

# First Amendment Expansionism

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# FIRST AMENDMENT EXPANSIONISM

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## INTRODUCTION

In recent years, many litigants have found the First Amendment to be a useful tool. One could mention pornography actors, tattoo artists, death row inmates, and corporate interests from small photography shops to meat trade associations to cigarette manufacturers to pharmaceutical companies. All have raised First Amendment claims in the last few years, and nearly all of them have met with some level of success.

These claims are examples of what has been called First Amendment opportunism, where litigants raise novel free speech claims that may involve the repackaging of other types of legal arguments.<sup>1</sup> To the extent that many such claims have succeeded in the courts, they are also examples of what I will call First Amendment expansionism, where the First Amendment's territory pushes outward to encompass ever more areas of law. Here, I will consider one recent case that epitomizes both phenomena. What explains them, however, is another matter. Although many forces contribute to both First Amendment opportunism and First Amendment expansionism, the two phenomena may say something about the nature of speech and the nature of rules.

## I. THE CASE

In 2013, the United States Court of Appeals for the District of Columbia decided *National Association of Manufacturers v. National Labor Relations Board*.<sup>2</sup> In 2011, the National Labor Relations

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1. See Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174, 176 (Lee C. Bollinger & Geoffrey Stone eds., 2002).

2. 717 F.3d 947 (D.C. Cir. 2013). Some months after the symposium of which this piece was a part, the D.C. Circuit, sitting en banc, issued a ruling in another case in which it stated that to the extent that the holding of *National Association of Manufacturers* conflicted with the en banc court's reasoning, it was overruled. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014). The court forbore, however, to opine on how much of a conflict there actually was between the two cases. *See id.* at 22 n.1. And elsewhere in its opinion the court distinguished *National Association of Manufacturers*. *See id.* at 27. More important than this internal confusion is the fact that the questions raised by both *National Association of Manufacturers* and *American Meat Institute* remain open at the Supreme Court level and in many other circuits. However when one reads the two cases together, the issues they raise

Board (Board) issued the so-called Notice Posting Rule, which required most private sector employers to display within the workplace a poster describing employees' workplace rights under the National Labor Relations Act (NLRA).<sup>3</sup> The poster stated, for example, that employees have the right to organize or join a union, to bargain collectively, to discuss wages and conditions with coworkers or a union, to take action to improve working conditions, and to choose to do none of these things.<sup>4</sup> The poster also identified some rules that the NLRA places on employer conduct and union conduct.<sup>5</sup>

The government rested its justification for the rule on the fact that the Board cannot initiate enforcement of the NLRA on its own, but instead requires a charge first to be filed by a third party, such as an employee, employer, or union.<sup>6</sup> Posting the principle components of the NLRA was justified because “[e]nforcement of the NLRA ... depend[s] on the existence of outside actors who are not only aware of their rights but also know where they may seek to vindicate them within appropriate timeframes.”<sup>7</sup>

The National Association of Manufacturers, a trade group, challenged the Notice Posting Rule, arguing that it violated the First Amendment rights of employers.<sup>8</sup> The District Court held that the Notice Posting Rule did not violate the First Amendment because it “[d]id not compel employers to say anything.”<sup>9</sup> Rather, the poster constituted speech on the part of the government.<sup>10</sup>

The D.C. Circuit reversed, holding that the Notice Posting Rule violated the speech rights of employers.<sup>11</sup> The court relied on a line

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remain important and unfinished.

3. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 950 (quoting 29 C.F.R. § 104.202(a) (2013)).

4. *Id.*

5. *Id.* The full poster is available at <http://perma.cc/B9N7-LWHJ>.

6. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 951.

7. *Id.* (quoting Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,010 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104)).

8. *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F.Supp. 2d 34, 58 (D.D.C. 2012), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013). The group also argued that the Board lacked the authority to promulgate the rule under the NLRA. *Id.* at 43.

9. *Id.* at 58.

10. *Id.*

11. *Nat'l Ass'n of Mfrs.*, 717 F.3d at 959. Technically, the court determined that the rule was inconsistent with section 8(c) of the NLRA, which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be

of so-called “compelled speech” cases, beginning with *West Virginia State Board of Education v. Barnette*, in which the Supreme Court held that requiring public school students to recite the Pledge of Allegiance violated the First Amendment.<sup>12</sup> The court concluded that the Notice Posting Rule could not be distinguished from *Barnette*.<sup>13</sup> Like the Pledge of Allegiance in *Barnette*, the employment notice was speech that the employer had to communicate whether it wanted to or not.<sup>14</sup> As in *Barnette*, “the government selected the message and ordered its citizens to convey that message.”<sup>15</sup> Thus, as in *Barnette*, the requirement had to be struck down.<sup>16</sup>

## II. THE CONTROVERSY

Let us pause at the D.C. Circuit’s assertion that requiring employers to post accurate information about the laws governing the employment relationship cannot be distinguished from requiring schoolchildren to recite the Pledge of Allegiance. Many lawyers, and indeed many laymen, would say these cases are eminently distinguishable. One could point to the fact that the workplace is different from other contexts. Both employers and employees play roles that often have little to do with their personal passions, and the workplace is heavily regulated for health, safety, and other reasons. One could point to the fact that labor relations are also heavily regulated. One could argue that the realm of commerce generally is different from the realm of politics at issue in *Barnette*. One could note that the Pledge of Allegiance amounts to an affirmation of personal political belief (“I pledge allegiance to the flag of the United

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evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c) (2012). Citing a Supreme Court opinion describing section 8(c) as “implement[ing] the First Amendment,” the D.C. Circuit relied upon First Amendment case law to strike down the Notice Posting Rule. *Nat’l Ass’n of Mfrs.*, 717 F.3d at 955 (quoting *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008)).

