Session CLE 505 | Tweet Tweet: Corporations and the First Amendment

Session Description:
As they have grown larger and more influential, corporations and the First Amendment seem to be on a collision course. Social media platforms, for example, are being pressured to regulate divisive speech that threatens our democracy. The SEC has sought to impose more extensive Environmental, Social, and Governance requirements on corporations in response to their growing impact on society, sparking accusations that they are violating their freedom of expression. The courts will in the near future have to resolve the extent to which efforts to regulate corporations and require them to be regulators run against the limits of the First Amendment. This panel of experts will discuss the quickly evolving challenges in applying the First Amendment to the corporate context.

Moderator:
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Speakers:
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Ramya Krishnan, Staff Attorney, Knight First Amendment Institute
Felix Wu, Professor of Law, Cardozo Law
The topic of this panel, corporations and the First Amendment, is a broad one. The law is unclear and evolving. In this setting, we thought that the best way to provide an overview of the subject was to include a combination of scholarly articles and a comment on an SEC rule proposal. We hope that by reading these materials, the participant will get a sense of some of the complexities of the application of the First Amendment to corporate speech.

The first article, *Do Platforms Have Editorial Rights*, discusses the different ways in which social media platforms can control the content on their platforms. It discusses how such editorial rights may or may not be consistent with the First Amendment.

The second article, *The Commercial Difference*, explains how commercial and corporate speech should be analyzed differently from other forms of speech.

The third reading is a comment on the SEC’s climate disclosure rules. It explains why these rules do not violate the First Amendment.
DO PLATFORMS HAVE EDITORIAL RIGHTS?

Ashutosh Bhagwat∗

Many regulatory proposals have been advanced, and in some cases legislatively enacted, to restrict how social media platform owners control what content they host, refuse to host, display, and prioritize. These proposals include, among other things, imposing common carrier status on platforms (an approach endorsed by Justice Thomas in a recent separate opinion), requiring viewpoint-neutral content moderation policies, and restricting or conditioning platforms’ Section 230 immunities. These proposals seek to restrict how social media platforms control the content that they host, refuse to host, display, and prioritize.

These proposals are in deep tension with the idea that platforms themselves have First Amendment rights to control what content is available or visible on their platforms—what I call editorial rights. In this article, I define and distinguish various kinds of First Amendment editorial rights. I then examine how, and to what extent, the courts have extended editorial rights to new communications technologies. I next turn to the specific question of internet platform editorial rights, concluding that social media platforms should indeed enjoy substantial editorial rights, though probably fewer than prototypical holders of editorial rights such as print newspapers. I conclude by considering whether current regulatory proposals are consistent with these editorial rights.

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INTRODUCTION

In a recent concurring opinion in Biden v. Knight First Amendment Institute at Columbia University, Justice Clarence Thomas discussed the relationship between the First Amendment and technology companies. He argued that the First Amendment might permit legislative restrictions on the power of technology companies to exclude users (a clear reaction to the Great Deplatforming that occurred after the Jan. 6, 2021 attack on the Capitol) because technology companies might legitimately be classified as common carriers or as places of public accommodation. In other words, a Supreme Court Justice in a published opinion encouraged legislatures to regulate technology companies—including and especially social media platforms—in ways that would restrict their control over the content available on their platforms.

At the same time, Congress is actively considering amending or even repealing Section 230 of the Communications Decency Act, as a means to force social media platforms to alter how they moderate content (Republicans claim the platforms discriminate against conservative content, and Democrats claim they are insufficiently

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1 141 S. Ct. 1220 (2021) (Thomas, J., concurring). The opinion concurred in the grant of certiorari and remand with directions to dismiss. The litigation arose as a successful challenge to President Trump’s actions blocking critics from commenting on his Twitter feed, which he and the White House described as an “official” account. The case became moot when President Biden succeeded Trump.

Do Platforms Have Editorial Rights?

Both of these developments run contrary to the idea that platforms themselves have First Amendment rights to control what content is available or visible on their platforms—what I call editorial rights. Justice Thomas explicitly attacks this idea, and Section 230 reformers do so implicitly. This article will explore the legitimacy of these attacks.

I begin by identifying and clarifying the nature of First Amendment editorial rights and their relationship to other regulatory issues such as publisher liability. I then consider how editorial rights have played out with respect to new technologies. In light of this history, I next turn to the specific question of internet platform editorial rights, concluding that social media platforms should indeed enjoy substantial editorial rights (though probably fewer than prototypical holders of editorial rights such as print newspapers). I conclude by considering some implications of this conclusion for nascent regulatory proposals.

I. Editorial Rights

Historically, the core protection provided by the Speech and Press Clauses of the First Amendment was the right to express one’s own choice of ideas, and to distribute them as widely as one chooses, free of governmental interference. In addition, since the 1943 flag salute case, there has also been a related right against compelled speech. The exact nature and contours of the latter right, however, are still quite indeterminate, and I for one have expressed doubts that such a right even belongs in the expressive and political provisions of the First Amendment (as opposed to the Religion Clauses). But for now, the right remains in place and indeed has expanded in scope in recent years.

Finally, however, the Court has also recognized that owners of expressive platforms that communicate their own speech or the speech of others have a right to choose what to include and what not to include on their platforms. These editorial rights are somewhat related to both the speech and compelled speech rights, but I

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would argue they are distinct, especially with respect to third-party content. Editorial rights are not a form of pure speech. When a platform carries third-party content, interference with editorial freedom does not involve suppression of the regulated entity’s own speech. Social media owners are different from traditional media such as newspapers in this regard; though they control the speech available on their platforms, they do not generate it, nor do they choose what should be displayed for most content (though as we shall see, many platforms do exercise control over what content attains prominence).

Editorial rights are also not pure rights against compelled speech, for two separate reasons. First, one aspect of editorial rights—the right to carry third-party speech that the government disapproves of—has nothing to do with compelled speech. Second, even when the claimed editorial right is to refuse to carry government-favored speech, pure compelled speech doctrine is a poor fit because editorial rights apply even when it is highly unlikely that the speech at issue would be attributed to the regulated entity/platform owner. Admittedly, the Supreme Court has occasionally recognized rights against compelled speech when misattribution was unlikely; but those cases inevitably involve harms to dignitary and conscience interests, which arguably derive from the Religion Clauses—not the Free Speech Clause. In any event, whatever their source those rights are surely not available to the sorts of publicly-traded corporations that typically claim editorial rights. A free-speech-based editorial right—rooted in instrumental concerns—to reject speech is therefore distinguishable from the personal, dignitary right to refuse to associate with speech inconsistent with personal values (whatever the source of the latter right).

