TAB 10

Information Libertarianism

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Legal scholarship has attacked recent First Amendment jurisprudence as unprincipled: a deregulatory judicial agenda disguised as free speech protection. This scholarly trend is mistaken. Descriptively, free speech protections scrutinize only information regulation, usefully pushing government to employ more direct regulations with fewer collateral consequences. Even an expansive First Amendment is compatible with the regulatory state, rather than being inherently libertarian. Normatively, courts should be skeptical when the state tries to design socially beneficial censorship.

This Article advances a structural theory that complements classic First Amendment rationales, arguing that information libertarianism has virtues that transcend political ideology. Regulating information is peculiarly difficult to do well. Cognitive biases cause regulators to systematically overstate risks of speech and to discount its benefits. Speech is strong in its capacity to change behavior, yet politically weak. It is a popular scapegoat for larger societal problems and its regulation is an attractive option for interest groups seeking an advantage. Collective action, public choice, and government entrenchment problems arise frequently. First Amendment safeguards provide a vital counterpressure. Information libertarianism encourages government to regulate conduct directly because when the state censors communication, the results are often

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counterproductive. Thus, a robust First Amendment deserves support regardless of ideology.

INTRODUCTION

Any liberal who still loves the First Amendment is a fool. So says most recent legal scholarship. This Article disagrees and advances a principled, politically neutral defense of expansive free speech doctrine.

Ever since the Supreme Court extended free speech protection to commercial advertising in *Virginia State Board of Pharmacy v. Virginia Consumer Council*,[1] a trickle of academic complaint has grown to a torrent of

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

criticism lamenting the "corporate takeover" of the First Amendment.[2] A formidable group of scholars has contributed to the deluge, including Robert Post,[3] Julie Cohen,[4] John Coates,[5] Tamara Piety,[6] C. Edwin Baker,[7] Tim Wu,[8] and Mark Tushnet.[9] They regard protection of corporate and commercial speech as a crude attempt to constitutionalize free market ideology, lacking any connection to the values—deliberative democracy, personal autonomy, the marketplace of ideas, and free thought—that the First Amendment is designed to protect. They further contend that free speech rights that protect the sale of consumer data or manipulative advertising portend a new free speech *Lochner*ism—an exploitation of the First Amendment to promote a broad deregulatory agenda, regardless of popular democratic will.[10]

With diligent searching, one can find snippets in First Amendment precedent that suggest the Court indeed protects commercial speech to promote free market capitalism. The *Virginia Board* opinion, for example, explained the societal value of advertising through its utility in a "free enterprise system."[11] And the handful of scholars who defended the commercial speech doctrine occasionally referred to advertising's ability to facilitate purchasing decisions and foster economic competition.[12] Critics seized on these references as evidence

2. John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 239 (2015); Adam Liptak, *First Amendment, 'Patron Saint' of Protesters, Is Embraced by Corporations*, N.Y. TIMES (Mar. 23, 2015), http://www.nytimes.com/2015/03/24/us/first-amendment-patron-saint-of-protesters-is-embraced-by-corporations.html [https://perma.cc/F4AM-MVV9].

3. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

4. Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015).

5. Coates, *supra* note 2.

6. Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2010).

7. C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009).

8. Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013); Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 2, 2013), http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation [https://perma.cc/AD86-KZKS].

9. Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234 (2014).

10. Coates, *supra* note 2, at 233. Commentators use "*Lochner*ism" to describe the period when the Supreme Court invalidated economic regulation on the grounds that it interfered with freedom of contract, effectively reifying a laissez-faire approach to the economy into constitutional doctrine. *See, e.g.*, Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 195–96 (2014).

11. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); Post, *supra* note 3, at 45.

12. The most prominent, and first, was Martin H. Redish, *The First Amendment in the Marketplace*, 39 GEO. WASH. L. REV. 429 (1971); *see also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990) (stressing commercial speech's value in a free market economy); Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 YALE J. ON REG. 85, 87 (1999) (arguing that "[a]dvertising also fosters competitive markets").

of bad motive—proof that the Court distorts the First Amendment to advance minimalist government.[13]

However, in their haste to unearth improper motives, critics have failed to contend rigorously with other arguments—more intellectually sound and ideologically neutral ones—that undergird First Amendment coverage for commercial speech and corporate speakers. For example, the *Virginia Board* decision was primarily concerned about the public's interest in receiving information.[14] Recognition of such an interest was long overdue. Its inclusion in free speech doctrine harmonizes with the democratic self-governance and personal autonomy theories that most legal scholars embrace.[15] Indeed, it improves them. The reason we care so deeply about the dissident's right to stand on a soapbox has more to do with that expression's influence on others than on the short-lived satisfaction of speaking out loud in an empty room. Freedom to receive information is central to the predominant theories about what makes speech special. Yet the critical literature rarely gives it sustained attention, perhaps because it conflicts with a preexisting preference to exclude commercial speech from constitutional protection.[16] After all, the propensity for advertising and other corporate speech to influence listeners' opinions is precisely what makes that speech so threatening.

To avoid this conundrum, some scholars have advanced a free speech model that selectively marries parts of deliberative democracy and autonomy theories to achieve predesignated outcomes.[17] Its scope is defined by reference to the haves and have-nots.[18] On this account, presumptively powerful speakers like corporations can be regulated at will because they are already dominant (notwithstanding their apparent impotence to derail the speech regulation at issue). The have-nots consist of dissidents, conceptual artists, and bedraggled consumers, whose right to free speech is sacrosanct. This vision for the First Amendment is designed to support a soft Marxist agenda. Thus, it is explicitly redistributive, seeking to equalize the power of strong and weak speakers. These scholarly critics are therefore guilty of the same instrumentalism of which they accuse the Court. Their agenda is the mirror image of the alleged new *Lochner*ism. If modern free speech scholarship is any indication, free speech

13. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Post, *supra* note 3, at 45. However, in other writing Post has described the link the Court has made between commercial information and democratic self-governance. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2372 (2000).

14. 425 U.S. at 765.

15. Jackson & Jeffries, Jr., *supra* note 13, at 9–14; Wu, *Machine Speech*, *supra* note 8, at 1507.

16. Piety, *supra* note 6.

17. J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 378–79; Baker, *supra* note 7, at 990–94; Tamara R. Piety, *"A Necessary Cost of Freedom"?: The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 4–5 (2012).

18. *See supra* note 17.

theory is bereft of principle, and its optimal scope depends entirely on one's political leanings.

We therefore find ourselves in the surprising position of defending the very concept of free speech.[19] The current state of First Amendment scholarship badly needs an ideologically neutral explanation for the liberty to communicate. This Article explains why scholars and jurists across the ideological spectrum may rationally commit to protect speech in all its forms, even when one's own ox is being gored.

Implicit in every theory of free speech is a quintessentially libertarian insight: when the state censors information, the results are usually bad. This Article presents a modern case for skepticism about governmental restrictions of information.[20] We explain why regulating information is likely to be deceptively difficult, and we present the available evidence that, while incomplete, bears out this theory. Thus, this Article endorses a libertarian model for speech not because unregulated speech is a fair contest, but because it is better than the alternatives.

Speech marks the beginning of things. Its harms, like its benefits, are inchoate. A wealth of behavioral research has shown that people anticipate serious risks from speech, and that those risks rarely materialize. Countervailing benefits, by contrast, are routinely discounted.[21]

These phantom harms and ignored benefits have a magnetic pull for corrupt and blundering regulation. Speech regulations seethe with public choice and collective action problems. The speculative risks of speech can mobilize the democratic process into regulation by those who have something concrete to lose, even when risks prove illusory. More often, "risks" of speech to the politically connected are actually *benefits* to their competitors and to the public. But the development of those benefits is just unpredictable enough that potential political opponents will not be sufficiently invested in the enterprise. Consequently, speech regulations can be exploited to dispose of information that challenges entrenched interests and to kill nascent ideas.[22] Worse yet, government can employ speech regulation to maintain or expand its powers. Agencies can and often do censor speech to achieve regulatory ends that they could not achieve directly, either because direct regulation is politically impracticable or forbidden by other law.[23]

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19. We are not alone, but find ourselves in a shrinking minority. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

20. This skepticism is a foundational assumption for all theories of free speech. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 152 (1769) ("To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.").

21. *See* discussion *infra* Part III.A.

22. *See* discussion *infra* Part III.B.

23. Martin H. Redish, *Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression*, 76 OHIO ST. L.J. 691, 701–02 (2015) ("Suppression of speech advocating

These troubles occur in regulatory contexts other than speech, of course, but they are particularly attracted to censorship. Because the beneficiaries of speech are diffuse and overly fearful of its dangers, speech is politically weak before it is strong. If caught early enough, disfavored speech can be quashed before it changes preferences and political will. The First Amendment provides structural counterbalancing. It instructs courts to harbor a healthy skepticism about the threats regulators forecast to justify censorship.

For these reasons, this Article argues that libertarianism is wise in the context of speech. It explains why information libertarianism ("info-libertarianism") improves governing no matter what the democratic goals may be. Info-libertarianism is in this sense a hard center for libertarian political theory. But this approach does not require adherence to other forms of libertarianism. In fact, it often disserves them. Info-libertarianism, as defined here, invites the government to regulate directly, by imposing restrictions or obligations on conduct.[24] Direct regulations are perfectly acceptable for info-libertarianism even if repulsive to libertarianism writ large. This is because the unique properties of information apply, obviously, only to information. A direct regulation imposing significant restrictions on trade and on people may have many problems, but it is tailored quite transparently to physical or transactional effects. These burdens are felt directly. Such rules are less likely to distort democratic debate or to corrupt development of new ideas.

Nothing prevents libertarians from using info-libertarianism to accomplish part of their deregulation agenda. However, info-libertarianism also has nothing to say if the democratic process leads to comprehensive wealth redistribution, significant restraint on trade, or a ban on the production of goods. Indeed, in many of the areas that we explore in this Article (including the prescribing and sale of drugs), we positively endorse direct regulations that would constrain doctors, pharmaceutical manufacturers, and other economic actors. Thus, when scholars claim that expansive speech rights threaten all economic regulation and the regulatory state itself,[25] they exaggerate.[26] In fact, a commitment to info-libertarianism is not exclusively conservative in effect. While info-libertarianism

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lawful conduct, then, enables government to engage in a form of stealth regulation of behavior."). The government has sometimes used zones of unprotected speech to silence disfavored political statements. Kozinski & Banner, *supra* note 12, at 649 (discussing S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987)).

24. We discuss the limits of the meaning of "speech," *infra* Part II. While the line between speech and conduct is hard to draw, most rules are clearly either speech regulations or conduct regulations. The types of information that trouble scholars—commercial speech, corporate speech, data sales, insults, and hateful speech—are regulated because of their communicative potential. They are not edge cases.

25. Wu, *The Right to Evade Regulation*, *supra* note 8.

26. *See* Fried, *supra* note 19, at 241 (distinguishing the development of commercial speech protection from *Lochner*ism); Redish, *supra* note 23, at 700 ("It is not uncommon for observers to collapse my commitment to free and open discussion and communication into a form of substantive libertarianism that I have never advocated.").

has politically conservative effects when the courts strike down privacy[27] or advertising[28] regulations, its effects are politically progressive when courts restrict trade secret,[29] trademark,[30] arbitration,[31] duties of employee loyalty,[32] or bans on the recording of corporations[33] and police.[34]

Finally, info-libertarianism does not even dismantle regulation of speech. It demands meaningful scrutiny, but that scrutiny can and should be passable.[35] Where the government can offer good evidence to justify regulating speech instead of conduct, the regulation should survive First Amendment challenge.[36]

Since modern technology and much of the U.S. economy trade in communications, the most significant change in the First Amendment landscape has not been the meaning of free speech but the salience of it. Regulators naturally seized on those communications to control new industries and firms.[37] The shift from an industrial economy to an information one inevitably means that more regulations draw free speech challenges. The First Amendment has not drastically expanded in meaning; rather, modern society has come to the nuisance. It is easier to regulate General Motors than Google, if only because of the First Amendment. This is a feature, not a bug. As we increasingly transact in speech, the First Amendment will become more prominent.

We concede: the First Amendment *is* a nuisance. It has always tested our patience for insulting and stupid expression.[38] Thus, it has always been easy to forget that for speech, the political cure is worse than the disease.

The Article proceeds as follows: Part I describes scholarly objections to recent expansions in free speech protection, arguing that each lacks internal consistency or external validity. Part II defines info-libertarianism and identifies its limits. Part III offers a consequentialist account for info-libertarianism, and

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

28. *See* R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).

29. *See* NanoMech, Inc. v. Suresh, 777 F.3d 1020 (8th Cir. 2015); Energy Recovery, Inc. v. Hauge, 745 F.3d 1353 (Fed. Cir. 2014).

30. *See* Univ. of Ala. Bd. of Tr. v. New Life Art, Inc., 683 F.3d 1266 (11th Cir. 2012); Toyota Motor Sales v. Tabari, 610 F.3d 1171 (2010).

31. *See* Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013).

32. *See* Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011).

33. *See* Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2014) (striking down Idaho's "ag gag" law).

34. *See* Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011).

35. In fact, we have each advocated for greater governmental regulation of information in other work. *See* Derek E. Bambauer, *Conundrum*, 96 MINN. L. REV. 584, 621–24 (2011) [hereinafter Bambauer, *Conundrum*] (cybersecurity); Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2079–81 (2014) [hereinafter Bambauer, *Exposed*] (revenge porn); Jane Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205 (2012) [hereinafter Bambauer, *The New Intrusion*] (privacy).

36. However, we also argue that the recent free speech cases that most trouble other legal scholars were decided correctly, so critics may find little comfort in the model of scrutiny we recommend.

37. *See* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015).

38. *See* Ronald K. L. Collins, *Comedy and Liberty: The Life and Legacy of Lenny Bruce*, 79 SOC. RES. 61 (2012).

thus a normative basis for expansive free speech coverage. We conclude by placing contemporary anxieties about a widening First Amendment in historical perspective. Free speech is not the same as political libertarianism. And although it has fallen into disfavor with progressives, free speech remains enduringly progressive.

I.
FEARS OF A NEW *LOCHNER*ISM

The past few years saw growing criticism of the First Amendment as crippling vital regulation. Politicians (including President Barack Obama),[39] media figures,[40] judges,[41] academics,[42] and ordinary citizens[43] excoriated Supreme Court decisions on free speech topics ranging from campaign finance to privacy to health care.[44] Prominent legal academics saw the ghost of *Lochner*-era freedom of contract lurking in these cases, and attacked the decisions as instrumental—First Amendment means used for deregulatory ends. They argued that free speech claims could be launched against every conceivable governmental regulation, potentially destroying the modern regulatory state.[45] Jack Balkin saw the First Amendment as in a state of "ideological drift."[46] Robert Post and Amanda Shanor stated that "the First Amendment has become a

39. *See* Adam Liptak, *Supreme Court Gets a Rare Rebuke, In Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/2010/01/29/us/politics/29scotus.html [https://perma.cc/R8ZE-8JCM].

40. *See Moral Kombat*, DAILY SHOW WITH JON STEWART (June 30, 2011), http://thedailyshow.cc.com/videos/vqgdfb/moral-kombat [https://perma.cc/8BJL-FUY6].

41. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 591 (2011) (Breyer, J., dissenting) (contending that "the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty").

42. The list is long and distinguished. *See, e.g.*, Coates, *supra* note 2; Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011); Piety, *supra* note 18; Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501 (2015); Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. BOOKS (May 13, 2010), http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy [https://perma.cc/ASM6-MHWV].

43. *Restore Democracy by Ending Corporate Personhood*, WE THE PEOPLE (Sept. 22, 2011), https://petitions.whitehouse.gov/petition/restore-democracy-ending-corporate-personhood [https://perma.cc/X37Q-MXHT].

44. The usual suspects are Sorrell, 564 U.S. at 552; Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011); Snyder v. Phelps, 562 U.S. 443 (2011); and Citizens United v. FEC, 558 U.S. 310 (2010). Circuit courts of appeal have also produced targets of criticism. *See, e.g.*, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012); U.S. v. Caronia, 703 F.3d 149 (2d Cir. 2012).

45. The most cogent response to this criticism is over thirty years old, and has lost none of its force. *See* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). Few current critics even cite Shiffrin, and those who do, such as Tamara Piety, fail to engage his arguments. *See* Piety, *supra* note 6, at 2672 n.399, 2676.

46. Balkin, *supra* note 18, at 383.

powerful engine of constitutional deregulation."[47] Tim Wu wrote that "[i]t is tempting to call [the First Amendment] the new nuclear option for undermining regulation, except that its deployment is shockingly routine."[48] John Coates described a "corporate takeover of the First Amendment."[49] And Julie Cohen contended that "the contemporary First Amendment shelters power's ability to make and propagate its own truth."[50] A deregulatory apocalypse seems nigh.

Invocations of a new *Lochner*ism can be grouped into five themes or objections: (A) departure from the Amendment's original meaning, (B) objections to treating nonhuman entities (especially corporations) as protected speakers, (C) objections to commercial speech protection frustrating economic regulation, (D) fears that free speech expansion has no limits, and (E) distaste for the consequences of expanded free speech coverage. We turn to each below.

A. Originalism

Originalist-minded scholars view commercial speech and speakers as the *nouveau riche* of the First Amendment. Articles have pointed to the recency of the doctrine's inception in *Virginia Board of Pharmacy* in 1976,[51] often contrasting it with the 1942 decision in *Valentine v. Chrestensen*, where the Court held that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[52] The Founding Fathers did not contemplate protection for advertising at the time of the First Amendment's adoption,[53] nor that the protocorporations then operating would generate protected expression.[54] Accordingly, critics have claimed that the commercial speech doctrine requires justification other than the Amendment's history and text.[55]

Originalism plainly does not describe the current state of First Amendment doctrine. But we doubt that progressive scholars criticizing modern free speech

47. Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015).

48. Wu, *The Right to Evade Regulation*, *supra* note 8.

49. Coates, *supra* note 2, at 39.

50. Cohen, *supra* note 4, at 1120.

51. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

52. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

53. Wu, *The Right to Evade Regulation*, *supra* note 8. The relevant historical moment varies, since the Fourteenth Amendment was ratified in 1868 and the First Amendment incorporated against the states in 1925. Gitlow v. New York, 268 U.S. 652 (1925).

54. *See* Cohen, *supra* note 4, at 1123 (quoting Citizens United v. FEC, 558 U.S. 310, 353 (2010)).

55. Commercial speech makes for strange bedfellows. It aligns progressive critics such as Tim Wu with conservative judge and scholar Robert Bork, who would protect only political speech under the First Amendment. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971) ("Freedom of non-political speech rests . . . upon the enlightenment of society and its elected representatives."); Robert McMillan, *The Father of Net Neutrality Is Running for Office—and He Could Win*, WIRED (Sept. 9, 2014), www.wired.com/2014/09/tim_wu [https://perma.cc/N5VF-G8LV] (describing Wu's progressive politics).

law would want a legal system constrained only by original meaning, where government has nearly unchecked power to ban expression. As Wu has noted, even in "the 1950s, cities or states could ban motion pictures they found distasteful, arrest a man for calling the local sheriff a fascist, and lock up declared members of the Communist Party, all without violating the Constitution."[56] Founding Father John Adams signed the Alien and Sedition Acts, and while judicial review was not yet fully established, there was no legal challenge to them.[57] Concord, Massachusetts, banned Mark Twain's *The Adventures of Huckleberry Finn* in 1884.[58] In 1910, state and local governments banned films of boxing prizefights because Jack Johnson, the black heavyweight champion, knocked out Jim Jeffries, the "great white hope."[59]

An originalist approach thus leaves many forms of expression to the mercy of the democratic process.[60] It is hard to fit art and music into the protected political core of speech, at least without doing violence to the term "political."[61] Mark Rothko's art,[62] 2 Live Crew's rap,[63] jazz,[64] John Cage's 4' 33"[65]—all fall outside core political speech.[66] Global temperature data would certainly have been vulnerable to restriction before climate change entered the political vocabulary.[67] Advertising for abortion services, or antiabortion counseling, could be banned.[68] Parodies of famous trademarks, such as Chewy Vuitton dog toys[69] or a fake Barney the Dinosaur,[70] could no longer shelter under the First Amendment and could be outlawed.[71] Thus, even if an originalist First

56. Wu, *The Right to Evade Regulation*, *supra* note 8.

57. *See Alien and Sedition Acts*, LIBR. CONGRESS, http://www.loc.gov/rr/program/bib/ourdocs/Alien.html [https://perma.cc/QX7M-PLUK].

