



## ARTICLE

## Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition

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**Abstract.** Though scholars have identified the expanding scope of First Amendment speech doctrine, little attention has been paid to the theoretical transformation happening inside the doctrine that has accompanied its outward creep. Taking up this overlooked perspective, this Article uncovers a new speech theory: the libertarian tradition. This new tradition both is generative of the doctrine's expansion and risks undermining the First Amendment's theoretical foundations.

This Article excavates the libertarian tradition through an analysis of Supreme Court cases that, beginning in the 1970s, consistently expanded speech protections by striking down limits on commercial speech and corporate political spending. The Court justified this expansion with the rationale of vindicating listeners' rights in the free flow of information—the corporate benefit was incidental. But by narrowly conceptualizing listeners as individuals whose interests are aligned with corporate speech interests, the Court ended up instrumentalizing listeners' rights in the service of corporate speech rights. This is the libertarian tradition. Today, the tradition has abandoned listeners' rights altogether, directly embracing corporate speech rights. This pure iteration of the

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libertarian tradition facilitates First Amendment doctrine's more aggressive expansion to increasingly diverse and dissonant types of corporate "speech"—for instance, data transmission and potentially fraudulent claims.

The libertarian tradition represents a radical departure from, and threat to, the two longstanding speech theories: the republican and liberal traditions. First, by reconceptualizing listeners as individuals whose interests are vindicated through deregulation, the libertarian tradition draws from and is hostile to the republican tradition, which emphasizes the rights of the public, figured as listeners. Second, because the libertarian tradition focuses on vindicating corporate speech rights, it strips away the hallmarks of individual autonomy central to the liberal tradition, leaving only a naked speech right against the state, which this article names "thin autonomy." If the two traditions have value, then the libertarian tradition is problematic. This insight cuts against the widespread belief that to protect speech we must be willing to countenance nearly any application of the right, even—and perhaps especially—if it goes against our most deeply held beliefs. That view is a myth; the speech right must have limits.

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## Introduction

For decades, the First Amendment has been claiming new doctrinal territory.<sup>1</sup> Scholars have described this phenomenon as “First Amendment expansionism”<sup>2</sup> and “imperialism,”<sup>3</sup> and a consensus has emerged that the doctrinal areas brought within the First Amendment’s boundaries are distorted in the process. That is the thesis of academics who document and lament what they understand as a neo-*Lochner* moment<sup>4</sup>: just as *Lochner* exalted the

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1. Many scholars have documented the rise of cases in which the First Amendment has been newly applied, especially to challenge economic regulations. *See infra* notes 2-4. For a collection of recent cases characterized by “civil libertarian challenges to the regulation of economic activity,” see Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917 & n.1 (2016); and Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614-16 (2015).
  2. Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015) (describing novel legal “claims [that] have succeeded in the courts” as examples of “First Amendment expansionism, where the First Amendment’s territory pushes outward to encompass ever more areas of law”); *see also* Frederick Schauer, *First Amendment Opportunism*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 175, 194-96 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).
  3. Several scholars have used variations of the term “First Amendment imperialism.” Daniel Greenwood defined the term as the First Amendment’s “rapid expansion into areas long thought impervious to constitutional law” and argued that the expansion deployed the Amendment “as a bar to governmental action . . . far into the realm of economic regulation we thought the courts had abandoned to the legislatures after the *Lochner* disaster.” Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 659-60 (footnote omitted); *see also* *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); Bertrall L. Ross II, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917, 917 n.1, 930 (2015) (using the term “imperial” to refer “to the current Supreme Court’s tendency to expand the reach of First Amendment protection to speech previously subject to governmental regulation” in the context of campaign finance whereby “First Amendment values . . . simply trump state interests” (citing Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1167, 1188-92 (2001))).
  4. Jack Balkin was one of the first scholars to fully recognize the neo-*Lochner* moment in First Amendment doctrine and its related corporatist turn. He presciently explained, with respect to free speech, that “[b]usiness interests and other conservative groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the first amendment by using the very same absolutist forms of argument offered by the left in previous generations.” J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384. Balkin described this phenomenon as “ideological drift,” which happens when “[t]he radical ideas of the day . . . become the orthodoxy of tomorrow, and, in the process, take on a quite different political valance.” *Id.* at 383; *see* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter & Spring 2003, at 173, 223 (“The First Amendment’s gradual extension of rights to corporations, and of the status of speech to what are essentially the commercial operations of firms in the information economy, pushes

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constitutional claim to liberty of contract over protective labor regulations,<sup>5</sup> today litigants—often corporate litigants—increasingly use the First Amendment to prioritize new applications of the freedom of speech over regulations designed to protect consumers and citizens.<sup>6</sup> Put differently, corporations use the First Amendment as a deregulatory weapon, urging courts to strike down structural and economic regulations as violations of their speech rights. And they have enjoyed considerable success.<sup>7</sup>

This widespread critique is correct but incomplete. Not only does the outward creep of the First Amendment exact a price from the areas of law that

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towards a new-Lochnerism for the information economy.”); Greenwood, *supra* note 3, at 661, 664-65 (arguing that the First Amendment “has become the locus of a new Lochnerism—or rather, a revival of the old Lochnerism under a new doctrinal label”—and pointing to a host of areas of law that appear to be “purely economic matters that may not seem to have anything to do with freedom of speech or religion”); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-31 (1979) (“[E]conomic due process is resurrected, clothed in the ill-fitting garb of the first amendment, and sent forth to battle the kind of special interest legislation that the Court has tolerated for more than forty years. In short, the Supreme Court has reconstituted the values of *Lochner v. New York* as components of freedom of speech.” (footnotes omitted)); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 166-67 (2015) (“[P]laintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy. It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.” (footnote omitted)); Schauer, *supra* note 1, at 1617, 1633-34 (arguing that there is “an accelerating attempt to widen the scope of First Amendment coverage to include actions and events traditionally thought to be far removed from any plausible conception of the purposes of a principle of free speech,” including the possibility of “First Amendment-inspired attacks on securities laws, antitrust laws, consumer protection laws, pharmaceutical and other product labeling laws, and the speech-restricting dimensions of the law of procedure and evidence”); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386-92 (1984) (“The first amendment has replaced the due process clause as the primary guarantor of the privileged.”); *see also* Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135 & n.5 (collecting citations of “a growing number of scholars, commentators, and judges [who] have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York*’s anticanonical liberty of contract” (footnote omitted)).

5. 198 U.S. at 49, 57-58, 64 (striking down maximum hour laws for bakers as a violation of bakers’ and employers’ liberty of contract, which is rooted in the Due Process Clause of the Fourteenth Amendment).
6. *See, e.g.*, John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223-24, 249 (2015) (finding that “corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights” and that the Court’s “docket now [is] roughly split between business and individual cases”).
7. *See, e.g., id.* at 251-52 (finding in a comprehensive empirical study that as corporations became successful at persuading the Supreme Court to strike down regulations as violations of corporate speech rights, their “win rate” grew more than individuals’ rate in the same time period).

its boundaries newly cover—one of the central points of the *Lochner* analogy—but this boundary shifting also risks undermining the theoretical traditions of the First Amendment itself, especially with respect to listeners’ rights and individual autonomy. The theoretical point is one that scholars have largely overlooked.<sup>8</sup> By reorienting the focus away from the external doctrinal impact of the First Amendment’s “expansionism” or “imperialism,” terms that themselves evince an outward focus, and attending instead to the overlooked but significant effects that the doctrine’s outward movement has *within* the First Amendment, this Article makes two central contributions.

First, and most significantly, this Article uncovers a new theoretical tradition that has been developing within First Amendment jurisprudence as the doctrine has expanded. This new tradition draws on but departs from the two longstanding traditions in speech doctrine: the liberal and republican traditions. The liberal tradition understands the purpose of the First Amendment as protecting innate individual rights by ensuring individuals are free from the state.<sup>9</sup> Its goal is to fulfill a vision of ascribed or a priori individual autonomy: the individual’s right of self-expression and self-realization.<sup>10</sup> Casting the individual right as instrumental, the republican tradition focuses instead on the rights of the public, figured as listeners, to accomplish achieved or socially constructed autonomy: the right to engage in self-determination and self-government.<sup>11</sup> The republican tradition emphasizes ensuring access to a robust speech environment to meet its autonomy goal.<sup>12</sup>

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8. While Schauer suggests that the First Amendment likely is “damaged in the process” of First Amendment opportunism—the strategic application of speech claims to seemingly noncore speech questions, *see infra* notes 28-29 and accompanying text—he qualifies the point by explaining that opportunism is only a problem if “there is some conception of a legally undistorted idea of the First Amendment” that could be damaged in the first place, Schauer, *supra* note 2, at 175, 194-96. But that may not be the case; it is possible that “none of the justifications for a distinct free-speech principle is sound, and that the First Amendment is revealed to be merely the raw material of opportunism and nothing else,” *id.* at 195 (footnote omitted), such that speech doctrine develops in a common law fashion and “opportunism provides the best way we have of understanding the role that the First Amendment plays in this society,” *id.* at 197.

The fundamental question whether there is a true meaning of the First Amendment that opportunism distorts, or if the doctrine develops in common law fashion such that opportunism is an apt description of its evolution, is a significant one this Article does not resolve. Rather, this Article shows as a descriptive matter that there are longstanding theoretical foundations of the speech doctrine and that they are undermined by the theoretical approach that has developed to undergird the doctrine’s outward creep.

9. *See infra* Part I.A.

10. *See infra* Part I.A.

11. *See infra* Part I.B.

12. *See infra* Part I.B.

However, the Supreme Court developed a new approach to speech doctrine to justify the expansion of First Amendment protections to commercial speech and corporate political spending beginning in the 1970s.<sup>13</sup> As scholars have documented,<sup>14</sup> the Court seemingly grounded its doctrinal innovation in the primary goal of protecting listeners' rights, apparently in line with the republican tradition.<sup>15</sup> When it struck down economic and structural regulations of commerce or corporations, it did so to benefit listeners by increasing the "free flow of information."<sup>16</sup> That corporate political and commercial speech rights were also vindicated was merely incidental, serving as an instrumental means to the end of upholding listeners' rights.

But, as this Article shows, the speech tradition developed by the Court ended up doing the opposite: using listeners' rights as an instrumental means to the end of vindicating corporate speech rights. The Court accomplished this inversion by radically transforming its understanding of listeners, abandoning the republican tradition on which it purported to draw. In the republican tradition, listeners are a stand-in for the public, whose interest in free expression is to achieve collective self-determination and self-government. This interest is vindicated through structures created by the state or through civil society. Leaving this tradition behind, the Court's new approach narrowly conceived of listeners as individual consumers or voters whose interest in free expression is to make informed choices in the market for goods or candidates.

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13. The Court's commercial speech cases extended speech protections to corporations and professionals speaking in the hopes of making a profit, such as through advertising. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 922-23 (17th ed. 2010). This Article understands commercial speech as part of a broader move to ensure corporate speech rights. Though commercial speech rights could be invoked by individuals, those individuals would be acting in their capacity as professionals, not as private citizens, seeking to exercise their speech rights.

The Court's holdings in corporate political spending cases extended speech protections to corporate expenditures in support of political causes and candidates. *See id.* at 1193-235. This Article is interested in the political expenditure cases regulating corporate speech as opposed to those cases regulating individual speech. There is a strong argument that assuming that spending money is a speech act, individual-spending-as-speech is coherent under the liberal tradition. Ultimately, this argument may fail, but the question on which it turns—whether spending money should be understood as a speech act—is beyond the scope of this Article.

For these reasons, this Article refers to both commercial speech and corporate political spending under the label of "corporate speech" and the rights that were created as "corporate speech rights."

14. *See infra* note 237.

15. *See infra* Part II.B.2 (discussing Supreme Court cases where this view of listeners' rights emerged).

16. *See infra* note 262.

The Court vindicated this interest by increasing the quantity of information available to listeners, often described in terms of facilitating the “free flow of information.”<sup>17</sup> The method the Court used to increase the free flow of information was deregulation, specifically striking down regulations on corporate speech. By understanding listeners as individuals whose interests are vindicated through deregulation, the same mechanism operates to uphold both listeners’ rights and corporate speech rights. As a result, these rights are aligned.

The Court’s transformation of listeners has made possible two related developments that undermine listeners’ rights. First, as the Court’s opinions show, listeners’ rights are subordinated to corporate speech rights. It is deeply ambiguous whether the Court’s deregulatory holdings actually benefit listeners, though corporate interests are always served. In some instances, deregulation may benefit listeners as understood in the new tradition. But in those cases where such a benefit is either highly contested, as where the Court split 5-4 in *First National Bank of Boston v. Bellotti*<sup>18</sup> and *Citizens United v. FEC*,<sup>19</sup> or where the Court’s deregulatory holding actually *decreases* the free flow of information, as in *Pacific Gas & Electric Co. v. Public Utilities Commission*<sup>20</sup>—violating its own definition of benefitting listeners—this tradition is vulnerable to the charge that listeners’ rights are subordinated to corporate rights. Thus, rather than achieving the Court’s purported goal of upholding listeners’ rights by instrumentally favoring corporate speech rights, the new speech tradition instrumentalizes listeners’ rights in the service of consistently vindicating corporate speech rights.<sup>21</sup>

This development has important theoretical consequences. Because the Court’s new speech tradition effectively asserts the freedom of corporations from the state, this tradition cannot be rooted in the same notions of autonomy that animate the liberal or republican traditions, which focus on the autonomy of individuals and the public. Rather, corporate speech rights are rooted in a radical new conception of autonomy: “thin autonomy.” Like autonomy in the liberal tradition, “thin autonomy” advances the idea that autonomy exists in a natural, a priori condition. But it importantly breaks from the liberal tradition’s conception of autonomy because, instead of being understood in relation to natural persons who have an innate capacity for self-expression and self-realization, it is understood as a feature of corporations and other nonnatural legal persons, which do not. Thus, “thin autonomy” undermines

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17. See *infra* Part II.

18. 435 U.S. 765, 766 (1978).

19. 558 U.S. 310, 316 (2010).

20. See 475 U.S. 1, 4, 20 (1986) (plurality opinion).

21. See *infra* Part II.



traditional notions of autonomy, stripping away the hallmarks of individual autonomy as figured in the liberal tradition and leaving only a naked right against the state.<sup>22</sup>

Second, the Court's transformation of listeners' rights has made possible an even more extreme development than the first. The transformation of listeners' rights makes possible not only their subordination to corporate rights but also their complete abandonment. If listeners' rights are merely instrumental in practice—functioning as a means to the end of vindicating corporate rights, even if listeners' rights are sometimes upheld along the way—it is unsurprising that the new tradition would eventually develop to abandon listeners' rights as a justification for removing restrictions on corporate speech. In recent years, that is precisely what has happened: listeners' rights have disappeared as a goal or justification, and litigants instead directly embrace the corporate speech right as an end in and of itself.<sup>23</sup>

By tracing the theoretical contours of this new speech tradition, it becomes possible to name it: the libertarian tradition. This tradition represents a radical break from the republican and liberal traditions on which it draws. To recap, the libertarian tradition co-opts the republican tradition's notion of listeners' rights, subordinating them to corporate speech rights and eventually nullifying them altogether. And the libertarian tradition transforms the notion of individual autonomy animating the liberal tradition into "thin autonomy," a mere naked right against the state. Thus, the libertarian tradition decouples the speech right from individuals and publics that are central to the two traditions, creating an impersonal speech right that is narrowly understood as a negative freedom from the state. These moves make it possible to invest speech rights in new types of entities, like corporations, and possibly other types of entities as well.

Building on the contribution of identifying, describing, and critiquing the libertarian tradition, the speech theory that supplies a justification for new applications of the speech right, this Article's second contribution shows that this tradition also operates as a mechanism generating outcomes in line with its logic. Beyond the legal rules at issue in the cases that expand the First Amendment, the application of which to new factual situations is the typical operation of precedent, this theory functions as a key precedent-like driver behind the doctrine's outward creep. In other words, while the libertarian tradition is unlike precedent because it is a theory as opposed to a legal rule, it functions similarly to precedent by pushing the doctrine to adhere to its logic and gaining in salience and power with each opinion that conforms to it. Thus, the libertarian tradition is both the product of increased First Amendment

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22. See *infra* Part II.C.3.

23. See *infra* Part III.

coverage and generative of it. As such, it serves as a central theoretical foundation for the neo-*Lochner* moment<sup>24</sup> and its productive engine: with each opinion that relies on and iterates the theory, its expansion becomes increasingly self-fulfilling and self-reinforcing.

This insight matters because it provides a theoretical explanation for speech doctrine's outward movement. By turning to theory, this Article complements a leading scholarly approach to explaining why First Amendment doctrine has crept outward: Frederick Schauer's turn away from theory<sup>25</sup> and toward factors exogenous to the doctrine, like politics, history, and culture.<sup>26</sup> According to Schauer, the First Amendment has a "magnetism" rooted in its unique place in American society.<sup>27</sup> Litigants who otherwise lack strong legal arguments have turned to this "plausibly effective but ill-fitting tool[]," and so "the doctrine and the rhetoric have been developed opportunistically in the service of goals external to the First Amendment rather than as a consequence of the purposes the First Amendment was designed to serve."<sup>28</sup> Schauer terms this latter phenomenon "First Amendment opportunism."<sup>29</sup> Together, the First Amendment's magnetism and the opportunism it fosters among the public, legal advocates, and courts "may explain much of the First Amendment's invasiveness."<sup>30</sup>

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24. Scholars have not clearly identified the core justification of the neo-*Lochner* doctrine. See, e.g., Shanor, *supra* note 4, at 186 ("The animating justification of the movement to protect commercial speech—or at least its litigation strategy—however, is not so richly theorized."). While this Article uncovers the libertarian tradition as a central justification of neo-*Lochner* doctrine, especially regarding commercial and corporate political speech, it does not purport to offer the exclusive explanation. Additional theories may also explain the speech doctrine's outward creep, and scholars should continue looking for those answers.

25. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1785 (2004) (observing that while "[p]rescriptive theories abound, . . . descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory" because "none of the existing normative accounts appears to explain descriptively much of, let alone most of, the First Amendment's existing inclusions and exclusions" (emphasis added)).

26. *Id.* at 1787 ("In light of this failure of normative free speech theory to explain the existing shape of the First Amendment, it may be more promising to shift course and consider the possibility that the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from [its] political, sociological, cultural, historical, psychological, and economic milieu . . .").

27. *Id.* at 1789; see also *id.* at 1793 (discussing "the magnetic effect of the First Amendment: the way in which legal and constitutional arguments migrate to claims of freedom of speech and press").

28. Schauer, *supra* note 2, at 175-76.

29. *Id.* at 176.

30. Schauer, *supra* note 25, at 1801; see also *id.* at 1789 n.122, 1795-98 (describing the interrelation of these factors as "bring[ing] issues into the First Amendment that  
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While Schauer is correct that current First Amendment theory is unable to explain the Speech Clause's coverage, that limitation is due in part to the fact that academic focus on theory is often *prescriptive*. Scholars have been operating within the framework of the liberal and republican traditions to determine where and how speech protections ought to apply. This Article departs from that approach by offering a *descriptive* account of a theory scholars have not yet identified—the libertarian tradition—but that has been developing within the doctrine as it has crept outward to include, for instance, commercial speech. The expansion of the First Amendment to cover commercial speech is very plausibly due in part to First Amendment magnetism and opportunism,<sup>31</sup> and this Article offers further explanation of that expansion grounded in theory. Thus, by attending to changes happening inside First Amendment doctrine as it creeps outward—and as a new speech theory develops—this Article recuperates theory's role in illuminating the Speech Clause's coverage.

This Article's two core contributions—identifying, describing, and critiquing the libertarian tradition, as well as showing that it does productive work by justifying and generating new applications of the speech right—illustrate what is at stake. First, the libertarian tradition justifies and generates increasingly diverse and dissonant applications of the speech right that focus exclusively on corporate speech. For example, corporations have invoked the First Amendment as a defense against regulations ranging from statutes that prohibit the use of records about physicians' prescribing practices for marketing purposes<sup>32</sup> and federal regulations prohibiting Internet service providers (ISPs) from discriminating against traffic from disfavored sources<sup>33</sup> to statutes outlawing misleading statements by companies to investors.<sup>34</sup> These

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previously had been outside its domain," resulting in "considerable outward pressure on the boundaries of the First Amendment"). See generally Schauer, *supra* note 1, at 1631-34 (discussing "the political, cultural, ideological, and psychological resonance of the First Amendment" and arguing that those factors in part help explain why the First Amendment may be applied in new areas of law). Other scholars have also offered explanations of the doctrine's outward creep. See Kendrick, *supra* note 2, at 1210-19 (discussing a variety of reasons that might explain First Amendment opportunism's "success").

31. See Schauer, *supra* note 2, at 180 (discussing commercial advertising's First Amendment coverage as a result of opportunism); see also Schauer, *supra* note 25, at 1776-77, 1794 n.144.

32. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

33. See *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016).

34. For an overview of ExxonMobil's resistance to investigations by state attorneys general into its statements about climate change, see John Schwartz, *Exxon Mobil Fights Back at State Inquiries into Climate Change Research*, N.Y. TIMES (June 16, 2016), <http://nyti.ms/24USZPI>.

novel applications of the right stretch the meaning of constitutionally protected “speech” to its breaking point.<sup>35</sup>

This expansionist threat is compounded by the fact that the libertarian tradition transcends the corporate speech claims that gave rise to it and thus could allow for even broader applications of the speech right than contemplated in this Article. The new speech theory could be applied, for instance, to other impersonal entities that could invoke speech rights. While it is beyond the scope of this Article to tease out these hypotheticals, and this Article self-consciously discusses the libertarian theory in terms of the commercial and corporate political speech doctrines through which it emerged, the fact of the theory’s possible broader application amplifies the concerns already raised.

Second, at the same time that the libertarian tradition poses external threats, it risks undermining the existing theoretical and normative foundations internal to the First Amendment. As discussed, the new speech theory is a problematic hybrid of the two traditions. It undercuts the republican tradition by co-opting its notion of listeners’ rights, subordinating and ultimately nullifying them. And it subverts the liberal tradition by transforming its notion of individual autonomy into “thin autonomy.” In so doing, the libertarian tradition displaces publics and individuals, which are central to the two traditions, and replaces them with an impersonal speech right grounded in “thin autonomy.” As a result, the new speech tradition is in tension with the two traditions. But unlike the tension between the liberal and republican traditions, which arguably are counterpoised, the tension created by the libertarian tradition is potentially corrosive.<sup>36</sup> Though it is unclear precisely what will happen internally to the First Amendment if the libertarian tradition continues to grow, its tension with and the continued damage it could do to the republican tradition’s notion of listeners’ rights and the liberal tradition’s individual autonomy justification are cause for concern if one believes the two traditions hold value. One could hold this belief for a variety of reasons: because the two traditions are rooted in original or textual meanings, because they are tied to important First Amendment values like the search for truth or deliberative democracy, and so forth.

These insights undermine the orthodoxy that to protect the First Amendment, we must be willing to countenance nearly *any* application of the speech right, even—and perhaps especially—if it cuts against our most deeply held convictions. This belief is a myth; there must be limits to the speech right’s application. Otherwise we risk diluting it not only through its broad application but also by undermining its internal coherence.

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35. All of these examples are discussed in detail in Part III below.

36. See *infra* Part III.B.

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This Article proceeds in three Parts. To understand why the rise of the libertarian tradition represents a radical departure from current theory, Part I establishes a theoretical baseline by describing the liberal and republican traditions in speech theory. That Part reveals the longstanding consensus among leading theorists that these two traditions exist and draws on scholarly work to develop a detailed conceptual typology of them. Part I focuses in particular on how autonomy is conceptualized because it is the First Amendment value that undergoes the most significant transformation in the libertarian tradition.

Departing from this baseline, Part II excavates the libertarian tradition as a distinct theoretical approach to speech doctrine and contrasts it with the liberal and republican traditions. Focusing on the neo-*Lochner* moment's impact *within* the speech doctrine, Part II identifies, explains, and critiques the new theoretical tradition in First Amendment doctrine that both justifies and produces the doctrine's territorial expansion.

