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# Executive Action and the First Amendment's First Word

Daniel J. Hemel\*

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## I. INTRODUCTION

For all that has been written about the First Amendment's Establishment Clause, Free Exercise Clause, Free Speech Clause, and Free Press Clause, surprisingly little has been said about the Amendment's first word: "Congress."<sup>1</sup> But in the last few years, the grammatical subject of the First Amendment has finally gained attention from constitutional scholars, especially those of a textualist orientation. These scholars have advanced the claim that the First Amendment, according to the plain meaning of its text, constrains only the legislative branch. "The simple fact is that the First Amendment by its terms does not apply to executive or judicial actions," write Gary Lawson and Guy Seidman in their 2004 book *The Constitution of Empire*.<sup>2</sup> "That fact may be out of step with modern sensibilities, but it is a fact nonetheless."<sup>3</sup>

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\* Law Clerk to Judge Michael Boudin, U.S. Court of Appeals for the First Circuit; Yale Law School, J.D. 2012. The author thanks Olivia Bailey, Will Baude, Eric Hemel, Jonathan Mitchell, Barbara Morgen, Richard Re, David Robinson, Jacob Schuman, Mark Shawhan, and—especially—Nicholas Rosenkranz for helpful comments on previous drafts, and thanks the staff of the *Pepperdine Law Review* for editorial suggestions that vastly improved the article.

1. U.S. CONST. amend. I. The First Amendment Assembly and Petition Clauses are similarly neglected. See STEPHEN F. ROHDE, *FREEDOM OF ASSEMBLY*, at vii (2005).

2. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 43 (2004).

3. *Id.*

In a pair of recent<sup>4</sup>—and deservedly acclaimed<sup>5</sup>—*Stanford Law Review* articles, Nicholas Quinn Rosenkranz elaborates upon this observation. His argument (which is one element of his comprehensive theory of constitutional adjudication<sup>6</sup>) begins from the premise that “the First Amendment is written in the active voice and it has just one subject, shared by all its clauses.”<sup>7</sup> Indeed, anyone with even a rudimentary understanding of English grammar would have to concede as much. But from this uncontroversial observation, Rosenkranz reaches a conclusion that will strike some readers as “frightening”<sup>8</sup>: “the President (and his . . . agents) cannot violate [the Free Exercise] clause”—or, for that matter, any other clause—of the First Amendment.<sup>9</sup>

The textualist contention regarding the inapplicability of the First Amendment to the executive branch is a serious argument that demands a serious response. Constitutional textualists are not just sticklers for grammar: they have a coherent theory (or theories<sup>10</sup>) of constitutional interpretation upon which they base their claims.<sup>11</sup> Although constitutional textualism is still a minority position in the academy and the judiciary, it is not necessarily destined to remain so.<sup>12</sup> After all, its close cousin<sup>13</sup>—

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4. Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011) [hereinafter Rosenkranz, *Objects*]; Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010) [hereinafter Rosenkranz, *Subjects*].

5. See, e.g., Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes* In Toto, 98 VA. L. REV. 301, 302 (2012) (describing Rosenkranz’s articles as “groundbreaking”). Rosenkranz’s work has drawn the attention not only of the academy, but also of the judiciary. See, e.g., *United States v. Jones*, 689 F.3d 696, 703-04 (7th Cir. 2012) (citing Rosenkranz, *Objects*, *supra* note 4, and Rosenkranz, *Subjects*, *supra* note 4); *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 n.10 (3d Cir. 2011) (citing Rosenkranz, *Subjects*, *supra* note 4); *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (same).

6. See generally NICHOLAS QUINN ROSENKRANZ, *THE SUBJECTS OF THE CONSTITUTION* (forthcoming 2013).

7. Rosenkranz, *Subjects*, *supra* note 4, at 1266.

8. See, e.g., Aaron Ross Powell, *The Frightening Permissiveness of Rosenkranz’s “The Subjects of the Constitution,”* AARON ROSS POWELL BLOG (May 26, 2010), <http://www.aaronrosspowell.com/blog/the-frightening-permissiveness-of-rosenkranz-the-subjects-of-the-constitution>.

9. Rosenkranz, *Subjects*, *supra* note 4, at 1266.

10. See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1702-03 (2004) [hereinafter Manning, *Eleventh Amendment*] (justifying constitutional textualism on the grounds that it protects political minorities); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 346 (1981) (reviewing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)) (suggesting that constitutional textualism offers a solution to the countermajoritarian difficulty).

11. See Manning, *Eleventh Amendment*, *supra* note 10, at 1702-03.

12. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29-36 (2006) (describing the broad appeal of textualism).

13. Its close cousin, but not its identical twin. See generally John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 692 (1999) (arguing that statutory

statutory textualism—quickly moved from the academic fringes to the jurisprudential mainstream in a few short years.<sup>14</sup> Moreover, across the ideological spectrum, scholars and jurists are acknowledging that constitutional interpretation cannot be entirely unmoored from constitutional text. As Jack Balkin argues in a new book: “We may articulate and supplement the constitutional text through construction, but we may not contradict it. Thus, whenever we argue from principles underlying the text, we must always return to the text to check our arguments.”<sup>15</sup> We might not all agree with every textualist argument, but we cannot ignore the text entirely and still keep a straight face.

It does not do to dismiss the textualist interpretation of the First Amendment's first word as contrary to original intent or original public meaning. For one thing, Mark Denbeaux has sought to show based on historical materials that “[t]he inclusion of the word ‘Congress’ [in the First Amendment] was an intentional act” (and that it was intended, in particular, to clarify that the amendment would only apply to the legislative branch).<sup>16</sup>

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textualism “promote[s] . . . the objectives *implicit* in the institutional design” set forth in the Constitution, such as the separation of powers (emphasis added)).

This is not to say that statutory textualists *must* reject constitutional textualism. *See id.* at 692–93. But just as one *can* be a constitutional textualist while also being a statutory textualist, one can also embrace the latter position without embracing the former. *Id.* For one thing, the process of amending the Constitution is much more cumbersome than the process of amending a statute. Thus, the frequent retort of statutory textualists whose interpretive method yields results that might be undesirable from a policy perspective—“it is a problem for Congress, not one that federal courts can fix,” *e.g.*, *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010)—rings rather hollow in the constitutional context. For another, as Justice Scalia has written, “the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation.” ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 37 (Amy Gutmann ed., 1997). Although in Justice Scalia's view this does not authorize “an interpretation [of constitutional texts] that the language will not bear,” it does justify a different approach to constitutional and statutory exegesis. *Id.*

14. Indeed, statutory textualism had become so entrenched in the legal community by the end of the 1990s that one scholar would memorably declare, “In a significant sense, we are all textualists now.” Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998).