58. *Banned Books That Shaped America*, BANNED BOOKS WEEK, http://www.bannedbooksweek.org/censorship/bannedbooksthatshapedamerica [https://perma.cc/T9V3-AC2Y].

59. Barak Y. Orbach, *The Johnson-Jeffries Fight 100 Years Thence: The Johnson-Jeffries Fight and Censorship of Black Supremacy*, 5 N.Y.U. J.L. & LIBERTY 270, 270–71 (2010).

60. *See* Bork, *supra* note 55.

61. *See* Shiffrin, *supra* note 45, at 1226.

62. *See* Sonya G. Bonneau, *Ex Post Modernism: How the First Amendment Framed Nonrepresentational Art*, 39 COLUM. J.L. & ARTS 195, 195–98 (2015).

63. *See* Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994); Sara Rimer, *Obscenity or Art? Trial on Rap Lyrics Opens*, N.Y. TIMES (Oct. 17, 1990), http://www.nytimes.com/1990/10/17/us/obscenity-or-art-trial-on-rap-lyrics-opens.html [https://perma.cc/JT7N-FXWK].

64. *See* Robert Kent, *Before There Were Samples: Imitation and Reference in Jazz*, *in* SIGNAL/NOISE 2K5: CREATIVE REVOLUTION? 14 (2005), https://cyber.harvard.edu/archived_content/events/SignalNoiseBBFINAL.pdf [https://perma.cc/AJ6U-6VBG].

65. *See There Will Never Be Silence: Scoring John Cage's 4'33,"* MOMA, https://www.moma.org/visit/calendar/exhibitions/1421 [https://perma.cc/2P2Z-WSXE].

66. Shiffrin, *supra* note 45, at 1226.

67. *See* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 99 (2014).

68. *See* Bigelow v. Virginia, 421 U.S. 809 (1975).

69. Louis Vuitton Malletier S.A. v. Haute Diggity Dog, 507 F.3d 252 (4th Cir. 2007) (protecting toys as nondiluting parodies of Louis Vuitton goods).

70. Lyons P'ship v. Giannoulas, 179 F.3d 384 (5th Cir. 1999).

71. *See generally* William McGeveran, *The Trademark Fair Use Reform Act*, 90 B.U. L. REV. 2267 (2010).

Amendment protected all core political speech (which, historically, it did rather poorly), much of the speech whose protection we take for granted today would exist at the government's whim.

A few scholars seem willing to live with dramatically limited free speech rights if that keeps corporate speakers from seeking the Constitution's safeguards. Tom Bennigson, for example, wrote that "there is no First Amendment interest in protecting opportunities for creativity for their own sake"[72] and that "performing music is not at the core of what the First Amendment protects."[73] But we doubt that most critics would defend the results of so limited a scope for free expression.[74] The scholarly criticism thus appears instrumental, particularly when it adopts a sort of *parvenu* originalism.[75] Criticism that the Court has not been faithful to the Founders' intent loses its force when the critics, too, would deviate from it—just not quite as far.

B. Nonhuman Speakers

The sharpest scholarly criticism has targeted decisions finding that nonhuman entities—in particular, corporations—enjoy First Amendment protection when they engage in expressive activity. The poster child is *Citizens United*, where the Supreme Court struck down restrictions on corporations' and unions' expenditures for certain political broadcast ads before an election.[76] The decision has been cast in calamitous terms, with progressives fearing that it "threatens an avalanche of negative political commercials financed by huge corporate wealth."[77] *Citizens United* is widely seen as an inflection point in First Amendment jurisprudence.

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72. Tom Bennigson, Nike *Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 413 (2006).

73. *Id.* at 412 n.189.

74. We confine our analysis here to the First Amendment context. But, in considering originalism more broadly, we have to think originalist critics believe the Court erred in legalizing same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The majority's opinion is expressly grounded in evolving notions of fundamental rights—including atextual rights—rather than America's long and highly consistent history of discrimination against same-sex couples. On the other side of the political aisle, *District of Columbia v. Heller*, 554 U.S. 570 (2008), overturned centuries of understanding about Second Amendment interpretation. *See* Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551 (2009). Here, too, we suspect policy preferences trumped principle.

75. We read some of the critics' other scholarly work to adopt more progressive and postmodern normative commitments. *See, e.g.*, TIM WU, THE MASTER SWITCH 303–08 (2010); Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210 (2007); Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1 (2006); Tim Wu, *The World Trade Law of Censorship and Internet Filtering*, 7 CHI. J. INT'L L. 263 (2006).

76. Citizens United v. FEC, 558 U.S. 310 (2010). Most prior challenges to campaign finance regulation came from politically liberal and progressive plaintiffs, not conservative ones. *See* RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS: THE *MCCUTCHEON* DECISION, CAMPAIGN FINANCE LAWS, AND THE FIRST AMENDMENT (2014).

77. Dworkin, *supra* note 42.

In fact, *Citizens United* is less aberrational than it seems.[78] The case did overrule some of the Court's prior campaign finance decisions about corporations.[79] However, other precedent shows both the protection of corporate speech and a reluctance to confer differential First Amendment treatment based on the type of speaker. In 1975, the Court struck down Virginia's criminal statute banning advertisements in its newspapers for out-of-state abortion providers.[80] That same year, Massachusetts prohibited corporations from spending funds on electioneering regarding most referenda.[81] The Supreme Court invalidated the law, holding that the statute "amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues."[82] In 1986, a pro-life nonprofit corporation issued a newsletter advocating election of specified candidates. After the Federal Election Commission (FEC) filed a complaint, the corporation successfully sought respite on free speech grounds.[83] And in 2007, another nonprofit corporation, Wisconsin Right to Life, successfully challenged the federal ban on corporate expenditures for advertisements advocating a political position during an election.[84] *Citizens United* was thus a culmination rather than revolution, but as the last link in the chain, it has assumed "the perceived sins of the whole line of decisions expanding corporate rights in the political marketplace."[85]

The recent wave of criticism focuses almost exclusively on *profit-generating corporations* as speakers, even though, ironically, Citizens United was a nonprofit corporation.[86] Consequently, discussion of *Citizens United* has overlooked the case's impact on other types of juridical persons whose speech is now clearly protected: nonprofit organizations (including churches and charities),[87] cooperatives,[88] public benefit corporations,[89] and partnerships

78. *See* Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 218–20 (2010).

79. *Citizens United*, 558 U.S. at 365–66 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and, in part, *McConnell v. FEC*, 540 U.S. 93 (2003)).

80. Bigelow v. Virginia, 421 U.S. 809 (1975).

81. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 768 (1978).

82. *Id.* at 784.

83. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

84. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 481–82 (2007).

85. Levitt, *supra* note 78, at 223.

86. *See, e.g.*, Bennigson, *supra* note 72, at 383; Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 419 (2013); Piety, *supra* note 6, at 2588; Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 CARDOZO L. REV. 2365, 2369 (2010).

87. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

88. Cooperatives are specialized associations created under state statutes. *See, e.g.*, REV. CODE WASH. § 23.86.007.

89. *See* Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, HUFFINGTON POST (July 22, 2013), http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.html [https://perma.cc/VK2V-WZW5].

among others.[90] Thus, although this Section addresses objections specific to for-profit corporations, its title seeks to draw attention to the breadth of the potential impact of reversing *Citizens United*.

1. Profit Motive

Critics have suggested that the speech of for-profit corporations should not be protected because corporations operate for a singular goal—profit—that is presumptively suspect in terms of First Amendment interests.[91] These distinctions between for-profit and not-for-profit corporate speech are questionable descriptively, and unprincipled normatively.

First, consider singularity of purpose. This characteristic is equally applicable to a church, organized as a nonprofit organization, with the sole goal of serving its deity.[92] The church, too, is single-minded in focus, collecting and spending money on speech to advance its objective. Moreover, even natural persons, who generally pursue myriad objectives, often produce speech with but one purpose—to persuade the listener to believe, do, buy, or vote for something. Critics have offered no reason to hinge constitutional protection on the speaker's complexity of motives, and have also failed to articulate why simple motives would not advance free speech goals.[93]

Second, scholars have concentrated on the corporation's potential for capital accumulation.[94] This approach provides the necessary link between corporate speakers and commercial speech: the value of speech is perverted when the speaker means to profit from it. Critics fear that corporations' ability to build capital will provide disproportionate influence in political debates.[95] Molly Wilson wrote that "corporate financial muscle may in fact *alter* public preferences . . . the financial power of corporations is breathtaking."[96] There is strong consensus among critical commentators that firms' sheer financial might can swamp competing speech. Representative Donna Edwards summarized the

90. *See* Paul Weitzel, *Protecting Speech from the Heart: How* Citizens United *Strikes Down Political Speech Restrictions on Churches and Charities*, 16 TEX. REV. L. & POL. 155 (2011).

91. Piety, *supra* note 6, at 2586; *cf.* Jackson & Jeffries, Jr., *supra* note 13, at 18 (stating that "[t]he decisive point is the absence of any principled distinction between commercial soliciting and other aspects of economic activity").

92. The controversial Westboro Baptist Church is a nonprofit organization with a highly focused agenda. *See* J. Bryan Lowder, *Subsidized Hate*, SLATE (Mar. 4, 2011), http://www.slate.com/articles/news_and_politics/explainer/2011/03/subsidized_hate.html [https://perma.cc/2Q29-3KCQ].

93. *See* Shiffrin, *supra* note 45, at 1257–58.

94. *See* Piety, *supra* note 6, at 2661–62.

95. Russell Feingold, *Who Is Helped, or Hurt, by the* Citizens United *Decision?*, WASH. POST (Jan. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012203874.html [https://perma.cc/9MBK-67VX] (arguing that *Citizens United* "gives a green light to corporations to unleash their massive coffers on the political system").

96. Wilson, *supra* note 86, at 2381–82.

conventional wisdom when she wrote that citizens "will be drowned out completely by this corporate takeover."[97]

And yet, the actual effect of *Citizens United* on corporate political spending has been slight. For example, a team of political scientists at the University of New Mexico constructed a database of Fortune 500 firms plus the next eighty-four others—the Fortune 584—for 2008–2012.[98] They collected data on the firms' spending from affiliated political action committees (PACs), contributions to super-PACs, and independent expenditures advocating for candidates and issues.[99] Two-thirds of the firms maintained a PAC during this period, but *Citizens United*'s effects on PAC spending contradict conventional wisdom. Between 2008 (when the spending limits applied) and 2012 (when they were struck down), spending by all PACs grew, but the rate of increase for the Fortune 584 PACs was less than half that of major noncorporate PACs.[100] A few individual firms undertook sizeable expenditures on PACs.[101] However, the top ten revenue-generating firms did not change their spending on PACs between 2008 and 2012 in any statistically significant way.[102]

Independent expenditures data are even more striking. According to the FEC, not one Fortune 584 company spent money from its general treasury on candidates or issues in 2012, and only ten contributed to super PACs.[103] The data do not capture contributions by corporations to 501(c) or 527 groups because disclosure is not mandated for the former and is spotty for the latter.[104] However, Stanford political scientist Adam Bonica calculated that even if all funds routed through 501(c) organizations that do not disclose donations were from corporate treasuries, it would constitute a maximum of $322 million—chump change in an election with expenditures of roughly $6 billion.[105] Some highly paid corporate employees have made significant contributions to super PACs or expenditures on advertising,[106] but these contributions seem to be independent minded. The political scientists found that these employees' expenditures did not track the

97. Donna F. Edwards, *A Call to Bold Action*, BOS. REV. (Sept./Oct. 2010), http://new.bostonreview.net/BR35.5/edwards.php [https://perma.cc/J4V4-RHNL].

98. Wendy L. Hansen, Michael S. Rocca & Brittany Leigh Ortiz, *The Effects of* Citizens United *on Corporate Spending in the 2012 Presidential Election*, 77 J. POL. 535, 538 (2015).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 539.

103. *Id.* at 540–41.

104. *Id. See generally What Is a 527 Organization?*, FED. ELECTION COMMISSION, http://www.fec.gov/ans/answers_general.shtml#527 [https://perma.cc/D73F-VC7P]; *Outside Spending: Frequently Asked Questions About 501(c)(4) Groups*, OPEN SECRETS, http://www.opensecrets.org/outsidespending/faq.php [https://perma.cc/DJV9-LPV4] (noting that "[a]nother major benefit, for many [501(c)] groups, is the ability to collect donations without disclosing donors").

105. Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. POL. 367, 371–72 (2016).

106. Hansen et al., *supra* note 98, at 543.

corporation's spending or interests.[107] In short, the predicted corporate tsunami did not occur.[108]

On sober reflection, it is not surprising that the frenzied fears following *Citizens United* turned out to be a false alarm. First, the singular focus on profits decried by critics ironically constrains the diversion of corporate resources into campaigns.[109] Firms rarely earn much return on those investments.[110] They are much more likely to spend corporate funds on lobbying rather than elections.[111] Most elections provide benefits too diffuse to justify the cost of influence.[112] Second, political expenditures can backfire, hurting a company's brand.[113] Target[114] and Chick-fil-A[115] provide two recent examples—supporting campaigns against same-sex marriage damaged their public image. Third, law may impose limits on the successful political candidates, as when the U.S. Supreme Court forced a West Virginia Supreme Court justice to recuse himself from a case involving a major political donor.[116] Political spending generates little return on investment if the elected official cannot deliver. Finally, Fortune 500 directors and executives are somewhat politically heterogeneous, making it more difficult for boardrooms to agree on to whom to donate.[117] Put simply, there are considerable structural constraints on corporate political spending, which explain the relative dearth of such expenditures even after *Citizens United*.

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107. *Id.*

108. Even the studies that draw negative conclusions about the effects of *Citizens United* document that campaign spending is dominated by wealthy individuals rather than corporations. *See, e.g.*, BRENNAN CENTER FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 2 (2015); *Million-Dollar Donors in the 2016 Presidential Race*, N.Y. TIMES (Feb. 9, 2016), http://www.nytimes.com/interactive/2016/us/elections/top-presidential-donors-campaign-money.html [https://perma.cc/KJT7-UC8M].

109. *See* Lee Drutman, *Despite* Citizens United, *Elections Aren't a Good Investment for Corporations*, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/opinions/despite-citizens-united-politics-isnt-a-good-investment-for-corporations/2015/03/27/f13e0d20-d26c-11e4-ab77-9646eea6a4c7_story.html [https://perma.cc/K8UX-Q48T] (stating that "[i]n interviewing 60 corporate lobbyists, one of the things that originally surprised me was how frequently their bosses at company headquarters questioned the costs of political engagement").

110. Hansen et al., *supra* note 98, at 539.

111. Bonica, *supra* note 105, at 370–71.

112. Hansen et al., *supra* note 98, at 538–39.

113. *Id.* at 536–37 (acknowledging that reputational consequences are most likely for direct corporate spending on elections, rather than more indirect expenditures by affiliates such as political action committees).

114. *See* Drutman, *supra* note 109; Brian Montopoli, *Target Boycott Movement Grows Following Donation to Support "Antigay" Candidate*, CBS NEWS (July 28, 2010), http://www.cbsnews.com/news/target-boycott-movement-grows-following-donation-to-support-antigay-candidate [https://perma.cc/VJ5M-SCCG].

115. Seth Cline, *Chick-fil-A's Controversial Gay Marriage Beef*, U.S. NEWS (July 27, 2012), http://www.usnews.com/news/articles/2012/07/27/chick-fil-as-controversial-gay-marriage-beef [https://perma.cc/P45X-UK8A].

116. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

117. Bonica, *supra* note 105, at 379–80.

2. Reliability

Another theory posits that for-profit firms are unreliable speakers, inclined to exploit biases in human cognition, spin negative information, and simply lie. As Tamara Piety put it, "[T]he danger in extending such expansive protection to for-profit corporations is that massive amounts of false speech will be injected into the market without any clear checking force . . . [which] will result in imbalance and chilling of debate."[118] Even if firms do not deliberately prevaricate, the argument goes, unceasing pressure to maximize shareholder value will cause employees to subtly misrepresent information. Companies that provide accurate information may still do so to target consumers' biases, cognitive shortcuts, and weaknesses.[119] Firms will employ data mining to advertise products just when we are most likely to purchase them.[120] Or, they will use sophisticated knowledge about our habits not to satisfy consumers' demands, but to create them; manipulating us into desiring things we would not otherwise want.[121]

These critics have made strong assumptions about the failure of consumers and competitors to discipline the market that are not generally correct, and have applied them categorically to all corporate speech. In Part III, we show that advertising rarely has the negative effects that people fear, and that its regulation is often the thing that harms consumers.

3. Self-Interest

Critics have argued that the singular focus on maximizing shareholder value means corporations act exclusively out of self-interest,[122] making their speech both more difficult to chill and less useful to society.[123] This premise flounders because, as these critics have acknowledged, corporations often spend

118. Piety, *supra* note 6, at 2617.

119. Cohen, *supra* note 4, at 1131.

120. Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 996–67 (2014). This critique is vulnerable to a standard economic riposte: If this is when I most need that good or service, why is it bad to help me find it?

121. Most critics have failed to give credit to the intellectual progenitor of this theory, John Kenneth Galbraith, who formulated the concept of *created demand* in the 1950s. *See* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 131 (1958) (arguing that "[a]s a society becomes increasingly affluent, wants are increasingly created by the process by which they are satisfied").

122. *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (holding that "[a] business corporation is organized and carried on primarily for the profit of the stockholders"); Cede & Co. v. Technicolor, 634 A.2d 345, 360 (Del. 1993) (noting that "directors are charged with an unyielding fiduciary duty . . . to act in the best interests of its shareholders"); Jia Lynn Yang, *Maximizing Shareholder Value: The Goal That Changed Corporate America*, WASH. POST (Aug. 26, 2013), http://www.washingtonpost.com/business/economy/maximizing-shareholder-value-the-goal-that-changed-corporate-america/2013/08/26/26e9ca8e-ed74-11e2-9008-61e94a7ea20d_story.html [https://perma.cc/5CYB-5QCD].

123. *See* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1214 (2015); Piety, *supra* note 6, at 2610; *see also* Post, *supra* note 3, at 33 (describing this empirical hypothesis running through the Court's reasoning, but also calling it "suspect").

money on activities that seem orthogonal to enhancing profits, such as charitable donations.[124] Much of the speech produced by corporations is similarly disconnected from core profit-making functions. Google releases regular transparency reports that reveal governmental surveillance of users, attempts to suppress content, copyright takedowns, and the like.[125] Berkshire Hathaway advocates for meaningful action to deal with climate change.[126] American Apparel rolled out its "Legalize Gay" campaign at a time when same-sex marriage was a losing cause politically.[127]

To maintain coherence, critics have argued that these eleemosynary actions ultimately redound to the firm's advantage by improving its brand and creating a positive image with consumers. Thus, the argument goes, these expenditures increase value for stockholders, even if indirectly.[128] Similarly, political expenditures can create opportunities for companies.[129] The trouble is that this approach becomes circular: everything a corporation spends money on is, by definition, profit maximizing, because why else would the firm spend it?[130] A more likely set of explanations is that firms believe that their corporate success also aids their communities, and that they have motives beyond pure return on investment.[131]

In any event, even accepting the premise that all corporate speech serves the financial interests of shareholders, the critique is flawed. At the core of distrust for corporate speech is an assumption that speech serving a corporation's interests cannot serve those of its listeners. But self-interest is hardly limited to corporate speakers; political parties and electoral candidates frequently demonstrate myopic vision when it comes to producing reliable information.[132]

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124. *See* Bennigson, *supra* note 72, at 393–95.

125. *Transparency Report*, GOOGLE, http://www.google.com/transparencyreport/?hl=en [https://perma.cc/3GJZ-S4GE]. *See generally* Jane R. Bambauer & Derek E. Bambauer, *Vanished*, 18 VA. J.L. & TECH. 137 (2013) (analyzing Google transparency data).

126. Nancy Gaarder & Steve Jordan, *Berkshire Hathaway Joins Major Renewable-Energy Effort*, OMAHA WORLD HERALD (July 28, 2015), http://www.omaha.com/money/buffett/berkshire-hathaway-joins-major-renewable-energy-effort/article_bac60de4-afe7-50aa-9ebd-8e34aa499ba4.html [https://perma.cc/B3Q4-PRDJ].