First, Part II locates the origins of this new tradition in a set of interrelated social and economic explanations, including the development of the speech right by the ACLU as a negative, individual right against the state; the successful corporate appropriation of that rights framework; and organized resistance to commercial and corporate regulation.

Second, Part II analyzes Supreme Court opinions in which the libertarian tradition emerged. This analysis focuses on two moments of significant doctrinal upheaval: the development of the commercial speech doctrine beginning with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>37</sup> and the dramatic turn in campaign finance law in *Citizens United v. FEC*.<sup>38</sup>

Third, Part II traces and critiques the theoretical contours of the libertarian tradition. This tradition developed to justify the speech doctrine's outward movement as corporations, starting in the 1970s, successfully advanced a deregulatory agenda in the courts by invoking the speech right. That Part argues that what the Court sought to accomplish by developing a new justification to underpin this doctrinal expansion—using corporate speech rights instrumentally to protect listeners' rights—failed in practice. Indeed, it resulted in precisely the opposite outcome.

Part III illustrates the libertarian tradition's central role in justifying and generating the outward creep of the First Amendment's boundaries. Through a brief review of three contemporary cases, Part III shows how the libertarian

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37. 425 U.S. 748 (1976).

38. 558 U.S. 310 (2010).

tradition has evolved to abandon listeners' rights and directly embrace corporate speech rights and in the process has facilitated increasingly diverse and controversial applications of the speech right. Because litigants advancing the argument for direct corporate speech rights are gaining traction in the courts, this new, pure iteration of the libertarian tradition is poised to dramatically accelerate the doctrine's outward expansion to new areas of law, heightening the risk of undermining the theoretical foundations of the First Amendment.

## I. Two Traditions in Speech Jurisprudence

Though they clashed over the meaning of the First Amendment<sup>39</sup> and the scope of its coverage, many prominent twentieth-century scholars agreed that there are two traditions that, as a descriptive matter, express the purpose of the First Amendment's speech protections.<sup>40</sup> Zechariah Chafee aptly described the

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39. This Article's discussion of the First Amendment focuses on the Speech Clause and, to a lesser extent, the Press Clause.

40. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 36-37 (1960) (locating "two freedoms, or liberties, of speech" in the Bill of Rights: "a 'freedom of speech' which the First Amendment declares to be non-abridgable," providing an "unlimited guarantee of the freedom of public discussion," which "is radically different in intent from" a "liberty of speech" which the Fifth Amendment declares to be abridgable," a "private right of speech" providing a "limited guarantee of the freedom of a man's wish to speak"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576 (1978) ("To speak of the 'purposes' of the first amendment's protections of speech[] [and] press . . . is to risk begging the central question posed by the Constitution's most majestic guarantee: is the freedom of speech to be regarded only as a means to some further end—like successful self-government, or social stability, or (somewhat less instrumentally) the discovery and dissemination of truth—or is freedom of speech in part also an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be?" (footnote omitted)); see also OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (1996) (describing the "distinction . . . between a libertarian and a democratic theory of speech"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878-86 (1963) (suggesting that underlying the purposes of the "system of free expression"—which "is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society"—are two logics: the notion that "freedom of expression [is] a right of the individual" and the "logic of free expression as a social good"); Jackson & Jeffries, *supra* note 4, at 11-13 (explaining that "political speech," a theoretical tradition that can be traced to Meiklejohn, "and individual self-fulfillment" are "two principles" that "capture in reliable summary the dominant conceptions of the meaning of freedom of speech"); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757, 1759 (1995) ("There are two free speech traditions in the United States, not simply one. There have been two models of the First Amendment, corresponding to the two free speech traditions. The first emphasizes well-functioning speech markets. . . . The second tradition, and the second model, focuses on public deliberation." (footnote  
*footnote continued on next page*

two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.<sup>41</sup>

This Article refers to the two traditions as the liberal and republican approaches to the purpose of the First Amendment, using these terms in their classical philosophical meaning.<sup>42</sup> Notably, despite the seeming similarity in terminology, these terms do not track the liberal and conservative political spectrum in modern democracies and should not be understood in that context. This Part focuses on describing the two traditions' theoretical contours to establish a baseline from which the libertarian tradition can be understood as a radical departure.

The liberal and republican traditions encompass much of the debate over the core values the First Amendment protects, though scholars within each tradition embrace different values to varying degrees. These values include autonomy, self-expression, democratic deliberation, the search for truth, and the checking function.<sup>43</sup> This Article zeroes in on the two traditions' treatment of autonomy but not to express a preference in favor of any value or to explain all values with respect to it. Rather, this Article focuses on autonomy because it lies at the heart of the libertarian tradition's key theoretical transformation.<sup>44</sup>

The typology in Table 1 below summarizes the main differences between the two traditions. Any typology overly simplifies its subject by virtue of a structured exposition. For instance, this typology suggests that the traditions are mutually exclusive; they are not, especially because some scholars in the

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omitted)); *cf.* Schauer, *supra* note 25, at 1791 n.133 (discussing scholarship on “the First Amendment’s essentially negative (in the ‘negative liberty’ sense) history” and noting “more positive prescriptive accounts of the First Amendment—accounts that would empower the state to facilitate speech even at the cost of allowing it to draw more content-based distinctions than are now permissible”).

41. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 33 (1941).

42. This Article’s use of the terms “liberal” and “republican” is similar to that of Jürgen Habermas, who described and distinguished the liberal and republican models of democracy. See Jürgen Habermas, *Three Normative Models of Democracy*, 1 *CONSTELLATIONS* 1, 1-3 (1994).

Additionally, this Article’s use of the terms “liberal” and “republican,” as well as the notions of liberty discussed herein, are not intended to parallel the “two concepts of liberty” described by Isaiah Berlin, whose work is quoted elsewhere, because his discussion of negative and positive liberty has a different meaning. For more on his ideas of liberty, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 131-34, 144 (1969).

43. For a summary of these values and citations to key works defining each approach, see Schauer, *supra* note 25, at 1786.

44. See *infra* Part II.C.

republican tradition carve out a place for individual rights. Still, Table 1 can serve as a guide to the theoretical discussion that follows.

**Table 1**  
Typology of the Two Traditions of Speech Jurisprudence

<b>Characteristics</b>	<b>Two Traditions</b>	
	<b>Liberal</b>	<b>Republican</b>
Purpose of the First Amendment and free expression	Protect and advance individual rights (liberty)	Collective self-determination, social values, and public good (equality)
Role of the speaker	Dominant: speaker's individual rights are central and an end in themselves	Instrumental: speaker's individual rights help to accomplish free expression's social purpose, often described by proxy of listeners' rights
Mechanisms for ensuring conditions for a robust speech environment	Free market	State/government, civil society
Political ideology	Liberalism	Republicanism
Nature of autonomy	Ascribed (a priori): robust individual autonomy focused on Enlightenment ideals of self-expression and self-actualization	Achieved (socially constructed): autonomy of the public to engage in collective self-governance
Social sphere that is privileged	Private, self/individual	Public

#### A. The Liberal Tradition

The liberal tradition,<sup>45</sup> which has been dominant in much of the discourse and jurisprudence about the freedom of expression,<sup>46</sup> prioritizes the

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45. This Article refers to this tradition as “liberal” because its features are in line with a classical liberal political philosophy. For discussion of that view, see Habermas, *supra* note 42, at 1-3. See also CLIFFORD G. CHRISTIANS ET AL., NORMATIVE THEORIES OF THE MEDIA: JOURNALISM IN DEMOCRATIC SOCIETIES 93-95 (2009).



individual's negative right to assert her expressive liberty. This view of the individual assumes that individual autonomy is ascribed, that it exists a priori.<sup>47</sup> In other words, individuals are understood as always already autonomous; autonomy is an innate characteristic. As such, autonomous individuals seek to exercise their freedom of speech to develop themselves—their capacities for self-expression, self-realization, and self-determination, all of which are necessary ingredients for the development of the self.<sup>48</sup> In this context, freedom of expression is “an end in itself.”<sup>49</sup> Such a vision of the autonomous self is in line with Isaiah Berlin's description of the negative conception of liberty as understood by John Stuart Mill: “The only freedom which deserves the name is that of pursuing our own good in our own way . . . .”<sup>50</sup>

This vision of liberty typically figures the state as a threat and structures the free market as the mechanism for affirmatively ensuring resources and opportunities for speech.<sup>51</sup> Such an outcome is not theoretically required. Consider Berlin's formal contrast between a required “area of non-interference” that individuals must enjoy to have the opportunity to engage in self-realization and self-development<sup>52</sup> and the flipside positive requirement of providing resources or opportunities. Theoretically, the state could be required

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46. As Robert Post suggests, the republican tradition, which he calls the “collectivist theory of the First Amendment” because it “subordinates individual rights of expression to collective processes of public deliberation,” is inconsistent with First Amendment doctrine, which embraces the liberal tradition. He makes clear that the “Supreme Court has been largely hostile” to the “collectivist” approach, which he argues effectively seeks to “revis[e] traditional First Amendment jurisprudence.” Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 ETHICS 654, 654, 656, 678 (1993).

47. *Id.* at 673 (“Structures of self-governance . . . situate citizens within webs of hermeneutic interactions, assuming therefore that citizens are autonomous and self-determining.”).

48. See Emerson, *supra* note 40, at 878-81 (elaborating on “individual self-fulfillment,” one of the four purposes of the system of freedom of expression); see also FISS, *supra* note 40, at 3 (“The libertarian view—that the First Amendment is a protection of self-expression—makes its appeal to the individualistic ethos that so dominates our popular and political culture.”).

49. Emerson, *supra* note 40, at 907 (describing the nature of the freedom of expression when understood “[a]s the private right of the individual”).

50. BERLIN, *supra* note 42, at 127.

51. See *infra* notes 55-56 and accompanying text.

52. BERLIN, *supra* note 42, at 126-27. Berlin traces the history of the noninterference principle to the Enlightenment, explaining that key theorists of that era, including “Locke and Mill in England, and Constant and Tocqueville in France,” believed “there ought to exist a certain minimum area of personal freedom which must on no account be violated” because if it is, then “the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred.” *Id.* at 124.

to keep out of the “area of non-interference” and provide for affirmative opportunities or structures within which individuals can develop themselves.<sup>53</sup> (The private sector could be figured that way, too.) Still, this tradition overwhelmingly understands the First Amendment to guarantee liberty by providing a negative, individual right<sup>54</sup> against the state—“the natural enemy of freedom.”<sup>55</sup>

As a result of figuring the state as “enemy,” it is unsurprising that the liberal tradition understands the private sector or free market as the mechanism that best facilitates discourse.<sup>56</sup> Again, while this outcome is not theoretically required by the logic of the liberal tradition, it is the approach that is typically embraced.<sup>57</sup> Recall Berlin’s dichotomy of noninterference

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53. Consider Richard Fallon’s discussion of autonomy. Though he explains that an “ascriptive” sense of autonomy, similar to my conception of ascribed autonomy, “permits both negative and positive libertarian interpretations,” the latter of which could allow what he calls “soft” paternalism,” on the whole ascriptive autonomy is “hostile to paternalism,” or state intervention. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878, 890-91, 900 (1994). Similarly, the Kantian idea of autonomy allows for limited state intervention. See Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 167-70 (1997).
54. See TRIBE, *supra* note 40, at 675 (“Some have argued that the first amendment does not confer individual rights, but protects a systemic freedom for expressive activities. This view unduly flattens the first amendment’s complex role; but even if the view were accepted, the language of rights would nonetheless be appropriate where the liberty guaranteed by the first amendment has as its primary focus the autonomy of individuals or of the press.” (footnotes omitted)).
55. FISS, *supra* note 40, at 2. Though Emerson describes a variety of roles the state must play in his system of free expression, when he focuses on the individual rights component of the system, he articulates a hands-off view of the state. Specifically, he argues that “legal support for such a system involves the protection of individual rights against interference or unwarranted control by the government”; that “[l]egal recognition of individual rights, enforced through the legal process, has become the core of free society”; and that “[p]rotection of the individual’s right to freedom of expression against interference by the government in its efforts to achieve other social objectives or to advance its own interests . . . has been in the past the main area of legal concern.” Emerson, *supra* note 40, at 895.
56. In describing the First Amendment “ideal of autonomy,” Post explains that “[t]he protection of individual autonomy prevents the state from violating the central democratic aspiration to create a communicative structure dedicated to ‘the mutual respect of autonomous wills.’” Post, *supra* note 46, at 665 (emphasis added); see also Sunstein, *supra* note 40, at 1759 (emphasizing the role of “well-functioning speech markets” in the liberal tradition).
57. Justice Holmes’s famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919), captures the marketplace logic that has become ubiquitous in First Amendment doctrine. There, he wrote that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.” *Id.* at 630 (Holmes, J., dissenting); see also Frederick Schauer, *Hohfeld’s First Amendment*, 76 GEO. FOOTNOTE CONTINUED ON NEXT PAGE

versus providing opportunities for expression.<sup>58</sup> Because the state has been figured as the actor that must not interfere, the other major actor in secular democracies—the private sector and free market—is charged with affirmatively providing opportunities for speech. And given that the market is understood as operating largely without interference from the state, the liberal tradition’s embrace of the market mechanism reinforces the image of the state as enemy. Thus, the key features of the liberal tradition require that individuals be free from the state in order to develop their a priori autonomous selves by exercising self-expression.<sup>59</sup>

The liberal tradition has dominated the Court’s interpretation of the Speech Clause.<sup>60</sup> Representative examples proliferate among the classic free speech cases that would be familiar to most law students. For example, in an important free speech case where the speaker was a natural person, *Cohen v. California*,<sup>61</sup> the Court found that the speech right is

designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that *no other approach would comport with the premise of individual dignity and choice upon which our political system rests*.<sup>62</sup>

The Court immediately referenced Justices Holmes and Brandeis’s concurrence in *Whitney v. California*,<sup>63</sup> where they had explained decades earlier that “[t]hose who won our independence believed that the final end of the State was to make men *free to develop their faculties*; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means.”<sup>64</sup> Across these two emblematic cases, the Court

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WASH. L. REV. 914, 922 & n.42 (2008) (discussing the origin of the “marketplace of ideas” and linking it to several Supreme Court cases); Sunstein, *supra* note 40, at 1759 (tracing the liberal free speech tradition, which “emphasizes well-functioning speech markets,” in part “to Justice Holmes’ great *Abrams* dissent, where the notion of a ‘market in ideas’ received its preeminent exposition” (footnote omitted)).

58. *See supra* note 52 and accompanying text.

59. This construction is in line with that of scholars “who argue that all claims of freedom are essentially triadic, asserting the freedom of (i) some person(s), (ii) from some restraint(s), (iii) to do, be, or achieve something.” Fallon, *supra* note 53, at 886 n.68. Thanks to Artemis Seaford for her insights on this approach to understanding freedom.

60. *See supra* note 46.

61. 403 U.S. 15 (1971).

62. *Id.* at 24 (emphasis added).

63. 274 U.S. 357 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

64. *Id.* at 375 (Brandeis, J., concurring) (emphasis added). Notably, *Whitney* is one of the ACLU’s first speech victories and one in which the ACLU clearly advanced a notion of ascribed autonomy as understood in the liberal tradition. *See The Successes of the* footnote continued on next page

articulated a vision of ascribed autonomy and focused on Enlightenment ideals of self-expression and self-realization.

## B. The Republican Tradition

In contrast to the liberal tradition, the republican approach<sup>65</sup> understands freedom of expression as a “social good.”<sup>66</sup> It is instrumentally wielded by individuals as a private right to accomplish broader public purposes. Just as private, individual rights are less important than public purposes, so too is a purely individual notion of autonomy rejected in favor of one understood in a social context.<sup>67</sup> Here, autonomy is not ascribed but rather achieved<sup>68</sup> through affirmative provisions offered by the state or civil society, not the free market. As with the liberal tradition, it is not theoretically necessary in the republican tradition that the state be figured as the mechanism for ensuring conditions for a robust speech environment, though this is how scholars in this tradition have overwhelmingly understood the state.<sup>69</sup>

While all scholars in the republican tradition view individual rights as less central to accomplishing the purpose of free expression as compared to scholars in the liberal tradition, they are not in lockstep; rather, they view the

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*American Civil Liberties Union*, AM. C.L. UNION, <https://www.aclu.org/successes-american-civil-liberties-union> (last visited May 5, 2017).

65. This Article refers to this tradition as “republican” because its features are in line with a classical republican political philosophy. For discussion of that view, see Habermas, *supra* note 42, at 1-3. See also CHRISTIANSET AL., *supra* note 45, at 93-95.

66. Emerson, *supra* note 40, at 881.

67. See FISS, *supra* note 40, at 83 (“The autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights.”); see also TRIBE, *supra* note 40, at 579 (“Those who defend freedom of speech as an end in itself and as a constitutive part of personal and group autonomy at times err in the opposite direction, by forgetting that freedom of speech is also central to the workings of a tolerably responsive and responsible democracy and that at least some of the first amendment’s most convincing implications follow directly from this perspective.” (footnote omitted)).

68. See Theodore L. Glasser & Marc Gunther, *The Legacy of Autonomy in American Journalism*, in THE PRESS 384, 385 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (“[Sunstein and Fiss] reject[] the notion of autonomy as a precondition of citizenship; [Sunstein] argues instead that citizens remain ‘unfree and nonautonomous’ until they overcome circumstances, well beyond a coercive state, that in any way impair or inhibit the judgments individuals make . . .” (quoting CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 19 (2007))).

69. Like ascriptive autonomy, Fallon understands “descriptive” autonomy—similar to this Article’s concept of achieved autonomy—as compatible with both negative and positive liberty. However, he explains that unlike ascribed autonomy, descriptive autonomy “is arguably consistent with a good deal of paternalism.” Fallon, *supra* note 53, at 877-79, 890.

relative importance of individual rights on a sliding scale. Whereas some scholars cast them as purely instrumental to accomplishing First Amendment purposes, others argue that they should be balanced against the social interest. And these scholars do not always agree on precisely what those First Amendment purposes should be. Though these nuances are worth teasing out, this tradition is unified by its priority of social good over individual right, the achievement over ascription of autonomy, and the positive role envisioned for the state. Thus, the republican tradition is concerned with the public and citizens.<sup>70</sup> And the public must have affirmatively provided structures affording access to information in order to achieve autonomy by engaging in collective self-determination and self-government.<sup>71</sup>

On one end, Alexander Meiklejohn, a prominent First Amendment philosopher active during the middle of the twentieth century whose work has had a lasting influence among scholars,<sup>72</sup> articulates the most absolute view within this tradition. He sees the individual's role as purely instrumental and defines the First Amendment as concerned with the public good of self-governance.<sup>73</sup> This is the logic driving his well-known adage that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said”—precisely so that “all the citizens shall, so far as possible, understand the issues which bear upon our common life.”<sup>74</sup> Following Meiklejohn, Owen Fiss similarly describes the republican approach to freedom of expression in contrast with the liberal approach, arguing that the republican approach values freedom of expression “not because it is a form of self-expression or self-actualization but rather because it is essential for collective self-determination.”<sup>75</sup>

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70. Scholars in the republican tradition are focused on vindicating shared interests—and to that end do not refer to “individuals” but rather to “the public” or “citizens” as a collective unit of analysis. When this tradition appears in doctrine, however, the Court at times uses the term “listener” as a proxy for “the public” or “citizens.” See *infra* note 95 and accompanying text.

71. See Fallon, *supra* note 53, at 886 n.68 (outlining this “triadic” construction of freedoms).

72. See Paul N. Halvonik, Book Review, 23 SANTA CLARA L. REV. 339, 342-43 (1983); see also Post, *supra* note 46, at 656.

73. See MEIKLEJOHN, *supra* note 40, at 37 (arguing that the Fifth Amendment provides a “private right of speech,” whereas the First Amendment “guarantee[s] . . . the freedom of public discussion”); see also *id.* at 27 (“The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”); *id.* at 79, 109 (advancing similar arguments contrasting the negative, individual rights tradition with the affirmative, social good approach for which he advocates).

74. *Id.* at 26, 75.

75. FISS, *supra* note 40, at 3.

Elsewhere on the scale, scholars in the republican tradition allow a somewhat larger role for the expressive rights of individuals than does Meiklejohn and offer slightly different conceptualizations of the social good. On the other end of the spectrum from Meiklejohn, Chafee argues that “[t]he various interests, individual and social, must . . . be balanced against one another with full regard to the social interests in progress and the attainment and dissemination of truth.”<sup>76</sup> His “balanc[ing]” approach provides more solicitude to individual rights as compared to Meiklejohn’s,<sup>77</sup> but his overall balancing prioritizes the social good of free expression over individual rights. Chafee repeatedly emphasizes the importance of balancing the social good, which he defines as including safety and morality, against the individual interest in speech, which, importantly, he understands as bound up with the “social interest in the gains from open discussion.”<sup>78</sup>

Similarly, Thomas Emerson recognizes the role of individual rights in the system of free expression but explains that it “is not the only end of man as an individual. In its social and political aspects, freedom of expression is primarily a process or a method for reaching other goals,” including the “attainment of truth” and “participation in decision-making.”<sup>79</sup>

Notwithstanding these differences, scholars in the republican tradition provide a much larger, more positive role for the state than do those in the liberal tradition. Yet again, the differences among republican-tradition scholars regarding the role of individual rights also inform the degree to which they embrace the government’s role in promoting free expression. Importantly, though scholars in this tradition allow for a state role in facilitating structures

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76. CHAFEE, *supra* note 41, at 157. Despite the liberal influence on and threads in Chafee’s thought, he is included within the republican tradition because much of his thinking was that of a mainstream progressive and “differed from conservative libertarianism” in a variety of ways, including—and central for our purposes—the belief that “the Constitution primarily protected the social interest in free speech, rather than the individual’s interest in self-expression.” See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 125 (1991).

77. Meiklejohn criticized Chafee over this point: “Mr. Chafee separates, as we have done, the private interest in speech from the public interest in speech. But he assigns to them both the same constitutional guarantee of freedom. He places them both under the protection of the First Amendment.” MEIKLEJOHN, *supra* note 40, at 55. This is problematic because, from Meiklejohn’s perspective, the First Amendment “cares for the public need” and is not concerned with private speech. *Id.*

78. CHAFEE, *supra* note 41, at 510 (describing the balancing process inherent in defining the freedom of speech as involving “a conflict between the interests of the community in national safety from external or internal violence, in morality, and so forth, on one side, and on the other side the individual interest in speaking out coupled with this social interest in the gains from open discussion”); see also *id.* at 31 (advancing similar balancing arguments).

79. Emerson, *supra* note 40, at 881-82, 907 (formatting altered).

of free expression—a key distinction from the liberal tradition—they do not require it. Rather, civil society is equally able to play a role in ensuring a robust speech environment.

Meiklejohn is the most positive about the state's role, explaining that the First Amendment "is concerned, not with a private right, but with a public power, a governmental responsibility."<sup>80</sup> In line with Meiklejohn, but acknowledging concerns that the state could pose a threat to expressive freedom, Fiss argues that the state "may also be a source of freedom" because it has a role in "fostering full and open debate" in order to "establish essential preconditions for collective self-governance by making certain that all sides are presented to the public."<sup>81</sup> More sympathetic to the role of individual rights and the threat the government could pose, Emerson concedes that the dynamic is "paradoxical" because "[f]reedom of expression is by its very nature laissez-faire" but "the conditions under which freedom of expression can successfully operate in modern society require more and more governmental regulation."<sup>82</sup> Thus, "[a] theory of freedom of expression must deal not only with the powers of the state to restrict the right of expression but also with the obligations of the state to protect it and, in some instances, to encourage it."<sup>83</sup>

The republican tradition arguably is less prominent in First Amendment law as compared to the liberal tradition,<sup>84</sup> and scholars have sought to recover and recuperate its doctrinal status.<sup>85</sup> It is beyond the scope of this Article to

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80. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

81. FISS, *supra* note 40, at 2, 17, 18.

82. Emerson, *supra* note 40, at 902.

83. *Id.* at 946.

