THE DISEMBODIED FIRST AMENDMENT

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ABSTRACT

First Amendment doctrine is becoming disembodied—increasingly detached from human speakers and listeners. Corporations claim that their speech rights limit government regulation of everything from product labeling to marketing to ordinary business licensing. Courts extend protections to commercial speech that ordinarily extended only to core political and religious speech. And now, we are told, automated information generated for cryptocurrencies, robocalling, and social media bots are also protected speech under the Constitution. Where does it end? It begins, no doubt, with corporate and commercial speech. We show, however, that heightened protection for corporate and commercial speech is built on several "artifices"—dubious precedents, doctrines, assumptions, and theoretical grounds that have elevated corporate and commercial speech rights over the last century. This Article offers several ways to deconstruct these artifices, re-tether the First Amendment to natural speakers and listeners, and thus reclaim the individual, political, and social objectives of the First Amendment.

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INTRODUCTION

Corporate speech lives a charmed constitutional life. Within the last half-century, businesses have used the First Amendment to challenge a remarkable range of laws. Efforts to regulate robocalling, pharmaceutical marketing, tobacco warnings, business licensing, product labeling, workplace disclosures, health and safety notices, adult entertainment, and even corporate influence in elections have all given way to the speech rights of corporations. The First Amendment may also prohibit, we are told, laws regulating cryptocurrencies, search engines, social media bots, and even the sale of sensitive encryption software or directions for making weapons.

When first presented with commercial speech in the 1940s, the Supreme Court held that it was not covered at all by the First Amendment.[1] Three decades later, the Court recognized limited protection for commercial speech, "commensurate with its subordinate position" among First

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

Amendment values.[2] But today, corporate commercial speech[3] enjoys many of the same judicial protections and suspicions of regulation enjoyed by core political and religious speech.[4] The Court's initial instinct to apply intermediate scrutiny to corporate commercial speech gradually mutated to "heightened" scrutiny and *de facto* strict scrutiny. In the process, the Court has transplanted doctrines designed to protect core speech—such as the presumptive invalidity of content- and speaker-based distinctions—to corporate commercial speech,[5] where the doctrines make little sense and thwart rather than promote First Amendment values.

This Article explains how this happened, why it matters, and what can be done to reclaim the First Amendment from corporate commercial speech.

On the question of *how* this came to be, we describe what we call the "artifices" of corporate commercial speech: the dubious precedents, doctrines, assumptions, and theoretical grounds that delivered corporate commercial speech from the periphery of the First Amendment to its core. Each "artifice," standing alone, represents a major shift in doctrine. But together, the artifices of corporate commercial speech reveal a radical departure from a First Amendment concerned with individual rights or the public good. For example, corporations gradually convinced courts to recognize not just economic or property rights in the corporation, but civil rights and liberty interests, too. Corporations also invited courts to pare away commonsense distinctions between artificial entities and natural persons. At the same time, the Supreme Court used atypical cases involving atypical corporations to extend constitutional protections to *all* businesses.

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2. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976).

3. "Commercial" speech is not necessarily coextensive with "corporate" speech, and vice versa. The prevailing test for identifying commercial speech is rather simplistic, asking whether the speech is an advertisement, whether it refers to a specific product, and whether the speaker has an economic motive—thus considering the form, content, and motivation for the speech. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983). In earlier work, one of us has criticized this test as outdated given the variety, subtlety, and sophistication of messaging by modern businesses. *See* Nathan Cortez, *Can Speech by FDA-Regulated Firms Ever Be Noncommercial?*, 37 AM. J.L. & MED. 388 (2011). Still, of course, not all corporate speech is commercial, as in the case of political speech by corporations. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010). Likewise, commercial speech can come from non-corporations. *Ohralik*, 436 U.S. at 455–56 (attorney advertising). This Article focuses on commercial speech by corporations, rather than noncommercial speech, such as political or religious speech by corporations. Thus, we refer to "corporate speech" as shorthand for "corporate commercial speech," unless otherwise specified. For a fuller discussion of the distinctions and where they matter, *see* Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005, 2021–22 (2017) [hereinafter Wu, *The Commercial Difference*].

4. For a fuller description of what "core" protected speech is, see discussion *infra* Section I.C at notes 60–75.

5. Frequently cited values promoted by the First Amendment include autonomy, dignity, self-governance, and the expression of ideas. *See* Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1 (2012) [hereinafter Piety, *A Necessary Cost of Freedom*].

These "artifices" we describe are just that—clever constructs used to elevate corporate commercial speech from a subordinate position to one on equal footing with core protected speech.

On the question of *why* this matters, we explain how corporate speech claims may frustrate efforts to use modern, information-based regulation to govern our modern, information-based economy. Because so much economic activity today concerns itself with information and communication, regulation of such activity is particularly susceptible to First Amendment challenges. Today's anti-regulatory atmosphere is exacerbated by the fact that courts increasingly are reluctant to observe previously accepted distinctions between different types of speech or different types of speakers, while blurring the distinctive types of interests protected by the First Amendment's free speech guarantee. Thus, well-founded skepticism of content- and speaker-based distinctions in core speech have been transported to commercial contexts where the skepticism is not well-founded. These doctrinal shifts also risk extending speech rights in unnatural and problematic ways. For example, some scholars argue that regulating robotic communication "implicates" free speech rights. [6] Considered as a whole, commercial speech protections are invoked routinely to disable reasonable efforts at economic regulation and democratic self-governance, reminiscent of the *Lochner* era.

On the question of *what* can be done, we consider four ways to deconstruct the artifices and thus properly reconstruct corporate commercial speech. First, we suggest that courts return to the original justification for covering commercial speech—protecting the interests of human consumers and listeners—and abandon later justifications that look to the interests of non-human speakers or the value of information for its own sake. Doing so will reclaim important individual, political, and social objectives of the First Amendment, properly subordinating economic objectives. Second, we engage the debate over corporate "personhood," arguing that, whether or not one embraces corporate personhood for some purposes, courts should resuscitate authentic distinctions between natural and corporate persons. Third, we argue that courts can blunt the countermajoritarian effects of judicial review in corporate commercial speech cases by regarding consumer welfare as a proxy for the public interest—an approach familiar to courts applying federal antitrust law. Finally, we explain why an appropriate balance between public regulation and individual liberty must account for the harms caused by modern forms of corporate and artificial

6. Madeline Lamo & Ryan Calo, *Regulating Bot Speech*, 66 UCLA L. REV. 988, 1003 (2019); Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1173 (2016); Toni M. Massaro, Helen Norton & Margot E. Kaminski, *Siri-ously 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481 (2017).

speech. Properly orienting corporate speech, therefore, may require a theory of free speech that identifies and values its affirmative benefits, such as autonomy, dignity, self-governance, and the expression of ideas.

We proceed in three parts. Part I considers the stakes, particularly the threat to modern, information-based regulation. Part II describes the "artifices," explaining how the Supreme Court has transplanted doctrines designed to protect core speech to corporate commercial speech. Part III considers what it will take to reclaim the First Amendment from corporate commercial speech, resuscitating consumer welfare as the lodestar.

I. THE SPEECH THREAT TO GOVERNANCE

Corporations have seized on the First Amendment's deregulatory potential, challenging a wide variety of laws on free speech grounds.[7] The Roberts Court has embraced these arguments, leading many scholars to call this a new *Lochner* era, in which courts invalidate fairly prosaic economic regulation based on claims grounded in individual rights.[8] This section builds on prior work, first by demonstrating how the First Amendment frustrates efforts to use information-based regulation to oversee an information-based economy, then by explaining how modern judicial skepticism, or even nihilism, about categorization under the First Amendment risks extending speech rights in unnatural ways. The effect is to further disable efforts at reasonable economic regulation and democratic self-governance.

A. Information-Based Regulation

Our economy has largely transitioned from an industrial to a post-industrial economy.[9] Information and informational goods have become central to many, if not most, industries.[10] Indeed, information is "arguably the most important commodity in a post-industrial economy."[11] Thus, the objects of modern regulation are more speech-like than in an industrial

7. *See, e.g.*, Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 924 (2007); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 377 n.17 (2016).

8. *See, e.g.*, Shanor, *supra* note 7; Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 52.

9. Cohen, *supra* note 7; Dibadj, *supra* note 7, at 924.

10. Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1446 (2016).

11. Dibadj, *supra* note 7, at 924.

economy, where regulation focuses on tangible products and places.[12] Thirty years ago Carl Mayer called information the "Modern Property," observing that "defense of this Modern Property is an increasingly urgent corporate concern."[13]

An information-based economy is increasingly subject to information-based regulation.[14] In recent decades, regulators have turned away from traditional command-and-control regulation, which relies on binding laws enforced through formal sanctions, toward lighter-touch regulation that relies on information production, affirmative disclosures, and other "soft" forms of law.[15] Although the historical development of information-based regulation is beyond our remit here,[16] it has a long pedigree—from the mandated disclosures of the Securities Act of 1933, designed to deter companies from harming investors,[17] to the executive orders from President Reagan onward, directing agencies to consider alternatives to command-and-control regulation.[18] Thus, rather than banning cigarettes outright, the government requires a Surgeon General's Warning; rather than banning sodas, the government requires labels to disclose sugar content; rather than banning prescriptions for unapproved uses, the government bans drug companies from promoting such uses; rather than punishing hospitals for high mortality rates, Medicare publishes data sets so users can compare hospital mortality rates.[19]

Disclosure mandates have crept into almost every industry and economic activity.[20] And it is important to understand why. Disclosure mandates appeal to policymakers because they seem to be "an easy and effective intervention compared to more traditional regulation."[21] They also appeal politically because disclosure requirements represent a "path of least

12. Shanor, *supra* note 7, at 171; *see also* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345–47 (2004).

13. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 604 (1990).

14. *See, e.g.*, William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701 (1999); Nathan Cortez, *Regulation by Database*, 89 COLO. L. REV. 1 (2018) [hereinafter Cortez, *Regulation by Database*].

15. Shanor, *supra* note 7, at 164–65.

16. *See, e.g.*, Sage, *supra* note 14; OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Cortez, *Regulation by Database*, *supra* note 14.

17. *See* 15 U.S.C. §§ 77a–77e; Sage, *supra* note 14, at 1780; Cortez, *Regulation by Database*, *supra* note 14, at 23–24; Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81 (2007).

18. Shanor, *supra* note 7, at 165 (citing Exec. Order No. 12,291, 3 C.F.R. § 127 (1982); Exec. Order No. 12,498, 3 C.F.R. § 323 (1986); Exec. Order No. 12,866, 3 C.F.R. § 638 (1994); Exec. Order No. 13,563, 3 C.F.R. § 215 (2012)).

19. Shanor, *supra* note 7, at 171; Cortez, *Regulation by Database*, *supra* note 14, at 24.

20. BEN-SHAHAR & SCHNEIDER, *supra* note 16.

21. Cortez, *Regulation by Database*, *supra* note 14, at 28.

resistance for administrative agencies seeking to promote meaningful change."[22] Most policymakers intuit that information-based regulation is consistent with free markets, individual autonomy, and even the pursuit of truth and knowledge.[23] But because information-based regulation, almost by definition, concerns itself with speech, it is susceptible to First Amendment challenges.

B. First Amendment Lochnerism

Regulating an information-based economy with information-based tools would seem to make sense, particularly if the tools are countenanced by both legislative and administrative processes. But modern courts, led by the Roberts Court, have undone numerous regulatory efforts in the name of free speech, including laws regulating corporate spending, advertising, and even the data used to craft marketing messages.[24] The Free Speech Clause[25] has become the centerpiece of the Roberts Court's broadly deregulatory agenda,[26] under which the First Amendment is used to question the constitutionality of all kinds of regulation—from business licensing,[27] to warning labels,[28] to mandatory workplace disclosures,[29] to country-of-origin labeling,[30] to warnings of cellular phone radiofrequency exposure,[31] to enforcement actions for unsubstantiated marketing claims,[32] to disclosure requirements for "conflict minerals."[33]

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22. Sage, *supra* note 14, at 1772.
23. Cortez, *Regulation by Database*, *supra* note 14, at 28.
24. Purdy, *supra* note 7, at 198.
25. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.
26. *See* Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 365 (2015) [hereinafter Piety, *Why Personhood Matters*]; Tamara R. Piety, Citizens United *and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010).
27. *See, e.g.*, Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014) (declaring invalid on First Amendment grounds a D.C. law that required licenses for tour guides). *But see* Liberty Coins, LLC v. Goodman, 748 F.3d 682 (6th Cir. 2014) (rejecting a claim that a state law requiring licenses for precious metals dealers violates the First Amendment).
28. *See, e.g.*, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012), *overruled in part by* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc).
29. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013), *overruled in part by Am. Meat Inst.*, 760 F.3d 18.
30. *Am. Meat Inst*., 760 F.3d 18.
31. CTIA–The Wireless Ass'n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019) (upholding against a First Amendment challenge a city ordinance requiring retailers to inform potential cell phone customers that carrying a phone could exceed FCC guidelines for radiofrequency radiation).
32. POM Wonderful, LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015) (upholding in part and invalidating in part an FTC enforcement action against POM Wonderful making unsubstantiated health claims regarding its pomegranate juice).
33. Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014) (invalidating on First Amendment grounds a requirement that companies disclose their use of conflict minerals originating from Congo or its neighbors), *overruled in part by Am. Meat Inst.*, 760 F.3d 18.

These decisions have prompted scholars to label the Court's approach "First Amendment *Lochnerism*," "fundamentalism," "expansionism," and "imperialism."[34] *Lochnerism* may be particularly apt. The *Lochner* era refers to a forty-year period from 1897 to 1936 during which the Supreme Court struck down dozens of minimum-wage, labor, and other laws regulating business based on "liberty of contract" and other un-enumerated economic rights.[35] Like *Lochner* itself, modern corporate speech decisions rest on questionable theoretical grounds and make questionable assumptions, with questionable fidelity to questionable precedents—which we refer to collectively in Part II as the "artifices" of corporate speech.

The most immediate parallel to *Lochner* is that modern corporate speech cases blur important demarcations between the political and the economic. Decisions by the Roberts Court in cases like *Citizens United* and *Sorrell v. IMS Health* imagine a world in which "pursuing one's preferences through spending and seeking profit by advertising" are practically the same as core political speech and debate.[36] In *Citizens United*, the Kennedy majority used dire language to strike down a ban on corporate spending in elections, arguing that "[t]he censorship we now confront is vast in its reach."[37] Kennedy's opinion thus endows corporate spending with the constitutional sanctity of classic political speech, as if Congress limiting "corporate campaign spending was just as unconstitutional as banning a flesh-and-blood person from arguing for or against health care reform."[38] A year later, in *Sorrell v. IMS Health*, Justice Kennedy's majority opinion extended this logic to invalidate a Vermont law that barred pharmaceutical companies (but not public health researchers or generic drug companies) from accessing records of drug prescriptions without the prescriber's permission, writing that Vermont "may not burden the speech of others in order to tilt public debate in a preferred direction."[39] As Jedediah Purdy emphasizes, "[t]here is something otherworldly about describing as 'public debate' companies' targeted pitches to physicians."[40] Never before had marketing been recognized as a core constitutional concern.[41] In dissent, Justice Breyer

34. *See, e.g.*, Jack M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659; Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167 (2001); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015); Bertrall L. Ross II, *Paths of Resistance to Our Imperial First Amendment*, 113 MICH. L. REV. 917 (2015).

35. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 181 (2018). During that period, the Supreme Court struck down over 200 pieces of federal and state legislation based on the idea that they violated economic liberty. Purdy, *supra* note 7, at 197.

36. Purdy, *supra* note 7, at 198.

37. Citizens United v. FEC, 558 U.S. 310, 354 (2010).

38. Purdy, *supra* note 7, at 199.

39. 564 U.S. 552, 578–79 (2011).

40. Purdy, *supra* note 7, at 199–200.

41. *Id.* at 202.

warned that the *Sorrell* majority "threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty."[42] But that threat seems to be materializing.

A second parallel to *Lochner* is the Court's refusal to defer to legislative judgments regarding the proper scope and methods of economic regulation. Justice Rehnquist's dissent in an early commercial speech case, *Central Hudson*,[43] was particularly prescient on this point, calling the Court's decision a "return[] to the bygone era of *Lochner* . . . in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."[44] To Rehnquist, *Virginia Pharmacy Board* had opened Pandora's Box.[45] He lamented that commercial speech, which had only been recognized as covered by the First Amendment four years earlier in *Virginia Pharmacy Board*, should occupy "a significantly more subordinate position in the hierarchy of First Amendment values" than the Court was granting it.[46] The four-part test in *Central Hudson*, Rehnquist observed, "elevates the protection accorded commercial speech . . . to a level that is virtually indistinguishable from that of noncommercial speech."[47] He worried that the test's requirement that any restrictions on speech be "no more extensive than necessary" would "unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State."[48] Rehnquist scoffed at the majority's rhetoric that the founders "would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a 'liberty' not subject to extensive regulation."[49] Businesses that question the wisdom of such regulation, he argued, should appeal to policymakers rather than the courts.[50]

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42. *Sorrell*, 564 U.S. at 591–92 (2011) (Breyer, J., dissenting) (citing Lochner v. New York, 198 U.S. 45, 75–76 (1905)).