For all of these reasons, editorial rights are best understood as a third, distinct right of free expression protected by either the Free Speech or Free Press Clauses of the First Amendment. Just as with compelled speech, however, the nature and reach of such rights remain murky. Editorial rights are of course well established

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6 Bhagwat, supra note 4, at 308–09.
7 Id. at 310.
8 The Court’s decision granting statutory conscience rights to a corporation in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), involved a private, family-owned corporation, not a publicly-traded one lacking a small group of identifiable owners. Admittedly, the largest social media firm, Facebook, is under the control of one individual (Mark Zuckerberg), but it is nonetheless a publicly-traded firm with myriad owners, unlike Hobby Lobby.
with respect to traditional print newspapers. But who else enjoys such rights is unclear. Some telecommunications entities—notably those historically treated as common carriers (e.g., telephone and telegraph companies)—by definition do not possess meaningful editorial rights, since the primary obligation of common carriers is to accept all customers and content on a nondiscriminatory fashion. At the other extreme, websites that are highly selective about the content they carry, such as nytimes.com and Huffpost.com, must possess strong editorial rights by way of analogy to print newspapers; it would, after all, be mad to treat the print and online versions of the New York Times differently in this regard, just as it would be mad to treat the New York Times and HuffPost differently. But beyond that, much uncertainty remains.

While issues regarding editorial rights have always arisen, as the newspaper cases demonstrate, debates over the nature and reach of such rights are now coming to a head because of the rise in importance of social media platforms. There can be no serious doubt that in recent years social media platforms have become, as the Supreme Court recently said, “the most important places . . . for the exchange of views.” But while this development has had the obvious advantage of democratizing public discourse, it has also generated huge amounts of controversy over such issues as foreign intervention in elections, the spread of falsehoods and conspiracy theories including false claims of election fraud, and ultimately the Great Deplatforming of President Trump following the January 6, 2021 attack on the Capitol. 


47 U.S.C. § 202; see also U.S. Telecom Ass’n v. FCC, 295 F.3d 1326, 1328–29 (D.C. Cir. 2002) (applying the FCC’s two-prong test for identifying a common carrier, as determined in the NARUC cases (NARUC v. FCC, 525 F.2d 630, 640–41 (D.C. Cir. 1976); NARUC v. FCC, 533 F.2d 601, 608–09 (D.C. Cir. 1976))).


In response to such controversy, there have inevitably been calls for reform, which have recently risen to a crescendo. Notable examples of such calls include Justice Thomas’s proposal to impose common carrier obligations on such platforms, as well as numerous calls from Congress and others for Section 230 reform—including requiring viewpoint-neutral social media content moderation policies, as proposed by Senator Josh Hawley and Dean Erwin Chemerinsky with his Berkeley School of Law colleague. In at least one instance, this has resulted in legislation, in the form of a Florida statute prohibiting platforms from banning politicians. In light of these developments, the question of whether Internet platforms possess editorial rights, and if so to what extent, becomes crucial to determining the permissibility of such regulations.

A. The Forms of Editorial Rights

Before turning to the main question of social media editorial rights, it is necessary to consider and dissect the nature of such rights, because editorial rights are not a monolith but rather come in different forms. To begin with, a distinction must be drawn between positive and negative editorial rights—i.e., between a right to include on one’s platform expression that the government disfavors and a right to exclude information that the government would mandate. This distinction has obvious parallels to the distinction between the basic free speech right and the right against compelled speech; but, as noted above, the parallel is not exact.

Nonetheless, it may well be that positive editorial rights should receive stronger constitutional protections than negative editorial rights, just as the right to speak is more robust than the right not to speak. In both cases, the reason for the difference

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16 Prasad Krishnamurthy & Erwin Chemerinsky, How Congress Can Prevent Big Tech from Becoming the Speech Police, THE HILL (Feb. 18, 2021, 8:00 AM), https://perma.cc/G8EJ-3XCM.


18 Admittedly, the Court has at times insisted upon “[t]he constitutional equivalence of compelled speech and compelled silence.” Riley v. National Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988). Given the ubiquity of disclosure obligations in the commercial and campaign finance contexts, however, these assertions cannot be taken entirely seriously.
is that the expressive injury, and potential distortion of public discourse, caused by state restrictions on what content platforms are permitted to include are obvious and severe; but the distortion caused by forced inclusion of content is clearly less so, as long as the platform owner is permitted to prominently disassociate itself from the required content and indicate that the content is government mandated.

Second, editorial rights encompass not only the right to carry or exclude content, but also how to present it and what content to emphasize. With respect to the traditional media, this editorial right encompasses the decision to highlight some content on a newspaper front page or magazine cover, while burying other content inside the paper or magazine. With broadcast and cable television channels, this editorial power is most obviously exercised when programming is allocated “primetime” slots, while other programming is relegated to 2 a.m. With cable television operators, the decision on which channels to grant preferred (i.e., low) channel numbers is similarly an editorial one. With Facebook, the decision on what content to highlight in users’ feeds, and what content to deemphasize, is similarly an editorial one.

Another, related distinction that might be drawn is between a right/obligation to store content on a platform in a way visible only to active searchers and a right/obligation to display content to users. With respect to pre-digital platforms such as print newspapers, this distinction of course had no meaning since all content was physically included. With respect to cable television operators, again the distinction was not meaningful because there are no “hidden” channels.

But with respect to a social media platform, especially the dominant Facebook, the distinction is potentially important. Facebook’s decisions regarding what content it chooses to display in its users’ “feeds,” and what content it hides, constitute some of the key editorial, business decisions that the platform makes (along with, of course, what content to block and what content to label). On the flip side, to have content available on Facebook but not prominently displayed on individual feeds makes it far less likely that the content will be seen, since to search for hidden content one must learn through some other communications media that it exists (at which point requiring its availability on Facebook may be pointless). One can assume that Facebook and other platforms would care more about controlling what content they display than what content they merely host, suggesting that the right to/not to display should be more robust than the right not to host; though to be sure, even the latter obligation might be objectionable either if the platform faces
capacity constraints or does not wish to be associated with particularly vile content. It should also be noted that this distinction, and the assumption that the right to, or not to, display is more robust, lies at the center of Eugene Volokh’s contribution to this Symposium.19

Finally, it is important to recognize that even when editorial rights exist, how the government interferes with those rights may well be constitutionally relevant. Regarding disfavored content, for example, presumably a prohibition on carrying the content constitutes a greater First Amendment burden than, say, a requirement that the content be accompanied by a warning label, something that platforms today do voluntarily, but in this instance would be attributed to the government. Similarly, if the government is to mandate carriage of particular content, for reasons already noted the harm of such a mandate would be mitigated (though not eliminated) so long as the platform can clearly state that the content is state mandated and disown it. Indeed, absent the ability to do so the violation of editorial rights merges with a compelled speech violation of the most egregious form, especially if the compelled content goes beyond demonstrably true facts.

In short, editorial rights can take a range of different forms, and can be interfered with in a variety of ways. When the rights of traditional vehicles such as print newspapers were disputed, these distinctions had little significance because the strong presumption was that any state interference with editorial rights violates the First Amendment. As we shall see, however, as the Supreme Court has extended editorial rights to new, electronic media, fine distinctions have taken center stage. And so it is likely to be with social media and other Internet platforms.

B. Editorial Rights and Platform Liability

Finally, it should be obvious that there is a close relationship between editorial rights and vehicle/platform liability for the speech of third parties, and this fact too has important implications for platform rights and responsibilities. To begin with, it should be obvious that a complete lack of editorial rights precludes liability. It is completely incoherent to impose common carrier requirements, which require firms to carry the speech of others on a nondiscriminatory basis, on a communications vehicle and then impose liability on the carrier for that speech. Such liability punishes them for communications beyond their control and incentivizes them to

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engage in conduct (blocking illegal content) that is in fact itself illegal. When criminals use cell phones to plan or carry out a crime, no one sues or prosecutes the phone company.

