

# FIRST AMENDMENT COVERAGE

AMANDA SHANOR\*

*Neither courts nor scholars have articulated a coherent theory of the scope of the First Amendment's "freedom of speech." Most First Amendment jurisprudence and scholarship has focused on the justification for the freedom of speech or questions of constitutional protection—essentially, how much scrutiny should apply in various contexts. Largely ignored is the often-dispositive threshold question of whether activities are "covered" by the First Amendment at all. Many activities that are colloquially considered "speech" are not traditionally subject to constitutional review. For instance, the regulation of contracts, commercial fraud, perjury, conspiracy, workplace harassment, the compelled speech of tax returns, and large swaths of regulation by the administrative state have all historically been treated as beyond the ambit of the First Amendment.*

*Today, however, the boundaries of the First Amendment are in a period of transformation. Plaintiffs across the country contend that the regulation of areas of social and economic life that never before were thought relevant to the Constitution is in violation of it. Courts are increasingly confronted with cases that raise the question: Does the First Amendment apply? This makes the need for a theory of the scope of the right of free speech—of the First Amendment's boundaries—ever more pressing.*

*This Article develops, first, a descriptive and sociologically-based theory of First Amendment coverage. By analyzing differences between free speech sub-doctrines, I argue that the animating difference between what falls within the First Amendment's reach and what is excluded from it does not rest on the distinction between speech and conduct, as is often thought. Instead, coverage depends on whether or not social norms about a given practice are (or courts believe should be) sufficiently strong to make the anticipated consequences of the speech—how it works and what it does—clear. Coverage depends, in short, on whether or not the audience of the activity is pluralistic.*

*Second, this Article develops a prescriptive theory of how courts should analyze questions of the boundaries of free speech. I argue that, at the borders of the First Amendment, courts must analyze the social context of the activity in question as well as the normative and institutional implications of charting First Amendment coverage.*

*I conclude by exploring the issues at stake in current and emerging First Amendment coverage questions. I argue that the scope of the First Amendment reflects and defines the areas of social life in which we need or want cohesive, non-pluralistic, social norms and relationships. In short, the boundaries of the First Amendment track not only the space of pluralistic contestation, but also the expectation of and desire for social cohesion.*

---

\* Copyright © 2018 by Amanda Shanor, Ph.D. Candidate in Law, Yale University, Adjunct Professor of Law, Georgetown University Law Center; J.D., Yale Law School; B.A., Yale College. My many thanks to Floyd Abrams, Jack Balkin, Emily Chapuis, David Cole, William Eskridge, Jr., Leslie Kendrick, Robert Post, David Pozen, Rebecca Tushnet, and the participants of the Freedom of Expression Scholars Conference at Yale Law School for their input and insights. All errors are my own.

INTRODUCTION ..... 319

    I. THE IMPORTANCE OF FIRST AMENDMENT COVERAGE .. 324

    II. A POSITIVE ACCOUNT OF THE SCOPE OF THE FIRST AMENDMENT..... 337

        A. *The History of Coverage and the Speech/Conduct Distinction* ..... 338

        B. *A Sociologically-Based Account of Coverage*..... 343

    III. A PRESCRIPTIVE THEORY OF FIRST AMENDMENT COVERAGE ..... 356

        A. *The Stakes of Contemporary Coverage Cases* ..... 361

        B. *The Broader Stakes of the Boundaries of the First Amendment* ..... 365

CONCLUSION ..... 366

INTRODUCTION

The First Amendment extends to the “freedom of speech.”<sup>1</sup> But what is the scope of that right? Most First Amendment jurisprudence and scholarship has focused on the justification for a free speech principle and the level of constitutional protection—essentially, strength of scrutiny—that should apply in various contexts within the First Amendment’s borders. Largely ignored is the often-dispositive threshold question of whether and why the First Amendment applies at all. The animating premise of much First Amendment theory and case law is that some things are speech, which fall within the First Amendment’s ambit, and others are conduct, and so fall outside it. But the reach of the First Amendment, which is often termed First Amendment coverage, is in fact not so self-evident. Take two examples.

Jeffery K. Skilling, the former chief executive officer of the Enron Corporation, was convicted of conspiracy, securities fraud, making false representations to auditors, and insider trading after Enron spiraled into bankruptcy.<sup>2</sup> Several of those crimes turned on elements of communication, and specifically the harms that Skilling’s messages (or his failure to divulge) had on others: Skilling lied to shareholders and auditors about Enron’s fiscal health and financial dealings, he and his

<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> See *United States v. Skilling*, 638 F.3d 480, 481 (5th Cir. 2011). Skilling’s indictment included several objects of conspiracy, including securities fraud and honest-services fraud. *Id.* The jury returned a general verdict of guilty on the conspiracy charge, but did not specify the object(s). *Id.* On appeal, the Supreme Court narrowed the scope of honest-services fraud and invalidated the government’s honest-services theory, but did not reverse Skilling’s conspiracy conviction. *Id.* On remand, the Fifth Circuit upheld the conspiracy conviction. *Id.*

co-conspirators agreed to engage in fraud, and he asked his broker to sell his Enron stock based on non-public information.<sup>3</sup> Skilling was represented by some of the nation's leading appellate counsel—including Sri Srinivasan, who went on to become a judge on the United States Court of Appeals for the District of Columbia, represented Skilling in the Supreme Court<sup>4</sup>—and Skilling's case was heard by the United States Supreme Court.<sup>5</sup> But at no stage did he defend himself on the grounds that the First Amendment protected his right to say, or not say, what he did.

By something of a contrast, there is the case of Theresa Harris.<sup>6</sup> Harris served as a manager at Forklift Systems, an equipment rental company. She alleged that Charles Hardy, Forklift's president, regularly insulted and harassed her because of her gender, calling her "a dumb ass woman," suggesting in front of other employees that the two of them "go to the Holiday Inn to negotiate [her] raise," and asking her to retrieve coins from his front pants pockets and pick up objects he had thrown on the ground.<sup>7</sup> Harris filed a Title VII suit, alleging that this constituted a hostile work environment. Forklift defended itself to the Supreme Court, including on First Amendment grounds. It argued that Title VII could not constitutionally "punish speech merely because a plaintiff found the speech offensive"<sup>8</sup> and that the courts could "avoid a direct conflict with the First Amendment only by ensuring that Title VII regulates employment practices and not, as petitioner proposes, merely offensive speech."<sup>9</sup> But despite briefing and argument, the Supreme Court ruled against Forklift without saying even a word on the First Amendment challenge.<sup>10</sup>

The examples of Skilling and Harris, which demonstrate the often counter-intuitive nature of the First Amendment's borders, are far from unique.<sup>11</sup> Many activities that are colloquially considered

---

<sup>3</sup> See *Breakdown of the Charges Against Enron's Top Officers*, N.Y. TIMES (Jan. 18, 2006), <http://www.nytimes.com/2006/01/18/business/worldbusiness/breakdown-of-the-charges-against-enrons-top-officers.html>.

<sup>4</sup> See Lauren Streib, *Next Up for the Unstoppable Sri Srinivasan: Jeff Skilling Defense*, BUS. INSIDER (Feb. 26, 2010), <http://www.businessinsider.com/next-up-for-the-unstoppable-sri-srinivasan-jeffrey-skilling-defense-2010-2>.

<sup>5</sup> See *Skilling v. United States*, 561 U.S. 358 (2010).

<sup>6</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993).

<sup>7</sup> *Id.*

<sup>8</sup> Brief for Respondent at 31, *Forklift*, 510 U.S. 17 (No. 92-1168).

<sup>9</sup> *Id.* at 33.

<sup>10</sup> *Forklift*, 510 U.S. at 23; see also Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1 (analyzing the Court's decision not to address the First Amendment issue in *Forklift*).

<sup>11</sup> See, e.g., KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 6–7, 41–76 (1992) (listing crimes that involve communications that generally do not generate First Amendment attention, including conspiracy, bribery and perjury, and describing

“speech” are not subject to constitutional challenge, let alone review or decision: the regulation of contracts, commercial and securities fraud, perjury, conspiracy and solicitation, workplace harassment, the compelled speech of tax returns, and large swaths of the administrative state, including antitrust, securities, and pharmaceutical regulation, to name just a few. By contrast, significant amounts of activity we might colloquially call conduct (or at least not “speech”)—from paintings and music to flag displays, cross burning, and arm-band wearing—are constitutionally protected, and their regulation prompts swift constitutional challenge.<sup>12</sup> As Frederick Schauer observed, to imagine “[t]hat the boundaries of the First Amendment are delineated by the ordinary language meaning of the word ‘speech’ is simply implausible.”<sup>13</sup>

This Article is concerned with understanding why the regulation of some activities is considered salient to the First Amendment and within its boundaries, while the regulation of others is not. How are the First Amendment’s boundaries set and how should courts set them?

To get purchase on these questions, it is important to recognize that the boundaries of the First Amendment are dynamic, not static. Commercial speech and even motion pictures, for example, were for decades explicitly excluded from any First Amendment review<sup>14</sup> and have only more recently been extended constitutional coverage.<sup>15</sup> This dynamism extends not just to what sorts of social practices courts recognize as implicating legitimate First Amendment claims, but to the sorts of cases that plaintiffs think relevant enough to the Constitution to bring in the first place. Perhaps the inapplicability of the First

---

categories of activities generally beyond the First Amendment’s ambit, including agreements, offers, and threats); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (describing the way in which many activities that are colloquially considered speech remain untouched by the First Amendment, including antitrust and securities regulation, criminal solicitation, and most of evidence law); Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1074 (2016) (observing that “[s]imilar examples pervade the law”).

<sup>12</sup> See Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1619 (2015).

<sup>13</sup> Schauer, *supra* note 11, at 1773; see also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267–82 (1981) (exploring the concept of First Amendment coverage, including its incongruence with the concept of speech in ordinary language).

<sup>14</sup> See *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230 (1915) (explicitly excluding motion pictures from the protection of the First Amendment).

<sup>15</sup> See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (overruling *Mutual Film Corp.* and extending First Amendment protection to motion pictures).

Amendment was so obvious in the Skilling case that his attorneys did not even raise a claim.

The First Amendment's borders are now in a period of great transformation—largely expansion, and rapid, at that.<sup>16</sup> Plaintiffs increasingly marshal the right of free speech<sup>17</sup> to limit governmental power in domains from public health regulation, to pricing and minimum wage laws, to executive action in foreign affairs, to the government's request that Apple write code to open iPhones.<sup>18</sup> These claims include types of activities that a generation ago would not have prompted a lawyer or court to identify any First Amendment concern. Business licenses, for instance, were not the fodder of free speech claims even two decades ago. Nor were warning labels and consumer disclosures—such as nutrition and cigarette labeling. Both are now the subject of some of the most pitched constitutional battles and circuit splits. More parts of social and economic life are, in short, now subject to First Amendment challenge.

This outward pressure on the First Amendment's boundaries, coupled with the profound deregulatory potential of the strict scrutiny with which free speech claims are customarily reviewed (in contrast to the rational basis review generally provided to regulations outside its scope), have made the question of First Amendment coverage and its limits more important. And, as the First Amendment has become the key battleground for challenging the powers of the modern administrative state,<sup>19</sup> the question of the First Amendment's reach has become more pressing.

But despite this dynamism and the importance of whether the First Amendment applies in a given case to its ultimate outcome and the distribution of powers, it is well recognized that neither courts nor scholars have articulated a coherent theory of the First Amendment's boundaries.<sup>20</sup> Instead, courts and commentators alike have generally

---

<sup>16</sup> This transformation is not wholly unidirectional. See *infra* Part I. National security concerns for instance are placing inward pressure on the First Amendment, particularly in the context of criminal law.

<sup>17</sup> This Article to a more limited extent addresses the scope of the right of association, though I believe it operates, both positively and prescriptively, in much the same way.

<sup>18</sup> See *infra* notes 35, 37–42 and related text (collecting cases); see also Schauer, *supra* note 12 (documenting the outward pressure on the First Amendment's borders of coverage and offering possible explanations for this phenomenon).

<sup>19</sup> See Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 176–82 (arguing that the First Amendment has great deregulatory potential); see also Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) (“It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation.”).

<sup>20</sup> See, e.g., Schauer, *supra* note 13 (exploring First Amendment coverage); Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427, 429 (2015)

treated the question of whether an activity is “speech” salient to the First Amendment as obvious or natural, often based on no explicit argument or criteria.<sup>21</sup> And the Supreme Court’s test for First Amendment coverage, articulated in *Spence v. Washington*,<sup>22</sup> has been analytically undone, even if not fully rejected by the courts.<sup>23</sup> There is, in short, no dominant understanding of the scope of the First Amendment; instead there is still largely “disarray.”<sup>24</sup>

This Article responds to that gap. It articulates a positive and sociologically-grounded account of the current state of the First Amendment’s borders and identifies the central pressures on those borders at work today. I locate an answer to why the regulation of some activities faces First Amendment scrutiny, while other regulation does not, in the social dynamics and social context of those activities. Coverage depends, I argue, on whether the social norms surrounding an activity are sufficiently cohesive to make the ways that the activity “works” self-evident.

This Article additionally supplies a prescriptive theory of how courts *should* approach the ever more prevalent questions about the First Amendment’s reach. I argue that a single test for the question of what qualifies as “speech” is unlikely to be either feasible or normatively desirable. Instead, at the boundaries of the First Amendment, courts must explicitly analyze the social context of the activity in question, as well as the normative and institutional implications of altering the scope of free speech coverage. First Amendment coverage protects a space of pluralism—a domain in which the effects of expressive activity are uncertain and norms vary and can be contested, poten-

---

(arguing that scholars “have avoided confronting the important foundational issues about freedom of speech”); Schauer, *supra* note 11, at 1767–68; *see also* Robert Post, *Recuperating First Amendment Doctrine*, 47 *STAN. L. REV.* 1249, 1250–60 (1995) (discussing the origins and deficiencies of the *Spence* test). This is not to suggest that there has not been sustained scholarly attention on the question of coverage, which I address in Part I.

<sup>21</sup> Schauer, *supra* note 11, at 1766; *see also* Fallon, *supra* note 10, at 13 (noting that courts generally treat it as self-evident that the First Amendment does not protect certain speech acts).

<sup>22</sup> 418 U.S. 405, 409–11 (1974) (per curiam); *see also* *Texas v. Johnson*, 491 U.S. 397, 405–06 (1989) (applying the *Spence* test to flag burning); *cf.* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (stating, contrary to the *Spence* test, that “a narrow, succinctly articulable message is not a condition of constitutional protection”).

<sup>23</sup> *See* Schauer, *supra* note 20, at 427 (“Does the First Amendment rest on a mistake? More specifically, is the First Amendment’s necessary distinction between speech and action fundamentally unsustainable?”). *Compare* Post, *supra* note 20, at 1250–60 (demonstrating the incoherence of the *Spence* test), *with* *Cressman v. Thompson*, 798 F.3d 938 (10th Cir. 2015) (applying *Spence*).

<sup>24</sup> Post, *supra* note 20, at 1249.

tially in favor of social and political change. Uncovered spaces, by contrast, are those in which we have or need other forms of ordered, normed life.

