive civil rights advocates and Northern journalists from Southern states.⁵⁶ A unanimous Court operationalized its suspicion through its new, and speech-protective, "actual malice" doctrine that bars public officials from recovering damages for defamatory falsehoods related to their official conduct unless they prove that the speaker acted with "knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not."⁵⁷

IV. SUSPICION, UN(DER)EXPLAINED

But just as courts' transparent theories of suspicion can contribute to the creation of valuable new doctrine, so too can the absence of these theories create doctrinal muddles. Think, for instance, of the longstanding puzzlement over when and how "exacting scrutiny"—a standard apparently somewhere between intermediate and strict scrutiny—should apply.⁵⁸ To date, the Court has applied "exacting scrutiny" when considering First Amendment challenges to certain campaign finance

⁵³ *NAACP*, 357 U.S. at 462; see also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (describing much of First Amendment doctrine as seeking to screen for the government's impermissible motive in regulating expression).

⁵⁴ 376 U.S. 254 (1964).

⁵⁵ *Id.* at 256–60. The plaintiffs alleged that the advertisement included reputation-damaging inaccuracies. *Id.* (alleging that the advertisement stated that protestors sang "My Country, 'Tis of Thee" when they actually sang the National Anthem, and that Dr. Martin Luther King, Jr. had been arrested seven times by local authorities when he had been arrested four times).

⁵⁶ See GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 229–55 (2006); see generally AIMEE EDMONDSON, *IN SULLIVAN'S SHADOW: THE USE AND ABUSE OF LIBEL LAW DURING THE LONG CIVIL RIGHTS STRUGGLE* (2019).

⁵⁷ *Sullivan*, 376 U.S. at 278–79.

⁵⁸ See Alexander Tsesis, *Levels of Free Speech Scrutiny*, 98 IND. L.J. 1225, 1227 (2023) (describing exacting scrutiny as "an under-theorized and inconsistent body of law"); *id.* at 1228–29 ("Since the

regulations⁵⁹ and certain compelled disclosures.⁶⁰ But the Court has yet to explain *why* those (or any other) particular speech regulations warrant exacting scrutiny (rather than higher or lower levels of suspicion), nor *how* exacting scrutiny appropriately operationalizes that level of suspicion.⁶¹

Think too of *Reed v. Gilbert*, where the majority announced its suspicion—and thus its application of strict scrutiny—*whenever* the government regulates speech on the basis of content, period.⁶² To be sure, content-based restrictions are “more likely to skew public debate for or against particular ideas and are more likely to be tainted by a constitutionally impermissible motivation.”⁶³ But not always. And the *Reed* majority made no effort to discuss, much less distinguish, the many settings identified by Justices Breyer and Kagan where the government routinely draws content-based speech distinctions without triggering First Amendment suspicion—like confidentiality requirements, energy conservation labeling, income tax reporting, and securities regulation.⁶⁴ The majority’s failure to engage this reality has generated needless, and often counterproductive, uncertainty about the constitutionality of longstanding and sensible regulatory frameworks.⁶⁵

mid-1970s, the Court’s exacting scrutiny jurisprudence has shifted its meaning from an intermediate standard to one significantly more stringent”); R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 208 (2016) (noting that exacting scrutiny “lacks internal structure, internal differentiation, mediating elements, internal cues as to its proper application, and meaningful substantive guiding or directive principles”).

⁵⁹ *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 64–66 (1976).

⁶⁰ *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021).

⁶¹ See Tsesis, *supra* note 58, at 1270 (“Transparent constitutional doctrine that is grounded in free speech values is necessary to prevent arbitrary government intrusion into the procedural and substantive rights of people to freely express themselves.”).

⁶² 576 U.S. 155, 164–66 (2015).

⁶³ *Stone*, *supra* note 36, at 280.

⁶⁴ *Reed*, 576 U.S. at 177 (Breyer, J., concurring in judgment); *id.* at 179–80 (Kagan, J., concurring in judgment). Justices Breyer’s and Kagan’s opinions offered theories of suspicion in which the government’s content-based speech regulation shouldn’t necessarily trigger suspicion, and thus strict scrutiny, absent the government’s viewpoint-based distinctions or its targeting of specific topics. *Id.*

⁶⁵ See Helen Norton, *What Twenty-First-Century Free Speech Law Means for Securities Regulation*, 99 NOTRE DAME L. REV. 97, 101 (2023) (“Newly vulnerable targets of this antiregulatory turn include the Food and Drug Administration’s framework for approving medical drugs and devices, various consumer health and safety warnings, and longstanding laws that require employers to

V. GITLOW, REVISITED

Written nearly a century after *Gitlow*, the Justices' opinions in *Holder v. Humanitarian Law Project* highlight lessons learned—and not learned—about the importance of transparent and justifiable theories of deference, and of suspicion.⁶⁶

The Humanitarian Law Project, a nonprofit organization, sought to persuade the Kurdistan Workers' Party ("PKK," a Kurdish organization in Turkey designated by the U.S. Secretary of State as a foreign terrorist organization⁶⁷) to reject violence and instead use peaceful means to advance Kurdish human rights.⁶⁸ More specifically, the Humanitarian Law Project wanted to train the Party to use international law to resolve disputes without violence and to engage in peaceful advocacy.⁶⁹ Federal law, however, made it a crime knowingly to provide "material support or resources" to organizations designated as terrorist organizations, where "material support" included not only money and tangible goods, but also expert advice and training.⁷⁰ Fearing that this law would be used to prosecute its efforts to provide advice and training to the PKK, the Humanitarian Law Project challenged its constitutionality on First Amendment grounds.⁷¹

The Justices divided, 5–4, over whether to defer to, or instead suspect, the government's assertion that the Humanitarian Law Project's speech threatened danger to national security because it might free up PKK's other resources for terrorist activities. The majority emphasized the federal executive's and legislature's epistemic advantages when "confront[ing] evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."⁷² The majority expressly doubted its own competence in making such assessments:

We have noted that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its

make certain disclosures to workers about the terms and conditions of employment, including the legal protections available to workers.").