43. *Central Hudson* is notable for establishing a four-part test for determining whether government restrictions on commercial speech violate the First Amendment: (i) the speech itself must concern lawful activity and may not be false or misleading; (ii) the government interest in regulating the speech must be substantial; (iii) the regulation of speech must directly advance the government's asserted interest; and (iv) the regulation must not be more extensive than necessary to achieve the government's interest. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

44. *Id.* at 589 (Rehnquist, J., dissenting).

45. *Id.* at 598 (Rehnquist, J., dissenting). *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), was the first to recognize First Amendment protection for commercial speech.

46. *Central Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting).

47. *Id.* at 591 (Rehnquist, J., dissenting).

48. *Id.* at 584–85 (Rehnquist, J., dissenting).

49. *Id.* at 595 (Rehnquist, J., dissenting).

50. *Id.* at 589–90 (Rehnquist, J., dissenting).

As with the sequelae of the *Lochner* era, the griefs and woes unleashed by corporate commercial speech may take decades to wrangle. To Jedediah Purdy, "this neo-Lochnerism supposes that the distinction between politics and markets, or principles and interests, is spurious: A democratically adopted policy is just the aggregation of some people's interests, and a company's economic interests make as worthy a basis for political argument as any principle."[51] From this perspective, "the First Amendment [is] a natural vehicle to constitutionalize transactions at the core of the market," achieving for consumer capitalism in the information age what the freedom of contract did in the industrial age.[52] This departs sharply from a principle the Court accepted after *Lochner* that "[b]uying and selling enjoy no special constitutional status, and legislatures can regulate markets and businesses to make life more equitable, safe, or healthful."[53] By contrast, the Roberts Court has used the First Amendment to cast ordinary commercial regulation as "censorship."[54]

Both modern commercial speech doctrine and the *Lochner* era cases posit government regulation as a barrier to economic freedom; "privilege the negative over the positive state"; and "render courts, not the political branches, they key arbiters of our economic life."[55] Seen in this way, the First Amendment is not a building block for democratic self-government but a wrecking ball. In particular, as we explain below,[56] the notion that economic regulation must be content neutral "obscures that the entities and interests being protected here are some of the world's most powerful institutions, . . . with enormous, some would say excessive, influence in the legislative process to obtain favorable laws."[57] They are not oppressed minorities. They are not politically persecuted. They are not even human. Corporations "are creatures of law meant to *serve* the public interest, not to dominate it."[58]

How, then, did corporations earn virtually equal footing with natural persons[59] under the First Amendment?

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51. Purdy, *supra* note 7, at 202.
52. *Id.*
53. *Id.* at 203.
54. *Id.*
55. Shanor, *supra* note 7, at 182, 205–06.
56. *See* Section II.B.1.
57. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 54.
58. *Id.*
59. Black's Law Dictionary defines "natural person" as, "A human being, naturally born, versus a legally generated juridical person." *Natural person*, BLACK'S LAW DICTIONARY (2d ed. 1910).

C. Nihilism About Categories

Modern courts have adopted a deep skepticism, if not outright nihilism, about maintaining categorical distinctions under the First Amendment. We evaluate the incongruencies of such skepticism in Section II.B below, focusing on content-based distinctions, speaker-based distinctions, and the moving target of which interests warrant recognition. Our point here is that categories *should* matter and erasing distinctions is problematic. Although it is now widely accepted that constraints on corporate commercial speech warrant *review* under the First Amendment, it is the elevated level of *protection* conferred by recent decisions that concerns us.[60]

Long ago the Supreme Court recognized that not all constitutionally covered speech must be treated equally.[61] Categorizing speech helps determine answers to the first-order question of what speech is covered, and the second-order question of how much protection covered speech should receive.[62] Core political speech and debate about matters of public concern deserve the most protection; attempts to restrict such speech trigger the strictest review.[63] The First Amendment signals, if nothing else, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[64] Political speech "is the essence of self-government,"[65] and so "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection."[66]

In contrast, courts historically apply intermediate scrutiny to time, place, and manner restrictions, commercial speech restrictions, regulation of expressive conduct, and restrictions on non-obscene but sexually explicit speech.[67] Still other speech is subject to even less searching review, such as rational basis review for compelled commercial speech.[68] And some speech

60. *See* Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346, 347–49 (2014–2015) [hereinafter Schauer, *Out of Range*].

61. For an excellent discussion, see Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015), and Schauer, *Out of Range*, *supra* note 60.

62. Schauer, *Out of Range*, *supra* note 60, at 348.

63. Citizens United v. FEC, 558 U.S. 310, 339–40 (2010).

64. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

65. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

66. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

67. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (commercial speech); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (time, place, and manner restrictions); United States v. O'Brien, 391 U.S. 367 (1968) (expressive conduct); R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens J., concurring in part) (sexually explicit speech).

68. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626 (1985); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 554 (6th Cir. 2012) (describing the *Zauderer* test as a "rational-basis standard").

is considered unprotected under the First Amendment altogether, including defamation, fighting words, obscenity, or threats of violence.[69]

It is difficult to pretend that who is speaking, about what, and why should be of no constitutional import. As Justice Stevens explained, "[m]uch of our First Amendment jurisprudence is premised on the assumption that content makes a difference."[70] Supreme Court precedents make numerous categorical distinctions based on the content of speech, thus allowing "greater regulation of child pornography, obscenity, fraud, perjury, price-fixing, conspiracy, or solicitation."[71] Stevens notes that "[w]hether a magazine is obscene, a gesture a fighting word, or a photograph child pornography is determined, in part, by its content."[72] Indeed, even *within* content-based categories of speech, the precise level of First Amendment protection is dictated by content. Both *New York Times Co. v. Sullivan*[73] and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[74] teach that "[s]peech about public officials or matters of public concern receives greater protection than speech about other topics."[75]

The Court now seems to recoil at the notion that commercial speech is of "lower value."[76] But comparing the value of speech undergirds longstanding precedents. Obscenity, perjury, fraud, and violent threats might be characterized, quite fairly, as "lower-value" speech, or less protected speech, in that they trigger fewer concerns about speaker autonomy and other interests traditionally protected by the First Amendment.[77] If we take seriously the Court's recent admonitions that content- and speaker-based distinctions are presumptively invalid,[78] these

69. *R.A.V.*, 505 U.S. at 383.
70. *Id.* at 421 (Stevens, J., concurring in part).
71. Shanor, *supra* note 7, at 179.
72. *R.A.V.*, 505 U.S. at 421 (Stevens, J., concurring in part).
73. 376 U.S. 254 (1964).
74. 472 U.S. 749 (1985).
75. *R.A.V.*, 505 U.S. at 421 (Stevens, J., concurring in part). *See also id.* at 422 ("It is also beyond question that the Government may choose to limit advertisements for cigarettes, but not for cigars; choose to regulate airline advertising, but not bus advertising; or choose to monitor solicitation by lawyers, but not by doctors. All of these cases involved the selective regulation of speech based on content—precisely the sort of regulation the Court invalidates today. Such selective regulations are unavoidably content based, but they are not, in my opinion, presumptively invalid. As these many decisions and examples demonstrate, the prohibition on content-based regulations is not nearly as total as the *Mosley* dictum suggests.") (internal quotations and citations omitted) (citing Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 99–100 (1972)).
76. Lakier, *supra* note 61 (explaining how the concept of "high value" versus "low value" speech is a relatively modern construct, conceived after the New Deal Supreme Court embraced a more libertarian conception of freedom of speech); *but see* Schauer, *Out of Range*, *supra* note 60 (agreeing with Lakier's analysis on borderline cases of coverage, but maintaining that some speech is of "no value" for purposes of First Amendment coverage).
77. Shanor, *supra* note 7, at 196; Schauer, *Out of Range*, *supra* note 60, at 348–50.
78. Shanor, *supra* note 7, at 179 (discussing Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) and Reed v. Town of Gilbert, 576 U.S. 155 (2015)).

categories become difficult to maintain. Indeed, ExxonMobil made precisely this argument when challenging state allegations that Exxon committed fraud by deliberately misleading investors about the risks of climate change. Exxon argued that the state's investigation "discriminates based on viewpoint to target one side of an ongoing policy debate, strikes at protected speech at the core of the First Amendment," and amounts to "an impermissible content-based restriction."[79]

Corporations have been the main beneficiaries of the Court's recent skepticism about categories, although it remains questionable whether commercial speech doctrine really protects any interests traditionally recognized by the First Amendment.[80] This newly found solicitude for corporate rights reverses decades of failure by corporate interests to immunize themselves on free speech grounds.

During the 1930s, corporations first deployed free speech arguments against the New Deal.[81] As Jeremy Kessler shows, "[t]he most steadfast proponents of . . . the First Amendment in the 1930s were corporate lawyers tasked with fending off New Deal economic regulation."[82] Some observers at the time recognized the significance of corporate efforts, noting that "[b]ig business . . . has merely raised the freedom of the press issue as a smokescreen."[83] During that era, President Roosevelt had identified freedom of speech as one of his famous "Four Freedoms," but noted that "freedom . . . of expression . . . is not freedom to work children, or to do business in a fire trap or violate the laws against obscenity, libel and lewdness."[84]

Thus, it was not surprising that when the Court was first confronted with commercial speech in 1942, in *Valentine v. Chrestensen*, it held that it fell outside First Amendment coverage.[85] The policymakers of that era, like the Framers, "were practical statesmen, not metaphysical philosophers."[86] The real-world problems posed by corporations such as child labor, workplace

79. Plaintiff's Original Petition for Declaratory Relief at ¶¶ 60, 66, Exxon Mobil Corp. v. Walker, No. 017-284890-16 (Tex. Dist. Ct., Apr. 13, 2016), 2016 WL 1622506; Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1469 (2017).

80. We lay out this case more fully in Part II below.

81. Kessler, *supra* note 7, at 1925.

82. *Id.*

83. SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA 71, 85–86 (2016).

84. ALFRED MCCLUNG LEE, THE DAILY NEWSPAPER IN AMERICA 242–43 (1937) (quoting President Roosevelt's statement in response to a voluntary code for daily newspapers adopted by the American Newspaper Publishers Association citing the freedom of the press).

85. 316 U.S. 52 (1942).

86. Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 555 (2012) (internal quotations omitted) (quoting Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment)).

safety, and the like outweighed any ethereal, hypothetical speech interests claimed by fictional legal entities. Speech by corporations warranted differential treatment because it was different.

A related example is "professional speech" delivered by physicians, lawyers, and other learned professions in the course of professional practice.[87] Professionals are subject to unique forms of state regulation, including educational and licensing requirements, limits on unauthorized practice, tort liability, and the like.[88] These laws clearly implicate speech, but few argue that the First Amendment prohibits these longstanding requirements.[89] At the same time, however, there are justifications for granting professional speech a greater degree of protection from state interference than, say, corporate commercial speech.[90] Unlike corporations, professional speech implicates the autonomy interests of professionals, is paid for and relied upon by clients, and is based on specialized knowledge and expertise.[91]

Recognizing these risks, Justice Breyer warned that courts should be less cavalier about treating all speech equally, as "virtually all government regulation affects speech."[92] As discussed below, for example, if data and information are protected speech—regardless of their content, their sources, their uses, and whether they implicate First Amendment values—then our modern regulatory state sits even less on *terra firma*.

D. Skiing to the Bottom: Straining the Logic of Protection

Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.[93]

Using the First Amendment to invalidate information-based regulation in an information-based economy may take recent Supreme Court

87. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1246 (2016).

88. *Id.* at 1279–84.

89. *Id*. Of course there are always exceptions. *See, e.g.*, Cooksey v. Futrell, 721 F.3d 226 (4th Cir. 2013) (upholding on First Amendment grounds a challenge against the North Carolina Board of Dietetics and Nutrition, which brought an enforcement action against the author of a "Diabetes Warrior" web site that offered customized dietary advice to individuals). One area where professional regulation has been problematic under the First Amendment is state limits on professional advertising. Haupt, *supra* note 87, at 1280–83.

90. *See* Haupt, *supra* note 87, at 1264–69 (evaluating the distinctions between professional and commercial speech).

91. *Id.* at 1269–77 (discussing the unique theoretical justifications for distinguishing professional speech).

92. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1152 (2017) (Breyer, J., concurring).

93. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990).

precedents in unnatural and problematic directions. The Robert Bork quote above warns about riding the slippery slope to absurdity—accepting illogical extremes because there are no immediately obvious logical endpoints.[94]

Applying similar logic to the commercial speech cases, federal courts have declared that virtually any data, including source code used to program computers, is constitutionally protected speech.[95] These cases reflect the view that "if it is written in a language that someone *might* use to communicate, then it must be covered under the First Amendment."[96] Thus, it was not a major leap for Justice Kennedy in *Sorrell v. IMS Health Inc.* to declare flatly that "information is speech."[97] Although more thoughtful arguments have been developed by scholars,[98] recent decisions suggest uncritical acceptance that the First Amendment extends to any speech, communication, or information without considering what values or contexts are constitutionally significant.[99] Kyle Langvardt calls this "the information rule," based on the ontological view that the presence of information or communication warrants coverage under the Speech Clause, without a satisfactory teleological explanation for *why*.[100] That coverage is *plausible,* however, does not mean that coverage is *required*; it means only that coverage is not entirely *implausible*.[101]

These arguments parallel the Supreme Court's commercial speech jurisprudence, reflecting its "near total deregulatory potential."[102] Virtually all human activity, particularly commercial activity, requires some form of communication.[103] Thus, virtually all regulations implicate some form of speech, including fraud, conspiracy, labeling requirements, financial disclosures, safety warnings, workplace harassment, and even required exit signs.[104] Indeed, much of the work of the FDA, FTC, SEC, and other agencies is predicated on either requiring regulated companies to disclose

94. Justice Ginsburg quotes this passage in her concurrence in *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 617 (2012) (Ginsburg, J., concurring in part).

95. *See, e.g.*, Karn v. U.S. Dept' of State, 925 F. Supp. 1 (D.D.C. 1996) (assuming that source code on a computer diskette is covered by the First Amendment), *remanded per curiam*, 107 F.3d 923 (D.C. Cir. 1997); Bernstein v. U.S. Dep't of State, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996) (finding source code to be speech); Junger v. Daley, 209 F.3d 481, 484–85 (6th Cir. 2000) (same).

96. Kyle Langvardt, *The Doctrinal Toll of "Information as Speech"*, 47 LOY. U. CHI. L.J. 761, 771 (2016).

97. 564 U.S. 552, 570 (2011) (referring to information identifying prescribers of certain drugs).

98. *See, e.g.*, Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014).

99. Langvardt, *supra* note 96, at 764.

100. *Id.* at 776.

101. Frederick Schauer likewise urges that first-order questions of First Amendment coverage should be informed by whether protecting the speech at issue furthers any First Amendment values. *See* Schauer, *Out of Range*, *supra* note 60, at 353.

102. Shanor, *supra* note 7, at 176.

103. *Id*.

104. *Id.* at 177, 192 (citing regulations).

information that is truthful, or prohibiting statements that are false, misleading, or fraudulent.[105] As Schauer emphasizes, "[i]t is unthinkable that all human behavior is covered by the First Amendment, and almost as unthinkable that all human behavior involving words is covered."[106]

Indeed, the assumption that data must be speech has generated fantastical arguments in litigation. For example, after the State Department prevented publication of blueprints for creating 3D-printed guns based on concerns that it violated International Traffic in Arms Regulations,[107] the publisher argued that it constituted a prior restraint on speech.[108] Other litigants have claimed that the Speech Clause means that employers need not display OSHA warnings in the workplace, that nude dancers need not obey laws that prohibit touching patrons, that the county cannot outlaw wearing hats backwards at the fair,[109] and that states cannot require licenses for using bitcoin because the cryptocurrency runs on computer code.[110]

Scholars have begun to pursue how far the Court's free speech doctrines might extend to novel technologies. For example, in their recent book *Robotica*, Ronald Collins and David Skover conclude that robotic speech—speech generated by software, artificial intelligence, robots, and the like—should be covered and protected by the First Amendment.[111] They argue that readers experience robotic speech as "meaningful and potentially useful or valuable,"[112] and suggest that "advances in robotic expression are so great and their potential so vast that free speech theory is . . . being reworked to permit communicative progress to continue."[113] They therefore regard calls for regulation of these technologies as impermissible "censorship" or "government control."[114]

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105. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 51.