127. *American Apparel to Give Away 'Legalize Gay' T-Shirts in Support of Same-Sex Marriage in France*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/2012/12/10/american-apparel-legalize-gay-marriage-france-t-shirts_n_2272608.html [https://perma.cc/38KU-UA76].

128. *See* Thomas L. Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 WIS. L. REV. 391, 397–400; Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579 (1997); Piety, *supra* note 6, at 2645 ("[A]ll speech by a for-profit corporation is commercial since, by virtue of the rules governing for-profit corporations a for-profit corporation has no legitimate purpose other than commerce. . . . So even when Exxon-Mobil talks about global warming its purpose is always and inherently commercial.").

129. *See generally* Levitt, *supra* note 78, at 230–32.

130. Piety, *supra* note 6, at 2627.

131. *See id.* (noting that social norms "allow for some behavior that is not straightforwardly profit-seeking to occur").

132. Examples are legion. Recently, Xavier Alvarez lied about being a Medal of Honor recipient during his stint as a politician. United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012). Former Alaska

If we believe that speech motivated by profit should not receive First Amendment protection, the logical extension is that *all* profit-motivated speech, including by individuals, ought to be unprotected.[133] And there is no principled reason to treat profit-motivated speech as more dangerous than other forms of self-interested speech designed to gain influence, get hired, get elected, or get someone into bed.

America frequently depends on self-interest to produce socially useful speech. Media corporations report on the day's news not only because of journalistic ethics, but also because it generates revenues.[134] From doctors to teachers to organic farmers, the U.S. economy generates valuable products and services from people seeking to do good and do well, and this is no less true for corporations as a class. Efforts to distinguish good corporations (the *New York Times*)[135] from the bad (Google)[136] and the ugly (Enron)[137] cannot be made on motive alone, and are too often based on the critic's idiosyncratic preferences.[138]

Put simply, one does not have to credit corporations with pure hearts to believe they can produce socially useful speech. As Samuel Johnson framed it, "No man but a blockhead ever wrote, except for money."[139]

C. *Commercial Speech as Regulatory Barrier*

Many critics of recent commercial speech cases have opposed including this type of expression within the First Amendment at all, believing that protection hamstrings vital regulation in the information economy. These scholars have claimed that an increasingly conservative judiciary, hostile to

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Governor Sarah Palin claimed that, under the Affordable Care Act, seniors would have to face "death panels" to determine whether they would receive needed treatment. Angie Drobnic Holan, *Sarah Palin Falsely Claims Barack Obama Runs a 'Death Panel,'* POLITIFACT (Aug. 10, 2009), http://www.politifact.com/truth-o-meter/statements/2009/aug/10/sarah-palin/sarah-palin-barack-obama-death-panel [https://perma.cc/7DJ3-NWLT]. Senator Harry Reid claimed that Republican presidential nominee Mitt Romney had not paid taxes in ten years. Louis Jacobson, *Harry Reid Says Anonymous Source Told Him Mitt Romney Didn't Pay Taxes for 10 Years*, POLITIFACT (Aug. 6, 2012), http://www.politifact.com/truth-o-meter/statements/2012/aug/06/harry-reid/harry-reid-says-anonymous-source-told-him-mitt-rom [https://perma.cc/TH6E-QWGF]. All were plainly lies.

133. *See* Jackson & Jeffries, Jr., *supra* note 13, at 31 n.108.

134. Most critics have attempted to distinguish media companies from other corporations. *See, e.g.*, Bennigson, *supra* note 72, at 441, 443; Cohen, *supra* note 4, at 1125. Steven Shiffrin demonstrated the fallacy of such attempts. Shiffrin, *supra* note 45, at 1242–43.

135. *See* Bennigson, *supra* note 72, at 441, 443.

136. *See* Wu, *Machine Speech*, *supra* note 8.

137. Piety, *supra* note 6, at 2608.

138. *Cf.* Bennigson, *supra* note 72, at 441–42 (arguing that *New York Times* articles represent either the author's or the editorial board's views); Cohen, *supra* note 4, at 1124 (arguing that media corporations ought to be protected under freedom of the press rather than freedom of speech, while other corporations should not enjoy speech rights). The *New York Times* employs a spokesperson. *See, e.g.*, Margaret Sullivan, *Valid Complaints on Story About Berkeley Balcony Collapse*, N.Y. TIMES (June 17, 2015), http://publiceditor.blogs.nytimes.com/2015/06/17/valid-complaints-on-story-about-berkeley-balcony-collapse [https://perma.cc/F2Y9-JST8] (quoting spokeswoman Eileen Murphy). It is not clear how Cohen and Bennigson's proposed approaches would deal with Murphy's speech.

139. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 622 (1791).

regulation on principle, uses commercial speech as a policy lever to block government intervention.[140] The key question here is not why regulatory targets sought relief under the First Amendment—any port will do in a storm—but why courts accepted their theories, especially given the political heterogeneity of federal judges. We suspect judges across the ideological spectrum could not find a sound reason to deny some protections for commercial speech, and scholars have yet to supply one. None of their objections to commercial speech are on firm theoretical footing.

First, governments can and do prohibit false or misleading commercial statements; regulation of commercial deception does not trouble courts or scholars.[141] Regulation targeting falsehoods can readily address any corporation's special proclivities to lie.

Second, as we discuss at length later, there are important reasons for courts to play the same countermajoritarian role when reviewing popular regulations of commercial speech that they do for curbs on political expression.[142] Regulations of commercial speech are often well-liked because people revile advertising—even the most free-market-minded economists hate it.[143] But commercial speech is valuable. It helps consumers make decisions and plan according to their preferences.[144] It aids voters in assessing the desirability of lawmaking, such as regulation of product labeling[145] or open Internet requirements.[146] It contributes to key policy debates such as addressing global warming[147] or imposing health

140. *See* Cohen, *supra* note 4, at 1131–32.

141. *See, e.g.*, MASS. GEN. LAWS ch. 93A, § 2 (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"); § 1 (defining "[t]rade" and "commerce" to include advertising); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 598–99 (2014) (describing the Federal Trade Commission (FTC)'s section 5 enforcement against unfair and deceptive trade practices); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) (holding "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity").

142. *See generally* U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986).

143. George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 213 (1961) (stating that advertising "is treated with a hostility that economists normally reserve for tariffs or monopolists").

144. *See* JOHN E. CALFEE, FEAR OF PERSUASION: A NEW PERSPECTIVE ON ADVERTISING AND REGULATION (1997); Troy, *supra* note 12, at 87.

145. For example, the FTC's prohibition on advertising lower-tar cigarettes may have unintentionally harmed smokers. *See* John E. Calfee, *Cigarette Advertising Regulation Today: Unintended Consequences and Missed Opportunities?*, 14 ADVANCES IN CONSUMER RES. 264 (1987).

146. *See* Sean Buckley, *AT&T, Verizon Say FCC Net Neutrality Move Will Stifle Broadband Investment, Raise Prices*, FIERCETELECOM (Feb. 26, 2015), http://www.fiercetelecom.com/story/att-verizon-say-fcc-net-neutrality-move-will-stifle-broadband-investment-ra/2015-02-26 [https://perma.cc/4F6T-68ML]; Brian Stelter, *Netflix Hails Net Neutrality Vote as 'Win' for Consumers*, CNN (Feb. 26, 2015), http://money.cnn.com/2015/02/26/media/netflix-net-neutrality [https://perma.cc/3F56-BTR4].

147. *See* Justin Gillis, *Companies Take the Baton in Climate Change Efforts*, N.Y. TIMES (Sept. 23, 2014), http://www.nytimes.com/2014/09/24/business/energy-environment/passing-the-baton-in-climate-change-efforts.html [https://perma.cc/AR47-FT4C].

care mandates.[148] Even F.J. Chrestensen, the loser in the 1942 case that denied commercial speech protection, included a screed against the City of New York's obstinate refusal to dock his submersible on the back of his advertisement for a tour of the sub.[149] Small-minded as it may be, that is speech about a government's policy decision. Commercial speech likely aided the growth of a nonpolitical press,[150] and certainly sustains it.[151] Commercial speech has significant value for consumers and voters alike.

In short, the interference objection merely recites what it means to have a countermajoritarian constitutional right: government should have to prove its case for restrictions on expression to a somewhat skeptical judicial branch, even when the restrictions have popular support.

D. Ever-Expanding Coverage

A prevalent theme in contemporary scholarly discourse is a felt unease with expansions in First Amendment coverage.[152] Since changes in free speech coverage operate as a one-way ratchet—always expanding, never contracting—expansion has profound long-term consequences.[153] The First Amendment becomes something like a Roach Motel: expression checks in, but it doesn't check out.[154]

Some scholars have offered particularly alarmist critiques of expanding coverage. They feared that everything could be characterized as having some expressive value, and thus some potential claim to First Amendment coverage.[155] If product design, commercial transactions, and conduct have expressive meaning, the First Amendment could expand to wipe out regulation

148. *See* Stephanie Mencimer, *America's Largest Health Care Company Tells Supreme Court That Anti-Obamacare Argument Is "Absurd,"* MOTHER JONES (Feb. 9, 2015), http://www.motherjones.com/politics/2015/02/hca-king-burwell-supreme-court-obamacare-amicus-brief [https://perma.cc/C5JD-SK6G] (noting that Hospital Corporation of America, in its amicus brief in *King v. Burwell*, 135 S. Ct. 2480 (2015), "present[ed] detailed data drawn from its own operations that demonstrate that the health care law is helping patients and the company itself").

149. Kozinski & Banner, *supra* note 12, at 627–28.

150. *See* Maria Petrova, *Newspapers and Parties: How Advertising Revenues Created an Independent Press*, 105 AM. POL. SCI. REV. 790 (2011).

151. *See* Troy, *supra* note 12, at 87–88 (discussing newspaper reliance on advertising revenues).

152. *See, e.g.*, Piety, *supra* note 6, at 2584–85; Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1634–36 (2015).

153. *See* Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1354 (2015) (arguing that the "categorical approach stopped expanding decades ago"); Wu, *The Right to Evade Regulation*, *supra* note 8.

154. With apologies to Black Flag. *See Black Flag Roach Motel [01]—TV Commercial (1981)*, YOUTUBE (Sept. 7, 2009), https://www.youtube.com/watch?v=jKhGHxO-woc&ab_channel=Lottoman17 [https://perma.cc/7L34-KQ2W] (using tag line "Roaches check in, but they don't check out!").

155. Larry Alexander, *The Misconceived Search for the Meaning of "Speech" in Freedom of Speech*, 5 OPEN J. PHIL. 39 (2015); Richards, *supra* note 42, at 1507.

altogether.[156] To avoid this absurdity, the argument goes, the bounds of First Amendment protection should be drawn more narrowly, and not revisited.[157]

This plea for more static boundaries is pervasive because commentators feel angst about which laws will be ground by the gears of free speech challenges next.[158] But it lacks principle, except for the dubious principle of constitutional finality. Indeed, this objection reflects status quo bias by assuming that, although we have made censorious errors in the past, the current amount and type of regulation is correct. A brief consideration of history reveals the flaw in this thinking: the same pleas for static meaning of free speech were deployed when Oliver Wendell Holmes and Louis Brandeis expanded free speech rights to cover political dissidents.[159] The changes they brought to the doctrine seemed radical at the time and perfectly natural today. Our current doctrine, too, is likely not the best of all possible worlds.

The argument that free speech *could* expand to cover everything also distracts from the pressing questions courts currently face involving regulation where the state's express purpose is to disrupt communication.[160] Prohibitions of off-label promotion, drug detailing using data, and election-related speech by corporations come nowhere near the nebulous boundary between speech and conduct that must be maintained. Anxieties that free speech expansion has no limit may become ripe if courts are unwilling or unable to evaluate the merits of regulations that only incidentally affect expression, but today's key controversies are far from that point.[161] The government can endlessly tinker with the market using nonspeech regulations like preapproval, prohibition, and taxation of products and conduct-based services.

Even when the First Amendment applies, it leaves many regulatory regimes affecting speech unscathed. Governments generally can punish price fixing and fraud,[162] prevent discrimination in housing,[163] and protect confidentiality[164]

156. Richards, *supra* note 42, at 1530–31.

157. *But see* Shiffrin, *supra* note 45, at 1222 ("A person contemplating divorce who listens to an attorney's message about divorce services may be a consumer, yet it is curious to describe the message as relating solely to his or her economic interests.").

158. Adam Liptak, *Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 18, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/6N85-S9T5].

159. Dennis v. United States, 341 U.S. 494, 507–08 (1951); Whitney v. California, 274 U.S. 357, 376–77 (1927) (Brandeis, J., concurring).

160. *See* Bambauer, *supra* note 67, at 87; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

161. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003). *But see* David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249 (2013).

162. *See* Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35 (2015); Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 905–06 (2014).

163. Antidiscrimination laws may face freedom of religion challenges. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000).

164. *See* Woodrow Hartzog, *Chain-Link Confidentiality*, 46 GA. L. REV. 657, 688 n.128 (2012); *cf.* ACLU v. Alvarez, 679 F.3d 583, 610–11 (7th Cir. 2012) (Posner, J., dissenting).

without running afoul of free speech protections. Other important laws implicating speech—such as prohibitions on fraud,[165] sexual harassment,[166] and blackmail[167]—will likely withstand scrutiny. Critics' fears betray a lack of confidence in either the weight of the government interest at stake, or in the legislature's craft in shaping laws. For the former, many long-established laws have the logical validity and real world evidence to stand up to scrutiny. Where they do not, the legislature should accomplish their goals in a different way, without burdening speech.

E. Undesirable Results

The most intellectually honest critiques of First Amendment expansion are the least satisfying for the evolution of free speech theory. Put bluntly, progressive legal scholars do not like the consequences of unfettered commercial speech. Commercial speech interferes with regulatory activity that critics favor.[168] It threatens privacy regimes,[169] securities disclosure laws,[170] warnings on cigarette packages,[171] network neutrality rules,[172] campaign finance restrictions,[173] antitrust enforcement,[174] limits on health claims by food and supplement manufacturers,[175] and a host of other regulations.[176] Commercial speech's intermediate scrutiny standard requires judges to consider both the importance of the government interest in regulating and also the law's tailoring

165. SEC v. Pirate Inv'r LLC, 580 F.3d 233, 255 (4th Cir. 2009).

166. *See* Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995). *But see* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

167. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005).

168. *See* Cohen, *supra* note 4, at 1121; Wu, *The Right to Evade Regulation*, *supra* note 8; Adam Liptak, *First Amendment, 'Patron Saint' of Protesters, Is Embraced by Corporations*, N.Y. TIMES (Mar. 23, 2015), http://www.nytimes.com/2015/03/24/us/first-amendment-patron-saint-of-protesters-is-embraced-by-corporations.html [https://perma.cc/F4AM-MVV9].

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

170. *In re* Full Value Advisors, LLC, Exchange Act Release No. 61,327 (Jan. 11, 2010), https://www.sec.gov/rules/other/2010/34-61327.pdf [https://perma.cc/32QV-6EBJ]; Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

171. R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).

172. *See, e.g.*, Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014) (declining to address Verizon's First Amendment challenge to the Federal Communications Commission (FCC)'s Open Internet Order).

173. Citizens United v. FEC, 558 U.S. 310 (2010).

174. *See* EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS (2012), http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf [https://perma.cc/JYW7-2NB3] (paper commissioned by Google). *See generally* Greene, *supra* note 162.

175. POM Wonderful v. FTC, 777 F.3d 478 (D.C. Cir. 2015).

176. *See generally* Wu, *The Right to Evade Regulation*, *supra* note 8.

to it.[177] Critics have charged that this invites ill-equipped courts to second-guess the more expert and accountable branches of government.[178]

We are more sympathetic to this style of argument than one might expect because we take a consequentialist approach as well. However, progressive scholars have assumed that general trust in the regulatory state for improving social welfare through conduct regulation applies equally well to speech restrictions.[179] As this Article shows in Part III, this assumption is mistaken.

It is also worth noting that the critics' disdain for judicial second-guessing leaves no place for the First Amendment or any other individual liberties. Not long ago, political speech with any connection to commerce was limited or banned despite its value to public discourse.[180] *Hillary: The Movie* is speech that First Amendment advocates would take to the barricades to defend, if only a corporation had not produced it.[181] If there are any good reasons to override democratic processes in favor of free speech (and of course there are), these same reasons could very well support an increased skepticism for speech regulations wherever they occur, even if at first, to quote Holmes, the regulations seem "perfectly logical."[182]

Finding the major criticisms of expanded First Amendment coverage unconvincing, this Article now defends a libertarian approach to information. Expansive free speech may be the least bad option after all.

II.
INFORMATION LIBERTARIANISM

In this Section, we define our terms, differentiate our approach from libertarianism writ large, and explain the model's implications. Info-libertarianism exerts a normative preference for direct regulation of use or conduct rather than for information regulation.

A. Definitions

We begin with information. Defining "information" is at least as challenging as defining "speech," and varies by discipline.[183] For example, Claude Shannon, the father of information theory, defined information as a

177. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–66 (1980).

178. *See* Jackson & Jeffries, Jr., *supra* note 13; Wilson, *supra* note 86, at 2384–85; Wu, *The Right to Evade Regulation*, *supra* note 8.

179. *See* Jackson & Jeffries, Jr., *supra* note 13.

180. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).

181. Citizens United v. FEC, 558 U.S. 310 (2010).

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

183. *See* Bambauer, *Conundrum*, *supra* note 35, at 621–24 (providing an overview of how fields such as economics, behavioral biology, and mathematics define information).

measure of uncertainty, or entropy.[184] The less the uncertainty, the less information conveyed.[185] Cognitive scientists often view information as enabling generalization: a subset communicates attributes about the set as a whole.[186] Physics deals with information through problems such as quantum entanglement.[187] Economists Carl Shapiro and Hal Varian described information as "anything that can be digitized – encoded as a stream of bits."[188] Semantics has mostly agreed on a general definition of information, whereby information consists of data, the data must be well formed, and those well-formed data are meaningful.[189] Legal scholars have mined these disciplines to draw on their definitions in areas such as intellectual property,[190] contract law,[191] and cybersecurity.[192]

For our purposes, we need a definition with Shapiro and Varian's conceptual breadth that also takes account of analog information such as books, newspapers, and paintings. And we need to cover data that is nonfactual but carries semantic meaning, such as abstract art.[193] Thus, we offer our own working definition here, knowing that it is necessarily imperfect: information is communication or signals between a sender and a receiver, where those communications are or could be useful to human beings.[194] People are thus potentially in the loop, but do not actually need to be.[195] We think this definition

184. C. E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379 (1948).

185. *Id.*

186. *See* Ronaldo Vigo, *Representational Information: A New General Notion and Measure of Information*, 181 INFO. SCI. 4847 (2011).

187. *See* Jeffrey Bub, *Quantum Entanglement and Information*, *in* STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2015), http://plato.stanford.edu/archives/sum2015/entries/qt-entangle [https://perma.cc/4ENH-D88Q].

188. CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 3 (1999).

189. Luciano Floridi, *Semantic Conceptions of Information*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2015), http://plato.stanford.edu/archives/spr2015/entries/information-semantic [https://perma.cc/JL7J-WGQ3]. A datum is defined as "a putative fact regarding some difference or lack of uniformity within some context." *Id.*

190. *See* Deven R. Desai, *An Information Approach to Trademarks*, 100 GEO. L.J. 2119 (2012); Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of "Authorship,"* 2004 BYU L. REV. 69; Jeanne Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014).

191. *See* Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 MICH. L. REV. 1479 (2009).

192. *See* Bambauer, *Conundrum*, *supra* note 35.

193. *See* Bonneau, *supra* note 62.

194. Daniel Farber offers a similar definition: information "includes all intellectually useful material such as ideas and theories as well as facts." Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 n.8 (1991).