The Article proceeds in four parts. Part I details the importance of First Amendment coverage. It demonstrates that the current central pressures on the First Amendment's borders include the outward pressure of litigants seeking to leverage the First Amendment as a deregulatory tool, and so to assert its applicability in more contexts, as well as inward pressure largely from threats to national security, which have prompted the government to assert that the First Amendment does not apply in contexts in which it previously has. Part II provides a positive description of the scope of the First Amendment and its development and analysis in both case law and scholarship. Part III presents a prescriptive argument about how courts should approach ever more prevalent First Amendment coverage issues.

Part IV considers the implications of current First Amendment coverage questions arising in the conflict between free speech and economic regulation. It argues that the stakes of the scope of the First Amendment, however, transcend even those critical social and political questions. In setting the boundaries of the First Amendment we are required to ask: Do we need types of social interactions and relationships other than pluralistic contestation? Do we need cohesive social norms? I argue that we need both, and that the reason why the First Amendment has not, and should not, extend even to all forms of "speech" is because of that underlying sociological fact. The boundaries of the First Amendment track not only the space of pluralistic contestation, but also the expectation, and desire, for social cohesion—the drive for, in the words of Robert Cover, a "nomos."<sup>25</sup>

## I

### THE IMPORTANCE OF FIRST AMENDMENT COVERAGE

The First Amendment prohibits the abridgement of the "freedom of speech,"<sup>26</sup> but it nowhere defines the "speech" that falls within that protection, as opposed to the range of activity (often termed conduct) that falls outside it. Nor does it clarify what relationship "the freedom

---

<sup>25</sup> Robert Cover famously wrote that we inhabit a *nomos*, or normative universe, in which we "create and maintain a world of right and wrong, of lawful and unlawful, of valid and void." Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983). He argued that a *nomos*—which includes principles of justice and the formal institutions of the law—cannot exist apart from the narrative that give it meaning; a *nomos* is held together by the force of interpretive commitments and interpretive communities. *Id.* at 4–8.

<sup>26</sup> U.S. CONST. amend. I.

of speech” has to “speech,” coextensive or otherwise. Against that open-ended text, First Amendment coverage denotes the scope of activities that litigants and judges consider proper targets of constitutional litigation and review. Coverage is a sociological concept: It is not the theoretical or philosophical scope of the right of free speech, but what litigants and courts in a given historical moment view as within, or plausibly within, the scope of that right. It is the range of activities whose regulation strikes legal actors at the constitutional moment.

We might at first blush think that the First Amendment covers the set of activities that are sufficiently expressive, or speech-like, that their regulation is thought to be of constitutional concern. As Part II explores in greater depth, the speech-conduct distinction does not explain the First Amendment’s current boundaries, as prominent scholars have observed.<sup>27</sup> Nor does the Supreme Court’s coverage test, articulated in *Spence v. Washington*<sup>28</sup> and since reiterated, as Robert Post has argued.<sup>29</sup> Much that we might colloquially consider “speech” has traditionally not been covered by the First Amendment at all. This includes the language in contracts and tax returns, commercial fraud, workplace harassment, and securities transactions—all of which are speech in any normal sense, but the regulation of none of which have historically been the subject of First Amendment suit or review.<sup>30</sup> And by contrast, a range of conduct, cultural objects, and symbolic expressions, including paintings, music, flag waving and flag

---

<sup>27</sup> See, e.g., Schauer, *supra* note 11.

<sup>28</sup> 418 U.S. 405, 409–11 (1974) (per curiam) (concluding that a flag display “was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments” because “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it”); see also *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’” (quoting *Spence*, 418 U.S. at 410–11)). *But see* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” (quoting *Spence*, 418 U.S. at 411)).

<sup>29</sup> See Post, *supra* note 20, at 1252 (“The *Spence* test thus appears to have enjoyed the normal life of a relatively minor First Amendment doctrine. What is curious, however, is that the doctrine is transparently and manifestly false. The test cannot plausibly be said to express a sufficient condition for bringing ‘the First Amendment into play.’” (quoting *Johnson*, 491 U.S. at 404)).

<sup>30</sup> See, e.g., Schauer, *supra* note 11, at 1766 (collecting examples of types of speech that do not generally generate First Amendment attention); Tushnet, *supra* note 11, at 1077–83, 1086 (same).



burning, have long been covered and protected by the First Amendment.<sup>31</sup> Part II will take up what in fact explains First Amendment coverage, if the speech-conduct distinction and *Spence*'s test do not. The important point for current purposes is that the First Amendment covers a range of activity, some of which most Americans would likely describe as "speech" and some perhaps as "conduct," that litigants and/or judges find salient to the Constitution.<sup>32</sup>

The boundaries of the First Amendment—the leading edge of coverage—have, moreover, changed significantly over time. The Supreme Court expressly excluded motion pictures, for instance, from the First Amendment's coverage in 1915.<sup>33</sup> "Are moving pictures within the [free speech] principle, as it is contended they are?" the Court asked.<sup>34</sup> "They, indeed, may be mediums of thought, but so are many things. So is the theatre, the circus, and all other shows and spectacles . . . ."<sup>35</sup> In the Court's view, "the exhibition of moving pictures [was] a business pure and simple, originated and conducted for profit, like other spectacles."<sup>36</sup> Whatever the scope of the right of free speech, motion pictures were not within its ambit in 1915. They were simple business practice. That changed nearly four decades later when the Court in 1952 expanded the First Amendment to cover movies.<sup>37</sup> Commercial speech was likewise once explicitly excluded from First Amendment coverage altogether, but was several decades later swept within the First Amendment's ambit.<sup>38</sup> The scope of the First Amendment is dynamic, not static.

---

<sup>31</sup> See, e.g., *Stromberg v. California*, 283 U.S. 359 (1931) (red flag display); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) (armbands); *Spence* 418 U.S. 405 (upside down U.S. flag display); *In re Primus*, 436 U.S. 412 (1978) (public interest litigation); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (boycotting); *Hurley*, 515 U.S. 557 (St. Patrick's day parade); *id.* at 569 (stating that the First Amendment "unquestionably shield[s]" abstract art).

<sup>32</sup> See Schauer, *supra* note 11, at 1767–68 (articulating the concept of constitutional salience).

<sup>33</sup> See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 241–45 (1915).

<sup>34</sup> *Id.* at 243.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 244.

<sup>37</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); see also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.").

<sup>38</sup> *Compare Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (finding commercial speech uncovered), with *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (finding commercial speech covered).

To understand the importance of coverage and its dynamism, it is also helpful to distinguish coverage from protection. Protection means the level of scrutiny applied to a given type of activity that falls within the First Amendment's borders, such as denouncing Obamacare or Donald Trump on a street corner (protected as political expression, generally under principles of strict scrutiny) or advertising Coca-Cola (protected under the commercial speech's slightly more relaxed review). Protection encompasses the question of which sub-doctrine applies—and what features that sub-doctrine should maintain—which largely depends on the constitutional value of the speech in question, meaning the reason the Constitution protects that activity in the first instance.<sup>39</sup>

First Amendment case law and scholarship have long debated the level of constitutional protection that should apply to different types of covered speech. A debate currently rages, for instance, over whether commercial speech should be subject to the same, or a more

---

<sup>39</sup> For example, since the Supreme Court first drew commercial speech within the First Amendment's scope, the reason it has been protected is because of the information it provides to listening consumers. As *Virginia State Board of Pharmacy* teaches, society "may have a strong interest in the free flow of commercial information." 425 U.S. at 764. The Court reasoned:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

*Id.* at 765 (citations omitted); *see, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (observing that "the extension of First Amendment protection to commercial speech is justified principally by the value to customers of the information such speech provides"); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (emphasizing the "informational function of advertising"). Commercial speech is protected because of its value to consuming listeners. By contrast, political speech, which lies at the heart of the First Amendment, is protected primarily as an autonomy right—due to its value to its speaker. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995) (noting, apart from the commercial speech context, the "general rule, that the speaker has the right to tailor the speech, [which] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid" (first citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995); and then citing *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988))); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

similar, level of protection as political speech instead of the more relaxed review it has traditionally enjoyed.<sup>40</sup> And theorists have offered famous justifications for the freedom of speech, including notably ones centering on autonomy or individual self-fulfillment, the marketplace of ideas, governance or deliberative democracy, and democratic culture.<sup>41</sup>

But as Frederick Schauer has most prominently observed, First Amendment coverage has been notoriously resistant to theorization:

Yet however hard we try to theorize about the First Amendment's boundaries, and however successful such theorizing might be as a normative enterprise, efforts at anything close to an explanation of the *existing* terrain of coverage and noncoverage are unavailing. Prescriptive theories abound, but descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory. . . . [I]f there exists a single theory that can explain the First Amendment's coverage, it has not yet been found.<sup>42</sup>

---

<sup>40</sup> Compare, e.g., *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (holding that government interests other than correcting potential deception could justify mandated disclosure of purely factual information in the commercial context), with *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012) (holding that attempts by the government to compel commercial speech should be subject to strict scrutiny), *overruled in part by Am. Meat Inst.*, 760 F.3d at 22–23.

<sup>41</sup> See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6–24 (1989) (explaining the “Classic Marketplace of Ideas Theory” of the freedom of speech); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–8 (1970) (outlining four main premises on which the freedom of expression rests); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 3–15 (1966) (same); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3–4 (2004) (arguing that freedom of speech is meant to promote a democratic culture); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22–23 (1971) (positing that the guarantee of free speech is meant to aid the political process in a representative government); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 263 (arguing that people need free speech “because they have decided . . . to govern themselves”); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that free speech solely serves the value of individual self-realization). Many of these theories propose a scope of coverage, at least implicitly by way of the justification for free speech they propose.

Robert Post has explicitly proposed a theory of coverage grounded in a normative theory of democracy and public discourse. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 1–25 (2012); see also generally ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995) (exploring how constitutional law balances the concerns of democracy, community, and management).

<sup>42</sup> Schauer, *supra* note 11, at 1784–86; see *id.* at 1787 (“To put it differently, existing normative theories seem of little relevance to achieving a descriptive understanding of how the First Amendment came to look the way it does and of how it came to include what it includes and exclude what it excludes.” (footnote omitted)); see also Leslie Kendrick, *First*

Instead, the question of whether the First Amendment applies at all, while “often far more consequential than are the issues surrounding the strength of protection . . . is rarely addressed, and the answer is too often simply assumed.”<sup>43</sup> This in itself is significant. But the First Amendment’s coverage is currently in a period of transformation,<sup>44</sup>

---

*Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1218 (2015) (highlighting the difficulties in advancing a unifying theory of freedom of speech).

<sup>43</sup> Schauer, *supra* note 11, at 1767; *see also* Post, *supra* note 20, at 1271 (“Contemporary First Amendment doctrine displays an image of the world in which something that can be called ‘speech’ is made salient as a generic object of First Amendment protection.”).

<sup>44</sup> Recent cases pushing the boundaries of coverage abound. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015) (considering a free speech and exercise challenge to a public accommodations law applied to a retail bakery and addressing whether creating a cake constitutes an expressive activity), *cert. denied*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, No. 15-SC-738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted*, 137 S. Ct. 2290 (2017) (No. 16-111) (mem.); *see, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (invalidating trademark law’s disparagement bar on free speech grounds); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1146–47 (2017) (holding that price regulations are speech in free speech challenge to credit card swipe fee law); Sorrell v. IMS Health Inc., 564 U.S. 552, 562–71 (2011) (assuming that data is speech in free speech challenge to data privacy law); United States v. Philip Morris USA Inc., 855 F.3d 321, 327–28 (D.C. Cir. 2017) (considering a free speech challenge to court-ordered disclosure that tobacco companies had violated RICO); U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 739–44 (D.C. Cir. 2016) (considering free speech challenge to net neutrality rules); Nat’l Ass’n of Mfrs. v. NLRB, 717 F.3d 947, 954–59 (D.C. Cir. 2013) (considering free speech challenge to a NLRB rule requiring the posting of employee rights); United States v. Caronia, 703 F.3d 149 (2d Cir. 2012) (considering free speech challenge to a conviction for conspiracy to introduce misbranded drug into interstate commerce); Spirit Airlines, Inc. v. U.S. Dep’t of Transp., 687 F.3d 403, 411–15 (D.C. Cir. 2012) (considering free speech challenge to a rule requiring prominent posting of airline ticket price including tax); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012) (considering free speech challenge to FDA requirements for cigarette warning labels); Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 297–98, 316 (1st Cir. 2005) (Boudin & Dyk, JJ., concurring) (rejecting free speech challenge to a securities fraud conviction); United States v. Wenger, 427 F.3d 840, 845–51 (10th Cir. 2005) (same); Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 113–16 (2d Cir. 2001) (considering free speech challenge to mercury disclosure); Amarei v. City of Chicago, No. 13-C-2805, 2015 WL 7251940 (N.D. Ill. Nov. 17, 2015) (free speech challenge to CPA disclosure law); Poughkeepsie Supermarket Corp. v. County of Dutchess, 140 F. Supp. 3d 309, 313–17 (S.D.N.Y. 2015) (considering free speech challenge to price labeling law), *aff’d*, 640 Fed. App’x 5 (2d Cir. 2016); Amarin Pharma, Inc. v. FDA, 119 F. Supp. 3d 196 (S.D.N.Y. 2015) (considering a First Amendment challenge to threatened misbranding action under the Food, Drug, and Cosmetic Act for promotion of a drug for off-label use); Grocery Mfrs. Ass’n v. Sorrell, 102 F. Supp. 3d 583, 621–42 (D. Vt. 2015) (free speech challenge to GMO labeling law), *appeal withdrawn*, No. 15-1504 (2d Cir. Aug. 5, 2016); Nat’l Rest. Ass’n v. N.Y.C. Dep’t of Health & Mental Hygiene, 49 N.Y.S.3d 18, 25 (App. Div. 2017) (evaluating free speech challenge to a sodium health hazard disclosure law); Apple Inc.’s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government’s Motion to Compel Assistance at 32–34, *In re* Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203, No. 5:16-CM-00010 (C.D. Cal. Feb. 25, 2016) [hereinafter Apple Inc.’s Motion] (challenging an FBI demand that Apple open an iPhone on free speech grounds); Ed Beeson, *Exxon Global Warming Fight Opens New Frontier for*

making the need of a theory of the scope of free speech and its limits more pressing.

Due to changes in modern administration and the information economy, as well as the efforts of a sophisticated business-led social movement, the First Amendment has emerged as a potent limit to state power and democratic decisionmaking.<sup>45</sup> Part of that phenomenon is that plaintiffs are seeking to expand the coverage of the First Amendment in hopes of shrinking or altering the scope of the administrative state by bringing claims about the regulation of types of activities that historically no one found salient to the First Amendment at all—from labels and disclosures<sup>46</sup> and business licenses,<sup>47</sup> to the regulation of offers,<sup>48</sup> pricing,<sup>49</sup> and professional practices,<sup>50</sup> to minimum

---

*Corporate Speech*, LAW360 (Aug. 19, 2016), <http://www.law360.com/articles/824896/exxon-global-warming-fight-opens-new-frontier-for-corporate-speech> (reporting on Exxon's assertion of a free speech defense against a subpoena regarding its alleged global warming fraud); Jacklyn Wille, *Labor Department Faces Five Lawsuits over Fiduciary Rule*, BLOOMBERG BNA (June 10, 2016), <http://www.bna.com/labor-department-faces-n57982073912/> (reporting on multiple free speech challenges to DOL rule requiring certain investment advisors to act as fiduciaries); see also Kendrick, *supra* note 42, at 1210–19 (describing First Amendment expansionism); Shanor, *supra* note 19, at 139–63 (noting the expansion of the commercial speech doctrine).