12. 319 U.S. 624 (1943); see also *Nat’l Ass’n of Mfrs.*, 717 F.3d at 957.

13. *Id.* (referring to *Barnette*, 319 U.S. 624, and *Wooley v. Maynard*, 430 U.S. 705 (1977), “We do not think these, and other such cases may be distinguished from this one on the Board’s terms”).

14. *Id.* at 958.

15. *Id.* at 957.

16. *Id.* at 959.

States of America”),<sup>17</sup> whereas the Notice Posting Rule merely requires the employer to restate facts about the actual law governing the employment relationship.<sup>18</sup> Many people would say that a personal oath and a restatement of the law are quite different forms of communication, and that this makes them more different than their both happening to be made of words makes them the same.

Moreover, although established First Amendment law may not reflect everyone’s intuitions on every topic, it offers plenty of support for the view that the Notice Posting Rule and the Pledge of Allegiance are not as one. First Amendment law treats labor relations as essentially a unique realm in which many general free speech principles do not apply.<sup>19</sup> Courts have recognized that the employment context permits many forms of regulation that would receive different analysis in other realms.<sup>20</sup> This includes the fact that employers may have duties to disclose certain information to employees, whether regarding health and safety or other aspects of the work environment.<sup>21</sup> First Amendment law has also treated commercial speech differently from other speech,<sup>22</sup> and has treated laws

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17. 4 U.S.C. § 4 (2012).

18. *See Nat’l Ass’n of Mfrs.*, 717 F.3d at 950.

19. *See, e.g., UAW–Labor Emp’t & Training Corp. v. Chao*, 325 F.3d 360, 365 (D.C. Cir. 2003) (“[A]n employer’s right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks.”); *see also Henry I. Siegel Co. v. NLRB*, 417 F.2d 1206, 1216 (6th Cir. 1969) (upholding required labor posting by employer, with some court-ordered modifications); *NLRB v. M.E. Blatt Co.*, 143 F.2d 268, 274-75 (3d Cir. 1944) (taking for granted that the Board could require employers to post notices that they would not discourage employees’ labor rights and concluding that employers had no First Amendment right to post their own notices that the Board found coercive).

20. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (defining standards for Title VII hostile workplace environment sexual harassment while ignoring First Amendment briefing from both parties); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (suggesting that regulation of sexual harassment speech under Title VII does not raise First Amendment problems); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1, 9 (“After *Harris*, however, it is virtually inconceivable that the Supreme Court might hold that the First Amendment forbids the imposition of Title VII liability for a broad category of sexually harassing speech.”).

21. *See, e.g., Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) (upholding a hazard-labeling law against a First Amendment challenge); *Stockwell Mfg. Co. v. Usery*, 536 F.2d 1306, 1309 (10th Cir. 1976) (upholding required posting of poor OSHA safety reviews); *Lake Butler Apparel Co. v. Sec’y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (upholding required posting of OSHA notices); *Fogle v. H & G Rest., Inc.*, 654 A.2d 449, 463 (Md. 1995) (upholding required posting of smoking notices against First Amendment challenge).

22. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748,

requiring speech about commerce differently from laws restricting communication about commerce.<sup>23</sup> More generally, First Amendment law has distinguished between compelled speech of the *Barnette* variety and compelled disclosure of uncontroversial factual statements, which should receive minimal scrutiny.<sup>24</sup>

In fact, in an earlier case, *UAW-Labor Employment & Training Corp. v. Chao*, the D.C. Circuit denied that employers had a free speech right not to post a different government mandated notice informing employees of certain labor rights.<sup>25</sup> In rejecting the free speech claim, the court said:

[A]n employer's right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks. Thus the dissent understandably offers no argument that employers' silence as to [employee] rights is in fact protected (or even arguably protected).<sup>26</sup>

A court could, in short, easily distinguish the Notice Posting Rule from the Pledge of Allegiance. But the D.C. Circuit did not. It is this fact that makes *National Association of Manufacturers* so indicative of current trends in First Amendment law. This is, to many, an easy case—an easy case in favor of the Notice Posting Rule. If anything, as the D.C. Circuit itself suggested in *Chao*, the hard part may be forming an understanding of the First Amendment under which the Notice Posting Rule is unconstitutional. And yet the D.C. Circuit concluded that it was.

What makes *National Association of Manufacturers* significant is this conclusion. As others have noted, the First Amendment operates as a rule and, like other rules, has a particular scope.<sup>27</sup> Some

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770 (1976).

23. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“[I]n virtually all our commercial speech decisions to date, we have emphasized that ... disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”).