84. *See supra* note 46.

85. Seemingly because the republican tradition has not commanded victories in the courts relative to the liberal tradition, contemporary scholars have spilled much ink seeking to recover it within First Amendment doctrine. Yochai Benkler offers a masterful example in critiquing a volume edited by renowned First Amendment lawyer Robert Corn-Revere. Benkler argues that the book "proceeds from a libertarian assumption that the first amendment is solely a command, aimed at government, not to regulate the production and distribution of information, knowledge, or culture—'speech,' understood expansively" and thereby wrongly casts a line of cases "develop[ing] a sustained commitment to prefer, as a normative matter, a widely decentralized information environment to a concentrated information environment" as a "derogation from a nonintervention principle." Yochai Benkler, *Free Markets vs. Free Speech: A Resilient Red Lion and Its Critics*, 8 INT'L J.L. INFO. TECH. 214, 215 (2000) (book review). Rather, he suggests that this line of cases, represented by *Red Lion*, is an equally worthy tradition as the ones representing the libertarian nonintervention principle Corn-Revere describes. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 9-11, 21 (arguing that in addition to the "negative-liberty model" of the First Amendment, there is a second "architectural model" in the Court's jurisprudence that informs "making spaces available to the public" and that exists "implicitly and should be adopted explicitly by courts"). *But see footnote continued on next page*

evaluate the relative merits of this important debate. But regardless of where one comes down with respect to the empirical question which tradition makes the most appearances in doctrine, the basic insight that there are two traditions that animate the purpose of the First Amendment's speech protections stands.<sup>86</sup>

When the Court articulates the republican tradition, it often does so in rejecting a First Amendment challenge to a structural regulation. Consider, for example, the Court's rationale in declining to strike down "must-carry provisions" requiring that cable companies carry local broadcast television stations<sup>87</sup>: "[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."<sup>88</sup> In other words, the Court affirmed the importance of the public's interest in access and the state's legitimate role in ensuring such a speech environment.

### C. A Note on the Press Right

While this Article focuses primarily on the Speech Clause, the liberal and republican traditions also characterize the Court's press jurisprudence,<sup>89</sup> demonstrating the broad scope of their influence. This Subpart briefly reviews

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Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 699-700 (2010) (arguing that although "[s]cholars have long advanced theories that would transform the First Amendment from a negative limitation on government action into an affirmative obligation on the government to provide the means for the meaningful exercise of free speech rights," the First Amendment "remains a limit on governmental action that does not reach private action").

86. See *supra* note 40.

87. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 626, 630 (1994).

88. *Id.* at 663; see Benkler, *supra* note 85, at 218-19 (discussing *Turner I* as representative of the republican tradition, along with other Supreme Court cases, and following directly from the logic of *Red Lion*).

89. See Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 1 (1976) [hereinafter Bollinger, *Freedom of the Press*] (explaining "two opposing constitutional traditions regarding the press," where print media is free from regulation because of the "right of the editor to be free from government scrutiny" but broadcast media is affirmatively regulated to satisfy the public's right of access to information). Bollinger further explores these traditions in his book *Images of a Free Press*, where he describes two separate images of the free press: first, the "central image" of press freedom as an autonomous press applicable to print media, where courts serve to "protect press freedom against government interference"; and, second, a "secondary image," where the press as broadcast media is viewed as "different" and "hence can be regulated not with impunity but in a manner consistent with the 'public interest' in healthy debate"—which leads to the striking fact of "the Court's virtual celebration of public regulation." See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 1, 40-62, 66, 71 (1991) (formatting altered).



how the Supreme Court has taken up the two traditions in its Press Clause jurisprudence.

In the context of the liberal tradition, the Court has applied the press right by focusing on the prerogative of “editor[s] to be free from government scrutiny.”<sup>90</sup> Thus, while in a given press case the Court may vindicate a media corporation’s claim to the press right, it does so by focusing on maintaining the integrity of the work of editors and publishers; it is *their* claim to the press right that matters and *their* individual autonomy that is being vindicated. In other words, this approach to press freedom perfectly tracks the liberal tradition of the Speech Clause if, instead of on an individual’s right to free speech, we focus on the editor’s right to a free press. A quintessential case illustrating this approach is *Miami Herald Publishing Co. v. Tornillo*, where the Court struck down a Florida right-of-reply statute because of its “intrusion into the function of editors.”<sup>91</sup> As the majority explained, the “treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . .”<sup>92</sup>

In the context of the republican tradition, the press right directly contributes to the goal of collective self-determination and the public’s autonomy in line with that tradition’s logic.<sup>93</sup> Just as the Court would with a noncorporate plaintiff, it subordinates the press’s individual claim to the broader social good. Perhaps the most well-known and widely debated case in the republican tradition is *Red Lion Broadcasting Co. v. FCC*,<sup>94</sup> in which the Court upheld the Fairness Doctrine, an FCC policy that required broadcasters to offer competing views about issues of public importance. The Court maintained that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”<sup>95</sup> By prioritizing the rights of listeners and the public over those of the broadcaster, the Court embraced a Meiklejohnian view of the free speech doctrine,<sup>96</sup> whereby the autonomy of the public to engage in collective self-governance is the most important consideration.

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90. Bollinger, *Freedom of the Press*, *supra* note 89, at 1.

91. 418 U.S. 241, 258 (1974).

92. *Id.*

93. See *supra* note 89 (discussing Bollinger’s idea of the press’s “secondary image”).

94. 395 U.S. 367 (1969).

95. *Id.* at 390.

96. See *supra* Part I.B.

## II. The Libertarian Tradition: Theoretical Contours and Critique

Today, the two traditions no longer provide a complete picture of the theoretical landscape of speech jurisprudence. By taking up a key perspective afforded by this Article—looking at the impact the outward movement of the doctrine’s boundaries is having *within* the First Amendment—it becomes possible to uncover a new theoretical tradition in the Supreme Court’s doctrine: the libertarian tradition. The Court developed the libertarian tradition as it began to expand the speech right to apply to corporate speech. This new tradition departs from and undermines the two traditions, as well as justifies and produces the doctrine’s continued expansion.

This Part develops the core insight and central contribution of this Article: that the libertarian tradition has emerged as a theoretically distinct and normatively problematic approach to the Court’s speech doctrine.<sup>97</sup> This Part focuses on identifying this new tradition and describing its key features with reference to theory and doctrine. Part III then shows how it has evolved, aggressively pushing the boundaries of First Amendment doctrine and redefining what constitutes “speech” in the process.

Part II.A sketches several potential and interrelated social and economic explanations for the rise of the libertarian tradition. Though a full explication of the libertarian tradition’s causes is beyond the scope of this Article, this overview begins that effort. Drawing on the work of legal scholars and media historians, this Part explains that the rise of this tradition is the product of several factors. First, this Part discusses the ACLU’s ironic departure from an internationalist approach, which broadly rejected the nation-state structure and embraced rights-skepticism,<sup>98</sup> and subsequent articulation of the speech right as an individual right against the state in the early twentieth century. Second, this Part reviews media corporations’ resistance to publicly interested regulations in the 1940s. Third, this Part discusses corporate activism asserting corporate speech rights in a broad effort to invalidate structural and economic regulations, especially in the 1970s.

These trends uncover a central theoretical question: When the Court took up corporations’ speech claims, which sought to strike down economic or structural regulations, what justification did it provide? The answer: the Court has developed a distinct tradition in speech jurisprudence that purports to vindicate listeners’ rights in receiving information by instrumentally

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97. The types of cases in which the libertarian tradition has developed involve corporations claiming a speech right. *See infra* Part II.B-C. Though corporations may invoke press rights, the doctrine is largely focused on their speech rights, so that is this Article’s focus.

98. *See* JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 157-60 (2007).

upholding corporate speech rights but in fact does just the opposite. This is the libertarian tradition.

Part II.B supports this core theoretical finding through a close analysis of a set of cases in which the Court developed this new tradition while expanding First Amendment doctrine. That Subpart demonstrates how the Court created the libertarian tradition and how, as the Court relied on and cultivated this tradition over time, it became a mechanism that both justifies and produces the outward movement of the First Amendment's boundaries. This insight—which is this Article's second core contribution—helps set the stage for Part III's discussion of the libertarian tradition's current productive work.

Building on the case analysis in Part II.B, Part II.C traces the tradition's theoretical contours. The libertarian tradition departs from the liberal and republican traditions and represents a new and heretofore unidentified theoretical approach to the speech doctrine. Most significantly, that Subpart explains that the Court's attempt to develop a speech tradition upholding listeners' rights through an instrumental vindication of corporate speech rights resulted in the opposite outcome. The Court transformed its understanding of listeners from how they were understood in the republican tradition, where they stood in as a proxy for the public that has an interest in collective self-determination and self-government,<sup>99</sup> and instead conceptualized them narrowly as individuals whose interest in free expression is to make informed choices in the market. The Court vindicated this interest by increasing the quantity of information available to listeners, often described as facilitating the "free flow of information," which it accomplished by striking down corporate speech regulations. As a result, the mechanism that upholds listeners' rights is the same as what satisfies corporate speech rights—deregulation—and thus these rights are aligned. But because listeners' rights are not unequivocally upheld by deregulation while corporate speech rights are clearly and consistently vindicated, these moves made possible the subordination of listeners' rights to corporate speech rights—the reverse of what the Court purported to do. This development has significant theoretical consequences, most importantly giving rise to a new approach to autonomy that is distinct from the two traditions: "thin autonomy." All of these features compose the libertarian tradition.

In addition to these descriptive elements, Part II critiques the libertarian tradition's normative implications, explaining how it is in tension with and threatens to undermine the other two traditions. Thus, this Part develops a key insight afforded by this Article's focus on the internal effects of the speech doctrine's outward movement: showing how the outward creep of the

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99. *See supra* note 70.

doctrine's boundaries risks undermining the existing foundations of the First Amendment.

A. A Sketch of the Causes of the Libertarian Tradition

There are three interrelated potential causes of the rise of the libertarian tradition in speech doctrine. First, the ACLU's conceptualization of the speech right as an individual right wielded against the state—and the success the civil liberties group found in the Court when it abandoned the internationalism of its founders and embraced an individual rights-based framework instead—created the possibility that corporations could later claim the right as theirs. Second, media corporations resisted regulation in the 1940s, taking up this rights framework and seeking, unsuccessfully, to “equate[] corporate power and basic individual freedoms” to beat back structural regulations.<sup>100</sup> Third, the broader movement of conservative and corporate activism, which resulted in the “corporate takeover of the First Amendment,”<sup>101</sup> won the legal successes in the 1970s and beyond that media corporations had sought decades earlier, upholding corporate speech rights by striking down structural and economic regulations. This trend has only continued in the decades since.<sup>102</sup>

The confluence of these doctrinal, social, and political threads helped create a radically new type of First Amendment claim for which a new justification was needed, resulting in a new tradition in speech doctrine. This Subpart considers each of these factors in turn.

1. The ACLU and articulating the individual speech right

At its core, the libertarian tradition and its “thin autonomy” justification are available because the speech right was constructed as an individual right, such that, with a little maneuvering, corporations could invoke it on their behalf. Through legal historians' accounts of the early history of the speech right, the ACLU emerges as the organization that, despite an initial commitment to internationalism rooted in nation-state and rights-skepticism,<sup>103</sup> shifted in the aftermath of World War I (WWI) to both embrace and then articulate for the courts the freedom of speech as an individual right.

The first key move progressives, and in particular the internationalist founders of the ACLU, made in the early twentieth century was turning away

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100. Victor Pickard, *Social Democracy or Corporate Libertarianism?: Conflicting Media Policy Narratives in the Wake of Market Failure*, 23 COMM. THEORY 336, 344 (2013).

101. Coates, *supra* note 6, at 239.

102. *See infra* text accompanying notes 137-38.

103. *See supra* note 98 and accompanying text.

from an internationalist approach to First Amendment rights and toward an individual rights model.<sup>104</sup> Specifically, the ACLU's founders took up a rights discourse during the interwar years that they had previously opposed, which legal historians have argued was born out of their desire to counteract abuses by the state during WWI.<sup>105</sup> Despite harboring a deep rights-skepticism and actively supporting state institutions, Crystal Eastman (and other key founders of the ACLU) "return[ed] to nineteenth-century rights claims as the quintessential strategy for resistance to the modern state that she had helped design."<sup>106</sup> By 1917, Eastman developed a "plan of test cases to try the 'actual testing of the *right of free speech*.'"<sup>107</sup> Ultimately, under ACLU cofounder and head Roger Baldwin, the "traditional language of rights overwhelmed the internationalist agenda that the rhetoric of rights had been marshaled to advance."<sup>108</sup>

The second key move progressives made concerned how they understood the state and, consequently, how they conceptualized the speech right in relation to it. They shifted away from a pro or neutral stance toward the state, which allowed for an affirmative understanding of the speech right, and toward a negative relationship with the state, supporting the understanding of the right as negative. This move is reflected in a shift in justification, whereby civil libertarians abandoned the "defense of political speech by reference to social justice and the broader good, as opposed to individual rights," and embraced the "negative, autonomy-based conception of liberty."<sup>109</sup> According

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104. See WITT, *supra* note 98, at 157-60, 195-97 (explaining that internationalists, who were skeptical of the "usefulness" of the "sovereignty of the nation-state" as well as of the "metaphysical truth" of individual rights, initially "adopted civil liberties as a strategic tool for the advancement of internationalism"—not as an end in and of itself).

105. *Id.* at 172, 207 (noting that despite the progressives' origins in "internationalist modernism," the ACLU's founders made an "ironic" shift "to more straightforwardly traditional arguments rooted ever more deeply in the trappings of American national identity"); Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 LAW & SOC. INQUIRY 187, 198 (2009) (book review) (arguing that the ACLU's founders shifted away from rights-skepticism to a strong embrace of rights rhetoric after the war as a "response to the state suppression of dissent and the expansion of federal power during and after World War I").

106. WITT, *supra* note 98, at 172.

107. *Id.* at 196 (emphasis added).

108. *Id.* at 207.

109. Weinrib, *supra* note 105, at 201, 203. The ACLU, through much of its twentieth-century litigation of First Amendment claims by individual plaintiffs, has won victories establishing a notion of ascribed autonomy characteristic of the liberal tradition. See *supra* Part I.A (discussing *Cohen v. California*, 403 U.S. 15 (1971)).

Additionally, this historical overview should not be read to suggest that the ACLU was the first or only group to articulate the freedom of speech as a negative, individual right. Other groups supported the approach that the ACLU most successfully

*footnote continued on next page*

to legal historian Laura Weinrib, this “conception of liberty”—which shares key characteristics with the liberal tradition<sup>110</sup>—serves as the theoretical foundation for the speech right as conceived by the ACLU and civil liberties advocates more broadly.<sup>111</sup> And conservative allies like the American Bar Association and the American Liberty League endorsed the ACLU’s court-based approach to securing speech rights.<sup>112</sup>

The ACLU was successful in securing its vision of the speech right through the courts. It pursued “litigation . . . as the chosen vehicle of reform only when lawsuits began to succeed” in the 1930s.<sup>113</sup> Moreover, given that the judicial “forum lent itself to individualized consideration of specific cases,”<sup>114</sup> it was possible, if not likely, that court opinions would frame the right in narrow, individualized terms—precisely the terms the ACLU articulated. Consider two examples.

One of the ACLU’s earliest and most important successes in establishing a liberty-based, individual speech right in the Court was *Stromberg v. California*.<sup>115</sup> In its brief in that case, the ACLU argued that the “[f]reedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due-process clause.”<sup>116</sup> The ACLU cited language from *Gitlow v. New York*, in which it lost the battle of overturning its client’s conviction but won the war of incorporating the speech and press liberties and defining them as individual rights.<sup>117</sup> In finding the California statute at issue in *Stromberg* impermissibly vague, Chief Justice Hughes explained that the

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advanced, including the libertarian Free Speech League, which ineffectively argued for this conception of the speech right in court before WWI. See Weinrib, *supra* note 105, at 200 n.27. See generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 23-76 (1997) (describing the “lost tradition of libertarian radicalism,” including the Free Speech League, that predated the ACLU).

110. See *supra* Part I.A.

111. Weinrib, *supra* note 105, at 205 n.41 (“[C]ivil libertarian lawyers, including the ACLU, have unequivocally endorsed individual liberty for its own sake.”).

112. Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 303-04, 307.

113. Weinrib, *supra* note 105, at 210; see also *id.* at 211 n.50 (describing the gradual ascendance of free speech claims before the Supreme Court and lower courts).

114. *Id.* at 215.

115. 283 U.S. 359 (1931); see also *The Successes of the American Civil Liberties Union*, *supra* note 64 (including this case among its list of “successes” (formatting altered)).

116. Brief of Appellant at 14, *Stromberg*, 283 U.S. 359 (No. 584), 1931 WL 32271.

117. 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); see also *The Successes of the American Civil Liberties Union*, *supra* note 64 (including this case among its list of “successes” (formatting altered)).

“right of free speech” cannot be meaningfully realized if vague laws “permit the punishment of the fair use of th[e] opportunity” for “free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.”<sup>118</sup> In other words, he affirmatively defined the right as protecting the individual’s ability to engage in political speech criticizing the government. Additionally, by tracing the limits of the right, he reinforced its antistate posture. “The right is not an absolute one,” he explained, such that the “State in the exercise of its police power may punish the abuse of this freedom.”<sup>119</sup> Thus, by outlining both the right’s substance and its limits, the Court sketched the image of a negative right against the state that the ACLU had advanced.

Though this Article is focused primarily on the speech right, it is worth noting that due in part to the ACLU’s work, the understanding of the freedom of the press that developed in the early twentieth century was similarly grounded in a liberty-based, individual right with an aggressive posture against the state.<sup>120</sup> Lee Bollinger, for example, locates this image of the press in *New York Times Co. v. Sullivan*,<sup>121</sup> though the same image was drawn over thirty years earlier in one of the earliest and most significant press decisions of the modern era, *Near v. Minnesota ex rel. Olson*.<sup>122</sup> In *Near*, a case in which the ACLU sought to represent the plaintiff on appeal,<sup>123</sup> the Court struck down a law imposing a prior restraint on a newspaper by grounding the purpose of the press right in the historical imperative of keeping the press free from the state. The “liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship,” with a particular emphasis on ensuring that “publications relating to the malfeasance of public officers” are protected.<sup>124</sup> As in *Stromberg*, the Court’s understanding of the right’s limits also shows that it sketched a right against the state: “Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse.”<sup>125</sup> In addition to

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118. 283 U.S. at 368-69.

119. *Id.* at 368.

120. *See supra* note 89.

121. 376 U.S. 254 (1964).

122. 283 U.S. 697 (1931).

123. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 91 (S. Ill. Univ. Press 2d ed. 1999) (1990) (“The ACLU offered to defend *Near* but, to its chagrin, was maneuvered out of the case by Colonel Robert McCormick, publisher of the *Chicago Tribune*.”).

124. *Near*, 283 U.S. at 716, 718.

125. *Id.* at 708.

sketching a negative right, the Court made clear that the free press right is an individual one, held by newspaper editors and publishers.<sup>126</sup>

In sum, the ACLU successfully crafted a negative, antistate, and individual speech right that the Court took up. These moves can be understood as helping to bring forth key aspects of the liberal tradition in practice and, ultimately, in doctrine. Further, this process allowed for the possibility that corporations could try to invoke the right on their behalf, thereby laying the groundwork for the libertarian tradition.

## 2. Corporate resistance to regulation in the 1940s

Corporations tried to and eventually succeeded in invoking individual speech rights, often to evade regulation.<sup>127</sup> This was not merely a litigation strategy but also an ideology, which media historian Victor Pickard traces to the 1940s and calls “corporate libertarianism.”<sup>128</sup> Similar to what C. Edwin Baker has described as the “rhetorical appeal” of media deregulation due to free speech arguments,<sup>129</sup> this ideology “conflates corporate privilege with First Amendment freedoms and is girded by a logic that advances individualistic negative liberties at the expense of the collective positive liberties that are central to a social democratic vision of media.”<sup>130</sup> Media corporations seeking to evade regulation, especially by the then-newly created FCC, advanced this perspective, which emerged as a central ideology driving media policy after World War II (WWII).<sup>131</sup>

While it is common wisdom among communication scholars that media corporations, and eventually the FCC itself, embraced this ideology,<sup>132</sup> there is little evidence that the Court adopted this view at the time. Indeed, Pickard acknowledges that in the cases he cites, corporations’ speech arguments were *not* adopted—and some of the cases were not even decided on First Amendment

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126. *Id.* at 720; *see supra* note 89; *see also supra* Part I.C.

127. *See infra* note 133 (discussing examples of the types of structural and economic regulations that media corporations opposed).

128. VICTOR PICKARD, *AMERICA’S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* 190 (2015).

129. C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 4 (2002).

130. PICKARD, *supra* note 128, at 190.

131. *See generally* PICKARD, *supra* note 128.

132. *See, e.g., id.* at 208-11. Perhaps most well-known and exhaustive is Baker’s scholarship, which critiques the “deregulatory perspective [that] swept through [American] policy-making circles.” BAKER, *supra* note 129, at 3. He explained that this approach was explicitly articulated by former FCC Chairman Mark Fowler and, at the end of the twentieth century, “became a global phenomenon”—not only with respect to media but also with respect to other sectors. *Id.* at 3-4.



grounds.<sup>133</sup> According to at least one exhaustive empirical study, it does not appear that media companies had major success in striking down structural and economic regulations.<sup>134</sup> Moreover, after the “corporate takeover of the First Amendment” began in the 1970s, expressive businesses were not the types of companies bringing most of the speech challenges against regulations.<sup>135</sup>

### 3. Corporate resistance to regulation in the 1970s

Rather, the ideology of corporate libertarianism gained traction among other types of businesses and, by the 1970s, saw the type of success before the Court that media companies in the 1940s could only have dreamed of. The Court became responsive to corporations seeking to vindicate their economic liberty through the First Amendment, upholding their novel claims to speech rights. This shift resulted in large part from corporate and conservative activism, with the explicit support of at least one Justice.<sup>136</sup>

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133. See PICKARD, *supra* note 128, at 55 (discussing *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943), in which the Court held that chain broadcasting regulations, which regulate associations among broadcasters and affiliates, “did not interfere with broadcasters’ First Amendment protections”); *id.* at 92-93 (discussing two appellate cases about the FCC’s Blue Book, neither of which adopted the broadcasters’ claim that “granting the FCC any regulatory authority over programming amounted to a gross abridgement of the First Amendment”); *id.* at 139, 197 (discussing *Associated Press v. United States*, 326 U.S. 1 (1945), where the Court explicitly rejected the newspaper industry’s First Amendment arguments and found that it had violated antitrust law).

134. Coates explains that what he calls “expressive businesses”—which include “film companies, newspapers, etc.”—experienced victories when “challenging laws that directly impeded their core business.” Coates, *supra* note 6, at 243, 248, 253-54. He cites as an illustrative example *Grosjean v. American Press Co.*, 297 U.S. 233, 244, 251 (1936), which struck down as a First Amendment violation a sales tax that specifically applied to certain newspapers. While *Grosjean* represents a victory for media corporations in striking down regulations, and indeed happened well before *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and the rise of the corporate takeover of the First Amendment beginning in the 1970s, it can be separated from this later movement because it is significantly narrower in scope than would have been the types of victories Pickard described these companies as seeking—and not winning—against the government in general and the FCC in particular. See *supra* note 133 and accompanying text.

135. Coates, *supra* note 6, at 239, 249 (“[C]ases currently in the Courts of Appeal under *Central Hudson* predominantly do not involve expressive businesses, but are attacks on laws and regulations that inhibit ‘speech’ by other kinds of businesses in areas of activity incidental or instrumental to their core profit-making activity.”).