15. JACK M. BALKIN, *LIVING ORIGINALISM* 270 (2011).

16. Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1169 (1986). As of August 15, 1789, when the first House of Representatives sat as a Committee of the Whole to consider a draft version of the amendment, the text read: “[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed.” *Id.* Representative Benjamin Huntington of Connecticut voiced his concern that the amendment might prevent federal courts from enforcing legal obligations running between churches and their congregants. *Id.* The House then changed the text of the draft amendment to read: “Congress shall make no laws touching

Denbeaux's historical claim is not universally accepted: then-Judge Michael McConnell devoted a portion of his opinion in *Shrum v. City of Coweta* to the matter and concluded that he "cannot agree with Professor Denbeaux's interpretation."<sup>17</sup> Even so, a thoroughgoing textualist who was unpersuaded by Denbeaux's argument from original intent still might say that the plain meaning of the First Amendment trumps, whether or not the plain meaning comports with what the drafters had in mind. As Jonathan Mitchell—himself a prominent proponent of textualism inside and outside the legal academy—writes in a recent *Michigan Law Review* article: "For textualists, the written words of the Constitution have primacy; original understandings that exist in the air do not control."<sup>18</sup>

Although one might justify the application of the First Amendment to nonlegislative actors by attacking the foundations of constitutional textualism,<sup>19</sup> this Article adopts a different approach. I will try to show that we can remain true to textualist principles without departing (or, at least, not departing very far) from modern-day First Amendment doctrine. Part II outlines the Article's essential argument: executive action that encroaches upon First Amendment freedom is either (a) action authorized by a statute, in which case the statute itself violates the First Amendment, or (b) ultra vires executive action that runs afoul of the Fifth Amendment's Due Process Clause. Some of the cases in which courts have found that the executive

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religion or infringing the rights of conscience." *Id.* (citing 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1052, 1088–89 (1971)).

17. *Shrum v. City of Coweta*, 449 F.3d 1132, 1142 (10th Cir. 2006) (McConnell, J.); see also Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 258 (2010) (stating that early nineteenth-century cases "support Judge Michael McConnell's view that the term 'Congress' was chosen simply to make clear that the First Amendment applied only to the federal government and not to states, and that 'there was no intention to confine the reach of the First Amendment to the legislative branch' of the federal government" (quoting *Shrum*, 449 F.3d at 1142)).

According to McConnell, the framers of the Amendment used the "Congress shall make no law" construction to clarify "that the limitations of what is now the First Amendment did not apply to the States." *Shrum*, 449 F.3d at 1141; see also *id.* at 1142 ("[T]here was no intention to confine the reach of the First Amendment to the legislative branch."). Moreover, when Senator Gabriel Moore of Alabama suggested in 1836 that the First Amendment only applied to Congress, his suggestion was met with "ridicule" by his colleagues in the upper chamber. *Shrum*, 449 F.3d at 1142 & n.5 (citing DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861*, at 9 (2005)). One might wonder, though, why other amendments in the Bill of Rights—which also originally applied only to the federal government—are not textually limited to "Congress" as well. Cf. *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (1 Pet.) 243, 250 (1833) (Marshall, C.J.) ("These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.").

18. Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 10 n.28 (2011).

19. For one such attack, see William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007).

branch has violated the First Amendment should perhaps be recast as cases in which the executive branch has violated the Due Process Clause, but the practical result is the same in either event. Part III acknowledges the limits of the argument and identifies the circumstances in which its logic would not apply.

Before proceeding further, three clarifications are in order. First, this Article seeks to present an interpretation of the First Amendment's first word that is *consistent* with constitutional text. The Article does not argue that this interpretation of the First Amendment's first word is the *only* interpretation that is consistent with constitutional text; more limitedly, it claims that constitutional textualism and a reasonably robust form of civil libertarianism are reconcilable, at least as far as the First Amendment's first word goes. Second, although this Article argues that one *can* apply a textualist interpretive methodology to the First Amendment and arrive at results that are largely consistent with modern-day doctrine, I do not argue that one *should* apply a textualist interpretive methodology to the First Amendment. In the larger debate between textualists, intentionalists, process theorists, pragmatists, and living constitutionalists, I remain resolutely agnostic. Third, I focus on the relationship between federal executive action and the First Amendment's first word, setting aside three related questions: (1) whether the First Amendment imposes any restrictions on judicial actors; (2) whether the First Amendment applies to treaties ratified by the Senate;<sup>20</sup> and (3) whether and how the First Amendment has been incorporated so as to apply to the states.<sup>21</sup> I set these questions aside

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20. See generally *Boos v. Barry*, 485 U.S. 312, 324 (1988) (assuming that "international agreements . . . are subject to the Bill of Rights," but also stating that the Court "need not decide" whether First Amendment analysis should ever be "adjusted" to "accommodate the interests of foreign officials" (citation omitted)). While "Congress . . . shall consist of a Senate and a House of Representatives," U.S. CONST. art. I, § 1, only "the Advice and Consent of the Senate" is required for ratification of treaties, *id.* art. II, § 2, cl. 2. These provisions might be read together to imply that when the Senate acts alone, it is not acting as "Congress," and thus is not constrained by the First Amendment's injunction that "Congress shall make no law . . ."

The question is not entirely hypothetical. See, e.g., A Treaty Between the United States and the Kaskaskia Tribe of Indians, art. 3, Aug. 13, 1803, 7 Stat. 78, 79 (promising the Kaskaskia tribe that the United States would pay \$100 a year for seven years to support a Catholic priest, along with \$300 to assist the Kaskaskia tribe in constructing a Catholic church). In any event, the question deserves much more thorough treatment than this brief article can provide.

21. As Professor Rosenkranz has observed, a textualist might say that First Amendment freedoms are "privileges" or "immunities" that every state-level actor—legislative, executive, and judicial—must respect. See Rosenkranz, *Objects*, *supra* note 4, at 1061. Alternatively, the relevant "privilege" or "immunity" might be the immunity from *legislative* encroachment upon First Amendment freedoms, in which case incorporation via the Fourteenth Amendment Privileges or Immunities Clause might leave individuals in the same position vis-à-vis state-level executive and

not because they are insignificant, but because giving any one of these three questions its due consideration would require an article of unwieldy length. (Admittedly, an article of more than 10,000 words whose subject is a single word already may be vulnerable to that criticism, even if it remains brief by the standards of the industry.)

## II. AN ARGUMENT BY WAY OF AN EXAMPLE

The stakes of the debate over the First Amendment's application to executive action are well illustrated by the recent case of *FCC v. Fox Television Stations*, which reached the Supreme Court twice in the span of three years.<sup>22</sup> Although the *Fox* case has attracted widespread attention at least in part because of the high-profile cast of celebrities who play a supporting role in the litigation, the case also offers a useful vehicle for setting forth this article's argument by way of example.