24. See *id.* at 650-51 & n.14 (stating that required disclosure of “purely factual and uncontroversial information” need only be “reasonably related” to state interests).

25. 325 F.3d 360, 365 (D.C. Cir. 2003). Once again, the court was discussing the effect of section 8(c), which it said “implements the First Amendment’ in the labor relations area.” *Id.* (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

26. *Id.* (internal citations omitted).

27. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary*

activities are within the scope of the First Amendment, and others are outside it.<sup>28</sup> Some speech has long been thought to be outside the scope of the First Amendment, such as insider trading, securities fraud, antitrust violations, criminal solicitation, various forms of conspiracies, and other inchoate crimes.<sup>29</sup> In addition, for those activities within the scope of the First Amendment, some receive a high degree of protection, and some receive a lower degree. Since 1976, for example, commercial speech has been within the scope of the First Amendment,<sup>30</sup> but some commercial speech receives “intermediate” protection<sup>31</sup>—lower than that received by, say, political speech—and other commercial speech receives no protection at all.<sup>32</sup>

The legal exercise of distinguishing cases concerns the scope of rules. To say that the Notice Posting Rule can be distinguished from the Pledge of Allegiance is to say that a court could conclude that they do not fall under the same rule.<sup>33</sup> A court could conclude that both fall within the scope of the First Amendment, but that the Pledge falls under a more protective First Amendment rule than the Notice. More drastically, a court could conclude that the Pledge falls within the scope of the First Amendment, while the Notice falls outside of it entirely. This is what it means to say that the cases can be distinguished.

The fact that the D.C. Circuit did none of these things says something about the current state of First Amendment law. As others have observed, litigants are raising First Amendment claims when earlier they never would have done so.<sup>34</sup> Beyond that, courts often

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*Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1769 (2004).

28. *See id.*

29. *See id.* at 1770-71.

30. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

31. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2674 (2011) (noting that the Supreme Court “has applied a less than strict, ‘intermediate’ First Amendment test when the government directly restricts commercial speech”).

32. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”).

33. *See, e.g.*, FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 58 (2009) (“In practice, a great deal of legal argument involves the attempt by one side to claim that some higher court case controls the result in the instant case, while the other side insists that there is a sufficient distinction between the two that the outcome in the precedent case need not be the outcome in the instant case.”).

34. *See e.g.*, Neil Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. &



entertain these claims, thus implying that they may fall somewhere within the First Amendment's scope. But this case goes further still. Not only was the First Amendment invoked, not only did the court find it relevant, but the court concluded that the employers had raised a *successful* claim. Nor is that conclusion a fluke. This case did not go to the Supreme Court because the Board decided not to seek certiorari, presumably out of concern that it would lose.<sup>35</sup> Not only was the First Amendment raised, not only was the case within its scope, but the *protection* given appeared to be of the highest level, on par with that offered in *Barnette*. Given the opportunities for distinguishing the two cases, the fact that the D.C. Circuit decided instead to place them together says something about how wide and robust the First Amendment's operation has become.

### III. FIRST AMENDMENT OPPORTUNISM

If one accepts this portrait of First Amendment expansionism, the natural impulse is to try to analyze it. Like the expansion itself, the task of understanding the expansion begins with the legal claims being made.

Claims like those of the National Association of Manufacturers reflect what Fred Schauer has called "First Amendment opportunism."<sup>36</sup> As a descriptive matter, the term "First Amendment opportunism" suggests that, at an earlier time, such claims would not have been made at all, or if they had, they would have met with derision.<sup>37</sup> Their flourishing suggests a certain entrepreneurialism in the deployment of the First Amendment in disputes that previously took place on other terms, if at all.<sup>38</sup>

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MARY L. REV. 1501 (2015); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613 (2015).

35. Press Release, NLRB, The NLRB's Notice Posting Rule (Jan. 6, 2014), <http://www.nlr.gov/news-outreach/news-story/nlrbs-notice-posting-rule> [<http://perma.cc/E44X-PWV2>].

36. Schauer, *supra* note 1, at 175.

37. See Schauer, *supra* note 34.

38. Schauer, *supra* note 1, at 191 ("In numerous other instances, political, social, cultural, ideological, economic, and moral claims that are far wider than the First Amendment, and that appear to have no special philosophical or historical affinity with the First Amendment, find themselves transmogrified into First Amendment arguments.").

Of course, litigation itself could be understood as entrepreneurial, and the fact that these claims are being made suggests that claimants have incentives to make them.<sup>39</sup> In cases such as *National Association of Manufacturers*, the incentives are obvious. Employers and their trade groups want to avoid regulation, which they perceive as costly and sometimes misdirected. Businesses want to be left alone to make their own decisions, and the First Amendment is a tool that can create legal purchase for this interest.