<sup>45</sup> See Shanor, *supra* note 19, at 138–82 (arguing this point generally); see also Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1068–72 (2016) (outlining three ways that freedom of speech legitimates state power); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1496–97 (2014) (arguing that courts look to protect speech that is functional so as to “limit coverage in a way that reserves the power of the state to regulate the functional aspects of the communication process, while protecting its expressive aspects”).

<sup>46</sup> See, e.g., *Am. Beverage Ass'n v. City of San Francisco*, 871 F.3d 884 (9th Cir. 2017) (sugar-sweetened beverage disclosure), *reh'g en banc granted*, 880 F.3d 1019 (9th Cir. 2018) (mem.); *CTIA—The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017) (cell phone disclosure), *reh'g en banc denied*, 873 F.3d 774 (9th Cir. 2017) (mem.), *petition for cert. docketed*, No. 17-976 (Jan. 9, 2018); *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (mineral source location disclosure); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) (cigarette warning labeling), *overruled in part by Am. Meat Inst. v. USDA*, 760 F.3d 18, 22–23 (D.C. Cir. 2014) (en banc) (meat country of origin labeling); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (calorie content disclosure). I was honored to be a part of the team with Lawrence Lessig and Robert Post that litigated *CTIA v. Berkeley* in the district court and before the Ninth Circuit.

<sup>47</sup> See, e.g., *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (tour guide license); *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (same); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014) (precious metals dealers license); *Waugh v. Nev. State Bd. of Cosmetology*, 36 F. Supp. 3d 991 (D. Nev. 2014) (cosmetology school license), *vacated and remanded*, No. 14-16674, 2016 WL 8844242 (9th Cir. Jan. 27, 2016).

<sup>48</sup> See *Nordyke v. Santa Clara County*, 110 F.3d 707 (9th Cir. 1997) (offer to sell firearms or ammunition).

<sup>49</sup> See *Expressions Hair Design*, 137 S. Ct. at 1146–47 (regulation of credit card swipe fees).

<sup>50</sup> See, e.g., *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (mandated physician disclosure for women seeking abortions); *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (same).

wage laws,<sup>51</sup> among others. Indeed, the prominent Supreme Court advocate, Floyd Abrams, has argued<sup>52</sup> that the constitutionality of securities regulations and the Federal Communications Act require a second look following the Supreme Court's decision in *Reed v. Town of Gilbert*.<sup>53</sup> Perhaps were Jeffery Skilling's case brought today, he would bring a First Amendment challenge. Will future defendants begin to do so? Will they be successful?

These growing pressures on the First Amendment's boundaries are part of larger changes occurring in free speech jurisprudence, and commercial speech caselaw in particular. As I have written elsewhere, those changes have the potential to remake modern administration, the balance of powers, and the theory of democratic legitimacy which underwrites both of them.<sup>54</sup> The deregulatory First Amendment<sup>55</sup> implicates the ability of the political branches to act in general, and to engage in welfare enhancing, pre-distributional economic regulation in particular, including in relation to growing economic inequality.<sup>56</sup> But the growing literature on First Amendment *Lochnerism*,<sup>57</sup> on

---

<sup>51</sup> Int'l Franchise Ass'n v. City of Seattle, 803 F.3d 389 (9th Cir. 2015).

<sup>52</sup> See Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html>.

<sup>53</sup> 135 S. Ct. 2218 (2015).

<sup>54</sup> See generally Shanor, *supra* note 19.

<sup>55</sup> Current deregulatory trends in First Amendment caselaw can be understood as a subset of neoliberal constitutionalism. See Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); see, e.g., David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 4 (2014) (defining neoliberalism as taking its meaning from a "contest between market imperatives and democratic demands"); Shanor, *supra* note 19, at 183 n.207 (collecting citations).

<sup>56</sup> See David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 667 (2014) (book review).

<sup>57</sup> See, e.g., John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015); Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411 (2015); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Tamara R. Piety, *Commentary, Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010); Post & Shanor, *supra* note 19; Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015); Purdy, *supra* note 55; Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Shanor, *supra* note 19; Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* (Susanna Mancini & Michel Rosenfeld eds.) (forthcoming 2018); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-firstamendmentevade-regulation>. For early seminal work, see Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); Mark Tushnet,

which this Article builds, is just beginning to recognize the role of expanding coverage in the increasing deregulatory use of the First Amendment.<sup>58</sup>

Courts have reacted to the growing number of free speech claims by categorizing some challenged regulations as not infringing “speech”—and so beyond the First Amendment’s ambit. The Ninth Circuit recently rejected a free speech challenge to Seattle’s minimum wage ordinance, concluding that it was “an economic regulation that does not target speech or expressive conduct.”<sup>59</sup> And the Fifth Circuit, diverging from the D.C. Circuit, suggested that a business license scheme for tour guides that regulated economic activity should not be subject to First Amendment review in the first place—while holding that even if it were, it would survive intermediate scrutiny.<sup>60</sup>

Last term, the Supreme Court heard *Expressions Hair Design v. Schneiderman* to resolve a circuit split over whether state statutes that prohibit retailers from charging customers a surcharge for using credit cards regulate “speech” for First Amendment purposes.<sup>61</sup> The Second Circuit, like the Fifth Circuit but diverging from both the Eleventh Circuit and a district court in the Ninth Circuit, had concluded that New York’s credit card swipe fee law was beyond the First Amendment’s reach because “prices (though necessarily communicated through language) are not ‘speech’ within the meaning of the First Amendment.”<sup>62</sup> After heated argument,<sup>63</sup> the Court issued a

*An Essay on Rights*, 62 TEX. L. REV. 1363, 1386–88 (1984); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993).

<sup>58</sup> See Kendrick, *supra* note 42, at 1200 (noting that when First Amendment opportunism is successful it can be described as First Amendment expansionism, meaning where the First Amendment’s territory expands to encompass more areas of law); Shanor, *supra* note 19, at 203–04 (elaborating the role of social movements in expanding coverage of commercial speech).

<sup>59</sup> *Int’l Franchise Ass’n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015).

<sup>60</sup> Compare *Kagan v. City of New Orleans*, 753 F.3d 560, 561–62 (5th Cir. 2014) (stating that “New Orleans thrives, and depends, upon its visitors and tourists” and that tour guide licensing regulations “serve an important governmental purpose without affecting what people say,” belying “any claim to be made about speech being offended”), with *Edwards v. District of Columbia*, 755 F.3d 996, 1000 (D.C. Cir. 2014) (finding that tour guide licensing regulations “fail even under the more lenient standard of intermediate scrutiny”). As a point of comparison, the Sixth Circuit applied only rational basis review to a licensing statute held to be a valid business regulation. See *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 691–93 (6th Cir. 2014).

<sup>61</sup> 137 S. Ct. 1144 (2017).

<sup>62</sup> *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2d Cir. 2015), *vacated*, 137 S. Ct. 1144 (2017); see also *Rowell v. Pettijohn*, 816 F.3d 73, 80 (5th Cir. 2016) (holding law prohibiting credit card surcharges to be a regulation of conduct, and thus outside the First Amendment’s ambit), *vacated*, 137 S. Ct. 1431 (2017) (mem.). But see Dana’s R.R.

narrow ruling, holding that the law in question *did* regulate speech, but the Court declined to articulate broader rules about how courts should identify “speech” for constitutional purposes and remanded the case to the Court of Appeals to analyze the law as a speech regulation in the first instance.<sup>64</sup> Cases such as these suggest that countervailing forces are pushing governments and courts to resist some outward pressure<sup>65</sup>—but they also underscore the uncertainty and flux about what constitutes “speech.”

The pressure on the First Amendment’s boundaries is not limited to attempts to whittle the administrative state down in size, even if those claims are currently exerting a broad and institutionally important force. As Frederick Schauer has argued, there is a more general “outward pressure on the First Amendment’s boundaries of applicability,”<sup>66</sup> which he attributes in part to what he terms “First Amendment opportunism,” meaning litigants’ gravitation to the First Amendment when little other authority is on point.<sup>67</sup> Plaintiffs have brought recent First Amendment challenges against things from the regulation of panhandling<sup>68</sup> to the government’s demand that Apple write code to unlock the iPhone of one of the San Bernardino shooters<sup>69</sup>—with courts often accepting the Amendment’s applicability. Free speech challenges have been mounted against public

---

Supply v. Att’y Gen., 807 F.3d 1235, 1251 (11th Cir. 2015) (similar law subject to First Amendment scrutiny and held unconstitutional); *Italian Colors Rest. v. Harris*, 99 F. Supp. 3d 1199, 1210 (E.D. Cal. 2015) (same), *aff’d and modified*, No. 15-15873, 2018 WL 266332 (9th Cir. Jan. 3, 2018).

<sup>63</sup> At oral argument, Justice Breyer expressed concern about First Amendment *Lochnerism*. Transcript of Oral Argument at 22:20–23:4, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391) (“It is a form of price regulation, and price regulation goes on all over the place in regulatory agencies. And so the word that I fear begins with an L and ends with an R; it’s called *Lockner* [sic]. . . . [I]f you want to know what’s worrying me, that’s it.”).

<sup>64</sup> *Expressions Hair Design*, 137 S. Ct. at 1151.

<sup>65</sup> These cases resist outward pressure by arguing or concluding that the First Amendment does not apply at all, as distinct from simply defending or ruling against the plaintiff on First Amendment grounds.

<sup>66</sup> Schauer, *supra* note 12, at 1617; *see also* Schauer, *supra* note 11, at 1796–98 (discussing the “considerable outward pressure on the boundaries of the First Amendment”).

<sup>67</sup> Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 176, 191–92 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

<sup>68</sup> *See, e.g.*, *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).

<sup>69</sup> *Apple Inc.’s Motion*, *supra* note 44, at 32–34 (arguing that it would violate the First Amendment for the government to be able to compel Apple to create code); *see also* Eric Lichtblau & Katie Benner, *U.S. Presses Bid to Force Apple to Unlock iPhone in New York*, *N.Y. TIMES* (Apr. 8, 2016), <http://www.nytimes.com/2016/04/09/technology/us-presses-bid-to-force-apple-to-unlock-iphone-in-new-york.html> (documenting similar case in New York).



accommodations and anti-discrimination laws around the country.<sup>70</sup> The Supreme Court heard argument this term, for example, on whether the Constitution protects a cake baker from punishment under a public accommodations law because he refused to bake a cake for a gay couple—including on the basis that baking a cake is protected expression.<sup>71</sup> And scholars have recently argued that activities and products ranging from data to instrumental music to illegal migration should be treated as First Amendment speech.<sup>72</sup>

At the same time, other forces are placing *inward* pressure on the First Amendment's boundaries—namely, to exclude from its coverage certain forms of activity and expression that are of national security concern.<sup>73</sup> The conflict underlying the Supreme Court's first decision

---

<sup>70</sup> The California Supreme Court, for example, recently considered a public university's argument that a state anti-strategic lawsuit against public participation (SLAPP) law required the dismissal, on free expression grounds, of an anti-discrimination suit brought by a professor who was denied tenure. *Sungho Park v. Bd. of Trs. of Cal. State Univ.*, 393 P.3d 905, 912, 914–15 (Cal. 2017) (holding that university failed to meet its burden under anti-SLAPP law, university's communications were not the basis for professor's claim and university failed to show that tenure decision was in furtherance of university's speech); see also *Melamed v. Cedars-Sinai Med. Ctr.*, No. B263095, 2017 WL 4510849 (Cal. Ct. App. Oct. 6) (dismissing anti-SLAPP motion on similar grounds), *rev'g* Cal. Rptr. 3d 328 (Cal. Ct. App. 2017) (granting review and remanding similar anti-SLAPP motion brought against physician's action involving wrongful termination and whistleblower retaliation claims).

There are growing free speech and free exercise challenges to public accommodations laws that penalize businesses that decline to provide goods or services to LGBT people or for same-sex marriages. See, e.g., *Elane Photography, L.L.C. v. Willock*, 309 P.3d 53 (N.M. 2013) (wedding photographer); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016) (wedding venue); *Klein v. Or. Bureau of Labor & Indus.*, 289 Or. App. 507 (2017) (bakery); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (florist); see, e.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014) (describing the history of constitutional challenges to public accommodations laws); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (analyzing distinctive nature of complicity-based conscience claims).

<sup>71</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017). I am honored to have been part of the team that litigated *Masterpiece Cakeshop* on behalf of the gay couple, Dave Mullins and Charlie Craig, before the Supreme Court.

<sup>72</sup> See, e.g., Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014); Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381 (2015); Daniel I. Morales, *"Illegal" Migration Is Speech*, 92 IND. L.J. 735 (2017).

<sup>73</sup> Frederick Schauer has previously argued that there is a "relative absence of interest groups urging the constriction rather than the expansion of the First Amendment." Schauer, *supra* note 11, at 1796 n.154. By his lights, "no . . . force pushes out those issues that had previously been inside" the First Amendment—so as to *constrict* its reach—in a manner "equivalent" to the forces pushing outward on the scope of coverage. *Id.* at 1796. The national security cases of today present a counterexample, suggesting that Schauer's conclusion may not hold. Before those cases, prominent advocates (including most notably Catharine MacKinnon) strongly—if ultimately unsuccessfully—argued that both pornography and hate speech should be excluded from First Amendment coverage. See *infra* notes 150–63 and related text. *But cf.* Jane R. Bambauer & Derek E. Bambauer,

to address the rights of speech and association in the context of the war on terror since the attacks of September 11, 2001, *Holder v. Humanitarian Law Project*, offers a prominent example.<sup>74</sup> That case involved a challenge to the federal statute that makes it a crime, punishable by fifteen years in prison, to provide “material support” to any entity the U.S. Secretary of State has designated as a foreign terrorist organization.<sup>75</sup> The case involved a retired Administrative Law Judge and a California-based NGO that conducted trainings in nonviolent dispute resolution and the use of international human rights mechanisms and wished to advocate for human rights both to and with the Kurdistan Workers’ Party, an organization on the Secretary’s list.