106. Schauer, *Out of Range*, *supra* note 60, at 353.

107. Def. Distributed v. U.S. Dep't of State, 121 F. Supp. 3d 680 (W.D. Tex. 2015); Def. Distributed v. Grewal, 364 F. Supp. 3d 681 (W.D. Tex. 2019) (dismissing claims on jurisdictional grounds), *rev'd*, 971 F.3d 485 (5th Cir. 2020).

108. 121 F. Supp. 3d at 692; Langvardt, *supra* note 96, at 766–67.

109. Langvardt, *supra* note 96, at 776 (citing 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); Blue Movies, Inc. v. Louisville/Jefferson Cnty. Metro Gov't, 317 S.W.3d 23 (Ky. 2010); Hodge v. Lynd, 88 F. Supp. 2d 1234, 1237 (D.N.M. 2000)).

110. Comment from Marcia Hofmann, Elec. Frontier Found. Special Couns., on behalf of Elec. Frontier Found., Internet Archive & Reddit to the N.Y. State Dep't of Fin. Servs. on BitLicense, the Proposed Virtual Currency Regul. Framework, 12–13, 16 (Oct. 21, 2014), https://www.eff.org/files/2014/10/21/bitlicense-comments-eff-ia-reddit-hofmann-cover.pdf [https://perma.cc/B8RV-J28M].

111. *See, e.g.*, RONALD K. L. COLLINS & DAVID M. SKOVER, ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE (2018); Lamo & Calo, *supra* note 6.

112. COLLINS & SKOVER, *supra* note 111, at 42.

113. They note that just as the printing press, telegraph, radio, television, and Internet transformed society and reframed free speech paradigms, so too will robotic speech. *Id.* at 49.

114. *Id.* at 55.

Protecting robotic speech under the First Amendment raises real slippery slope concerns, as it rests on the scaffolding used to endow corporate speech with constitutional weight.[115] Notably, the argument for greater constitutional protection for robotic speech relies on rejecting categorizations and distinctions under the First Amendment. For example, Collins and Skover attempt to disclaim meaningful distinctions between natural and artificial speakers, noting that "the written word itself is an artificial object."[116] Indeed, they claim that First Amendment jurisprudence is too focused on the substantive *messages* protected by free speech rather than the *medium* through which they are conveyed.[117]

With skis waxed for a quick descent down the slippery slope, proponents of robotic speech reason from the proposition that bots and other novel forms of automated communication "implicate" free speech, and therefore cannot be conclusively left unprotected given recent commercial speech decisions, to the conclusion that regulating it is problematic.[118] But does regulating search engines, robocallers, robotraders, and social media bots compromise free speech simply because they perform some communicative function? Whose speech interests exactly are furthered by these types of automated communication?[119]

Consider "MS Tay," the self-learning Twitter chatbot released by Microsoft in 2016, designed to interact with users and produce tweets without human control.[120] After less than a day, Twitter users had manipulated Tay's self-learning process, and the bot "devolved into a hate-spewing Nazi," denied the Holocaust, posted misogynistic and transphobic tweets, and prompted Microsoft to take it offline.[121] If Tay were human, the tweets would be protected by the First Amendment from government

115. Massaro, Norton & Kaminski, *supra* note 6, at 2502.

116. COLLINS & SKOVER, *supra* note 111, at 11.

117. *Id.* at 67.

118. *See* Lamo & Calo, *supra* note 6, at 1003. Likewise, Massaro and Norton (and Kaminski in a later article) observe that "very little in foundational free speech theory and doctrine rules out coverage" for artificial speakers. Massaro & Norton, *supra* note 6, at 1173. However, they do not make the normative claim that regulating such speech is undesirable. *See* Massaro & Norton, *supra* note 6, at 1173; Massaro, Norton, & Kaminski, *supra* note 6.

119. Massaro and Norton posit that "[o]nly theories based solely on *speaker* autonomy pose potential roadblocks for protecting strong AI speakers," noting that Lawrence Solum had observed many years ago that even lacking traditional attributes of personhood, such as "souls, consciousness, intentionality, feelings, interests, and free will," would not distinguish in a meaningful way artificial from human intelligence. Massaro & Norton, *supra* note 6, at 1178–79; *see* Lawrence B. Solum, *Legal Personhood for Artificial Intelligence*, 70 N.C. L. REV. 1231, 1258–79 (1992).

120. Sarah Perez, *Microsoft Silences Its New A.I. Bot Tay, After Twitter Users Teach It Racism*, TECHCRUNCH (Mar. 24, 2016, 9:16 AM), https://techcrunch.com/2016/03/24/microsoft-silences-its-new-a-i-bot-tay-after-twitter-users-teach-it-racism/ [https://perma.cc/Z9M9-L9MY].

121. Lamo & Calo, *supra* note 6, at 994 (internal quotations omitted); April Glaser, *Bots Need to Learn Some Manners, and It's on Us to Teach Them*, WIRED (Apr. 13, 2016, 2:55 PM), https://www.wired.com/2016/04/bots-emergent-behavior-deception/ [https://perma.cc/C7BW-S4GF]; Massaro, Norton, & Kaminski, *supra* note 6, at 2481.

censorship, no matter how distasteful and offensive.[122] But what First Amendment interests would be served by protecting a chatbot's tweets, and whose rights would be at stake? Microsoft's? Its programmers'? Its audience on Twitter?

Defenders of robotic speech often start from the position that artificially generated information should be covered because software is a tool for human communication, stressing the nexus between humans and computers and the intention to use that medium to convey messages.[123] Collins and Skover go further, concluding that, whether or not the automated process is communicating at the behest of a human or conveying a human message, robotic speech warrants protection because it is potentially useful or valuable to the *reader*.[124] Thus, they use the same maneuver that delivered commercial speech to the First Amendment in *Virginia Board of Pharmacy*: it is the *listener's* interest, not the *speaker's*, that matters, which renders the nonhuman character of the speaker to be "of no constitutional moment."[125] In fact, Collins and Skover acknowledge that their utility-based theory, what they call "intentionless free speech," aligns well with "modern-day American capitalism."[126]

Arguments of this sort have not gone unchallenged. James Grimmelmann, Helen Norton, and others push back on "utility" as a new paradigm for free speech coverage.[127] As Grimmelmann argues, "without a human somewhere in the loop, there is no cognizable First Amendment interest to assert, because no one's rights have been infringed."[128] Grimmelmann reinforces his conclusion by observing that "[i]f utility is the 'First Amendment lodestar,' then speech eats the world, because anything some human cares enough to do is useful, at least to them."[129] Norton similarly worries that utility and "intentionless free speech" lack any limiting principle.[130]

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122. Unless, of course, the speech rose to the level of incitement or a true threat. Massaro, Norton, & Kaminski, *supra* note 6, at 2482.

123. *See, e.g.*, Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL'Y 883 (2012) (published white paper commissioned by Google); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013).

124. COLLINS & SKOVER, *supra* note 111, at 38. "[I]ntent to convey a particularized message" comes from *Spence v. Washington*, 418 U.S. 405, 410–11 (1974). *See* COLLINS & SKOVER, *supra* note 111, at 42 ("It should be immaterial to free speech treatment that a robot is not a human speaker").

125. COLLINS & SKOVER, *supra* note 111, at 44.

126. *Id.* at 51.

127. James Grimmelmann, *Speech In, Speech Out*, *in* ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE, *supra* note 111, at 85, 87; Helen Norton, *What's Old Is New Again (and Vice Versa)*, *in* ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE, *supra* note 111, at 100, 103–07 [hereinafter Norton, *What's Old is New Again*].

128. Grimmelmann, *supra* note 127, at 91.

129. *Id.*

130. Norton, *What's Old Is New* Again, *supra* note 127, at 103–04.

Other commentators resist the notion that nonhuman speakers warrant free speech protection on the grounds that it would not further First Amendment values such as individual autonomy, self-realization, or democratic self-governance.[131] Collins and Skover retort that "robotic expression *supercharges* the communicative process," expanding "the potential magnitude of its audience."[132]

Though this may be true, it is likely to be so for the powerful rather than the powerless, the connected rather than the disconnected. It risks, just as corporate speech has, drowning out genuine human voices and failing to serve genuine human interests. Just because *some* people might find information generated without human intervention valuable doesn't mean it always or usually is. Robotic speech is as likely to harm or create burdens to consumers as not. And arguments to extend protection based on the assumed interests of listeners will morph into arguments that all non-human speech has intrinsic value, then morph further into arguments that artificial speakers have protectable interests of their own—repeating the mistakes of recent corporate commercial speech cases.

These questions are no longer hypothetical. Take robocalls. Despite intense political polarization today, nearly everyone can agree that robocalls are a nuisance. Robocalls confuse and frustrate consumers, often preying on the unsuspecting and vulnerable.[133] The first state laws forbidding robocalls in their entirety were upheld as reasonable time, place, or manner restrictions that serve important government purposes, such as protecting privacy in the home.[134] However, lower courts invalidated as improper content-based restrictions those state prohibitions that were limited to robocalling for commercial or political purposes.[135] Finally, in July 2020, the Supreme Court decided *Barr v. American Ass'n of Political Consultants*.[136]

Seeking to make political robocalls in connection with the 2020 election, the plaintiff-respondents had challenged on free speech grounds the Telephone Consumer Protection Act of 1991, which banned robocalls to

131. *See, e.g.*, Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008); *accord* Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013).

132. COLLINS & SKOVER, *supra* note 111, at 54.

133. *Cf.* Woodrow Hartzog, *Unfair and Deceptive Robots*, 74 MD. L. REV. 785 (2015).

134. *See, e.g.*, Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995); Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996); Oklahoma *ex rel.* Edmondson v. Pope, 505 F. Supp. 2d 1098 (W.D. Okla. 2007), *vacated*, 516 F.3d 1214 (10th Cir. 2008).

135. *See, e.g.*, Gresham v. Rutledge, 198 F. Supp. 3d 965 (E.D. Ark. 2016) (invalidating Arkansas law prohibiting commercial and political robocalling); Cahaly v. LaRosa, 796 F.3d 399 (4th Cir. 2015) (invalidating South Carolina law that prohibited unsolicited commercial and political robocalls).

136. 140 S. Ct. 2335 (2020).

cellphones.[137] The Court refused to invalidate the entire statute but agreed with the consultants that an exception allowing robocalls for collecting government-backed debts was an unconstitutional content-based distinction.[138] Justice Kavanaugh, writing for the majority, applied strict scrutiny, characterizing the debt-collection distinction as "about as content-based as it gets."[139]

In separate opinions, Justices Sotomayor and Breyer argued that strict scrutiny need not apply to all content-based distinctions.[140] According to Breyer, regulation of government debt collection has "next to nothing to do with the free marketplace of ideas" and "everything to do . . . with government response to the public will through ordinary commercial regulation."[141] The marketplace of ideas "is not simply a debating society for expressing thought in a vacuum"; rather, it is "an instrument for 'bringing about . . . political and social chang[e].'"[142] Recognizing the serious implications of the majority's decision, Breyer cautioned that applying strict scrutiny "indiscriminately to the very 'political and social changes desired by the people'" would undermine our democracy, "not through the inability of the people to speak or to transmit their views to the government, but because of an elected government's inability to translate those views into action."[143]

II. THE ARTIFICES AND THEIR DISCONTENTS

A. The Artifices

Corporate commercial speech now lives a charmed constitutional life. But this was not preordained. Corporate speech rights emerged from a series of dubious precedents, based on dubious assumptions, resting on dubious theoretical grounds. Just like a plane crash requires a series of unlikely events to transpire—overcoming flight-system redundancies and fail-safes[144]—the current moment in corporate commercial speech required overcoming a series of doctrinal and theoretical hurdles.

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137. Telephone Consumer Protection Act § 3(a), 47 U.S.C. § 227(b)(1)(A)(iii).

138. 140 S. Ct. at 2347, 2349.

139. *Id.* at 2346–47.

140. *Id.* at 2356 (Sotomayor, J., concurring in the judgment); *id.* at 2357 (Breyer, J., dissenting in part).

141. *Id.* at 2359 (Breyer, J., dissenting in part).

142. *Id.* at 2358 (Breyer, J., dissenting in part) (alterations in original) (quoting Meyer v. Grant, 486 U.S. 414, 421 (1988)).

143. *Id.* 2359 (Breyer, J., dissenting in part) (quoting *Meyer*, 486 U.S. at 421).

144. *See* JOHN DOWNER, LONDON SCH. OF ECON. & POL. SCI., WHEN FAILURE *IS* AN OPTION: REDUNDANCY, RELIABILITY, AND REGULATION IN COMPLEX TECHNICAL SYSTEMS 2–5 (2009),

This section explains: (1) how economic rights for corporations gradually expanded into civil rights, (2) how speech by artificial entities earned parity with speech by natural persons, and (3) how atypical corporate cases created precedents for ordinary corporate cases. We call these the "artifices" of corporate speech, and each was required to move it from the periphery to the core, where any content- and speaker-based distinctions receive strict rather than intermediate or rational basis scrutiny.

1. Economic Rights Become Civil Rights

The first artifice of corporate speech occurred when corporations convinced courts to recognize not just their economic or property rights, but their civil rights and liberty interests, too. Nothing in the text of the Constitution expressly protects corporate rights.[145] Nor do any records of the Constitutional Convention suggest the founders thought about protecting corporations.[146] Moreover, during the ensuing centuries, the Constitution "was never formally amended to extend rights to corporations, the way it was for women and racial minorities."[147]

Although the earliest corporations were created to exercise legal rights, these rights were primarily property rights, and corporations were considered distinct from natural persons.[148] Corporations needed property rights to function.[149] But liberty rights "oriented around physical and spiritual freedom," such as exercising autonomy over one's body or conscience, make little sense for corporations.[150] In early cases, the Supreme Court declined invitations to extend liberty rights, such as the freedom of association, to corporations.[151] In fact, when the Court first considered criminal liability for businesses in 1906, the Justices treated corporations differently from natural persons, distinguishing property rights that corporations could rightly claim from liberty rights that applied only to natural persons.[152]

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http://eprints.lse.ac.uk/36537/1/Disspaper53.pdf [https://perma.cc/FED2-DD7Z]; *cf.* J. Von Neumann, *Probabilistic Logics and the Synthesis of Reliable Organisms from Unreliable Components*, *in* AUTOMATA STUDIES 43, 65 (C.E. Shannon & J. McCarthy eds. 1956) (explaining how redundancies can allow systems to be more reliable than the sum of their constituent parts).

145. WINKLER, *supra* note 35, at 3.

146. *Id.*

147. *Id.* at 376.

148. For a brief history of the *societas publicoranum* in ancient Rome, *see id.* at 44–46. *See also id.* at 49–51 (discussing Blackstone's understanding of corporate property rights and personhood).

149. *Id.* at 184–85.

150. *Id.* at 185.

151. *See* W. Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Berea Coll. v. Kentucky, 211 U.S. 45, 53–54 (1908).

152. WINKLER, *supra* note 35, at 165; Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 253–55 (1906); Hale v. Henkel, 201 U.S. 43 (1906).

Over the course of decades, however, corporations gradually convinced the Supreme Court to recognize a variety of corporate liberty interests.[153] As Adam Winkler carefully documents:

> [Corporations] gained the protections of nearly all of the most significant individual rights provisions in the Constitution: rights of property, contract, and access to court; the right to be free from unreasonable searches and seizures; equal protection and due process; the right against double jeopardy and the right to counsel; the right to trial by jury; freedom of the press and freedom of association; commercial speech rights and even a limited right to speak on electoral politics . . . .[154]

These decisions effectively erased the commonsense line between property and liberty rights for corporations, enabling the counterproductive doctrinal spillovers we discuss below.

Corporations were early and aggressive movers in pursuing their civil rights. As Winkler observes, "[r]ather than corporations building on the established rights of individuals, individuals would instead build on the rights established by businesses."[155] For example, the earliest Supreme Court cases applying the Fourth Amendment right against unreasonable searches and seizures and the Fifth Amendment right against self-incrimination did not involve individuals, but businesses.[156]

The first corporate rights case (1809) was decided by the Supreme Court almost fifty years before the first case addressing the constitutional rights of African Americans (1857), and almost sixty-five years before the first case addressing the rights of women (1872).[157] The Civil Rights amendments were used more often to expand the rights of businesses than the racial minorities they were written to protect.[158] Over time, corporations pushed the Court to grant businesses freedom of association, freedom of the press, and freedom of speech.[159] Ultimately, with cases like *Citizens United*,

153. *See* WINKLER, *supra* note 35, at 359.