The First Amendment is not, however, the only tool that can be, or has been, employed in this regard. In the early twentieth century, businesses articulated similar antiregulatory sentiment in other terms. This was the *Lochner* era, a period of antiregulatory constitutionalism epitomized by the Supreme Court's decision in *Lochner v. New York*.<sup>40</sup> In this period, antiregulatory impulses took the form of a constitutional claim to liberty of contract. But in their structure, the claims of the past resemble those of the present. In the *Lochner* era, business interests claimed a liberty-based immunity from certain forms of government regulation, such as minimum wage and maximum hours laws.<sup>41</sup> Free speech claimants like the *National Association of Manufacturers* now claim a liberty-based immunity from certain forms of government regulation—in this case, the required disclosure of the very labor laws that now govern the employment relationship.<sup>42</sup> More broadly, litigants claim immunity from laws regulating commercial conditions such as employee safety<sup>43</sup>

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39. *Id.* (“When there is a good argument to be had, whether it is the First Amendment or not, those who would benefit from its acceptance are likely to use it, both in court and in public discourse.”).

40. 198 U.S. 45 (1905). The parallels between the modern First Amendment and *Lochnerism* have been identified and deeply explored. For trenchant examples, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375, 389; Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-31 (1979); Schauer, *supra* note 1, at 191; Schauer, *supra* note 34; Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541, 1544-45 (2008).

41. *See, e.g., Lochner*, 198 U.S. at 57, 64 (striking down a law limiting bakers' work to ten hours per day and sixty hours per week).

42. *See, e.g.,* cases cited *supra* note 19.

43. *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1125-26, 1128, 1134 (C.D. Cal. 2013) (holding that an adult entertainment group stated a claim when it argued that a condom requirement in pornography production may violate performers' free speech rights and constitute invalid prior restraint but denying preliminary injunction).

and benefits;<sup>44</sup> the location<sup>45</sup> and organization<sup>46</sup> of businesses; the composition and labeling of foodstuffs,<sup>47</sup> drugs,<sup>48</sup> and commercial products;<sup>49</sup> and the treatment of customers.<sup>50</sup> These claims mirror

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44. See, e.g., *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 441-42 (W.D. Pa. 2013) (rejecting a claim by a for-profit business that providing contraceptive coverage to employees under the Affordable Care Act violates its right against compelled subsidy of speech); *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1166 (E.D. Mo. 2012) (rejecting claim by for-profit business that providing contraceptive coverage to employees under the Affordable Care Act violated right against compelled expressive conduct).

45. *Foley v. Orange Cnty.*, No. 6:12-CV-269-ORL-37, 2013 WL 4110414, at \*12 (M.D. Fla. Aug. 13, 2013) (rejecting a First Amendment claim that compliance with land use special exception procedure amounts to compelled speech); *Demarest v. City of Leavenworth*, 876 F. Supp. 2d 1186, 1197 (E.D. Wash. 2012) (rejecting claim that zoning rule mandating signs in a "Bavarian theme" violates First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863, 871 (Ariz. 2012) (concluding that a denial of zoning permit to a tattoo parlor triggered First Amendment intermediate scrutiny).

46. *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014) (declining to address Verizon's First Amendment claims against net neutrality regulation while holding for Verizon on other grounds); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 443-44 (S.D.N.Y. 2014) (holding that results of a Chinese search engine's algorithms are entitled to First Amendment protection).

47. See, e.g., *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 746 F.3d 1065, 1071 (D.C. Cir. 2014), *reh'g en banc granted and opinion vacated by* No. 13-5281, 2014 WL2619836 (D.C. Cir. Apr. 4, 2014), *judgment reinstated by* 760 F.3d 18 (D.C. Cir. 2014) (en banc); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996) (granting preliminary injunction on First Amendment grounds against a Vermont law requiring labeling of milk from cows treated with synthetic growth hormone); *Monster Beverage Corp. v. Herrera*, No. EDCV 13-00786-VAP, 2013 WL 4573959, at \*12 (C.D. Cal. Aug. 22, 2013) (denying motion to dismiss First Amendment challenges to City Attorney's labeling demands for highly caffeinated energy drinks).

48. See *United States v. Caronia*, 703 F.3d 149, 168-69 (2d Cir. 2012) (striking down FDA regulations forbidding drug manufacturers to market prescription drugs to doctors for nonapproved uses).

49. See, e.g., *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014) (striking down law requiring producers to disclose whether minerals and mineral products are "conflict-free"); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (striking down law requiring graphic warnings on cigarette labels); *CTIA-Wireless Ass'n v. City & Cnty. of S.F.*, 494 F. App'x 752, 754 (9th Cir. 2012) (striking down requirement that cell phones be accompanied by warning information); *United States v. Philip Morris USA, Inc.*, 907 F. Supp. 2d 1, 26 (D.D.C. 2012) (rejecting claim that corrective statements required of tobacco companies violated First Amendment); *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, No. 08-1967MD-W-ODS, 2009 WL 3762965, at \*5 n.4 (W.D. Mo. Nov. 9, 2009) (rejecting claim that tort failure-to-warn claim violates First Amendment rights of defendants).

50. See, e.g., *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 91 (2d Cir. 2010) (rejecting First Amendment challenge to Bankruptcy Abuse Prevention and Consumer Protection Act's requirements that debt relief agencies provide bankruptcy clients with certain disclosures and written contracts); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2014) (rejecting claim that state nondiscrimination law violated photography company's First Amendment

*Lochner*-era claims in their structure: they posit a constitutional right, held by business interests (be they sole proprietors or corporate entities), which immunizes them from government regulation, often regulation that relies upon state interests in public health, safety, and welfare.