The Solicitor General, Elena Kagan, argued that advice provided to a designated terrorist organization to pursue nonviolent political action constituted “conduct, not speech.”<sup>76</sup> She reasoned that the statute was merely a “prohibition on conduct,” namely, “the act of giving material support to terrorists—regardless whether accomplished through words.”<sup>77</sup> While the United States did not explicitly argue that the First Amendment did not apply at all to a ban on material support that “takes the form of words,”<sup>78</sup> it analogized the statute to the regulation of other “speech” wholly outside of the First Amendment, such as “[c]onspiracy . . . fraud, bribery, and extortion.”<sup>79</sup> While the Supreme Court rejected the assertion that the statute regulated only conduct, it deferred so sharply to the government on the factual question of whether the plaintiffs’ speech in fact furthered terrorism<sup>80</sup> that the opinion had a similar effect as if the

---

*Information Libertarianism*, 105 CALIF. L. REV. 335, 354 (2017) (“Since changes in free speech coverage operate as a one-way ratchet—always expanding, never contracting—expansion has profound long-term consequences.” (footnote omitted)); Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 382 & n.60 (2014) (stating that “the constitutional ratchet arguably works upward only” but noting possible caveats including the weakening of protection for public employee speech).

<sup>74</sup> 561 U.S. 1 (2010). I was honored to be a part of the team with David Cole that litigated *Humanitarian Law Project* before the U.S. Supreme Court.

<sup>75</sup> 18 U.S.C. § 2339B(a)(1) (2006).

<sup>76</sup> 561 U.S. at 26.

<sup>77</sup> Brief for the Respondents at 45, 47, *Humanitarian Law Project*, 561 U.S. 1 (Nos. 08-1498 & 09-89).

<sup>78</sup> *Id.* at 47.

<sup>79</sup> *Id.* at 46.

<sup>80</sup> The case thus occupies an awkward position in the constellation of First Amendment jurisprudence, applying a lesser form of scrutiny than it announced. *See, e.g.*, Post & Shanor, *supra* note 19, at 179–80 (noting deference is not a traditional form of strict scrutiny); Tushnet, *supra* note 11, at 1081–82 (same). For discussions of the place of *Humanitarian Law Project* in historical First Amendment perspective has been frequently discussed, *see, e.g.*, David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 147

Court had excluded the case from First Amendment review altogether.

More recently, the Department of Justice has brought material support charges against alleged terrorist supporters in multiple circuits, on the grounds that a variety of what we might colloquially term “speech” acts are proscribable “conduct” coordinated with a terrorist organization.<sup>81</sup> These cases include charges against people for using “social media to receive and disseminate information about foreign terrorist groups,” and to “declare . . . support for violent jihad,”<sup>82</sup> as well as for the use of “Twitter to provide advice and encouragement to [the Islamic State of Iraq and the Levant] and its supporters.”<sup>83</sup>

A number of scholars have supported this inward pressure on the First Amendment’s boundaries. One, for example, has contended that the First Amendment’s protection should be relaxed in moments of crisis—such as the current conflict with ISIS—and saying that ISIS’s ability to spread “ideas that lead directly to terrorist attacks . . . calls for new thinking about limits on freedom of speech.”<sup>84</sup> And another has called for a form of First Amendment balancing in the national security domain: “If (and only if) people are explicitly inciting vio-

---

(2012); Amanda Shanor, *Beyond Humanitarian Law Project: Promoting Human Rights in a Post-9/11 World*, 34 SUFFOLK TRANSNAT’L L. REV. 519 (2011).

<sup>81</sup> See, e.g., *United States v. Mehanna*, 735 F.3d 32, 49 (1st Cir. 2013) (translation of al Qaeda propaganda); *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1226 (C.M.R. 2011) (production of online video), *aff’d en banc*, 840 F.3d 757 (D.C. Cir. 2016) (per curiam); U.S. Attorney’s Office for E. Dist. of Va., *Pakistani National Living in Woodbridge Pleads Guilty to Providing Material Support to Terrorist Organization*, U.S. DEP’T OF JUST. (Dec. 2, 2011), <https://www.justice.gov/archive/usaovae/news/2011/12/20111202ahmadnr.html> (announcing a guilty plea for creating and sharing online a violent video glorifying extremism).

<sup>82</sup> Office of Pub. Affairs, *New York Man Pleads Guilty to Attempting to Provide Material Support to ISIL*, U.S. DEP’T OF JUST. (Dec. 17, 2015), <https://www.justice.gov/opa/pr/new-york-man-pleads-guilty-attempting-provide-material-support-isil>.

<sup>83</sup> Office of Pub. Affairs, *Virginia Teen Pleads Guilty to Providing Material Support to ISIL*, U.S. DEP’T OF JUST. (June 11, 2015), <https://www.justice.gov/opa/pr/virginia-teen-pleads-guilty-providing-material-support-isil>. Such cases are in keeping with the statement of John Carlin, the former Assistant Attorney General for National Security, that the Justice Department would consider criminal charges against individuals who are “proliferating ISIS social media sites or involved in ISIS’s social media production.” *Assistant Attorney General John Carlin on Cybersecurity*, C-SPAN 2 (Feb. 23, 2015), <http://www.c-span.org/video/?324471-2/assistant-attorney-general-john-carlin-cybersecurity>; see also Shane Harris, *Justice Department: We’ll Go After ISIS’s Twitter Army*, DAILY BEAST (Feb. 23, 2015, 9:07 PM) (discussing the Justice Department’s approach and the tensions between the material support statute and First Amendment protections), <http://www.thedailybeast.com/articles/2015/02/23/justice-department-we-ll-go-after-isis-twitter-army.html>.

<sup>84</sup> Eric Posner, *ISIS Give Us No Choice but to Consider Limits on Speech*, SLATE: VIEW FROM CHICAGO (Dec. 15, 2015, 5:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/12/isis\\_s\\_online\\_radicalization\\_efforts\\_present\\_an\\_unprecedented\\_danger.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html).

lence, perhaps their speech doesn't deserve protection when (and only when) it produces a genuine risk to public safety, whether imminent or not."<sup>85</sup>

The current pressures on the First Amendment's scope are, in short, not unidirectional. While significant outward pressure is being placed on the boundaries of the First Amendment, largely in the context of economically salient activities, national security concerns are exerting inward pressure, mainly in criminal law domains. Because of both forces, questions of coverage are increasingly facing the courts. The threshold question of whether something falls or should fall within the First Amendment's ambit is accordingly of ever more significant societal and institutional importance.<sup>86</sup>

## II

### A POSITIVE ACCOUNT OF THE SCOPE OF THE FIRST AMENDMENT

Whether the First Amendment is implicated in a given case is often so obvious to both courts and litigants as to render the issue of coverage invisible. Perhaps coverage may be undertheorized in part because of the general obviousness of these social judgments.<sup>87</sup> But the applicability of the First Amendment is not simply about recognizing whether "speech" is there in some objective sense—as if constitutionally salient "speech" were a pre-social object to be discovered—however natural such a judgment might seem. Recall that movies once were not considered speech salient to the First Amendment, a fact that appears strange to modern observers.<sup>88</sup> Neither was commercial speech, which is now the subject of some of the most pitched constitu-

---

<sup>85</sup> Cass R. Sunstein, *Islamic State's Challenge to Free Speech*, BLOOMBERG VIEW (Nov. 23, 2015, 12:38 PM), <http://www.bloombergvew.com/articles/2015-11-23/islamic-state-s-challenge-to-free-speech>. This proposal would relax the current standard for incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (permitting such a constriction of First Amendment coverage only when speech "is directed to inciting or producing *imminent* lawless action *and* is likely to incite or produce such action") (emphasis added) (footnote omitted)).

<sup>86</sup> Cf. Kendrick, *supra* note 42, at 1219 ("[A] conception—one which can comprehensively explain the relationship between 'speech' and 'the freedom of speech'—is precisely what courts need to address the diverse and often novel claims that First Amendment opportunism brings their way.").

<sup>87</sup> *But see* Schauer, *supra* note 11, at 1772–73 (arguing, in reference to the Fourth and Eighth Amendments, that while "[q]uestions of coverage typically remain hidden because the answers are so obvious that they attract scant controversy . . . [t]he First Amendment's coverage questions are difficult because the normal tools for delineating the coverage of a constitutional rule are unavailing").

<sup>88</sup> See *supra* notes 33–37 and related text.

tional battles involving the nation's most esteemed appellate litigators.<sup>89</sup>

The scope of the First Amendment instead reflects shared cultural norms about social activities and their meanings—and those norms and meanings can change based on social forces. That much may be true, if not obvious. But it still begs the question: Why do courts and litigants understand some things to be constitutionally salient and others (often obviously) beyond the First Amendment's reach? This Part reviews the history of First Amendment coverage and its theorization to develop a descriptive answer to that question.

### A. *The History of Coverage and the Speech/Conduct Distinction*

*Chaplinsky v. New Hampshire* is often cited for the proposition that the Supreme Court extends First Amendment protection to all speech, except certain historically recognized excluded categories.<sup>90</sup> *Chaplinsky* was a Jehovah's Witness, who was convicted of addressing another person with offensive, derisive, and annoying words or names—namely calling the City Marshal of Rochester a “God damned racketeer” and “a damned Fascist” and asserting that “the whole government of Rochester are Fascists or agents of Fascists.”<sup>91</sup> In analyzing *Chaplinsky's* First Amendment challenge in the early 1940s, the Court stated that “it is well understood that the right of free speech is not absolute at all times and under all circumstances,”<sup>92</sup> and named “certain well-defined and narrowly limited classes of speech, the prevention of which and punishment of which have never been thought to raise any Constitutional problem,” including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’

---

<sup>89</sup> See *supra* notes 38–39 and related text.

<sup>90</sup> 315 U.S. 568 (1942); see also, e.g., *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (quoting *Chaplinsky*, 315 U.S. at 571–72); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2173 (2015) (noting that “[t]he Court’s emphasis on the historical origins of the low-value categories can be traced back to *Chaplinsky*”).

<sup>91</sup> 315 U.S. at 569 (internal quotation marks omitted).

<sup>92</sup> *Id.* at 571 (first citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940); then citing *Herndon v. Lowry*, 301 U.S. 242 (1937); then citing *De Jonge v. Oregon*, 299 U.S. 353 (1937); then citing *Near v. Minnesota*, 283 U.S. 697 (1931); then citing *Stromberg v. California*, 283 U.S. 359 (1931); then citing *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); and then citing *Schenck v. United States*, 249 U.S. 47 (1919)); see also *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”); *Spence v. Washington*, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (“[Th]e Court has long recognized . . . that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language.” (citing *Roth v. United States*, 354 U.S. 476 (1957))).

words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>93</sup>

More recently, the Roberts Court has held that new categories of excluded speech cannot be added to this “well-defined and narrowly limited”<sup>94</sup> list, announcing in *United States v. Stevens* that, in general, exceptions to First Amendment coverage must be confined to the “historic and traditional categories long familiar to the bar.”<sup>95</sup> In *Stevens*, the Court enumerated a slightly different and expanded list of categories than those named in *Chaplinsky*, “including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”<sup>96</sup> And it rejected, as “startling and dangerous,” the notion that the Court would engage in a “free-floating test for First Amendment coverage” based on “an ad hoc balancing of relative social costs and benefits.”<sup>97</sup>

The Court reemphasized that approach the next year in *Brown v. Entertainment Merchants Association*, when it rejected the argument that violent video games were beyond the scope of the First Amendment, stressing that *Stevens* had “held that new categories of unprotected speech may not be added to the list,”<sup>98</sup> and that “without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the ‘judgment [of] the American people,’ embodied in the First Amendment, ‘that the benefits of its restrictions on the Government outweigh the costs.’”<sup>99</sup>

The Court did so again in *United States v. Alvarez*, when it extended robust First Amendment protection to false statements in a challenge to the Stolen Valor Act.<sup>100</sup> In so doing, the Court presented an even more expanded list of historical exceptions—including “advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called ‘fighting words,’ child pornography, fraud, true threats, and speech presenting

---

<sup>93</sup> *Chaplinsky*, 315 U.S. at 571–72 (citing ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 149 (1941)).

<sup>94</sup> *Id.* at 571.

<sup>95</sup> 559 U.S. 460, 468 (2010) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)), *superseded by statute on other grounds*, Animal Crush Videos Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177 (codified at 18 U.S.C. § 48 (2012)).

<sup>96</sup> *Id.* at 468 (citations omitted).

<sup>97</sup> *Id.* at 470.

<sup>98</sup> *Stevens*, 564 U.S. at 791.

<sup>99</sup> *Id.* at 792 (quoting *Stevens*, 559 U.S. at 470).

<sup>100</sup> 567 U.S. 709, 730 (2012).

some grave and imminent threat the government has the power to prevent.”<sup>101</sup>

Genevieve Lakier has since drawn into question whether the historical record justifies the conclusion that there were ever in fact “low-value” categories of speech, the punishment of which has not, since the ratification of the First Amendment, been thought to raise constitutional concern.<sup>102</sup> More fundamentally, however, the Court’s articulated list of categories (in short or long form) does not account for the far greater range of regulations of what is colloquially understood as speech or expression that have long not been subject to First Amendment challenge, let alone strict review.<sup>103</sup> These categories include the speech of compulsory tax returns, perjury, the rules of evidence, malpractice, contract law, and harassing and discriminatory speech in the workplace, to name a few. The “historic and traditional categories,” in short, do not explain First Amendment coverage even with regard to types of activities most would colloquially describe as “speech.”

The test the Court has articulated for the threshold application of the First Amendment—the *Spence* test<sup>104</sup>—fares no better in explaining its current boundaries, as Robert Post has prominently argued.<sup>105</sup> The Court has recognized that the First Amendment extends to “more than simply the right to talk and to write.”<sup>106</sup> But it has refused to “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>107</sup> In *Spence*, the Court began by noting this limit and asking whether Spence’s activity “was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”<sup>108</sup> It framed its inquiry on characteristics of the activity in question. The Court stated that First Amendment review was triggered because Spence, who had flown an upside-down American flag bearing a peace sign to protest

---

<sup>101</sup> *Id.* at 717 (citations omitted).

<sup>102</sup> Lakier, *supra* note 90 (examining the doctrine of “low-value” speech from the eighteenth century, through the New Deal, and into contemporary times).

<sup>103</sup> *Cf.* Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346, 347 (2015) (arguing that “the real issue is not between high- and low-value speech, but instead . . . about which forms of speech, in the ordinary language sense of that word, or which forms of communication or expression, will be understood as having nothing to do with the First Amendment” such as contract law, wills and trusts, perjury, antitrust, or the laws of evidence).

<sup>104</sup> *See Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (per curiam).

<sup>105</sup> Post, *supra* note 20, at 1250–60 (discussing problems with the *Spence* test).

<sup>106</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

<sup>107</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>108</sup> *Spence*, 418 U.S. at 409.

the then-recent “Cambodian incursion and the Kent State tragedy,” demonstrated that “[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>109</sup> This test has come to be known as the *Spence* test and reiterated in later cases up to the present.<sup>110</sup>

As Post has explained: “What is curious, however, is that the doctrine is transparently and manifestly false. The test cannot plausibly be said to express a sufficient condition for bringing ‘the First Amendment into play.’”<sup>111</sup> Graffiti that defaces property, he notes for instance, satisfies *Spence* but is not within the First Amendment’s ambit.<sup>112</sup> So, too, crimes motivated by political views or bias—such as political assassination, the 9/11 attacks, or racially motivated violence.<sup>113</sup> And by contrast, art that does not “convey a particularized message,”<sup>114</sup> such as Duchamp’s *The Fountain* or Warhol’s *Sleep*, would not qualify—despite the Court’s insistence that such art is “unquestionably shielded.”<sup>115</sup>

The First Amendment’s boundaries have likewise been remarkably resistant to theorization. The most prominent justifications for the freedom of speech imply (if not explicitly state) a scope of coverage. Alexander Meiklejohn, for instance, would extend First Amendment coverage to communication relevant to governance, and in so doing exclude such things as artistic and cultural production that is not related to governance or the building of the knowledge and capacity needed to govern.<sup>116</sup> In the words of Jack Balkin,

---

<sup>109</sup> *Id.* at 410–11.