154. *Id.*

155. *Id.* at 180.

156. *Id.* at 178–80 (discussing Boyd v. United States, 116 U.S. 616, 633–35 (1886)).

157. *Id.* at 35; *see also* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) (corporations); Dred Scott v. Sandford 60 U.S. (19 How.) 393 (1857) (African Americans); Bradwell v. State 83 U.S. (16 Wall.) 130 (1872) (women).

158. WINKLER, *supra* note 35, at 110. Courts also simply heard many more cases considering the rights of corporations than those of natural persons. In the 44 years after the Fourteenth Amendment was ratified, the Supreme Court heard 312 cases involving corporate claims to Fourteenth Amendment protection and only 28 cases involving claims by African Americans, the very group whose rights motivated the amendment. *Id.* at xv.

159. *Id.* at 22, 254–55.

corporations would gain the right to influence elections despite a century of statutes and Supreme Court precedents dictating otherwise.[160]

Just five years after the *Lochner* era came to a close, the Court in *United States v. Carolene Products Co.* famously declared that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless" it fails to "rest[] upon some rational basis." [161] Today, however, virtually no laws regulating corporate commercial speech are subject to rational basis review. Most are subject to "heightened" scrutiny that goes beyond even the intermediate standard established in *Central Hudson*. Some believe that economic rights should be given equal weight with non-economic civil rights and that *Lochner*-era doctrines should be revived.[162] To others, though, the shift from economic to civil rights for corporations debases and corrupts our grand democratic experiment.

In the first case recognizing a right to commercial speech, *Virginia Board of Pharmacy*, Justice Rehnquist wrote a prescient dissent, quipping that he had understood the First Amendment to "relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo."[163] By that time, however, economic rights for corporations had already morphed into civil rights for corporations, aided by a parallel shift in doctrine blurring the artificial with the natural.

2. The Artificial Becomes the Natural

For over a century, corporations have invited courts to pare away commonsense distinctions between artificial entities and natural persons. Today, that erosion has obvious implications for regulating robocalling, robotrading, social media bots, fake news, and other automated communications.[164]

The distinctions certainly mattered at the Founding. On July 4, 1776, the Second Continental Congress declared the self-evident truth that "all Men are created equal . . . endowed by their Creator with certain unalienable

160. *Id.* at 359.

161. 304 U.S. 144, 152 (1938).

162. *See, e.g.*, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 337–66 (2014); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 211–19, 274–334 (2004); DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* 125–28 (2011). *But see* JOHN RAWLS, A THEORY OF JUSTICE 60–61 (1971) (defending non-economic liberties as elevated above economic liberties, though recognizing as a "basic" liberty the right to hold personal property).

163. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 787 (1976) (Rehnquist, J., dissenting).

164. *See supra* Section I.D; Richard L. Hasen, *Cheap Speech and What It Has Done (To American Democracy)*, 16 FIRST AMEND. L. REV. 200, 216–17 (2017).

Rights," including "Life, Liberty, and the Pursuit of Happiness."[165] The Founding was grounded in the idea that natural persons possess certain *a priori* rights antecedent to the state.[166] Blackstone's *Commentaries on the Laws of England* (1765) described the corporation as an "artificial person[]," distinct from the people who form it.[167] Corporations were a useful fiction because they could exercise certain rights, such as the right to own property, make contracts, and access the courts.[168] Unlike natural persons, Blackstone explained, corporations "may maintain a perpetual succession, and enjoy a kind of legal immortality."[169] But a corporation "cannot commit treason, or felony, or other crime, in its corporate capacity."[170]

Eventually, corporations conceived the idea of limited liability to shield the assets of stockholders and other members,[171] recognizing a distinction between the artificial entity and the natural persons that are part of it. In the first case to rule against extending constitutional rights to corporations, *Bank of Augusta v. Earle*, the Supreme Court suggested that stockholders could not have it both ways—using corporate personhood to shield their personal assets, while also piercing the corporate veil to assert their personal rights.[172]

This logic won broad acceptance. Unlike natural persons, corporations do not possess "the capacity or inclination to think and act like a human being with the full range of human concerns."[173] Later cases asserted that the unique legal traits of corporations endowed them with "special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" that already allowed them to use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"[174]

In *Bellotti*, Justice Rehnquist warned that state-created privileges of incorporation, such as perpetual life and limited liability, although

165. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
166. Weiland, *supra* note 79, at 1394.
167. 1 WILLIAM BLACKSTONE, COMMENTARIES *467.
168. *See* WINKLER, *supra* note 35, at 50.
169. BLACKSTONE, *supra* note 167, at *467.
170. *Id.* at *476–77; WINKLER, *supra* note 35, at 51.
171. *See* WINKLER, *supra* note 35, at 102.
172. 38 U.S. (13 Pet.) 519, 586–87 (1839); WINKLER, *supra* note 35, at 102–03.
173. Leo Strine Jr., Chief Just., Del. Sup. Ct., Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporations, 2015–16 Judge Ralph K. Winter Lecture on Corporate Law and Governance, at 04:21 (Oct. 13, 2015), https://law.yale.edu/yls-today/yale-law-school-videos/leo-strine-corporate-power-ratchet [https://perma.cc/V5VT-D8HQ] [hereinafter Strine, Corporate Power Ratchet], *quoted in* WINKLER, *supra* note 35, at 388.
174. Austin v. Mich. Chamber of Com., 494 U.S. 652, 658–59 (1990) (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986)), *overruled by* Citizens United v. FEC, 558 U.S. 310, 365 (2010).

"beneficial in the economic sphere, pose special dangers in the political sphere."[175] Justice White expressed similar sentiments:

> Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to . . . limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.[176]

As Reza Dibadj observes, "[i]t would defy logic to argue that the state creating this artificial entity cannot regulate its speech."[177] But that is exactly where we have landed today. The Court has elevated corporate speech to the level of natural speech, even though corporations are not "free" in the sense that natural persons are "free." Corporate speech is almost by definition self-serving and not made in service of the public. Corporations are compelled by law to maximize profit for shareholders,[178] and corporate officers who do not pursue profits first and foremost risk violating their fiduciary duties.[179] The law generally requires corporations to prioritize shareholder value over other values such as fairness, equality, social welfare, or environmental concerns, thus making impossible "the very autonomy often thought to be essential to rights of political participation and religious liberty."[180]

Corporations often invited courts to disregard these distinctions. In the very first corporate rights case, *Bank of United States v. Deveaux*, Chief Justice John Marshall described the corporation as an "invisible, intangible, and artificial being."[181] But to Marshall, these traits made corporations incapable of exercising constitutional rights as citizens theselves,[182] as if that were a valid function of the corporate form. Thus, Marshall pierced the corporate form in *Deveaux* and looked "to the natural persons composing

175. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 826 (1978) (Rehnquist, J., dissenting).
176. *Id.* at 809 (White, J., dissenting).
177. Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. Rev. 913, 926 (2020).
178. WINKLER, *supra* note 35, at xxii.
179. *Id.* at 388; *see also* Strine, *supra* note 173, at 04:29 (noting that "corporations must put profit first under the predominant corporate law in the United States").
180. WINKLER, *supra* note 35, at 388.
181. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809).
182. *Id.* at 86–87; WINKLER, *supra* note 35, at 66.

[the] corporation,"[183] allowing corporations to assert the rights of their members.

Over the next 200 years, the Supreme Court would be asked to extend this logic to many types of artificial entities engaged in many types of speech. As noted above, defenders of artificial speech like Collins and Skover argue that it matters not whether the speech comes from a natural or artificial source.[184] Ryan Calo declares that machines today "resemble and even substitute for people."[185]

But why grant artificial entities, or artificial speech, rights identical to natural persons?[186] Though it may make sense to allow artificial entities to sue and be sued, it does not mean they also deserve other rights enjoyed by natural persons.[187] The notion that they do materialized from a series of atypical cases in which litigants successfully obscured rather than emphasized their corporate form.

3. The Atypical Becomes Typical

Corporate rights have accrued through atypical cases involving atypical corporations. The Supreme Court held in *Bank of the United States v. Deveaux* (1809) that corporations were "citizens" under Article III and so could establish, through their individual members, diversity jurisdiction.[188] The Bank of the United States was a for-profit business; however, it was chartered not by private businessmen but by the first Congress in 1791, and it was tasked with performing decidedly public functions.[189] Thus, the right of corporations to access federal courts was first recognized through an atypical corporation.

Ten years later, "one of the most important precedents in the history of the Supreme Court" involved a non-business corporation, Dartmouth College.[190] In *Trustees of Dartmouth College v. Woodward*, the Court held that Dartmouth was a private rather than a public entity and so was protected from public control under the Constitution's Contract Clause.[191] The opinion was revolutionary because, when Dartmouth was established

183. Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1680 (2015).

184. COLLINS & SKOVER, *supra* note 111, at 66–67.

185. Ryan Calo, Robotica *in Context*, *in* ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE, *supra* note 111, at 71.

186. SAMIR CHOPRA & LAURENCE F. WHITE, A LEGAL THEORY FOR AUTONOMOUS ARTIFICIAL AGENTS 153–92 (2011); Massaro, Norton & Kaminski, *supra* note 6, at 2509.

187. Massaro, Norton & Kaminski, *supra* note 6, at 2509–10.

188. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

189. WINKLER, *supra* note 35, at 39.

190. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

191. *Id.*

in 1769, corporations were only chartered to further some *public* purpose.[192] In fact, Dartmouth's charter from the Crown decreed its public-minded mission to expand the "Indian Charity School" and "promote learning among the English."[193] But the Court's decision in *Dartmouth College* applied to *all* types of corporations, not just colleges, and over the next decade American businesses increasingly favored the corporate form as a shield against regulation.[194]

Two of the earliest Supreme Court cases to use the First Amendment to strike down laws violating freedom of speech or freedom of the press involved corporations.[195] But both corporations were newspapers asserting that they "were political dissenters facing persecution by powerful government officials eager to quiet them."[196] In *Near v. Minnesota ex rel. Olson*, the Supreme Court struck down a public nuisance law that was used to target *The Saturday Press*, a "sleazy scandal rag" that frequently criticized Minneapolis area politicians.[197] In *Grosjean v. American Press Co.*, the Court invalidated a Louisiana tax targeting the state's largest newspapers, almost all of which were vocal critics of the controversial governor, Huey P. Long.[198]

In *Grosjean*, the newspapers differentiated themselves from ordinary for-profit businesses by pointing to their special role in gathering and disseminating information in a democratic society.[199] The framing worked, as "the [J]ustices largely overlooked the newspapers' identity as corporations."[200] Although corporations were not "citizens" under the Privileges and Immunities Clause, Justice Sutherland wrote in the majority opinion, they were "persons" under the Equal Protection and Due Process Clauses.[201] The Supreme Court had never before extended liberty rights to corporations; only property rights. But Sutherland's opinion, with little fanfare and even less critical analysis, extended them the right to free speech and freedom of the press—contrary to all precedents.[202]

The Court extended the freedom of association to corporations in another atypical case brought by a nonprofit corporation, the National Association

192. WINKLER, *supra* note 35, at 78–79.
193. *Id.* at 76–77; *see* FRANCIS N. STITES, PRIVATE INTERESTS AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819 at 23–26 (1972).
194. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 245–47 (2007).
195. WINKLER, *supra* note 35, at 240–41.
196. *Id.* at 242.
197. 283 U.S. 697 (1931); WINKLER, *supra* note 35, at 241.
198. 297 U.S. 233 (1936).
199. WINKLER, *supra* note 35, at 248.
200. *Id.* at 250–51.
201. 297 U.S. at 244.
202. WINKLER, *supra* note 35, at 254.

for the Advancement of Colored People (NAACP).[203] In *NAACP v. Alabama ex rel. Patterson*, the Supreme Court struck down an effort by the Alabama Attorney General to force the NAACP to disclose its list of members as a condition of being registered as a corporation there.[204]

In the first case to explicitly extend First Amendment coverage to commercial speech, the plaintiffs were *customers* rather than businesses.[205] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[206] Public Citizen represented pharmacy customers in challenging Virginia's ban on advertising prescription drug prices. The plaintiffs were not pharmaceutical companies whose drugs were being sold, or even the pharmacists whose advertising had been barred by state regulation. The plaintiffs were consumers asserting a "right to know." Contrary to precedent,[207] the Court declared that the First Amendment right attached "to the communication, to its source and to its recipients both."[208]

Virginia Board of Pharmacy would be used only rarely by recipients or consumers, but would be frequently deployed by businesses to fight off regulation.[209] In fact, decades later, *Virginia Board of Pharmacy* "was recognized to be so contrary to consumer interests that Robert Weisman, the president of Public Citizen, called for the entire line of commercial speech cases to be overturned."[210] Likewise, in *Bellotti*, the first case considering whether corporations have First Amendment rights to engage in *political* speech, the majority focused not on "whether corporations 'have' First Amendment rights, and if so, whether they are coextensive with those of natural persons," but on the interests of listeners.[211]

In sum, although the Supreme Court frequently cautions that atypical cases should be limited to their facts, the Court has seldom differentiated between different *types* of corporations in liberty cases, which effectively

203. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

204. *Id.*

205. WINKLER, *supra* note 35, at 294.

206. 425 U.S. 748 (1976).

207. Valentine v. Chrestensen, 316 U.S. 52 (1942). Note, however, that the Supreme Court decided two cases decades earlier in which plaintiffs argued that the First Amendment freedom of the press applied to the circulation of lottery advertisements. *See Ex parte* Jackson, 96 U.S. (6 Otto) 727 (1878); *Ex parte* Rapier, 143 U.S. 110 (1892). Although the Court upheld the federal statute banning use of the mail to circulate lottery ads, the Court did not hold that the First Amendment was inapplicable; rather, it upheld the statute because it allowed circulation by other means. For a discussion of these cases, see Lakier, *supra* note 61, at 2182–83; Alex Kozinski & Stuart Banner, Response, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 765 (1993).

208. 425 U.S. at 756.

209. WINKLER, *supra* note 35, at 299–300.

210. *Id.* at 300 (citing Robert Weissman, Commentary, *Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech from the Ambit of the First Amendment*, 83 TEMP. L. REV. 979 (2011)).

211. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

creates greater protections for *all* businesses.[212] The "corporate" plaintiffs in *Dartmouth College*, *NAACP*, and *Citizens United* were atypical, non-business corporations.[213] Indeed, Citizens United itself was a small nonprofit ensnared by campaign finance law for using corporate money to fund its documentary.[214] Yet the majority in *Citizens United* virtually ignored the for-profit businesses funding the nonprofit's speech,[215] propelling the uncritical expansion of corporate rights. Moreover, when expanding corporate rights, the Court has never identified *who* counts as members of the corporation (employees, stockholders, board members, or directors) or what rights they might want the corporation to enjoy.[216]

Moreover, several cases were atypical because they involved not purely profit-seeking corporate interests, but "mixed" speech interests, such as religious freedoms or freedom of the press. For example, early cases brought by Jehovah's Witnesses asserted that commercial activity—selling pamphlets and books—was a core part of their religion, mixing commercial and religious objectives. Likewise, early cases such as *Grosjean* were brought by corporations running newspapers, implicating freedom of the press. As Jeremy Kessler observes, "no issue better exemplified the slippery boundary between civil and economic liberty in the 1930s than press freedom."[217] Kessler finds that the "blurred nature of the line between economic and civil liberty created a kind of 'Step Zero' question, the answer to which would embroil the Court in the same sort of economic reasoning that it had purportedly abandoned in the late 1930s."[218]

These atypical cases not only set precedents that would be stretched by more typical businesses, but they also encouraged bolder corporate claims for rights.[219] Corporations no longer were asking courts to review statutes

212. WINKLER, *supra* note 35, at xxi.

213. *Id.* at 373.

214. *Id.*

215. *Id.* at 328–29, 334, 341–42, 364.

216. *Id.* at 67. Meir Dan-Cohen evaluates the relationship between natural persons and corporations via the "role-distance" metric, or how closely a person's role within an organization is tied to his or her personal identity. Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1237–38 (1991). A small role-distance between the entity and one's personal identity, such as membership in a church, might raise concerns that speech restrictions or compulsions by the state infringe the rights of individuals. In contrast, the large role-distance that typifies employees, executives, shareholders, and the like in for-profit corporations raises few risks of infringement on *individuals*. Wu, *The Commercial Difference*, *supra* note 3, at 2043.

217. Kessler, *supra* note 7, at 1930.

218. *Id.* at 1989.