The *Fox* case involved efforts by the Federal Communications Commission (FCC) to enforce 18 U.S.C. § 1464, a federal statute that makes it a crime to "utter[] any obscene, indecent, or profane language by means of radio communication."<sup>23</sup> (The statute is understood to apply to television as well as radio.<sup>24</sup>) Congress has authorized the FCC to impose monetary penalties on broadcasters who violate § 1464<sup>25</sup> and to revoke the station licenses of broadcasters who run afoul of the statute.<sup>26</sup> Meanwhile, the FCC has established certain safe harbors for broadcasters, including—most notably—a safe harbor for indecent or profane materials broadcast between 10 p.m. and 6 a.m. (hours when, according to the agency's logic, children are unlikely to be listening or watching).<sup>27</sup>

Prior to 2004, the FCC had also indicated that in its view, "isolated or fleeting broadcasts of the 'F-Word'" were "not indecent," and that broadcasters would not be subject to sanctions for fleeting expletives.<sup>28</sup> But

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judicial officials as vis-à-vis the federal executive and judiciary. *See id.* at 1060–61. This, of course, assumes that the Privileges or Immunities Clause of the Fourteenth Amendment, and not the Due Process Clause, is the textual agent of incorporation. *See generally* Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998) (noting the broad scholarly consensus on this point, although also pointing out the practical problems presented by Privileges or Immunities Clause incorporation).

22. *FCC v. Fox Television Stations*, 556 U.S. 502 (2009) (*Fox I*); *FCC v. Fox Television Stations*, 132 S. Ct. 2307 (2012) (*Fox II*).

23. 18 U.S.C. § 1464 (2006).

24. *See, e.g., Obscenity, Indecency, and Profanity*, FCC, <http://www.fcc.gov/guides/obscenity-indecency-and-profanity> (last visited May 15, 2012).

25. 47 U.S.C. § 503(b)(2)(C)(ii).

26. 47 U.S.C. § 312(a)(6).

27. *See Obscenity, Indecency, and Profanity*, *supra* note 24.

28. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4980 (2004) [hereinafter *In re Golden Globe Awards*].

after the rock star Bono used the phrase “f\*\*\*ing brilliant” on live television at the 2003 Golden Globe Awards, the Commission changed course.<sup>29</sup> It announced that broadcasters “will be subject to potential enforcement action for any broadcast of the ‘F-Word’” in circumstances similar to the Bono incident.<sup>30</sup> In March 2006, the Commission issued an order identifying two broadcasts by Fox Television Stations as “actionably indecent” under the new fleeting-expletives regime. The first of the two was a broadcast of the 2002 Billboard Music Awards during which the singer Cher exclaimed: “I’ve also had my critics for the last 40 years saying that I was on my way out every year. Right. So f\*\*\* ‘em.” The second was a broadcast of the 2003 Billboard Awards during which Nicole Richie, the star of the TV show *The Simple Life*, had noted that despite the show’s name, “get[ting] cow s\*\*\* out of a Prada purse” is “not so f\*\*\*ing simple.”<sup>31</sup> The Commission subsequently imposed fines totaling over \$1.2 million on ABC-affiliated stations that showed a 2003 episode of the network’s *NYPD Blue* series during which a female character appeared on screen in the nude for seven seconds.<sup>32</sup>

Fox, joined by CBS Broadcasting, Inc. and NBC Universal, Inc. (and later by ABC<sup>33</sup>), challenged the FCC’s policy on several grounds, including both of the following:

**Argument 1 (A1):** The stations argued that the FCC lacked the *statutory* authority to implement its “fleeting expletives” policy.<sup>34</sup> Specifically, the stations cited 47 U.S.C. § 326,<sup>35</sup> which states: “Nothing in [the Communications Act] shall be understood or construed to give the Commission the power of censorship . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech . . . .”<sup>36</sup> Since (in the stations’ view) the FCC’s fleeting-

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29. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1807 (2009) (*Fox I*); *In re Golden Globe Awards*, *supra* note 28, at 4976 n.4.

30. *In re Golden Globe Awards*, *supra* note 28, at 4982.

31. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2314 (2012) (*Fox II*) (citing the case below, *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 323 (2d Cir. 2010)).

32. *Id.*

33. The ABC and Fox et al. cases were consolidated when they reached the Supreme Court in *Fox II*. *See id.* at 2314.

34. Brief for Petitioner CBS Broadcasting Inc. at 37–39, *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760), 2006 WL 4900577.

35. *Id.* at 37–38.

36. 47 U.S.C. § 326 (2006).



expletives policy interfered with the right of free speech, the FCC had gone beyond the bounds of its statutory authority by implementing the policy.<sup>37</sup>

**Argument 2 (A2):** The stations also argued that the FCC’s fleeting-expletives policy violated the First Amendment. Specifically, “indecent but not obscene” expression is protected by the Free Speech Clause,<sup>38</sup> so even if the fleeting use of the F-word is “indecent,” it cannot constitutionally be proscribed. Thus, the FCC, by promulgating its fleeting-expletives policy, had violated the First Amendment.<sup>39</sup>

The stations could have made an additional argument (though they didn’t):

**Argument 3 (A3):** The federal statute that makes it a crime to “utter[] any obscene, indecent, or profane language by means of radio communication,” 18 U.S.C. § 1464, itself violates the First Amendment. As noted above,<sup>40</sup> indecent expression is constitutionally protected, and a statute flat-out banning such expression is presumptively unconstitutional.

To summarize, A1 boils down to the claim that the FCC violated the commands of Congress. A2 amounts to the claim that the FCC violated the First Amendment. And A3 states that *Congress* violated the First Amendment.

This list is nonexhaustive. The Supreme Court ultimately adopted a fourth argument (**A4**) when it struck down the FCC policy in June 2012: that the FCC failed to provide fair notice to the television stations in advance of its enforcement actions (and thus violated the Fifth Amendment Due Process Clause).<sup>41</sup> However, limiting our focus to A1, A2, and A3 is helpful for

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37. See Brief of Petitioner CBS Broadcasting Inc., *supra* note 34, at 37–39; *cf.* 47 U.S.C. § 326.

38. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

39. As the stations acknowledged, protected speech *can* be proscribed by a law that is narrowly tailored to achieve a compelling government interest, but the stations maintained that the FCC’s fleeting-expletives policy flunked this strict-scrutiny test. See Brief of Petitioner CBS Broadcasting Inc., *supra* note 34, at 14.

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

41. See *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (*Fox II*). Potentially, one could proffer a fifth argument (**A5**) that the Communications Act of 1934 is invalid on the alternative ground that it violates the nondelegation doctrine. *Cf.* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002) (arguing that “a statute that leaves to executive (or judicial) discretion matters that are of basic importance to the statutory scheme is not a ‘proper’ executory statute” within the meaning of the Necessary and Proper Clause). The question of whether the modern administrative state is or is not consistent with constitutional text lies way, way

analytical purposes. First, note that A1, A2, and A3 all lead to the same immediate result: reversal of the FCC's order.<sup>42</sup> Second, the textualist objection only applies to A2. With respect to A3, textualists readily concede (indeed, they insist!) that the First Amendment prohibits Congress from making any law that abridges the freedom of speech. With respect to A1, textualists acknowledge that, "[a]t a minimum, the Fifth Amendment's Due Process Clause embodies the principle of legality from Magna Carta, which declares that executive and judicial deprivations of life, liberty, or property must be authorized by valid sources of law."<sup>43</sup> If the Communications Act does not authorize the FCC to issue orders that abridge the freedom of speech, then such an order would violate the stations' due-process rights.