On the other hand, it is precisely because newspapers can decline advertisements, and printers can refuse to print materials, that we have generally held them civilly and sometimes criminally liable for content they disseminate. It should be remembered that John Peter Zenger, the most famous seditious libel defendant in colonial American history, was a printer and publisher, not primarily an author. In other words, we have long presumed that strong editorial rights imply strong legal responsibilities to reject illegal content.

Even here, though, there are ambiguities because of the arguably perverse incentives created by liability. Benjamin Franklin (in his capacity as a printer, not a Founding Father) once wrote an editorial defending himself against criticism for an advertisement that he printed, by arguing that printers are and should be willing to print almost any legal content. Franklin was to some extent analogizing printers to common carriers, on the theory that because printers as a group controlled a rare resource critical to communications—the printing press—they should encourage a diversity of voices. Excessive liability would disincentivize such choices and encourage printers and other distributors of third-party content to publish only “safe” speech—a concern that, of course, has led the modern Supreme Court to place limits on publisher liability.

The question of editorial rights and liability has been particularly fraught with respect to social media and other Internet platforms such as search engines. While the first part of Section 230 famously gives Internet platforms immunity for third-party content they carry, as if they were common carriers, the second part of Section 230 protects from liability the good faith content moderation (i.e., editorial) decisions of platforms. As such, Section 230 grants online platforms the benefits of common carrier status (immunity) without the burdens (obligations to serve), and

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21 See Benjamin Franklin, Apology for Printers, PENNSYLVANIA GAZETTE (June 10, 1731), https://perma.cc/83V7-X8NP.

it also grants such platforms the benefits of traditional media (editorial rights) without the accompanying burden (liability for illegal content). This fact is undoubtedly the source of much modern criticism of the legal regime within which Internet platforms operate today.

II. EDITORIAL RIGHTS AND TECHNOLOGY

As the previous discussion indicates, the problem of editorial rights is not a purely modern or "technology" issue, as editorial disputes have arisen even in the context of the most traditional communications vehicle, print newspapers. But as communications has become dominated by electronic communications, and especially electronic vehicles that primarily carry the speech of others, the question of when, and to what extent, owners of such vehicles should enjoy editorial rights has become more important and more disputed.

When the issue came up with regards to the first important electronic mass media—broadcast radio and television—the Court gave a mixed answer but largely rejected strong editorial rights. Most famously, in the Red Lion case the Court upheld the Federal Communication Commission's (FCC's) Fairness Doctrine, which imposed significant restrictions on broadcasters' editorial rights including by imposing a "right of reply." The Court later struck down similar statutory restrictions on newspapers, thus making clear that broadcasters' First Amendment editorial rights were substantially weaker than traditional media. In particular, the Court in Red Lion sustained the FCC's "personal attack" rule requiring broadcasters to grant individuals and groups subject to attacks upon their "honesty, character, integrity or like personal qualities" notice, and an opportunity to respond using the broadcaster's facilities. This holding is, of course, a strong rejection of broadcasters' negative editorial rights to reject government-favored content. The question of positive editorial rights (i.e., the right to distribute disfavored third-party content) does not arise much in the broadcaster context because broadcasters are not truly platforms for others' speech, and so editorial and direct free speech rights merge. It should be noted in this context that the Court has sustained restrictions

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25 Red Lion, 395 U.S. at 373–74.
on broadcasters’ ability to distribute some speech—in particular, an “indecent”
comedy monologue\textsuperscript{26}—even though a bookstore surely could not be punished for
distributing similar content.\textsuperscript{27} To be sure, it seems safe to assume that the Court
would hold some interferences with broadcasters’ control over content, such as
viewpoint-based carriage requirements, to be unconstitutional; broadcasters do
possess some negative editorial rights, unlike common carriers. But they are clearly
very limited.

When the Court was subsequently faced with questions regarding editorial
rights of more recent technologies, however, it has been far more receptive to con-
stitutional claims. Most importantly, the Supreme Court has held that cable televi-
sion operators, meaning the entities that own and operate the physical infrastruc-
ture of wires that bring cable television programming into the household, possess
constitutionally protected “editorial discretion over which stations or programs to
include in its repertoire.”\textsuperscript{28} This is notable because, as with social media platforms
but not with broadcasters, the choice of content carried by cable operators—that is
to say, the particular combination of cable television channels offered to customers
and the programming that those channels offer—is truly third-party content. The
channel lineup of a cable operator is not something that cable viewers would con-
sider to be some sort of ideological choice by the operator, nor would viewers at-
tribute the content of those channels—\textit{i.e.}, the programming—to the cable opera-
tor. After all, the typical cable television provider carries, simultaneously, CNN, Fox
News, and MSNBC. It also carries the major broadcast networks, cable channels
such as HBO, and often on-demand pornography. No rational viewer could or
would think that a cable television provider such as Comcast is consciously endors-
ing, or associating itself with, such a wide array of content and political slants.

Importantly, however, while the Court has granted significant editorial rights
to cable operators, those rights are not absolute and are probably weaker than those

\textsuperscript{26} FCC v. Pacifica Found., 438 U.S. 726, 750–51 (1978) (ruling for the FCC on its decision to
censure the broadcasting of a satirical monologue titled “Filthy Words”).


\textsuperscript{28} Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636–37 (1994) [hereinafter \textit{Turner I}] (quoting
City of Los Angeles v. Preferred Commc’ns, Inc., 476 U.S. 488, 494 (1986)); \textit{see also} Denver Area
agree that cable television operators possess editorial rights, even though the Court splintered as to
the actual restrictions challenged in the case).
of traditional print media. This is evident from the ultimate outcome in the *Turner Broadcasting* decision. *Turner* involved a challenge to the FCC’s “must carry” rules, which required cable operators to carry the signals of local broadcast television stations, free of charge and on low channel numbers. The first time a challenge to these rules reached the Court, it held in the language quoted above that the rules implicated the First Amendment editorial rights of cable operators, and so triggered heightened scrutiny. It also held, however, that the rules were content neutral, and therefore subject to intermediate rather than strict scrutiny. Ultimately, in the second *Turner* decision the Court upheld the must-carry rules. Relying significantly on the fact that cable operators (at the time) typically were monopolists with bottleneck control over wireline television programming into the home, the Court concluded that must-carry rules survived intermediate scrutiny because they advanced important congressional interests in preserving free, over-the-air broadcast television.

The *Turner* litigation (and other cable television cases) thus establish that, while cable operators have significant editorial rights to control their channel lineup, Congress may interfere with those rights if it has sufficiently important policy objectives. However, three limitations of this holding should be recognized. First, the *Turner I* Court explicitly stated that cable operators had greater First Amendment rights than broadcasters. Second, the *Turner* cases only involved interference with cable operator’s negative editorial rights to refuse carriage of government-favored channels. It is doubtful that the case would have come out the same way if the government had attempted to forbid operators from carrying particular channels (albeit, in the pre-digital era of limited channel capacity, must-carry in effect did require operators to drop channels—but it was those of the operators’, not the government’s choosing).