219. Corporate rights were also crafted out of whole cloth by allies inside the Court who would distort precedents. Adam Winkler in *We the Corporations* details how the Supreme Court was deceived into recognizing Fourteenth Amendment rights for corporations. WINKLER, *supra* note 35, at 113–60. In *San Mateo County v. Southern Pacific Railroad Co.*, a railroad challenged a California law that

that enjoyed a presumption of constitutionality; instead, the plaintiffs routinely asserted an opposite presumption—against constitutionality.[220]

B. Their Discontents

The artifices above have delivered corporate commercial speech from the periphery of the First Amendment to its core. Corporate speech cases now preoccupy much of the contemporary First Amendment, with the Court's free speech "docket now roughly split between business and individual cases."[221] Amid the large volume of litigants and claims, courts have been invited to extend doctrines designed to protect core speech—such

banned railroads, but not individuals, from deducting their mortgage payments from property taxes. 116 U.S. 138 (1885). Arguing the case for Southern Pacific was Roscoe Conkling, the last surviving member of the Joint Committee on Reconstruction that drafted the Fourteenth Amendment. Conkling argued that the law violated Southern Pacific's Fourteenth Amendment rights to due process and equal protection. To make his case, Conkling told the Supreme Court that Congress had used the word "person" instead of "citizen" in an early draft of the Fourteenth Amendment in order to grant corporations the same rights of equal protection and due process as former slaves. But, as Winkler explains, this simply was not true. The drafters did not contemplate the rights of corporations, nor did they amend the language the way Conkling suggested. It was pure fantasy to suggest that the drafters of the Fourteenth Amendment, without telling anyone, had smuggled into the Constitution broad new protections for corporations. Winkler found that Conkling had "purposefully misled the [J]ustices about the original meaning and intent of the Fourteenth Amendment." WINKLER, *supra* note 35, at 114–15. Although the Court did not decide *San Mateo County* that term, it decided an almost identical case two years later in *Santa Clara County v. Southern Pacific Railroad. Co.* 118 U.S. 394 (1886). That case also would see a convenient error that would help cement corporate rights. The Supreme Court Reporter at the time, J.C. Bancroft Davis, wrote a misleading syllabus for *Santa Clara County* that the Court had decided definitively that "[c]orporations are persons" under the Fourteenth Amendment Equal Protection Clause. According to to the syllabus, the holding of *Santa Clara County* was that "defendant Corporations are persons within the intent of . . . the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deny any person within its jurisdiction the equal protection of the laws." Indeed, the headnotes declared that the Court did not even wish to hear argument on whether the Fourteenth Amendment applied to corporations because "[w]e are all of the opinion that it does." But the Court did not say that, nor did it even rule on the question. In fact, in correspondence just before the decision was published, Chief Justice Morrison Waite made clear to Davis that "we avoided the constitutional question in the decision[]." Malcolm J. Harkins III, *The Uneasy Relationship of* Hobby Lobby, Conestoga Wood, *the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 248–50 (2014); WINKLER, *supra* note 35, at 152–53. Yet after the misleading syllabus and headnotes were published, they were duly cited for just that proposition. Howard Jay Graham would later write "[n]owhere in the United States Reports are there to be found words more momentous or more baffling than these." HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 566 (1968). But pro-business Justices would eagerly adopt the misleading headnote as gospel. Just a few years later, Justice Stephen Field—who would use arguments for economic liberty to strike down dozens of business regulations, building a foundation for the *Lochner* era—wrote in *Minneapolis & St. Louis Railway Company v. Beckwith* that "corporations are persons" under *Santa Clara County*. 129 U.S. 26, 28 (1889). The statement was published without other Justices seeing it beforehand, but would be cited frequently over the next two decades, even though *Santa Clara* did not support that proposition.

220. Kessler, *supra* note 7, at 1989.

221. John C. Coates IV, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24, 249 (2015).

as the presumptive invalidity of content- and speaker-based distinctions—to commercial speech, where the doctrines make little sense.

Some argue that the project of extending protections for core speech to commercial speech should continue, and that the historically subordinate position of commercial speech is not justified.[222] They point to the difficulty of line-drawing, or to the idea that free speech principles logically extend to commercial speech.[223] And the Roberts Court seems to agree. The decisions in *Citizens United* and *Sorrell,* in particular, muddled longstanding distinctions between core and corporate speech so much that the two have reached near-convergence.[224] Although the Supreme Court has declined invitations to explicitly recognize commercial speech on par with core speech,[225] its decisions achieve in practice what the Court is reluctant to acknowledge expressly.[226]

Thus, just like core speech, courts are now skeptical of content- and speaker-based distinctions in corporate and commercial speech.[227] And like core speech, courts now protect the interests of corporate *speakers* and value commercial speech for its *own* sake—a wild departure from the original justification that looked to the interests of listeners and consumers. In this Part we describe how these doctrines migrated to corporate commercial speech, why this migration is problematic, and why the theoretical justifications remain unconvincing.

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222. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630–33 (1982); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990); Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171 (2013).

223. *See, e.g.*, Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965); Comment, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

224. Stern & Stern, *supra* note 222, at 1186.

225. *See, e.g.*, Nike, Inc. v. Kasky, 45 P.3d 243 (Cal. 2002), *cert. denied*, 539 U.S. 654 (2003).

226. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 4; David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RESERVE L. REV. 1049 (2004).

227. Content- and speaker-based distinctions sometimes bleed into each other. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 831 (1995). For example, viewpoint discrimination can involve both content and speaker, and is often treated as "an egregious form of content discrimination" in which "the government targets not subject matter, but particular views taken by speakers on a subject." Iancu v. Brunetti, 139 S. Ct. 2294, 2313 (2019) (Sotomayor, J., concurring in part and dissenting in part) (quoting Rosenberger, 515 U.S. at 829). But it is important to understand that viewpoint discrimination is more narrow than content-based restrictions—regulating speech not based on the type of communication or certain subject matter, but based on agreement or disagreement with a particular position. Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. STATE U. L. REV. 765, 770 n.12 (2015) (citing 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:8 (2014)).

1. Content-Based Distinctions

Content neutrality is a "guiding First Amendment principle."[228] Whether a law is content-neutral or content-based ordinarily determines whether it stands or falls.[229] The Supreme Court first expressed doubt about content-based distinctions in *Cohen v. California*, when a man was convicted of disturbing the peace for wearing to a courthouse a jacket with the phrase "Fuck the Draft."[230] The Court overturned his conviction, invoking "the usual rule that governmental bodies may not prescribe the form or content of individual expression."[231] The Court emphasized that free expression is "intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[232] Thus, the Court's original skepticism of content-based distinctions was grounded in an individual- and public-minded First Amendment.

A year after *Cohen*, the Supreme Court in *Police Department of Chicago v. Mosley* invalidated an ordinance that prohibited picketing in front of schools except for "peaceful picketing of any school involved in a labor dispute."[233] The Court in *Mosley* stressed that "the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter, or its content."[234] Warning that the "essence of this forbidden censorship is content control," the Court struck down the ordinance on the grounds that content-based restrictions "would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[235] Again, the distaste for content-based distinctions was grounded in a public-minded First Amendment.

The problem, of course, is that commercial regulation necessarily targets speech because of its commercial content. Most business regulation is, by its very nature, content-based.[236] In fact, the category of commercial speech itself is based on its content.[237]

Neither *Cohen* nor *Mosley* involved corporate or commercial speech. But in 1978, the Court ruled in *First National Bank of Boston v. Bellotti* that a

228. Kagan, *supra* note 227, at 770 n.11 (citing McCullen v. Coakley, No. 12-1168, slip op. at 9 (U.S. June 26, 2014)).
229. Kagan, *supra* note 227, at 770 n.11 (citing 1 SMOLLA, *supra* note 227, § 3.1).
230. 403 U.S. 15 (1971).
231. *Id.* at 24.
232. *Id.* (citing Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring)).
233. 408 U.S. 92, 93 (1972).
234. *Id.* at 95.
235. *Id.* at 96 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
236. Shanor, *supra* note 7, at 146.
237. *Id.* at 151; *see* Piety, *A Necessary Cost of Freedom*, *supra* note 5; Cortez, *supra* note 3.

Massachusetts law banning corporate communications during pending state ballot initiatives "amounts to an impermissible legislative prohibition of speech based on the identity of the interests" that the speech represents.[238] Although *Bellotti* involved political rather than commercial speech, Justice Powell's opinion emphasized that "[t]he inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual."[239]

This notion sat undeveloped for over a decade, until the Court declared in 1992 that content-based restrictions must satisfy heightened scrutiny, even if the speech does not qualify as core, fully protected speech. In *R.A.V. v. City of St. Paul*, the Court invalidated a city ordinance banning expressions of "fighting words" made "on the basis of race, color, creed, religion, or gender."[240] The Court was careful to note that even though obscenity, defamation, and fighting words themselves are not fully protected "because of their constitutionally proscribable content," the government still may not make content-based distinctions *within* these categories.[241] Justice Scalia reasoned that "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."[242] Accordingly, the Court reasoned, government restrictions of less protected speech may be upheld, but only if "justified without reference to the content of the regulated speech."[243] The Court's focus turned, then, to government justifications. Content-based restrictions are permissible only for limited reasons—namely, for reasons that relate to why that type of speech is subject to differential treatment in the first place.[244] For example, fraud is proscribed speech, so any distinctions among types of fraud must be content-neutral, or at least relate to the special harms caused by fraud.

In 1993, the Supreme Court extended the content-neutrality rule to commercial speech. In *City of Cincinnati v. Discovery Network, Inc.*, the Court struck down a city ordinance regulating newsracks that displayed business fliers differently than racks displaying newspapers.[245] Scholars identify *Discovery Network* as "the first intimation that singling out commercial speech for different treatment on the basis of its commercial content might run afoul of the First Amendment—even though the doctrine

238. 435 U.S. 765, 784 (1978).
239. *Id.* at 777.
240. 505 U.S. 377 (1992).
241. *Id.* at 383–84.
242. *Id.* at 384.
243. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal citaitons omitted).
244. *Id.*
245. 507 U.S. 410 (1993).

is predicated on such a distinction."[246] The Stevens majority was not convinced by the city's "bare assertion that the 'low value' of commercial speech" was sufficient justification for the differential treatment.[247] Tamara Piety discerns in the opinion a "studied disapproval of what sounds like discriminatory or paternalistic judgments with respect to what constitutes high versus low value speech."[248]

In 2011, the Court aggressively extended its expectation of content-neutrality in *Sorrell v. IMS Health Inc.*, invalidating a Vermont law that barred pharmaceutical companies from using prescriber data without their consent, while allowing access by public health researchers and generic drug companies without such consent.[249] The Court announced that because the restriction was content-based, it was subject to "heightened" scrutiny. The Kennedy majority reasoned that "[c]ommercial speech is no exception" to the content-neutrality rule and that "it is all but dispositive to conclude that a law is content based."[250] But, as Justice Breyer's dissent pointed out, it is not unusual for regulators to control the form and content of information provided by regulated parties based on the identity of the speaker and the content of their speech.[251] Regulators frequently "find it necessary to create tailored restrictions on the use of information subject to their regulatory jurisdiction."[252] Breyer emphasized that neither content- nor speaker-based distinctions had ever warranted heightened scrutiny in commercial speech cases because "[r]egulatory programs necessarily draw distinctions on the basis of content."[253] For example, electricity regulators oversee company statements, "but only about electricity"; the Federal Reserve Board regulates the content of statements, advertisements, and interest rate disclosures, "but only when made by financial institutions"; and "the FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture."[254] This reasoning did not persuade a majority.

Four years later, in *Reed v. Town of Gilbert*, the Court would declare categorically that *any* government regulation that is content-based is presumptively unconstitutional and subject to strict scrutiny.[255] In *Reed*, the

246. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 38.
247. 507 U.S. at 428.
248. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 39.
249. 564 U.S. 552 (2011).
250. *Id.* at 566, 571. Perhaps the most extreme opinion in this genre was the Second Circuit's decision in *United States v. Caronia*, which held, based on *Sorrell*, that the FDA's use of speech as evidence in a criminal misbranding action was content-based and thus subject to heightened review. 703 F.3d 149 (2d Cir. 2012).
251. 564 U.S. at 587 (Breyer J., dissenting).
252. *Id.*
253. *Id.* at 589.
254. *Id.*
255. 576 U.S. 155, 163–68 (2015).

Court invalidated a city code that required a permit for displaying outdoor signs, except for "ideological signs," "political signs," and over twenty other exempt categories.[256] Contrary to the Scalia majority in *R.A.V.*—which would permit content-based regulation so long as the government tied any content-based distinctions back to the original justifications for treating that type of speech differently in the first place—the Thomas majority declared that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."[257] The opinion in *Reed* drew immediate criticism for its striking breadth, lack of nuance, and potential sweep.[258] Robert Post warned that it "would roll consumer protection back to the 19th century."[259] Floyd Abrams said it would require "a second look at the constitutionality of aspects of federal and state securities laws, the federal Communications Act and many others."[260] The holding in *Reed* quickly reached commercial speech cases, where counsel now argue that commercial speech restrictions require strict scrutiny precisely because they target commercial speech as such.[261]

In two recent cases, the Supreme Court continued the uncritical campaign against content-based distinctions without seriously evaluating the First Amendment values at stake. In both cases, the Court invalidated portions of the Lanham Act that barred registration for any "disparaging," "immoral," or "scandalous" trademarks. First, in *Matal v. Tam*, the Court held unanimously that the bar on "disparaging" trademarks was invalid under the First Amendment because it discriminated on the basis of viewpoint—barring, for example, a trademark that disparaged a person, institution, belief, or national symbol, while granting trademarks that celebrated those things.[262] Second, in *Iancu v. Brunetti*, the Court struck down the Lanham Act's bar on registering "immoral" or "scandalous" trademarks under the same rationale, that it "disfavors certain ideas" and thus constitutes viewpoint discrimination.[263]

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256. *Id.* at 159–61.

257. *Id.* at 169.

258. Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), at https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/82VZ-8TQP].

259. *Id.*

260. *Id.*

261. Shanor, *supra* note 7, at 179 n.193 (citing the argument made by Ted Olson as counsel in CTIA—The Wireless Ass'n v. City of Berkeley, 139 F. Supp. 3d 1048 (N.D. Cal. 2015)).

262. 137 S. Ct. 1744 (2017) (upholding a First Amendment challenge by a band called *The Slants* to a decision by the U.S. Patent and Trademark Office (PTO) rejecting registration because its name disparaged people of Asian descent). The PTO famously canceled the Washington Redskins' trademark under the same provision. *See* Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d (BNA) 1080, 1111–12 (T.T.A.B. 2014).

263. 139 S. Ct. 2294 (2019).

In neither case did the Court clarify whether trademarks constitute commercial or non-commercial speech. In *Tam*, the Court did not reach the question because it found the disparagement clause violated even the intermediate test under *Central Hudson*.[264] In *Brunetti*, the Court did not seriously engage the question, instead relying on the logic of *Tam*.[265]

But Justice Breyer's separate opinion in *Brunetti* "would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of viewpoint discrimination, content discrimination, commercial speech, government speech, or the like."[266] Instead of using categories as outcome-determinative, Breyer "would appeal more often and more directly to the values the First Amendment seeks to protect," including weighing any speech-related harms.[267] Nevertheless, he took pains to note that trademark rules "inevitably involve content discrimination,"[268] citing cases in which the Court has struck down "ordinary, valid regulations that pose little or no threat to the speech interests that the First Amendment protects."[269] After all, he wondered, "[h]ow much harm to First Amendment interests does a bar on registering highly vulgar or obscene trademarks work?"[270] "Not much," Breyer answered.[271]

In summary, it has become Supreme Court gospel that content-based distinctions are presumptively invalid, regardless whether the speech is commercial or whether the category of speech itself is content-based. The uncritical extension of earlier cases, detailed above, has made hash out of both commercial speech jurisprudence and longstanding distinctions between core and corporate speech. But perhaps that is the point.

2 Speaker-Based Distinctions

Skepticism of speaker-based distinctions, the younger cousin of content-based distinctions, has also been uncritically expanded to commercial speech. Yet with speaker-based distinctions, the Supreme Court has adopted

264. 137 S. Ct. at 1764–65.

265. 139 S. Ct. at 2298–99.

266. *Id.* at 2304 (Breyer, J., concurring in part and dissenting in part) (internal quotations omitted).

267. *Id.* at 2305 (Breyer, J., concurring in part and dissenting in part).

268. *Id.* at 2306 (Breyer, J., concurring in part and dissenting in part) (internal quotations omitted); *see generally*, Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1639 (2010) (considering how trademark law implicates content or viewpoint discrimination through the lens of antidiscrimation theory).