136. See *id.* at 242 (explaining that the “movement’ among businesses and conservatives . . . was stimulated in part by the 1971 ‘Powell memo,’ in which Lewis Powell—before he went on the Supreme Court—advocated that the Chamber of Commerce undertake a broad, multi-channel effort at mobilizing corporations and their resources to defend capitalism and the ‘free enterprise system,’” an effort that included advocating that the courts not merely “enforce or interpret the law” but also “change the law” (quoting Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, U.S. footnote continued on next page

In the decades since the 1970s, the corporate movement for speech rights has exploded. According to John Coates's empirical study, once corporations became successful at persuading the Court to strike down regulations as violations of corporate speech rights, beginning with *Virginia State Board*, they subsequently enjoyed a growing "win' rate[.]"<sup>137</sup> Today, "corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights"; the Court's "docket now [is] roughly split between business and individual cases."<sup>138</sup>

In sum, scholars' empirical and historical research makes clear that at the behest of corporate plaintiffs, the corporate takeover of the First Amendment began sometime between the 1940s and 1970s. This movement has only grown in salience in the decades since. Though the existing scholarship has not yet answered some important historical and empirical questions—like precisely what type of plaintiff first successfully wielded the speech right to strike down regulations—this Article turns to pressing theoretical questions that have been left open: Once the Court took up these corporate arguments, how did it justify applying individual rights to corporations? Did the principles advanced in its justification hold up in practice? And what vision of the First Amendment emerged in its jurisprudence?

#### B. Evidence of the Libertarian Tradition in the Supreme Court's Speech Jurisprudence

This Subpart demonstrates how the Court developed the libertarian tradition through a series of cases where it expanded the free speech doctrine to vindicate corporate speech rights. Importantly, this new tradition emerged

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Chamber of Commerce Educ. Comm. 1 (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf>); Shanor, *supra* note 4, at 154 (documenting the "business-led social movement" that helped to bring about the "First Amendment's libertarian turn"); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 2, 2013), <https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation>; *see also* Schauer, *supra* note 2, at 178-79 ("Facing the increasing constitutional (or at least doctrinal) weakness of arguments from economic libertarianism, economic libertarians turned their attention to the First Amendment. In the 1976 case of . . . *Virginia Board of Pharmacy*, those who a generation earlier would have couched their objections in terms of economic liberty now argued that Virginia's prohibition on the advertising of pharmaceutical prices violated the First Amendment." (footnote omitted)); *cf.* ROBERT L. KERR, *THE CORPORATE FREE-SPEECH MOVEMENT: COGNITIVE FEUDALISM AND THE ENDANGERED MARKETPLACE OF IDEAS* 2-3, 46-47 (2008) (explaining that the "ideology of corporate citizenship," key to the corporate free speech movement, merged "the priorities of the profit imperative . . . with the values of liberty, equality, and freedom of speech").

137. Coates, *supra* note 6, at 251-52.

138. *Id.* at 223-24, 249.

over a series of holdings, and it is only in hindsight that it is possible to even give the tradition a name. It can be misleading to read any one of these cases looking for the libertarian tradition as if it were a foregone conclusion. Rather, this Article approaches these cases with deference to the goals the Court purported to accomplish and a recognition of opportunities missed; only when reaching the end of the analysis do the contours of the new tradition emerge.

The following case analysis fleshes out a core contribution of this Article. This Article reorients the focus on the effect that the speech doctrine's outward movement is having *within* the First Amendment. This perspective not only helps uncover the libertarian tradition that has functioned as the justification undergirding the doctrine's expansion,<sup>139</sup> but it also reveals that this tradition operates as a mechanism driving the doctrine's continued outward movement. To that end, the case analysis shows how, as the Court has developed it, the libertarian tradition has become a mechanism that both justifies and produces the outward creep of the First Amendment's boundaries.

This Subpart proceeds in two steps. First, this Subpart explains the approach used to select which cases to analyze to identify the libertarian tradition in the Court's jurisprudence. Second, this Subpart provides a close reading of a series of those cases to trace this tradition's development and theoretical components. Building on this case analysis, Part II.C then elaborates on the libertarian tradition's theoretical contours.

#### 1. Case selection

This Article seeks to answer an open theoretical question: Once the Supreme Court took up corporate free speech arguments, how did it justify applying individual rights to corporations? Did it use the traditional liberal and republican approaches to develop its holdings,<sup>140</sup> as in *Cohen v. California*<sup>141</sup> and *Turner I*<sup>142</sup>? Or did it develop a new justification? To answer that question, this Article examines cases involving a corporate entity challenging an economic or structural regulation on First Amendment grounds, where the Court reached the constitutional question and invalidated the regulation as a speech violation.

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139. See *infra* Part II.C.

140. The Court has previously developed tangible approaches to justifying its speech doctrine in line with the republican and liberal traditions, providing a baseline against which the Court's development of the libertarian tradition can be understood as a distinct doctrinal and theoretical approach. For a full discussion of illustrative examples of the two traditions in the context of the Speech and Press Clauses, see Part I above.

141. 403 U.S. 15 (1971).

142. 512 U.S. 622 (1994).

To narrow the inquiry to an illustrative set of cases in which the Court was in a position to articulate a vision of the First Amendment, this Article focuses on two legal moments when the Court reversed itself and overturned its precedents. Through the case or set of cases in which the Court shifts the doctrine, it is possible to witness the Court in the act of newly justifying its work. The Court has both an obligation to justify its departure from precedent and an opportunity to reenvision the doctrine.<sup>143</sup> And even if the majority does not articulate the scope of its break from the past, the dissent may take up that role for the Court—and often does so with vigor.

Specifically, this Article locates and analyzes two moments in speech doctrine to identify the new tradition that emerged through the Court's holdings.<sup>144</sup> The first is the “commercial speech” moment, when the Court in *Virginia State Board* found that the “question whether there is a First Amendment exception for ‘commercial speech’ is squarely before us” and decided for the first time that commercial speech is protected.<sup>145</sup> This decision overruled *Valentine v. Chrestensen*,<sup>146</sup> where the Court had held that commercial

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143. This analysis focuses on Supreme Court cases because the Court is in a unique position with respect to interpreting the Constitution. A future study could, however, analyze lower court cases arising after these doctrinal shifts to evaluate the way in which the Court's new approach has been taken up.

144. This approach aligns in part with Coates's empirical analysis, *see supra* note 6; *infra* notes 145, 149, and with cases Kathleen Sullivan identifies as included in the doctrine's “libertarian strand,” Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 158 (2010). Sullivan directly connects *Citizens United* to *Virginia State Board*, arguing that “*Citizens United* has been unjustly maligned as radically departing from settled free speech tradition” and linking the majority's reasoning to that of “[t]he commercial speech cases—beginning with *Virginia State Board of Pharmacy*.” *Id.* at 158, 176.

145. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760-61, 770 (1976); *see also id.* at 781 (Rehnquist, J., dissenting) (observing that the majority “elevate[d] commercial intercourse” and “extend[ed] the protection of [the First] Amendment to purely commercial endeavors”); Coates, *supra* note 6, at 238 (noting that in *Virginia State Board*, the Court “first announced” that “First Amendment doctrine . . . includes a distinct commercial speech component”).

Coates's data suggest that this case can be read as an important doctrinal moment. *See* Coates, *supra* note 6, at 250-51 (explaining that “*Virginia Pharmacy* (1976) marks a clear shift in the data” such that before that case, “businesses were involved in 26% of the 176 [studied First Amendment] cases, or 1.5 per year, while afterwards they were involved in 34% of the 246 cases, or 2.2 per year,” a statistically significant increase, and finding that “[b]usiness ‘win’ rates also rose dramatically after *Virginia Pharmacy*”).

146. 316 U.S. 52 (1942); *see Va. State Bd.*, 425 U.S. at 758 (citing *Valentine* and explaining that “[t]here can be no question that in past decisions the Court has given some indication that commercial speech is unprotected”); *id.* at 776 (Stewart, J., concurring) (“[T]he Court ends the anomalous situation created by [*Valentine*] and holds that a communication which does no more than propose a commercial transaction is not ‘wholly outside the protection of the First Amendment.’” (quoting *id.* at 761 (majority opinion))).

speech in public spaces is not constitutionally protected.<sup>147</sup> After announcing this new approach, the Court in a handful of cases elaborated on it.<sup>148</sup> Following Coates's analysis,<sup>149</sup> this Article identifies two cases decided shortly after *Virginia State Board* in which the Court similarly struck down a structural or economic regulation on speech grounds at the behest of a corporate entity: *First National Bank of Boston v. Bellotti*<sup>150</sup> and *Central Hudson Gas & Electric Corp. v. Public Service Utility Commission*.<sup>151</sup> It also includes two cases decided shortly after *Central Hudson* featuring a corporate party successfully securing the invalidation of a regulation on speech grounds: *Consolidated Edison Co. of New York v. Public Service Commission*<sup>152</sup> and *Pacific Gas & Electric Co. v. Public Utilities Commission*.<sup>153</sup>

The second is the “corporate political spending as speech” moment, when the Court in *Citizens United* overruled two of its campaign finance precedents<sup>154</sup>—*Austin v. Michigan State Chamber of Commerce*<sup>155</sup> and *McConnell v. FEC*<sup>156</sup>—and vigorously reaffirmed and expanded the notion that corporations have speech rights just as natural persons do.<sup>157</sup>

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147. 316 U.S. at 54-55.

148. Note that cases are included even though they do not pertain to commercial speech, as long as they are cases in which the Court struck down structural or economic regulations as violating a corporate entity's speech rights.

149. See Coates, *supra* note 6, at 241 (citing *Virginia State Board*, *Bellotti*, and *Central Hudson* as three groundbreaking cases in which businesses became the “direct beneficiaries of judicial review of law for violations of the right to free speech” and linking these cases to *Citizens United*).

150. 435 U.S. 765 (1978). While *Bellotti* is substantively about corporate political spending, it is included in this Article's discussion of commercial speech cases because it was decided in close chronological proximity to those cases and its logic is tied to and builds on them.

151. 447 U.S. 557 (1980).

152. 447 U.S. 530 (1980).

153. 475 U.S. 1 (1986).

154. *Citizens United v. FEC*, 558 U.S. 310, 362-66 (2010) (justifying its departure from *stare decisis* and explaining the scope of its move to overrule precedent); see also *id.* at 377-79, 384-85 (Roberts, C.J., concurring); *id.* at 408-12 (Stevens, J., concurring in part and dissenting in part) (criticizing the majority's departure from *stare decisis*).

155. 494 U.S. 652 (1990), overruled by *Citizens United*, 558 U.S. 310.

156. 540 U.S. 93 (2003), overruled in part by *Citizens United*, 558 U.S. 310.

157. *Citizens United*, 558 U.S. at 318-19, 343 (reiterating that “[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons’” and invalidating a federal law that prohibited corporations from “using their general treasury funds to make independent expenditures for speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate” (first quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978); and then quoting 2 U.S.C. § 441b)); *id.* at 394 (Stevens, J., concurring  
*footnote continued on next page*

To be clear, this Article does not claim that the Court always strikes down economic or structural regulations by turning to the libertarian tradition, nor does it claim that the other two traditions are dormant. These are interesting questions, but their answers are not dispositive regarding the claim made here. Indeed, it is quite possible that notwithstanding the tension between the two longstanding traditions and the new tradition, all three traditions and their justifications currently coexist and that the Court strikes down regulations for other reasons as well. The central claim here—that the Court developed a new justification when vindicating corporate speech rights that was contrary to what it purported to announce, which this Article identifies as a distinct theoretical approach to First Amendment doctrine—still stands.

## 2. Case analysis

The following discussion of the cases composing the “commercial speech” moment and the “corporate political spending as speech” moment proceeds chronologically to show how the Court developed its thinking and how, eventually, the features of the libertarian tradition emerged as both a justification for and productive mechanism of opinions in line with its logic.

### a. “Commercial speech” moment

The beginnings of the libertarian tradition can be traced to *Virginia State Board*, where the Court, in striking down advertising limitations as a violation of the Speech Clause, found for the first time that the First Amendment applied to commercial speech.<sup>158</sup> At issue was a Virginia statute prohibiting licensed pharmacists from advertising the prices of prescription drugs; violating the statute constituted unprofessional conduct.<sup>159</sup> Consumer groups and an individual consumer challenged the regulation as infringing their First Amendment rights to receive information, like drug prices, from pharmacists.<sup>160</sup>

To justify the novel move of granting First Amendment protections to commercial speech, the Court invoked listeners’ rights in the form of the

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in part and dissenting in part) (describing and rejecting the majority’s “conceit that corporations must be treated identically to natural persons in the political sphere”). A review of *Citizens United*’s “citing references” in Westlaw did not reveal any later Supreme Court cases in which a corporate entity similarly challenged a regulation, so only *Citizens United* is considered illustrative of the second moment.

158. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

159. *Id.* at 749-50.

160. *Id.* at 753.

“reciprocal right to receive the advertising.”<sup>161</sup> Among the cases the Court cited to support its proposition that free speech protection applies to both the “source[s] and . . . recipients” of communication was *Red Lion*.<sup>162</sup> The Court referenced a part of *Red Lion* that, arguably more clearly than any other Supreme Court case, articulates the core of the republican tradition: “It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”<sup>163</sup> Furthermore, the Court argued that its notion of the public interest did not conflict with, but rather was consonant with, the republican tradition. The “free flow of commercial information is indispensable” not only to individuals making “private economic decisions” but also “to the formation of intelligent opinions as to how [the commercial] system ought to be regulated or altered.”<sup>164</sup> By showing that commercial information facilitates individuals’ decisionmaking in their capacity not only as consumers but also as voters, the Court maintained that its view of unrestricted corporate speech was in line with Meiklejohn’s understanding of the purpose of the First Amendment. Citing Meiklejohn, the Court concluded that “even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.”<sup>165</sup>

To uphold listeners’ rights in the “free flow of information,” the Court relied on the free market—a clear departure from the republican tradition. Rejecting the state’s “highly paternalistic” regulatory approach, the Court argued instead for relying on the free market as the mechanism that would ensure the best expressive environment for consumers<sup>166</sup>: “That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”<sup>167</sup> In other words, the “free flow of commercial information” satisfies the “consumer’s interest” and potentially the “general

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161. *Id.* at 757. Elaborating on listener interests, the Court explained that the “consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. . . . [S]ociety also may have a strong interest in the free flow of commercial information.” *Id.* at 763-64.

162. *Id.* at 748, 756; *see also* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

163. *Red Lion*, 395 U.S. at 390.

164. *Va. State Bd.*, 425 U.S. at 765.

165. *Id.* at 765 & n.19 (footnote omitted) (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)).

166. *Id.* at 770.

167. *Id.*

public interest,” a logic that justifies striking down restrictions on corporate speech.<sup>168</sup> That is precisely what the Court did in *Virginia State Board*.

In the portion of the decision discussed above, the Court made several novel moves, influenced by the work of legal scholar Martin Redish and the immediate procedural issue of finding standing for consumers challenging a law regulating pharmacists’ speech.<sup>169</sup> First, it reconceptualized listeners as individuals, specifically individual consumers, whose interest in free expression is to make informed choices in the market. This approach departed from the republican tradition’s broader understanding of listeners as a proxy for the public or citizens, a collective that has a group interest in self-determination and self-government. Second, by understanding listeners this way, it became possible to vindicate their speech interests through deregulation, which increases the quantity of information available in the market by encouraging the “free flow of information.” By reconceptualizing and narrowing the meaning of listeners as individual consumers, as compared to how listeners are understood in the republican tradition, the Court aligned

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168. *Id.* at 763-64, 770.

169. As scholars have noticed, the Court’s reasoning appears to have been influenced by the same argument Martin Redish advanced a few years earlier. *See, e.g.*, Tamara R. Piety, “A Necessary Cost of Freedom”?: *The Incoherence of Sorrell v. IMS*, 64 ALA L. REV. 1, 30 (2012); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1188 n.32 (1988). In arguing that commercial advertising deserves First Amendment protection, Redish developed some of the theoretical contours of the speech approach the Court purported to develop—but which became the libertarian tradition, discussed in Part II.C below.

First, he focused on listeners’ rights, as opposed to corporate speech rights, as the goal of bringing commercial speech within the First Amendment’s coverage: “Since advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the seller, as the frame of reference.” Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 434 (1971); *see also id.* at 446, 452 (reiterating the importance of listeners’ interests in the context of the First Amendment speech right). Second, Redish embraced the marketplace logic that by putting more information into the market, listeners’ rights would be vindicated. Drawing on Meiklejohn and the value of political discourse to accomplish self-government, Redish argued that the same logic applied to information in the marketplace: “Just as we require a free flow of information regarding the political process because we value the concept of political self-realization, so too, should we require an open exchange of ideas and information in the marketplace that will help the individual govern his personal life.” *Id.* at 445.

Also shaping the Court’s focus on listeners’ rights was the fact that, as Piety points out, consumers brought the case. *See supra* note 160 and accompanying text. This fact raised the question whether they had standing to challenge the statute. *Va. State Bd.*, 425 U.S. at 756 (evaluating whether, even if there is a First Amendment interest in the “flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information”); *id.* at 781-82 (Rehnquist, J., dissenting) (criticizing the majority for “extend[ing] standing”). As a result, the Court’s focus—both procedurally and substantively—was on listeners as individual consumers. Piety, *supra*, at 29-30, 29 n.155.



listeners' interests seamlessly with commercial interests, setting a precedent that upholds both listeners' and corporations' rights by striking down commercial or corporate regulations that restrict the "free flow of information."

Justice Rehnquist explicitly called out the fact that the Court's approach departed from past practice. He explained in dissent that the case should be understood as "present[ing] a fairly typical First Amendment problem—that of balancing interests in individual free speech against public welfare determinations embodied in a legislative enactment."<sup>170</sup> In the typical approach, as he explained, the individual speech right is balanced *against* the listener's interest. However, by departing from this standard approach and aligning listeners' interests with corporate interests, the Court created a question as to how it understands the relationship between these interests. There are two potential interpretations of the Court's view.

First, it is possible that the Court simply expanded the republican tradition by advancing listeners' rights, where listeners are understood as a proxy for the public, through an instrumental vindication of corporate speech rights. In other words, by recognizing an area where consumer and corporate interests aligned, the Court vindicated commercial speech rights by removing structural or economic regulations as a means to a different end—satisfying listeners' rights. Under this approach, benefits to corporate speakers from having regulations removed are incidental to the primary purpose of satisfying listeners' rights. This could very well be what the Court sought to do in *Virginia State Board* by expanding commercial speech rights.<sup>171</sup>

Second, it is possible to understand this case as departing from both the republican and liberal traditions and instead representing the first step in the development of the libertarian tradition. By narrowly reconceptualizing listeners as individual consumers, the Court foreclosed the broader understanding of listeners as a stand-in for the public, as in the republican tradition. Though the Court appears to have understood its reconceptualization of listeners as individual consumers as consonant with the image of the public in the republican tradition,<sup>172</sup> this Article contends that these two notions of listeners are ultimately at odds.<sup>173</sup> In the new tradition, listeners' interests are vindicated through deregulation, by increasing the flow of information in the market—in other words, through the *quantity* of information. By contrast, while a broader definition of listeners as the public, like in the republican tradition, would understand deregulation to sometimes

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170. *Va. State Bd.*, 425 U.S. at 789 (Rehnquist, J., dissenting).

171. See *infra* Part II.C.3.b.

172. See *Va. State Bd.*, 425 U.S. at 765 & n.19.

173. This argument is developed in detail in Part II.C.1.a below.

be in the public interest, it would also understand that regulations can be necessary to advance listeners' interests. In the republican tradition, the public's rights are furthered based on the *quality* of information, not its *quantity*. But under the Court's new understanding of listeners, the interests of the public as understood in the republican tradition are not necessarily vindicated; rather, the Court focuses on and vindicates the interests of individual consumers through deregulation. Thus, in the new tradition, the Court is able to align listeners' interests with corporate interests, both of which are purportedly served when regulations are struck down.

Presented with this theoretical crossroads, this Article argues that the Court in subsequent cases took that latter path, creating the libertarian tradition. Specifically, the Court radically transformed listeners' rights from how they are understood in the republican tradition, reconceptualizing listeners as individuals with an interest in the "free flow of information." It purported to vindicate those rights through deregulatory rulings, the same mechanism that benefits corporate speech rights. This approach aligns these rights, making it possible to conflate listeners' interests with corporate interests. But as this Article will show, even operating within the Court's logic, it is unclear if listeners' interests are vindicated in the cases decided by the Court. Such ambiguity undermines the coherence of the Court's approach, which purports to prioritize listeners' rights. To the extent listeners do not clearly benefit from the Court's deregulatory holdings while corporations do—and especially when listeners clearly do *not* benefit—the Court opens itself up to the charge that listeners' rights as it understands them are in fact subordinated to corporate speech rights. Put differently, listeners' rights are instrumentalized, or used as a means to an end of satisfying corporate speech rights. Indeed, this is precisely the opposite of what the Court purported to do in *Virginia State Board*.

Importantly, this argument does not turn on what the Court intended to do or even accomplished in *Virginia State Board* and the expansion of commercial speech in that case. Nor does this argument suggest that listeners' interests are *never* upheld by deregulation; indeed, sometimes they are. Rather, what matters is that this case laid the conceptual groundwork on which the Court built the libertarian tradition in subsequent opinions, where listeners' rights served as a one-way deregulatory ratchet: individual consumers' interests are invoked to support deregulation, which *always* benefits the corporate interest and only *sometimes* (if ever) benefits the listener.

The next step in the development of the libertarian tradition came two years later in *First National Bank of Boston v. Bellotti*.<sup>174</sup> There, the Court struck down a Massachusetts statute that "forb[ade] certain expenditures by banks and

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174. 435 U.S. 765 (1978).

business corporations for the purpose of influencing the vote on referendum proposals” as invalid under the Speech Clause, an issue the Court noted was “one of first impression” in that context.<sup>175</sup> As an initial move, the Court explicitly elided the question—and therefore the implication—of applying speech rights to corporations in this context: “[W]e need not survey the outer boundaries of the Amendment’s protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment.”<sup>176</sup> In so doing, the Court glossed over the likely implication of applying individual speech rights to corporations: stripping away those rights’ ideals of self-expression and self-realization, resulting in “thin autonomy.”<sup>177</sup>

In dissent, Justices Brennan, White, and Marshall appeared to make a similar point, acknowledging the contradiction of corporations enjoying individual rights. They argued that “what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.”<sup>178</sup> Similarly, Justice Rehnquist argued in his dissent that the Court had not to that point found that corporations enjoy the type of liberty to which natural persons are entitled.<sup>179</sup>

The Court addressed the concerns of the dissenting Justices by arguing, following *Virginia State Board*, that corporate speech rights are justified not by reference to speakers’ rights but rather by reference to listeners’ rights. The Court rearticulated its argument that restrictions on corporate speech are invalid because they contravene one purpose of the First Amendment’s

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175. *Id.* at 767. While the regulation at issue was a criminal statute, it can be understood as a type of economic regulation because it concerned expenditures. Therefore, this case fits within this Article’s methodology, which analyzes cases where the Court struck down structural or economic regulations of corporations on speech grounds.

176. *Id.* at 777.

177. For a detailed discussion of “thin autonomy,” the autonomy tradition that the Court developed through these opinions by vindicating the speech rights of corporations, see Part II.C.3 below.

178. *Bellotti*, 435 U.S. at 804-05 (White, J., dissenting); see also *id.* at 805 (“It is clear that the communications of profitmaking corporations are not ‘an integral part of the development of ideas, of mental exploration and of the affirmation of self.’ They do not represent a manifestation of individual freedom or choice.” (footnote omitted) (quoting THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966))).