Finally, and most importantly, the must-carry rules were upheld because they were deemed to be content neutral. If the rules were classified as content-based, as a 4-Justice dissent in *Turner I* argued, there is little doubt that they would have

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29 *Turner I*, 512 U.S. at 630–32.
30 Id. at 660–61.
31 Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (1997) [hereinafter *Turner II*].
failed strict scrutiny. Nonetheless, it is doubtful that the Court would tolerate even comparable content-neutral interference with print newspapers’ editorial rights, such as, say, requiring newspapers to randomly publish letters to the editor or columns submitted by the public (though admittedly the issue has never been litigated). Thus, while Turner clearly extends editorial rights to electronic media platforms, it also suggests that the physical and economic nature of that media is relevant to determining the scope of those rights.

After the rise of the Internet, the question of editorial rights and new technology reappeared. With respect to non-platform, content-providing websites not primarily dedicated to third-party content, the issue has rarely arisen because the government has rarely tried to interfere with their content—and when it has, as with indecent or sexually oriented content, the relevant laws have invariably been struck down (though, to be fair, non-platform cases tend to implicate primary speech rights rather than editorial control). With respect to platforms, as noted below, the existence of Section 230 has largely obviated disputes by substituting (for now) statutory for constitutional protections.

As a result, editorial issues have arisen most clearly regarding Internet Service Providers (ISPs), as a consequence of the net neutrality rules adopted by the Federal Communications Commission (FCC) in March of 2015. Net neutrality rules, in broad terms, forbid broadband ISPs from discriminating among websites in providing access to end users. The legal basis for the FCC’s Order was its decision to reclassify ISPs as common carriers, by labeling them “telecommunications services” providers under the Federal Communications Act. When the FCC’s Order

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34 Miami Herald Pub’g Co. v. Tornillo, 418 U.S. 241, 256–57 (1974). The Court struck down a right-of-reply statute that applied to newspapers, but because the right of reply in that case was triggered by attacks on political candidates, it was in effect content based, id. at 256–57. Dictum in the opinion, however, does express strong hostility to any statutory right of access to newspapers.


was challenged in the D.C. Circuit, a panel upheld the Order by a 2-1 vote.\textsuperscript{37} The majority opinion dealt primarily with regulatory and administrative law issues, but at the end of the majority opinion the court considered, and rejected, an argument that net neutrality rules violated ISPs’ First Amendment editorial rights (Judge Williams’s dissent did not address this issue).\textsuperscript{38} Briefly, the majority reasoned that common carriers have always been subject to nondiscrimination requirements because such carriers, like ISPs, carry “others’ speech, not a carrier’s communication of its own message.”\textsuperscript{39} The majority also rejected an analogy to cable television operators, to whom (as was just noted) the Supreme Court has granted editorial rights, on the grounds that ISPs do not have capacity constraints and so do not have to exclude some content if required to include other content.\textsuperscript{40}

When the ISPs challenging the net neutrality order sought en banc review, a majority of the D.C. Circuit rejected the petition.\textsuperscript{41} Then-Judge Kavanaugh, however, issued a lengthy dissent from denial of en banc review. In it, he explicitly argued that, like cable providers, ISPs enjoy strong editorial discretion, protected by the First Amendment, over the content they carry over their networks.\textsuperscript{42} The fact that ISPs did not communicate their own content was irrelevant, he argued, because neither do cable operators. Indeed, he argued that ISP editorial rights were less subject to regulation than cable operators because ISPs, unlike cable operators, do not possess market power.

Now that Justice Kavanaugh is on the Supreme Court, it is possible that his views will control a majority and lead to strong protection for ISPs (and the permanent demise of net neutrality). It should be noted in this regard, however, that Kavanaugh’s views are in deep tension with Justice Thomas’s views in \textit{Biden v. Knight First Amendment Institute at Columbia University}, discussed in the Introduction, that legislatures may classify platforms as common carriers—because if platforms can be so regulated, then a fortiori so can ISPs, which exercise far less control over content than platforms and have far less need to do so.

\begin{footnotesize}
\begin{enumerate}
\item U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).
\item Id. at 740–44.
\item Id. at 740.
\item Id. at 743.
\item U.S. Telecom Ass’n v. FCC, 855 F.3d 381 (D.C. Cir. 2017).
\item Id. at 431–35 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial for rehearing en banc).
\end{enumerate}
\end{footnotesize}
The converse of this point is that if then-Judge Kavanaugh was correct about ISP editorial rights, then social media platforms necessarily possess very strong editorial rights because they exercise far more control over content than ISPs and also do not possess the sort of physical monopoly that cable television providers do (though concededly, Facebook’s share of the social media market is very large). Even if Kavanaugh is wrong about ISPs, however (as I think he is), the question of social media platform rights remains very much an open one. In practice, the issue has not arisen because Section 230 provides strong statutory protections for platform editorial rights, mooting the constitutional issue. But as Congress contemplates Section 230 reform, the constitutional issue will of course arise. It is to that question, then, that we now turn.

III. Why Internet Platforms Should Have Some Editorial Rights

A. Why Rights?

In this subpart, I will argue that the same factors that in the past have led the Supreme Court to extend editorial rights to new communications technologies argue in favor of editorial rights for social media platforms. Indeed, I will argue that the case for platform editorial rights is stronger than that for other technologies such as cable television providers, and certainly than for ISPs.

Most fundamentally, the reason to grant social media platforms editorial rights is that they, unlike common carriers such as telephone companies (and unlike ISPs), are intentionally designed to provide a specific experience to users. While it is true that most of the content available on social media platforms is generated by third parties rather than the platforms themselves, social media is not a transparent conduit for speech such as a telephone system or ISPs. To the contrary, platforms famously moderate content extensively, making constant, value-based choices about what third-party content to permit on their platforms. It should be noted in

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43 Kavanaugh’s analysis in the net neutrality litigation, and in particular his analogy to Turner and cable operators, is unconvincing because as a historical matter ISPs, with rare exceptions, simply have not exercised control over the content they transport, nor have they had any reason to do so. As a result, they look far more like telephone carriers than they do platforms—much less content providers.

44 Eric Goldman made this point succinctly in a brief essay. See Eric Goldman, Of Course the First Amendment Protects Google and Facebook (and It’s Not a Close Question), KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV. (Feb. 26, 2018), https://perma.cc/UU8L-R72T. For a thor-
In this respect that social media platforms in many ways control content on their platforms far more than cable television operators. To give just one obvious example, the on-demand pornography (or for that matter the *Game of Thrones* HBO series) available on cable is not permitted on either Facebook or YouTube.

In addition to content moderation, platforms also typically employ algorithms that determine what content to show users, what content to emphasize, and what content to deemphasize. Such algorithmic controls, while not universally employed, are a major element of the design of, at the least, Facebook, the largest social media platform. Furthermore, Facebook and other platform owners are constantly tweaking and making deliberate choices about how their algorithms should operate, both for business reasons and for ideological ones (sometimes in response to public pressure). Facebook, for example, has deliberately adjusted its algorithms to deemphasize political content in favor of content linked to personalized groups, in response to claims that its previous algorithms contributed to political polarization. In short, platforms are editors, and their editorial decisions are central to their functionality, their relationship to society, and their very existence.