195. One can readily think of communication that is not information, such as when a moth hears a bat's echolocation and begins evasive flight. However, once biologists become interested in studying interactions between bats and moths, government regulation of recording echolocation would need to withstand scrutiny. *See generally* M. Brock Fenton & James H. Fullard, *The Influence of Moth Hearing on Bat Echolocation Strategies*, 132 J. COMP. PHYSIOLOGY 77 (1979).

usefully bridges the mathematical approach of communications theory and the more phenomenological orientation of constitutional theory.[196]

The definition could likely be improved, and may not be sufficiently precise at the margins, but this Article is not overly concerned with edge cases where precision matters. Instead, our interest is in areas where it is clear that the regulation targets information. For example, network neutrality regulation is a controversy at the margins of our definition.[197] Plainly, the data routed over the Internet is information. However, the act of routing data is not likely to be information: there is usually no metamessage from moving bits (where the message is in the bits themselves).[198] Internet service providers (ISPs) rarely send meaningful signals about the bits that they do or do not route; hence, regulation of routing does not seem to be regulation of information.[199] This is in contrast to a cable television provider or bookstore, which may intend to signal based upon the information it chooses to carry.[200] In most situations, though, it is plain whether regulation targets information or behavior.

We use "speech" to mean information within the First Amendment's scope. Put differently, speech is information for which regulation draws constitutional scrutiny. Information is not automatically speech; whether information constitutes speech is a legal conclusion, not a property of that communication.[201] There is information that is not speech. For example, obscenity,[202] fighting words,[203] and child pornography[204] are all clearly information. In fact, the concern is that these materials are too much of interest to human receivers. But they are not protected speech. These historically excluded categories may not be the only ones, as there are live controversies over issues such as computer-

196. *See* Shannon, *supra* note 184; Cohen, *supra* note 4, at 1131 (contrasting definitions of speech "based on the distinction between signal and noise" from cybernetics with constitutional law's emphasis on "the creation of meaning"); Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1456 (2014).

197. *See* FCC, In the Matter of Protecting and Promoting the Open Internet, No. 14-28 (2015).

198. *Cf.* Bambauer, *Conundrum*, *supra* note 35, at 625 (arguing that "Internet data counts as information when it is something that users seek to access or engage with").

199. *Cf.* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006). One possible exception would be family-friendly ISPs or other services that deliberately curate content traveling along their pipes. *See* Derek E. Bambauer, *Foxes and Hedgehogs in Transition*, 13 J. TELECOMM. & HIGH TECH. L. 1, 15 (2015).

200. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997).

201. This Article uses "information" and "expression" interchangeably.

202. *See* Miller v. California, 413 U.S. 15 (1973); United States v. Little, 365 F. App'x 159 (11th Cir. 2010).

203. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

204. *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982).

generated information[205] and copyright authorship[206] that take up the speech/information divide.

Conversely, all speech is likely information, though there may be difficult edge cases, including expressive conduct. For example, David O'Brien's burning of his draft card[207] and Gregory Lee Johnson's burning of the American flag[208] are challenging mixtures of information and action. If both defendants had burned their articles for fuel, there would be no information at all. But O'Brien and Johnson were prosecuted because they both intended to convey a signal to viewers, and the viewers understood it as such.[209]

In short, we define information to mean communication between a sender and a receiver that is potentially useful to human beings. Info-libertarianism resists government suppression of information by imposing a skeptical review of those state actions. Here, our definitions are narrower than the scope of free speech law. The claims in this Article are limited to state actions that restrict information, not those that mandate or provide it.[210] Compelled speech and government speech fall outside the scope.

B. Implications

The principal implication of info-libertarianism is that it prefers direct regulation of conduct to achieve regulatory goals over indirect regulation of information. The theory's claims do not extend beyond information. We do not defend libertarianism generally, and have each advocated for greater governmental regulation in other work.[211] This Article presents reasons to be skeptical of harms alleged to result from information and the political processes that produce regulation. These reasons usually do not apply to other forms of regulation. Put formally, we are agnostic about libertarian claims regarding the proper scope of regulation.

In fact, info-libertarianism will sometimes undermine political libertarianism. The normative goal of info-libertarianism is to shift the regulatory target from information to the conduct or behavior that causes harm. A

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205. *See* VOLOKH & FALK, *supra* note 174; Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629 (2014); James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868 (2014); Wu, *Machine Speech*, *supra* note 8.

206. *See* Bambauer, *Exposed*, *supra* note 35, at 2070–85; Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 STAN. TECH. L. REV. 5; Rebecca Tushnet, *How Many Wrongs Make a Copyright?*, 98 MINN. L. REV. 2346, 2369–71 (2014).

207. United States v. O'Brien, 391 U.S. 367 (1968).

208. Texas v. Johnson, 491 U.S. 397 (1989).

209. O'Brien burned the card in an attempt to persuade people to oppose the Vietnam War and Selective Service. *O'Brien*, 391 U.S. at 370. Johnson burned the flag to express opposition to the policies of then-President Ronald Reagan. *Johnson*, 491 U.S. at 406.

210. Fried, *supra* note 19, at 234 (describing government suppression of communications between individuals as the "paradigmatic free speech case").

211. *See supra* note 35.

government that regulates directly regulates best. Direct regulation is more transparent and more accountable.

To give one example: Vermont sought to control prescription drug prices by banning the provision of prescription information to pharmaceutical companies that were using the data for promotional purposes.[212] The Supreme Court struck down the ban as a content-based restriction of speech that failed to meet strict scrutiny.[213] This outcome is consistent with info-libertarianism. However, we have no quarrel with direct regulation that manages drug prices or controls a doctor's choice between generic and brand-name pharmaceuticals.[214] Vermont could have taxed brand-name or high-cost drugs.[215] It might have required substitution of generics by default.[216] Or it could have mandated the prescription of generics where health outcomes would be equivalent.[217] Some states mandate substitution of generics for brand name drugs unless a physician specifies otherwise, which seems entirely sensible.[218] The federal government could decide to provide coverage only for generic drugs under Medicare Part D.[219] And, in some circumstances, direct price controls might make sense.[220] Info-libertarianism is open to each of these, just not the restriction on information that the state actually used.

We advance three arguments in favor of direct regulation. First, taking government rationales at face value, direct regulation of behavior is usually more effective than information restrictions. For example, the ban on advertising drug prices in *Virginia Board* neither prevented price competition nor acted as an effective subsidy for low-margin but socially valuable services. Consumers could share information about which pharmacies offered the lowest-cost medications; informal networks were particularly potent in small

212. *See* Sorrell v. IMS Health Inc., 564 U.S. 552 (2011). The State claimed the law intended to protect doctor privacy, a position no one else took seriously. *See* Cohen, *supra* note 4, at 1130.

213. *Sorrell*, 564 U.S. at 579. While the *Sorrell* opinion suggested that the statute discriminated unlawfully on the basis of both content and viewpoint, the Court recently characterized it as content-based. Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

214. *See, e.g.*, MASS. GEN. LAWS ch. 112, § 12D (2015) (mandating substitution of generic for brand-name drug except where practitioner indicates "no substitution").

215. *Cf. Annual Fee on Branded Prescription Drug Manufacturers and Importers*, IRS (May 19, 2015), http://www.irs.gov/Businesses/Corporations/Annual-Fee-on-Branded-Prescription-Drug-Manufacturers-and-Importers [https://perma.cc/EDV4-XXV9] (describing the Affordable Care Act tax on entities selling brand-name drugs to government programs).

216. *See, e.g.*, MASS. GEN. LAWS ch. 112, § 12D.

217. *Cf. id.*

218. *Id.*

219. *See What Drug Plans Cover*, MEDICARE.GOV, https://www.medicare.gov/part-d/coverage/part-d-coverage.html [https://perma.cc/V6SU-CYGX].

220. *Cf.* F. Scott Kieff, *Removing Property from Intellectual Property and (Intended?) Pernicious Impacts on Innovation and Competition*, *in* COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION 416, 424–25 (Geoffrey A. Manne & Joshua D. Wright eds., 2011) (describing federal government efforts after the attacks of September 11, 2001, to force Bayer to manufacture large quantities of ciprofloxacin and sell them cheaply).

communities.[221] Newspapers could report on drug price differentials.[222] And, ultimately, it is not clear that the restriction of information achieved any cross subsidization of less lucrative services anyway, since consumers could purchase drugs at one store and services at another.[223]

If Virginia wanted to actively manage the drug and pharmacy services markets, it had many more effective and transparent options at its disposal. It could have managed drug prices using price controls.[224] Or, it could have tailored policy to protect low-income consumers via subsidies or tax credits.[225] Price controls would have been uniformly effective for Virginia consumers, since neighboring states' pharmacies would not have been able to fill a prescription written by a Virginia doctor unless that doctor was also licensed in their state. And controls would have been quite effective for nonprescription medication, since only consumers at Virginia's borders would have found it cost-effective to cross state lines to buy these drugs. Virginia similarly could have subsidized desirable but low-margin services, as many states do with childhood immunizations.[226] Government subsidies ensure universal accessibility if built in directly (such as via governmental purchase of vaccines), and a large degree of accessibility if made available via rebate or tax credit. In short, Virginia could have accomplished its ends far more effectively by implementing direct, rather than information, regulation. Direct regulation will nearly always be more effective at achieving the government's stated end than controls on information.

Second, direct regulation has fewer collateral consequences for socially useful information, including for listeners and speakers who would not be subject to a conduct-based regulatory regime. When Virginia banned abortion ads, its newspapers were distributed beyond its borders, so ads for New York abortion providers were viewable in states where such services were legal.[227] Bans on promoting pharmaceutical drugs for off-label uses prevented physicians from accessing information not only about a drug's unsafe off-label uses but safe ones, too.[228] Advertising about the value of ingesting dietary fiber in cereal educated even noncereal consumers.[229] Information generally has positive externalities,

221. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763–65 (1976).

222. *Id.* at 764–65.

223. *Cf. id.* at 768–70.

224. Jackson & Jeffries, Jr., *supra* note 13, at 32; *cf.* Rubin v. Coors Brewing Co., 514 U.S. 476, 479 (1995).

225. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

226. *Immunizations Policy Issues Overview*, NCSL (Jan. 12, 2015), http://www.ncsl.org/research/health/immunizations-policy-issues-overview.aspx [https://perma.cc/BU4U-RRUA].

227. *See* Bigelow v. Virginia, 421 U.S. 809, 822–25 (1975).

228. United States v. Caronia, 703 F.3d 149 (2d Cir. 2012); Amarin Pharma, Inc. v. U.S. Food & Drug Admin., 119 F. Supp. 3d 196 (S.D.N.Y. 2015).

229. J. Howard Beales III, *Health Related Claims, the Market for Information, and the First Amendment*, 21 HEALTH MATRIX 7, 18–19 (2011); Pauline M. Ippolito & Alan D. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, FTC (1989), https://www.ftc.gov/sites/default/files/documents/reports/health-claims-advertising-and-labeling-study-cereal-

but they are difficult to predict. Direct regulation leaves the potential for those benefits undiminished.

The constitutional law concept of *tailoring* captures the problems of ineffectiveness and collateral consequences.[230] Direct rules will generally be more carefully tailored than indirect regulation of information. Information regulation risks being underinclusive, overinclusive, or both. Supreme Court precedent shows the myriad ways in which speech rules are underinclusive: beer drinkers could still consume high-alcohol beer even if the label did not list its strength, and alcoholics surely would.[231] Virginia citizens could still shop for the cheapest drugs, even if advertisements did not list prices. Vermont physicians could still prescribe brand-name drugs where generics would work equally well.

Overinclusiveness is also common. Limits on corporate speech intended to control product marketing can undercut the circulation of relevant information, even about political issues. Bans on transferring information about a drug's off-label uses can harm patients for whom that use is the only therapeutically effective option. And responsible yet thrifty drinkers along with drunkards are impeded in finding lower-priced alcohol.

Some regulation suffers both flaws. For example, New York banned utilities from including advertising that promoted electricity consumption with bills. The law not only blocked them from encouraging use during periods when powerplants were idle (improving efficiency), but also did nothing to prevent utilities from advertising other forms of consumption, such as fuel-hogging vehicles.[232]

By contrast, direct regulation is generally more targeted. The more precise focus on the harm at issue means that most if not all interest groups will have some stake in participation, pushing legislators to draft more finely. And wildly untargeted programs risk invalidation under the (minimal) scrutiny of rational basis review.[233]

Finally, direct regulation is more transparent, leading to greater political and moral accountability.[234] Direct regulation forces the legislature or executive to reveal, and confront directly, its end goal. The Vermont statute in *Sorrell* could pretend to be protecting privacy when its real reason was to cabin drug prices.[235] Disguising price controls as privacy protections likely limited both the regime's efficacy and political opposition to it (because of the lesser efficacy).

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market/232187.pdf [https://perma.cc/8AQG-U46C]; Timothy J. Muris, *Developments in Consumer Protection: Economics and Consumer Protection*, 60 ANTITRUST L.J. 103 (1991).

230. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

231. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

232. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 559–60, 567 (1980).

233. *See* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281 (2015).

234. *Cf.* Bambauer, *supra* note 37.

235. *See* Cohen, *supra* note 4, at 1130.

Straightforward rules limiting drug prices or doctors' prescribing options would be more likely to cut costs but would also have to run the gamut of the political process, complete with opposition by doctors and pharmaceutical companies. Debates about the best way to optimize health costs and drug innovation would receive their full airing. Structuring the law as a ban on information disguised the stakes and scattered its burdens.

Information regulation is too often the product of avoiding these political fights. It frequently proceeds on the theory that anything worth doing is worth doing badly.[236] We disagree. The next Section lays out the unappreciated hazards of information regulation.

Info-libertarianism likely comes at a cost. Some regulatory regimes may not survive scrutiny under its approach because they require governmental control over information itself. If these rules are socially valuable and struck down under review, then their loss must be counted as a debit in info-libertarianism's ledger. Laws that prohibit surreptitious recording of activities in farming and agricultural facilities ("ag gag" laws) would be unconstitutional under this Article's approach[237]—but so would regulations that prohibit covert recording at facilities that provide abortions.[238] Some trade secret laws or enforcement might run afoul of info-libertarianism, especially because trade secret has few if any built-in accommodations for free speech protection.[239] The tort of intentional infliction of emotional distress would likely be circumscribed if not barred altogether.[240] Gay athletes would be able to call their sporting contests the "Gay Olympic Games."[241] And we view certain other regimes, such

236. Jack Gilbert, *Failing and Flying*, *in* REFUSING HEAVEN 18 (2005) ("[A]nything worth doing is worth doing badly.").

237. *See* Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2014); Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, ATLANTIC (Mar. 20, 2012), http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674 [https://perma.cc/4PLC-EGYA].

238. *See* Ema O'Connor, *Attorney General of California to Review Organization Behind Planned Parenthood Videos*, BUZZFEED NEWS (July 25, 2015), http://www.buzzfeed.com/emaoconnor/democrats-push-attorney-general-to-investigate-organization#.do6V3XpjN [https://perma.cc/HM9X-UV7B].

239. *See* DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 14 (Cal. 2003); Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777 (2007).

240. *See* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300; Hustler Mag., Inc. v. Falwell, 485 U.S. 46 (1988); Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

241. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (finding that the First Amendment does not prohibit Congress from granting exclusive commercial or promotional use of the word "Olympics").

as the right of publicity,[242] bans on gay conversion therapy,[243] and off-label promotion[244] as potentially vulnerable as well. Knowing that there is inevitably error in any judicial assessment, we must take the bitter with the sweet.[245]

Still, the available evidence suggests that info-libertarianism's benefits will far outweigh its costs. Its listener-centric orientation protects our right to learn and to create knowledge. It grants the government wide-ranging authority to control behavior so long as it does so directly, without disguising its goals by curtailing speech. And info-libertarianism both respects and checks democratic processes by focusing on their competence along with their structural shortcomings. The next Section builds the case for skepticism of information regulation.

III.
NORMATIVE DEFENSES FOR INFO-LIBERTARIANISM

Legal scholars have defined and explained the American commitment to free speech through a patchwork of overlapping theories about deliberative democracy, autonomy, freedom of thought, and the marketplace of ideas.[246] Deliberative democracy theories of the First Amendment are concerned that popular decisions to quash speech that seems dangerous or wrong may entrench the current rulers, trample minority views, and impinge upon democratic institutions.[247] Autonomy and free-thought theories predict that speech of low value for most of us can enlighten and inspire a few of us.[248] And the marketplace of ideas analogy argues that censorship will fail to thwart bad ideas as effectively as open dialogue, and may kill off good ideas in the process.[249]

All of these theories are info-libertarian because they embrace the historical worries about governmental power that generated the Bill of Rights. Although some theories (such as deliberative democracy) are defined by what makes speech good, each theory contains a necessary assumption about what makes the

242. *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1512–22 (9th Cir. 1993) (Kozinski, J., dissenting) (rejecting the majority's granting of protection to Vanna White against a Samsung commercial's use of a blond-haired, dress-wearing robot in a futuristic game show); Wendt v. Host Int'l, 125 F.3d 806 (9th Cir. 1997) (remanding grant of summary judgment requiring new evidence to understand the "likeness" claim).

243. *See* Pickup v. Brown, 740 F.3d 1208, 1215–21 (9th Cir. 2014) (O'Scannlain, J., dissenting) (rejecting the panel's characterization of the communications as nonexpressive conduct).

244. U.S. v. Caronia, 703 F.3d 149 (2d Cir. 2012) (vacating judgment of conviction for prosecuting for mere off-label promotion).

245. Bailey v. United States, 133 S. Ct. 1031, 1045 (2013) (Scalia, J., concurring).

246. Bambauer, *supra* note 67, at 91–92.

247. Bork, *supra* note 55, at 26; Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 LAW & SOC. INQUIRY 521 (1977); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

248. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Redish, *supra* note 19; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

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

political process *bad*. Each is driven by skepticism about seemingly sound regulations of speech.[250] And the skepticism, in turn, is driven by one core insight: humans are incompetent at designing good rules of censorship. We do a poor job assessing the costs of speech. The perceived risks are deceiving and frightening and spur censorship efforts that are not in the long-term best interest of society. This makes speech politically weak. Consequently, its regulations are blighted with structural problems: collective action, public choice, government entrenchment, and regulatory overconfidence.

This Section explains why skepticism is warranted as a general rule. It provides modern evidence supporting the theory of info-libertarianism. Part III.A shows that the threats from speech are routinely exaggerated, and the benefits often discounted. This leaves speech vulnerable to a host of intractable political problems described in Part III.B.

A. Assessment Problems

The imagination runs darker with speech than with other problems. This Section describes three common problems that especially plague the assessment of harms claimed to be caused by speech. The most pervasive and well-documented is the "third-person effect"—a perceptual bias that fools us into believing that other people are more prone to the negative influence of speech than we are. The third-person effect is closely related to the additional problem of false causation, wherein speech is wrongly blamed for tricky social problems that have no good solutions. Finally, speech regulations often suffer from the problem of tautological injury, a mistake rarely made in other contexts.

1. The Third-Person Effect

In 1983, the sociologist W. Phillips Davison hypothesized that people believe speech negatively influences others much more than it influences themselves.[251] Davison's theory has been tested and validated with spectacular success. Evidence of the third-person effect has breadth and depth; it has been documented in a wide array of contexts, and the effects are large. For example, people generally believe that others spend much more time on Facebook, engage with it more intensively, and suffer more harm from it than they do themselves.[252] Third-person effects also distort perceptions about the negative

250. Martin Redish expressed similar skepticism when he argued that the scope of free speech coverage needs to be broad to foster the self-realization that is a necessary prerequisite for all First Amendment theories. Redish, *supra* note 19, at 594 (arguing that "[a]ny external determination that certain expression fosters self-realization more than any other is itself a violation of the individual's free will"); *see also* Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012).

251. W. Phillips Davison, *The Third-Person Effect in Communication*, 47 PUB. OPINION Q. 1 (1983).

252. Mina Tsay-Vogel, *Me Versus Them: Third-Person Effects Among Facebook Users*, 2015 NEW MEDIA & SOC'Y 1.

influence of rap lyrics,[253] violent video games,[254] idealized body image,[255] sexting,[256] product placement,[257] and political advertising among other things.[258]

The only documented exceptions to the third-person effect are findings consistent with a "first-person effect" (or a "reverse third-person effect"), in which people believe they were more influenced by the *positive* effects of speech than everybody else.[259] For example, viewers who had recently watched *An Inconvenient Truth*, Al Gore's documentary on climate change, reported that they expected to take more action for the good of the environment than other people who had watched the movie.[260] First-person effect findings are consistent with third-person effects: ego enhancement and superiority biases explain both.[261] Together, these effects reveal a misplaced confidence, widely shared, that our own relationship to speech is unusually enlightened.[262]

The third-person effect and the superiority complex that produces it lead unsurprisingly to a taste for censorship.[263] People often support legal restraints

253. Douglas M. McLeod et al., *Support for Censorship of Violent and Misogynic Rap Lyrics*, 24 COMM. RES. 153 (1997).

254. Erica Scharrer & Ron Leone, *First-Person Shooters and the Third-Person Effect*, 34 HUM. COMM. RES. 210 (2008); Zhi-Jin Zhong, *Third-Person Perceptions and Online Games: A Comparison of Perceived Antisocial and Prosocial Game Effects*, 14 J. COMPUTER-MEDIATED COMM. 286 (2009).