269. 139 S. Ct. at 2304–05 (Breyer, J., concurring in part and dissenting in part) (first citing Janus v. Am. Fed'n of State, County, and Municipal Employees, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting); then Sorrell v. IMS Health Inc., 564 U.S. 552, 589–92 (2011) (Breyer, J., dissenting); and then Reed v. Town of Gilbert, 576 U.S. 155, 175–79 (2015) (Breyer, J., concurring)).

270. *Id.* at 2306 (Breyer, J., concurring in part and dissenting in part).

271. *Id.* (Breyer, J., concurring in part and dissenting in part).

anti-discrimination rhetoric that has a powerful superficial appeal. Here, we describe how the presumption against speaker-based distinctions evolved, why the theoretical justifications for extending it to commercial speech ring hollow, and how it further warps First Amendment doctrine.

It was not until 2010, in *Citizens United*,[272] that the Supreme Court first clearly articulated the rule that the First Amendment disfavors laws that treat different speakers differently, even without content-based distinctions.[273] The *Citizens United* majority declared that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others" or identifying "certain preferred speakers."[274] The Kennedy majority emphasized that "[t]he First Amendment protects speech and speaker, and the ideas that flow from each."[275] In dissent, Justice Stevens explained how the law permits speech restrictions based on identity in numerous contexts, including those involving students, soldiers, prisoners, and civil servants.[276]

Still, long before *Citizens United*, skepticism of speaker-based distinctions was implicit in several Supreme Court decisions. The first hint was in *Grosjean* (1936), when the Court invalidated a Louisiana tax targeting large newspapers that had been critical of the governor.[277] Because the tax applied only to newspapers with circulations exceeding 20,000, the Court viewed the tax as a subterfuge for "penalizing the publishers and curtailing the circulation of a selected group of newspapers."[278]

Of course, *Grosjean* involved political speech and freedom of the press, and other early cases likewise focused on core political and religious speech.[279] In *Mosley* (1972), a city's ban on picketing in front of schools exempted peaceful labor picketing.[280] The Court held the distinction was unconstitutional under the Equal Protection Clause, which it found "closely intertwined" with the First Amendment because the ordinance "describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter."[281] In *Bellotti* (1978), the Court held that a ban on corporate contributions for ballot initiatives imposed "an impermissible

272. Citizens United v. FEC, 558 U.S. 310 (2010).
273. Kagan, *supra* note 227, at 781–84.
274. 558 U.S. at 340.
275. *Id.* at 341.
276. *Id.* at 420 (Stevens, J., dissenting in part).
277. Grosjean v. Am. Press Co., 297 U.S. 233, 251 (1936).
278. *Id.*
279. Here we focus on the political speech cases. For cases involving religious groups, see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) and Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).
280. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94 (1972).
281. *Id.* at 95, 99.

legislative prohibition of speech based on the identity" of the speaker.[282] Likewise, in *City of Ladue* (1994), the Court invalidated a city ordinance that banned all residential signs in order to combat visual clutter, making ten exemptions, including signs "for churches, religious institutions, and schools."[283] The Court rejected the town's argument that adequate alternatives existed for the plaintiff's anti-war messages, noting that yard signs can be important precisely because they identify the speaker.[284]

The Court extended this reasoning to corporate speech not by emphasizing the interests of corporate *speakers*, but by emphasizing the interests of *listeners*. As discussed more fully below, the listeners' rights theory posits that speech is valuable regardless of the speaker. Thus, in 2010, the majority in *Citizens United* asserted plainly that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'"[285] In fact, the majority warned, the government cannot "distinguish[] among different speakers, allowing speech by some but not others."[286]

The dissent by Justice Stevens noted that the Court had done precisely that in multiple cases, holding in 2007 that the government could restrict the speech of public school students when the same speech by adults would not be restricted,[287] and holding in 1973 that the speech rights of government employees was more limited than the rights of ordinary people.[288] As Stevens observed, "[t]he Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners, and its own employees."[289] After all, if the listeners' rights theory of free speech means anything, then surely it would mean that the public had a legitimate interest in hearing from government employees? Moreover, federal law has long made speaker-based distinctions even in political speech, prohibiting churches, charities, and other 501(c)(3) nonprofit entities from advocating for or against federal candidates, while allowing such speech from "social welfare organizations" organized under 501(c)(4).[290] In fact, in 2012, shortly after *Citizens United*, the Supreme

282. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978).
283. City of Ladue v. Gilleo, 512 U.S. 43, 46, 58–59 (1994).
284. *Id.* at 56–57.
285. Citizens United v. FEC, 558 U.S. 310, 349 (2010) (quoting *Bellotti*, 435 U.S. at 777).
286. *Id.* at 340 (citing *Bellotti*, 435 U.S. at 784).
287. *Id.* at 421–22 (Stevens, J., dissenting in part) (citing Morse v. Frederick, 551 U.S. 393, 396–97 (2007)).
288. *Id.* at 423 (Stevens, J., dissenting in part) (citing U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973)).
289. *Id.* at 420 (Stevens, J., dissenting in part) (citations omitted).
290. WINKLER, *supra* note 35, at 367; 26 U.S.C. § 501(c)(3).

Court affirmed, without publishing its reasoning, a ban against foreign nationals contributing and spending money in U.S. elections.[291]

Justice Breyer's dissent in *Sorrell* sounds the same themes, noting that it is not unusual at all for regulatory programs to apply to certain parties but not to others beyond the agency's jurisdiction.[292] Breyer warns in *Sorrell* that subjecting regulations based on the identity of commercial speakers to heightened scrutiny "threatens significant judicial interference with widely accepted regulatory activity."[293] Again, most rules by their nature "affect only messages sent by a small class of regulated speakers."[294] Thus, Breyer explains, while the journalist or fashion blogger can make claims about a new cosmetic product in their reviews, the FTC can require the *manufacturer* to substantiate its marketing claims with "backup testing" without violating the First Amendment.[295] Regulating one but not the other makes sense—the manufacturer has direct profit incentives—and should not be presumptively invalid.

Despite countless examples of laws that draw commonsense distinctions between regulated parties, the Supreme Court has embraced the rhetoric that nearly any such distinctions are problematic. The Court employs phrases like "disfavored speakers" and "censorship," thus dramatizing the nature of everyday regulation.[296] In *Citizens United*, for example, the Kennedy majority counterposes "preferred speakers" from the "disadvantaged person or class."[297] In *Sorrell v. IMS Health*, the Kennedy majority uses terms like "disfavored," "discrimination," "unwanted," and "viewpoint" to describe a drug marketing law.[298] The use of such terminology, as Piety observes, "exploits our tendency to condemn discrimination between persons in order to make . . . controversial decisions seem self-evidently correct and neutral."[299] The rhetoric of discrimination calls to our innate sense of shared humanity, which imbues anti-discrimination laws with moral legitimacy.[300]

Using such rhetoric in the corporate realm invites us into a fantasy world in which there is a moral and political imperative to commit "to the equal treatment of all fictional entities."[301] Helen Norton joins this critique, noting that "*censorship* is a value-laden term that assumes the value . . . of the

291. Bluman v. FEC, 565 U.S. 1104 (2012).
292. Sorrell v. IMS Health Inc., 564 U.S. 552, 589–90 (2011) (Breyer, J., dissenting).
293. *Id.* at 590 (Breyer, J., dissenting).
294. *Id.* (Breyer, J., dissenting).
295. *Id.* at 589–90 (Breyer, J., dissenting).
296. Piety, *Why Personhood Matters*, *supra* note 26, at 363.
297. Citizens United v. FEC, 558 U.S. 310, 340 (2010).
298. 564 U.S. at 564–66; Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 14–15 (quoting *Sorrell*, 564 U.S. *passim*).
299. Piety, *Why Personhood Matters*, *supra* note 26, at 363.
300. *See id.* at 364–65.
301. *Id.* at 365.

targeted expression: we generally talk of censoring speech that challenges political, religious, and artistic orthodoxy."[302] Indeed, the First Amendment protects non-conformity; regulation is about a certain degree of desired conformity. But as Piety observes, the Court's rhetoric in free speech cases "transforms a fairly prosaic regulation of commerce into what sounds like a civil rights case."[303] The Court's language trivializes "the real life-and-death struggles of plaintiffs who are in fact relatively powerless and elides the Court's exercise of its counter-majoritarian power on behalf of the powerful."[304]

Courts have not been alone in dramatizing everyday regulation. Scholars too speak of the distinction between commercial and non-commercial speech being justified only if we are comfortable abridging "expression we find worthless."[305] Regulation becomes "manipulat[ion]."[306] Marketing among competitors becomes a clash of "viewpoints."[307] As Tamara Piety retorts, "it is hard to picture the large, multinational corporation as an oppressed minority in need of the protection of the counter-majoritarian power of the Court to counteract state-sanctioned discrimination."[308]

And that is why protections for commercial speech were initially justified not based on the interests of *speakers*, but based on the interests of *listeners*. Yet, as with most doctrines pertaining to corporate and commercial speech, the justifications have mutated to the maximum benefit of corporations.

3. From Listeners to Speakers to Information Itself

The justification for covering commercial speech under the First Amendment has shifted from protecting the interests of listeners, to protecting the interests of speakers, to valuing information for its own sake regardless of authorship or source. These shifting justifications have brought maximum protection for commercial speech, contrary to original justifications meant to provide only limited protection.

The rationale in the very first case for extending constitutional protection to commercial speech was that it furthered *consumers'* or *listeners*' interest

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302. Norton, *What's Old Is New Again*, *supra* note 127, at 107 (italics added) (internal quotations omitted).

303. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 4–5.

304. *See id.* at 5.

305. Stern & Stern, *supra* note 222, at 1202.

306. *Id.*

307. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 14 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011)).

308. *Id.* at 43.

in the free flow of information.[309] Thus, a state law banning pharmacists from advertising the prices of drugs was unconstitutional not because the pharmacists had any special liberty or autonomy interest as speakers, but because the information was valuable to the audience.[310] The Court speculated, in a bit of hyperbole, that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[311] Indeed, the challenge in *Virginia Board of Pharmacy* was brought by consumers, not pharmacists, and thus the Court did not even consider the speakers' interests.[312] In fact, the dissent questioned whether the consumers even had standing to challenge the law, because the law did not prevent consumers from publishing drug prices themselves.[313]

It would have been bizarre at the time to suggest that the corporate interest in publishing drug prices implicated the typical speaker-oriented justifications for protecting expression, such as autonomy, self-determination, and the interest in developing one's rational faculties.[314] Corporations cannot think or believe. And they lack the emotional, rational, and perceptual capacities required for "autonomy-based theories for free expression."[315] As a result, the Supreme Court invoked the newly-conceived "First Amendment right to 'receive information and ideas.'"[316] The Blackmun majority found that the interest in receiving information resided both with consumers and the public at large.[317] The speaker's interest was mentioned only in passing, where the Court said that "the advertiser's interest is a purely economic one."[318] The commercial speech doctrine, then, forged at the height of the consumer movement in the 1970s,[319] was conceived by the Supreme Court "as a tool of consumer protection to secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers."[320] In later years, the Court would

309. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976).

310. *Id.* at 770.

311. *Id.* at 763.

312. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 29.

313. 425 U.S. at 782 (Rehnquist, J., dissenting); Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 29.

314. *See* Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 35.

315. Wu, *The Commercial Difference*, *supra* note 3, at 2016; *see also* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 296–97 (2011).

316. 425 U.S. at 757 (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

317. *Id.* at 764–65.

318. *Id.* at 762.

319. Richard L. Worsnop, *Directions of the Consumer Movement*, CQ RESEARCHER (Jan. 12, 1972), https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1972011200 [https://perma.cc/9LES-LFRY] (last visited Dec. 18, 2022).

320. Shanor, *supra* note 7, at 143.

reaffirm the idea that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising" rather than any interests of the speaker.[321]

Contrast this to the rationales for protecting core, political speech, which is predicated on both the *speaker's* interest in autonomy and self-determination[322] and on the necessity of open and unencumbered discourse to democratic self-governance.[323] Indeed, the dissent in *Bellotti* argued that "what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech."[324]

However, beginning in the 1990s, attention started to shift in commercial speech cases from listeners to speakers,[325] as the Supreme Court struck down restrictions on advertising for alcohol, gambling, and tobacco.[326] And in more recent cases the Court has "gestured toward the notion that commercial speech is protected due to the autonomy interest of commercial speakers, not due to the value of commercial information to the public."[327] For example, Justice Kennedy's majority opinion in *Citizens United* declared that "[t]he First Amendment protects speech and speaker, and the ideas that flow from each."[328] The Kennedy majority in *Sorrell* then declared that the Vermont prescribing data law "on its face burdens disfavored speech by disfavored speakers."[329]

Lower courts have taken the cue. For example, in *R.J. Reynolds Tobacco Co. v. FDA*, Judge Janice Rogers Brown of the D.C. Circuit authored an opinion relying on precedents protecting core speech to uphold a First Amendment challenge by tobacco companies, likening the FDA's graphic tobacco warnings to a requirement that students must salute the U.S. flag

321. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

322. For example, in Stromberg v. California, 283 U.S. 359, 369 (1931), the Court invalidated a California statute that criminalized displaying a red flag or any other pro-anarchy symbol, emphasizing that it "is a fundamental principle of our constitutional system" to maintain "the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means."

323 *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

324. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 804–05 (1978) (White, J., dissenting).

325. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 48; Rodney A. Smolla, *Free the Fortune 500!: The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RESERVE L. REV. 1277, 1295–96 (2004); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

326. 517 U.S. 484 (alcohol); 527 U.S. 173 (gambling); 533 U.S. 525 (tobacco).

327. Shanor, *supra* note 7, at 150–51; Sorrell v. IMS Health Inc., 564 U.S. 552, 564–65 (2011).

328. Citizens United v. FEC, 558 U.S. 310, 341 (2010).

329. 564 U.S. at 564.

and recite the Pledge of Allegiance.[330] Likewise, in *Edwards v. District of Columbia*, Judge Brown wrote that the District's requirement that tour guides maintain a valid business license burdened tour guides' First Amendment rights.[331]

Critics have called this transition a classic "bait-and-switch," whereby the Supreme Court offered limited protection for commercial speech under one justification, then once granted, changed those justifications to expand its protections.[332] Originally justified as protecting listeners' interests and the free flow of commercial information,[333] commercial speech is now protected due to its value to the speaker, even when the speech harms or disadvantages listeners.[334] Thus, first recognized during a golden era of consumer protection and rationalized as furthering consumer interests, modern commercial speech jurisprudence is now, ironically, "inconsistent with much regulation of commerce, particularly consumer protection regulation."[335]

Today, with nearly half a century of experience with commercial speech, we need not be so naïve. Experience strongly suggests that the only constitutionally valuable interests at stake in commercial speech are those of listeners.[336] Although it is corporations rather than consumers that typically bring First Amendment claims, what we really care about are the speech rights of listeners, not speakers.[337] Felix Wu thus calls corporate interests "derivative."[338] Instead of focusing on the corporation, Wu argues, "we need to look instead to theories of free expression to understand whether and why corporate speech deserves protection."[339] Though corporations might contribute to the values of free expression, they do so instrumentally, not intrinsically, and thus their interests are merely derivative.[340] The law should take seriously pharmacists' challenge to a ban on advertising drug prices not because of the intrinsic free speech interests of the pharmacists, but because their interests are instrumental to vindicating the rights of listeners to receive truthful information that increases consumer welfare.[341] This view is consistent with the views of

330. 696 F.3d 1205, 1211 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

331. 755 F.3d 996 (D.C. Cir. 2014).

332. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 5.

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

334. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 5. For a discussion of harms, see Section III.D *infra*.

335. Piety, *A Necessary Cost of Freedom*, *supra* note 5, at 5.

336. Wu, *The Commercial Difference*, *supra* note 3, at 2009.

337. *Id.*

338. *Id.*

339. *Id.* at 2015.

340. *Id.*

341. *Id.* at 2008–09.

Meiklejohn and Post, who maintain that because free speech serves the purpose of democracy and self-government, corporate speech interests are only instrumental and derivative of the interests of natural persons.[342]

More recent Supreme Court cases drift even further from seriously considering the interests of listeners, and depart from even speaker-based rationales by valuing the information involved in commercial speech for its own sake. As Massaro and Norton observe, the Court's recent decisions "hinge[] more on pragmatism and on expression's informational value than on any philosophical purity about speaker personhood or rights."[343] Perhaps presaging the "utility" argument made later by Collins and Skover, Massaro and Norton predicted that Supreme Court precedents would lead to protection for artificially-generated speech, given its usefulness to humans.[344] Information then, would be protected even when disconnected from the interests of either identifiable speakers or identifiable listeners.