Moreover (and this is the central claim of the Article), A1 and A3 can encompass virtually all free-speech challenges to federal executive action. Note that the relevant sections of the Communications Act of 1934 are amenable to one of the following two interpretations:

**Interpretation 1 (I1):** The FCC is authorized to impose penalties upon persons who utter "obscene, indecent, or profane language by means of radio [or television] communication,"<sup>44</sup> *excluding* penalties for fleeting expletives on primetime television.

**Interpretation 2 (I2):** The FCC is authorized to impose penalties upon persons who utter "obscene, indecent, or profane language by means of radio [or television] communication,"<sup>45</sup> *including* penalties for fleeting expletives on primetime television.

In other words, the Communication Act either does *not* (I1) or *does* (I2) give the FCC authority to impose penalties for fleeting expletives.

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beyond the scope of this brief Article.

42. Note that A3 would *not* necessarily lead to the invalidation of the Communications Act *in toto*. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502–04 (1985) (stating that when a litigant whose own speech is constitutionally protected challenges a statute, "partial, rather than facial, invalidation is the required course").

43. Gary S. Lawson, *Would Half a Loaf by Any Other Name Throw Out the Baby? Why Sandefur Is Both Right and Wrong about Substantive Due Process*, CATO UNBOUND (Feb. 13, 2012), <http://www.cato-unbound.org/2012/02/13/gary-s-lawson/would-half-a-loaf-by-any-other-name-throw-out-the-baby-why-sandefur-is-both-right-and-wrong-about-substantive-due-process>. Professor Lawson believes that this legality principle—while "embodie[d]" by the Fifth Amendment—was also part of "the original, unamended Constitution" and thus "forbade arbitrary federal action from June 21, 1788 onward."

44. 18 U.S.C. § 1464 (2006).

45. *Id.*

Importantly, we can adopt I2 without concluding that the FCC *must* impose penalties for fleeting expletives; I2 is consistent with Commission discretion. But narrowing the range of interpretations of the Communications Act to I1 and I2 is analytically helpful because it shows why executive action against the television stations is unconstitutional even if A2 is foreclosed by the First Amendment's first word.

As an initial matter, if I1 is the correct interpretation of the Communications Act, then A1 is valid: the FCC's enforcement of the fleeting-expletives policy is an *ultra vires* executive action. Accordingly, any fine imposed on the television stations for violation of the fleeting-expletives policy would run afoul of the principle—embodied in the Fifth Amendment—that “executive . . . deprivations of . . . property must be authorized by valid sources of law.”<sup>46</sup>

Meanwhile, if I2 is the correct interpretation of the Communications Act, then A3 is valid: Congress has passed a law that abridges the freedom of speech. If not for the relevant sections of the Communications Act,<sup>47</sup> radio and television stations would enjoy an unabridged freedom to broadcast indecent or profane language over the airwaves. The Communications Act alters the situation: now, radio and television stations only have the freedom to broadcast such language over the airwaves if the FCC grants the stations an exemption from the criminal and civil penalties imposed by the Act. In other words, as a result of the Communications Act, the stations go from having unabridged freedom of speech to having freedom of speech that is contingent upon the FCC's good graces.<sup>48</sup> And since it is the Act itself that establishes this situation, it is the Act—and thus, Congress—that violates the text of the First Amendment.

This argument will be qualified in Part III. What I am suggesting here is that so-called free-speech challenges to federal executive action are “really” either (a) challenges to *ultra vires* executive action, or (b) challenges to the statute that ostensibly authorizes the executive action. Either Congress has not granted the relevant agency the power to violate the Free Speech Clause (as with I1 above), or Congress *has* granted the relevant agency the power to violate the Free Speech Clause (I2), in which case the grant itself is a violation of the First Amendment. Perhaps some portion of Free Speech

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46. See *supra* text accompanying note 43.

47. 47 U.S.C. §§ 312(a), 503(b)(1)(D).

48. My argument does not hinge on whether the relevant statute (i) proscribes a broad range of expression or conduct, and then empowers an agency to carve out safe harbors from that proscription, or (ii) empowers the agency to proscribe a broad range of expression or conduct, even though the statute on its own proscribes no expression or conduct at all. In either case, the statute renders the right to engage in expression or conduct *contingent* upon the (in)action of an executive agency, thus transforming an unabridged freedom into a conditional one.

Clause cases should really be considered Due Process Clause cases, but the outcome is as if the Free Speech Clause applied to the federal executive.

### III. CONSIDERING COUNTERARGUMENTS

The skeptic might raise (at least) three objections to the conclusion in the previous paragraph. First, she might dispute the claim that the Communications Act is amenable to only two possible interpretations (I1 and I2).<sup>49</sup> Second, she might argue that even if I1 is the correct interpretation of the Communications Act (i.e., even if FCC actions imposing penalties upon persons who transmit profanity across the airwaves are *ultra vires*), an agency's *ultra vires* action does not necessarily constitute a Fifth Amendment violation.<sup>50</sup> Third, the skeptic may accept that although the Fifth Amendment prohibits executive officials from abridging the freedom of speech when acting pursuant to a statute, not all executive actions are pursuant to a statute: at least some are pursuant to an executive's inherent authority under Article II.<sup>51</sup> The following Sections consider these three objections in turn.

#### A. *The Sound of Congressional Silence*

First, the skeptic might maintain that interpretations I1 and I2 are nonexhaustive and that the Communications Act is amenable to a *third* interpretation, distinct from I1 and I2:

**Interpretation 3 (I3):** The FCC is authorized to impose penalties upon persons who utter “obscene, indecent, or profane language by means of radio [or television] communication,”<sup>52</sup> *full stop*. The Communications Act does not explicitly authorize the FCC to ban fleeting expletives, nor does the Act prohibit the FCC from doing so.<sup>53</sup>

The adherent to I3 might say that the FCC can, consistent with the Communications Act, ban fleeting expletives, but it is not Congress who would be violating the right of free speech—it's the FCC. And since the

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49. See *infra* Part III.A.

50. See *infra* Part III.B.

51. See *infra* Part III.C.

52. 18 U.S.C. § 1464; 47 U.S.C. § 502(b)(2)(C)(ii) (2006).

53. See 47 U.S.C. §§ 151–162.

First Amendment does not apply to the FCC, the First Amendment does not stand in the way of the fleeting-expletives policy.