179. *Id.* at 822 (Rehnquist, J., dissenting) (“[W]e concluded . . . that the liberty protected by [the Fourteenth] Amendment ‘is the liberty of natural, not artificial persons.’ . . . Before today, our only considered and explicit departures from that holding have been that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons . . .” (citation omitted) (quoting *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906))).

protection of expression: the right to receive information.<sup>180</sup> Here, the Court repeatedly cited *Red Lion*, among other “press cases,” to argue that these decisions “are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.”<sup>181</sup> Further, it cited *Virginia State Board* for the proposition that “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw,” emphasizing that commercial advertisements are constitutionally protected “because [they] further[] the societal interest in the ‘free flow of commercial information.’”<sup>182</sup>

As in *Virginia State Board*, the Court understood listeners as individuals whose interests are upheld through deregulation that increases the free flow of information. Here, they are individual voters as opposed to consumers, who need information to make informed choices in the market for candidates and issues. Bristling at the majority’s “listeners’ rights” justification in this context, Justice White explained in dissent that simply because one purpose of the First Amendment is “the right to hear or receive information, [important] to protect the interchange of ideas,” that “does not establish . . . that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression.”<sup>183</sup>

Further building on the groundwork laid in *Virginia State Board*, the Court assumed that listeners’ rights are effectively coextensive with corporate rights. It understood listener and corporate interests as vindicated by the same deregulatory move—here, removing restrictions on corporate expenditures regarding ballot initiatives. As a result, it perfectly aligned corporations’ right to speak with listeners’ right to hear or receive information, specifically information that could inform a voting decision.

But it is unclear whether the Court’s deregulatory move actually benefited listeners; indeed this is a key point over which the majority and dissent sharply disagreed. While the majority acknowledged that corporate political speech

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180. *Id.* at 776 (majority opinion) (“The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the regulation] abridges expression that the First Amendment was meant to protect. We hold that it does.”).

181. *Id.* at 781, 783. The Court also explicitly recognized the two traditions of free expression: individual self-expression and collective self-determination. *Id.* at 777 n.12.

182. *Id.* at 783 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)).

183. *Id.* at 806-07 (White, J., dissenting).

hypothetically could pose the risks of fostering corruption, undermining voter participation, and eroding voter confidence in the electoral process, it dismissed these otherwise legitimate concerns for lack of evidence.<sup>184</sup> In dissent, Justice White argued that to the contrary, there was evidence to support maintaining a limit on corporate expenditures to preserve the integrity of the electoral process so that individual voters, not corporations, are in control. Broadly, he explained that “the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate . . . the very heart of our democracy, the electoral process,” which presented a threat to voters.<sup>185</sup> Specifically, he cited evidence of corporate domination of the electoral process in Massachusetts, arguing that the Commonwealth’s “experience with unrestrained corporate expenditures in connection with ballot questions establishes” that corporations gained an unfair advantage.<sup>186</sup> For the dissent, this evidence showed that the Court’s deregulatory holding, which removed a limit on corporate political spending, would undermine the electoral process and thereby harm individual voters.

It is open to debate whether the majority’s or the dissent’s view of the evidence is correct and, thus, whether listeners benefited from or were harmed by the Court’s deregulatory holding. This Article does not purport to answer that empirical question. The key point for the purposes of this Article is that the nature of the 5-4 split illustrates that it is deeply contested whether listeners, as the Court understands them in this tradition, benefit at all from its deregulatory holding. This ambiguity reveals the distinct possibility that listeners are not the primary beneficiaries of the libertarian tradition. The insight is striking because the Court purports to vindicate listeners’ rights. But because corporate speech rights are clearly vindicated by the Court’s deregulatory move, while it is not at all clear whether listeners’ rights are similarly upheld, the Court arguably began to use listeners’ rights as an instrumental one-way deregulatory ratchet.

The Court continued to crystallize the libertarian tradition two years later in *Central Hudson Gas & Electric Corp. v. Public Service Utility Commission*, invalidating a state regulation that “completely ban[ned] promotional advertising by an electrical utility” on First Amendment speech grounds.<sup>187</sup> Again, the Court justified its invalidation of economic or structural regulations

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184. *Id.* at 787-90 (majority opinion); *id.* at 789 n.28 (specifically citing and rejecting the dissent’s analysis of Massachusetts’s experience with unlimited corporate expenditures in an election as evidence that corporate political speech poses a threat to the electoral process and therefore to voters, cutting against the Court’s deregulatory holding).

185. *Id.* at 809 (White, J., dissenting).

186. *Id.* at 810-11.

187. 447 U.S. 557, 558, 571 (1980).

by recourse to the First Amendment principle of listeners' rights, explicitly relying on *Virginia State Board*.<sup>188</sup> Here, the Court pushed this argument further than in prior cases, arguing that "[e]ven in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment."<sup>189</sup> Extending the listeners' rights logic from a competitive market to a monopoly context is notable because it broadens the application of the Court's logic to contexts where consumers' interests in making informed choices in the market exist in theory but are structurally limited in practice. The Court maintained that consumers still face important choices under monopoly conditions, so that information could be useful to decide "whether or not to use the monopoly service at all, or how much of the service he should purchase."<sup>190</sup>

The majority both reaffirmed its view of listeners as individual consumers with an interest in making informed choices in the market facilitated by the free flow of information and reinforced the free market logic undergirding the libertarian tradition. Moreover, Justice Blackmun argued that the regulations in question "strike[] at the heart of the First Amendment" because they are "a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice."<sup>191</sup>

In his dissent, Justice Rehnquist took direct aim at the free market logic undergirding the Court's deregulatory reasoning. While he acknowledged that "it is true that an important objective of the First Amendment is to foster the free flow of information," he questioned the efficacy of the free market in accomplishing that purpose<sup>192</sup>: "There is no reason for believing that the

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188. *Id.* at 561-62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."); *see also id.* at 584 (Rehnquist, J., dissenting) ("The Court's asserted justification for invalidating the . . . law is the public interest discerned by the Court to underlie the First Amendment in the free flow of commercial information."). The Court also cited *Bellotti* for the proposition that the "First Amendment's concern for commercial speech is based on the *informational function* of advertising." *Id.* at 563 (majority opinion) (emphasis added) (citing *Bellotti*, 435 U.S. at 783).

189. *Id.* at 567. Justice Rehnquist argued that the holding went beyond what was required under the Court's precedent. *Id.* at 584 (Rehnquist, J., dissenting).

190. *Id.* at 567 (majority opinion).

191. *Id.* at 574-75 (Blackmun, J., concurring in the judgment). In another case decided that year, *Consolidated Edison Co. of New York v. Public Service Commission*, the Court similarly invoked the importance of maintaining a free and open marketplace in order to accomplish the public purpose of the First Amendment when it invalidated as a violation of the Speech Clause a regulation that prevented a company from publishing certain information in its utility bill inserts. 447 U.S. 530, 533-35, 544 (1980).

192. *Cent. Hudson*, 447 U.S. at 592 (Rehnquist, J., dissenting).

marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market.”<sup>193</sup> In particular, he decoupled the unbridled free flow of information from the public interest, arguing that there are “a number of instances [where] government may constitutionally decide that societal interests justify the imposition of restrictions on the free flow of information.”<sup>194</sup> Viewing these two concepts—the unbridled free flow of information and the public interest—separately is significant because it underscores the fact that the public interest is not always vindicated by a deregulatory approach that conflates corporate and public interests. In other words, Justice Rehnquist rejected the libertarian tradition’s move of narrowly construing listeners as individuals and recuperated other ways of understanding who listeners are, what interests they have, and how those interests can best be served. But because the majority yet again conceptualized listeners’ interests as vindicated by deregulation—and did so in the context of monopoly—it further solidified its narrow conception of listeners and its alignment of listeners’ rights with corporate speech rights.<sup>195</sup>

Five years later in *Pacific Gas & Electric Co. v. Public Utilities Commission*,<sup>196</sup> the Court made explicit the idea that the libertarian tradition prioritizes corporate speech rights over listeners’ rights and took an important step toward decoupling corporate speech rights from listeners’ rights, which is how the tradition manifests today.<sup>197</sup> In this case, a privately owned utility company argued that the California Public Utilities Commission’s requirement that it include a third-party newsletter with which it disagreed in its billing envelopes violated its First Amendment rights.<sup>198</sup> The Court agreed<sup>199</sup> and struck down a regulation requiring that *more* information be provided to consumers; as a result, the marketplace would have *fewer* ideas flowing through it—directly undermining listeners’ rights as the Court had come to understand them.

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193. *Id.*

194. *Id.* at 593.

195. Justice Rehnquist suggested, though did not directly make, this point when he presciently critiqued the majority’s move of elevating commercial speech as a “return[] to the bygone era of *Lochner*.” *Id.* at 589; see also *id.* at 591 (“[B]y labeling economic regulation of business conduct as a restraint on ‘free speech,’ [the Court has] gone far to resurrect the discredited doctrine of cases such as *Lochner* . . .”).

196. 475 U.S. 1 (1986).

197. See *infra* Part III (discussing how the libertarian tradition has abandoned listeners’ rights entirely and directly embraces corporate speech rights).

198. *Pac. Gas & Elec.*, 475 U.S. at 4-7 (plurality opinion).

199. *Id.* at 7.

Unlike in the other cases composing the “commercial speech” moment, the Court did not ground its deregulatory move in vindicating listeners’ rights; instead, it directly vindicated the corporate speech right. So it might seem irrelevant that the holding undermines listeners’ rights. But the Court retained an important theoretical link to listeners’ rights. Specifically, the plurality invoked the First Amendment purpose of facilitating listeners’ rights to receive information as illuminating the meaning of the Speech Clause, describing a key purpose of the First Amendment as “protect[ing] the public’s interest in receiving information.”<sup>200</sup> Importantly, the Court explicitly cited opinions that constitute the libertarian tradition to articulate its understanding of listeners’ rights. For instance, it cited *Bellotti* for the proposition that “[t]he constitutional guarantee of free speech ‘serves significant societal interests’ wholly apart from the speaker’s interest in self-expression.”<sup>201</sup> Further, the Court relied on its discussion of listeners’ rights to justify its application of the First Amendment to the facts in this case.<sup>202</sup> By setting up listeners’ rights as the central purpose of the First Amendment and the justification for why the Speech Clause applied, the Court created a problematic contradiction: How can listeners’ rights be so essential when the Court’s holding directly undermines them?

The Court never addressed this contradiction. Rather, it focused the bulk of its analysis on how the Commission’s order infringed on the private utility’s direct corporate speech right. Comparing the order to the right-of-reply statute in *Miami Herald*, which applied to a newspaper, the Court found that the private utility’s speech right was infringed.<sup>203</sup> According to the plurality, these types of access requirements burden corporate speech by creating a chilling effect, where the speaker self-censors because it knows it may be in a position to disseminate views with which it disagrees, and by interfering with the speaker’s editorial control.<sup>204</sup> Though the Court acknowledged a potential downstream impact on listeners—if corporate speakers self-censor, that would “reduc[e] the free flow of information and ideas that the First Amendment seeks to promote”<sup>205</sup>—its analysis overwhelmingly focused on the harm to

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200. *See id.* at 8.

201. *Id.* (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)). The Court also cited both *Bellotti* and *Consolidated Edison* for the proposition that the unconstitutional prohibitions at issue in those cases “limited the range of information and ideas to which the public is exposed.” *Id.* (citing *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 533-35 (1980); and *Bellotti*, 435 U.S. at 776-76, 781-83).

202. *Id.* (“There is no doubt that under these principles appellants’ newsletter *Progress* receives the full protection of the First Amendment.”).

203. *Id.* at 9-17.

204. *Id.* at 10, 13-16.

205. *Id.* at 14.



corporate speech rights. Moreover, the Court failed to acknowledge the immediate harm to listeners' rights that its deregulatory holding would have: immediately reducing the amount of information available to consumers.

Thus, despite embracing a listener-based view of the First Amendment, the Court failed to reckon with the evident, immediate harm that its deregulatory holding would have on listeners. By contrast, corporate speech rights were clearly vindicated at the expense of listeners' rights as the Court had conceived of them: as benefitting from the free flow of more information through the marketplace of ideas. As a result, the rights of listeners were subordinated to corporate speech rights, providing a clear example of how listeners' rights can suffer at the expense of a deregulatory holding that vindicates corporate speech rights.

The relationship between listeners' rights and corporate speech rights in *Pacific Gas & Electric* can be read as an intermediate step between other cases in the libertarian tradition, which uphold corporate speech rights based on a listeners' rights justification, and cases in the contemporary libertarian tradition, which abandon the listeners' rights justification entirely. In *Pacific Gas & Electric*, the Court backed away from using listeners' rights as a legal rationale for upholding corporate speech rights but retained listeners' rights as the purpose of the First Amendment animating its thinking. As a result, this opinion both subordinates listeners' rights to corporate speech rights and prefigures the Court's ultimate trajectory of abandoning listeners' rights altogether.

Further, by sustaining the private utility's direct First Amendment claim, the Court embraced the speech right unmoored from the purposes of self-expression or self-realization, neither of which can logically attach when the right is applied to a nonnatural person. As many scholars have explained, corporations are for-profit entities that do not necessarily represent their shareholders' interests, and as a result corporate speech cannot be imputed to shareholders.<sup>206</sup> Indeed, the disconnect between corporate speech and shareholders' control—or lack thereof—of a corporation's speech in part has “inspired many corporate law scholars to call for better disclosures or other reforms that would protect shareholder interest[s] or better align the law with practice.”<sup>207</sup> Thus, because the Court embraced a speech right disconnected from self-expression or self-realization, “thin autonomy” is finally clearly visible in its doctrine.

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206. See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194-224 (1989); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1002-04, 1056, 1061 (1998).

207. Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 376 n.82 (2015) (citing several law review articles in which corporate law scholars address this concern).

In his dissent, Justice Rehnquist read the Court's two-part move of eschewing listeners' rights as the Court had come to define them and vindicating a corporate speech right on par with individual speech rights as a departure from its earlier corporate speech cases, like *Bellotti* and *Consolidated Edison*. There, he argued, the Court had extended speech rights to corporations not to vindicate their individual rights, as corporations were understood not to have an interest in self-expression comparable to that of individuals,<sup>208</sup> but rather "as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government."<sup>209</sup> Criticizing the plurality, he explained that the "[e]xtension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point."<sup>210</sup> From this perspective, the holding in *Pacific Gas & Electric* is anomalous.

But, following the logic that animates the libertarian tradition, *Pacific Gas & Electric* represents the culmination of the approach to the speech doctrine that the Court began crafting in *Virginia State Board*. Contrary to what Justice Rehnquist asserted, the corporate speech right did not emerge as "an instrumental means"<sup>211</sup> of advancing listeners' rights, even though that may have been the Court's aim in *Virginia State Board*. Rather, because it transformed listeners into individual consumers with an interest in making informed choices in the market facilitated by the free flow of information and therefore made it possible to align this narrower understanding of listeners' rights with corporate speech rights, the Court opened the door to instrumentalizing listeners' rights in the service of corporate rights. The fact that the Court sharply disagreed as to whether listeners benefited in *Bellotti* suggested that listeners' rights might very well have been subordinated to corporate speech rights. In *Pacific Gas & Electric*, the Court moved from a suggestion to a clear statement: listeners' rights are subordinated to corporate rights in the libertarian tradition. In this case the facts—where the Court struck down a regulation that would have put more information into the marketplace—aligned to reveal that reality.

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208. Justice Rehnquist made clear that he understood that an individual's interest in self-expression vindicated through the speech right aligns with the ascribed autonomy justification, a central feature of the liberal tradition. He explained that the Court has long recognized that "natural persons enjoy negative free speech rights because of their interest in self-expression; an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience." *Pac. Gas & Elec.*, 475 U.S. at 32 (Rehnquist, J., dissenting).

209. *Id.* at 33.

210. *Id.*

211. *Id.*

Additionally, in *Pacific Gas & Electric*, the Court finally caught up with itself and acknowledged that it had decoupled individual speech rights from the autonomy justification of the liberal tradition and instead had created “thin autonomy.”<sup>212</sup> Indeed, Justice Rehnquist was more right than he knew. When the individual right to speech is unmoored from self-expression and self-realization, such a move indeed “strains the rationale of those cases beyond the breaking point”;<sup>213</sup> ascribed autonomy as developed in the liberal tradition does in fact break when applied to corporations. What remains when the ideals of self-expression and self-realization are stripped away from the individual right is a bare negative right against the state. Thus, after nearly a decade of doctrinal development, the crystallization of the libertarian tradition and its “thin autonomy” justification was underway.

b. “Corporate political spending as speech” moment

Building on its development of the libertarian tradition through the cases composing the “commercial speech” moment, the Court made the same central moves in the “corporate political spending as speech” moment: subordinating listeners’ rights to corporate speech rights and articulating the new justification of “thin autonomy.” This development shows how the libertarian tradition helped justify and generate important legal outcomes because it accounts for one of the Court’s most controversial and sweeping recent opinions: *Citizens United*.

The nonprofit group Citizens United produced a film about then-Senator Hillary Clinton and sought to air it through video-on-demand during the thirty days prior to the 2008 primary elections. Because airing the video would have violated the Bipartisan Campaign Reform Act, the group sued the Federal Election Commission for declaratory and injunctive relief.<sup>214</sup> The Court ruled 5-4 in favor of Citizens United. First, it held that suppressing political speech on the basis of a speaker’s corporate identity violates the First Amendment,<sup>215</sup> overruling *Austin v. Michigan State Chamber of Commerce*.<sup>216</sup> Second, the Court held that prohibiting independent corporate expenditures for electioneering

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212. This concept is fully developed in Part II.C.3 below.

213. See *Pac. Gas & Elec.*, 475 U.S. at 33 (Rehnquist, J., dissenting).

214. *Citizens United v. FEC*, 558 U.S. 310, 319-22 (2010); see also Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of the U.S. Code).

215. *Citizens United*, 558 U.S. at 365.

216. 494 U.S. 652 (1990), overruled by *Citizens United*, 558 U.S. 310.

communications runs afoul of the First Amendment,<sup>217</sup> partly overruling *McConnell v. FEC*.<sup>218</sup>

Just as the Court did in the “commercial speech moment” cases, the *Citizens United* majority made the key analytical moves of the libertarian tradition. First, the Court invoked listeners’ rights to justify striking down campaign finance regulations. The regulations prohibited corporations from making independent expenditures advocating for or against a political candidate.<sup>219</sup>

Second, the Court justified its deregulatory move by arguing that striking down these regulations would increase the flow of information to listeners, who were again understood narrowly as individuals. In the “commercial speech moment” cases, the Court changed its understanding of listeners from the public, as defined in the republican tradition, to individual consumers. Here, the Court understood listeners as individual voters.<sup>220</sup> Whether as individual consumers or voters, defining listeners as individuals with an interest in making informed choices in the market makes it possible to understand their rights as vindicated through deregulation. Deregulation removes regulatory barriers that impede the free flow of information and thereby increases the flow of information—the *quantity* of information—which, the argument goes, individuals need to make informed choices in the market. Specifically, the Court “place[d] primary emphasis . . . on the listener’s interest in hearing what every possible speaker may have to say.”<sup>221</sup> “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public . . . . Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false.”<sup>222</sup> According to the Court’s argument, such judgments should be made in the marketplace of ideas, with which the precedent the majority struck down “interfere[d].”<sup>223</sup>

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217. *Citizens United*, 558 U.S. at 365-66.

218. 540 U.S. 93 (2003), *overruled in part by Citizens United*, 558 U.S. 310.

219. The provision at issue was 2 U.S.C. § 441b, and in particular § 441b(b)(2), which the Bipartisan Campaign Reform Act of 2002 had amended. *Citizens United*, 558 U.S. at 310, 321.

220. *Id.* at 341 (“[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”).

221. *Id.* at 469 (Stevens, J., concurring in part and dissenting in part). The dissent argues that “[t]he Court’s central argument is that laws such as § 203 have ‘deprived [the electorate] of information, knowledge and opinion vital to its function,’ and this, in turn, ‘interferes with the “open marketplace” of ideas protected by the First Amendment.’” *Id.* at 469 (alteration in original) (citation omitted) (quoting *id.* at 354 (majority opinion)).

222. *Id.* at 354-55 (majority opinion) (citation omitted).

223. *Id.* at 354.

Third, as a result, the Court evinced an understanding of listeners' rights as aligned with corporate rights, both of which are vindicated by deregulation that increases the free flow of information. But it is unclear, and indeed highly contested and deeply ambiguous, whether the majority's deregulatory move actually benefited listeners. This matters because, as discussed with respect to the "commercial speech moment" cases, to the extent listeners do not clearly benefit from the Court's deregulatory holdings while corporations do, the Court opens itself up to the charge that listeners' rights as it understands them are in fact subordinated to corporate speech rights—the opposite of what it is purporting to do.

Specifically, like *Bellotti*, *Citizens United* was a 5-4 opinion and the dissent sharply disagreed with the majority on the question whether listeners benefit from the Court's deregulatory holding, spelling out in detail various ways that listeners' rights could be undermined. The dissent explained: given that "the [majority's] appeal to 'First Amendment principles' depends almost entirely on the listeners' perspective . . . , it becomes necessary to consider how listeners will actually be affected."<sup>224</sup> Justice Stevens discussed at length the various ways in which "unregulated general treasury expenditures [could] give corporations 'unfair influence' in the electoral process . . . and distort public debate in ways that undermine rather than advance the interests of listeners."<sup>225</sup> For example, "[i]f the overriding concern depends on the interests of the audience, surely the public's perception of the value of corporate speech should be given important weight."<sup>226</sup> The dissent also remarked that "[i]n the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process."<sup>227</sup>

Even if evidence eventually supports the majority's position, the fact that the Court struck down these campaign finance statutes in the absence of clear empirical evidence that listeners would in fact benefit—and did so despite having to take the unusual step of overturning two of its precedents—illustrates how firmly engrained the libertarian tradition is in the Court's thinking. Listeners' rights, understood narrowly as individuals' right to receive unlimited information in a free market, are aligned with corporate interests. So, given the dubious empirical support for the majority's assumption that

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224. *Id.* at 473 (Stevens, J., concurring in part and dissenting in part) (citation omitted).

225. *Id.* at 469 (second alteration in original) (citation omitted) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 558 U.S. 310).

226. *Id.*

227. *Id.* at 472.

listeners would benefit from the result in this case and the availability of evidence to the contrary, the Court created the possibility that it unintentionally used listeners' rights instrumentally, as a means to a deregulatory end that benefited corporations but not necessarily listeners.

But it is equally if not more likely that evidence will cut against the majority's position. In that case, either the dissent is correct that the Court's deregulatory decision did not help listeners or, at minimum, the benefit to listeners is mixed. Under these circumstances, there is no question that the listeners' rights justification for the majority's deregulatory holding was instrumental. Either way, the libertarian tradition once again is vulnerable to the charge that listeners' rights are subordinated to corporate speech rights—that they are a means to the end of vindicating corporate speech rights through deregulation.

Beyond the question whether the majority or dissent was correct as to whether striking down campaign finance regulations benefits listeners, and indeed regardless of the answer, the Court's conceptualization of listeners as individual voters is important for another reason. By understanding listeners as individuals, the Court departed from the republican tradition—just as in the “commercial speech moment” cases.<sup>228</sup> As a consequence, the notion of autonomy that undergirds listeners' rights in the republican tradition, the autonomy of the public to engage in collective self-governance and self-determination, does not apply to the Court's understanding of listeners as individuals. This matters because the Court repeatedly invoked listeners' rights to justify applying individual speech rights to corporations. Rather, in line with the “commercial speech moment” cases, the Court embraced the type of autonomy that supports applying individual speech rights to corporations: “thin autonomy.” While this move is obscured in the majority's opinion, the dissent's strong and detailed critique of the majority's “eli[sion]” of “[t]he fact that corporations are different from human beings” in applying speech rights to corporations helps illuminate how “thin autonomy” was at play.<sup>229</sup>

According to Justice Stevens's reasoning, speech rights are properly understood as applying to humans and justified with reference to ascribed autonomy, which animates the negative tradition. Because individual self-expression and self-realization are core justifications for the freedom of speech, he reasoned that “[c]orporate speech . . . is derivative speech, speech by proxy.”<sup>230</sup> His adherence to the traditional view of individual autonomy explains why he contended that the “restrictions on . . . electioneering [we]re

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228. *Id.*; see *supra* Part II.B.2.a.

229. *Citizens United*, 558 U.S. at 465 (Stevens, J., concurring in part and dissenting in part).