The difference today is that the First Amendment is so often the designated vehicle for these antiregulatory impulses. But this, too, is not surprising. As constitutional rights go, the First Amendment speech right provides an unusually robust amount of protection for activities that fall within its ambit. If a litigant can squeeze her claims under the First Amendment umbrella, the rewards are great—certainly much better than the rational basis review afforded to economic regulation in the post-*Lochner* era.

Moreover, this robust protection is given to something called “the freedom of speech.” Many activities involve “speech” in some way. This truism only becomes truer in an information economy, where many activities and products involve communication. Even if “the freedom of speech” should turn out to mean something different from “speech,” a First Amendment claim may look more facially plausible to a litigant than, say, a Fourth Amendment claim when no arguable search has taken place, or a Second Amendment claim that does not involve guns.

Thus, the First Amendment offers strong protection at a seemingly low price of admission. The incentives are clear. Just as ketchup can suddenly look like a vegetable to a strapped USDA,<sup>51</sup> so too can general antiregulatory sentiment suddenly look like a speech claim to any litigant who can remotely characterize her activity as one that involves communication. A bit of speech, like a dab of tomato sauce, puts one in a whole new category.

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rights by requiring it to serve same-sex customers).

51. See National School Lunch, School Breakfast, and Child Care Food Programs; Meal Pattern Requirements, 46 Fed. Reg. 44,452, 44,455-56 (Sept. 4, 1981) (proposing that “vegetable and fruit concentrates” count as full servings of vegetables and that schools “could credit a condiment such as pickle relish as a vegetable”); *Who Deserves a Break Today?*, NEWSWEEK, Sept. 21, 1981, at 43 (describing widespread interpretation of regulations as counting ketchup as a vegetable and reactions thereto).

## IV. FIRST AMENDMENT EXPANSIONISM

That incentives exist for First Amendment opportunism, however, does not explain its success. Granted, the questions of why a claim is brought and why it is successful are related. The more successful a litigant predicts a claim to be, the more likely she is to make it. But there is enough distance between litigants' decisions to make claims and courts' decisions to grant them that the two phenomena are worth distinguishing. After all, not everything that is opportunistic is also successful; naked opportunism often fails.<sup>52</sup> Why has First Amendment opportunism led to First Amendment expansionism?

There are many possible reasons, not all of which will be canvassed here. Some have suggested a cultural argument, wherein widespread societal support for the First Amendment gives it an inherent leg up on other constitutional arguments and perhaps discourages public officials from being perceived as "against" it.<sup>53</sup>

Some would say that this is a more specifically political phenomenon: that what matters is who is making the First Amendment claim, or which judges are hearing it. Supporters of this view could point to the fact that the notice upheld by the D.C. Circuit in *UAW-Labor Employment & Training Corp. v. Chao* informed workers that they did not have to join a union or pay certain dues,<sup>54</sup> whereas the notice struck down by the D.C. Circuit in *National Association of Manufacturers* told workers about their pro-union rights, as well as their rights not to join.<sup>55</sup> Some would argue that the divergent outcomes in the two cases come down to the divergent substance of the notices.

Others would say that First Amendment doctrine itself contributes to the problem, because it does not give clear guidance to

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52. See, e.g., *Ketchup Not a Vegetable, Administration Decides*, SARASOTA HERALD-TRIB., Sept. 26, 1981, at 16-A.

53. See Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 474 (1997) ("The absence of a coherent structure, however, has not prevented the First Amendment from becoming the object of veneration. Who can possibly be opposed to it? Like community, therefore, the First Amendment carries a high and positive emotional valence."); Schauer, *supra* note 1, at 192.

54. 325 F.3d 360, 362 (D.C. Cir. 2003).

55. 717 F.3d 947, 950 (D.C. Cir. 2013).

litigants or courts.<sup>56</sup> First Amendment doctrine is rife with specialized tests governing particular types of speech, and different tests may arguably apply to the same speech. For a lower court genuinely trying to understand and apply Supreme Court case law, it may be difficult to decide whether, for example, a required disclosure regarding a commercial product merits rational basis review, intermediate scrutiny for commercial speech, or the same strict scrutiny applied in political speech cases such as *Barnette*.<sup>57</sup> This lack of clarity is heightened by courts' tendencies to speak in general terms about protection for "speech" without making clear what specific speech category they are addressing, or what particular principle is in play.<sup>58</sup>

First Amendment doctrine, however, is intrinsically related to First Amendment theory, and theory makes its own contributions to First Amendment expansionism. The phrase "the freedom of speech" is, of course, not self-executing. It must mean something different from "freedom for all speech-related activities," and everyone has his or her own intuitive example of speech not included within "the freedom of speech," be it blackmail, fraud, or the nutritional information on a box of cereal. "The freedom of speech" means something other than freedom for all speech, and to understand what it encompasses requires a theory—an explanation of why the activities within the scope of "the freedom of speech" deserve to be treated differently from those outside of it.<sup>59</sup> Any decision about

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56. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278 (1991) ("[F]irst amendment doctrine is neither clear nor logical. It is a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections. It requires determined interpretive effort to derive a useful set of constitutional principles by which to evaluate regulations of expression.")