The problem with this argument lies not in the First Amendment's first word, but in its eighteenth: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging* the freedom of speech . . . ."<sup>54</sup> *Abridge* is a verb with multiple meanings, but the one most relevant here is "[t]o curtail, lessen, or diminish (rights, privileges, advantages, or authority)."<sup>55</sup> If not for the Communications Act, broadcasters would enjoy an undiminished right to transmit fleeting expletives over the airwaves.<sup>56</sup> But as a result of the Communications Act, the right is diminished in the following sense: broadcasters only have a right to transmit fleeting expletives over the airwaves as long as the FCC finds that such content is not obscene, indecent, or profane.<sup>57</sup> And it is at least textually plausible to say that such a diminishment equals an abridgement, regardless of whether the FCC exercises its statutory authority to crack down on fleeting expletives.

This is not to say that any regulation of the content of broadcasts violates the freedom of speech, or that any statute conferring regulatory power upon the FCC violates the First Amendment. As Alexander Meiklejohn has argued, "[t]he First Amendment does not protect a 'freedom to *speak*'"<sup>58</sup>; rather, the "freedom of speech" has been understood throughout American constitutional history as it is today—to incorporate certain limitations,<sup>59</sup> such as the oft-cited rule that one cannot cry "fire" in a crowded theater.<sup>60</sup> In a similar vein, Justice Hugo Black—who was at least arguably the most faithful adherent to constitutional text in the Court's history<sup>61</sup>—resoundingly rejected the "suggest[ion] that the constitutional

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54. U.S. CONST. amend. I.

55. "Abridge, v." 1 THE OXFORD ENGLISH DICTIONARY 33 (James A.H. Murray et al. eds., 1978); *see also* 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 61 (Brandi Besalke ed. 2012) (1755) ("To ABRIDGE. v. . . . 2. To contract, to diminish, to cut short . . .").

56. *See United States v. Sw. Cable Co.*, 392 U.S. 157, 177–78 (1968) (finding that the Communications Act has charged the FCC with the role of enforcing television regulations).

57. *Cf. FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2320 (2012) (Fox II) (holding that "[t]he Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent," but not foreclosing the possibility that such fleeting expletives could otherwise be actionable if deemed obscene, indecent, or profane).

58. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) (emphasis added).

59. *Terminiello v. City of Chi.*, 337 U.S. 1, 28 (1949) (Jackson, J., dissenting) ("If it seems strange that no express qualifications were inserted in the [First] Amendment, the answer may be that limitations were thought to be implicit in the definition of 'freedom of speech' as then understood.").

60. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.).

61. *Cf. Michael J. Gerhardt, A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 27 (1994) (noting "the contrast between Justice Black's tendency to

freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”<sup>62</sup> In Black’s view, such criminal statutes did not abridge the freedom of speech or of the press because those First Amendment freedoms simply did not include the expressive acts proscribed by such statutes.<sup>63</sup> But insofar as the Communications Act allows the FCC to restrict expressive acts that fall within the scope of the “freedom of speech,” the Act abridges that freedom regardless of whether the FCC actually promulgates speech-restrictive regulations.<sup>64</sup> Whether anyone would have standing to challenge the statute *ab initio* is a separate question, and it might be that any injury to the stations on account of the statute would be too “conjectural” or “hypothetical”<sup>65</sup> to support standing until the FCC regulations began to take shape.<sup>66</sup> But even if no litigant has standing to bring a First Amendment claim until a later time, the fact remains that the First Amendment violation occurred with the statute’s passage, and the First Amendment violator was Congress.

A more difficult question is whether the argument applies to the portions of the First Amendment that *precede* the verb “abridg[e]”<sup>67</sup>—i.e., the Establishment Clause and the Free Exercise Clause. Consider the case of *Founding Church of Scientology of Washington D.C. v. United States*,<sup>68</sup> which involved instruments (so-called “Hubbard Electrometers”) that, according to the Church of Scientology, possessed quasi-mystical curative powers and that, according to the FDA, were falsely and misleadingly labeled medical devices.<sup>69</sup> The Church challenged the government’s action

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follow his reading of the text, regardless of the consequences, and Justice Scalia’s use of judicial restraint as a default rule to supplement the constitutional text”).

62. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

63. *See id.* at 501–02.

64. *See Meiklejohn*, *supra* note 58, at 255.

65. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990)).

66. I also bracket the question of whether—assuming that the Communications Act *does* authorize the FCC to encroach upon broadcasters’ freedom of speech—the proper remedy is to strike down the statute only insofar as it authorizes the FCC to abridge the freedom of speech or whether the proper remedy is to strike down the statute *in toto*. *Cf. Rosenkranz, Subjects*, *supra* note 4, at 1248 n.139 (“suggest[ing] that ordinary severability doctrine should not apply when Congress . . . is the subject of the constitutional claim,” but adding that “[f]uture work will analyze severability implications in detail” (citation omitted)).

67. U.S. CONST. amend I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

68. 409 F.2d 1146 (D.C. Cir. 1969).

69. *See id.* at 1151.

on free exercise grounds and ultimately prevailed in the D.C. Circuit.<sup>70</sup>

Reconciling this result with the First Amendment's first word is not so straightforward. Although "Congress shall make no law . . . *prohibiting* the free exercise"<sup>71</sup> of religion, a law that gives the FDA broad authority to regulate device claims is not necessarily a law prohibiting the free exercise of religion.<sup>72</sup> The Food, Drug, and Cosmetic Act,<sup>73</sup> on its own, does not *prohibit* the Church of Scientology from doing anything.<sup>74</sup> It might *abridge* the Church of Scientology's freedom of religious exercise by making the exercise of religion conditional upon FDA approval, but the First Amendment does not say that "Congress shall make no law *abridging* the free exercise of religion."<sup>75</sup>

Yet the previous paragraph operates under the assumption that the verb "prohibit" in the First Amendment means the same thing as the verb "prohibit" in the parlance of the twenty-first century. That assumption may be faulty. Professor McConnell has noted that in the preeminent dictionary at the time of the drafting of the First Amendment, one of the definitions given for the verb "to prohibit" is "to hinder."<sup>76</sup> According to McConnell, the use of "prohibit" instead of "abridge" in the Free Exercise Clause may merely reflect "elegant variation" on the part of the Framers—a sort of stylistic flourish with no semantic significance.<sup>77</sup>

Professor McConnell's argument will not necessarily persuade all textualists, however. After all, syntactic textualism rests on the premise that textual variations within and among particular provisions of the Constitution have *enormous* significance, and the significance of the text is not controlled by the intentions of the Framers themselves. Moreover, even if we accept that "to prohibit" and "to hinder" were synonymous in the language of the late eighteenth century, there remains the question of whether a law authorizing an agency to "hinder" the free exercise of religion is itself a law "hindering" the free exercise of religion. My own linguistic intuition is to answer that question in the affirmative, although I doubt that my intuition is shared universally.