230. *Id.* at 466.

less likely to encroach upon First Amendment freedoms.”<sup>231</sup> He measured the majority’s holding with reference to this view of autonomy, finding that it comes up short: “Take away the ability to use general treasury funds for some of those ads, and no one’s autonomy, dignity, or political equality has been impinged upon in the least.”<sup>232</sup> In essence, he invoked the liberal tradition’s central justification of ascribed autonomy and argued that this justification cannot hold when speech rights are applied to corporations, which cannot claim that autonomy interest.

While Justice Stevens is correct that ascribed autonomy as understood in the liberal tradition cannot undergird corporate speech rights, there is a different notion of autonomy that can justify the application of individual speech rights to corporations: “thin autonomy.” Though the majority said little about the new ideal of autonomy that it embraced and simultaneously produced to justify its holding, the elision Justice Stevens observed whereby the majority failed to address the difference between corporations and human beings is telling. By glossing over the move that transferred the fundamental right of free speech from citizens to corporations, the Court tacitly repudiated the values of self-expression and self-realization, which logically cannot apply to corporations and other nonhuman entities.<sup>233</sup> It is no response to argue, following Justice Scalia’s reasoning, that corporate speech is merely the “speech of many individual Americans, who have associated in a common cause, giving the leadership of the [corporation] the right to speak on their behalf.”<sup>234</sup> Such a formulation denies the priority of the individual because corporations, as for-profit entities, do not necessarily represent their shareholders’ interests and

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231. *Id.* Justice Stevens quoted from *Whitney* and *Cohen*, both of which are emblematic of the liberal tradition. See *supra* Part I.A. Quoting Justice Brandeis’s *Whitney* concurrence, he wrote that “[f]reedom of speech helps ‘make men free to develop their faculties.’” *Citizens United*, 558 U.S. at 466 (Stevens, J., concurring in part and dissenting in part) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). Then, quoting *Cohen*, he noted that the freedom of speech “respects [individuals]’ ‘dignity and choice.’” *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

232. *Citizens United*, 558 U.S. at 467 (Stevens, J., concurring in part and dissenting in part).

233. See, e.g., *supra* notes 206-07 and accompanying text. For a discussion of alternative circumstances in which a noncorporate group can claim a connection to the interests of its members, see notes 287-89 and accompanying text below.

234. *Citizens United*, 558 U.S. at 392 (Scalia, J., concurring). Importantly, there is merit to Justice Scalia’s intuition that people may associate and the entity representing their mutual interests may serve as a proxy that speaks on their behalf. The link between the proxy and the speech interests of its members is maintained when the group is noncorporate, such as a political party or an interest group. For a full discussion of this point, see note 289 and accompanying text below.

thus corporate speech cannot be imputed to shareholders.<sup>235</sup> As a result, this understanding of speech is not in line with the liberal tradition.

With no theoretically coherent way to claim the autonomy justifications undergirding either the liberal or republican traditions, the Court effectively embraced a new one: “thin autonomy.” “Thin autonomy” is a stripped-down version of ascribed autonomy, characteristic of the liberal tradition, in which autonomy is unmoored from the Enlightenment ideals of self-expression and self-realization and is instead focused narrowly on a negative freedom from the state.<sup>236</sup> Once autonomy is understood in this way, not only does the argument that the campaign finance regulations at issue in *Citizens United* violated corporate autonomy seem coherent, but the libertarian tradition’s radical break with the other two traditions is also made visible.

### C. Theoretical Contours of the Libertarian Tradition

As the preceding case analysis shows, once the Court began to take up corporations’ arguments advancing their speech rights, it did not rely on the logic of the two well-established traditions to align its new approach with First Amendment principles. Rather, through these opinions, the Court developed a new tradition in speech doctrine, which this Article identifies as a distinct theoretical approach to First Amendment doctrine: the libertarian tradition.

This insight is a central contribution of this Article and departs from the scholarly consensus about these opinions. The consensus view—that the Court created a new framework to support the corporate political and commercial speech doctrines, instrumentally using corporate speech rights to uphold listeners’ rights through deregulation<sup>237</sup>—reflects the Court’s description of

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235. See *supra* note 206 and accompanying text.

236. See *infra* Part II.C.3.

237. See, e.g., TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* 11, 60 (2012) (“[W]hat is distinctive about the First Amendment protection extended to commercial speech in the creation of the commercial speech doctrine is that it was created in order to protect the *listener’s*—that is to say consumer’s—interests. Protecting commercial speech in order to protect the commercial speaker’s right to speak would turn the doctrine on its head.”); Post & Shanor, *supra* note 4, at 170 (describing the “constitutional value of commercial speech” as residing “in the rights of *listeners* to receive information so that they might make intelligent and informed decisions,” which is a departure from typical First Amendment doctrine that “focuses on the rights of *speakers*”); Sullivan, *supra* note 144, at 145, 174 (describing these cases as undergirded by “a negative theory that focuses on the interests of listeners, in a system of freedom of speech, to assess speech and speakers without paternalistic government intervention,” where the “First Amendment is a negative check on government tyranny” and “ideas are best left to a freely competitive ideological market”); see also Shanor, *supra* note 4, at 142-45 (explaining the pro-consumer historical and social context in which the listener-focused approach to the commercial speech doctrine developed).



what it was doing. Following the “triadic” model of freedom—which involves “the freedom of (i) some person(s), (ii) from some restraint(s), (iii) to do, be, or achieve something”<sup>238</sup>—the Court asserted the freedom of (i) corporations (ii) from the state (as manifested in regulations) (iii) to vindicate listeners’ rights or ability to access information (presumably required for listeners’ autonomy).<sup>239</sup> The consensus view leaves the door open to reading these cases in line with, or at least related to, the republican tradition on which the Court explicitly drew.<sup>240</sup>

But there are cracks in the consensus reading of these cases. Some scholars explicitly reject reading these cases as in line with the republican tradition, understanding at least some of the cases as clearly distinct from that tradition.

For example, Kathleen Sullivan, focusing on *Citizens United*, described the majority opinion—which she “trace[d] back to the listener-focused reasoning in the commercial speech cases”—as part of a “libertarian strand” in speech doctrine.<sup>241</sup> She distinguished that strand from the dissent’s “equality” approach, similar to what this Article describes as the republican tradition.<sup>242</sup> She also distinguished the “libertarian strand” from a “theory of free speech as liberty,” which “hold[s] that the First Amendment protects ‘self-expression’ or ‘self-realization,’ values that inhere only in natural persons,” similar to what this Article calls the “liberal tradition.”<sup>243</sup> Though it is unclear whether she intended to draw out the “libertarian strand” as distinct from the liberal tradition—the distinction was made in passing,<sup>244</sup> and at other points she appeared to align the “libertarian strand” with the liberal tradition<sup>245</sup>—what

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238. Fallon, *supra* note 53, at 886 n.68; *see also supra* note 59.

239. The ostensible goal of the approach the Court crafted may have been similar to that of the republican tradition—to create conditions to ensure achieved autonomy, albeit in the private sector as opposed to the public sector—whereby individual consumers (not the public) have all the information they need to make choices in the market (not regarding government).

240. This point is related to the interpretation of *Virginia State Board* that the Court seemed to advance, discussed in Part II.B.2.a above.

241. Sullivan, *supra* note 144, at 174-76.

242. *Id.* at 145-55.

243. *Id.* at 153, 158 (footnotes omitted) (quoting *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part)).

244. *See id.* at 158.

245. For instance, Sullivan’s description of the liberty and equality approaches—which she identifies in the *Citizens United* majority and dissent, respectively—at times reads like a description of the two traditions. For example, she argues that the majority and dissent in *Citizens United* are each “committed to free speech, but to two very different visions of free speech.” *Id.* at 144. According to her, the majority embraced a vision of “free speech as serving the interest of political liberty,” such that the “First Amendment is a negative check on government tyranny” and “ideas are best left to a freely competitive ideological market.” *Id.* at 145. The dissent, on the other hand, defended a different

*footnote continued on next page*

matters is that her departure from the scholarly consensus ends here. While the distinctions she draws are correct, she reaffirms the scholarly consensus by accepting the Court's description of its *Citizens United* opinion as focused on "the interests of listeners"<sup>246</sup> and, in line with Justice Scalia's reasoning,<sup>247</sup> defends rooting individual speech rights in corporate speech rights.<sup>248</sup>

Another scholar who broke from the consensus view was Steven Heyman.<sup>249</sup> While *Citizens United* was the only case he discussed relevant to this Article, in his treatment of that case he went further than Sullivan, not only rejecting the link with the republican tradition but moreover rejecting the consensus description that the opinion vindicated listeners' rights. He argued that while "[a]t first glance, the majority opinion . . . appears to be based squarely on th[e] view" of free speech advanced by Meiklejohn, or what this Article describes as the republican tradition, it in fact departs from it, a position that this Article also takes.<sup>250</sup> Instead, he argued that the majority opinion was rooted in what he termed "the conservative-libertarian approach" to constitutional doctrine.<sup>251</sup> Though he named this approach "libertarian," his description of it essentially mirrored what this Article identifies as the liberal tradition—characterized by a Millian conception of individual liberty, where the state is a "necessary evil," and by a "narrow and one-sided view of the self," especially as compared to the republican tradition.<sup>252</sup> And his description was problematically linked to certain Justices' "conservative" politics—problematic because this tenuously purports to know the Justices' intent and motivations.<sup>253</sup> Still, Heyman's instinct that something theoretically different is happening in those cases where "judges have used the First Amendment to erect a barrier against regulation" was spot on.<sup>254</sup>

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vision—one of "free speech rights [that] serve an overarching interest in political equality." *Id.* at 144. This vision "embraces first an antidiscrimination principle" and second "a kind of affirmative action for marginal speech in the form of access to government subsidies without speech-restrictive strings attached." *Id.* at 144-45.

246. *See id.* at 174.

247. *See supra* note 234 and accompanying text.

248. Sullivan, *supra* note 144, at 156 ("If this interpretation requires an ultimate foundation in the rights of individuals, corporations enable individuals to 'speak in association with other individual persons,' banding together in a 'common cause.'" (quoting *Citizens United*, 558 U.S. at 392 (Scalia, J., concurring))).

249. Steven J. Heyman, The Conservative-Libertarian Turn in First Amendment Jurisprudence, C. Edwin Baker Lecture for Liberty, Equality, and Democracy (Apr. 4, 2014), in 117 W. VA. L. REV. 231 (2014).

250. *Id.* at 261-66.

251. *Id.* at 262.

252. *Id.* at 237-38, 240-43, 299; *see supra* Part I.A-B.

253. Heyman, *supra* note 249, at 236-37.

254. *Id.* at 236.

Like Sullivan and Heyman, this Article rejects the view that *Citizens United* and the long line of commercial and corporate political speech cases that preceded it can be read as part of the republican tradition. And like Heyman, this Article is motivated by a similar instinct that something theoretically different is afoot. But this Article departs from both of their critiques, and from the scholarly consensus view, by assessing how the Court's new speech tradition actually played out. As this Subpart explains, the approach the Court developed failed. It ended up doing the opposite of what it purported to: subordinating listeners' rights to corporate speech rights. In other words, while the Court ostensibly had as its goal the achievement of listeners' rights and sought to reach that goal by ruling in favor of deregulation and thus recognizing a benefit for corporations, it did not achieve this goal in reality. Even though listeners' rights were logically of first priority, they were effectively of secondary priority to corporate rights.<sup>255</sup> By critically investigating the doctrine, this Subpart describes how the Court accomplished this inversion and for the first time identifies, describes, and critiques the new speech theory it ended up creating instead: the libertarian tradition.<sup>256</sup>

First, the Court radically transformed listeners' rights as compared to how they were developed in the republican tradition, reconceptualizing listeners narrowly as individuals whose interest in the "free flow of information" is served by increasing the quantity of information.

Second, in the cases discussed, the Court used listeners' interests in the free flow of information as a one-way deregulatory ratchet, justifying less regulation but never more. It purported to vindicate listeners' rights through deregulatory rulings, the same mechanism that benefits corporate speech rights. But listeners' rights are not always upheld by deregulation and thus are not perfectly in line with corporate speech rights. Indeed, the result of these moves in the Court's opinions was to consistently vindicate corporate speech rights even when listeners' rights were not clearly served—or were even undercut. Thus, the outcome of the Court's new tradition is the reverse of what

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255. Thanks to Kiel Brennan-Marquez for his insightful feedback that helped clarify this argument.

256. This Article's use of the term "libertarian" is distinct from Sullivan's and Heyman's uses of the term to the extent they conflate libertarianism with liberalism. But where Sullivan appears to distinguish libertarianism from liberalism, this Article is largely in agreement with her use of the term.

Though this Article understands libertarianism, as a theoretical matter, to represent a more extreme version of liberalism, it understands libertarianism as a distinct philosophy. See *infra* note 269 (discussing the similarities and differences between liberal and libertarian theory in how the state is conceptualized). And despite these theoretical commonalities, libertarianism as a speech tradition should be understood as an entirely separate and distinct tradition from either the liberal or republican traditions.

it purported to do: listeners' rights are effectively subordinated to corporate speech rights.

Third, as a consequence of subordinating listeners' rights to corporate speech rights, the Court developed a radically different understanding of autonomy than that offered by either of the two traditions, departing most importantly from autonomy as understood in the liberal tradition. This new understanding can be described as "thin autonomy." Thus, the resulting libertarian tradition effectively asserts the freedom of (i) corporations (ii) from the state (iii) to vindicate their speech rights.

By identifying and describing the new theoretical approach in First Amendment jurisprudence, this Subpart develops one of this Article's key contributions: showing how the outward movement of the First Amendment's boundaries (here, to the corporate speech doctrine) feeds back into the doctrine itself and risks undermining its foundations. Descriptively, the libertarian tradition draws on, yet is radically distinct from, the liberal and republican traditions, as outlined in Table 2 below. Normatively, it risks undermining key elements of the free speech doctrine's traditional justifications. So to the extent those approaches have value—which this Article presumes they do—the libertarian tradition is problematic.

**Table 2**  
Libertarian Tradition Compared to the Two Traditions

Characteristics	Libertarian Tradition	Two Traditions	
		Liberal	Republican
Purpose of the First Amendment and free expression	Advance listeners' individual interests in principle; protect and advance corporate rights in practice (liberty)	Protect and advance individual rights (liberty)	Collective self-determination, social values, and public good (equality)
Role of the speaker	Instrumental in principle; dominant in practice (corporate speaker's rights are central while listeners' rights are instrumental)	Dominant: speaker's individual rights are central and an end in and of themselves	Instrumental: speaker's individual rights help to accomplish free expression's social purpose, often described by proxy of listeners' rights
Mechanisms for ensuring conditions for a robust speech environment	Free flow of information	Free market	State/government, civil society
Political ideology	Libertarianism	Liberalism	Republicanism
Nature of autonomy	"Thin": autonomy unmoored from Enlightenment ideals; narrow negative freedom from the state	Ascribed (a priori): robust individual autonomy focused on Enlightenment ideals of self-expression and self-actualization	Achieved (socially constructed): autonomy of the public to engage in collective self-governance
Social sphere that is privileged	Private, corporate	Private, self/individual	Public

1. Breaking with the republican tradition: transforming listeners' rights

In lieu of justifying corporate speech rights in reference to ascribed autonomy—the justification that characterizes the liberal tradition but which is no longer coherent when a nonhuman entity possesses the speech right—the Court's justification under the libertarian tradition shifts to satisfying listeners' rights. As discussed in the case analysis in Part II.B above, the Court draws explicitly on the republican tradition,<sup>257</sup> which first developed the goal of satisfying listeners' rights.<sup>258</sup> Despite the appearance that the Court's emerging commercial and corporate political speech doctrines might be a species of the republican tradition, a possibility that scholars advancing the consensus view leave open,<sup>259</sup> this discussion shows how the Court dramatically broke from that tradition by reconceptualizing who listeners are and how their interests can be served. This move is a precondition to identifying the new speech theory that the Court ended up creating.

a. From listeners-as-public to listeners-as-individuals

Though the Court used the language of the republican tradition vindicating the rights of listeners, it developed a new understanding of who listeners are. Instead of standing in as a proxy for the public and the public interest, rooted in free expression's collective and social purpose, the Court defined listeners as individuals, whether as individual consumers or individual voters. Either way, the listener-as-individual has an interest in making informed choices in the marketplace, whether that decision is what to purchase or whom to vote for. This is a much narrower definition of listeners than that of the republican tradition, which understands them primarily as the public, consistent with the idea that the purpose of free expression is to ensure collective self-determination and self-government.<sup>260</sup>

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257. See *supra* notes 161-65 and accompanying text (discussing how the Court in *Virginia State Board*, where the libertarian tradition originated, invoked *Red Lion*, an exemplar of the republican tradition, and Meiklejohn's understanding of the First Amendment's purpose).

258. See *supra* Part I.B.

259. See *supra* note 237.

260. The distinction between the libertarian tradition's understanding of listeners as individuals and the republican tradition's understanding of listeners as a proxy for the public tracks debates in democratic theory about how citizens are conceptualized. For example, Iris Marion Young argues that in the "aggregative" model of democracy, "democracy [i]s a process of aggregating the preferences of citizens," who are understood as discrete individuals. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 18-19 (2000). To function well, this model requires "the expression of and competition among preferences." *Id.* at 19. Thus, the aggregative model's conceptualization of citizens mirrors the libertarian tradition's understanding of listeners as individuals who pursue

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b. From the quality to quantity of information

Because listeners as individuals have an interest in making informed choices in the marketplace, it becomes possible to understand their rights as served by the “free flow of information.”<sup>261</sup> Increasing the “free flow” is central to vindicating listeners’ rights so understood, and deregulation—removing restrictions on information flow—is a key mechanism for accomplishing that goal through the courts.

The “free flow of information” metaphor does significant implicit work for the Court, standing in as a shorthand for a libertarian theory of communication.<sup>262</sup> The metaphor of “free flow” evinces an indifference to the

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their own interests, whether as consumers or voters, in an open and competitive market. Indeed, Young describes liberal democracies as largely embracing this view of voters, such that the political process “treats citizens as atomized.” *Id.* at 22. Moreover, her critique of the aggregative model as “lack[ing] any distinct idea of a *public* formed from the interaction of democratic citizens and their motivation to reach some decision,” *id.* at 20, is precisely what is conceptually lost when the Court transforms the republican tradition’s conception of listeners-as-public to the libertarian tradition’s conception of listeners-as-individuals.

By contrast, the “deliberative” model of democracy conceptualizes citizens as together constituting a larger public, a group that has preferences transcending each individual’s preferences—just like the public in the republican tradition. *Id.* at 21-26. This transcendence occurs because the deliberative model involves open discussion of problems among citizens who together make decisions “by determining which proposals the collective agrees are supported by the best reasons.” *Id.* at 23. Integral to the “process of democratic discussion” is a “*transform[ation of]* the preferences, interests, beliefs, and judgements of participants.” *Id.* at 26. In other words, individual preferences change through the process of group discussion and debate, drawn from but transcending each individual’s perspective, whereby the outcome represents the view that the public has achieved collectively.

261. Several opinions discussed in Part II.B above use this metaphor in the context of arguing that listeners’ rights are vindicated through deregulation and the unfettered operation of the free market, which allows for the free flow of information. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 577-78 (1980) (Blackmun, J., concurring in the judgment); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783, 801-02 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 755-56, 763-65, 770, 781 (1976).

262. In addition to how the term is used in the Court’s opinions, as has been discussed in this Article, the broader social and cultural contexts for the “free flow of information” help illuminate the metaphor’s meaning. This Article draws on both the Court’s use of the term, as well as the following cultural and social contexts, for its interpretation of the metaphor.

In policy discourse, the term “free flow of information” can be traced to American foreign policy in the 1940s and stands in opposition to communication rights in the New World Information and Communication Order debates during the 1970s and 1980s. *See* Victor W. Pickard, *Communication Rights in a Global Context*, in 1 *BATTLEGROUND: THE MEDIA* 91, 92-93 (Robin Andersen & Jonathan Gray eds., 2008). For instance, the 1980 MacBride Commission report, published by UNESCO, critiqued the inequalities that attended how the “free flow of information” was both conceptual-

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actors who set the flow in motion, their intent, and the consequences of the flow, such as where information flows, who has access to information, and who does not. “Flow” does not invite questions of agency, equity, or fairness but instead shuts them down by suggesting that answering them is neither important nor possible. Thus, essential questions about what types of information are not included in the “flow” and where information does not “flow”—questions about structural and social inequality—are foreclosed.

Despite explicitly linking its reasoning to the republican tradition, the Court’s “free flow of information” metaphor and the libertarian theory of communication it embodies contradict that tradition’s approach to vindicating listeners’ rights. The republican tradition upholds listeners’ rights through

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ized and implemented. See Int’l Comm’n for the Study of Commc’n Problems, UNESCO, *Many Voices One World: Towards a New More Just and More Efficient World Information and Communication Order*, at III-13 to -20 (1980). For that and other reasons, Western powers like the United States pulled out of UNESCO shortly thereafter. See Pickard, *supra*, at 93-94.

The simultaneous development in information theory of the one-way transmission model of communication—which involves the idea of information and how it is transmitted or flows—also sheds light on the meaning of the “free flow of information” metaphor. In 1948, Claude Shannon developed his seminal one-way transmission model of communication. C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECHNICAL J. 379, 379-82 (1948); see THE PROCESS AND EFFECTS OF MASS COMMUNICATION 13-14, 23 n.9 (Wilbur Schramm & Donald F. Roberts eds., rev. ed. 1971). Key to Shannon’s theory is that information is evacuated of meaning. Warren Weaver, *The Mathematics of Communication*, SCI. AM., July 1949, at 11, 14. He viewed the communication process as information transmission, the “fundamental problem” of which is “reproducing at one point either exactly or approximately a message selected at another point.” Shannon, *supra*, at 379. This idea of the communicative process and the information that composes it—where it is divorced from human agency and understood in terms of transmission of “fundamental elements” or “bits”—allows for the idea that information could *flow* (analogous to transmission) and that it *ought* to flow *freely*, thereby improving the functioning of the system by reducing the ratio of signal to noise. See *id.* at 380 (describing the “unit for measuring information” as “binary digits, or more briefly *bits*”); Weaver, *supra*, at 13-14 (discussing the problem of “noise” interfering with the transmission of information); see also H. PETER ALESSO & CRAIG F. SMITH, CONNECTIONS: PATTERNS OF DISCOVERY 80-82 (2008) (explaining that Shannon’s research included work on reducing noise in communications signals and that he “reduc[ed] information to . . . binary code” and introduced the term “bit”); Bernard Dionysius Geoghegan, *The Historiographic Conceptualization of Information: A Critical Survey*, IEEE ANNALS HIST. COMPUTING, Jan.-Mar. 2008, at 66, 66 (“Shannon was the person who saw that the binary digit was the fundamental element in all of communication.” (quoting George Johnson, *Claude Shannon, Mathematician, Dies at 84*, N.Y. TIMES (Feb. 27, 2001), <https://nyti.ms/2oAatTl>)). This development in information theory comports with James Carey’s description of the “transmission” or “transportation” model of communication, which he argues has gained in salience since the advent of modern communication technologies like the telegraph and which he critiques in comparison to a “ritual view of communication” that understands communication in a cultural context. JAMES W. CAREY, COMMUNICATION AS CULTURE 12-16 (Routledge rev. ed. 2009) (1989).



structures provided by the state or developed through civil society, an approach that is often hospitable to regulation, though it also allows for deregulation. Given that the republican tradition understands listeners to have an interest in collective self-determination and self-government, its focus rests not on the *quantity* of information but on its *quality*, rooted in and growing through the structures and procedures of communication—perhaps so much so that, as Robert Post worries, voices will be left out.<sup>263</sup> This core idea of the republican tradition is most succinctly and notably captured by the Meiklejohnian adage that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said.”<sup>264</sup> Importantly, this understanding of communication stands in stark contrast to the deregulatory “free flow” approach, which prioritizes information quantity and discounts, if not altogether ignores, structures of communication.