57. *Compare* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (applying rational basis review while also attempting to explain the standard as a version of intermediate scrutiny), *with* Nat'l Ass'n of Mfrs., 717 F.3d at 957 (implying through analogies to *Barnette* and *Wooley* that strict scrutiny applied).

58. See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2373 (2000) (noting "the tendency of courts to speak of First Amendment rules as applying to speech generally, thus systematically effacing the domains of speech actually implicated by different First Amendment theories").

59. See, e.g., Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319, 1320-21 (1983); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 125 (1989); Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1289 (1983).

whether an activity falls within the First Amendment's ambit, or how much protection it receives, ultimately comes back to some theory of what the First Amendment is for.<sup>60</sup>

One could observe that First Amendment theories are numerous, that courts employ them with differing levels of consistency and awareness, and that individual judges may endorse different theories. One could make arguments for why any of these factors might contribute to First Amendment expansionism. I would suggest that the problem for First Amendment theory is even more intractable. It has to do with two things: the nature of speech and the nature of rules.

#### A. *Speech*

The first point is one about a clash between semantics and the normative demands of the First Amendment. As previously observed, countless activities involve "speech."<sup>61</sup> These include professional advice from doctors and lawyers, legal documents and testimony, instruction manuals from product manufacturers, labels on food products, campaign spending, flag burning, tattoos, the production and distribution of pornography, work produced by machines such as Internet search results, work produced by people now dead, activities undertaken by infants and minors, and so on. "Freedom of speech" is a term of art that does not refer to all speech activities, but rather designates some area of activity that society takes, for some reason, to have special importance.<sup>62</sup> The judgment that a particular activity has this importance is a normative judgment, and the category "the freedom of speech" is a normative category. But the category the "freedom of speech" refers to "speech"—a term as to which people have an understanding that has nothing to do with values or principles. Instead, they have a semantic under-

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60. Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 5 (1989) ("A theory of free speech is thus a theory that posits a rationale, or justification, or goal, in terms other than free speaking, and then maintains that freedom to speak, or write, or communicate, will promote that posited rationale, justification, or goal.... Freedom of speech is thus ordinarily seen instrumentally, as the vehicle for promoting some supposed primary, or at least more fundamental, value.").

61. See *supra* notes 43-50 and accompanying text.

62. Schauer, *supra* note 60, at 5.



standing of the term as referring to many real-world phenomena (and not to others). Thus the stage is set for a struggle over the relationship between “speech” and “the freedom of speech.”

This struggle plays a role in First Amendment expansionism. Courts rarely see First Amendment challenges to laws that have nothing to do with the phenomenon “speech.” This is despite the fact that the First Amendment forbids laws “abridging the freedom of speech,”<sup>63</sup> and many non-speech-related laws do just that. Real property laws, for example, greatly reduce the speech opportunities of non-property holders. Yet property laws, although occasionally implicated in free speech law, are not a locus of First Amendment opportunism, let alone successful expansion.<sup>64</sup> Even something so seemingly irrelevant as the DMV’s driving license criteria help determine who can make it to the library and who cannot. As Larry Alexander has said, “[A]ll laws affect what gets said, by whom, to whom, and with what effect.”<sup>65</sup> This is not to say that all such effects rise to the level of “abridg[ing]” the freedom of speech. But it does suggest that, if First Amendment expansionism were completely divorced from the real world phenomenon of “speech,” it would be more evenly distributed among all regulations—those that explicitly involve “speech” and those that do not. Instead, the fact that a regulation does not concern “speech” on its face seems to make it much less likely to become a target of review in the name of “the freedom of speech.”

Meanwhile, when a regulation does involve “speech” in the colloquial sense, courts seem more likely to conclude that it also involves “the freedom of speech.” *National Association of Manufacturers* is an example,<sup>66</sup> as are challenges to consumer labeling requirements.<sup>67</sup> From a theoretical perspective, it is difficult to identify a conception of “the freedom of speech” that would make such requirements

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63. U.S. CONST. amend. I.

64. See *Amalgamated Food Emps. Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) (recognizing a First Amendment right to picket in a privately owned shopping center), *overruled by* *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (rejecting First Amendment right to distribute handbills in privately owned shopping center) and *Hudgens v. NLRB*, 424 U.S. 507 (1976) (rejecting First Amendment right to picket in a privately owned shopping center).

65. Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 *HASTINGS L.J.* 921, 929 (1993).

66. 717 F.3d 947 (D.C. Cir. 2013).

67. See *supra* notes 47 and 49.



constitutionally suspect. If the value that justifies “the freedom of speech” is the search for truth, then requiring employers and manufacturers to supply true information hardly seems to offend this value.<sup>68</sup> If anything, the search for truth would seem to argue in favor of such disclosures. Indeed, the primary reason that the Supreme Court gave commercial speech First Amendment protection was out of concern that suppression of commercial speech might deprive listeners of valuable information, including information related to political decision making.<sup>69</sup> This concern is notably absent when a law *requires* information sharing, rather than banning it.