255. Stella C. Chia, *When the East Meets the West: An Examination of Third-Person Perceptions About Idealized Body Image in Singapore*, 12 MASS COMM. & SOC'Y 423 (2009).

256. Ran Wei & Ven-Hwei Lo, *Examining Sexting's Effect Among Adolescent Mobile Phone Users*, 11 INT'L J. MOBILE COMM. 176 (2013).

257. Dong-Hee Shin & J. K. Kim, *Alcohol Product Placements and the Third-Person Effect*, 12 TELEVISION & NEW MEDIA 412 (2011).

258. Jeremy Cohen & Robert G. Davis, *Third-Person Effects and the Differential Impact in Negative Political Advertising*, 68 JOURNALISM Q. 680 (1991).

259. Anita G. Day, *Out of the Living Room and into the Voting Booth*, 52 AM. BEHAV. SCIENTIST 243, 246 (2008); Sonny Rosenthal et al., *Efficacy Beliefs in Third-Person Effects*, 2015 COMM. RES. 1, 4.

260. Sue-Jen Lin, *Perceived Impact of a Documentary Film: An Investigation of the First-Person Effect and Its Implications for Environmental Issues*, 35 SCI. COMM. 708 (2013). First-person effects are not as strong or consistent as third-person effects. Prabu David, Kaiya Liu & Michael Myser, *Methodological Artifact or Persistent Bias?: Testing the Robustness of the Third-Person and Reverse Third-Person Effects for Alcohol Messages*, 31 COMM. RES. 206, 227 (2004).

261. Lisa Henriksen & June A. Flora, *Third-Person Perception and Children: Perceived Impact of Pro- and Anti-Smoking Ads*, 26 COMM. RES. 643 (1999); Richard M. Perloff, *The Third-Person Effect: A Critical Review and Synthesis*, 1 MEDIA PSYCHOL. 353, 359 (1999) (defining ego enhancement as ego protection by perceiving oneself as less influenced than others would be). Ego enhancement biases are also called "biased optimism." Day, *supra* note 259; *see* Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 SCI. 1232, 1232 (1989) ("When asked about their own chances, people claim they are less likely to be affected than their peers.").

262. This is especially true when one's views are compared to the poor, the uneducated, the young, or those with a different political ideology. Patrick C. Meirick, *Topic-Relevant Reference Groups and the Dimensions of Distance: Political Advertising and First- and Third-Person Effects*, 31 COMM. RES. 234 (2004) (discussing those with a different political ideology); Erica Scharrer, *Third-Person Perception and Television Violence*, 29 COMM. RES. 681 (2002) (finding that these groups are believed to be the most influenced).

263. Michael B. Salwen, *Perceptions of Media Influence and Support for Censorship*, 25 COMM. RES. 259 (1998); Hernando Rojas et al., *For the Good of Others: Censorship and the Third-Person Effect*, 8 INT'L J. PUB. OPINION RES. 163 (1996).

on speech like pornography, violent television, or advertising because they think their peers are less capable of self-regulating preferences and conduct.[264] Even support for censorship of core political speech can be explained in part by third-person effects.[265] Americans favor the creation of new government agencies to screen and censor political attack ads and televised trials out of fear that they would have a negative influence over others, but not themselves.[266] And a study of the 2008 presidential election found significant support for censorship of pre-election voter polls because people believed that pollsters misrepresented true attitudes and that polls would influence the voting behavior of other people. Both of these assumptions were incorrect.[267]

Research on the third-person effect has also unearthed a paradox: a message is most vulnerable to censorship just when it is dying on its own. The less socially accepted a message is, the greater the perceptual gap between the predicted effects on others and ourselves.[268] Censorship can be counterproductive for reviled messages, even if stamping out nonconforming beliefs were a legitimate goal. Disfavored messages inspire mitigation efforts. They prompt recipients of the message who disagree with it to engage in counterspeech, to vote against the position taken by the message, and to take other responsive actions.[269] Altogether, this dynamic suggests that people are prone to believe that speech regulation is most needed at the point when the marketplace of ideas is already functioning well.

This insight is consistent with Supreme Court jurisprudence for political speech. Statutes prohibiting desecration of the American flag probably did more to induce flag burning than any individual act of flag burning ever could have by

264. Cynthia Hoffner et al., *Support for Censorship of Television Violence*, 1999 COMM. RES. 726; Rojas et al., *supra* note 263, at 179; Rosenthal et al., *supra* note 259, at 5, 16 (studying support for restrictions on pornography). However, the relationship between the third-person effect and a preference for censorship, while statistically significant, is not large. Jie Xu & William J. Gozenbach, *Does a Perceptual Discrepancy Lead to Action? A Meta-Analysis of the Behavioral Component of the Third-Person Effect*, 20 INT'L J. PUB. OPINION RES. 375 (2008).

265. Michael B. Salwen & Michel Dupagne, *The Third-Person Effect: Perceptions of the Media's Influence and Immoral Consequences*, 26 COMM. RES. 523 (1999).

266. *Id.* at 535.

267. Ran Wei et al., *Third-Person Effect and Hostile Media Perception Influences on Voter Attitudes Toward Polls in the 2008 U.S. Presidential Election*, 23 INT'L J. PUB. OPINION RES. 169 (2011) (noting that all of the more than 150 published polls put Barack Obama in the lead).

268. Albert C. Gunther & Esther Thorson, *Perceived Persuasive Effects of Product Commercials and Public Service Announcements*, 19 COMM. RES. 574 (1992); Jisu Huh et al., *The Third Person Effect and Its Influence on Behavioral Outcomes in a Product Advertising Context: The Case of Direct-to-Consumer Prescription Drug Advertising*, 31 COMM. RES. 568, 574, 589 (2004); Ran Wei & Guy Golan, *Political Advertising on Social Media in the 2012 Presidential Election: Exploring the Perceptual and Behavioral Components of the Third-Person Effect*, 7 ELECTRONIC NEWS 223, 225 (2013).

269. Matthew Barnidge & Hernando Rojas, *Hostile Media Perceptions, Presumed Media Influence, and Political Talk: Expanding the Corrective Action Hypothesis*, 26 INT'L J. PUB. OPINION RES. 135 (2014); Guy J. Golan et al., *Likelihood to Vote, Candidate Choice, and the Third-Person Effect: Behavioral Implications of Political Advertising in the 2004 Presidential Election*, 52 AM. BEHAV. SCIENTIST 278 (2008); Rojas et al., *supra* note 263. *But see* Wei & Golan, *supra* note 268, at 234–35 (finding that the third-party effect did not induce corrective countermessaging by the study subjects).

giving the act the mystique of forbiddenness. Since the Supreme Court struck down flag-burning statutes in *Texas v. Johnson*,[270] virtually no one bothers to set Old Glory ablaze.[271]

Of course, speech is not the only target for perceptual biases. Human judgment is clouded about other risks, too. For example, people often believe that they can handle the responsibilities of dangerous machinery or weapons better than others can.[272] But biases always play a role in the perception of speech because the threat from putatively dangerous speech hinges on the intelligence and self-control of the listener. Because the feared harms from speech require interpretation and action by the audience, third-person effects distort the assessment of risk.

In theory, speech regulation could be desirable despite the perceptual distortions from third-person effects if speech really did cause harm. That is, if our estimates about the effect of speech on other people are correct (or close to it), regulation might be wise even if we have an ego-preserving blind spot for our own faults. But this is not the case. When decent data are available, popular assumptions about the negative influence of speech are consistently exaggerated. People overestimate negative effects from advertising, violence in the news, defamatory statements, and many other types of expression.[273]

This persistent pessimism makes speech an uncooperative medium for standard cost-benefit analysis. Regulators and scholars estimate the costs of speech based on the presumed effects that the speech will have on other, less prudent listeners. The estimates are off not only because we tend to misjudge the

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270. 491 U.S. 397 (1989).

271. Prior to the 2016 presidential campaign, the only example we found was a plan to publicly burn the U.S. flag as well as a Confederate flag by a group called "Disarm NYPD" to demonstrate against "systemic racism." Ida Siegal, *Plans to Burn American Flag in Brooklyn War Memorial Park to Protest Racism Spur Controversy*, NBC (July 1, 2015), http://www.nbcnewyork.com/news/local/Activist-Group-Burn-American-Flag-Fort-Greene-Park-311112791.html [https://perma.cc/CB38-6F9W]. In fact, if the flag burning occurred at all, it occurred in secret, the night before it was scheduled to happen. Kate Briquelet, *Brooklyn's Obnoxious Secret Flag Burning Ends with a Whimper*, DAILY BEAST (July 1, 2015), http://www.thedailybeast.com/articles/2015/07/01/brooklyn-s-obnoxious-secret-flag-burning-ends-with-a-whimper.html [https://perma.cc/8DAG-RQ7P] ("A group burned the American flag—but was too scared to show up to its own media circus."). But the rise of Donald Trump inspired Gregory Johnson, of *Texas v. Johnson*, to return to flag burning as a political statement. *See* Anna Merlan, *Communist Group That Loves Burning Flags Probably Thrilled Trump Gave Them a Reason to Burn Flags*, JEZEBEL (Nov. 30, 2016), https://theslot.jezebel.com/communist-group-that-loves-burning-flags-probably-thril-1789516000 [https://perma.cc/QG7Q-SCMA].

272. *See, e.g.*, Baruch Fischhoff et al., *How Safe Is Safe Enough? A Psychometric Study of Attitudes Towards Technological Risks and Benefits*, 9 POL'Y SCI. 127 (1978); Kurt Neuwirth et al., *Protection Motivation and Risk Communication*, 20 RISK ANALYSIS 721 (2000).

273. Jeremy Cohen et al., *Perceived Impact of Defamation: An Experiment on Third-Person Effects*, 52 PUB. OPINION Q. 161 (1988); Gunther & Thorson, *supra* note 268; Richard M. Perloff, *Third-Person Effect Research, 1983–1992: A Critical Review and Synthesis*, 5 INT'L J. PUB. OPINION RES. 167 (1993); Richard M. Perloff, *Ego-Involvement and the Third-Person Effect of Televised News Coverage*, 16 COMM. RES. 236 (1989); Salwen, *supra* note 263, at 261.

impressionability of other people, but also because we wrongly assume speech is responsible for the bad judgment of the people who *do* cause harm. As the next Section will elaborate, speech is falsely accused of causing many social ills when the actual causes are resistant to cure.

2. False Causation

Speech is a tempting scapegoat for many social ailments. It offers a vivid and parsimonious explanation for unwanted trends because words of encouragement frequently accompany the undesirable conduct. The presence of speech, a correlate, is mistaken for the cause, and censorship provides a seemingly easy and obvious solution.

The evidentiary record is particularly well developed for violent video games. This is because the gap between perceptions of harm and reality was exposed in *Brown v. Entertainment Merchants Association*.[274] In that case, a California statute restricted the sale of violent video games to minors to reduce youth aggression.[275] The Supreme Court found that video games were protected expression,[276] so the survival of the statute depended on California's ability to establish a link between violent video games and violent acts.

The State offered some social science evidence, but the research showed only a crude correlation between children playing violent video games and engaging in aggressive behavior. This research could easily be explained by reverse causation—children who engaged in aggressive behavior also played violent video games. Indeed, it seems likely that violent children tend to be more attracted to violent video games than other, less violent children.[277] In fact, even the crude correlation was illusory. When one of California's key studies was reanalyzed to control for gender, the correlation nearly vanished.[278] (To reduce violence, we just need to get rid of boys.) Moreover, if the study were sound, it would have proved too much, since the same research design produced similar results based on exposure to Bugs Bunny cartoons and violent biblical passages.[279]

Medical and social science research that used better outcome measures (actual incidents of violence) and appropriate controls found either no

274. 564 U.S. 786 (2011).

275. *Id.*

276. *Id.*

277. Brief of Social Scientists et al. as Amici Curiae Supporting Respondents at 7, *Brown*, 564 U.S. 786 (No. 08-1448) (critiquing the 2004 survey by Douglas Gentile). As the brief points out, the measure for "aggressive behavior" is questionable because it includes "argument[s] with a teacher" as one of its indicators. *Id.* at 7–8. The Gentile Study itself cautioned that "[i]t is important to note . . . that this study is limited by *its correlational nature. Inferences about causal direction should be viewed with caution.*" *Id.* at 7.

278. *Id.* at 9.

279. Brief of Respondents at 41–42, *Brown*, 564 U.S. 786 (No. 08-1448) (citing studies introduced by the state of California as well as Brad J. Bushman et al., *When God Sanctions Killing: Effect of Scriptural Violence on Aggression*, 18 PSYCH. SCI. 204, 206 (2007)).

relationship or a negative relationship between violence and violent video games.[280] For regulators, these findings are hard to accept. The actual causes of adolescent violence—home life, genetics, and randomness[281]—are much more difficult to change. When speech is the culprit, the solution is simple: stop the speech. But violent video games and other violent media do not have significant influence on the bad decisions that aggressive people make.[282] Although some continue to believe that the Supreme Court got the science in this case wrong, pointing to the larger number of experts signing onto amicus briefs supporting California,[283] California's position cannot be squared with history. Our virtual worlds have become much more violent and interactive while our real world has become more peaceful, and juvenile crime trends have tracked the trends in all other age groups throughout the period of video game proliferation.[284] Any video game effect would have to be small.

As the video game debate shows, commercial speech, with its lower level of social status and constitutional protection, is a magnet for third-person effects and false causation. Regulators and their constituents frequently believe that advertising will cause more pernicious effects than it actually does. Although firms can (and do) take advantage of unconscious biases in their marketing campaigns,[285] their work is quite difficult because of the pronounced skepticism and debiasing heuristics that consumers direct toward advertising. Consumers are intensely critical of marketing.[286] They consistently believe that ads insult their intelligence, distort information about the product, and manipulate their audiences.[287] Consumers are surprisingly capable of detecting manipulation and have a nuanced (if intuitive and not altogether conscious) ability to spot raw

280. Brief of Social Scientists et al., *supra* note 277, at 30–34.

281. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE (2011).

282. *See, e.g.*, JONATHAN L. FREEDMAN, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION: ASSESSING THE SCIENTIFIC EVIDENCE (2002).

283. Deana Pollard Sacks et al., *Do Violent Video Games Harm Children? Comparing the Scientific Amicus Curiae "Experts" in* Brown v. Entertainment Merchants Association, 106 NW. U. L. REV. COLLOQUY 1 (2011), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1064&context=nulr_online [https://perma.cc/F5Q2-U526].

284. NAT'L RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 25–65 (2001). Access to handguns was the key and possibly only factor affecting increased crime for juveniles during the studied period.

285. *See, e.g.*, Jenny Jordan & Klaus P. Kaas, *Advertising in the Mutual Fund Business: The Role of Judgmental Heuristics in Private Investors' Evaluation of Risk and Return*, 7 J. FIN. SERVS. MARKETING 129 (2002).

286. John E. Calfee & Debra J. Ringold, *The 70% Majority: Enduring Consumer Beliefs About Advertising*, 13 J. PUB. POL'Y & MARKETING 228, 236 (1994) (explaining that consumers become more critical of advertising because of false advertising).

287. Huh et al., *supra* note 268, at 572; Gunther & Thorson, *supra* note 268. However, evidence shows that children are less aware of advertising's persuasive purpose and intent. Caroline Oates et al., *Children and Television Advertising: When Do They Understand Persuasive Intent?*, 1 J. CONSUMER BEHAV. 238 (2002).

deals. They distinguish informative from persuasive advertising,[288] dislike aggressive sales pitches, and assume that zealous efforts are attempting to make up for a product's flaws.[289]

For many legal scholars, *Sorrell v. IMS* represents everything that is wrong with expanded free speech protection,[290] though the statute struck down in that case was almost certainly the product of third-person effects and false causation. Vermont banned the sale of prescription data to pharmaceutical manufacturers in order to inhibit the effectiveness of pharmaceutical detailing. Detailing is the practice of sending drug company representatives to doctors' offices to promote their drugs. The parties in *Sorrell* disagreed about whether the primary effect of these detailing visits was to inform or to peddle,[291] but for our purposes it does not matter because the evidence was sparse, at best, that the marketing aspects of detailing caused harm to patients.

Vermont argued that detailing inappropriately influenced the prescribing decisions of doctors, coaxing them into prescribing more expensive and more dangerous brand-name drugs where a generic drug (or some other therapy) would work perfectly well.[292] Nobody, including the pharmaceutical industry litigants, denied that detailing results in increased prescribing of brand-name drugs. So the critical question was whether this shift in prescribing habits was harmful—that is, whether marketing clouded the judgment of prescribing doctors such that their patients experienced worse health outcomes, or paid more for equivalent health outcomes.[293]

Vermont produced no evidence that detailing in general, and data-driven detailing in particular, actually caused adverse effects. It relied heavily on an implicit assumption that, because pharmaceutical detailing increases sales, its success must come at the cost of public health.[294] This inference could not be substantiated.[295] In fact, the year that the Court heard this case, a systematic

288. Gunther & Thorson, *supra* note 268, at 577 (describing literature on negative perceptions of advertising).

289. Amna Kirmani, *Advertising Repetition as a Signal of Quality: If It's Advertised So Much, Something Must Be Wrong*, 26 J. ADVERT. 77 (1997).

290. Ashutosh Bhagwat, Sorrell v. IMS Health: *Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012); Piety, *supra* note 6; Richards, *supra* note 42 (encouraging a narrow reading of *Sorrell*).

291. *Compare* Brief for Petitioners at 51, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (No. 10-779) (peddle), *with* Brief of Respondents, IMS Health Inc. et al. at 7, *Sorrell*, 564 U.S. 552 (No. 10-779) (inform).

292. Brief for Petitioners, *supra* note 291, at 49–50.

293. Although the Supreme Court did not elaborate, it seems that these are the only options for a substantial state interest when a legal rule undergoes free speech scrutiny. The state's interest in lowering costs while also lowering the quality of care would be of questionable value for the public, and would indicate that the state was favoring the financial interests of some stakeholders (insurers) over others (pharmaceutical companies). *See* Brief for Respondent Pharmaceutical Research & Manufacturers of America at 51, *Sorrell*, 564 U.S. 552 (No. 10-779) ("Sorrell v. IMS, Brief for PhRMA").

294. Brief for Petitioners, *supra* note 291, at 51.

295. In its amicus brief, the U.S. Department of Justice argued that "simple common sense" sufficed to intuit the connection between successful marketing and societal harm. Brief for the United

review of the relevant medical literature found that the existing research could not show that detailing had an adverse effect on the quality of prescribing decisions.[296]

The conclusion we draw here—that detailing probably does not cause significant detriment—verges on blasphemy in the law and public health communities, particularly because many doctors supported the Vermont statute.[297] But the support of the medical community should not surprise anybody familiar with third-person effects. Doctors are as susceptible to third-person effects as anyone else.[298] Physicians and public health experts were worried about the "massive imbalance in information presented to doctors,"[299] yet doctors are aware of the imbalance and guard against it.[300] The same "not me, them" bias affects doctors' perceptions about the influence of detailing[301] when, in fact, doctors distrust detailers and usually dislike them, too.[302]

To be clear, pharmaceutical companies can pose a risk to the responsible practice of medicine. However, the evidence suggests that it is the nonspeech aspects of pharmaceutical marketing—the conflicts of interest when doctors receive significant perks or direct financial advantage from prescribing a

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States as Amicus Curiae Supporting Petitioners at 25, *Sorrell*, 564 U.S. 552 (No. 10-779). The United States also relied on the theory that less expensive generic drugs are therapeutically equivalent to the name-brand drugs that doctors were persuaded to prescribe. *Id.* at 26. This is not always the case. *See* Michael D. Privitera, *Generic Antiepileptic Drugs: Current Controversies and Directions*, 8 EPILEPSY CURRENTS 113 (2008).