<sup>110</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (discussing the *Spence* test); *cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (clarifying the post-*Spence* landscape by declaring that “a narrow, succinctly articulable message is not a condition of constitutional protection”); *Cressman v. Thompson*, 798 F.3d 938, 955–63 (10th Cir. 2015) (applying the “*Spence-Johnson* test,” in light of *Hurley*).

<sup>111</sup> Post, *supra* note 20, at 1252 (quoting *Johnson*, 491 U.S. at 404).

<sup>112</sup> *Id.*

<sup>113</sup> *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 490 (1993) (upholding as constitutional a state hate crimes law that allowed for enhanced sentencing in crimes motivated by bias, including on the basis of race or religion).

<sup>114</sup> *Spence*, 418 U.S. at 411.

<sup>115</sup> *Hurley*, 515 U.S. at 569; see also Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012) (discussing First Amendment coverage of nonrepresentational art, including how current doctrinal theories are inadequate for explaining its unquestioned coverage).

<sup>116</sup> See Meiklejohn, *supra* note 41, at 255 (“The First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’”); *id.* at 256–57 (arguing that “there are many forms of thought and expression within the range of human communications from which the voter derives . . . the capacity for sane and objective judgment which, so far as possible, the ballot should express,” and which “must suffer no abridgment,” including “education,”



“Meiklejohn has met LOLCats, and he is not amused.”<sup>117</sup> But putting aside whether the First Amendment’s boundaries *should* be set in the governance-centric way that Meiklejohn suggests, his theory is plainly not accurate as a descriptive matter.<sup>118</sup> Similar critiques can be made of other justification-driven theories—which are over or under inclusive in their accounts of current doctrine, or often both.<sup>119</sup>

Against that context, recent relevant scholarship has divided into a few rough camps: those lamenting (or, rarer, lauding) contemporary First Amendment expansionism, those identifying the forces leading to its current transformations, and those analyzing the need for a coverage rule or speech/conduct type distinction.<sup>120</sup>

---

“philosophy and the sciences,” “literature and the arts,” and “public discussions of public issues,” including “information and opinion bearing on those issues”); *id.* at 258–59 (stating that private defamation is an example of an activity “wholly outside the scope of the First Amendment” because it “has no relation to the business of governing”).

<sup>117</sup> Balkin, *supra* note 45, at 1059 (explaining that those who ascribe to Meiklejohn’s theory “become gravely disappointed when they realize that digital technologies allow people to escape from focusing on matters they find disagreeable, annoying, or dull”).

<sup>118</sup> See, e.g., *Hurley*, 515 U.S. at 569 (stating that the First Amendment “unquestionably shield[s]” the “painting of Jackson Pollock, music of Arnold Schoenberg, or Jaberwocky verse of Lewis Carroll”); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

<sup>119</sup> See, e.g., Schauer, *supra* note 13, at 271–76 (describing how both “literalist” and “definitional-absolutist” theories tend toward both over- and under-inclusiveness in different areas).

<sup>120</sup> A number of scholars have argued against what is—if not often identified as—First Amendment expansionism in commercial speech, including Jack Balkin, John Coates, Tamara Piety, Robert Post, Jedediah Purdy, Tim Wu, and myself. Balkin, *supra* note 41, at 1080–88 (arguing that commercial speech should be treated differently than ordinary public discourse not because it *isn’t* public discourse, but rather because it serves a different social function); Coates, *supra* note 57 (arguing that corporations have become the primary beneficiaries of the First Amendment and discussing how that development amounts to “socially wasteful rent seeking”); Piety, *supra* note 57 (analyzing what *Citizens United* may mean for the future of the commercial speech doctrine); Post & Shanor, *supra* note 19 (criticizing the return of “*Lochnerian* substantive due process” under the First Amendment); Purdy, *supra* note 55 (drawing a comparison between constitutional neoliberalism and the *Lochner* era); Shanor, *supra* note 19 (identifying and analyzing a new era of constitutional deregulation); Wu, *supra* note 45 (decrying the “corporate takeover of free speech” and writing that “anti-regulatory First Amendment cases . . . may weaken” the law and “intimidate legislature and agencies contemplating future regulations”). Where by contrast, Jane and Derek Bambauer argue in favor of what they call information libertarianism. Bambauer & Bambauer, *supra* note 73, at 340 (arguing that this expansion “improves governing no matter what the democratic goals may be”).

Frederick Schauer and Leslie Kendrick have additionally described some of the reasons and mechanisms by which First Amendment *opportunism* leads to First Amendment *expansionism*. Kendrick, *supra* note 42, at 1210–19 (considering cultural,

But a theory of coverage has been evasive. Why? The most serious explanations center on the inability of a single rule or justification to fully explain the basis for the freedom of speech.<sup>121</sup> This Article takes a different approach: Rather than attempting to justify the scope of First Amendment through analytical or philosophical principles, I approach coverage as a sociological phenomenon. I identify the key social mechanisms that appear to underlie coverage.<sup>122</sup> It is the *social* nature of coverage, I suggest, that has contributed to the difficulty of crystalizing a theory of it in legal decisionmaking and constitutional theory. But those same social mechanisms may also help us get a handle on how courts might better go about approaching coverage questions.

### B. A Sociologically-Based Account of Coverage

First Amendment coverage questions arise and unfold in concrete social and institutional settings. If we look at the differences between

---

political, and doctrinal reasons, as well as the inherent nature of both speech and rules); Schauer, *supra* note 67, at 177–90 (applying the concept to cases of libertarianism, sexual freedom, sexual orientation, and campaign finance reform). And Mark Tushnet has argued that a speech/conduct type distinction is necessary as a meta-constitutional matter, including because the lack of one may create pressure to level the protection of speech downward. Tushnet, *supra* note 11, at 1114–16; *cf.* Schauer, *supra* note 13, at 271–72 (“We must either water down the test for protection . . . or conclude that certain categories of speech are to be tested under drastically different standards of protection.”).

<sup>121</sup> Schauer, *supra* note 13, at 306 (noting that “[n]umerous justifications are given for a principle of freedom of speech,” and imagining a theoretical “complex code,” built into which would be “[e]very relevant and justifiable distinction, no matter how fine”). In this vein, Leslie Kendrick has insightfully argued that this is for reasons related to the nature of speech and the nature of rules. Kendrick, *supra* note 42, at 1212–19 (discussing the interplay between “speech” and “freedom of speech” and rules and standards). As Kendrick observes, some scholars have opted for a full coverage rule (all “speech” is covered), but with a list of exceptions. *Id.* at 1217–18 (noting that this rule “cannot avoid the difficult questions: some activities will have to be defined out, and some set of values will have to govern that process”). Eugene Volokh is the preeminent example of this approach. See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* xiii, 1–2 (4th ed. 2011) (listing out exceptions to coverage and providing a doctrinal method for readers that entails starting with coverage and moving through the possible ways to except that coverage); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005) (“Neither generally applicable laws nor specially targeted laws should be allowed to restrict speech because of what the speech says, unless the speech falls within one of the exceptions to protection . . .”).

<sup>122</sup> This approach builds off of the work of Frederick Schauer and Robert Post, who have argued that analysis of social context and social movements are necessary to understanding the animating logic of the First Amendment. See, e.g., Post, *supra* note 20 (critiquing current tests for First Amendment coverage and arguing that the doctrine will continue to fail until the Court takes account of various forms of social order); Schauer, *supra* note 11 (taking into account various factors in determining coverage).

how these settings are treated in First Amendment case law, a logic to the scope of the right emerges. Interestingly enough, it is not based, at least singularly, on shared norms about what constitutes “speech.” We might all agree that commercial or securities fraud,<sup>123</sup> perjury, extortion, and conspiracy involve speech, for instance, but the First Amendment would not pop to mind if we were defending someone charged with those offenses—let alone if we were litigating an ordinary contract case, negotiating the regulation of wills and estates, or displeased with a discovery demand.<sup>124</sup>

The thesis of this Section is that the pattern of First Amendment coverage can be explained instead, at least in significant part, by a sort of social consequentialism, which I call “speech effects.” The case law suggests that First Amendment coverage rests on the cohesiveness of the expected social meaning of, and reaction to, the activity in question—including how a speaker will affect the behavior of or harm a listener or audience.<sup>125</sup> Consequentialism may not be quite the right word.<sup>126</sup> My point is that the logic and pattern of coverage rest on the strength of the social judgment about how an expressive activity *works* in its social context and what, if any, effect it is likely to have. The puzzle of First Amendment coverage reflects the cohesiveness of

---

<sup>123</sup> For a discussion of securities regulation and First Amendment protection, see Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990).

<sup>124</sup> Jane Bambauer has argued that Frederick Schauer and Robert Post are incorrect to state that significant amounts of “speech” fall (and has historically fallen) outside of the First Amendment. Bambauer, *supra* note 72, at 67–69, 67 n.36. She contends that most instances of uncovered “speech” occur where that speech is incidental to “conduct” that is regulable. *Id.* at 69 (offering child pornography and fraud as examples). Bambauer takes for granted that the category of “speech” is socially obvious. It is unclear how she would explain the historical exclusion of movies or commercial speech from First Amendment coverage, except as incorrect in her view, or how we are to identify what is “speech” in emergent technologies and social practices. And Bambauer herself acknowledges that Title VII regulates speech on her definition, *id.* at 69 n.40, as do presumably regulations against defamation and obscenity, to name a few types of “speech” that have long been excluded from coverage.

<sup>125</sup> Whether a particular type of “speaker” or group is included or excluded from First Amendment protection is another type of coverage question. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (boycotters); First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (corporations); De Jonge v. Oregon, 299 U.S. 353 (1937) (those who attend Communist Party meetings). This Article focuses on social practices because the lion’s share of coverage questions today are of that type. It argues that while the notion of norms may be somewhat analytically distinct with regard to why some speakers are or are not covered, the normative analysis is not.

<sup>126</sup> Social meaning captures a similar idea, insofar as it connotes how words and actions are understood both to signify and shape our relationships with—and reactions to—others. The concept outlined here includes expectations about both contingent and intrinsic harms. *But cf.* Robert C. Post, *Blasphemy, The First Amendment and the Concept of Intrinsic Harm*, 8 TEL AVIV U. STUD. L. 293, 294 (1988) (distinguishing between the two).

social norms—and courts' normative judgments about whether norms should be treated *as if* they are cohesive.

Methodologically, I draw this thesis from both the pattern of First Amendment cases and some prominent examples of plainly uncovered speech. This review is necessarily incomplete. It does not fully canvass the great number of incidences in which individuals could theoretically have pursued a First Amendment claim but did not—either because of the sort of naturalness of the social norms relative to the interaction, or because of resource, knowledge, or other constraints.<sup>127</sup> Why are some sorts of interactions more likely to draw free speech claims? And what are the dynamics that lead the Speech Clause—or more broadly some constitutional rights but not others—to act as the hook for certain substantive social and political projects?<sup>128</sup> How do communities differ in their judgments, interests, and ability to bring those claims? And what are the normative, institutional, and distributional effects of pulling different areas of social life within the First Amendment? Here I submit a framework through which we can consider these questions.<sup>129</sup>

---

<sup>127</sup> See, e.g., JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 119 (2010) (discussing the legal mobilization of businesses in the 1970s); Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571, 590 (2012) (naming some of the legal issues political parties consider in running political campaigns, including First Amendment issues); Herbert M. Kritzer, *Claiming Behavior as Legal Mobilization*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 261 (Peter Cane & Herbert M. Kritzer eds., 2010) (surveying some demographic analyses of the kinds of claims that are considered worth pursuing through litigation); Michael McCann, *Litigation and Legal Mobilization*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 522 (Gregory A. Caldeira et al. eds., 2008) (addressing the reasons that some communities or individuals do not pursue remedies through legal institutions).

<sup>128</sup> It is interesting that association claims have not risen to the prominence of free speech claims, particularly as a tool to challenge antidiscrimination measures. Cf. Bagenstos, *supra* note 70, at 1229–30 (noting that courts have not interpreted the freedom of association vis-à-vis public accommodations or antidiscrimination laws as broadly as many anticipated); Robert Post, *RFRA and First Amendment Freedom of Expression*, 125 YALE L.J.F. 387, 392 (2015) (arguing that the Religious Freedom Restoration Act should not be interpreted to extend to conduct that otherwise falls outside the ambit of the First Amendment). There are indications, however, that there may be a constituency for such claims. See *supra* notes 70–71 (collecting recent free speech and free exercise challenges to antidiscrimination and public accommodations laws).

<sup>129</sup> More scholarly work, particularly empirical, is needed to develop a fuller understanding of the dynamics of First Amendment and other forms of constitutional coverage.

Courts already do, and scholars have urged them to, weigh the benefits of speech against its potential harm.<sup>130</sup> After a case is filed, and both a litigant and a court decide that the First Amendment applies, the constitutional analysis often turns on understandings of the consequences of speech, as Erica Goldberg has recently analyzed.<sup>131</sup> But the importance and sociology of the effects of speech go beyond the harms and benefits that Goldberg explores. Assumptions about speech effects—which are based on norms about the relationships and contexts in which the activity occurs—are key to whether a litigant or court will identify a free speech problem in the *first instance*. That is, speech effects explain some of the forces underlying First Amendment coverage.

I argue that the First Amendment does not extend when there is a common norm about the social effect of the activity or when the court decides there should be such a norm. Conversely, when there is no such common norm—or the court decides there should not be one—the First Amendment extends.<sup>132</sup> Contemporary First Amendment case law bears out this observation: Assumptions about the effects of speech vary within different parts of First Amendment jurisprudence, depending on the social and institutional contexts in which those cases occur.

Before delving into that claim, it is important to recognize that there is an important question of when a tipping point is reached as to sociological coverage, and how and when we should conceptualize social norms as unitary or in conflict. Which community's judgment is best considered (local or national; citizens, judges, or regulated entities; etc.), particularly when the filing or acceptance of claims or views of one community may influence another? Presumably it is not at the point a one-off litigant brings a far-fetched claim or perhaps even when the Supreme Court definitively includes or excludes an activity from the scope of the right (by analogy, we might rightly question, for example, whether *Roe v. Wade* signaled a national norm regarding

---

<sup>130</sup> See Vincent Blasi, *Shouting "Fire!" in a Theater and Vilifying Corn Dealers*, 39 *CAP. U. L. REV.* 535, 537–48 (2011); Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 *S. CAL. L. REV.* 953, 1003 (2016).