Valuing information for its own sake, apart from listeners and speakers, may have been recognized first in *Citizens United*, which emphasized the value of the speech rather than the speaker.[345] But the idea no doubt descends from the "marketplace of ideas" rhetoric at the core of early commercial speech cases.[346] Indeed, in *Bellotti*, the Court explained that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[347] Kathleen Sullivan explains that this view of free speech is "indifferent to a speaker's identity or qualities—whether animate or inanimate, corporate or nonprofit, collective or individual."[348] The Court now focuses not on the "rights of any determinate set of speakers," but on "a system or process of free speech."[349]

But what is free speech if not for speakers and listeners? Whose interests, if any, matter today? The logical implications of a disembodied First Amendment take us to a place that looks more like the dystopian techno-future of *Black Mirror* than the romanticized marketplace of ideas

342. ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 73–74 (2014).

343. Massaro & Norton, *supra* note 6, at 1173.

344. *Id.* at 1174.

345. Citizens United v. FEC, 558 U.S. 310, 392–93 (2010) (Scalia, J., concurring).

346. Massaro & Norton, *supra* note 6, at 1174–75, 1178.

347. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978).

348. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 156 (2010).

349. *Id.* at 155–56 (internal quotations omitted) (noting that on one reading of the Free Speech Clause, it speaks in terms of "speech" rather than focusing on speakers or persons).

envisioned by Justice Holmes.[350] Massaro and Norton agree that the logical extensions of corporate speech "may be so uncomfortable that it inspires a rethinking of current theory and doctrine."[351] This Article proceeds precisely in this spirit.

III. RECONSTRUCTING CORPORATE COMMERCIAL SPEECH

Corporate commercial speech has drifted far from its moorings. Despite claims by those like Justice Thomas—who argues that there is no "philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech"[352]—our analysis demonstrates that there is. If the philosophical and historical bases seem hard to discern today, it is because the Supreme Court itself has obscured them: by extending civil as well as economic rights to corporations; by blurring commonsense distinctions between natural persons and artificial entities; and by extending rulings involving atypical entities with atypical claims to ordinary businesses. Having done those things, the Court now uncritically extends the presumptive invalidity of content- and speaker-based distinctions to corporate commercial speech, straying from the justifications for granting limited protection to commercial speech in the first place. In response, we offer strategies for reconnecting corporate commercial speech to the First Amendment so as to promote individual and societal interests rather than frustrating them in service of corporate interests.

A. Rejecting Libertarian Corporatism

The Supreme Court's early instincts on commercial speech were the right ones.[353] When commercial speech was first declared worthy of constitutional attention, the Court clarified that it was distinct from core speech and thus deserved "a different degree of protection."[354] The Court concluded that "the greater objectivity and hardiness of commercial speech" meant that the First Amendment would tolerate greater regulation that

350. *Black Mirror* is a dystopian British television anthology that explores the dark and unanticipated consequences of new technologies, pursuing themes of paranoia, surveillance, and loss of control. It is sometimes described as a modern *Twilight Zone*. *See* Barry Vacker, *Black Mirror: The Twilight Zone of the 21st Century*, MEDIUM (Oct. 14, 2018), https://link.medium.com/Zk0bCx8Yk8 [https://perma.cc/NYM7-5USZ].

351. Massaro & Norton, *supra* note 6, at 1175.

352. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (Thomas, J., concurring in part and concurring in the judgment) (internal quotations omitted); *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 572–90 (2001) (Thomas, J., concurring in part and concurring in the judgment).

353. Of course, the Court's first formal opinion on commercial speech declared that it was not protected at all by the First Amendment. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).

354. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

would be suspect, if not completely disallowed, in non-commercial contexts.[355] The Court reasoned that because the truth or falsity of commercial speech "may be more easily verifiable . . . than . . . news reporting or political commentary," and "may be more durable . . . [s]ince advertising is the *sine qua non* of commercial profits," there would be "little likelihood of its being chilled by proper regulation."[356] The First Amendment would not, the Court reassured, draw into question vast swaths of commercial regulation.[357]

But, as explained above, that is precisely what happened. Rehabilitating the First Amendment will require a return to foundations.

The most influential theories of the First Amendment offer three justifications for protecting free speech: (i) promoting individual liberty and autonomy; (ii) promoting democratic self-governance; and (iii) promoting a free exchange of ideas.[358] Each justification pursues "ideals about a hoped-for greater good" that may "produce something beneficial."[359] Morgan Weiland calls the first two of these the classically "liberal" and classically "republican" traditions.[360] Under the liberal tradition, free speech is important to protect individual liberty and autonomy from state interference[361]—safeguarding innate interests in self-expression, self-determination, and self-realization.[362] Under the republican tradition, free speech is a social good, as individual expression is instrumental to achieving public-minded goals of *collective* self-determination and *collective* self-governance.[363] The republican tradition frequently casts individuals as listeners whose right to information furthers public-minded goals.[364]

But as Weiland carefully explains, free speech jurisprudence has strayed from the liberal and republican traditions, towards a third "libertarian" theory.[365] This theory treats "listeners as individual consumers or voters whose interest in free expression is to make informed choices in the market for goods or candidates,"[366] and urges striking down business regulation to ensure the "free flow of information" to consumers. Weiland traces how the

355. *Id.*
356. *Id.*
357. *Id.* at 770–71.
358. Massaro & Norton, *supra* note 6, at 1175–76.
359. *Id.* at 1176.
360. Weiland, *supra* note 79, at 1402–03.
361. *Id.* at 1404–05.
362. *Id.* at 1394.
363. *Id.*
364. *Id.* at 1408–10 (discussing Alexander Meiklejohn's influence).
365. *Id.* at 1395, 1397.
366. *Id.* at 1395. Kathleen Sullivan also noted this shift, drawing a parallel between *Virginia Board of Pharmacy* and *Citizens United*. Sullivan, *supra* note 348, at 158, 176.

Court gradually used arguments for listeners' rights in the republican tradition to vindicate naked corporate rights under this libertarian theory.[367]

As scholars show, however, the Court's recent corporate speech decisions do not necessarily promote consumer welfare. These rulings may or may not "actually benefit listeners, though corporate interests are always served." [368] Rather than using corporate interests as instruments for protecting listeners' rights, the Court flips the logic and uses listeners' interests as instruments for protecting corporate rights.[369]

Abandoning a connection between corporate speech and consumer interests bastardizes both the liberal and republican traditions—"leaving only a naked right against the state."[370] As Felix Wu writes, "individuals, not corporations, are the fundamental units of democracy."[371] Rather than focusing on natural persons, however, the Court now examines in isolation what might be fair to corporations. Under the Roberts Court, the interests of listeners have waned while corporate interests have emerged as worthy of protection in and of themselves—no longer derivative, no longer subordinate.[372] As Weiland explains, "the libertarian tradition decouples the speech right from individuals and publics that are central to the two traditions, creating an impersonal speech right that is narrowly understood as a negative freedom from the state."[373]

Corporate and commercial interests have more than sufficient resources and incentive to produce and disseminate information about their products and services. Lillian BeVier views the First Amendment as a "constitutional subsidy" that protects "otherwise rather fragile incentives to produce and disseminate information about government and public officials." [374] Corporate commercial speech needs no constitutional subsidy. Our representative democracy did just fine for centuries without special protections or subsidies for corporate commercial speech, likely because American commerce may threaten as much as support the values enshrined in the Bill of Rights. If we consult "the text, history, and structure of the Constitution," BeVier argues, there is a stronger case that corporate commercial speech deserves no protection than protection equal to that of core political speech.[375]

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367. Weiland, *supra* note 79, at 1450–51.
368. *Id.* at 1396.
369. *Id.*
370. *Id.* at 1397.
371. Wu, *The Commercial Difference*, *supra* note 3, at 2016.
372. Weiland, *supra* note 79, at 1397.
373. *Id.*
374. Lillian R. BeVier, *A Comment on Professor Wolfson's 'The First Amendment and the SEC*,' 20 CONN. L. REV. 325, 327, 328–29 (1988).
375. *Id.* at 327.

The "marketplace of ideas" justification for free speech, as famously articulated by Justice Oliver Wendell Holmes,[376] refers to the constitutional importance of maintaining the free flow of "social, political, esthetic, moral, and other ideas and experiences."[377] It does not refer to *actual* marketplaces for goods and services.[378]

Although commercial speech is not "valueless in the marketplace of ideas,"[379] it was never meant to be on par with "core" political speech.[380] Marketplaces for goods and services are easily undermined by sellers that make false, misleading, or fraudulent claims.[381] This is why we regulate them. Rather than allowing all commercial assertions and simply warning consumers *caveat emptor*, we prohibit certain claims and require others to ensure more efficient markets.[382] This enhances consumer welfare; it does not undermine or reduce it.

In the marketplace for political ideas, "there may be useless proposals, totally unworkable schemes, as well as very sound proposals," but "there is no such thing as a 'fraudulent' idea."[383] As Justice Breyer explains, "speech on matters of public concern needs 'breathing space'—potentially incorporating certain false or misleading speech—in order to survive."[384] Although today's misinformation campaigns might draw this wisdom into question,[385] most would agree that it is dangerous and unworkable to police core political speech.[386] Even a recent legislative attempt to require bots to

376. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting that "the ultimate good desired is better reached by free trade in ideas," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

377. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

378. Sorrell v. IMS Health Inc., 564 U.S. 552, 583 (2011) (Breyer, J., dissenting). In the 1960s and 1970s, several influential voices recognized the advantages in melding the two. *See* Dibadj, *supra* note 7, at 916 (first citing Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 3 (1964); and then citing R. H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 389 (1974)).

379. Bigelow v. Virginia, 421 U.S. 809, 826 (1975).

380. 564 U.S. at 582 (Breyer, J., dissenting).

381. Moreover, there is the depressing reality that the "marketplace for ideas" itself may be hopelessly broken, with the proliferation of fake news, misinformation, and wild conspiracy theories. As Tamara Piety notes, "[a]ll sorts of bad ideas are 'accepted' by the public and it is by no means certain that the best ideas will 'win' in the long run." Piety, *Why Personhood Matters*, *supra* note 26, at 379; *see also* Hasen, *supra* note 164; Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSPS. 211 (2017).

382. Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557, 598–99 (1980) (Rehnquist, J., dissenting).

383. *Id.* at 598 (Rehnquist, J., dissenting).

384. Nike, Inc. v. Kasky, 539 U.S. 654, 676 (2003) (Breyer, J., dissenting).

385. *See* ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 28–29 (2019); Hasen, *supra* note 164, at 205–06; Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 68 (2017).

386. *See, e.g.*, United States v. Alvarez, 567 U.S. 709 (2012) (invalidating a federal law that made it a crime to lie about receiving a congressional honor, noting that the First Amendment protects even false political speech).

identify themselves as such was met with suspicion that a disclosure requirement would create "the scaffolding for censorship."[387]

Thus, like democracy itself, First Amendment doctrine requires that "the economic is subordinate to the political."[388] To be sure, information from corporate and commercial speakers can be important to consumers, promoting mutually beneficial transactions and economic efficiency.[389] But, as Felix Wu contends, those objectives "are not the sorts of expressive goals protected by the First Amendment."[390]

B. Escaping Corporate "Personhood"

A common argument against protecting corporate speech is that endowing corporations with the rights of natural persons made the First Amendment impersonal and led to decisions like *Citizens United*. As Massaro, Norton, and Kaminski observe, "[f]ree speech theory has marched steadily away from a construction of legal personhood that views speakers solely through an individual or animate lens, and now defines them in a practical, non-ontological sense."[391] In fact, they write, the current debate about speech rights for A.I. "illustrates just how much human dignity and speaker autonomy have been downplayed or erased from the First Amendment equation."[392]

On the other hand, Adam Winkler's work demonstrates how, contrary to expectations, equating corporations to people often *limited* corporate rights.[393] Strict separation between a corporation and its members has long been considered "a general principle of corporate law deeply ingrained in our economic and legal systems."[394] The earliest Supreme Court cases therefore struggled with the idea that corporations could be considered "people" endowed with rights under the Constitution.[395] Often, the Court expanded rights to corporations by "obscuring and hiding the corporate person rather than exalting it"—by finding corporations to be associations that claim rights on behalf of constituents rather than separate legal entities that claim rights of their own accord.[396] In fact, Winkler shows, the law of

387. Lamo & Calo, *supra* note 6, at 991, 1008–09 (discussing a now-enacted California law, CAL. BUS. & PROF. CODE §§ 17940–17943 (West 2019), and a U.S. Senate bill, Bot Disclosure and Accountability Act of 2018, S. 3127, 115th Cong. (2018), that would require bots to self-identify as nonhuman).

388. 447 U.S. at 599 (Rehnquist, J., dissenting).

389. Wu, *The Commercial Difference*, *supra* note 3, at 2017.

390. *Id.*

391. Massaro, Norton & Kaminski, *supra* note 6, at 2497.

392. *Id.* at 2499.

393. *See* WINKLER, *supra* note 35, at 61–62.

394. *Id.* at 51–52 (quoting United States v. Bestfoods, 524 U.S. 51, 61 (1998)).

395. *Id.* at 37.

396. *Id.* at 37, 70.

corporate "personhood" retains relatively firm lines between natural persons and artificial, corporate "persons."[397]

The first corporate rights case, *Bank of the United States v. Deveaux*, relied on novel arguments that, for constitutional purposes, corporations were associations of people who had enforceable rights.[398] Likewise, in *Trustees of Dartmouth College v. Woodward*, Chief Justice Marshall embraced the notion that corporate rights were defined by the rights of individual members.[399] Decades later, Justice Harlan's opinion in *NAACP v. Alabama ex rel. Patterson* would also allow the nonprofit corporation to assert the interests of its members, giving no attention to whether the NAACP itself had a right to assert freedom of association.[400] In fact, Justice Harlan pierced the corporate veil precisely because it was a voluntary nonprofit membership organization rather than a business.[401]

As a functional matter, however, awarding corporations the rights of their members did collapse the distinction between corporate persons and natural persons.[402] In *Citizens United*, Justice Kennedy's majority opinion drew no attention to the corporation itself, instead emphasizing the rights of individuals (shareholders and listeners) and describing the corporation as "an association that has taken on the corporate form."[403] In the 2014 decision, *Burwell v. Hobby Lobby Stores, Inc.*, Justice Alito's opinion continued to use the "language of personhood" but the "logic of piercing" the corporate veil, holding for the first time that the for-profit corporation could assert the religious liberty rights of its owners: the Green family, who are Evangelical Christians.[404] The Court in *Hobby Lobby* looked to "the interests of the real human beings who stood *behind* the corporation."[405]

Moreover, as Leo Strine has argued, the opinions in *Citizens United* and *Hobby Lobby* were "not credible to equate the views of the corporation to those of its diverse and changing stockholders."[406] Both cases rely on the unrealistic notion that stockholders who disagree with a corporation's speech or political spending can simply divest or make use of "the

397. *Id.* at 70, 378–381.

398. *Id.* at 55; *see also* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 80–82 (1809).

399. 17 U.S. 518 (1819).

400. 357 U.S. 449, 458–60 (1958). The Court would later allow the NAACP to also assert the right of association on its own behalf in *NAACP v. Button*. 371 U.S. 415 (1963).

401. WINKLER, *supra* note 35, at 274.

402. *Id.* at 37.

403. Citizens United v. FEC, 558 U.S. 310, 349 (2010); WINKLER, *supra* note 35, at 364–65.

404. WINKLER, *supra* note 35, at 380–81 (discussing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)).

405. Piety, *Why Personhood Matters*, *supra* note 26, at 372.

406. Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 903 (2016).

procedures of corporate democracy."[407] In fact, investors in mutual funds and pensions cannot vote in corporate elections, nor do they choose specific corporate stocks.[408]

The corporate form is not an association of its members; it is a distinct legal entity separate from its stockholders, managers, creditors, and the like—which, after all, "is the whole point of corporate law."[409] As Winkler observes regarding *Hobby Lobby*, "members of [the] Green family were wholly distinct legal persons" who "depended on that separation to protect their personal assets; they would have insisted on a strict boundary between them and the corporate entity if a customer had fallen in a Hobby Lobby store and sued the Greens personally for damages."[410] Winkler concludes that restricting the rights of corporations requires "embracing corporate personhood, rather than piercing the corporate veil."[411] Yet, as Tamara Piety emphasizes, even though the Supreme Court continues to recognize that "corporations do not have the full panoply of rights that natural persons do . . . the case law does not inspire confidence about how the Court will rule on any particular question in the future."[412]

We agree that "personhood" can be a fuzzy concept, which is sometimes used to blur distinctions between natural and artificial persons. But the corporation is not a fuzzy concept. Corporations are chartered by the state for economic reasons, not political ones. They are granted perpetual life and limited liability to protect the economic interests of their members, not their constitutional interests. To the extent corporate communications matter to the First Amendment, they should matter only instrumentally to promote the interests of consumers and society. Corporations should not have intrinsic constitutional rights as speakers.