296. Of the ten studies on the association between detailing and prescription quality, five found negative correlations, four found no relationship, and one found both negative and positive correlations. The authors of the systematic review pointed out that none of the studies could account for the possibility of reverse causation, and therefore the most they could say was that there is little evidence that detailing visits improve prescribing decisions. Geoffrey K. Spurling et al., *Information from Pharmaceutical Companies and the Quality, Quantity, and Cost of Physicians' Prescribing: A Systematic Review*, 7 PLOS MED. e1000352 (2010).

297. Brief for Petitioners, *supra* note 291, at 49.

298. Jisu Huh & Rita Langteau, *Presumed Influence of DTC Prescription Drug Advertising: Do Experts and Novices Think Differently?*, 34 COMM. RES. 25 (2007).

299. 2007 Vt. Acts & Resolves No. 80, §1(6).

300. Huh & Langteau, *supra* note 298. Doctors seem to abide by the precautionary principle, acquiescing to patients' requests to try advertised drugs less than half the time. Richard F. Beltramini, *Consumer Believability of Information in Direct-to-Consumer (DTC) Advertising of Prescription Drugs*, 63 J. BUS. ETHICS 333, 337 (2006) (describing studies showing that rates of acquiescence to a request for a brand-name prescription are consistently measured at about 44 percent); Joel Lexchin & Barbara Mintzes, *Direct-to-Consumer Advertising of Prescription Drugs: The Evidence Says No*, 21 J. PUB. POL'Y & MARKETING 194 (2002). When they do acquiesce, patients are more likely to comply with the treatment plans. *Id.* at 341 (finding 61 percent of patients said their medical condition improved while 2 percent reported it declined); C. Lee Ventola, *Direct-to-Consumer Pharmaceutical Advertising: Therapeutic or Toxic?*, 36 PHARMACY & THERAPEUTICS 669 (2011).

301. John A. Hopper et al., *Effects of an Educational Intervention on Residents' Knowledge and Attitudes Toward Interactions with Pharmaceutical Representatives*, 12 J. GEN. INTERNAL MED. 639, 640–41 (1997).

302. Puneet Manchanda & Elisabeth Honka, *The Effects and Role of Direct-to-Physician Marketing in the Pharmaceutical Industry: An Integrative Review*, 5 YALE J. HEALTH POL'Y 785, 788–89 (2005).

particular drug—that corrupt prescribing habits.[303] The record for detailing is far less clear.

Traditional forms of advertising are also frequently blamed for problems that they have limited power to cause. Some abusive forms of advertising (like fraudulent deception) will induce consumers to make regrettable purchasing decisions that are inconsistent with their preferences, and bans on this type of speech are uncontroversial. But much of the criticism directed at advertising concerns purchases consistent with the preferences that consumers actually have. Many scholars have implicitly adopted the theory that advertising creates artificial demand—that if consumers were exposed to less persuasive advertising, they would not actually want the products that they purchase.[304]

This theory of artificial demand is difficult to test because researchers cannot specify an ideal consumption level.[305] Any specification would necessarily substitute the researcher's judgment of what consumers should have bought for the consumers' actual market choices. But even when experts can agree on a goal, such as reducing cigarette consumption, advertising restrictions have a surprisingly disappointing track record. For example, a study of international variation in cigarette advertising restrictions found that the only restrictions that reduced consumption were total bans, and even those had negligible effects.[306] Meanwhile, less comprehensive cigarette ad restrictions can unintentionally *increase* consumption by reducing counterspeech and by eliminating negative attack ads between competing cigarette manufacturers.[307] Advertising regulations may be able to advance public health goals under some

303. For example, the amicus brief filed by the *New England Journal of Medicine* used the drug Nesiritide as an example of detailing's undue influence. Brief Amici Curiae of the New England Journal of Medicine et al. at 36, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (No. 10-779). However, Nesiritide's producer encouraged doctors not only to prescribe the drug, but also to charge professional fees for its administration and for postinfusion observation. This kickback arrangement allowed doctors to charge hundreds of dollars for their own services, which naturally compromised their decision making. Eric J. Topol, *Nesiritide—Not Verified*, 353 NEW ENG. J. MED. 113 (2005). The amicus brief also relied on studies of gifts and perks given to detailed physicians. Brief Amici Curiae of the New England Journal of Medicine et al., *supra*, at 34 (citing Ashley Wazana, *Physicians and the Pharmaceutical Industry: Is a Gift Ever Just a Gift?*, 283 JAMA 373 (2000)).

304. *See* Piety, *supra* note 6, at 2590 n.24; Cohen, *supra* note 4, at 1131.

305. Geoffrey P. Lantos, *Advertising: Looking Glass or Molder of the Masses?*, 6 J. PUB. POL'Y & MARKETING 104 (1987).

306. Jon P. Nelson & Douglas J. Young, *Do Advertising Bans Work?: An International Comparison*, 20 INT'L J. ADVERT. 273 (2001); Henry Saffer & Frank Chaloupka, *The Effect of Tobacco Advertising Bans on Tobacco Consumption*, J. HEALTH ECON. 1117 (2000).

307. Jane Bambauer, *Big Pharma: The Unseemly First Amendment Champion, Part Two*, BALKINIZATION (Oct. 16, 2014), http://balkin.blogspot.com/2014/10/big-pharma-unseemly-first-amendment_16.html [https://perma.cc/FE8F-SJMV]; James L. Hamilton, *The Demand for Cigarettes: Advertising, the Health Scare, and the Cigarette Advertising Ban*, 54 REV. ECON. & STAT. 401 (1972). For a dated but useful review of the positive effects of negative advertising, see Karen E. James & Paul J. Hensel, *Negative Advertising: The Malicious Strain of Comparative Advertising*, 20 J. ADVERT. 53 (1991). Complete bans (as opposed to content regulation) have the best chance of affecting consumption. *See* Henry Saffer & Dhaval Dave, *Alcohol Consumption and Alcohol Advertising Bans*, 34 APPLIED ECON. 1325 (2002).

conditions, but the task is challenging. By contrast, direct regulations (even those that fall short of product bans, such as sin taxes) are much more effective at nudging consumer choices toward healthier lifestyles.[308]

Speech is more often a symptom than a cause of social maladies. Lawmakers too often accept loose theories of causation linking speech to the risk of harm. This is not so for other forms of regulation, which usually decline to penalize an actor or industry without good evidence that they are causing harm or risk.[309]

3. *Tautologies*

Speech regulation can evade rigorous cost-benefit analysis by creating new, self-defining harms.[310] These tautologies arbitrarily recognize the interests of one class of stakeholders without acknowledging the interests of others, and then assert that protection is necessary to avoid "harm" to one side of the ledger.

Consider trademark dilution. Trademark was originally conceived as a species of fraud.[311] The law was designed to prevent consumer confusion so that if a person bought a computer with the Apple logo, he knew that the computer was actually manufactured by Apple Corporation.[312] This allows the consumer to rely on Apple's reputation for quality, craftsmanship, and style at the point of purchase.[313] It also allows the consumer to rightly credit or blame the company for the product's actual quality after the sale. The consumer confusion aspect of trademark is unobjectionable on speech grounds, even though it regulates information, because it does such a fine job of limiting disinformation campaigns that are very likely to lead to fraudulent transactions. In Judge Alex Kozinski's words, "Whatever first amendment rights you may have in calling the brew you make in your bathtub 'Pepsi' are easily outweighed by the buyer's interest in not being fooled into buying it."[314]

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308. EVAN BLECHER, THE IMPACT OF TOBACCO ADVERTISING BANS ON CONSUMPTION IN DEVELOPING COUNTRIES (2008), http://www.econrsa.org/system/files/publications/policy_papers/pp13.pdf [https://perma.cc/EC5C-QDY4].

309. Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985).

310. Trademark law provides a simple example. Historically, trademark doctrine protected against the likelihood that a consumer would be confused by the use of a similar or identical mark on competing products. In the twentieth century, however, states and the federal government expanded trademark law to cover nonconfusing uses of similar or identical marks under dilution statutes. Thus, harm became automatic once a competitor used a similar mark—another tautology. *See* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129, 1176–78 (2015).

311. *See* Yale Elec. Corp. v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928) (holding that "[i]f another uses [a mark], he borrows the owner's reputation").

312. *Cf.* E&J Gallo Winery v. Gallo Cattle Co., 955 F.2d 1327 (9th Cir. 1992) (enjoining cheesemaker from using mark "Gallo" due to confusion with winemaker's senior mark).

313. *See* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 656–61 (2004).

314. Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 973 (1993).

Trademark dilution, however, is an entirely different theory of information regulation. It is an awkward offshoot of the treatment of trademarks as property in gross.[315] The dilution doctrine punishes trademark use that does not cause confusion.[316] In dilution cases, the mark holder asserts that even though consumers who see the defendant's message understand its source, the objectionable speech wrongly tarnishes or overuses the mark, to the mark holder's detriment. So, for example, when comedian Nathan Fielder helped a friend convert the signage of his struggling coffee shop to read "Dumb Starbucks," Starbucks may have had a viable dilution claim, even if consumers did not think the ubiquitous chain had opened a new outlet.[317] Starbucks did not actually bring a claim.[318] But other jokers are not so lucky. The luxury handbag manufacturer Louis Vuitton brought a trademark suit against Chewy Vuiton, a company that made chew toys for dogs resembling the French firm's purses.[319] And Mattel is notorious for zealously protecting Barbie with the dilution doctrine.[320]

Dilution cases clearly censor information. So what is the danger from trademark-diluting speech? The answer is circular. The dilution doctrine defines harm to mark holders based on the loss of a unique cognitive association between the mark and the source in consumers' minds. Whether this loss in fact occurs is dubious.[321] But even if it does, the harm to mark holders may be more than offset by the benefit to infringers and consumers. A company selling Buick aspirin might not confuse any consumers, who would be unlikely to believe that the car

315. Frank Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927). *See generally* Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929 (2015).

316. *See* Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 429–30 (2003).

317. Alison Vingiano, *We Finally Got the Whole Story Behind Dumb Starbucks on Last Night's "Nathan for You,"* BUZZFEED (July 30, 2014), https://www.buzzfeed.com/alisonvingiano/dumb-starbucks-episode-nathan-for-you [https://perma.cc/W33Z-SVNE]. *See generally* Nabisco v. PF Brands, Inc., 191 F.3d 208 (2d Cir. 1999).

318. Jolie Lee, *Starbucks Responds to Dumb Starbucks in L.A.*, USA TODAY (Feb. 11, 2014), http://www.usatoday.com/story/news/nation-now/2014/02/10/dumb-starbucks-parody-free-coffee/5357597 [https://perma.cc/M9VJ-CE5K]; Lisa Borodkin, *Dumb Starbucks Was the Perfect Crime, but Starbucks Was Smart to Play Dumb*, GUARDIAN (Feb. 12, 2014), https://www.theguardian.com/commentisfree/2014/feb/12/dumb-starbucks-trademark-lawyer [https://perma.cc/4NVW-CMKW].

319. Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252 (4th Cir. 2007).

320. *See* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003); Mattell, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002).

321. Scholars are virtually united that dilution harms are ephemeral. *See* Christine Haight Farley, *Why We Are Confused About the Trademark Dilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1175 (2006); Paul J. Heald & Robert Brauneis, *The Myth of Buick Aspirin: An Empirical Study of Trademark Dilution by Product and Trade Names*, 32 CARDOZO L. REV. 2533 (2011); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507 (2008). *But see* MAUREEN MORRIN & JACOB JACOBY, TRADEMARK DILUTION: EMPIRICAL MEASURES FOR AN ELUSIVE CONCEPT (2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=231023 [https://perma.cc/9G7W-PYQX] (finding some experimental support for dilution harms).

manufacturer had decided to enter the analgesic business.[322] Nonetheless, the possibility that consumers might hear the term "Buick" and have more than one firm come to mind led states and the federal government to pass laws banning dilution to protect the automaker to the detriment of the aspirin producer.[323] Dilution is a castle built in the air, a real restriction on speech justified by a self-defining harm.[324]

Privacy regulations can also suffer from tautologies when the losses to the putative victims are considered in isolation, without taking account of the value that others stand to gain when information is shared. Privacy rules are generally designed to honor the preferences of the person described by the personal information without regard to the preferences of the people who may share or receive the information.[325] The subject of the information can exercise control over the information even if the value to others is far greater.[326]

Courts and regulators do not often have these blind spots outside the context of speech. Even with intangible interests, like financial transactions or employment, courts are careful to constrain the meaning of harm to areas where the law has reason to craft legal rights and corresponding duties.[327] If a company were to complain to the courts that a competitor stole its customer base by offering a more popular product, or if a candidate for a job brought a grievance to the court when the employer chose another, equally qualified candidate, the costs experienced by the claimants would not be confused for harm unless the law were to grant the claimant a monopoly or anticompetitive right.

4. Discounted Benefits

The theme that connects all of the problems discussed in this Section is an exaggerated sense of risk paired with an immodest sense of regulators' skill. If

322. *See* Heald & Brauneis, *supra* note 321.

323. *See, e.g.*, 15 U.S.C. § 1125(c) (2012); MASS. GEN. LAWS ch. 110B, § 12 (2006) (adopted 1947 as first antidilution statute); Ringling Bros.–Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 454 (4th Cir. 1999) (noting that half of states had such laws when the federal statute was adopted in 1996).

324. For dilution, corporations will have mixed views on the First Amendment's proper role. Dilution contains some built-in free-speech safeguards. 15 U.S.C. § 1125(c)(3). Firms with famous marks will usually oppose First Amendment restrictions on their rights, while their competitors and companies with lesser-known marks will favor free speech limits.

325. Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (2012); Pineda v. Williams-Sonoma Stores, Inc., 51 Cal. 4th 524 (2011) (finding that the Song-Beverly Credit Card Act of 1971 restricts retailers from asking customers for their zip code information). By contrast, some privacy laws are carefully crafted to balance the losses to privacy victims against countervailing social benefits. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681u (2012) (permitting unconsented access to credit reports under some conditions and prohibiting it in others).

326. *See* Bambauer, *The New Intrusion*, *supra* note 35, at 224–27.

327. For example, nondiscrimination laws are crafted to balance job applicants' interests in equality of opportunity against the burdens to prospective employers. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5) (2012) (requiring covered entities to make *reasonable* accommodations for employees with disabilities).

the government responds to an inflated estimate of speech risk, the perceived risk crowds out appreciation for the benefits of unpopular speech. These benefits are often subtle, dispersed, and difficult to predict.

Commercial speech and corporate speech are considered "low value" in First Amendment doctrine,[328] but they contribute directly to human autonomy.[329] This information helps people learn and act on their preferences and live the life they desire. Empowerment may be even more important in the marketplace than in the political arena. Each person has the power to make meaningful and expressive choices via commerce. They can buy fair trade coffee,[330] drive a hybrid car,[331] and avoid fast food chains that oppose gay marriage.[332] Automated speech from devices can help consumers find a retailer or pick a doctor. Each of these decisions helps them realize their vision of a meaningful existence, even if only in a small way. And these quotidian choices often affect citizens' life courses more than political theory can, since political choices are made collectively.[333] So even if courts could cleanly separate low-value corporate speech from core political speech,[334] doing so would imperil an important input for American lives as they are actually lived.[335]

People often perceive information to be more dangerous and less valuable than it actually is. This creates prime conditions for political mischief, described next.

B. Structural Problems

The danger with speech is that it is both strong and weak.

Speech is strong because it changes minds and behavior. Reports of abusive labor practices led to boycotts of well-known firms such as Nike and Gap.[336] In

328. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2182 (2015).

329. On autonomy, see C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

330. *See* Heather McClees, *5 Reasons You Should ONLY Buy Fair-Trade, Organic Coffee*, ONEGREENPLANET (Sept. 23, 2014), http://www.onegreenplanet.org/vegan-food/why-you-should-only-buy-fair-trade-organic-coffee [https://perma.cc/BBK8-Z56H] ("Good karma" as reason).

331. *See* Alan Dunn, *5 Reasons to Buy a Hybrid Car*, U.S. NEWS MONEY (Mar. 24, 2011), http://money.usnews.com/money/blogs/my-money/2011/03/24/5-reasons-to-buy-a-hybrid-car [https://perma.cc/LZ4M-GPZ8] ("It's Hip" as reason).

332. Cline, *supra* note 115.

333. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 (1976). Indeed, the marketplace of ideas may function *better* for the consumer search for truth than the political search for truth. BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER 14 (2007) (pointing out that "when a consumer has mistaken beliefs about what to buy, he foots the bill" and is less likely to permit flawed ideologies to lead him astray).

334. Consider, for example, the advertising of abortion services, which can allow its audience to judge whether regulation ought to make it more or less difficult for a woman to terminate a pregnancy. *See* Bigelow v. Virginia, 421 U.S. 809, 821–22 (1975).

335. *See* Shiffrin, *supra* note 45, at 1227–32.

336. *See* Simon Birch, *How Activism Forced Nike to Change Its Ethical Game*, GUARDIAN (July 6, 2012), http://www.theguardian.com/environment/green-living-blog/2012/jul/06/activism-nike

response, the companies implemented better working conditions. A whistleblower revealed that the National Security Agency exploited a vulnerability in Google's communications infrastructure, and the company bolstered security.[337] Gun store owners went to the media to share experiences about being denied banking services due to informal government pressures on their industry, Congress took notice, and the harassment was curtailed.[338] While the classic ideal of speech's power is the principled political argument that sways voters, information has decisive effects on a vast range of decisions—from whether to smoke cigarettes to which restaurant to patronize to which charity to favor with a donation.

That strength has led regulators to persistently target speech.[339] They banned sales of violent video games to minors, for fear that playing *Assassin's Creed* would cause children to engage in violence themselves.[340] They prohibited disclosure of alcohol content in beer, concerned that drinkers would pick the most potent potable.[341] They prevented doctors from asking patients whether they own a firearm, worried that physicians would shame gun owners.[342] Examples are legion. The goal is to push people away from choices or behaviors that the state views as undesirable. Information is seen as a threat.

And yet speech is also quite weak and easily discouraged. Information is increasingly low cost to produce and distribute.[343] Many producers, though, capture only imperfectly the benefits of the speech they share, particularly since those benefits are frequently uncertain, widely distributed, and reaped in the future.[344] Costs, however, show up more quickly and in more concentrated form, especially if regulators impose them. Seth Kreimer described this problem in his

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[https://perma.cc/2AEF-5VH5]; Felicity Lawrence, *Sweatshop Campaigners Demand Gap Boycott*, GUARDIAN (Nov. 21, 2002), http://www.theguardian.com/uk/2002/nov/22/clothes.globalisation [https://perma.cc/3QUA-89AP].

337. *See* Jennifer Garnett, *Google Encrypts Its Network to Counteract NSA Surveillance*, HARV. JOLT DIG. (Nov. 18, 2013), http://jolt.law.harvard.edu/digest/privacy/google-encrypts-its-network-to-counteract-nsa-surveillance [https://perma.cc/8VAG-N7M9]; Barton Gellman & Ashkan Soltani, *NSA Infiltrates Links to Yahoo, Google Data Centers Worldwide, Snowden Documents Say*, WASH. POST (Oct. 30, 2013), https://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html [https://perma.cc/L5Z7-NSEA].

338. *See* Bambauer, *supra* note 37, at 62–66; Todd Zywicki, *FDIC Retreats on Operation Choke Point?*, WASH. POST (Jan. 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/29/fdic-retreats-on-operation-choke-point [https://perma.cc/7C53-UBTN].

339. Lior Strahilevitz and Adam Samaha offer a thoughtful topology of speech regulation, based on whether the restriction targets the questioner or the respondent and whether the speech is mandated, prohibited, or permitted. Adam M. Samaha & Lior Jacob Strahilevitz, *Don't Ask, Must Tell—And Other Combinations*, 103 CALIF. L. REV. 919 (2015).

340. Brown v. Entm't Merchants Ass'n, 564 U.S. 786 (2011).

341. Rubin v. Coors Brewing Co., 514 U.S. 476, 479 (1995).

342. Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014).

343. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

344. *See* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 28 (2006).

work on information intermediaries.[345] The issue of localized costs and diffused (if not unpredictable) benefits also affects first-party speech. Information is easily chilled, and regulators have a strong incentive to freeze it out when it is a vital input to the decision-making processes that the state wants to control.