Finally, social media platforms lack the sort of market power enjoyed by traditional common carriers, as well as by cable television operators during the pre-streaming era, when the *Turner* litigation occurred. Platforms may benefit from network effects, but they are not natural monopolies. Alternative social media platforms like Facebook, Twitter, Snap, and Instagram can and do coexist; and this diversity includes ideologically oriented platforms such as 4Chan, 8Chan, and Parler. This diversity, and lack of physical monopolies, cuts strongly against imposing

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*Adult Nudity and Sexual Activity, Facebook: Community Standards,* https://perma.cc/VQY7-R2NZ.


Insofar as there are smaller platforms that do not moderate content and do not utilize algorithms, their claim to editorial rights would undoubtedly be much weaker, since their operations, unlike those of the major social media platforms, would resemble traditional common carriers. Needless to say, however, such platforms, if they exist, are not major players in this field.
Do Platforms Have Editorial Rights?

common-carrier-like restrictions or nondiscrimination requirements on social media platforms (i.e., stripping them of editorial rights). The reason is that if a user is unsatisfied with a platform’s content moderation—which is to say editorial—decisions, the user remains free to seek an alternative platform more to their liking, as illustrated by the migration to Parler following the Great Deplatforming of President Trump.49

In addition to these factual arguments, basic free speech principles support granting social media platforms editorial rights. The reason we grant editorial rights to other media such as newspapers and websites that provide their own content is because we think public discourse is enhanced when publishers are able to present coherent, consistent products with consistent messages. Fox News is not CNN, and the Wall Street Journal editorial pages are not the same as those of the New York Times. Furthermore, we believe that this diversity of perspectives advances public debate despite some risk of ideological sorting (conservatives watching Fox News and reading the Wall Street Journal, liberals doing the same with CNN and the New York Times). Permitting the creation of such coherent and consistent messaging50 is the very purpose of First Amendment editorial rights. Part of the reason why we consider such coherence desirable is that while debate across perspectives is of course a valuable part of public discourse, so is discussion within ideological groups to develop and enhance their particular message(s).51

Indeed, it would seem fundamental to the very concept of democratic citizenship that we must permit individuals to choose what information and perspectives to focus on. Or conversely, it is entirely inconsistent with our system of popular

49 See Yelena Dzhanova, Top Conservative Figures Are Tweeting to Advertise Their Parler Accounts After Trump was Permanently Banned from Twitter, BUSINESS INSIDER (Jan. 9, 2021, 7:17 AM) (though the accounts had to be accessed via the Parler website since hosting services like Google Play had begun to remove the app).

50 In a paper analyzing compelled speech, Eugene Volokh described an analogous concept he labeled called “coherent speech products.” Eugene Volokh, The Law of Compelled Speech, 97 Tex. L. REV. 355, 361–63 (2018). The concept is not quite the same as what I describe because Volokh appears to be primarily envisioning first-party speech, rather than platforms for third-party content. Nonetheless, the argument I make here for platform editorial rights surely carry over, fully, to products such as newspapers, which publish their own content.

51 For a fuller development of this argument, tying it to the implied First Amendment right of association, see ASHUTOUSH BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 56–57 (2020).
sovereignty and democratic self-governance to permit the State to choose what information is “appropriate for” or “beneficial to” citizens, and then force it upon them. We do not, after all, require liberals to watch Fox News, or conservatives to watch CNN, and could never do so consistent with the First Amendment. Yet imposing viewpoint neutrality, nondiscrimination, or common carrier requirements on social media platforms does precisely the same thing. It denies platforms the ability to create ideologically coherent packages of content, and so denies platform users the ability to select among such packages. Such regulation is no different than legally requiring Fox News to provide airtime to Rachel Maddow or requiring CNN to provide time to Laura Ingraham—laws which presumably all would agree would violate the First Amendment editorial rights of those news channels, and for good reason. To deny social media platforms, unquestionably the new dominant media for political and social discourse, the same freedom makes little sense.

In short, assuming that the purpose of the First Amendment is to enhance public discourse, we as a society have long believed that publishers contribute best to that discourse when they are able to provide coherent messages, not a cacophony of voices randomly strung together. It should be noted in this regard that highly partisan media platforms (i.e., newspapers) were the norm for most of American history; it was not until the Twentieth Century that the concept of a “nonpartisan” press became dominant.\textsuperscript{52} To give a famous historical example, during the 1790s Benjamin Franklin’s grandson, Benjamin Franklin Bache, published a newspaper named The Aurora, which was tied to the developing Democratic Republican Party led by Thomas Jefferson and James Madison. During John Adams’s presidency, The Aurora published an article describing President Adams as “blind, bald, crippled, toothless,” and “querulous.”\textsuperscript{53} Bache was, for this affront, criminally prosecuted by the Adams Administration under the Sedition Act of 1798 (Bache died while awaiting trial). That such media partisanship sharpened disagreements (what today we call political polarization) in the extremely divisive politics of the 1790s seems clear; but it seems equally clear that by presenting the People with clear political and ideological choices it also strengthened the young American Republic, leading ultimately to consolidation of power by the Jeffersonians following the crucial election of 1800. The same may well be true of platform publishers today, just


as it was for more traditional ones.

If anything, the fact that modern social media platforms rely on third-party content, rather than their own, strengthens rather than weakens the argument in favor of editorial autonomy. The starting, but widely shared, assumption here is that democratic self-governance and republican government rely on public discourse;\(^5^4\) and further, that both are enhanced when that discourse is truly \textit{public}, meaning open to the public at large. While historically a partisan press permitted those few who had access to the press—\textit{i.e.}, political and social leaders—to create and shape groupings of citizens with shared values and perceived interests, social media permits citizens themselves to engage in discourse, both with leaders and among themselves, and so to participate in that creative, shaping process. Thus, the Internet has democratized not just speech but also association and assembly.\(^5^5\) Admittedly, granting platforms editorial rights leaves citizen groups at the mercy of the platform owners’ decisions to permit or deplatform such groups, including ideologically driven decisions;\(^5^6\) but to deny platforms such rights would leave such groups at the mercy of government regulation that would inevitably also favor some groups over others, surely a worse outcome. And in any event platforms, unlike the government, do not monopolize power and so if a group is denied access to one platform (say Facebook), it can always migrate to another (say Parler). A group disfavored by the government would have no such exit option.