<sup>131</sup> Erica Goldberg, *Free Speech Consequentialism*, 116 *COLUM. L. REV.* 687 (2016).

<sup>132</sup> The existence of a norm and the court's judgment may not be in alignment; a court may not mirror even generally held norms, as discussed below. Because of the possibility of that disjuncture, a court's judgment is necessarily normative, not simply descriptive of social facts. The possibility of difference between the social judgments of courts and the public (or courts and minority communities) raises important questions about how social forces structure law and how law structures social forces. To what degree, for example, did the Court's decision in *Forklift* to not identify a First Amendment claim affect workplace norms?

abortion). And, of course, courts and litigants, or even the majority of Americans, may disagree as to whether a given activity is or should be covered. For ease of discussion, *but that alone*, this Article treats coverage as a relatively unitary category, but this is not to deny or obscure the cultural diversity and conflict that may (often) underlie it. That diversity, or its lack, is in fact a central concept motivating this Article. It is also a subject in need of further scholarly and empirical inquiry.

\* \* \*

The origins of the Supreme Court's First Amendment jurisprudence centered on the issue of social causation. The Court's early cases involved charges of conspiracy and attempt, largely to obstruct the World War I draft by use of words. Those opinions, perhaps therefore not surprisingly, focused on speech effects. In *Schenck*, for example, while addressing a criminal prosecution brought for conspiring to distribute leaflets urging resistance to the draft, the Court explained: "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."<sup>133</sup> It was in that context that the Court articulated the concept of clear and present danger, saying the First Amendment "does not even protect a man from an injunction against uttering words that may have all the effect of force."<sup>134</sup> The right of free speech emerged from debates over speech effects, and the early Court decided that the causal link between leafletting against the draft and others obstructing it was sufficiently clear for no right to extend.

Before those cases were brought, was it so sufficiently obvious to socialized Americans and their lawyers that urging resistance to the draft caused (or meant) its obstruction? Is that why they did not bring First Amendment defenses? That hypothesis is consistent with the history of public reaction to anti-war advocacy during that period. As John Witt has described, "many of the most spectacular episodes of intolerance and repression" in response to anti-war speech in the World War I period "were not directly the result of government action at all."<sup>135</sup> Instead, crowds of pro-war protesters attacked war dissenters, often injuring or killing them, sometimes even as police attempted to fend off the mob.<sup>136</sup> These incidents suggest that anti-

---

<sup>133</sup> *Schenck v. United States*, 249 U.S. 47, 51 (1919).

<sup>134</sup> *Id.* at 52.

<sup>135</sup> JOHN WITT, *THE AMERICAN FUND: A STORY OF MONEY AND POLITICS IN AMERICA* 33 (forthcoming 2018) (draft on file with the author).

<sup>136</sup> *Id.* at 33–35.

war speech had a meaning and effect that was clear enough to cause thousands of Americans to mobilize, sometimes violently, in opposition. The audience of anti-war speech was, it would seem, substantially unified in its understanding. The effects and social meaning of blasphemy were perhaps similarly once more universally accepted.

The regulation of obscenity—a category long excluded from the First Amendment’s coverage—offers another example. Obscenity refers “to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”<sup>137</sup> This standard is explicitly tied to how “the average person, applying contemporary community standards” would assess the work.<sup>138</sup> As the Court has explained:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the “prurient interest” or is “patently offensive.” . . . [O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.<sup>139</sup>

Obscenity jurisprudence thus protects a space of local, not national, community standards—recognizing that communities may vary as to agreed-upon norms of what constitutes prurient or offensive material.<sup>140</sup>

Incitement, another historically uncovered category, is founded on a similar logic. The “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>141</sup> What does it mean for a fact finder to establish that a call to imminent lawless action “is likely to incite or produce such action”? It is to say, in the social context at hand, that

<sup>137</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>138</sup> *Id.* (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (per curiam)).

<sup>139</sup> *Id.* at 30.

<sup>140</sup> *Id.* at 32 (“It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”). This is a different question than the one Patrick Devlin addressed in *THE ENFORCEMENT OF MORALS* (1965), in which he famously argued that law is justified insofar as it enforces the moral judgments of a society. See also Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986 (1966) (arguing that American lawyers need to pay attention to the arguments raised by Devlin in that lecture).

<sup>141</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

we can determine the effects of the speech. We know how that sort of speech will operate.

The exclusion of certain common-law torts from First Amendment coverage follows a similar social logic. Why, for example, can the publication of embarrassing facts be regulated consistent with the Constitution? Robert Post's analysis of the conceptual structure of the tort of invasion of privacy is illuminating: He argues that the tort guards social norms that protect and recognize individuals and give them identity in their communities.<sup>142</sup> By contrast, within the public sphere, where the First Amendment generally applies, the logic is deliberately indifferent to those norms. The exclusion of common-law torts safeguards a space of cohesive social norms around what it means to treat others with dignity and respect. Underlying Post's insight is the idea that the privacy torts protect a space of unified social norms—and a space of norm and identity development on which the functioning of the public sphere depends.

But the realm of common-law privacy is just one realm of normed social life to which the First Amendment does not generally or fully extend. Other notable spheres include organized institutional spaces—such as schools, workplaces, courthouses, and market-places—as well as countless instances in which individuals make promises with or rely on others.

Two classes of the most basic social relationships often fall outside of the First Amendment's boundaries: those involving promises and those involving reliance. Contracts, conspiracy, and price-fixing offer prominent examples of the first. Contracts involve written promises, and most people understand how promises are supposed to operate. If I promise you I will sell you my TV for X dollars, the prevailing norm is that I plan to and in fact should do so. Conspiracy, which is essentially an agreement or promise to commit a crime, perhaps not surprisingly, has a similar social logic—and thus similarly is excluded from First Amendment coverage. Price-fixing, too, fits the mold of this quite basic form of social relationship: It is a promise. Promises, relative to other types of social ordering, have relatively strong norms.<sup>143</sup> When you make a promise, we know how those words typically work.

---

<sup>142</sup> See, e.g., Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 1008 (1989).

<sup>143</sup> See generally Luigino Bruni & Robert Sugden, *Moral Canals: Trust and Social Capital in the Work of Hume, Smith and Genovesi*, 16 ECON. & PHIL. 21 (2000); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986).



So, too, with fraud and malpractice—both examples of breaches of relationships are founded on trust and reliance, and are also typically outside the ambit of the First Amendment.<sup>144</sup> If you rely on the advice of a doctor or lawyer and that person misleads you (say, advising that you needed surgery when you did not), or a salesperson on whom you rely for material commercial information lies to you (in fact that tonic will not cure cancer, or that food does contain peanuts when they explicitly state it does not), it would be clear enough that they did not abide by the appropriate norms attendant to the relationship of a doctor and patient or seller and purchaser. You relied on someone for information, and they did not participate in the social relationship you expected, as other socialized Americans observing the transaction would likely recognize. The same can be said not just of securities fraud, but of a broad range of securities regulations.

We could say similar things about the range of types of speech that are plainly uncovered that form the organizing foundations of larger social institutions, such as the rules of evidence or the failure of disgruntled public school children everywhere to bring First Amendment claims for being penalized for providing wrong answers on their exams. The rules of evidence are norms of behavior in a highly complex social institution: the courts. Within the courts, people are allowed to speak at certain times, but not others. Why do participants not view these rules as regulating “speech” for First Amendment purposes? Because they are in a court. And courts, like schools, religious, military, or penal institutions, like promises and relationships of reliance, have their own ordered norms, which we learn and on which we rely to negotiate those institutions. The rules of evidence are part of what structures the institution of a court: They are embedded in its functioning.

The Supreme Court’s decision in *Forklift* to decline even to comment on the potential conflict between Title VII’s regulation of harassing workplace speech and the First Amendment, even though that issue was briefed, offers another example.<sup>145</sup> Without discussion, the Court in essence found no First Amendment coverage issue. As Richard Fallon observed, the Court’s failure to notice a First Amendment question with regard to the regulation of sexually

---

<sup>144</sup> Jack Balkin’s proposal that parts of the digital infrastructure should be treated as information fiduciaries arguably leverages this social insight. See Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. (forthcoming 2018) (draft on file with the author).

<sup>145</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); see also Fallon, *supra* note 10 (noting that the Court ignored the First Amendment issue after it was specifically briefed).

harassing workplace speech under Title VII perhaps indicates that such speech “was so clearly unrelated to the First Amendment’s purposes that it should not be [dignified] with an explanation as to why it constituted an ‘exception’ [to the First Amendment’s reach].”<sup>146</sup> Decisions like *Forklift* essentially hold that speech acts in some social institutions—such as harassment in the workplace—have an obvious, norm-disrupting effect, regardless of whether that would *in fact* be the effect in every instance.

By contrast, if we see (or courts believe we should see) uncertainty around the norms of the activity, then the First Amendment generally extends its coverage. The political speech cases are emblematic in this regard. They embrace Justice Harlan’s notion in *Cohen v. California* that “one man’s vulgarity is another’s lyric”<sup>147</sup>—that we do not know how an audience will view the activity. The political speech cases further generally embrace the notion that speech cannot be constitutionally curtailed due to its *potential*—and at core unpredictable—negative effects. They reflect the view that “[e]very idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.”<sup>148</sup> I can urge the public to vote for Donald Trump or convert to Judaism, but we don’t know what you or others will do. Will you act upon it?<sup>149</sup> The animating logic is that we cannot know what the effect of my activity will be. I submit that this is because the audience is understood to come from divergent interpretive communities with different shared norms.

Debates over pornography and hate speech shed further light on this distinction—and the fact that different communities can have divergent understandings and norms. Scholars and advocates in the 1980s and 1990s sparred over whether either should be regulable under the First Amendment because of their harms.<sup>150</sup> Catharine MacKinnon famously maintained that “[p]ornography is more act-like

---

<sup>146</sup> Fallon, *supra* note 10, at 13.

<sup>147</sup> 403 U.S. 15, 25 (1971).

<sup>148</sup> *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

<sup>149</sup> T.S. Eliot’s *The Hollow Men* is brought to mind:

Between the idea  
And the reality  
Between the motion  
And the act  
Falls the Shadow

T.S. Eliot, *The Hollow Men*, in *POEMS 1909–1925*, at 123, 127 (1925).

<sup>150</sup> See generally David Cole, *Playing by Pornography’s Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

than thought-like” because of the harms it enacts on women.<sup>151</sup> MacKinnon’s concern was with “what pornography *does* as a practice of sex discrimination.”<sup>152</sup> She worried that “[o]nce power constructs social reality, as . . . pornography constructs the social reality of gender, the force behind sexism, the subordination in gender inequality, is made invisible.”<sup>153</sup> When we protect pornography under the First Amendment, she argued—when we “look[ ] neutrally on the reality of gender so produced”—we ignore what it *does*.<sup>154</sup> But of course, in her view, there is a plural audience assessing what pornography does: There are those (especially men) who see only the construction of gender so created, which looks not like subordination but instead the appropriate recognition of sex difference,<sup>155</sup> and others (women) who see and live its effects.<sup>156</sup> There is a pluralistic interpretive community that assesses differently pornography’s effects, and because of the different social positions of that community’s members, understands what it *does* differently.

Indianapolis adopted an anti-pornography ordinance grounded in the theory proposed by MacKinnon and Andrea Dworkin. The Seventh Circuit ruled it unconstitutional and, in so doing, it emphasized that the First Amendment “leave[s] to the people the evaluation of ideas,” regardless of what prevails.<sup>157</sup> This is because, “[b]ald or subtle, an idea is as powerful as the audience allows it to be.”<sup>158</sup> In short, we do not know the effect of pornography—that is, how powerful its audience will allow it to be—and so it falls within the First Amendment’s ambit. The Supreme Court affirmed the Court of Appeals without comment,<sup>159</sup> in some sense in the mirror image of *Forklift*.

---

<sup>151</sup> MacKinnon, *supra* note 150, at 65; *id.* at 65 n.155 (noting, however, that she does not assert that pornography is “conduct” in a doctrinal sense, only regulable like obscenity (an uncovered category)); *id.* at 65 (“Segregation expresses the idea of the inferiority of one group to another on the basis of race. That does not make segregation an idea. A sign that says ‘Whites Only’ is only words. Is it therefore protected by the first amendment? Is it not an act, a practice, of segregation because of the inseparability of what it means from what it does?”).

<sup>152</sup> *Id.* at 1–2.

<sup>153</sup> *Id.* at 7.

<sup>154</sup> *Id.* at 1–2.

<sup>155</sup> *Id.* at 27.

<sup>156</sup> *Id.* (arguing that as a social group, men are not hurt by pornography the way women are).

<sup>157</sup> *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985).

<sup>158</sup> *Id.* at 327–28; *see also id.* at 332 (“Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions, [and] without a strong guarantee of freedom of speech, there is no effective right to challenge what is.”).

<sup>159</sup> *Hudnut v. Am. Booksellers Ass’n*, 475 U.S. 1001 (1986) (mem.).

This fault line—between unified and plural audiences, between well-accepted norms and contested ones—is likewise evident in debates about hate speech. Mari Matsuda, for instance, has argued that racist hate speech should be excluded from First Amendment coverage, like false advertising, incitements to violence, and fighting words, because of the harms it effects on those in the target group.<sup>160</sup> Matsuda advocates that speech should be constitutionally proscribable if its message is one of racial inferiority, it is directed at a historically oppressed group, and it is persecutorial, hateful, and degrading.<sup>161</sup> But her focus, like MacKinnon’s, is on the split reaction to hate speech between targeted communities and others. Parallel to MacKinnon, she rejects abstract notions of neutrality and equality in favor of the particulars of the social reality and experience of people of color: to view hate speech through the victim’s eyes.<sup>162</sup> And through those eyes, hate speech most certainly causes harm, the psychic dimension of which Patricia Williams has described as “spirit-murder.”<sup>163</sup>

Different communities, of course, may have different experiences of the same activity.<sup>164</sup> The Supreme Court recognized this in *Virginia v. Black*, when it accepted that, in principle, a state could ban cross burning because it “is often intimidating, [and] intended to create a pervasive fear in victims that they are a target of violence,”<sup>165</sup> and cross burning with the intent to intimidate “is a type of true threat where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>166</sup> But the Court refused to accept the prima facie provision of Virginia’s statute, which made the burning of a cross prima facie evidence of the required intent to intimidate.<sup>167</sup> The Court refused to accept that as a general matter cross burning causes its audience to experience that sort of fear, and it did so in explicit reference to the pluralistic poten-

---

<sup>160</sup> See Matsuda, *supra* note 150, at 2321; see also Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 172–73 (1982) (noting that a tort for racial insults would be seen as content regulation and held to higher scrutiny under the First Amendment).

<sup>161</sup> Matsuda, *supra* note 150, at 2357–58.

<sup>162</sup> *Id.* at 2323–24.

<sup>163</sup> Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

<sup>164</sup> Empirical work by Dan Kahan, for example, demonstrates that whether an audience perceives an activity as speech or conduct relates to their ideological commitments. Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 882–83 (2012). Kahan’s research is focused on ideology, but it suggests a broader point. Communities may differ in their perceptions of events and the meanings they ascribe to them based on context-bound norms and understandings.