## 2. Subordinating listeners’ rights to corporate speech rights

Breaking with the republican tradition’s understanding of listeners and their interests, the Court embraced a different approach to satisfying their rights. Specifically, the Court used a deregulatory approach to vindicate listeners’ rights—the same mechanism that upholds corporate speech rights. By removing regulations infringing on corporate speech rights, the Court could satisfy listeners’ interests in having an increased information flow. Because it understood both listeners’ rights and corporate speech rights as benefitting from deregulation, the Court developed a speech tradition that effectively conceptualized listeners’ rights and corporate speech rights as aligned.

But listeners’ rights as understood in the libertarian tradition—where listeners are individual consumers or voters who have an interest in making informed decisions in the market—are not always served by deregulation.<sup>265</sup> Thus, they are not perfectly aligned with corporate speech rights, which are vindicated by deregulation. Rather, as the case analysis in Part II.B above revealed, the Court’s attempts to vindicate listeners’ rights by ruling in favor of deregulation are deeply flawed.

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263. See *infra* note 274 and accompanying text.

264. See MEIKLEJOHN, *supra* note 40, at 26. Meiklejohn’s well-known adage is a core concept of the republican tradition not only as a philosophical approach but also as it manifests in doctrine. For example, the Court in *Red Lion*, perhaps the opinion most in line with this tradition, channeled Meiklejohn’s view when it asserted that “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

265. When listeners are understood in terms of the republican tradition, as a proxy for the public, their interests are not necessarily vindicated by deregulation. Listeners and their interests are understood to often benefit from intervention by the state or civil society, while at other times they benefit from deregulation. See *supra* Part I.B.

Recall that the Court was repeatedly and deeply divided over whether its deregulatory holdings that undeniably benefited corporate speech rights also vindicated listeners' rights, where listeners are understood as individual voters.<sup>266</sup> Sharp and substantive disagreements over time matter. In both *Bellotti* and *Citizens United*, the Court split 5-4 over the question whether listeners would actually benefit from the Court's deregulatory holdings. This is an empirical question, and the fact that the majority and minority disagree about it introduces ambiguity regarding whether listeners do indeed benefit. At a bare minimum, the nature of these 5-4 splits opens the Court to the charge that its decisions do not clearly vindicate listeners' rights; worse yet, they might not benefit listeners' rights at all or may in fact harm them. But even the criticism that the Court's decisions do not clearly benefit listeners matters because the point of these holdings is to vindicate listeners' rights. What is clear, however, is that corporate speech rights are consistently and unambiguously upheld.

Moreover, in *Pacific Gas & Electric*, the Court undermined listeners' rights, which it invoked as a central First Amendment purpose, by prioritizing a deregulatory move that resulted in *less* information being provided to consumers. Recall that by the logic the Court had developed through the opinions discussed in this Article and on which it relied in *Pacific Gas & Electric*, listeners benefit when there is *more* information in the market and when it can flow freely. But while the *Pacific Gas & Electric* Court invoked a listener-centric view of the First Amendment, it focused on satisfying corporate speech rights, creating a tension that it did not address and that cannot be resolved. Here, the corporate interest in deregulation and the listener's interest in more information diverged—and the corporate interest won.<sup>267</sup>

By conceptualizing corporate and listeners' interests as aligned because both benefit from deregulation, the Court has developed a tradition in which corporate interests are always vindicated while listeners' interests are not. While it may be true that in some instances corporate and listeners' interests overlap and both are vindicated by deregulation, as might have been the case in *Virginia State Board*,<sup>268</sup> that fact is not fatal to this Article's insight. Rather, the insight is that while the Court developed a First Amendment tradition that purported to vindicate listeners' rights and incidentally benefited corporate speech rights, its opinions show that in fact corporate rights have *always* benefited from its deregulatory approach while listeners' rights have only *sometimes* been satisfied.

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266. See *supra* Part II.B.2.a-b.

267. See *supra* Part II.B.2.a.

268. See *supra* Part II.B.2.a.

Thus, contrary to the Court's emphasis on vindicating listeners' rights by instrumentalizing corporate speech rights, the result is the reverse of the Court's stated intention: vindicating corporate speech rights by instrumentalizing listeners' rights. In other words, the libertarian tradition subordinates listeners' rights to corporate rights; corporate speech rights are the only rights that are consistently and clearly vindicated across the Court's cases in this tradition. Listeners' rights in the free flow of information operate as a one-way ratchet, justifying less regulation but never more.

3. Breaking with the liberal tradition: the libertarian tradition's new "thin autonomy" approach

Because listeners' rights are merely instrumental, the effect of the libertarian tradition is not to consistently vindicate their rights, either as individuals or as a collective public. Listeners' claims to autonomy do not animate this new tradition. Rather, the libertarian tradition primarily works to vindicate corporate speech rights, which are undergirded by a radical new notion of autonomy: "thin autonomy." As this Article now describes, "thin autonomy" undermines the traditional notions of autonomy animating the other speech traditions, stripping away the hallmarks of individual autonomy as figured in the liberal tradition and leaving only a naked right against the state.<sup>269</sup> Thus it is the key element of the libertarian tradition that risks harming the foundations of First Amendment doctrine.

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269. Because "thin autonomy" is defined narrowly against the state, there is even less room for the state to play a role in fostering autonomy than in the liberal tradition. Though the state is not strong in the liberal tradition, there is more room for it with respect to the affirmative notion of robust ascribed autonomy. See *supra* notes 51-56 and accompanying text. These differences between the libertarian and liberal speech traditions in how the state is understood roughly track Robert Nozick's classic libertarian argument for the "minimal state" as the only manifestation of the state that is "justified" as compared to a liberal Rawlsian view that allows for a relatively more active state. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA*, at ix, 113-18 (1974); cf. JOHN RAWLS, *A THEORY OF JUSTICE* (1971). The similarity between Nozick's conception of the "minimal state" and how the state is understood in the libertarian speech tradition accounts in part for the decision in this Article to name this new speech tradition "libertarian."

It is important not to overstate the connection between this Article's discussion of the libertarian tradition and Nozick's understanding of libertarianism, especially with respect to his conceptualization of individual rights and autonomy. See NOZICK, *supra*, at ix, 214. Developing a comparison of Nozick's conception of the individual with the libertarian tradition identified here is beyond the scope of this Article, in no small part because it is unclear precisely what Nozick's conception of the individual is. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 94, 100 (2d ed. 1998) (explaining that Nozick does "not spell out in any detail the conception of the self [he] rel[ies] on" and that his "theory of the person is not easy to discern").

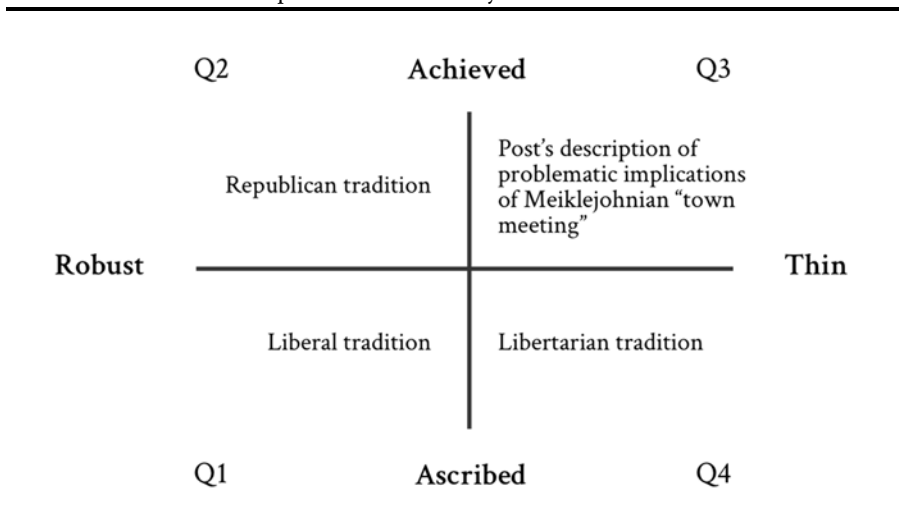
a. Autonomy in comparison

To understand what “thin autonomy” is and why it represents a significant departure from the liberal and republican traditions, it is helpful to compare it to the theoretical ideas of autonomy that animate those two traditions. In theory, neither of the dominant views of autonomy—*ascribed* (a priori) or *achieved* (socially constructed)<sup>270</sup>—is necessarily robust or thin. The liberal and republican traditions embrace the robust form of the version of autonomy undergirding them, meaning that the ideal of autonomy is fully realized and conceptually rich. Under these conditions, a robust version of autonomy supports each tradition’s ability to realize the goals of free expression as defined in that tradition.

But a thin or watered-down version of autonomy in each tradition is possible. The thin versions of both achieved and ascribed autonomy are impoverished forms of their robust counterparts. Neither the ideal of autonomy nor the goals of free expression as understood in the robust version of either tradition are attained. Figure 1 below maps out these relationships—between achieved and ascribed on one axis and between robust and thin on the other—and situates each tradition in one of four quadrants.

**Figure 1**

Comparison of Autonomy Across Traditions



For example, ascribed autonomy can be robust (Quadrant 1), which is how autonomy is conceptualized in the liberal tradition. Under this approach,

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270. See *supra* Part I.A-B.

citizens are understood as a priori autonomous in terms of their innate capacity to express and actualize themselves. According to the liberal tradition's adherents, an a priori condition in which citizens are always already autonomous and capable of cultivating their innate capacities of self-expression and self-realization is necessary for democracy,<sup>271</sup> and it follows that freedom of expression must be an individual right. This view of autonomy goes hand in hand with the liberal tradition's understanding of free expression's purpose as protecting and advancing individual rights. This type of autonomy is what probably comes to mind when you imagine the autonomy harm you would experience if you were deprived of your right to, for example, write a sensational political blog or exhibit explicit artwork.

Similarly, achieved autonomy can be robust (Quadrant 2), which is how autonomy is understood in the republican tradition. Achieved autonomy, or the autonomy of the public to engage in collective self-governance, is robust if the state provides sufficient structures so that the public can meaningfully engage in the project of collective self-governance.<sup>272</sup> This understanding of autonomy is in line with the purpose of the First Amendment in the republican tradition, ensuring collective self-determination. This is the type of autonomy that would be violated if, for instance, you were deprived of use of a town square or denied access to the Internet in violation of the principle of network neutrality.<sup>273</sup>

Despite each tradition's goal of cultivating its vision of autonomy in a robust manner, neither achieved nor ascribed autonomy is necessarily robust. In other words, it is possible that instead of being fully realized, an impoverished version of autonomy takes root. Consider a hypothetical thin version of achieved autonomy (Quadrant 3). Achieved autonomy could be thin if, as Robert Post worries, the Meiklejohnian rules of a structured "town meeting" discourse are narrow and stifling, such that some people and ideas are shut out, diminishing the opportunities for both individuals and the public to become autonomous and genuinely self-governing.<sup>274</sup> In this hypothetical, achieved

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271. See, e.g., Post, *supra* note 46, at 671 ("Constitutional solicitude for public discourse . . . presupposes that those participating in [it] are free and autonomous."). See generally *supra* Part I.A.

272. See Post, *supra* note 46, at 655, 663-64 (discussing scholarship by Sunstein and Fiss in line with the achieved autonomy position).

273. See *infra* Part III.A.2 (discussing network neutrality).

274. Post, *supra* note 46, at 657-59, 661-62 ("Managerial structures necessarily presuppose objectives that are unproblematic and hence that can be used instrumentally to regulate domains of social life. The enterprise of public discourse, by contrast, rests on the value of autonomy, which requires that all possible objectives . . . be rendered problematic and open to inquiry. No particular objective can justify the coercive censorship of public discourse without simultaneously contradicting the enterprise of self-determination.").

autonomy is understood as socially constructed—the one feature it shares with robust achieved autonomy. But here, achieved autonomy is thin because inadequate structures for public discourse undermine the ability of the public to engage in collective self-governance. As a result, thin achieved autonomy fails to support the purpose of the First Amendment in the republican tradition.<sup>275</sup> Indeed, the litany of potential perversions and abuses of a thin version of achieved autonomy have preoccupied scholars, especially capturing their imaginations during WWII and the Cold War.<sup>276</sup>

Now consider thin ascribed autonomy (Quadrant 4). Like the vision of thin achieved autonomy that Post develops in his critique of Meiklejohn, thin ascribed autonomy is a perversion of its theoretical robust counterpart, robust ascribed autonomy. But unlike Post's vision, which operates in theory, thin ascribed autonomy has been taken up in practice. This is the type of autonomy that results from applying individual speech rights to corporations and other nonnatural legal persons, which the Court did in developing its corporate speech jurisprudence.

Thin ascribed autonomy shares with robust ascribed autonomy the idea that autonomy exists in a natural, a priori condition. But it departs from its robust counterpart. Instead of being understood in relation to natural persons who have an innate capacity for self-expression and self-realization, it is understood as a feature of corporations and other nonnatural legal persons, which do not.<sup>277</sup> Thus the Court's move in the corporate speech cases—taking the individual speech right, which is applied to natural persons in the liberal tradition, and applying it to corporations to vindicate corporate speech rights<sup>278</sup>—strips self-expression and self-realization from the speech right's purpose. The right is articulated as a mere negative freedom from the state. Thus the Court's move undercuts the possibility of realizing the purpose of free expression as understood by the liberal tradition. Thin ascribed autonomy,

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275. See *supra* Part I.B.

276. Notably, state abuse of free speech—which would produce thin achieved autonomy—concerned scholars during much of the twentieth century, along with the larger social and political issues of authoritarianism, totalitarianism, and communism.

277. See *supra* notes 206-07 and accompanying text.

278. As this Article has explained, though the Court sought to vindicate listeners' rights in those cases, listeners' rights were instrumentalized in the service of corporate speech rights—which are therefore the focus of this analysis. In other words, because corporate speech rights were primary while listeners' rights were subordinate, the autonomy justification that animates the *corporate* speech interest is what matters. By contrast, the autonomy justification that undergirds listeners' rights—robust achieved autonomy—is not in play here. See *supra* Part II.C.2 (explaining how listeners' rights were instrumentalized in the service of corporate speech rights in the commercial and corporate political speech cases); see also *supra* notes 176-79, 206-13, 228-36 and accompanying text (identifying and describing the emergence of “thin autonomy” in the Court's opinions).

which this Article refers to as “thin autonomy,”<sup>279</sup> is the result.<sup>280</sup> And because the corporate right often comes at the expense of the autonomy interests of natural persons by virtue of instrumentalizing listeners’ rights, thin achieved autonomy amounts to what Yochai Benkler calls a “moral inversion of the First Amendment.”<sup>281</sup>

In other words, “thin autonomy” is an unsatisfying justification for the libertarian tradition because of the internal impact that it has within First Amendment theory, undermining traditional notions of autonomy. Further, as

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279. This Article uses the term “thin autonomy” to refer only to thin *ascribed* autonomy, which—unlike thin *achieved* autonomy—is the only type of thin autonomy that has developed in the Court’s doctrine. Thin achieved autonomy is a hypothetical. This is not surprising; the Court has taken up the republican tradition less often than the liberal one. *See supra* note 85.

280. Many scholars assume that ascribed autonomy manifests only in a robust way and that it is therefore a category error to vindicate a corporation’s autonomy. In other words, in the absence of the “thin autonomy” framework, it seems as if there is no theoretical infrastructure within which to vindicate corporate autonomy. For example, Baker argues that “the crucial aspect of protected speech is its origin or source in a self. Because the speech noncoercively expresses the choices, values, commitments, or identity of the self, protection of speech respects that self’s liberty or autonomy.” BAKER, *supra* note 206, at 198. Thus, he contends that commercial speech fails to meet this standard and therefore does not deserve the same constitutional protection: “This view of speech as an expression of the self seems ill suited for describing the profit-motivated speech of the marketplace of commodities, which intuitively does not seem to deserve the same status as the speech of the marketplace of the mind.” *Id.*

Piety and Benkler make similar arguments. *See* PIETY, *supra* note 237, at 58, 161 (arguing that the conception of the First Amendment as advancing individual self-expression and self-realization “is not a good fit applied to corporations” because “[c]orporations are not moral subjects or ends in themselves” and they do not possess a “human need for self-expression”); Benkler, *supra* note 4, at 201, 204 (arguing that corporations only have instrumental autonomy rights advanced on behalf of citizens and cannot be treated “as the bearers of moral claims to autonomy” because the First Amendment is designed in part to secure “our individual autonomy”).

These scholars’ understanding of autonomy is correct within the liberal tradition; robust ascribed autonomy cannot justify a corporate autonomy interest. *See supra* notes 206-07 and accompanying text. But, as this Article shows, ascribed autonomy does not have a singular theoretical meaning. Rather, “thin autonomy” strips away the “dignitary interest” or “respect for rational beings or will” that is integral to the type of autonomy they describe and provides a theoretical framework for a corporate autonomy interest. Benkler, *supra* note 4, at 204. While their arguments provide a normative approach to argue against “thin autonomy,” it is incorrect to categorically assume that autonomy only takes the form they describe—thereby overlooking the theoretical possibility and practical emergence of “thin autonomy.”

281. Benkler, *supra* note 4, at 204 (describing the “trend” in speech law whereby corporations are protected “even at the expense of very real and immediate constraints on the expressive autonomy and democratic speech of individuals” as “a moral inversion of the First Amendment”).

Part III below illustrates, “thin autonomy” is also problematic because of its consequences.

b. How to identify “thin autonomy”

Because this Article identifies “thin autonomy” for the first time, it is helpful to think through how to identify it outside the libertarian tradition. Recall that “thin autonomy” is a perversion of the type of autonomy that undergirds the liberal tradition; it is unmoored from the Enlightenment ideals that animate robust ascribed autonomy because it is divorced from natural persons, as shown in Table 2 above.<sup>282</sup> “Thin autonomy” is associated with corporations claiming an individual speech right.<sup>283</sup> However, that is not the only circumstance under which “thin autonomy” can exist, nor must it necessarily exist when corporations claim individual speech rights. Consider a few examples.

First, consider the case of corporations claiming the speech right, or some third party seeking to vindicate a corporate speech right. “Thin autonomy” does not necessarily exist under these circumstances, though these are the conditions under which it is most likely to exist. As discussed earlier in this Article, there is a fair argument to be made that in *Virginia State Board*, where consumers challenged a statute that limited pharmacists’ ability to offer information about drug prices, removing restrictions on commercial speech did in fact benefit consumers and thereby vindicated their rights as listeners.<sup>284</sup> Consumers received information that they wanted and needed to make important choices. This is the argument the majority made in *Virginia State Board* and, while the way the Court developed this tradition failed to vindicate listeners’ rights,<sup>285</sup> the argument is a reasonable one in theory. Especially taken on a case-by-case basis, it could be empirically evaluated. (For example, did consumers actually benefit from striking down the statute? If not, then there is a strong case that their rights were being instrumentally leveraged on behalf of corporate rights.) Following this logic, *Virginia State Board* is a species of the republican tradition, where the mechanism for ensuring conditions for a robust speech environment is the market as opposed to the government, and the nature of autonomy is broadened (or diluted, depending on your

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282. See *supra* Part II.C.

283. For a discussion of why corporate speech is disconnected from the purposes of self-expression and self-realization that constitute robust ascribed autonomy in the liberal tradition, see notes 206-07 and accompanying text above. For a discussion of alternative circumstances in which a noncorporate group can claim a connection to the interests of its members, see notes 287-89 and accompanying text below.

284. See *supra* Part II.B.2.a.

285. See *supra* Part II.B.2.a.



perspective) to include not only the value of collective self-governance but also the value of collective consumption.

It is important to underscore that even if you are persuaded that *Virginia State Board* is a species of the republican tradition, this conclusion has no bearing on this Article's broader argument about the libertarian tradition. *Virginia State Board* is simply the first in a long line of cases that, in the aggregate, articulate a new approach to First Amendment theory maintaining that a deregulatory approach upholds both listeners' rights and corporate speech rights. That corporate and consumer interests might align in one case—and a rare one at that<sup>286</sup>—in no way requires that they always do.

Second, consider the case of a noncorporate group, like a political party or interest group, seeking to vindicate its speech rights.<sup>287</sup> There, "thin autonomy" is not necessarily implicated just because a *group* claims the speech right; what matters is how the group relates to its members. Imagine that a political organization challenges a law it argues violates the group members' speech rights and those members have chosen to self-express as a group. The group then selects a spokesperson as its proxy in the litigation, charging her with conveying the group's sentiments. If she successfully vindicates her speech rights—intended as a proxy for vindicating the group's rights—"thin autonomy" would not be implicated. Rather, this hypothetical is a species of the liberal tradition, whereby the group's rights are the goal of free expression and vindicating them is animated by robust ascribed autonomy that is shared by the group, as shown in Table 2 above. It is possible for the group to stand in as an individual for the purposes of the liberal tradition, or to have an interest in vindicating its free expression rights and to have an authentic relationship with ascribed autonomy, because political parties and other interest groups, unlike corporations,<sup>288</sup> are constituted by the will of their members.<sup>289</sup>

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286. Some scholars have argued that corporate deregulation and the public interest often do not align in practice, especially where expressive interests are concerned. Among the most prominent legal scholars to voice this position was C. Edwin Baker, who critiqued media deregulation as largely failing to vindicate listeners' rights: "In no case would a presumption against regulation have served the public interest. Cases where media-specific structural regulation occurs but audiences would have benefited from no regulation are rare." BAKER, *supra* note 129, at 102; see Greenwood, *supra* note 206, at 1068 (making a similar point to Baker's argument in a broader legal context); see also PIETY, *supra* note 237, at 121-40 (critiquing how commercial speech largely fails to "contribute[] to any real autonomy for the listener").

287. I am grateful to Anna Moltchanova, who encouraged me to think through group rights and developed a version of this hypothetical.

288. See *supra* note 206 and accompanying text.

289. It is under these circumstances that Justice Scalia's description of "speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf" is applicable. *Citizens United v. FEC*, 558 U.S. 310, 392 (2010) (Scalia, J., concurring); see *supra* note 234.

Third, consider the hypothetical where an individual seeks to vindicate a corporate speech right, similar to the consumer in *Virginia State Board*.<sup>290</sup> “Thin autonomy” would not necessarily be absent just because the claimant is an individual. In this hypothetical, the individual could strategically undermine his own speech right, using it instrumentally to vindicate a corporate right. Though an unlikely scenario, not only because standing requirements would be difficult to satisfy,<sup>291</sup> it is theoretically possible.

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By tracing the development of the Supreme Court cases that for the first time vindicated commercial and corporate political speech rights and the theoretical contours of a new speech tradition that took shape, this Part has demonstrated how the Court created the libertarian tradition. In developing this tradition, the Court came to rely on it and cultivate it over time such that it both justified and produced the outward movement of the First Amendment’s boundaries, from *Virginia State Board* to *Citizens United*. This insight helps explain the doctrine’s outward movement over the past several decades and sets the stage to discuss the libertarian tradition’s current productive work. As these cases show, this tradition is not static, and today its theoretical contours are continually negotiated and refined through litigation and court opinions. Part III explores these dynamics as they are developing in ongoing litigation.

### **III. The Pure Libertarian Tradition: Abandoning Listeners’ Rights and Embracing Corporate Rights**

Tracing the development of the libertarian tradition not only reveals a mechanism that has justified and produced First Amendment doctrine’s territorial expansion over the past several decades but also illuminates the directions in which the doctrine is continuing its outward creep. As discussed in Part II, this new tradition puts increasing “outward pressure”<sup>292</sup> on the

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290. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 753 (1976).

291. Finding standing for the consumer and consumer groups in *Virginia State Board* was an issue because they were bringing a claim about a statute that pertained to pharmacists, not consumers. *See supra* note 169 and accompanying text. In this hypothetical, by contrast, the relationship between the consumer-plaintiff and his claim is more attenuated because the hypothetical assumes that he is undermining his speech right, so his claim might be vulnerable as a species of third-party standing.

292. This Article uses Schauer’s phrase “outward pressure,” as it captures the nondeterministic nature of the effect the libertarian tradition has on the doctrine’s boundaries. *See supra* note 30.

doctrine, especially as it has developed through case law and gained the status of settled precedent. While not deterministic, the libertarian tradition, like other aspects of precedent, is self-fulfilling and self-reinforcing; it pushes the doctrine to conform to its logic and gains in salience and power with each argument and opinion that conforms to it.