C. Resisting Counter-Majoritarian Intervention

Although judicial review serves a key counter-majoritarian function—protecting individuals from overbearing majorities—aggressive judicial review undermines the principle of legislative supremacy at the

407. Strine, Corporate Power Ratchet, *supra* note 173, at 06:19, *quoted in* WINKLER, *supra* note 35, at 384.

408. WINKLER, *supra* note 35, at 385.

409. Strine & Walter, *supra* note 406, at 887.

410. WINKLER, *supra* note 35, at 387.

411. *Id.* at 75.

412. Piety, *Why Personhood Matters*, *supra* note 26, at 370; *see also* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995 (1998) (critiquing the idea that corporations deserve *any* free speech rights).

heart of our constitutional structure.[413] It is a tension the Court famously tried to confront in footnote four of *Carolene Products*, with Justice Harlan Fiske Stone declaring that the role of judicial review is not to reexamine the judgments of Congress when regulating economic activity, but to review legislation for violations of the Bill of Rights.[414]

Decades later, in both *Virginia Board* and *Central Hudson*, Justice Rehnquist would be among the first to warn of the counter-majoritarian potential of protecting commercial speech.[415] First Amendment protection for commercial speech, Rehnquist worried, would "unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State."[416]

In those early cases, there was at least a pretense that the Court was protecting the interests of listeners as representing a collective public interest. In *Virginia Board* and *Central Hudson*, protecting listeners' access to information implied protecting the public's interest in self-determination and self-government.[417] However, the Roberts Court increasingly regards listeners only as atomized consumers making individual purchasing or voting decisions.[418] As the Court's deregulatory speech decisions abandon the collective listener-based rationale for protection, they gradually subordinate majoritarian preferences for beneficial regulation to newly announced corporate rights.[419]

One must recognize this trend in order to reverse it. Asserting intrinsic rights of corporate speakers, or giving constitutional significance to commercial information divorced from any living audience, creates a disembodied First Amendment that only serves the interests of disembodied entities and disembodied speech.

The counter-majoritarianism of corporate First Amendment doctrine compounds a broader frustration in America today about more sweeping

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413. Reed v. Town of Gilbert, 576 U.S. 155, 158–65 (2015); *see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962); *see also* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348–49 (2006).

414. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *Carolene Products* was a rejection of the *Lochner* era, during which the Court refused to defer to legislative judgments regarding the proper scope and methods of economic regulation. *See, e.g.*, Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

415. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

416. 447 U.S. at 584–85 (Rehnquist, J., dissenting).

417. *See* Weiland, *supra* note 79, at 1395, 1433–34.

418. *See id.* at 1450.

419. *See id.* at 1463.

"minority rule."[420] For example, longstanding critiques that the Senate and Electoral College are anti-democratic in design have boiled over, increasing calls for reforming one or both mechanisms.[421] Despite majority support for greater environmental protection, stricter gun control laws, and increased immigration reform, the public still waits for Congress to act on its preferences, and the Executive Branch to implement them.[422]

D. Taking Harms Seriously

We close by recommending one more improvement to corporate commercial speech theory and doctrine. The Supreme Court's free speech jurisprudence has become almost entirely untethered from the harms imposed by corporate speech. Although the Court has never developed a systemic framework for categorizing harms in connection with First Amendment analysis, "the dominant trend has been to discount the

420. *See, e.g.*, Michelle Goldberg, Opinion, *The Tyranny of the Minority*, N.Y. TIMES (Sep. 25, 2017), https://www.nytimes.com/2017/09/25/opinion/trump-electoral-college-minority.html [https://perma.cc/VD6N-DZDN]; Daniel Markovits & Ian Ayres, Opinion, *The U.S. Is in a State of Perpetual Minority Rule*, WASH. POST (Nov. 8, 2018, 4:46 PM), https://www.washingtonpost.com/opinions/the-us-is-in-a-state-of-perpetual-minority-rule/2018/11/08/9f9f38a0-e2b1-11e8-8f5f-a55347f48762_story.html [https://perma.cc/ZQE9-7UBK]; Dylan Matthews, *The Tyranny of the Majority Isn't a Problem in America Today. Tyranny of the Minority Is*., VOX (Sep. 12, 2018, 5:10 PM), https://www.vox.com/2018/9/12/17850980/democracy-tyranny-minority-mob-rule-james-madison [https://perma.cc/LHK6-BBPJ].

421. *See, e.g.*, Jonathan M. Ladd, *The Senate Is a Much Bigger Problem Than the Electoral College*, VOX (Apr. 9, 2019, 1:05 PM), https://www.vox.com/mischiefs-of-faction/2019/4/9/18300749/senate-problem-electoral-college [https://perma.cc/26Y6-QYJY] (noting, for example, that California's 39 million residents are represented by two Senators, just like the 578,000 people in Wyoming and 626,000 people in Vermont); Jamelle Bouie, *Minority Rule Does Not Have to Be Here Forever*, SLATE (Oct. 14, 2018, 8:30 PM), https://slate.com/news-and-politics/ 2018/10/minority-rule-not-in-the-constitution.html [https://perma.cc/RQ84-TALT] (noting that "[a] majority of Americans are represented by just 18 senators"); Geoffrey Skelley, *Abolishing the Electoral College Used to Be a Bipartisan Position. Not Anymore*., FIVETHIRTYEIGHT (Apr. 2, 2019, 4:13 PM), https://fivethirtyeight.com/features/abolishing-the-electoral-college-used-to-be-bipartisan-position-not-anymore/ [https://perma.cc/CMK3-LKCN] (noting that 61% of Americans favored amending the Constitution to elect presidents by popular vote rather than the Electoral College).

422. *See, e.g.*, Brady Dennis, *Most Americans Believe the Government Should Do More to Combat Climate Change, Poll Finds*, WASH. POST (June 23, 2020, 10:00 AM), https://www.washingtonpost.com/climate-environment/2020/06/23/climate-change-poll-pew/ [https://perma.cc/W2BR-M2UM]; Katherine Schaeffer, *Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017*, PEW RSCH. CTR. (Oct. 16, 2019), https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/ [https://perma.cc/H2B4-QEZH]; Alec Tyson, *Public Backs Legal Status for Immigrants Brought to U.S. Illegally As Children, But Not a Bigger Border Wall*, PEW RSCH. CTR. (Jan. 19, 2018), https://www.pewresearch.org/fact-tank/2018/01/19/public-backs-legal-status-for-immigrants-brought-to-u-s-illegally-as-children-but-not-a-bigger-border-wall/ [https://perma.cc/2XTL-K74Y]. Of course, some like Josh Chafetz might say that "broad public support" does not necessarily equate to the "sufficient public consensus" needed to motivate legislative action. *See* Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2081 (2013). Yet, contrary to conventional wisdom, congressional inaction is not the point of legislative procedure. Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217 (2013).

existence or effects of any purported harms when weighed against First Amendment claims."[423] Thus, the modern Court has been reluctant to declare anything objectionable about corporate money in elections[424] or the commercial exploitation of drug prescribing records,[425] and has downplayed the harmful effects of racist expression.[426]

Although "[t]he First Amendment has always had a delicate relationship with harm,"[427] the Roberts Court has "largely abandoned balancing of speech benefits and harms in favor of a categorical approach to protecting speech unless it falls within a historically recognized exception to the First Amendment."[428] As of 2016, "there ha[d] been no case in which . . . the Supreme Court has found a government interest sufficient to redeem a law that it had analyzed as content-based."[429]

Modern free speech theory should not ignore, devalue, or minimize the potential for harm in speech. For example, numerous laws manage to regulate speech that constitutes workplace harassment and discrimination without undermining free expression.[430] Likewise, the government can ban commercial speech that is false or misleading, or that promotes an illegal activity, without violating free speech rights.[431] And licensed professionals are prohibited from lying or making misrepresentations to their clients.[432] Each of these legal frameworks is based on the potential harms to *listeners*.

Particularly for corporate speech and new forms of automated speech, harm should be a central inquiry. Indeed, concern over A.I. has revived discussions about the role of harms in justifying regulations of speech.[433] Massaro and Norton emphasize that "[l]ike corporations, smart machines and their outputs already wield great social and economic power" and "already have the capacity to inflict grave harms to human autonomy, dignity, equality, and property."[434] Frank Pasquale in *The Black Box Society* carefully documents how modern information merchants can deceive, manipulate, discriminate, and coerce in a variety of industries, ranging from

423. COLLINS & SKOVER, *supra* note 111, at 55.
424. Citizens United v. FEC, 558 U.S. 310 (2010).
425. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).
426. *See e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
427. Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 81.
428. COLLINS & SKOVER, *supra* note 111, at 55 (citing United States v. Stevens, 559 U.S. 460 (2010); Snyder v. Phelps, 562 U.S. 443 (2011); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011)).
429. Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 955 (2016).
430. *See* Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016) [hereinafter Norton, *Truth and Lies in the Workplace*]; Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999).
431. Massaro, Norton & Kaminski, *supra* note 6, at 2519.
432. *Id.* at 2519–20.
433. *See id.* at 2483–84.
434. Massaro & Norton, *supra* note 6, at 1174.

finance and insurance to health care.[435] Communicative technologies will become still more sophisticated and capable of even greater harms.[436]

Systematically assessing harms may discourage courts from pursuing a disembodied First Amendment jurisprudence, unconnected to the human speakers and listeners whose interests should have primacy. Moreover, accounting for harms may force courts to confront the reality that the interests of speakers and listeners can collide, especially with artificial speech. Consider Internet trolls, who "take perverse joy in ruining complete strangers' days."[437] And the trolling community, as listeners, who "consider trolling to be enjoyable—of utility—precisely because others find it so unpleasant."[438] As Lamo and Calo explain, bots can "engage in online harassment at an unprecedented scale . . . especially [against] women and people of color."[439] Likewise, fake news sources and social media bots that perpetrate confusion, conspiracy theories, and unrest "serve[] the utility of some listeners at the expense of others."[440] Even the notice-and-comment process, the hallmark of responsive and legitimate regulation, is subject to abuse by bots that flood open comment periods with duplicative statements, generating a false sense of consensus.[441]

One antidote may be a public-minded First Amendment that takes listeners' collective interests seriously.[442] One example is medical speech. Privileging patients' interests as listeners means attaching oversight and accountability to the speech of professionals as knowledgeable, powerful speakers. Indeed, medical speech is extensively regulated in what professionals may not say (*e.g.*, giving negligent advice) and in what they are compelled to say (*e.g.*, disclosures related to obtaining informed consent from patients).[443]

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435. FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015).

436. Massaro & Norton, *supra* note 6, at 1189–90.

437. WHITNEY PHILLIPS, THIS IS WHY WE CAN'T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE 10 (2015).

438. Norton, *What's Old Is New Again*, *supra* note 127, at 105.

439. Lamo & Calo, *supra* note 6, at 999.

440. Helen Norton observes "that the nasty and pernicious features of certain speech can strip it of utility for some listeners is precisely why other listeners find it useful." Norton, *What's Old Is New Again*, *supra* note 127, at 105.

441. Lamo & Calo, *supra* note 6, at 1000; Issie Lapowsky, *How Bots Broke the FCC's Public Comment System*, WIRED (Nov. 28, 2017, 12:19 PM), https://www.wired.com/story/bots-broke-fcc-public-comment-system/ [https://perma.cc/6HEP-XJPQ].

442. *See* Massaro, Norton, & Kaminski, *supra* note 6, at 2484, 2488.

443. *See, e.g.*, Haupt, *supra* note 87, at 1284–85; Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1739 n.83 (1995); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 961 ("Professional medical speech is continuously regulated without seeming to run afoul of First Amendment constraints.").

As with professional speech, in which the equality of speaker and listener cannot be presumed, we should not presume the equality of corporate speakers and listeners.[444] Norton observes that "speakers sometimes enjoy information and power advantages that increase the likelihood and severity of the harms that they may inflict upon their listeners."[445] This naturally leads to the insight Dibadj offers, that "[t]he usual argument that speech should be countered with more speech becomes farcical in [the commercial] context."[446]

Corporations and other powerful speakers can deceive, manipulate, and even coerce listeners by distorting information and shaping choices. Companies do not spend billions on market research and advertising simply to convey bland, purely factual information about their goods and services. They "invest huge amounts of time and money to influence and even manufacture our preferences."[447] Likewise, as behavioral economics has shown, consumers are not dispassionate, utility-maximizing, rational actors.[448]

These asymmetries support courts once again privileging the interests of listeners over speakers, particularly in commercial and professional settings "where government imposes duties of honesty, accuracy, and disclosure upon comparatively powerful and knowledgeable speakers."[449] Thus, courts would be justified in adopting a protective stance for consumers "not because the consumer lacks sophistication, but because the advertiser has an overabundance of it."[450]

Thus, modern speech theory should focus not just on negative theories of what the government should not do, but on positive theories of what the government should do. Just as actual marketplaces often require regulation to function properly, modern speech theory must confront how well the marketplace of ideas actually functions. American law "rejects such a role for government in public fora, even if it means allowing speech that actually aims to thwart democracy or hinder the search for truth."[451] As Michael

444. Haupt, *supra* note 87, at 1268.

445. Norton, *What's Old Is New Again*, *supra* note 127, at 106; Norton, *Truth and Lies in the Workplace, supra* note 430, (noting that employer arguments that the First Amendment protects their speech must be tempered by the power dynamic between employers and workers).

446. Dibadj, *supra* note 7, at 920.

447. Norton, *What's Old Is New Again*, *supra* note 127, at 106. *See also* Dibadj, *supra* note 7, at 920 (noting that "[a]dvertisers spend some sixty billion dollars per year to disseminate their messages.") (citation omitted).

448. *See* REZA R. DIBADJ, RESCUING REGULATION 73–79 (2006).

449. Norton, *What's Old Is New Again*, *supra* note 127, at 106.

450. Haupt, *supra* note 87, at 1268 (internal quotations omitted) (citing Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 41 (2000)).

451. Kagan, *supra* note 227, at 791.

Kagan notes, we rely instead on the marketplace metaphor, and Justice Brandeis's wisdom that the remedy is more speech, not less.[452]

Yet David Richards argues that the truth does not always emerge from a free marketplace of ideas.[453] To the contrary, he suggests, the venues in which ideas are tested most rigorously in pursuit of truth require significant government regulation.[454] For example, testimony in courts and legislatures must be germane under the rules of civil procedure, evidence, or parliamentary procedure.[455] Such procedures ensure that the accuracy and relevancy of information can be challenged.

How can the government promote First Amendment values like democratic self-governance, enlightenment, autonomy, and perpetuation of knowledge?[456] Is the main problem too much government involvement in the market, or not enough? Existing free speech doctrine lingers on the negative, "the need to constrain the government's potentially dangerous control of expression," which tends to focus on listeners' interests in receiving speech.[457] Positive theories of free speech, on the other hand, value and protect affirmative benefits such as individual autonomy, democratic self-governance, and the expression of ideas and knowledge—emphasizing "humanness or humanity" and thus real speakers' interests.[458] Although "humanness is not essential to *legal* personhood,"[459] we might conclude it is essential to any positive theory of free speech.

CONCLUSION

This Article offers a theory to explain why corporate commercial speech enjoys a charmed constitutional life in America today. The "artifices" of corporate speech, built insistently over several decades, have delivered corporate and commercial speech from outside the borders of the First Amendment to its periphery, and then to its core. Each artifice, standing alone, represents a noteworthy shift in doctrine. But when viewed over their entire arc, they constitute a radical departure from a First Amendment that is concerned with natural persons' individual rights or with the public good.

The First Amendment today has been disembodied. Resuscitating free speech rights in America will require deconstructing the artifices of

452. *Id.* at 793 (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).
453. DAVID A. J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY 18–22 (1999).
454. *Id.* at 20–22.
455. *Id.*
456. Massaro, Norton & Kaminski, *supra* note 6, at 2487–88.
457. Norton, *What's Old Is New Again*, *supra* note 127, at 101; Massaro & Norton, *supra* note 6; Massaro, Norton & Kaminski, *supra* note 6.
458. Norton, *What's Old Is New* Again, *supra* note 127, at 101.
459. *Id.* (citation omitted).

corporate speech, drawing clear lines between the natural and the artificial, and crafting sensible doctrines for each, including doctrines that account for the potential harms of corporate commercial speech and the benefits to consumers of regulating it. Failing to act subverts our citizens and our democracy.