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70. *Id.* at 1162–63.

71. U.S. CONST. amend I (emphasis added).

72. *See Church of Scientology*, 409 F.2d at 1151.

73. 21 U.S.C. §§ 301–399 (2006).

74. *See Church of Scientology*, 409 F.2d at 1154–55.

75. Compare "Prohibit, v." 8 OXFORD ENGLISH DICTIONARY, *supra* note 55, at 1441 ("1. *trans.* To forbid (an action or thing) by . . . a command[,], statute[, law, or other authority] . . ."), with "Abridge, v." 1 OXFORD ENGLISH DICTIONARY, *supra* note 55, at 33 ("5. To curtail, to lessen, to diminish (rights, privileges, advantages, or authority)").

76. Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1487 & n.394 (1990) [hereinafter McConnell, *Origins*]; *see* 2 JOHNSON, *supra* note 55, at 1582.

77. McConnell, *Origins*, *supra* note 76, at 1487 n.395.

In any event, the federal executive clearly remains bound by the Religious Freedom Restoration Act (RFRA), which provides that the federal government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the burden is “in furtherance of a compelling governmental interest” and is “the least restrictive means of furthering that compelling governmental interest.”<sup>78</sup> And today, RFRA rather than the First Amendment exerts the most forceful constraint upon federal executive actions that implicate free-exercise concerns.

True, the Religious Freedom Restoration Act does not affect the Establishment Clause.<sup>79</sup> And a statute delegating broad authority to an executive agency would not appear to be a law “respecting an establishment of religion,” even if subsequent executive action pursuant to that delegation did “respect[] [an] establishment of religion.” But as Professor Rosenkranz points out,<sup>80</sup> current Supreme Court case law already effectively rules out so-called “taxpayer standing” challenges to executive action on Establishment Clause grounds.<sup>81</sup> In this respect, the “frightening permissiveness”<sup>82</sup> of thoroughgoing textualism is not all that far out of line with modern-day doctrine.<sup>83</sup>

It may be that for some committed civil libertarians, the notion that the federal executive could be unbound by the Religion Clauses seems so significant that it amounts to a *reductio ad absurdum* argument against textualism—even though (1) modern-day doctrine already erects high barriers to Establishment Clause challenges aimed at execution action, and (2) the Religious Freedom Restoration Act provides *more* robust protection against executive infringements of religious exercise than the Free Exercise Clause does today. Note, though, that from a civil libertarian perspective, a textualist reading of the First Amendment is not altogether uncongenial. The question of whether *Employment Division v. Smith*’s “valid and neutral

78. 42 U.S.C. § 2000bb-1 (2006); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423–24 & n.1 (2006).

79. See 42 U.S.C. § 2000bb-4.

80. Rosenkranz, *Subjects*, *supra* note 4, at 1257–63.

81. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 479 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 102 (1968)) (emphasis added); see also *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1445 (2011) (summarizing *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007)).

82. Cf. Powell, *The Frightening Permissiveness of Rosenkranz’s “The Subjects of the Constitution,”* *supra* note 8.

83. Concededly, not all Establishment Clause challenges rely on so-called “taxpayer standing.” See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803 (2010).



law” standard applies to the clauses of the First Amendment that follow the verb “abridg[e]” is an open one.<sup>84</sup> Shortly after *Smith* came down, Judge Coffey of the Seventh Circuit suggested that *Smith* should apply with equal force to a belly dancer’s free speech claim as it does to a free exercise claim.<sup>85</sup> Yet a textualist reading of the First Amendment might provide a basis for limiting *Smith* to the Free Exercise Clause. A valid and neutral law that *abridges* the freedom of speech without prohibiting such speech entirely might run afoul of the Free Speech Clause, even if a valid and neutral law that abridges the free exercise of religion does not violate the First Amendment unless the law goes so far as to *prohibit* religious exercise. In other words, if the justification for *Smith* lies in the Free Exercise Clause’s unique verb usage, then *Smith* ought not apply to the speech, press, assembly, and petition clauses of the First Amendment. The committed civil libertarian may welcome the possibility that textualism can limit the scope of *Smith*.

In any event, one could remain a thoroughgoing textualist and still maintain that (1) the federal executive is constitutionally prohibited from infringing upon the First Amendment freedoms that follow the verb “abridg[e],” and that (2) the federal executive is either constitutionally or *statutorily* prohibited from infringing upon the freedom of religious exercise. Whether that conclusion is ultimately agreeable to the committed civil libertarian is a separate question. But the thoroughgoing textualist certainly need not concede that First Amendment freedoms are *entirely* unprotected from executive encroachment.

#### *B. Ultra Vires Actions and the Limits of the Fifth Amendment*

In Part II, I asserted that ultra vires executive action (in the example above, imposition of fines on television stations) would violate the Fifth

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84. *Smith* contains a so-called “hybrid rights exception,” whereby a free exercise claim “in conjunction” with a challenge under some other constitutional provision, “such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children,” may trigger heightened scrutiny. *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990) (citations omitted). Given that a free speech or parental rights claim *on its own* would presumably trigger heightened scrutiny, one might wonder what function the hybrid rights exception serves at all. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part). For a survey and critique of the case law on the hybrid rights exception, see Steven H. Aden & Lee J. Strang, *When a “Rule” Doesn’t Rule: The Failure of the Oregon Employment Division v. Smith “Hybrid Rights Exception,”* 108 PENN. ST. L. REV. 573 (2003).

85. *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1117 (7th Cir. 1990) (Coffey, J., dissenting) (“I am at a loss to be able to comprehend how the First Amendment provides a dancer’s alleged exercise of a First Amendment right any greater freedom from generally applicable criminal laws than is enjoyed by an individual attempting to practice a First Amendment right to free exercise of religion.”).

Amendment Due Process Clause.<sup>86</sup> But a Due Process Clause violation only occurs when a “person . . . [is] deprived of life, liberty, or property.”<sup>87</sup> A skeptic might argue that a governmental actor can “abridge the freedom of speech” without “depriv[ing]” anyone of “life, liberty, or property.”<sup>88</sup> If this is true, then not every ultra vires executive action abridging the freedom of speech amounts to a Due Process Clause violation.

Consider, for example, the case of *Hannegan v. Esquire, Inc.*,<sup>89</sup> in which the respondent, a men’s magazine, challenged the Postmaster General’s decision to deny it the privilege of paying the discounted second-class postage rate.<sup>90</sup> The Postmaster denied the privilege to *Esquire* on the grounds that the magazine’s content was “morally improper.”<sup>91</sup> If Congress had by statute authorized the executive to deny discounts to “morally improper” magazines, then that statute might well (indeed, almost certainly would) violate the First Amendment. But Justice Douglas, writing for the Court in *Hannegan*, held that no such statute existed.<sup>92</sup> According to the Court, “Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which aailable periodical disseminates.”<sup>93</sup> The Commissioner’s actions were ultra vires.