⁶⁶ 561 U.S. 1 (2010).

⁶⁷ *Id.* at 9–10.

⁶⁸ *Id.* at 10.

⁶⁹ *Id.* at 21–22.

⁷⁰ *Id.* at 7–9.

⁷¹ *Id.* at 10.

⁷² *Id.* at 34.

people. . . . [W]hen it comes to collecting evidence and drawing factual inferences in this area, “the lack of competence on the part of the courts is marked,” and respect for the Government’s conclusions is appropriate.⁷³

The majority thus deferred to the political branches’ determination that all material support to terrorist organizations—including speech taking the form of education and training about peaceful advocacy—is fungible and thus dangerous: “That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs.”⁷⁴

Writing for the dissent, Justice Breyer heard *Gitlow*’s echoes in the majority’s opinion:

I am not aware of any case in this Court—not *Gitlow v. New York*, not *Schenck v. United States*, not *Abrams*, not the later Communist Party cases decided during the heat of the Cold War—in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, for example, buy negotiating time for an opponent who would put that time to bad use.⁷⁵

Challenging the majority’s choice to defer, Justice Breyer distinguished the political branches’ capacity to assess threats to national security from their capacity to assess the causal relationship between the speech in question and such threats. He determined the political branches to have epistemic advantages in making the former, but not the latter, assessments: “I concede that the Government’s expertise in foreign affairs may warrant deference in respect to many matters, *e.g.*, our relations with Turkey. But it remains for this Court to decide whether the Government has

⁷³ *Id.* (citations omitted).

⁷⁴ *Id.* at 33–34; *see also id.* at 34–35 (“In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government. The material-support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur. The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”) (citations omitted).

⁷⁵ *Id.* at 53 (Breyer, J. dissenting) (citations omitted); *see also id.* at 48 (“The most one can say in the Government’s favor about these statements is that they *might* be read as offering highly general support for its argument. The statements do not, however, explain in any detail how the plaintiffs’ political-advocacy-related activities might actually be ‘fungible’ and therefore capable of being diverted to terrorist use. Nor do they indicate that Congress itself was concerned with ‘support’ of this kind.”).

shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment.”⁷⁶

The dissent thus understood the *Holder* majority to emphasize the federal branches’ primacy in matters of national security, but observed that that primacy need not encompass (at least not without justification) the power to decide when training on lawful, nonviolent means of political advocacy threatens national security. So too did the *Gitlow* majority defer to the legislature’s assessment of danger based on the legislatures’ power to protect the public welfare, even though the power to protect the public welfare need not include (at least not without justification) the power to decide when speech threatens the public welfare.”⁷⁷

To be sure, the Justices’ exchange in *Holder* is in some respects an improvement on that in *Gitlow*. The *Holder* majority offered a justification—other federal branches’ epistemic advantage on national security matters—for its choice to defer, while the *Gitlow* majority offered none. And the *Holder* dissent offered a challenge to the majority’s choice of deference, while the *Gitlow* dissent offered none.

Even so, we can still expect more from the Justices’ exchange—especially since the outcome of this high-stakes dispute turned on the outcome of this exchange. On one hand, the majority’s claim of the government’s epistemic advantage in national security matters failed to engage the dissent’s more specific call for evidence of any epistemic advantage in identifying a causal connection between lawful speech and unacceptable danger. Indeed, while the *Gitlow* majority failed to explain why it deferred to the legislature’s assessment that advocacy of *unlawful* activity threatened unacceptable danger, the *Holder* majority failed to explain why it deferred to the political branches’ determination that advocacy of *lawful* activity threatened unacceptable danger by assisting (even if inadvertently) those organizations’ terrorist activities.

And the dissent, for its part, failed to identify specific reasons for distrusting the government’s assessment of danger in this setting even though examples abound of the government’s over-estimation—and sometimes the government’s exaggeration—of the threats to national security posed by contested expression. Recall the federal government’s World War I-era prosecutions of those who criti-

⁷⁶ *Id.* at 55.

⁷⁷ See *supra* notes 29–33 and accompanying text.

cized the United States' involvement in the war, expressed admiration for draft resisters, or asserted that the draft was unconstitutional. Recall too the federal government's assertion that newspapers' publication of the Pentagon Papers that revealed unflattering details (about Vietnam-era military operations and diplomatic negotiations) would endanger national security.⁷⁸

CONCLUSION

Legal scholar Geof Stone has described the lessons of twentieth-century free speech law to include the Court's realization "that government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression, which will often be to silence their critics and to suppress ideas they do not like."⁷⁹ This is no less true in the 21st century.⁸⁰ And this in turn, reminds us of the *Gitlow* majority's failure to justify its choice to defer to governmental claims that expression threatened unacceptable danger—a failure that one hopes we now realize should have triggered skepticism about, and spurred reconsideration of, that deferential choice.

⁷⁸ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁷⁹ Stone, *supra* note 36, at 277.

⁸⁰ See, e.g., *Perkins Coie LLP v. U.S. Dep't of Justice*, 2025 WL 1276857, *9 (D.D.C. May 2, 2025) (considering First Amendment challenge to executive order targeting law firm based on the President's determination of "'good cause to conclude that [the firm] neither have access to our Nation's secrets nor be deemed responsible stewards of any Federal funds'"); *id.* at *26–38 (concluding that the order was impermissibly motivated by the government's viewpoint-based retaliation against the firm's protected expression).