Finally, the argument that because the major social media platforms today claim \textit{not} to engage in ideologically based moderation, they have no need for editorial rights, is wrong for three different reasons. First, it is irrelevant. Even if platforms such as Facebook have not engaged in ideologically-based moderation, they still use their algorithms to control users’ experiences on their platform, making them more engaging (and arguably more addictive, which is the source of much criticism of Facebook and Twitter). It is worth remembering in this context that the First Amendment protects entertainment as well as political and ideological speech,


\(^{5^6}\) Such deplatforming decisions are not uncommon. See, e.g., Joshua Partlow, \textit{Facebook’s Decision to Shut Down Militia Pages Prompts Backlash Among Some Targets}, \textit{Wash. Post} (Aug. 21, 2020).
Second, it is untrue. Social media platforms’ terms of service and other moderation rules are replete with ideological choices. The decisions by Facebook and Twitter to ban hate speech, glorification of violence, electoral falsehoods, and even nudity are in fact ideological choices. To consider just nudity, the enormous struggles Facebook faced early in its existence over defining nudity and determining how to apply its prohibition to breastfeeding women\textsuperscript{58} or the famous Napalm Girl photograph,\textsuperscript{59} illustrates the charged ideological questions that can arise in enforcing even seemingly simple rules. Moreover, social media firms’ willingness to engage in arguably ideological content moderation is evolving. Twitter started life as an “anything goes” platform,\textsuperscript{60} and has rapidly moved in recent years to exercise extensive control over content.\textsuperscript{61} Just the events of January 2021, when multiple platforms decided to deplatform the President of the United States, show how quickly these practices are evolving.

Finally, there is a logical error in conditioning constitutional rights on their exercise. By that logic, only current gun owners would have Second Amendment rights—but that obviously cannot be the law. Similarly, a printer’s Ben Franklin-like commitment to generally publish all perspectives\textsuperscript{62} cannot mean that the printer has waived their right to reject content that is particularly objectionable in their (evolving) view. For the same reason, even if social media platforms today do

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\textsuperscript{59} Aarti Shahani, With ‘Napalm Girl,’ Facebook Humans (Not Algorithms) Struggle to be Editor, NPR (Sept. 10, 2016, 11:12 PM), https://perma.cc/HE6Q-N7WB.

\textsuperscript{60} See Farhad Manjoo, Twitter, It’s Time to End Your Anything-Goes Paradise, N.Y. TIMES (Nov. 22, 2017); see also Lindy West, This American Life: Ask Not for Whom the Bell Trolls; It Trolls for Thee, CHI. PUB. RADIO (Jan. 23, 2015), https://perma.cc/sVUC-8KJW. Lindy West’s segment on the harms of trolls led to Twitter’s then-CEO admitting the platforms failures to address harassment, Caitlin Dewey, Twitter CEO Dick Costolo Finally Admits the Obvious: Site has Failed Users on Abuse, WASH. POST (Feb. 5, 2015).


\textsuperscript{62} See Franklin, supra note 21.
not engage in ideological censorship,⁶³ that is no reason to believe that they have waived that right, given the extensive other moderation that they undoubtedly do engage in.

**B. Which Rights?**

For all of the reasons stated above, it seems unexceptional that social media platforms are entitled to First Amendment editorial rights. But as the discussion to this point, especially of the Court’s approach to broadcasters and cable television operators, indicates, to say that entities have editorial rights does not mean that they enjoy all editorial rights or that those rights are equally strong (i.e., equally exempt from government regulation). This subpart considers which editorial rights platforms should enjoy, and which should be more (or less) robust than others. Put differently, I will consider here what aspects of platform editorial rights should be considered near inviolable, meaning subject to regulatory control only to advance extremely important state objectives, and what forms of rights might be subject to greater regulation. The distinction drawn here has obvious parallels to the standard free-speech dichotomy between content-based restrictions (triggering “strict” scrutiny) and content-neutral regulations (triggering “intermediate” scrutiny); but for reasons that will be explained, the analogy is imperfect.

At first cut, seemingly the strongest editorial right a platform must possess is the positive right to include any legal content it desires on its platform. For the state to interfere with this right not only directly interferes with the platform’s editorial control, but it also directly infringes on the free-speech rights of the individual who posted the content. Since such regulations necessarily specify what content is forbidden, such regulatory intervention is presumptively unconstitutional (i.e., subject to strict scrutiny) under standard First Amendment doctrine, if challenged by the speaker. Even if the speaker does not assert their right to speak, however, a platform should similarly be able to assert its editorial rights to invalidate any such regulation. As we shall see, however, this simple fact dooms many regulatory proposals (primarily from the political left) directed at social media platforms.

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⁶³ Whether or not they do so turns entirely on the definition of “ideological.” If by that one means that platforms favor “liberal” over “conservative” content, there appears to be no evidence that they do. But if a ban on hate speech can be considered ideological, then the major platforms clearly engage in such behavior.
On the other hand, regulatory interference with negative editorial rights, by requiring inclusion of specified content, certainly remains constitutionally troubling but might be defensible in specific circumstances. The problem with such inclusion requirements, to begin with, are two-fold. First, and foremost, such inclusion undermines a platform’s ability to create a coherent user experience; and concomitantly, it interferes with the ability of groups of users to develop shared beliefs and values, by interposing the state’s own preferred beliefs into the conversation. As such, forcing content onto platforms interferes with both editorial and associational values. Second, requiring inclusion of content has the potential to distort public discourse, by overemphasizing the preferred positions of the state at the expense of the views of the public as expressed in posts by users, a clear violation of the democratic principles that underlie the First Amendment. As Madison put it, in a “Republican Government . . . the censorial power is in the people over the Government, and not in the Government over the people.”64

For all of these reasons, there should generally exist a presumption against state-imposed inclusion of content onto platforms. But it need not be absolute, because inclusion of content clearly has less impact on either editorial integrity or public discourse than suppression of content. Requiring content carriage does not actually suppress any messages, and so long as platform owners can label required content as such, specifying that it is state-imposed rather than platform- or user-generated, the risk of confusion is also reduced. Furthermore, unlike with, say, a newspaper, inclusion of government-mandated content on a platform constitutes less of an interference with First Amendment interests because platforms are already dedicated to hosting content generated and selected by third parties, with only modest control (which is also why interference with negative editorial rights is analytically distinct from compelled speech).

Nonetheless, it seems clear that regulations that require platforms to carry content expressing the government’s own ideological preferences are out of bounds. Such rules would create the greatest distortions of public discourse and seem to have no strong justification since the government remains free to circulate its preferred message using its own means. For this reason, a law that, for example, would require a social media company to display messages discouraging smoking/drug

64 New York Times v. Sullivan, 376 U.S. 254, 275 (1964) (quoting 4 ANNALS OF CONGRESS 934 (1794)).
use/premarital sex would be clearly unconstitutional.

On the other hand, requirements of non-ideological, factual content, even though it is chosen by the government, seem less problematic. Thus regulations that require platforms to prominently disclose their own content moderation practices, for example, are surely not terribly troubling. And one could imagine a myriad of other factual content not directly related to the platform’s own policies, such as displaying polling hours and locations near in time to an election or displaying the locations of shelters during a natural disaster. Surely these advance strong state interests while imposing little or no harm to editorial rights or public discourse, so long as the quantity of mandated content remains modest (modest because if content requirements become ubiquitous, they would threaten to crowd out platform- and user-favored content\(^65\)). Somewhat oddly, in the context of non-platform compelled speech the modern Supreme Court has invalidated such factual disclosure requirements unrelated to the speaker’s product of services;\(^67\) but again, given that platforms are in the business of displaying third-party content with few restrictions, requiring some additional, unobjectionable content seems a minor burden on their editorial rights.