Here, the skeptic might ask: On what basis could the Court issue an injunction requiring the Postmaster to grant the second-class discount to *Esquire*? The skeptic might concede that the Postmaster’s actions violated the then-applicable Classification Act, which stated that “[m]ailable matter of the second class shall embrace all . . . periodical publications which are issued at stated intervals, and as frequently as four times a year,”<sup>94</sup> provided that it was “originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.”<sup>95</sup> *Esquire* almost certainly met these requirements,<sup>96</sup> and it does

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86. See *supra* text accompanying notes 43 & 46.

87. U.S. CONST. amend. V.

88. *Id.*

89. 327 U.S. 146 (1946).

90. *Id.* at 148–49.

91. *Id.* at 149.

92. *Id.* at 158–59.

93. *Id.* at 158.

94. Classification Act of 1879, ch. 180, § 10, 20 Stat. 355, 359 (formerly codified at 39 U.S.C. § 224 (1956)).

95. 39 U.S.C. § 226 (1952). The statute specified that second-class mail must meet other technical requirements, e.g., that it “bear a date of issue” and be “without board, cloth, letter, or other substantial binding.” *Id.*

96. See *Hannegan*, 327 U.S. at 150–51 (“Regular features of the magazine . . . include articles

not appear that the Postmaster himself contested this point.<sup>97</sup> Thus, “due process of law” required that, pursuant to the Classification Act, the Postmaster grant *Esquire* the second-class discount. But the Fifth Amendment does not apply whenever executive action is taken “without due process of law”; it only applies when a person is “deprived of *life, liberty, or property* without due process of law.”<sup>98</sup> Clearly, no one’s “life” was in peril in *Hannegan*. And it is doubtful that *Esquire* had a “property” interest in a second-class discount. As Professor McConnell and coauthor Nathan Chapman write, “property” for the purposes of the Due Process Clause “is confined to interests established pursuant to positive law, such as the common law of property, inheritance law, the terms of federal land grants, patent law, or other such sources.”<sup>99</sup> The Classification Act does not purport to vest publishers with a property interest in a second-class discount, and no other “positive law” appears to do the same.

The critical question, then, is whether the Postmaster’s actions in *Hannegan* deprived *Esquire* of “liberty.” One certainly could argue that “liberty” for the purposes of the Due Process Clause encompasses the freedom of speech and of the press (as well as the freedom of religion, the freedom of assembly, and the right to petition for grievances). But the Postmaster did not block *Esquire* from printing its magazine; he blocked *Esquire* from obtaining a discount.<sup>100</sup> Does the right to a discounted postage rate qualify as a “liberty” within the meaning of the Due Process Clause?

The text of the Constitution does not resolve the question definitively, but it does not preclude an affirmative answer. If the relevant liberty is “the freedom of speech” or the “freedom of the press,” then it is difficult to say that the Postmaster’s actions have deprived *Esquire* of that freedom entirely. But if the relevant liberty is “the *unabridged* freedom of speech” or “the *unabridged* freedom of the press,” then *Esquire* has a much more

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on topics of current interest, short stories, sports articles or stories, short articles by men prominent in various fields of activities, articles about men prominent in the news, a book review department . . . a theatrical department . . . a department on the lively arts . . . a department devoted to men’s clothing, and pictorial features, including war action paintings, color photographs of dogs and water colors or etchings of game birds and reproductions of famous paintings, prints and drawings.”).

97. See *id.* at 151 (“[T]he controversy is not whether the magazine publishes ‘information of a public character’ or is devoted to ‘literature’ or to the ‘arts.’ It is whether the contents are ‘good’ or ‘bad.’”).

98. U.S. CONST. amend. V.

99. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1781 (2012); see also *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”).

100. *Hannegan*, 327 U.S. at 148–49.

compelling argument.<sup>101</sup> At least arguably, “abridgement” includes “inhibition as well as prohibition.”<sup>102</sup> (I use the word “prohibition” here in its modern—and not necessarily its eighteenth century—sense.<sup>103</sup>) A post office policy that denies discounts to publishers who print certain content may operate to inhibit publishers from printing such content, even if it does not operate as an outright ban. The policy, then, deprives publishers of the *unabridged* freedom of speech and replaces it with a *limited* freedom of speech. If the former freedom is a “liberty” within the meaning of the Due Process Clause, then the Postmaster General’s actions would seem to be a violation of that Clause.

Even if one rejects the argument of the previous paragraph, one might still accept that courts can enjoin *ultra vires* executive actions in cases such as *Hannegan*. For one thing, the Judiciary Act authorizes federal district courts to issue writs of mandamus “to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”<sup>104</sup> While writs will only be issued to compel executive actions “of a mere ministerial character,”<sup>105</sup> the facts of *Hannegan* might very well meet the mandamus criterion. The Court has stated that “where the proper construction of a statute is clear” (and here, it appears to be clear), “the duty of an officer called upon to act under it is ministerial in its nature and may be compelled by mandamus.”<sup>106</sup>

A more difficult question arises when an executive officer’s actions are less manifestly *ultra vires*. Under the Administrative Procedure Act (APA), passed four months after the decision in *Hannegan*, a person “adversely affected or aggrieved by agency action”<sup>107</sup> can seek judicial relief on the grounds that the agency action is “in excess of statutory jurisdiction,” regardless of whether the agency action is “ministerial.”<sup>108</sup> And any person whose religious exercise has been unduly burdened by the federal government may seek judicial relief under the Religious Freedom Restoration Act, so long as the litigant meets the general requirements for

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101. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring).

102. *Id.*

103. See *supra* notes 76–77 and accompanying text.

104. 28 U.S.C. § 1361 (2006).

105. *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 44 (1888); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170–73 (1803) (discussing the standards for mandamus).

106. *Miguel v. McCarl*, 291 U.S. 442, 451–52 (1934).

107. 5 U.S.C. § 702.

108. *Id.* § 706(2)(C).

Article III standing.<sup>109</sup>

Granted, there are important exceptions to the APA's reach: it does not apply to Congress, to the courts, to territorial governments and the government of the District of Columbia, or to the military in time of war.<sup>110</sup> (No such exceptions are found in RFRA.) The Supreme Court has also held (in *Franklin v. Massachusetts*) that "the President is not an agency within the meaning of the [Administrative Procedure] Act,"<sup>111</sup> although the Act itself includes no presidential exception.<sup>112</sup> But a thoroughgoing textualist (at least of the statutory variety) might reject the *Franklin* Court's extra-textual improvisation, in which case ultra vires presidential action would be subject to judicial review as well.