In addition to the incentive problems for producing versus forgoing information generation, there are a number of structural reasons to be skeptical when the state targets speech. These include collective action problems, public choice issues, and governmental self-promotion. The next Sections explore each of these in turn.

1. Collective Action Problems

Economics-oriented free speech literature describes speech as a classic public good: like public parks, national security, and great collections of art, it is more valuable shared than hoarded.[346] Speech is nonrivalrous: its use for public purposes does not compete with use for other purposes, and so it cannot be depleted except through regulatory censorship.[347] However, speech's nonexcludible character is more fragile than that of other public goods.[348] While public support for the abstract concept of free speech may be high, those who stand to gain from a particular form of speech may be too diffuse or too uncertain to organize and advocate for it.[349]

When the state censors speech, it removes a resource that is too early in its development to attract the political opposition of all those who are deprived by the ban. Those who are opposed to censorship may not be able to value the loss from deprivation, or the transaction costs of organizing may be too high.[350] Collective action problems are natural byproducts of assessment problems—speech is undervalued while its harms are exaggerated—so our claims about collective action largely rise and fall with those arguments. Nevertheless, a brief tour of the collective action problems helps elaborate why information regulation should not be left to unfettered democratic processes.

The Food and Drug Administration's (FDA) approach to regulating medical devices demonstrates the hazards of dampening information too early, before prospective consumers develop the demand for a service and the

345. *Id.* at 28–32.

346. Volokh, *supra* note 343; Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995).

347. Parties can privately commit through contract and nondisclosure agreements not to disseminate a piece of information, but such mechanisms bind only them. Speech can also be curtailed through the use of private force, hacking, and other illegal means. *See* Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377 (2009).

348. As one example, some speech can be the subject of intellectual property rights.

349. *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33 (2003).

350. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 43–52 (1965); Guy Halfteck, *Legislative Threats*, 61 STAN. L. REV. 629, 700 (2008).

motivation to curb the regulators. The Federal Food, Drug, and Cosmetic Act regulating medical devices requires producers to submit evidence of efficacy and safety to the FDA before marketing or offering the device for sale.[351] Traditionally, the FDA rules applied to items physically placed inside human bodies or otherwise used to treat a patient in a medical setting (such as pacemakers and scalpels).[352] However, the FDA has interpreted its regulations to require 23andMe, mobile health apps, and other information services to comply with the complex rules for preapproval and labeling of medical devices.[353] Under this interpretation, even the Apple watch, the Fitbit, and Google's search engine could fall within the scope of regulated medical devices since they "transform[] a platform" into something consumers can use to manage their own health or wellness.[354]

The FDA's stated goal is to protect the public from bad health advice that could either dissuade a user from seeking needed professional care or prompt a user to get expensive and risky medical tests.[355] But nothing, other than the connection to a physical object (a "device"), constrains the FDA's preapproval power over health information. When the FDA intervened in 23andMe's health services, it derailed a movement that could have expanded and popularized access to the latest research on genomic health indicators, and undercut the shift

351. 21 C.F.R. § 807 (2016).

352. *Classify Your Medical Device*, FDA, http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Overview/ClassifyYourDevice/default.htm [https://perma.cc/G7LT-TSVX] (using scalpel as an example) (last visited Aug. 24, 2016).

353. U.S. DEP'T OF HEALTH & HUMAN SERVS., MOBILE MEDICAL APPLICATIONS: GUIDANCE FOR FOOD AND DRUG ADMINISTRATION STAFF app. B, at 23 (2015) (providing examples of apps for which the FDA "intends to exercise enforcement discretion"). The regulations cover any "instrument . . . including any component, part, or accessory, which is . . . intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease." 21 U.S.C. § 321(h) (2012). Limiting the reading of "diagnosis" and "mitigation" to tools used in the course of a doctor-patient consultation could peg the FDA's regulation of medical devices to the practice of medicine, which could help shield it from strict First Amendment scrutiny. *See* ROBERT POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012) (arguing that regulations of speech for expert licensing classes should receive lower scrutiny). *But see* Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183 (2015).

354. FDA, MOBILE MEDICAL APPLICATIONS, http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ConnectedHealth/MobileMedicalApplications/ucm255978.htm [https://perma.cc/6UN3-P87U]; 21 U.S.C. § 321(h) (defining regulated medical devices). Google customizes searches if the user has registered with the site. Bryan Horling & Matthew Kulick, *Personalized Search for Everyone*, GOOGLE OFFICIAL BLOG (Dec. 4, 2009), http://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html [https://perma.cc/LEG2-7V9C].

355. *See* George J. Annas, *23andMe and the FDA*, 370 NEW ENG. J. MED. 985 (2014) (noting that the agency was concerned about how consumers "might use information").

toward democratized medicine.[356] There are real costs to blocking consumers' cheap and convenient access to health research.[357]

Because it has accumulated a large biobank and has attracted the business of pharmaceutical companies,[358] 23andMe has the infrastructure and funds to navigate the FDA's regulatory structure. Indeed, the company boasts that it is now "the first and only genetic service available directly to you that includes reports that meet FDA standards."[359] It now has something to gain when the FDA obstructs smaller competing services. Consumers have the most to lose because information products that can improve health decisions (relative to the status quo) will not be developed.[360] Yet consumers are unlikely to mount an organized campaign in favor of health applications that fail to meet the FDA standards for accuracy even if the standards are too high or too onerous. It is only the occasional controversy, like with 23andMe, that reveals how much baby might be thrown out with the bathwater.

The value of information, and the costs of banning it, is hard to predict. And the dispersion of value among individuals, along with the costs of organizing to advocate for the benefits of unrestricted expression, means that collective action problems provide grounds for skepticism about speech regulation.

2. *Public Choice Issues*

Public choice issues are easy to describe yet notoriously difficult to solve.[361] Some actors in policy debates have more concentrated stakes than others, and are likely to invest heavily in swaying those contests.[362] Other interest

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356. *See* ERIC TOPOL, THE PATIENT WILL SEE YOU NOW (2015) (describing the democratization of medicine by information technologies and its threat to "eminence-based medicine"); Neal Pollack, *23andMe Wants to Reveal Health Risks Using Your DNA*, WIRED (Dec. 2, 2014), http://www.wired.co.uk/news/archive/2014-12/02/23andme [https://perma.cc/TR4P-HYYY].

357. *See, e.g.*, Ishita Singh, *How 23andMe, a Personal Genetic Testing Company, Saved My Life*, HUFFINGTON POST (Jan. 25, 2014), http://www.huffingtonpost.com/2013/12/17/23andme_n_4460974.html [https://perma.cc/7HK3-VW49] (describing how 23andMe testing, confirmed by blood test, revealed BrCa1 mutation).

358. Matthew Herper, *In Big Shift, 23andMe Will Invent Drugs Using Customer Data*, FORBES (Mar. 12, 2015), http://www.forbes.com/sites/matthewherper/2015/03/12/23andme-enters-the-drug-business-just-as-apple-changes-it/#4c75168c2278 [https://perma.cc/M8WR-J9BD].

359. 23ANDME, https://www.23andme.com/dna-health-ancestry [https://perma.cc/D9FP-LR9J] (last visited Dec. 13, 2016).

360. *See* Adam Candeub, *Digital Medicine, the FDA, and the First Amendment*, 49 GA. L. REV. 933, 978–80 (2015) (discussing the mobile app *Doctor Mole Detector* that fails to comply with regulatory standards but outperforms primary-care physician diagnoses).

361. *See* OLSON, *supra* note 350, at 2 (stating that "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*").

362. Interestingly, Ronald Coase described academics' support for a lightly regulated marketplace of ideas as an example of public choice: "The market for ideas is the market in which the intellectual conducts his trade. . . . That others should be regulated seems natural, particularly as many

groups, including the polity at large, have less incentive to engage the process because each individually has less to lose or gain, even if as a whole their stakes outweigh those with concentrated interests.

Copyright provides a classic example. The utilitarian justification for copyright is straightforward: providing authors with exclusive rights over their works generates incentives to produce expression in the first place.[363] As Thomas Macaulay said, "It is a tax on readers for the purpose of giving a bounty to writers."[364] To balance exclusivity's increased cost of access and incentive effects, works move out of copyright and into the public domain, where they form building blocks for new creativity.[365] Intellectual property scholars have documented the critical role that the public domain plays in production of new information.[366]

Given this basic model, it is surprising that the history of copyright legislation shows not only ever-increasing duration, but also an unbroken pattern of extending copyright terms.[367] The lopsided lobbying of the entertainment industry has nearly stopped the flow of works from copyright protection into the public domain.[368] Constitutional challenges have uniformly failed even though the challengers were armed with evidence that the laws have infinitesimal effects on the incentives to create new works.[369] The latest statute extended copyright by twenty years (to the life of the author plus seventy years),[370] even though only 2 percent of copyrighted works still had commercial value after fifty-five years of protection.[371] Nonetheless, the subset of copyright owners holding those works had significant incentives to seek term extension: the works earned an estimated $400 million annually, and the term extension was worth several billion additional dollars in revenues.[372] In contrast, the incentive effect of the

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of the intellectuals see themselves as doing the regulating." R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 386 (1974).

363. Derek E. Bambauer, *Faulty Math: The Economics of Legalizing The Grey Album*, 59 ALA. L. REV. 345, 353–57 (2008).

364. Thomas Macaulay, *A Speech Delivered in the House of Commons on the 5th of February, 1841*, OPPOSING COPYRIGHT EXTENSION, http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary/MacaulaySpeeches.html [https://perma.cc/T86U-ZQ34] (last visited Dec. 13, 2016).

365. *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

366. *See* Yochai Benkler, *Commons and Growth: The Essential Role of Open Commons in Market Economies*, 80 U. CHI. L. REV. 1499, 1513–17 (2013) (reviewing scholars' work on public domain).

367. Eldred v. Ashcroft, 537 U.S. 186, 200 (2003) (noting that "[h]istory reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions").

368. *See* Litman, *supra* note 365; Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

369. *Eldred*, 537 U.S. at 254–63 (Breyer, J., dissenting).

370. Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), (d), 112 Stat. 2827, 2827–28 (1998).

371. *Eldred*, 537 U.S. at 248–49 (Breyer, J., dissenting).

372. *Id.*

law for works not yet created was tiny: economists calculated that a 1 percent chance of a work earning one hundred dollars each year, starting seventy-five years in the future, was worth less than seven cents in present-day money.[373]

In nearly a century, only a single year's worth of works (from 1923) has entered the public domain.[374] The reason is the disparity in incentives between copyright owners, who have a discrete pecuniary interest in their works, and the consuming public, for whom the benefits of the public domain are ephemeral and the additional cost from copyright is small.[375] These incentives lead copyright owners to lobby heavily and consumers to lobby little if at all. Public choice theory capably explains "the stunning recent expansion of U.S. copyright law."[376]

Information regulation is particularly driven by public choice concerns. Sometimes restrictions directly benefit a politically powerful entity. State laws that restrict who can dispense legal advice do some work in solving the information asymmetry problem between lawyers and clients, but principally they allow attorneys to shield themselves from lower-priced competition.[377] Government-mandated secrecy in the drafting process of international instruments such as the Trans-Pacific Partnership gives firms with a financial stake in the negotiations a tremendous advantage in influencing the terms of the treaties.[378] Regulating information can help reduce political opposition by hiding rules' effects—conduct remains licit, but restrictions on data make it more difficult. This dynamic reinforces the public choice problems that favor concentrated interest groups in the political calculus.

Information regulation is particularly susceptible to public choice problems because people are naturally inclined to think speech is dangerous for others. Every stakeholder can capitalize on persistent fears. Every bootlegger can find

373. *Id.* at 254–55.

374. *See id.* at 241 (Stevens, J., dissenting); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

375. *See* Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203 (2013); Litman, *supra* note 368; Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2236–37 (2000); William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139 (1996). As Jessica Litman's research demonstrates, copyright legislation emerges from bargaining among interest groups—notably excluding consumers—and is ratified by Congress. JESSICA LITMAN, DIGITAL COPYRIGHT 35–74 (2006).

376. Margot Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587, 607 (2014).

377. *See* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 433 (2001); James E. Moliterno, *The Trouble with Lawyer Regulation*, 62 EMORY L.J. 885 (2013).

378. *See* Margot E. Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977 (2014); David S. Levine, *Bring in the Nerds: Secrecy, National Security, and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105 (2012).

plenty of Baptists.[379] Take booze. In 1956, Rhode Island passed two statutes treating alcohol advertising.[380] One prohibited liquor vendors and distributors from advertising the price of alcohol, except on price tags and signs within their establishments.[381] The second banned news media from publishing any ads that contained alcohol price information.[382] The state argued that the bans promoted temperance.[383] But there are reasons to be skeptical: stores could advertise liquor in any fashion that made it attractive as long as they did not mention price.[384] And there is considerable evidence that the Rhode Island alcohol industry accepted and even helped enforce the rules to protect higher prices.[385]

It was a series of complaints by competing vendors, not concerned citizens, that led to enforcement against 44 Liquormart, the store whose federal challenge to the law succeeded at the Supreme Court.[386] The state liquor store association won an injunction that prevented a Woonsocket newspaper from listing ads for a nearby Massachusetts store.[387] As the Supreme Court noted, there were more effective policy interventions available to Rhode Island: the state could have placed a sin tax on alcohol, limited per capita purchases, or imposed a complete ban on consumption.[388] Moreover, higher prices would not deter alcoholics.[389] Thus, the purported rationale for what was concededly a price maintenance scheme did not hold up to scrutiny. In any price-fixing cartel, the core problem is cheating: every participant has a strong incentive to lower prices and to inform customers.[390] A government ban on price advertising is effective in maintaining a cartel.[391]

The law at issue in *Virginia Board* was even more blatant.[392] There, Virginia did not have the fig leaf of discouraging vice to justify its prohibition

379. "Bootleggers and Baptists" is the concept that economic actors seeking a market advantage through regulation can team up with moral crusaders to push it through. *See* ADAM SMITH & BRUCE YANDLE, BOOTLEGGERS AND BAPTISTS: HOW ECONOMIC FORCES AND MORAL PERSUASION INTERACT TO SHAPE REGULATORY POLITICS (2014).

380. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489–90 (1996).

381. *Id.* at 489 n.2 (citing R.I. GEN. LAWS § 3-8-7) (1987).

382. *Id.* at 489 n.3 (citing R.I. GEN. LAWS § 3-8-8.1).

383. *Id.* at 504.

384. *Id.* at 493.

385. *See* Anthony J. Dukes, *Advertising and Competition*, *in* ISSUES IN COMPETITION LAW & POLICY 515, 525–30 (Wayne D. Collins et al. eds., 2008); Jeffrey Milyo & Joel Waldfogel, *The Effect of Price Advertising on Prices: Evidence in the Wake of* 44 Liquormart, 89 AM. ECON. REV. 1081 (1999).

386. *44 Liquormart*, 517 U.S. at 492–93.

387. R.I. Liquor Stores Ass'n v. Evening Call Publ'g Co., 497 A.2d 331, 332–33 (R.I. 1985).

388. *44 Liquormart*, 517 U.S. at 507–09.

389. *Id.* at 506.

390. *See* Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1629–30 (2008).

391. *See* Dukes, *supra* note 385.

392. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

on pharmacists advertising drug prices.[393] Virginia argued that unrestrained price competition would undercut the relationship between patient and pharmacist, damage the profession's image, and cause pharmacists to cease offering less profitable services that were allegedly cross subsidized by higher drug prices.[394] As the Supreme Court noted, though, Virginia already regulated pharmacists directly, reducing the risk that they would neglect their consumers.[395] And if less remunerative offerings were of value to customers, pharmacists who offered them could also advertise, differentiating themselves from competitors who did not.[396] The Court made plain the ban's rationale: the "only effect the advertising ban has on [a pharmacist] is to insulate him from price competition."[397] The censorship was public choice parasitism disguised as consumer protection.

3. *Governmental Self-Promotion*

A third structural problem, similar conceptually to public choice concerns, is that the interests of the polity (the principals) and regulators (their agents) may diverge. That divergence could lead governmental actors to promote their interests at their constituents' expense. There are at least three ways in which this problem emerges. The first is ideological: the faction in power may use information regulation to maintain control against political challengers. The second builds on theoretical work on bureaucratic competition. Different parts of the regulatory state try to augment their authority to obtain greater funding, prominence, and perceived power. The third is to evade blame: state entities may restrict information to avoid revealing mistakes or admitting liability. In each case, even if regulators genuinely believe that restrictions on information are valuable, the presence of countervailing influences on their behavior is grounds for skepticism about the rules.

a. Ideological Entrenchment

Ideological entrenchment—actions designed to protect political actors in power—is well known, and has provoked a number of legal responses. Sometimes bias is clear, as when federal law prohibited the Postal Service from delivering "communist political propaganda" unless the recipient affirmatively indicated a desire to receive it.[398] The Supreme Court has prohibited firing public employees,[399] or treating them differently for personnel purposes such as

393. The statute, VA. CODE ANN. § 54-524.35 (1974), was challenged by a Virginia resident who took prescription medications daily, and who therefore had a strong interest in finding the lowest prices. *Va. State Bd. of Pharmacy*, 425 U.S. at 753.

394. *Va. State Bd. of Pharmacy*, 425 U.S. at 767–78.

395. *Id.* at 768–69.

396. *Id.* at 770.

397. *Id.* at 769.

398. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

399. *See* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347, 347 (1976).

promotion, based on political affiliation,[400] if political loyalty is not a key requirement for the position. When Texas defended a registration requirement for union organizers as merely "directed at business practices, like selling insurance," the Supreme Court disagreed, finding that the statute violated free-speech rights.[401]

The legislative and executive branches have made some efforts to curb this problem. On the statutory front, the Hatch Act limits partisan political activities by executive-branch employees.[402] And President Barack Obama issued an executive order limiting the ability of officials to work on matters involving a former employer, or to lobby former colleagues after leaving government.[403]

Plainly, though, entrenchment challenges remain. For example, campaign-finance legislation inherently favors incumbents, who have greater name recognition and access to popular media, and therefore need less funding to achieve similar effects.[404] Statutes that criminalize material support to designated terrorist groups tread close to making political speech itself illegal, in addition to predicating liability on whether the government decides to list an organization as supporting terrorism.[405] Thus, Assistant Attorney General John Carlin agreed that the government could prosecute people who are "proliferating ISIS social media."[406] The federal government aggressively prosecutes whistleblower critics while leaving loyal officials who disclose secrets unmolested.[407] The administration of President George W. Bush selectively categorized information as classified or sensitive to block its release,[408] and President Richard Nixon

400. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 62–63 (1990).

401. Thomas v. Collins, 323 U.S. 516, 526 (1945) (internal citations omitted).

402. 5 U.S.C. §§ 7321-7326 (2012).

403. *See* Barack Obama, *Executive Order*, WHITE HOUSE (Jan. 21, 2009), https://www.whitehouse.gov/21stcenturygov/actions/revolving-door [https://perma.cc/QP2T-N2TG]; Juliet Eilperin, *Obama Promised to Curb the Influence of Lobbyists. Has He Succeeded?*, WASH. POST (Mar. 22, 2015), http://www.washingtonpost.com/politics/obama-promised-to-curb-the-influence-of-lobbyists-has-he-succeeded/2015/03/22/e9ec766e-ab03-11e4-abe8-e1ef60ca26de_story.html [https://perma.cc/7SVR-BYM2].

404. *See* McConnell, *supra* note 86, at 417.

405. 18 U.S.C. § 2339B (2012); Holder v. Humanitarian Law Project, 561 U.S. 1, 26, 36 (2010); *see* Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1680–88 (2015); Post & Shanor, *supra* note 47, at 179 (arguing that the *Holder* decision "upholds speech restrictions primarily on the basis of deference to an Executive Branch affidavit").

406. Shane Harris, *Justice Department: We'll Go After ISIS's Twitter Army*, DAILY BEAST (Feb. 23, 2015), http://www.thedailybeast.com/articles/2015/02/23/justice-department-we-ll-go-after-isis-twitter-army.html [https://perma.cc/W7PM-XLEP].