As a sidelight, it should be noted that content compulsions, including disclosure requirements, are almost always content based, since it is generally meaningless to require publication of content without specifying what content is to be published (the exception would be things such as common carrier regulation, or a requirement that newspapers publish letters to the editor on a random basis). As such, the fact that a content compulsion is “content based” cannot in itself make such a requirement constitutionally suspect or subject to strict scrutiny, at least in the context of commercial interactions, since this would sound the death knell for

\(^65\) It is noteworthy in this respect that in the non-platform context of compelled commercial speech, the Court has upheld compelled disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available.” NIFLA, 138 S. Ct. at 2372 (quoting Zauderer v. Off. of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)). If so, then a similar disclosure requirement when services are actually being provided is surely permissible as well.

\(^66\) Cf. Am. Beverage Ass’n v. City & Cnty. of San Francisco, 916 F.3d 749, 757 (9th Cir. 2019) (en banc) (citing NIFLA to invalidate a warning requirement on advertisements of sugar-sweetened beverages because the size of the warning drowned out the advertisers’ speech).

\(^67\) See NIFLA, 138 S. Ct. at 2372.
all commercial disclosure requirements (and the Supreme Court’s suggestion otherwise in the NIFLA case\textsuperscript{68} must be incorrect). This is one important way in which negative editorial rights differ from positive rights to publish disfavored content, because content-based prohibitions on content are presumptively invalid, for the reasons laid out above.

To this point, we have considered interferences with platform editorial control that either prohibit, or require, specified content. As discussed earlier,\textsuperscript{69} however, the state has a larger regulatory repertoire than that. Consider a hypothetical legal requirement that platforms label specific content as false, or a requirement that platforms post warning labels or links to trusted sources of factual information (as many already do) when specific topics such as COVID-19 vaccines are the subject matter of a post. Notice that such requirements implicate both positive and negative editorial rights. They implicate positive rights because a platform’s decision to display specific user content triggers legal consequences.\textsuperscript{70} They implicate negative rights because the legal remedy is to force platforms to post content of the government’s choosing.

Nonetheless, it seems plain that labeling requirements are less intrusive on editorial discretion than flat bans because platforms remain free to post any material they wish, to control the prominence of those materials, and to disassociate themselves from any government-mandated label by captioning the label as such. On the other hand, there is an obvious concern that regulatory authorities will select what content to target for labeling for ideological reasons, which would violate the cardinal rule against ideologically-based infringements of negative editorial rights. As a consequence, at a minimum courts should approach labeling or linking requirements with a high degree of skepticism, and uphold them only if the government has a strong regulatory interest, the information labeled is uncontroversially factual and false, and the information the platform is required to link to (if any) is uncontroversially factual and true.

Moving beyond government efforts to mandate what content is, or is not, available on platforms, one can also imagine any number of other ways in which laws

\textsuperscript{68} See id. at 2371 (suggesting that because the notice requirement in that case was “a content-based regulation of speech,” it was presumptively invalid).

\textsuperscript{69} See discussion supra in Part I.A.

\textsuperscript{70} See supra note 34, discussing Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241 (1974).
might interfere with platform editorial discretion. At the most extreme, some have proposed regulation that treats platforms as common carriers, or alternatively as state actors. The purpose and result of such regulation would be to eliminate all platform editorial rights by requiring them to host and display all legal, First-Amendment-protected content on a nondiscriminatory basis.

Another obvious, and today salient, form of regulation is laws which require platforms to host not specific content, but rather users which the platform would rather not. Such interference could take two distinct forms. First, if platforms were subjected to common-carrier-like regulations as Justice Thomas has urged, then platforms would be required to accept all users, capacity permitting (as with the major platforms it generally does). As Christopher Yoo’s contribution to this symposium points out, that does not necessarily mean that platforms are deprived of all control over content on their platforms;71 but there can be no doubt that in practice control over speaker identity is correlated with control over content and so implicates editorial rights, even if (a big if) such legislation does not deny platforms editorial control altogether.

Second, however, one can also imagine laws which forbid platforms from deplatforming a specific class of users—as in fact Florida has done with respect to politicians,72 in obvious response to the deplatforming of President Trump in January of 2021. Such legislation has the direct and obvious effect of denying platforms one powerful remedy—temporary or permanent deplatforming—against users who regularly violate content policies, which in itself interferes with editorial freedom. Leaving aside remedial authority, however, a requirement of including specific users has obvious parallels to the must-carry rules that the Supreme Court permitted the FCC to impose on cable television operators. In some respects, such a requirement is less burdensome on platforms than cable operators because including one set of users does not displace others, unlike with cable television in an era of limited channel capacity. Nonetheless, just as the Turner Court held that must-carry rules implicate editorial rights, so surely do laws such as the Florida legislation. Whether, like must-carry, such laws can nonetheless be justified we will consider in the next Part.

Another way in which regulation can interfere with editorial discretion without outright imposing or banning content is to exert authority over prominence—which is to say, over which content will be easily visible to users, for example by featuring prominently in Facebook newsfeeds. The analog equivalent would be to permit newspapers to print whatever they wish, but to assert control over what sorts of stories appear on the front page. Control over prominence can take a number of forms.

First, and most likely, would be legal requirements that platforms determine prominence randomly or on a viewpoint-neutral basis. This is essentially the result that Ohio’s Attorney General is seeking with respect to Google searches in the litigation he has launched against Google. Alternatively, regulations might require certain kinds of content—perhaps concerning the statements or activities of politicians—to be given prominence over others. Both sorts of legal strictures interfere directly with editorial rights, since surely determining prominence is at the heart of what many platforms do; but it is equally obvious that a nondiscrimination requirement is less problematic than state manipulation of feeds to push its own content. The latter sort of regulation, by explicitly distorting public discourse, runs up against fundamental First Amendment values, and would surely be invalidated by any court to hear a challenge. The former, however, raises more complex issues that I will turn to soon.

Finally, let us consider the distinction that lies at the center of Eugene Volokh’s contribution to this symposium: the distinction between an obligation to carry content on a platform that is accessible via search (what he calls compelled hosting), as opposed to an obligation to actually display content (which was analyzed above as interference with negative editorial rights). Volokh argues that under current Supreme Court precedent, an obligation to host third-party content would not violate the First Amendment, even if an obligation to display content would. While I do not fully agree with Volokh’s argument for reasons too complicated to fully lay out here, I do agree that so long as a platform does not face a capacity constraint,

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73 Daisuke Wakabayashi & Cecilia Kang, Ohio’s Attorney General Wants Google to be Declared a Public Utility, N.Y. TIMES (June 8, 2021).
74 Volokh, supra note 19.
75 I disagree with Volokh mainly because neither of the two key cases Volokh relies upon—Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), and Rumsfeld v. FAIR, 547 U.S. 47 (2006)—
the intrusion on editorial rights is clearly far less severe in this situation than with compelled display. As such, a compelled hosting requirement might survive First Amendment scrutiny if the government could demonstrate a sufficiently strong regulatory justification.