But the libertarian tradition is not static, and it makes available new arguments that push the tradition's boundaries in consistent—if extreme—directions. Just as the Court's transformation of listeners' rights made possible the subordination of listeners' rights to corporate speech rights,<sup>293</sup> it has also made possible their complete abandonment. While this move might appear to be a departure from the Court's earliest cases in the libertarian tradition, which seek to vindicate listeners' rights, it is perfectly in line with how the tradition has developed. Abandoning listeners' rights is the logical progression of a theory that subordinates those rights to corporate speech rights, which have become the primary goal. In other words, if listeners' rights are no longer the primary justification driving the doctrine, why would litigants jump through the hoop of justifying their speech claims in those terms?

It seems that corporate litigants have asked themselves a version of that question. Today, litigants and judges have abandoned the justification of listeners' rights and instead are directly embracing corporate speech rights, giving rise to a purer version of the theory. This move, which increasingly characterizes the types of First Amendment arguments corporations are making, can be understood as the logical culmination of the libertarian tradition and the purest manifestation of it and its "thin autonomy" principle.

The increased salience and power of the libertarian tradition, combined with its more aggressive iteration focused directly on vindicating corporate speech rights, facilitates the outward movement of the First Amendment in diverse areas of law. And it allows for increasingly dissonant applications of the speech right. Through a brief review of three contemporary legal battles, this Part shows the theory in action, demonstrating how it continues to justify and produce the outward creep of First Amendment doctrine. In each of the three examples discussed, corporations have invoked the First Amendment as a defense against regulations—including statutes that prohibit the use of records about physicians' prescribing practices for marketing purposes,<sup>294</sup> federal regulations prohibiting ISPs from discriminating against traffic from disfavored sources,<sup>295</sup> and statutes outlawing misleading statements by companies to investors<sup>296</sup>—and in each case, the litigants abandoned the

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293. See *supra* Part II.C.1-2.

294. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

295. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016).

296. See *supra* note 34.

justification of listeners' rights for removing restrictions on corporate speech. Rather, they directly embraced the corporate speech right, claiming it as an expressive value warranting protection in and of itself. As a result, litigants advancing this argument and the judges who agree with them necessarily embrace the right's "thin autonomy" justification. The speech right they support is unmoored from the purposes of self-expression and self-realization, which cannot logically attach to the right when applied to a nonnatural person.<sup>297</sup> Thus, as in *Pacific Gas & Electric*, "thin autonomy" comes to the forefront.<sup>298</sup>

These descriptive changes in theory have normative consequences. This iteration of the libertarian tradition helps facilitate or make available novel arguments about what actions and conduct constitute speech, with companies arguing that data transmission and potentially fraudulent claims should be granted First Amendment protection. Unencumbered by a listeners' rights justification, the pure libertarian tradition can move outward aggressively, applying to more legal claims and in a fashion that is even less tied to longstanding speech principles. Thus, these examples suggest the potential limitlessness of the First Amendment doctrine's outward creep afforded by the libertarian tradition, further threatening to undermine the existing foundations of the First Amendment itself.

#### A. Three Examples of the Pure Libertarian Tradition in Action

This Subpart discusses three cases in which corporations invoked the First Amendment to strike down regulations and, in line with the new iteration of the libertarian tradition, did not appear to argue that vindicating listeners' rights was their ultimate goal. Not only do these examples provide evidence of the new iteration of the libertarian tradition that has abandoned listeners' rights, but they also demonstrate the broad productive work this speech tradition is doing to justify and generate legal arguments and outcomes in line with its logic.<sup>299</sup>

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297. See *supra* notes 206-07 and accompanying text.

298. See *supra* Part II.B.2.a.

299. Other recent cases also make the point. Consider one high-profile example: Apple's claim that the Justice Department's efforts to compel it to access data from the San Bernardino shooter's iPhone amounts to compelled speech is, as Ciara Torres-Spelliscy describes it, part of the company's claim of a "particularly grand set of corporate constitutional rights, which if accepted by the courts, could have further undermined the government's ability to regulate the economic market." Ciara Torres-Spelliscy, *A Locked iPhone: Unlocked Corporate Constitutional Rights*, 164 U. PA. L. REV. ONLINE 287, 289 (2016). While in that instance, Apple's argument aligned with personal privacy interests—in other words, corporate speech rights and listeners' interests converged—usually they are "not so neatly aligned." *Cf. id.* at 290.

*footnote continued on next page*

1. The Supreme Court in *Sorrell v. IMS Health Inc.* overturns as a speech violation a ban on the use of prescriber-identifying data

The Supreme Court's approach in *Sorrell v. IMS Health Inc.*<sup>300</sup> represents a direct shift from its prior reasoning in the context of the commercial speech doctrine. As discussed in Part II above, the Court sought in principle to vindicate listeners' rights, which justified striking down economic and structural regulations of corporations, even though that approach failed in practice.<sup>301</sup> In *Sorrell*, brand-name drug manufacturers and data miners challenged a Vermont statute, which prohibited corporate drug representatives from using doctors' prescription records for marketing purposes, as violating the manufacturers' and data miners' First Amendment speech rights.<sup>302</sup> They contended that the use of prescriber-identifying data, which the statute restricted, "is constitutionally protected speech."<sup>303</sup> The Supreme Court agreed, striking down the statute on First Amendment grounds and finding that there is a "strong argument that prescriber-identifying information is speech."<sup>304</sup>

Though Justice Kennedy, writing for the majority, gave a nod to listeners' interests,<sup>305</sup> the bulk of the analysis centered on the government's infringement of speakers' rights: "[T]he State cannot engage in content-based discrimination to advance its own side of a debate."<sup>306</sup> As Tamara Piety has explained, the Court in effect "elevate[d] the speaker's rights over the listener's and pervert[ed] the rationale of protection for commercial speech by invoking content neutrality."<sup>307</sup> Piety argued that *Sorrell* in effect "do[es] away with the [commercial speech] doctrine altogether" along with its "limited protection [of] commercial speech," which was "justified . . . on the basis of the *listeners'*, not the

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This case also implicated the expanding boundaries of what constitutes "speech"; Apple argued that its code is speech. There is a variety of literature with opposing views of this claim. Compare Neil Richards, *Apple's "Code = Speech" Mistake*, MIT TECH. REV. (Mar. 1, 2016), <https://www.technologyreview.com/s/600916/apples-code-speech-mistake>, with Brief of Amici Curiae Electronic Frontier Foundation & 46 Technologists, Researchers, & Cryptographers at 12-13, *In re Search of an Apple iPhone*, No. 16-cm-00010-SP (C.D. Cal. Mar. 3, 2016), 2016 WL 859886.

300. 564 U.S. 552 (2011).

301. See *supra* Part II.B.2.a.

302. Brief of Respondents IMS Health Inc. et al. at 11-20, *Sorrell*, 564 U.S. 552 (No. 10-779), 2011 WL 1149043.

303. *Id.* at 13.

304. *Sorrell*, 564 U.S. at 557, 570.

305. See *id.* at 577; see also Piety, *supra* note 169, at 49.

306. *Sorrell*, 564 U.S. at 580.

307. Piety, *supra* note 169, at 16.

sellers', interests."<sup>308</sup> But when situated within the theoretical framework of the libertarian tradition, this Article understands the Court's shedding its focus on listeners' rights and explicitly embracing corporate speech rights as the logic of the libertarian tradition working itself out.

## 2. ISPs oppose net neutrality as infringing their speech rights

In a different legal context, ISPs advanced a similar argument to undermine network neutrality regulations, the FCC's public interest rules that ensure ISPs cannot block or discriminate against information moving through their networks.<sup>309</sup> In challenges to the FCC's Open Internet rules handed down in 2015 and 2010,<sup>310</sup> ISPs like Alamo Broadband and Verizon argued that their transmission of data is speech<sup>311</sup>—that they are speaking when loading the data packets that an end user requests when searching for websites. As a result, they contended, the regulations' prohibition on blocking and discriminating amounted to an unconstitutional violation of their speech rights, as they may be compelled "to transmit speech with which they might disagree."<sup>312</sup>

To make their First Amendment argument, ISPs relied both on a longstanding line of cases recognizing a First Amendment interest in the "editorial discretion" of media corporations, like newspapers and cable operators,<sup>313</sup> as well as on precedent in the libertarian tradition.<sup>314</sup> Leveraging

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308. *Id.* at 16-17.

309. See generally Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf).

310. While the D.C. Circuit invalidated the 2010 rules, it did not reach the First Amendment question. *Verizon v. FCC*, 740 F.3d 623, 628, 655-56 (D.C. Cir. 2014).

311. See Joint Brief for Petitioners Alamo Broadband Inc. & Daniel Berninger at 4-5, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063); Joint Brief for Verizon & MetroPCS at 43, *Verizon*, 740 F.3d 623 (No. 11-1355), 2012 WL 9937411.

312. *U.S. Telecom*, 825 F.3d at 740.

313. Joint Brief for Petitioners Alamo Broadband Inc. & Daniel Berninger, *supra* note 311, at 4-5, 7 (citing *Miami Herald* for the proposition that newspapers exercise editorial discretion and have a First Amendment interest in that activity and arguing that ISPs perform a similar role); Joint Brief for Verizon & MetroPCS, *supra* note 311, at 42-43 (citing *Turner I* for the proposition that cable operators exercise editorial discretion and have a First Amendment interest in that activity and arguing that ISPs perform a similar role).

314. Joint Brief for Petitioners Alamo Broadband Inc. & Daniel Berninger, *supra* note 311, at 7 (citing *Pacific Gas & Electric* along with *Miami Herald* to support the argument that network neutrality "rules deprive broadband providers of their editorial discretion by compelling them to transmit *all* lawful content, including Nazi hate speech, Islamic State videos, pornography, and political speech with which they disagree"). Additionally, Alamo repeatedly cited *Citizens United*, another case in the libertarian tradition, in arguing that strict scrutiny should apply to the rules (and in applying strict scrutiny). *Id.* at 7-9.

both lines of cases demonstrates a key part of the pure libertarian tradition's productive power: reinforcing and fortifying other lines of First Amendment precedent to more aggressively and persuasively advance direct corporate speech rights.

Here, ISPs marshaled resources from both lines of cases to make the novel argument that they are First Amendment speakers who speak when transmitting data. Arguing by analogy, they relied on cases like *Miami Herald* and *Turner I* to cast themselves as media companies that perform editorial functions similar to those of newspapers and cable companies.<sup>315</sup> This argument is relatively weak because ISPs arguably are more similar to conduits like telephone companies, at least with respect to the transmission of data—indeed, the D.C. Circuit shot down the ISPs' argument in part on these grounds.<sup>316</sup> But ISPs were able to bolster their claim by also relying on *Pacific Gas & Electric*.<sup>317</sup> By pointing to a case in which the Court had recognized a First Amendment speech interest for a private utility company to support their claim that network neutrality “rules deprive broadband providers of their editorial discretion by compelling them to transmit *all* lawful content,”<sup>318</sup> the ISPs closed the gap of analogic reasoning: If a private utility company has a constitutionally sanctioned speech interest, why not an ISP, too? Though the D.C. Circuit was not persuaded by the ISPs' overall First Amendment argument,<sup>319</sup> this case illustrates how the pure libertarian tradition functions to support existing direct corporate speech arguments—here, with respect to media companies—to improve the quality of a novel direct corporate speech claim.

Not only did the pure libertarian tradition function to make the data-transmission-as-speech argument more *credible*, but also it arguably helped make the argument more *salient* such that courts take it seriously. It matters

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315. See *supra* note 313.

316. See *U.S. Telecom*, 825 F.3d at 743 (“In contrast to newspapers and cable companies, the exercise of editorial discretion is entirely absent with respect to broadband providers subject to the Order. . . . In that regard, the role of broadband providers is analogous to that of telephone companies: they act as neutral, indiscriminate platforms for transmission of speech of any and all users.”).

317. See *supra* note 314.

318. Joint Brief for Petitioners Alamo Broadband Inc. & Daniel Berninger, *supra* note 311, at 7.

319. See *U.S. Telecom*, 825 F.3d at 740-44; see also Morgan Weiland, *D.C. Circuit's Net Neutrality Ruling Rejects Corporate First Amendment Expansionism*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y (June 14, 2016, 8:31 PM), <https://cyberlaw.stanford.edu/blog/2016/06/dc-circuit%E2%80%99s-net-neutrality-ruling-rejects-corporate-first-amendment-expansionism>.

that the D.C. Circuit engaged at length with the ISPs' constitutional claim.<sup>320</sup> This points to the continuing productive power of the libertarian tradition to help generate legal arguments—indeed, novel ones that push the edges of how we conceive of what constitutes “speech”—and, potentially, opinions in line with its logic. And the Court could have another libertarian tradition case on its plate: the ISPs are seeking en banc review and could appeal to the Supreme Court.<sup>321</sup>

Beyond the legal arguments that the ISPs made to the D.C. Circuit, the broader understanding of corporate speech rights that animates anti-network neutrality arguments is emblematic of the new iteration of the libertarian tradition. Listeners' rights are not central—if they factor in at all—to the ISPs' argument to strike down network neutrality regulations. Rather, ISPs focus on their own speech rights and the government's violation of them. Laurence Tribe and Thomas Goldstein, who argued in 2009 on behalf of Time Warner Cable in attacking network neutrality on First Amendment grounds, put it clearly when they articulated a speech right that directly applies to corporations as if they are individuals:

[N]et neutrality proposals rest on the mistaken premise that the Constitution gives the government a role in ensuring that the voices of various speakers receive equivalent attention and that audiences receive equal access to all speakers. In fact, a central purpose of the First Amendment is to prevent the government from making . . . choices about private speech . . . . Inconsistent with that purpose is any notion that government might properly limit private decisions, such as those by [ISPs] regarding the control of their networks, in order to widen the access of some to the avenues of speech or to swell the aggregate amount of speech beyond whatever would result from the decisions of private speakers enjoying “absolute freedom from First Amendment constraints.”<sup>322</sup>

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320. For an overview of scholarship supporting the proposition that serious treatment of a legal argument that loses, as opposed to ignoring or deeming it frivolous, suggests a future in which that argument could win, see Schauer, *supra* note 1, at 1629-30. For example, Schauer argues that the Supreme Court's

refusal to say *anything* about free speech in its opinion in the verbal workplace sexual harassment case of *Harris v. Forklift Systems, Inc.*, [ 510 U.S. 17 (1993),] despite the First Amendment arguments made in some of the briefs and some portion of the oral argument, is a more definitive statement of rejection of such claims than explicit discussion of them in the opinion would have been.

*Id.*

321. See David McCabe, *Industry Asks for Full Court to Review Net Neutrality Challenge*, HILL (July 29, 2016, 5:33 PM EDT), <http://thehill.com/policy/technology/289834-industry-asks-for-full-court-to-review-net-neutrality-challenge>.

322. Laurence H. Tribe & Thomas C. Goldstein, Proposed “Net Neutrality” Mandates Could Be Counterproductive and Violate the First Amendment 2-4 (2009) (quoting *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion)), <https://ecfsapi.fcc.gov/file/7020375998.pdf>. While these comments pertain to an earlier version of the rules, the constitutional claim is virtually identical to what ISPs have recently argued.



Notably, they disavowed the interests of “audiences”—in other words, listeners or consumers—as a relevant mechanism for making policy decisions.

### 3. ExxonMobil uses speech as a weapon in fraud investigations

The new iteration of the libertarian tradition is evident in another ongoing matter: state attorneys general are investigating whether ExxonMobil deliberately misled investors and consumers about the risks of climate change, thereby committing fraud.<sup>323</sup> In opposing subpoenas in these investigations, ExxonMobil has claimed that “[t]he chilling effect of this inquiry, which discriminates based on viewpoint to target one side of an ongoing policy debate, strikes at protected speech at the core of the First Amendment” and that the the subpoenas “improperly target[] political speech and amount[] to an impermissible content-based restriction.”<sup>324</sup>

Unlike the litigants in *Sorrell* and *United States Telecom*, ExxonMobil is not opposing a pro-consumer regulation aimed at its business sector but rather opposing antifraud statutes writ large. And it is doing so by using the First Amendment as a weapon, seeking to constitutionalize potentially fraudulent speech. As Robert Post has explained, “ExxonMobil and its supporters are now eliding the essential difference between fraud and public debate.”<sup>325</sup> Perhaps it goes without saying, but the company is abandoning listeners’ interests in advancing its constitutional claim; the entire point of prosecuting fraud is to protect investors and consumers who, because of information asymmetries, could be duped by misleading claims.

#### B. Normative Implications

The new iteration of the libertarian tradition—in which the corporate speech right has triumphed over listeners’ rights in principle and in practice—will remain salient whether it wins or loses in court. Either way, litigants are

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323. Schwartz, *supra* note 34.

324. Plaintiff’s Original Petition for Declaratory Relief ¶¶ 60, 66, Exxon Mobil Corp. v. Walker, No. 017-284890-16 (Tex. Dist. Ct. Apr. 13, 2016), 2016 WL 1622506. The company made the same claim against the Attorney General of Massachusetts. See ExxonMobil’s Complaint for Declaratory & Injunctive Relief at 25, 28-29, Exxon Mobil Corp. v. Healey, No. 4:16-cv-00469-A (N.D. Tex. June 15, 2016). Prominent conservative voices have joined the First Amendment chorus. Among them is the editorial board of the *National Review*, which wrote that “a group of Democratic attorneys general . . . is attempting to criminalize . . . political activism.” Editorial, *Senate Democrats Seek to Criminalize First Amendment-Protected Speech*, NAT’L REV. (July 12, 2016, 7:06 PM) <http://www.nationalreview.com/article/437765/sheldon-whitehouse-senate-democrats-criminalize-first-amendment-protected-climate>.

325. Robert Post, Opinion, *Exxon-Mobil Is Abusing the First Amendment*, WASH. POST (June 24, 2016), <http://wapo.st/296TW2U>.

gaining traction. And by making salient their claim of direct corporate speech rights, as a descriptive point, they expand the scope of what is legally available in terms of precedent and legal imagination. Put differently, the new iteration of the libertarian tradition continues to expand the boundaries of First Amendment jurisprudence into diverse and arguably problematic areas of law, especially when we understand “jurisprudence” to include not only holdings but also dissents, dicta, and litigants’ briefs, all of which compose the field of available legal possibilities.

As a result, the new iteration of the libertarian tradition presents pressing normative concerns. First, because litigants no longer justify their deregulatory claims through the rubric of listeners’ rights—which, though imperfect, served as the tradition’s constraining force—it has potentially limitless applications. As the examples discussed show, the claim that corporate “speech” cannot be regulated has much broader purchase when unconstrained by listeners’ rights, thereby facilitating accelerated outward movement of the doctrine to increasingly diverse areas of law. These diverse and dissonant applications of the speech right threaten to dilute the meaning of “speech” by spreading it thin. Moreover, to the extent these arguments seek to constitutionalize areas of law that arguably should not be constitutionalized, like fraud, this rapid outward movement presents an ethical problem. What recourse do citizens or the government have to address pernicious public policy problems like fraud, which evade straightforward market regulation and exploit information asymmetries and are therefore difficult to combat, if fraud statutes are effectively found to violate the First Amendment?

Second, by abandoning the listeners’ rights justification, the pure libertarian tradition is even more hostile to the traditional theoretical justifications of First Amendment doctrine than its earlier manifestation. Thus, the pure libertarian tradition dilutes the First Amendment’s theoretical traditions and risks undermining its foundations. Consider the comparison of the liberal, republican, and libertarian traditions outlined in Table 2 above. Under the pure iteration of the libertarian tradition, the purpose of free expression unequivocally is to advance corporate speech rights, and “thin autonomy” is directly embraced. Not only does the pure iteration of the libertarian tradition embrace “thin autonomy,” but the fact that it directly seeks to vindicate corporate speech rights also undermines the place of individuals in the First Amendment ecosystem, creating intractable conflicts between corporations on the one hand and persons and publics on the other.

These tensions are most immediate in terms of theory but are also poised to play out in practice. Recall the network neutrality example<sup>326</sup>: If the transmission of data is corporate speech, then how do courts weigh its value

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326. See *supra* Part III.A.2.

against the public's right to equal access to channels of communication both to speak and to hear, the First Amendment values network neutrality regulations vindicate? And consider other possibilities where the libertarian tradition could be in conflict with the liberal or republican traditions. Imagine regulations of search engine results or of artificial intelligence (AI) voice assistants like Apple's Siri or Amazon's Alexa intended to protect or promote individual self-expression or public access rights, values of the liberal and republican traditions, respectively. Then imagine a First Amendment challenge to those regulations that casts search engine results as algorithmic "speech" and virtual AI responses as "speech." Such a challenge would pit the libertarian tradition against the values of the two other traditions. While the legal move of challenging government regulation of speech, and arguing that the government's interest in regulating it does not outweigh the speaker's liberty, is a basic tenet of speech doctrine, the scale and scope of the type of behaviors that the libertarian tradition could seek to constitutionalize as "speech" is unprecedented. So too is the potential clash between the values undergirding a libertarian speech claim and the values animating the liberal and republican traditions.

Regardless of where one stands on these normative questions, the descriptive point is unmistakable. The pure iteration of the libertarian tradition is poised to dramatically accelerate the outward expansion of First Amendment doctrine's boundaries to encompass new areas of law. And it is poised to heighten the interrelated, simultaneous risk of corrupting the doctrine's longstanding theoretical foundations.

### Conclusion

"[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but *freedom for the thought that we hate*."<sup>327</sup> This Article challenges how far we can apply Justice Holmes's famous dissent, which is conceptually linked to the widespread belief among civil libertarians that to protect the First Amendment, we must be willing to countenance nearly *any* application of the speech right, even—and perhaps especially—if it cuts against our most deeply held beliefs.

This orthodoxy rests on the assumption that each new application of the speech right bolsters the last. This Article shows this proposition is a myth. The tradition the Supreme Court developed to justify the commercial and corporate political speech doctrines was grounded in listeners' rights and based

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327. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (emphasis added).

on conceptualizing corporate and listeners' rights as similarly vindicated by deregulation. But because listeners did not clearly benefit from the Court's deregulatory holdings, and at times were harmed by them, while corporations always benefited, the Court ended up subordinating listeners' rights to corporate speech rights to the point where the theory has now abandoned listeners' rights entirely. As a result, applying the speech right in line with the libertarian tradition does not support longstanding theories about the purpose of the First Amendment. In fact, it does just the opposite. This new tradition undermines them: first because of its "thin autonomy" justification, which undercuts traditional notions of autonomy, and second by decentering the roles of people and publics so vital to the two traditions. Thus, the doctrinal expansion of the neo-*Lochner* moment undermines the areas of law that are newly covered and—because of the libertarian tradition that developed to justify the speech doctrine's outward movement—risks undermining the theoretical foundation of the First Amendment itself.

Some may accept these consequences, believing that there is no deeper meaning to the First Amendment and therefore no foundation to worry about. To them, Frederick Schauer's notion of "opportunism" accurately describes how the doctrine develops.<sup>328</sup> But others will not accept these consequences. Many people believe that the First Amendment means something more than how it is strategically used and that its meaning relates to the values embodied by the two traditions. Regardless of *why* one might believe that the Speech Clause has meaning—because of originalism, textualism, some combination of the pluralistic values animating the doctrine, or something else—believing that it *does* have meaning makes the current expansion of the First Amendment that does both external and internal damage a cause for concern. That concern is heightened today. The libertarian tradition, which serves as the justification for and productive engine of the doctrine's outward movement, has developed a pure form that is rapidly extending the tradition's reach and helping produce increasingly diverse and dissonant speech claims.

Thus, for those who believe that the Speech Clause has meaning beyond its strategic use, the application of the speech right must have limits. In other words, the outward creep of the speech doctrine's boundaries need not be tolerated as "freedom for the [speech] that we hate."<sup>329</sup>

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328. *See supra* note 8.

329. *Schwimmer*, 279 U.S. at 655 (Holmes, J., dissenting).