407. *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 451–52 (2014); Jeff Bachman, *President Obama Loves Leaks, Despises Whistleblowers*, HILL (May 21, 2013), http://thehill.com/blogs/congress-blog/the-administration/300981-president-obama-loves-leaks-despises-whistleblowers [https://perma.cc/X38W-TX3C]; John Kiriakou, *Obama's Abuse of the Espionage Act Is Modern-Day McCarthyism*, GUARDIAN (Aug. 6, 2013), http://www.theguardian.com/commentisfree/2013/aug/06/obama-abuse-espionage-act-mccarthyism [https://perma.cc/DSN6-RYLD].

408. *See* David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-Pentagon Papers World*, 48 HARV. C.R.-C.L. L. REV. 473, 485–88 (2013).

sought to block publication of a government study showing that the Vietnam War was progressing poorly.[409]

In all these cases, restrictions had other, more palatable justifications, but they clearly benefited incumbents while impeding less popular speech and speakers.

b. *Bureaucratic Competition*

Different government branches, levels, agencies, and employees compete for regulatory control, which brings budget, prestige, and power. Regulatory competition is a well-known phenomenon, building on the pathbreaking work of German sociologist Max Weber.[410] Weber studied the emergence of bureaucratic forms in both public administration and private firm governance.[411] Weber concluded that all bureaucracies possess a sort of inertia, which leads them to perpetuate themselves.[412] Scholars since have focused on bureaucratic competition as a driver of regulatory expansion: when government entities jockey for authority, the number of regulators involved and the scope of regulation itself inevitably tends to expand.[413] Success in the contest leads to additional funding and staff, prestige for officials, and perhaps rulemaking authority. The converse is also true; agencies have an interest in protecting existing resources and authority against competitors.[414]

Bureaucratic competition can affect every industry, but the exaggerated risks and undervalued benefits of information make it an enticing target. For example, in the late 1990s, the Federal Trade Commission (FTC) began to aggressively regulate firms' online privacy and security policies under its Section 5 authority to police misleading and deceptive practices.[415] Undoubtedly, the firm sensed a gap in American privacy law, which is sector specific and had no clear regulatory scheme for Internet commerce.[416] It is not clear, though, why the FTC would be the logical choice as regulator, particularly given the Federal Communications Commission (FCC)'s historic role in

409. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

410. *See* WOLFGANG J. MOMMSEN, THE POLITICAL AND SOCIAL THEORY OF MAX WEBER 13–16 (1989).

411. *See generally* Robert K. Merton, *Bureaucratic Structure and Personality*, 18 SOC. FORCES 560 (1940) (discussing Weber's theories).

412. MOMMSEN, *supra* note 410, at 114 (describing "the tendency of bureaucracies to mushroom .... [They] tend to subject everything to their control, unless there are countervailing forces").

413. *See* Brian A. Ellison, *Bureaucratic Politics, the Bureau of Reclamation, and the Animas-La Plata Project*, 49 NAT. RESOURCES J. 367, 376-79, 397–401 (2009); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an "It,"* 96 MINN. L. REV. 194, 224–30, 251–57 (2011). *See generally* WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

414. Ellison, *supra* note 413, at 377–78.

415. 15 U.S.C. § 45(a) (2012); *see* Solove & Hartzog, *supra* note 141.

416. Solove & Hartzog, *supra* note 141, at 586–87 (comparing U.S. law to European Union privacy laws).

telecommunications governance. The most likely answer is that the FTC sought to fill this gap not only out of concern for consumers, but also because it would enable the agency to expand its remit and stake out a role in Internet regulation.[417]

The FTC has used its new powers to regulate the use and protection of consumer information extensively, effectively creating its own common law.[418] Recently, the FCC has reentered the fray, announcing its intention to develop privacy rules for ISPs in the wake of its decision to classify certain ISPs as common carriers.[419] The FTC's decision was a brilliant success in bureaucratic competition; the agency is now widely acknowledged as the most powerful privacy regulator in the United States.[420] But there is little doubt that its move was, in part, designed to secure resources, prestige, and power for the FTC.[421] And critics have argued that the FTC has overstepped its statutory authority, and that privacy regulation should have been left to congressional action rather than the FTC's string of complaints and settlements.[422]

Another example involves breakfast cereal. The FTC and FDA awkwardly share jurisdiction over health claims made for foods; the FTC regulates advertising, and the FDA governs labeling.[423] In the early 1980s, the agencies diverged in their approach to nutrition claims. The FTC scrapped its rules on nutrition claims for food in late 1982, while the FDA maintained a near-total ban on statements linking diet to disease.[424] That year, the National Academy of Sciences (NAS) issued a report suggesting that consumption of dietary fiber

417. *See* RANDAL C. PICKER, UNJUSTIFIED BY DESIGN: UNFAIRNESS AND THE FTC'S REGULATION OF PRIVACY AND DATA SECURITY (2013), http://www.masonlec.org/site/rte_uploads/files/PickerGMUDraft.pdf [https://perma.cc/Y4W5-FCR4].

418. *See* Solove & Hartzog, *supra* note 141, at 600–04.

419. *See* Andrea Peterson, *The FCC's Net Neutrality Decision Could Mean Stronger Privacy Rules for Internet Service Providers*, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/02/27/the-fccs-net-neutrality-decision-could-mean-stronger-privacy-rules-for-internet-service-providers [https://perma.cc/A8CL-96R8]; Mario Trujillo, *FCC to Start Work on Broadband Privacy in Fall*, HILL (June 26, 2015), http://thehill.com/policy/technology/246259-fcc-to-start-work-on-broadband-privacy-in-fall [https://perma.cc/F9PK-H8NQ].

420. *See* Solove & Hartzog, *supra* note 141, at 585–86.

421. Justin (Gus) Hurwitz, *Data Security and the FTC's Uncommon Law*, 101 IOWA L. REV. 966, 968–70, 984–88, 998–99, 1007–08 (2016).

422. *See* David J. Bender, *Tipping the Scales: Judicial Encouragement of a Legislative Answer to FTC Authority over Corporate Data-Security Practices*, 81 GEO. WASH. L. REV. 1665 (2013); Michael D. Scott, *The FTC, the Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?*, 60 ADMIN. L. REV. 127, 128 (2008); Gerard M. Stegmaier & Wendell Bartnick, *Psychics, Russian Roulette, and Data Security: The FTC's Hidden Data-Security Requirements*, 20 GEO. MASON L. REV. 673 (2013). *But see* FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015) (upholding FTC's authority).

423. *See* Jennifer L. Pomeranz, *A Comprehensive Strategy to Overhaul FDA Authority for Misleading Food Labels*, 39 AM. J.L. & MED. 617, 630–31 (2013).

424. Marian Burros, *Health Claims on Food Put FDA in a Corner*, N.Y. TIMES (Feb. 19, 1986), http://www.nytimes.com/1986/02/19/garden/health-claims-on-food-put-fda-in-a-corner.html [https://perma.cc/T8AG-67CP].

could reduce incidence of certain cancers.[425] Kellogg, which produced the high-fiber All-Bran cereal, saw an opportunity. The company collaborated with the National Cancer Institute—which had commissioned the NAS study—to design an advertising campaign touting the benefits of a high-fiber diet.[426] In particular, the company's print advertisements stated that this diet "may reduce the risk of some types of cancer."[427]

The head of the FTC's consumer protection bureau endorsed Kellogg's campaign.[428] The FDA opened an investigation. The FDA concluded that Kellogg's label violated its rules—there was "no question that the claims . . . rendered the product an unapproved drug"[429]—but decided to reexamine its labeling regime as a whole.[430] While the FDA reevaluated its position, consumer groups attacked Kellogg's ads as misleading.[431] The FDA waivered in its position, and eventually the issue was mooted by legislation.[432] Food producers, meanwhile, could lawfully make claims in advertising but not on labels—a confusing situation for consumers.

This bureaucratic competition involved the FDA extending its regulatory jurisdiction into a gray area—the two regulators had long observed a dividing line between labeling and advertising. Had the FDA taken action against ads as well as labels, it might have lost a court challenge, particularly given the Agency's longstanding position on the relevant division of authority.[433] Analysts disagree on whether the FTC's retrenchment and the FDA's relative forbearance led, on balance, to better health information for consumers[434] or to a wave of disingenuous advertising.[435] But with respect to fiber intake—proven to reduce colon cancer—the results of lesser speech regulation were unambiguously positive. After the All-Bran campaign, manufacturers increased the amount of dietary fiber in breakfast cereals, without increasing fat or sodium, and female

425. NAT'L RESEARCH COUNCIL, DIET, NUTRITION, AND CANCER (1982).

426. *See* Vicki S. Freimuth, Sharon L. Hammond & Judith A. Stein, *Health Advertising: Prevention for Profit*, 78 AM. J. PUB. HEALTH 557 (1988).

427. *Id.*

428. Irvin Molotsky, *Cereal Ad Praised by an F.T.C. Aide*, N.Y. TIMES (Dec. 5, 1984), http://www.nytimes.com/1984/12/05/garden/cereal-ad-praised-by-an-ftc-aide.html [https://perma.cc/QE94-KEVX].

429. Steven B. Steinborn & Kyra A. Todd, *The End of Paternalism: A New Approach to Food Labeling*, 54 FOOD DRUG L.J. 401, 404 (1999).

430. Burros, *supra* note 424.

431. *See* Burros, *supra* note 424; Freimuth, Hammond & Stein, *supra* note 426, at 557; Bernice Kanner, *Kellogg's Hard Sell*, N.Y. MAG., Dec. 3, 1984, at 22.

432. Steinborn & Todd, *supra* note 429, at 404–06. *But see* Beales, *supra* note 229, at 22–23.

433. *Working Agreement Between Federal Trade Commission and Food and Drug Administration*, 4 TRADE REG. REP. (CCH) ¶ 9850.01 (1971). The FDA eventually lost a suit brought by dietary supplement manufacturers, who sought to make health claims accompanied by disclaimers. Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999).

434. *See* Beales, *supra* note 229, at 18–22; Pauline M. Ippolito, *What Can We Learn from Food Advertising Policy Over the Last 25 Years?*, 12 GEO. MASON L. REV. 939, 946–48 (2004).

435. *See* CHARLES K. ATKIN & LAWRENCE WALLACK, MASS COMMUNICATION AND PUBLIC HEALTH 92 (1990) (arguing campaign "opened a Pandora's box of misleading claims").

consumers began eating more high-fiber cereals.[436] Consumption increased most among female-headed households and racial and ethnic minorities.[437] Manufacturers included more health claims in advertising, and consumers did not overreact to those claims, such as by overconsuming high-fiber cereal.[438] Less speech regulation made cereal consumers healthier.

At times, government entities will compete for authority and resources, increasing information regulation in ways that may not benefit citizens.

c. Evading Blame

Governments also regulate information to avoid blame or simply looking bad.[439] The efforts to prevent distribution of the Pentagon Papers are one cogent example.[440] For another, the Department of Justice asserted the "state secrets" evidentiary privilege to avoid revealing to a Stanford doctoral student why she had been placed on the government's "no fly" list.[441] The reason: a Federal Bureau of Investigation agent made a clerical error, putting the lie to Attorney General Eric Holder's sworn assertion that invoking the privilege was not to "conceal 'administrative error'" or "'prevent embarrassment.'"[442] The state secrets doctrine has a bad history: it was originally invoked in a lawsuit against the U.S. Air Force after a B-29 bomber crashed.[443] The government argued that disclosing the reasons for the crash would jeopardize national security, and the Supreme Court agreed.[444] Recently released documents show that the crash was, in fact, caused by Air Force negligence.[445]

Efforts to use information regulation to evade blame go beyond evidentiary rules. After the Department of Homeland Security (DHS) seized the domain name of the popular hip-hop blog Dajaz1, allegedly because the site trafficked in copyright-infringing material, the government repeatedly refused to reveal its evidence supporting the seizure.[446] In fact, DHS sealed its court filings,

436. Ippolito & Mathios, *supra* note 229; *see* Beales, *supra* note 229, at 18–19; Timothy J. Muris, *Economics and Consumer Protection*, 60 ANTITRUST L.J. 103 (1991).

437. Muris, *supra* note 436.

438. *Id.*

439. *See* Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73 (2015).

440. *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

441. David Kravets, *How Obama Officials Cried "Terrorism" to Cover Up a Paperwork Error*, WIRED (Feb. 11, 2014), http://www.wired.com/2014/02/no-fly-coverup [https://perma.cc/BUW4-YVWU].

442. *Id.* (citing Holder declaration).

443. United States v. Reynolds, 345 U.S. 1 (1953).

444. *Id.*

445. Louis Fisher, *The State Secrets Privilege: Relying on* Reynolds, 122 POL. SCI. Q. 385, 399 (2007) (noting that the accident "report revealed clear negligence on the part of the Air Force").

446. *See* Declan McCullagh, *DHS Abruptly Abandons Copyright Seizure of Hip-Hop Blog*, CNET (Dec. 8, 2011), http://www.cnet.com/news/dhs-abruptly-abandons-copyright-seizure-of-hip-hop-blog [https://perma.cc/LGD4-HNNH].

preventing Dajaz1's counsel from learning about the state of the case.[447] When DHS finally had to reveal its position, it abandoned the case, returning the domain name.[448] The likely reason is that the recording industry, which had pressed the federal government to strictly enforce copyright, had been leaking tracks to Dajaz1 ahead of their official release date with the permission of copyright owners.[449] The government knew it had no case for infringement, but obfuscated nonetheless.

Finally, recordings of public encounters with police provide rich examples.[450] In some states, wiretapping laws require both parties to a communication to consent for one of them to record it lawfully.[451] Citizens who have recorded police encounters in public have been arrested, on the theory that the police did not consent. The chilling effects of this approach are obvious, particularly since recordings are often key to determining what occurred during a police interaction. For example, in Massachusetts, bystander Simon Glik recorded an arrest because he was concerned that Boston police were using excessive force.[452] The police arrested him for violating the state's wiretapping law.[453] Though charges were dropped, Glik sued the officers and the city, claiming that the arrest violated his First Amendment rights.[454] The First Circuit Court of Appeals agreed, finding that Glik had a constitutionally protected right to record the police under the circumstances.[455] While the result seems obviously correct, it is not universal: the Seventh,[456] Ninth,[457] and Eleventh Circuits[458] agree, but the Third Circuit held that the right was not yet "clearly established."[459] Wiretapping laws are intended to prevent recording where one party has a reasonable expectation of privacy. Police arresting someone in public lack that expectation. These prosecutions are plainly intended to prevent citizens from gathering evidence of potential police misconduct. Thus, sometimes the state limits information to avoid liability or blame.

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447. *See* Timothy B. Lee, *Waiting on the RIAA, Feds Held Seized Dajaz1 Domain for Months*, ARS TECHNICA (May 4, 2012), http://arstechnica.com/tech-policy/2012/05/waiting-on-the-riaa-feds-held-seized-dajaz1-domain-for-months [https://perma.cc/WP4S-NSG9].

448. *See* Timothy B. Lee, *ICE Admits Year-Long Seizure of Music Blog Was a Mistake*, ARS TECHNICA (Dec. 8, 2011), http://arstechnica.com/tech-policy/2011/12/ice-admits-months-long-seizure-of-music-blog-was-a-mistake [https://perma.cc/D976-U96L].

449. *See* McCullagh, *supra* note 446.

450. *See* Margot Kaminski, *Privacy and the Right to Record*, 96 B.U. L. REV. (forthcoming 2017); Justin F. Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016); Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559 (2016).

451. *See, e.g.*, CAL. PENAL CODE § 631(a) (2011) (implementing all-party consent rule).

452. Glik v. Cunniffe, 655 F.3d 78, 79–80 (1st Cir. 2011).

453. *Id.* at 80.

454. *Id.*

455. *Id.* at 85.

456. ACLU v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012).

457. Adkins v. Limtiaco, 537 F. App'x 721, 722 (9th Cir. 2013).

458. Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

459. Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010).

Governmental limits on speech are often self-interested: they help entrench politicians, enable state entities to expand their authority, and shield state actors from accountability. Each affords a basis for skepticism about information regulations.

CONCLUSION

The First Amendment has acquired a bad rap lately. The Supreme Court's expanded protections for commercial speech and corporate speakers have been depicted as grave threats: a deregulatory "nuclear option,"[460] the reincarnation of *Lochner*-style judicial license,[461] and by threatening privacy regulation, perhaps even the destruction of capitalism altogether.[462] This Article argues that fears of a free-speech planet are overblown, and that recent jurisprudence offers valuable skepticism about information regulation. Critics of the modern First Amendment have unwittingly repeated history. Information frequently appears terrifying; only the speakers vary. Past threats have included speech from Communists,[463] anarchists,[464] union organizers,[465] civil-rights activists,[466] doctors providing abortions,[467] Jehovah's Witnesses,[468] and a cavalcade of others. Time proved those fears unfounded. It will show the apocalyptic predictions about recent First Amendment law to be more Chicken Little than Cassandra.

We conclude with some larger thoughts about info-libertarianism and its place in First Amendment theory. First, this initial exposition leaves some difficult questions unanswered. It does not provide theories of the middle range to determine whether commercial speech regulation should continue to face intermediate scrutiny or to receive strict scrutiny as limits on "core" First Amendment speech do.[469] Similarly, if this speech remains under intermediate

460. Wu, *The Right to Evade Regulation*, *supra* note 8.

461. *See* Piety, *supra* note 6, at 2586.

462. *See* Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 673 (2016) (quoting Andrew Odlyzko, The End of Privacy and the Seeds of Capitalism's Destruction (June 2, 2014) (unpublished manuscript)) ("[P]ublic perception could reach a point of no return, such that we may abandon capitalism altogether, or at least witness a sea change in its configuration."). Calo states that for Odlyzko, "capitalism in general cannot sustain its current information intensity." *Id.* Odlyzko's argument that more information imperils capitalism is, to put it politely, contrary to virtually all mainstream economic theory and empirical findings.

463. *See* Dennis v. United States, 341 U.S. 494, 494 (1951).

464. *See* Abrams v. United States, 250 U.S. 616, 617–18 (1919).

465. *See* Debs v. United States, 249 U.S. 211, 212–15 (1919).

466. *See* NAACP v. Alabama, 357 U.S. 449, 451 (1958); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

467. *See* Bigelow v. Virginia, 421 U.S. 809, 811 (1975); *see also* Rust v. Sullivan, 500 U.S. 173 (1991).

468. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).

469. Some scholars question whether protected speech should receive differing levels of scrutiny. *See* Shiffrin, *supra* note 45 (arguing that there are no grounds for different levels of review). But defining the First Amendment's boundaries does not require these controversies to be settled.

scrutiny, info-libertarianism does not yet provide much guidance on a methodology for sorting expression by corporate entities into commercial versus political, other than to contend that some expression must fall into each camp.[470] These are projects for another day.

Second, info-libertarianism is expressly listener-centric. We defend information because of its potential to shape listeners and readers.[471] This is unusual for First Amendment theory, which prizes speakers, from town criers to pamphleteers.[472] Yet speakers give voice to their views not merely out of the joy of oration or authorship, but to reach and persuade others. Likewise, the state regulates speech to blunt its influence on others. Listeners appear too infrequently in the First Amendment canon.[473] They are increasingly important in the Internet era, where speaker and listener may be separated in time and space, unknown to one another. This Article cannot explore the full implications of a listener-focused First Amendment, but its theory strongly advances that orientation.

Finally, while our approach is structural in nature, we think info-libertarianism is not only compatible with major First Amendment theories, but that it supports them. It enables the flow of valuable, accurate information into the marketplace of ideas, and prevents government from systematically disadvantaging an entire class of useful sources of such data. It promotes autonomy by empowering people with more information to make decisions, from whether climate change requires remediation to which brand of underwear to purchase.[474] It contributes to freedom of thought by forcing the government to justify meaningfully any limits upon information exchange. And it advances democratic discourse by recognizing that policy decisions depend not merely on theory, but upon dry, mundane facts such as economic data and drug prices.[475] Info-libertarianism is capacious enough to shelter dominant free-speech theories and also limited enough to permit the modern regulatory state to function largely unimpeded.

470. *See* Bennigson, *supra* note 72, at 387–89.

471. *See* Bambauer, *supra* note 67.

472. *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).

473. *See* Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 918–19 (2012).

474. *See* Shiffrin, *supra* note 45, at 1259 ("If the government tells me that I cannot read Mobil Oil's literature, I should have a first amendment right to object whether or not I have any desire to read the literature . . . . Any such regulation would offend the value of respect owed to persons.").

475. *Id.* at 1232.