<sup>165</sup> 538 U.S. 343, 360 (2003).

<sup>166</sup> *Id.*

<sup>167</sup> See *id.* at 364–67 (O’Connor, J.) (plurality opinion).

tial audience of such acts of hate speech. Cross burning could not be banned as a *prima facie* matter because the cross's audience may or may not experience that "speech" as harm.<sup>168</sup>

As Guy-Uriel Charles has observed, one interesting thing about the Court's decision in *Virginia v. Black* was its shift *towards* the understanding of critical race theorists such as Matsuda that hate speech like cross burning does in fact cause harm.<sup>169</sup> The Court accepted that cross burning could be banned when it did, in context, cause the harm. It accepted, as a matter of social reality, that cross burning often—but not always—*works* on its audience in the way that critical race theorists, and generations of victims, have asserted. Justice Thomas, in his dissent, took the stronger position that "[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, and the profane."<sup>170</sup> Cross burning, for Thomas, was a social practice that in "our culture"—our national culture—works in one way: to intimidate and inspire the fear of "[m]urder, hanging, rape, [and] lynching."<sup>171</sup> He wrote that "[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence,"<sup>172</sup> such that it can be constitutionally banned as a prohibition of "intimidating and terroristic conduct," not expression.<sup>173</sup>

To recap the arguments thus far: First Amendment coverage tracks judgments about whether a given expressive act operates in a way that is generally understood in the interpretive community to have a given effect. When there is a question about how the speech works, in the words of MacKinnon, about what it *does*—that is, there is a pluralistic interpretive community—the First Amendment generally offers its coverage. This may help explain, in part, why an *analyt-*

<sup>168</sup> Compare CATHARINE A. MACKINNON, ONLY WORDS 11–15 (1993) (arguing that social inequality is substantially created and enforced—"done"—through words and images, including women's subjugation by pornography, regardless of its audience, and that such words should be unprotected by the First Amendment), with *Black*, 538 U.S. at 357, 362–63 (declining to conclude that cross burning necessarily embodies a threat without a clear intent to intimidate or threaten, because of differences in audience reception, and so finding it constitutionally protected).

<sup>169</sup> Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575 (2005) (discussing the shift in understanding of the social harm of hate speech between *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Black*, 538 U.S. 343).

<sup>170</sup> *Black*, 538 U.S. at 388 (Thomas, J., dissenting) (citations omitted).

<sup>171</sup> *Id.* at 390 (quoting *United States v. Skillman*, 922 F.2d 1370, 1378 (9th Cir. 1991), which quoted from the testimony of an African-American mother who had a cross burned on her lawn).

<sup>172</sup> *Id.* at 391.

<sup>173</sup> *Id.* at 394.

*ical* or meta-justification-driven theory of First Amendment coverage has been so evasive, and perhaps also why the First Amendment's boundaries so easily migrate with changing underlying social and institutional arrangements and technologies.

My argument builds on Robert Post's analysis that First Amendment doctrine is made internally incoherent by its attempt to ground itself in a generic notion of "speech."<sup>174</sup> From this insight, Post contends that "[s]peech does not itself have a general constitutional value, but rather we attribute to speech the constitutional values allocated to the discrete forms of social practice that speech makes possible."<sup>175</sup> Post identifies a number of domains that the Constitution treats differently, he says because of the distinct values of the underlying social practices. He calls for a reshaping of First Amendment doctrine based on "the necessary material and normative dimensions of these forms of social order and of the relationship of speech to these values and dimensions . . . [and] for allocating speech to these distinct forms of social orders."<sup>176</sup>

My point is that while social orders are various, at the threshold, First Amendment coverage turns in significant part on the *strength* of the social norms of those orders. The strength of those norms indicates whether we are, or are not, in a given social order—be it contract, military service, employment, racial violence, or reliance. It is not just that contracting has a different constitutional value than arguments over Marxist theory or *Straight Outta Compton*. We know an expressive activity is potentially constitutionally salient if we do not simply take it for granted, because of the strength of the social norms surrounding that activity about how it will "work" in that setting.<sup>177</sup>

Why then has a theory of coverage been so hard to come by? It is at least in part because coverage traces a myriad of social norms and community and institutional boundaries, instead of analytical categories or any single justification or distinction.<sup>178</sup>

---

<sup>174</sup> Post, *supra* note 20, at 1273.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1281.

<sup>177</sup> Post argues that we can get a handle on coverage by way of a two-by-two chart that maps the existence of a "medium for the communication of ideas" with governmental intent. Post, *supra* note 20, at 1253–60. My argument problematizes and looks to the source of the judgment for Post's "medium of expression." *Id.* at 1264 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)).

<sup>178</sup> This argument resonates with Leslie Kendrick's point that there is something about the nature of legal rules that contributes to the difficulty of crafting a theory of coverage in legal doctrine. Kendrick, *supra* note 42, at 1204–06; *cf.* Massaro, *supra* note 73, at 387 ("Theories that are analytically crisp enough to limit applications of freedom of speech in a meaningful way often cannot be squared with a vast amount of modern doctrine and contemporary free speech intuition, which makes them practically and normatively

The edge of coverage, then, may be less about what constitutes “speech” versus “conduct”—or any analytically or philosophically tight distinction—than about the expected effect of an activity on its audience and whether that audience has (or courts believe it should have) cohesive or pluralistic norms. Areas of communicative social life, such as contracts and tax returns, that generally do not face First Amendment challenge and are often considered speech outside the boundaries of the First Amendment, may tell us something about what sorts of speech acts are generally considered straightforward in their effect to a national interpretive community.<sup>179</sup> They may, often even, reflect the existence of an actual unitary interpretive community about how those sorts of speech acts operate. In a society where the norms of contracting are relatively unproblematic, for example, the resistance or acquiescence to a given contractual arrangement may vary within the set of familiar outcomes and within established conventions for their contestation—but not as to the existence of contract itself. As such, the contested frontiers of the First Amendment, such as warning labels and securities regulation, may reflect areas of social life in which the unity of social understandings of the effect of communicative social actions, are becoming—or being pushed to become—unsettled.

If my description is correct, moreover, we may well be in for more First Amendment expansionism. Loosening the unity of a social convention may be easier than the reverse. This may be particularly the case in an ever more diverse and global world, where the space of pluralist interaction is greater.

### III

#### A PRESCRIPTIVE THEORY OF FIRST AMENDMENT COVERAGE

This Part shifts to a prescriptive register. In light of this Article’s explanation for the First Amendment’s current boundaries, how should courts conduct coverage analyses?

Because what falls within the First Amendment is not an obvious or foregone conclusion, we should avoid the tempting illusion that what is speech is obvious. I argue that just like “property” or “due

---

suspect.” (footnotes omitted)). First Amendment opportunism may exacerbate this problem insofar as it has prompted courts to embed a range of values and considerations in various parts of First Amendment doctrine.

<sup>179</sup> It is perhaps notable, for example, that one of the few recent contracts cases raising free speech claims involved a claim about a stolen screenplay idea (a type of social product that has long been viewed as within the First Amendment). *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1191–92 (9th Cir. 2017).

process,” something is “speech” for First Amendment purposes if a social actor finds it constitutionally salient, litigates it, and a court recognizes it as such. That recognition may come with trade-offs—sometimes more or less weighty, sometimes more or less visible. If there is no clean analytical basis for the speech/conduct distinction, substantive normative commitments, grounded in the range of social and institutional contexts in which coverage questions arise, must guide our thinking.

In the Title VII context, the countervailing social interest is equality and anti-discrimination; it is the ability to have workplaces that are organized on civil interactions.<sup>180</sup> The Court’s exclusion of Title VII from coverage, despite litigants’ identification of a constitutional concern, articulates a view that we *should* all have a shared understanding of the effects of harassing workplace speech and the organizing norms of modern workplaces. We should understand the workplace not as a place of ideological contest and communicative uncertainty—like the paradigmatic realm of political speech—but instead as a space governed by norms and practices appropriate to a modern workplace, in which harassment is inappropriate and causes disruption and harm.

In the realm of contracts and fraud, the lack of First Amendment coverage reflects respect for the basic social relationships of promise and reliance, respectively. The general failure of plaintiffs to bring, or courts to recognize, claims about the multitude of regulations of speech in public institutions, like courts and schools, reflects the existence, if not also the need for, those different forms of ordered social life. The expansion (or contraction) of the First Amendment may additionally implicate democratic values, as discussed more fully below.

If my diagnosis is correct, the boundaries of coverage reflect different ways of ordering—other than the normative contestation of pluralistic audiences—and the facts and expectations of those various orders. Courts faced with First Amendment challenges should therefore explicitly attend to the scope of the First Amendment’s freedom of speech. They should consider the social ordering of the context of the activity and the value of such ordering when deciding whether a

---

<sup>180</sup> This is not to argue that the First Amendment addresses itself to equality or other non-liberty values, which is a question of significant litigation and scholarly debate. *See, e.g.,* *Citizens United v. FEC*, 558 U.S. 310, 425–46 (2010); ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 59–60 (2014). It is to say that in defining the boundaries of the First Amendment’s sphere of liberty—even, if not particularly, if we assume it protects liberty alone—we must consider other social values that its extension implicates.



given social practice—such as the language in securities prospectuses, contracts, or tax returns—comes within the First Amendment’s boundaries.

More granularly, courts and litigants must be attuned to First Amendment coverage questions not just in areas of traditionally wholly uncovered speech, but in areas where there is the potential for extension of covered categories, such as commercial speech, to types of activity that sphere has previously not covered. For instance, is a corporate tax return commercial speech or some other type of activity outside of the First Amendment’s boundaries? Second, courts should weigh (and litigants argue) not only their instincts about the speech/conduct boundary or a given practice’s fit to a recognized category of speech (e.g. commercial or political), but also the social and institutional effects of including that practice within the First Amendment’s ambit—and they should do so explicitly.<sup>181</sup>

This is not a contention that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”<sup>182</sup> It is instead a call for a context-specific inquiry into the social and institutional relationships at stake in the challenged activity and the effects and incentives of setting the First Amendment’s boundaries relative to that activity. This is the type of analysis that both realism and law and economics have made so prominent in contemporary legal analysis.<sup>183</sup>

But are there other more attractive approaches? It may be enticing to imagine that we can sidestep these difficulties by way of the historically unprotected categories.<sup>184</sup> But these categories, and lack of forthright explanation, cannot account for the inapplicability of the First Amendment to workplace harassment, contracts, malpractice, and perjury, to name but a few. Without explicit analysis of why a given social practice should fall within the First Amendment, we put rule of law values at risk.<sup>185</sup> Is the regulation of the sale of a firearm

---

<sup>181</sup> I urge explicit judicial articulation of reasons to reshape the First Amendment’s boundaries, notwithstanding that so doing will necessarily invite a host of challenges. But, as Robert Cover argues with respect to aspects of the law of association, “that is as it should be. The invasion of the *nomos* of the insular community . . . ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community.” Cover, *supra* note 25, at 67 n.195.

<sup>182</sup> *United States v. Stevens*, 559 U.S. 460, 470 (2010) (quoting Brief for United States at 8, *Stevens*, 559 U.S. 460 (No. 08-769)).

<sup>183</sup> See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>184</sup> Cf. *Stevens*, 559 U.S. at 470 (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”).

<sup>185</sup> Shanor, *supra* note 19, at 181–82.

speech within the scope of the First Amendment?<sup>186</sup> It takes place through the use of words: an offer and an acceptance, likely facilitated by some form of advertising. What about the regulation of harassing workplace speech or perjury? Both operate through speech and expression in any colloquial sense. Coverage questions, and their significant social and institutional implications, cannot be left to conclusory judgments about an activity's "speechiness."

Should entrusting these judgments to judges raise concerns of activism? I think not. Without explicit analysis, we are left with the largely unarticulated social judgments of judges—and their potentially profound institutional implications. Those unstated social judgments have the same "activist" effect. For example, take the exclusion of Title VII from First Amendment coverage. No one would suggest that the harassing speech in *Forklift* plausibly fell within one of the historically excluded categories—or that the social, economic, and institutional effect of deciding, *sub silentio*, that harassing workplace speech is not "speech" was not enormous. The courts, including the Justices in *Forklift*, are already making just these sorts of judgments, only often doing so without discussion. It is in the core competencies of judges, moreover, to articulate the scope and limits of constitutional provisions and the balance of their interactions.

The other obvious path would be to extend constitutional coverage, at least presumptively, to all manner of expression.<sup>187</sup> This is essentially what Justice Roberts proposed in *United States v. Stevens*,<sup>188</sup> and what Floyd Abrams has offered in response to critics of First Amendment *Lochnerism*.<sup>189</sup> This approach raises several problems. First, it would constitutionalize great swaths of social life and in so doing open up plausible legal challenges to anything from ordinary contract law to the federal rules of evidence. It would, among other things, run much of the administrative state and the world's largest economy through the courts. It would create, in short, what

---

<sup>186</sup> See *Nordyke v. Santa Clara County*, 110 F.3d 707, 712–13 (9th Cir. 1997) (concluding that a county lease provision that prohibited "any person from selling, offering for sale, supplying, delivering, or giving possession or control of firearms or ammunition to any other person at a gun show at the fairgrounds" violated the First Amendment); cf. *Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1191–92 (E.D. Cal. 2015) (deciding a First Amendment challenge to a state restriction on handgun advertising), *aff'd* 637 Fed. App'x 401 (9th Cir. 2016).

<sup>187</sup> Cf. Ronald Dworkin, *What Rights Do We Have?*, in *TAKING RIGHTS SERIOUSLY* 266, 266–67 (1977) (finding the notion of a general right to liberty "absurd").

<sup>188</sup> 559 U.S. 460, 471–72 (2010).

<sup>189</sup> Floyd Abrams, Comment at Abrams Institute First Amendment Salon: *Reed v. Gilbert* & the Future of the First Amendment (Nov. 2, 2015), <https://www.youtube.com/watch?v=LzJakXHnXhI>.

Mark Tushnet has called the “too much work” principle.<sup>190</sup> Second, it would create predictable distributional effects. As the political science literature has captured, only certain sorts of individuals can and do bring legal challenges.<sup>191</sup> By drawing more parts of social life into the First Amendment’s ambit, we provide more contexts for First Amendment opportunism—and so more opportunities for, at least generally, certain sorts of claimants to embed their substantive policy views in the law. Third, expanding the scope of coverage may create pressure to lower levels of protection within that coverage, as others have argued.<sup>192</sup> We may dilute free speech protection, and that dilution may spill over into traditional areas of First Amendment coverage in ways that are now difficult to anticipate.

But more fundamentally, a coverage everywhere (or everywhere except in historically exempt categories) approach does not avoid the line drawing problem: We still must identify what is “speech” and what is not for purposes of the First Amendment. As the Court noted in *City of Dallas v. Stanglin*, “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the pro-

---

<sup>190</sup> Tushnet, *supra* note 11, at 1076 (“Doctrines that require ordinary judges to do too much work to reach obvious results ought to be avoided because too often ordinary judges will make mistakes—from the point of view of a higher court—as they try to implement the complex doctrines step by step.”); *see also id.* at 1117–20 (arguing that the “too much work” principle represents a balance of decision costs and error costs, by which higher courts avoid rules that would require lower courts to do too much work to reach the correct result, which may offer a reason to maintain the coverage/protection distinction).