In sum, ultra vires executive actions that *abridge* the freedom of speech (and the freedom of the press, of assembly, and of petition) at least arguably *deprive* persons of a "liberty" within the meaning of the Due Process Clause, and even if the verb "abridge" sweeps more broadly than "deprive," the Due Process Clause is not the only vehicle for individuals to challenge ultra vires executive action. Some suits seeking relief from executive action under the First Amendment might be better labeled as Due Process Clause challenges, petitions for a writ of mandamus, or suits under the APA, but a textualist reading of the First Amendment's first word does not compel the conclusion that the executive branch enjoys *carte blanche* to infringe upon First Amendment freedoms.

### C. A First Amendment-Free Zone?

There is one area, however, where executive action that infringes upon the freedom of speech, freedom of the press, freedom of assembly, and freedom of petition might not be ultra vires. Article II, Section 2 of the Constitution empowers the President to act as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States," without explicit congressional authorization.<sup>113</sup> It is unclear how far this "inherent" presidential power extends. As Richard Epstein writes, "there is no doubt that . . . the President as the commander in chief possesses

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109. 42 U.S.C. § 2000bb-1(c).

110. 5 U.S.C. § 551(1). Of course, the First Amendment already applies to Congress, so one would not need the aid of the APA to challenge congressional action on free-speech or other First Amendment grounds. Moreover, the District of Columbia and territorial governments are generally subject to their own versions of the APA that have the same effect. See, e.g., District of Columbia Administrative Procedure Act, D.C. Code §§ 2-501 to 2-511 (1968); Uniform Administrative Procedure Act (Puerto Rico), P.R. LAWS ANN. 3 § 2101-2201.

111. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

112. Cf. 5 U.S.C. § 551(1).

113. U.S. CONST. art. II, § 2, cl. 1.

the power to defend the United States against a sudden attack”;<sup>114</sup> whether inherent presidential power goes beyond that is a hotly contested question that lies beyond the scope of this Article. My claim is limited to this: insofar as the President exercises lawful authority without congressional authorization, then the argument of Part II does not necessarily apply.

It would be a mistake to make too much of this concession. First, if we are going to be textualists with respect to the First Amendment, then we must be bound by the text of Article II as well, and a textualist might well conclude that the inherent authority of the executive under Article II is quite limited.<sup>115</sup> Second, to the extent that thoroughgoing textualism renders the military a “First Amendment-free zone,” existing Supreme Court case law already takes us one step in that direction. For example, in *Goldman v. Weinberger*, the Court considered a free exercise challenge by Simcha Goldman, an Air Force psychologist and an Orthodox Jew, to an Air Force policy prohibiting servicemembers from wearing headgear indoors.<sup>116</sup> (An Air Force colonel had formally reprimanded Goldman for wearing a yarmulke.) The Court rejected Goldman’s challenge, holding that the Free Exercise Clause does not compel the Air Force to accommodate religious practices such as yarmulke-wearing “in the face of its view that they would detract from the uniformity sought by the dress regulations.”<sup>117</sup> Along the way, the *Goldman* Court noted that its “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”<sup>118</sup>

In a stinging dissent, Justice O’Connor—joined by Justice Thurgood Marshall—charged that the Court had “reject[ed] Captain Goldman’s claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of

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114. Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 319 (2005).

115. LAWSON & SEIDMAN, *supra* note 2, at 47–50 (arguing that Article II gives the President “the power to command the nation’s armed forces,” but for the most part, the power “to impose rights and obligations on citizens” lies with the legislature, not the executive); *see also* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553 (2004) (concluding that textual arguments for a broad conception of inherent executive authority under Article II “are, at best, indeterminate”).

116. 475 U.S. 503 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006).

117. *Id.* at 509–10.

118. *Id.* at 507; *see also* Greer v. Spock, 424 U.S. 828 (1976) (declining to apply the First Amendment public forum doctrine to a military base).

dress within the military hospital.”<sup>119</sup> But if this Article’s textualist reading of the First Amendment’s first word is correct, then “the slightest attempt to weigh [Goldman’s] asserted right to the free exercise of his religion against the interest of the Air Force”<sup>120</sup> may not have been necessary, so long as the Air Force regulations at issue were within the inherent authority of the executive branch under Article II. And from a civil libertarian perspective, the textualist approach (which limits the doctrinal damage from cases like *Goldman*) might be preferable to the status quo. *Goldman* has been cited in nearly 300 cases, many of which have nothing to do with the military.<sup>121</sup> If military cases make bad First Amendment law, then perhaps it would be better for military cases to make no First Amendment law at all.

Note that the argument of this Section runs up against the tripartite framework proposed by Justice Jackson in his *Youngstown* concurrence and widely hailed by courts and commentators ever since. According to Jackson, “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . .”<sup>122</sup> Less deference is due “[w]hen the President acts in the absence of . . . a congressional grant . . . of authority,” and “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”<sup>123</sup> The analysis here suggests that, at least from a textualist perspective, Justice Jackson may have been mistaken when he said that a President who acts in the absence of a congressional grant of authority lacks the leeway of a President who acts pursuant to a statute. Indeed, at least with regard to First Amendment freedoms, greater deference may be due to the President when she acts pursuant to her own inherent Article II authority rather than pursuant to “an express or implied authorization of Congress.”<sup>124</sup> When a President is acting pursuant to her inherent Article II authority, it is very difficult to see how she would be bound by a provision that begins “Congress shall make no law . . . .” But when a President acts pursuant to an authorization of Congress, the statute so authorizing the President is subject to the First Amendment’s constraints.

#### IV. CONCLUSION

In sum, thoroughgoing textualists need not abandon the application of

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119. *Goldman*, 475 U.S. at 528 (O’Connor, J., dissenting).

120. *Id.*

121. See, e.g., *Dake v. Bowen*, 521 N.Y.S.2d 345 (N.Y. App. Div. 1987) (regulation prohibiting Saratoga County police officers from wearing moustaches upheld on free expression challenge).

122. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

123. *Id.* at 637.

124. *Id.* at 635.

the First Amendment to the executive branch entirely. Either (a) First Amendment principles are embedded in the very statutes that authorize executive action or (b) such statutes themselves run afoul of the First Amendment, in which case the executive lacks lawful authority to run roughshod over First Amendment freedoms. Admittedly, this argument is weaker with regard to the religion clauses than with regard to the other clauses of the First Amendment, and the argument only applies where the executive acts pursuant to statutory authority rather than inherent Article II authority. But these concessions largely track modern-day doctrine, which limits the ability of individuals to challenge executive action on Establishment Clause grounds, limits the application of the Free Exercise Clause under *Employment Division v. Smith*, and allows the executive branch broad discretion on military matters.

Importantly, I am not saying that the textualist approach is the “right” way to approach the First Amendment. My claim is much narrower: constitutional textualism need not yield the conclusion that the federal executive has *carte blanche* to ignore First Amendment freedoms. Although the executive branch is not the First Amendment’s grammatical subject, the executive branch is still subject to constitutional constraints—supplemented by statutory restrictions—that prevent it from trampling over religious, expressive, and associative liberties.



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