If the value underlying “the freedom of speech” is individual autonomy, employers and manufacturers may cast themselves as unwilling speakers whose autonomy rights are being violated. But this claim would fail under many comprehensive theories of free speech autonomy.<sup>70</sup> Generally speaking, the overriding aim of the commercial sphere is typically profit maximization, rather than pursuit of a particular individual’s personal commitments or preferences.<sup>71</sup> Within the employment relationship in particular, neither employers nor employees may pursue their personal interests without regard for the duties they undertake by virtue of their role within the workplace. They may not sexually harass, or even gossip about, colleagues without facing potential discipline, despite the fact that these rules constrain their freedom to speak as they wish.

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68. See, e.g., William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1-2 (1995) (discussing the “canonized” view that the First Amendment furthers the search for truth and noting criticisms of this view); Eugene Volokh, *In Defense of the Marketplace of Ideas / Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595 (2011) (arguing that the search for truth should count as an important justification for the First Amendment, along with democratic participation).

69. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976) (noting consumer and societal interests in commercial information); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (noting legitimate informational interests in advertisement for abortion services in another state).

70. See, e.g., C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 273 (2011) (“The structural compulsion of the market means that neither liberty nor autonomy is at stake, at least to the extent this sphere works according to its ideal. (Autonomy may exist in respect to a person’s choice of the entity for which to work—but not the entity’s behavior.)”); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 296 (2011) (developing a thinker-based, autonomy-centered view of free speech which would distinguish employer speech because “business corporate speech does not involve in any direct or straightforward fashion the revelation of individuals’ mental contents”).

71. See Shiffrin, *supra* note 70, at 296-97.

Meanwhile, manufacturers clearly have duties to provide consumers with information about their products, including how they work, what potentially dangerous substances they contain, and how not to use them. These duties are undergirded by tort liability for failure to warn about dangerous products, an area of law so far seemingly immune to First Amendment expansionism, if not entirely opportunism.<sup>72</sup>

If the First Amendment's justification goes back to democratic self-governance, these cases seem equally mystifying. Whether one's view of political speech is narrow<sup>73</sup> or broad,<sup>74</sup> the employment relationship would seem to be one where employers and employees owe duties to behave differently to each other than they would in their capacities purely as citizens. And if one were to argue that the employment relationship or food labeling remains within the scope of the First Amendment, providing factual information would only seem to foster democratic self-governance, not to hinder it.

Meanwhile, if one argument for the D.C. Circuit's conclusion in *National Association of Manufacturers* is that speech compulsions may be employed by the government to target those with politically disfavored views, there is nothing special about speech compulsions in this regard. The government could target disfavored views through means having nothing to do with "speech"—through taxation, heavier general regulation, or selective prosecution, for example. Meanwhile, disclosure requirements may serve any number of legitimate purposes having nothing to do with penalizing viewpoints.<sup>75</sup> There seems little reason to conclude that such requirements in particular are presumptively suspect, unless the

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72. See *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, MDL No. 1967, 2009 WL 3762965, at \*6 n.4 (W.D. Mo. Nov. 9, 2009) (rejecting an argument that a tort failure-to-warn claim violates First Amendment rights of defendants).

73. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 27-28 (1971) (defining speech protected by the First Amendment as "speech about how we are governed").

74. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 483 (2011) (describing "public discourse" as guiding First Amendment value); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493 (2011) (arguing the same).

75. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (stating that disclosure laws provide citizens with useful information, ensure they are fully informed, and prevent confusion).

fact that they involve “speech” is driving that conclusion.<sup>76</sup> All in all, any argument for the relevance of “the freedom of speech” to product labeling or employer disclosure is far from obvious or inevitable. Nor do judicial opinions in this arena tend to rely on subtlety. Instead, they seem animated by “speech”—by the fact that these materials are made of words.

Perhaps, then, courts are less likely to identify “the freedom of speech” as a value in the absence of “speech” in a regulation, and more likely to conclude that “the freedom of speech” is implicated in the presence of “speech.” Nor is this result necessarily unreasonable. There must be some overlap between the two, or else “the freedom of speech” would be called something else. And once one admits some correspondence between “the freedom of speech” and “speech,” it may be difficult to say with confidence where that correspondence ends. For some, concluding that the First Amendment *obviously* does not apply to some form of “speech” may be as unlikely as concluding that “No Vehicles in the Park” *obviously* does not include motorcycles or dunebuggies.<sup>77</sup>

### B. Rules

One might observe, however, that it is the job of courts not to mistake terms of art for everyday language, and if the definition of “the freedom of speech” were clear enough, they would not do so. No doubt there is much truth to this, and no doubt, too, we will never reach that blissful state.<sup>78</sup> But even if we did, one problem would

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76. One might respond that compulsory disclosure has previously been used to target disfavored groups, as was fairly plainly the case in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). This historical precedent might support the conclusion that compelled disclosure is presumptively unconstitutional. But this argument would ignore the fact that other forms of regulation have also historically been used to target disfavored groups. *See, e.g.*, *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (striking down Louisiana Governor Huey Long’s special tax on newspapers with circulations of greater than 20,000). The NAACP itself endured numerous forms of regulatory targeting. *See, e.g.*, *Alabama ex rel. Patterson*, 357 U.S. at 451-54 (describing application of Alabama foreign corporations law and rules of contempt to NAACP). On the role of suspect purpose in compelled disclosure analysis, see Leslie Kendrick, *Disclosure and Its Discontents*, 27 J.L. & POL. 575, 575-76 (2012).

77. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); *see also* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1134 (2008).

78. Bork, *supra* note 73, at 20 (“The law has settled upon no tenable, internally consistent

remain—this one a problem about the nature of rules rather than the nature of speech.

When it comes to the scope of the First Amendment, there are only two clear rules: either no speech is covered, or all speech is covered. Every other position is somewhere in the mushy middle. The first clear rule—no speech is covered—suggests that speech is not distinguishable from other activities, or that “the freedom of speech” is not distinguishable from some other freedom that covers a broader range of activities. This position, while it garners some support in the theoretical literature,<sup>79</sup> seems unlikely to be adopted as a tenet of constitutional law.

The second clear rule, that all speech is covered, is sometimes called the “all-inclusive approach.”<sup>80</sup> This may seem equally unpalatable. After all, everyone has intuitive examples of speech that simply cannot receive First Amendment protection. Any rule that all speech is covered must involve a heavy amount of defining out, presumably by employing some sort of test to conclude that while all speech is nominally within the scope of the First Amendment, some of it ultimately receives little to no protection.

But this option must be compared with the alternatives. Any theory of free speech falling between “no coverage” and “all coverage” will be nuanced and complex. This is certainly true of any pluralistic theory, which identifies multiple purposes that freedom of speech serves.<sup>81</sup> It is also true of any unified theory, which assigns importance only to one value, such as the search for truth or democratic participation.<sup>82</sup> Even if only one value is involved, a theory must account for all of the different activities in the world that serve that value and how they relate to “the freedom of speech.” Such a theory should probably also explain how various activities that involve “speech” in the everyday sense either do or do not further the chosen

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theory of the scope of the constitutional guarantee of free speech.”).

79. See, e.g., LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005); Alexander & Horton, *supra* note 59, at 21-22; Schauer, *supra* note 59, at 1290-91.

80. Weinstein, *supra* note 74, at 491-92 (identifying examples of the “all-inclusive approach” in treatises and other literature).

81. See, e.g., KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 9-14 (1992); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 9-45 (1990); Greenawalt, *supra* note 59, at 119-20.

82. For a survey of various unified theories of the First Amendment, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).

value, and thus how they do or do not relate to “the freedom of speech.” Certainly courts are going to want to know the answer to this question when faced with applying “the freedom of speech” to particular activities.

Even at their best, such theories will involve complexity, they will involve nuance, and they will go on for pages. At their worst, given all the innumerable things that speech does, and all the ways that particular values either are or are not furthered by speech activities, listening to somebody else’s First Amendment theory can be roughly as interesting and illuminating as listening to someone recount a dream over the breakfast table. As Henry James said, “Tell a dream, lose a reader.”<sup>83</sup>

Any actual First Amendment theory, then, will function as more of a standard than a rule. Even the hardest and clearest theory will require much explication to reduce it to the level of particular activities in particular disputes. Rather than deal with these complexities, some courts and some scholars opt for the “all-inclusive approach.” They prefer defining out to defining in. The all-inclusive approach cannot avoid the difficult questions: some activities will have to be defined out, and some set of values will have to govern that process. But it feels clearer and easier to start with the presumption that everything is in and work from there. And along the way one may conclude that the easiest course is just to leave the Board notice, the tattoos, and the food labels in after all.

Of course, it need not be thus. European courts, for example, seem quite happy with standards, as do some American judges. But for many American courts, rules seem to exert a magnetic pull. Theorists who are working to develop a comprehensive First Amendment theory not only have their work cut out for them generally, but they are fighting against this pull. Even the world’s best First Amendment theory would still have to contend with judges’ desire for what Learned Hand described, in the context of subversive speech, as “a qualitative formula, hard, conventional, difficult to evade.”<sup>84</sup> And if

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83. See MARTIN AMIS, *Review of Ulysses by James Joyce*, in *THE WAR AGAINST CLICHÉ: ESSAYS AND REVIEWS, 1971-2000*, at 446 (2001) (quoting Henry James).

84. Letter from Learned Hand to Zechariah Chafee, Jr., (Jan. 2, 1921), in *REASON AND IMAGINATION, THE SELECTED CORRESPONDENCE OF LEARNED HAND: 1897-1961*, at 103 (Constance Jordan ed., 2013); see also Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *STAN. L. REV.* 719, 725 (1975)

this pull exerts itself in the First Amendment context, it is likely, at least at this point, to pull toward “all coverage” rather than “no coverage.”

First Amendment expansionism is likely a product of many factors. It does, however, highlight challenges intrinsic in formulating and propagating a workable understanding of “the freedom of speech.” The pull of both everyday language and clear rules undercuts the best efforts to bring a full conception of the First Amendment to legal decision making. Such a conception—one which can comprehensively explain the relationship between “speech” and “the freedom of speech”—is precisely what courts need to address the diverse and often novel claims that First Amendment opportunism brings their way. It is a paradox that a complex understanding of the First Amendment is simultaneously exactly what legal decision making requires, and exactly what it shuns.

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(applying Learned Hand’s words in a First Amendment context).