<sup>191</sup> *See supra* note 127.

<sup>192</sup> *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring in the judgment) (noting that content-based categories of speech have been generally excluded from stringent—if any—First Amendment protection that the majority’s redefinition of content-based analysis would render presumptively constitutional, saying “I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that ‘strict scrutiny’ normally carries with it. But, in my view, doing so will weaken the First Amendment’s protection in instances where ‘strict scrutiny’ should apply in full force”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 *CIN. L. REV.* 1181, 1194 (1988) (discussing the move of commercial speech from outside to inside the First Amendment, and arguing that “[w]ere existing first amendment rules to be applied to commercial speech, we can foresee similar dangers of doctrinal dilution, where ‘doctrinal dilution’ refers to the possibility that some existing first amendment rule would lose some of its strength because of the number of unacceptable applications it would generate when its new applications were added”); Tushnet, *supra* note 11, at 1086–88 (agreeing with Justice Breyer’s concurrence in *Reed*).

tection of the First Amendment.”<sup>193</sup> Due to the pervasive nature of speech and expression, there is still the problem of the limiting principle. Thus, even if we were to embrace a generally more capacious scope of the right,<sup>194</sup> and perhaps particularly if we sustain a robust level of protection within that ambit, we will still face limiting principle cases and need a method of approaching them.

It may be easy to understand the freedom of speech as an abstract liberty right, with its scope obvious (be it “speech,” “information,” or “expression”). But the seeming obviousness of First Amendment coverage obscures the other important social values that expanding it upsets—including normative and institutional values such as equality and workplace order (Title VII), democratic decision-making and reliance/promising norms (deregulatory First Amendment). At the frontiers of the First Amendment, we must both analyze social context carefully—and weigh the effects and normative implications of coverage decisions. This makes scope-of-the-right claims distinctive to claims in already covered spaces. It is also the beginnings of what I call a “realist approach” to the First Amendment.<sup>195</sup>

#### A. *The Stakes of Contemporary Coverage Cases*

This Section explores the stakes of current and emerging First Amendment coverage questions—now found most prevalently in conflicts between free speech and the regulatory state, and particularly the regulation of economic life. Commentators and judges alike increasingly describe these cases under the umbrella term of First Amendment *Lochnerism*.<sup>196</sup> These cases include challenges to business licensing laws, a wide range of labeling and disclosure requirements in domains from health and safety to foreign affairs, to the regulation of the pharmaceutical industry’s research and development of drugs.<sup>197</sup> And advocates of a libertarian vision of the First Amendment have anticipated claims against federal and state securities laws, among others.<sup>198</sup> As one libertarian free speech activist explained:

---

<sup>193</sup> 490 U.S. 19, 25 (1989).

<sup>194</sup> For an argument in favor of this proposition, see Bambauer & Bambauer, *supra* note 73, at 393–94.

<sup>195</sup> See Shanor, *supra* note 19, at 206. This approach is somewhat resonant with Mark Tushnet’s critical legal studies approach in *Art and the First Amendment*, *supra* note 115.

<sup>196</sup> See *supra* note 57 and related text.

<sup>197</sup> See *supra* note 44.

<sup>198</sup> Liptak, *supra* note 52. We can likewise foresee free speech challenges to disclosure mandates such as the SEC’s CEO pay ratio disclosure, Press Release, SEC, SEC Adopts Rule for Pay Ratio Disclosure (Aug. 5, 2015), <https://www.sec.gov/news/pressrelease/2015->

Over the past several decades, the Supreme Court has provided commercial speech more legal protection. Some on the Court have begun to accept the idea that the First Amendment does not discriminate between different forms of speech. But there is more to be done. For example, the Supreme Court and the Circuit Courts can strengthen the First Amendment by ending the exclusion of some forms of speech from constitutional protections by characterizing it as “conduct.”<sup>199</sup>

How should courts evaluate these proliferating claims? Is a securities registration statement<sup>200</sup> “speech” for First Amendment purposes, for instance? What about a sticker price?<sup>201</sup>

The interests at stake in these deregulatory First Amendment cases are at once various and the same. They span a huge range of social institutions and relationships, including the regulation of basic market norms, from business licensing requirements to reliance relationships—such as those that underlie commercial and securities fraud as well as malpractice. How do these different forms of communication, like registration statements, operate in the marketplace? Certainly registration statements provide information on which investors

---

160.html, the Labor Department’s anti-union consultation disclosure, Press Release, Dep’t of Labor, New US Department of Labor Rule Improves Transparency for Workers Considering Union Representation (Mar. 23, 2016), <http://www.dol.gov/newsroom/releases/olms/olms20160323>, and perhaps the FDA’s new warnings labels for opioid painkillers, Press Release, FDA, FDA Announces Enhanced Warnings for Immediate-Release Opioid Pain Medications Related to Risks of Misuse, Abuse, Addiction, Overdose and Death (Mar. 22, 2016), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm491739.htm>. We could quickly identify countless other potential cases. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234–35 (2015) (Breyer, J., concurring in the judgment) (enumerating areas of governmental regulation where presumption against constitutionality has no place, such as securities regulation, energy conservation labeling-practices, regulation of prescription drugs, doctor patient confidentiality, income tax statements, and hand washing signs at petting zoos); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (“There are literally thousands of similar regulations on the books—such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and . . . the requirement to file tax returns . . . . The idea that these . . . require an extensive First Amendment analysis is mistaken.”); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (listing the numerous regulations that could be challenged if the court recognized a broad First Amendment right against compelled disclosures).

<sup>199</sup> *Ninth Circuit Increases First Amendment Protections for Speech*, PAC. LEGAL FOUND. (Jan. 11, 2016), <http://blog.pacificlegal.org/ninth-circuit-increases-first-amendment-protections-for-speech/>.

<sup>200</sup> *See* 15 U.S.C. § 78l (2012) (providing requirements for what must be included in a registration statement).

<sup>201</sup> *Compare Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 131 (2d Cir. 2015) (holding that a state law forbidding credit card surcharges was a regulation of conduct, not speech), *vacated*, 137 S. Ct. 1144 (2017), *with* *Dana’s R.R. Supply v. Att’y Gen.*, 807 F.3d 1235, 1245–46 (11th Cir. 2015) (holding that a state law forbidding credit card surcharges was a regulation of speech).

depend, much like patients rely on information from their doctors. Do we need or want these sorts of trust relationships in our marketplaces—or should the realm of securities transactions be a domain of free normative contestation? Does the notion that “[u]nder the First Amendment there is no such thing as a false idea” and that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas”<sup>202</sup> make social sense in the context of securities markets?

At the same time, the deregulatory cases all implicate similar higher-level normative and institutional considerations. The coming First Amendment coverage issues point out larger normative and political questions about what role we, as a democratic society, will countenance for both courts and private parties in limiting the powers of the political branches to structure our economic and social life. Due to the pervasiveness of speech and expression, First Amendment claims can, in practice, be brought against nearly all manner of regulation.<sup>203</sup> This leaves the substantive shape of economic policy, at least under a regime of relatively stringent First Amendment protections, largely in the hands of resourceful litigants. The pervasiveness of speech and expression permits selective deregulation based upon the preferences of those able and interested in bringing such challenges. This has the potential—as Maria Glover has argued with regard to private arbitration regimes—to erode the substantive law itself.<sup>204</sup> The First Amendment deregulatory cases thus raise pressing questions about how much we, as a society, will acquiesce to the displacement of public decision-making by largely elite preferences.<sup>205</sup> We might also ask what conception of the state and citizen these sorts of cases embrace or prompt us to envision.<sup>206</sup>

---

<sup>202</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); *cf.* *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (protecting false statements regarding military awards).

<sup>203</sup> Shanor, *supra* note 19; *cf.* Schauer, *supra* note 67, at 191–92 (noting that the First Amendment has become broad enough to cover areas that do not appear to have any clear connection to “speech” as most people would understand the term).

<sup>204</sup> J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052, 3074–75 (2015).

<sup>205</sup> *Cf.* Raymond Fisman et al., *The Distributional Preferences of an Elite*, 349 *SCIENCE* 1300 (2015) (demonstrating divergent distributional preferences of Yale Law School students from a sample drawn from the American Life Panel, which is a broad cross-section of Americans, as well as an intermediate elite drawn from the student body at U.C. Berkeley); Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSP. ON POL.* 51 (2013) (reporting an empirical study of the divergence of elite preferences from the general public).

<sup>206</sup> *Cf.* Amy Kapczynski, *Intellectual Property’s Leviathan*, 77 *LAW & CONTEMP. PROBS.* 131 (2015) (asking these questions in the context of intellectual property law).

But the new *Lochner* cases also raise important questions beyond these democratic dimensions, about the extension of normative contestation into previously otherwise ordered domains. Michel Foucault identified something similar decades ago, saying that the “crucial problem of present-day liberalism” is “knowing how far the market economy’s powers of political and social information extend.”<sup>207</sup> By this I mean two things, interrelated with my points about the social function and context of such things as securities registration statements and the potential of deregulatory cases to erode public decision-making. First, expanding the logic of the First Amendment political speech cases (and its traditional domain of strict scrutiny) expands the space for a type of social interaction that is not ordered. It is deliberately open to norm contestation—not just about beliefs on things from gay marriage to the best type of basketball shoe, but also how usual things are done. Do we sit down on the bus, kiss each other goodbye, or take our shoes off by the door? Do we know how promises work or how testing functions in an educational setting? Expanding the First Amendment’s core domain of norm contestation offsets other sorts of social orderings. Conversely, the argument that such normative contestation should be everywhere (or presumptively everywhere outside of the traditionally excluded categories), embraces a vision of the *person* and her social context that does not need other sorts of relationships, institutions, and orders—such as reliance relationships of trust upon a doctor’s advice or the structuring of communications in institutions like courthouses and schools.

Second, the combination of extending coverage without consideration of the normative and institutional consequences of doing so devolves the choice of whether a social institution should be ordered on norms other than contestation to those who can and do invoke First Amendment protections. This is not to say that cases which expand coverage in ways that offset the administrative state are necessarily neoliberal (or normatively suspect or ill-intentioned) or that the vision of the person they embrace is market-constructed.<sup>208</sup> It is to say that, due to the pervasiveness of speech and flexibility of its invocation, in coverage cases we give over not just substantive policy decisions to free speech claimants—but also decisions about whether norms and conventions other than contestation should structure and give meaning to our social lives.

---

<sup>207</sup> MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–79*, at 117–18 (Michel Senellart, ed., Graham Burchell, trans., 2004).

<sup>208</sup> Cf. Grewal & Purdy, *supra* note 55 (discussing the shift towards market-centered approaches in different areas of law).

*B. The Broader Stakes of the Boundaries of the First Amendment*

“We inhabit a *nomos*—a normative universe,” Robert Cover began his path-breaking work, *Nomos and Narrative*.<sup>209</sup> We create and maintain a world about right and wrong, lawful and unlawful, good and bad. To Cover’s list we might add the sublime, the tedious, the uncouth, the revolutionary, the cool, and the quotidian. Law, Cover pointed out, is one of the narratives that gives the world we live in meaning.

Cover’s insight was that “[t]he normative universe is held together by the force of interpretive commitments—some small and private, others immense and public.”<sup>210</sup> It is through their separation and interaction, through the act of constituting interpretive communities, with their common meanings, values, rituals, conventions, and narratives, that the law is created. The unity of meaning and the understanding of social life that each of these differing communities create, he says, is “shattered, in fact, with its very creation”<sup>211</sup> through its interaction with the diversity of others, and the clash with and attempt to forge a bridge between it and other social orders.

Cover’s discussion centers on insular sects and associations—such as the Amish and Mennonite communities.<sup>212</sup> But his analysis reaches beyond associations modeled on insular autonomy to “collective attempts to increase revenue from market transactions, to transform society through violent revolution, to make converts for Jesus, and to change the law or the understanding of the law.”<sup>213</sup> These groups, too, “have an inner life and some social boundary.”<sup>214</sup>

Beyond such more formal associations, we might add other social institutions and relationships, such as schools, churches, the dynamics of a doctor’s office, the floor of the stock market, or the commitments made in the moment of a marriage or purchasing a car. Those relationships and institutions have inner lives and boundaries, too. They adopt their own logics—some more or less complete in the worlds of meaning they plot—and thicker or thinner in the understandings of what actions and words within them mean.

Cover argues that cohesive communities are built on the background of pluralist contestation protected by the First Amendment.<sup>215</sup> “Such is the radical message of the first amendment: an interdepen-

---

<sup>209</sup> Cover, *supra* note 25, at 4.

<sup>210</sup> *Id.* at 7.

<sup>211</sup> *Id.* at 16.

<sup>212</sup> *Id.* at 32–33.

<sup>213</sup> *Id.* at 33–34.

<sup>214</sup> *Id.* at 34.

<sup>215</sup> *Id.* at 16–17.



dent system of obligation may be enforced, but the very patterns of meaning that give rise to effective or ineffective social control are to be left to the domain of Babel.”<sup>216</sup>

This Article’s analysis of First Amendment coverage suggests that conception is incomplete, if not reversed. The patterns of meaning that underlie our interdependent social institutions are not just created in the domain of Babel and by, as Cover says, the “problem of intelligibility among communities.”<sup>217</sup> They are also shaped by the norms of those communities and institutions—those cohesive social orders—themselves. It is against those cohesive social orders that the boundaries of First Amendment coverage are charted, and which, in some deep sense, they defend.

### CONCLUSION

Should the First Amendment extend to securities or commercial fraud, discovery rules, or conspiracy? Should it encompass ordinary contract law or malpractice? These are the sorts of questions that the current transformation of the First Amendment raises. But it also surfaces deeper normative questions about social ordering: Are securities markets, courts, or contracts the types of institutions we want defined by pluralistic contestation—or by other social structures and ordering assumptions?

In deciding coverage questions, courts and communities do not simply recognize pre-existing norms and institutions: They draw the lines of those social boundaries and form part of the forces that shape them and invite new worlds. The exclusion of Title VII from First Amendment coverage includes within workplaces individuals that otherwise would have been excluded, harassed, marginalized, or demeaned. Title VII’s exclusion contributed to the forging of modern workplace norms and a different sort of workplace pluralism. The Court’s decision, whether spoken or not, was a normative one not only about what our workplaces are and how words in them work—but also about what they should be. It is those sorts of fundamentally normative decisions that drawing the First Amendment’s borders demands and, regardless, cannot avoid.

Ultimately, the boundaries of the First Amendment not only reflect the sometimes pluralistic, and sometimes unitary, understandings of human expression—but also create and maintain those communities, their boundaries, and their worlds of meaning.

---

<sup>216</sup> *Id.* at 17.

<sup>217</sup> *Id.* at 17 n.45.