Several caveats are necessary here, however. First, the capacity point is important. If a platform did have capacity constraints (which mega-platforms such as Facebook, Twitter, and YouTube do not, but smaller platforms might), then compelled hosting would require the platform to jettison other content that it preferred, a serious intrusion on editorial control. Second, if a platform was owned by an individual, a group of like-minded individuals, or perhaps a closely held corporation such as Hobby Lobby, the owner(s) might well have a conscience-based right to not be associated with content contrary to the owner’s values, such as requiring a conservative religious platform to host pornography. And lastly, given the existence of multiple alternative platforms it is far from clear what the government interest would be in forcing a mega-platform to host content. After all, to search for content one must generally know of its existence, and if one knows it exists, there is no reason to believe a theoretical searcher would not also know on which other platforms to seek the content. As such, what is gained by foisting a hosting duty on Facebook or Twitter is far from clear.

What becomes evident out of the above discussion is that while platforms undoubtedly enjoy a range of editorial rights, not all such rights are equal. Some are well-nigh absolute, but others can and should be subject to restrictions if necessary to achieve strong enough social goals. With that in mind, we can now turn to specific regulatory proposals advanced in recent years and evaluate them under the First Amendment.

IV. IMPLICATIONS AND QUALIFICATIONS

If I am correct that the First Amendment grants important, albeit limited editorial rights to social media platforms, this has important implications for currently circulating reform proposals. Many such proposals are entirely inconsistent with editorial rights, while others will have to be modified to ensure that burdens on such rights are minimized. Yet others pose no First Amendment concerns at all.

involved intrusion on editorial control over a communications platform, and while Turner Broadcasting did, I (as discussed earlier), unlike Volokh, read the Court there as recognizing editorial rights, albeit ones subject to limitation.
The most radical regulatory proposals regarding social media platforms are undoubtedly those that would treat platforms as common carriers (Senator Bill Hagerty introduced legislation in April of 2021 that would do just that\(^7\)) , places of public accommodation, or sometimes as “utilities.” This approach has of course been endorsed by Justice Thomas,\(^77\) as well as others.\(^78\) Such an approach would subject platforms to strict nondiscrimination requirements with respect to users and, presumably, content, which means that platforms would be required to post all (legal) content on a first-come, first-served basis so long as the platform has capacity. In a similar vein, a number of recent legislative proposals (all introduced by Republicans) would, without explicitly labeling platforms as common carriers, forbid platforms from removing or restricting any lawful content and so achieve much the same ultimate outcome.\(^79\)

Leaving aside what a terrible idea this is (who exactly wants to create social media platforms flooded with hate speech, non-obscene pornography, or other content that Eric Goldman and Jess Miers call “lawful, but awful”\(^80\)), under the analysis presented here all these proposals are quite clearly unconstitutional. To believe that legislatures have the power to simply designate platforms as common carriers (as Justice Thomas apparently does) or to otherwise eliminate their ability to remove lawful content is necessarily to embrace the position that platforms have no First Amendment editorial rights, since the essence of editorial rights is to choose


\(^77\) See supra note 1 and accompanying text.


\(^80\) Eric Goldman & Jess Miers, Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules, 1 J. FREE SPEECH L. 191, 194 (2021).
content. But it is of course the essential thesis of this paper, set forth in the previous Part, that platforms do indeed have significant First Amendment editorial rights. If that is so then legislatively-imposed common carrier, public accommodation, or utility status for platforms is out of the question, as is a prohibition on removal of lawful content, since obviously legislatures cannot by fiat eliminate First Amendment rights.

A close relative of common carrier regulation is legislation restricting platform power to deplatform—i.e., to permanently ban individuals from posting on their platforms. As noted earlier, Florida has recently adopted legislation which imposes fines on social media platforms that deplatform politicians, and other states including Texas are considering similar legislation. As noted in the previous Subpart, legislation restricting deplatforming (or alternatively, requiring access for users) has obvious parallels to the “must-carry” rules that the Supreme Court upheld for cable television operators in the Turner litigation, despite the Court’s conclusion that cable operators possessed editorial rights. Thus, restrictions on deplatforming are not as obviously unconstitutional as imposing common carrier status on platforms.

Even under this view, however, the Florida legislation and its kin raise severe constitutional concerns because they do not neutrally regulate deplatforming decisions, but rather single out a favored set of users—politicians—and then flatly prohibit their deplatforming no matter how egregiously a user violates platforms’ moderation policies. The legislation seems clearly to violate the First Amendment for two separate reasons. First, the legislation severely restricts platform editorial control over a very important group of users—politicians—because under the legislation politicians can be secure in the knowledge that the worst that can happen to them for violating platform policies is to have individual posts removed. As such, it obviously incentivizes serial violations on the hopes that some will get through the platform’s enforcement mechanisms, which in turn strips platforms of effective editorial rights with respect to this class of speakers.

But second and even more fundamentally, one of the key reasons why the

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81 S.B. 7072, 2021 Leg. (Fla. 2021).
83 It is also probably preempted by Section 230; but that is a topic beyond the scope of this paper.
FCC’s must-carry rules were upheld in *Turner* was that the Court concluded that the rules were not based on the content carried by the favored speakers—broadcasters—but rather by the desire to preserve the economic viability of a particular communications technology—free broadcast television.\(^{84}\) No such neutral justification can possibly be advanced, however, to explain a blatant preference for politicians over the general public in the Florida legislation.\(^{85}\) In context it is perfectly obvious that the only purpose, and the only consequence, of the law will be to protect specific users: politicians who wish to use social media to spread specific messages in violation of platform policies, including primarily falsehoods and hate speech, as well as justification, and glorification of violence. This is of course the antithesis of the neutrality commanded by the First Amendment as interpreted in *Turner* and so is unconstitutional.\(^{86}\)

It is, however, possible to envision more neutral and nuanced regulations of deplatforming decisions, which might survive First Amendment scrutiny despite the fact that they would undoubtedly burden platform editorial rights. At a minimum, legislation requiring platforms to follow specific and consistent procedures in making deplatforming decisions, and perhaps granting an internal appeals process—in short, the sorts of requirements that Facebook’s Oversight Board recently imposed in the context of reviewing President Trump’s deplatforming\(^{87}\)—probably should survive First Amendment scrutiny. Such procedural requirements impose a fairly limited burden on platform editorial control: while they do require platforms to follow consistent rules, and might slow down platform decisionmaking, they leave the ultimate, substantive power to decide what to do with platforms. And on the flip side, the state interest in protecting all users from inconsistent or discriminatory treatment by platforms seems obvious, given the enormous importance of

\(^{84}\) *Turner I*, 512 U.S. at 646.

\(^{85}\) The Florida legislature appears to have a particular predilection for self-serving and blatantly unconstitutional legislation of this sort; the right-of-reply statute struck down in *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974), also only benefited politicians.


 platforms in modern public discourse.

A more difficult issue would arise if legislation sought to impose legal restrictions on what sorts of substantive violations platforms can invoke to justify deplatforming. Such substantive regulation cuts closer to the First Amendment quick because it implicates platform authority to determine what sorts of content are more and less objectionable, surely a core editorial right. Put differently, for the state to determine what sorts of content does, or does not, justify deplatforming seems precisely the sort of substantive decision reserved to First Amendment editors because of both the importance of such control for platforms and the serious potential for ideological bias in such legislation (e.g., Republican legislatures prohibiting deplatforming for hate speech and Democratic legislatures requiring it).

Other close cousins of common carrier regulation are a recent proposal advanced by UC Berkeley Law Professor Prasad Krishnamurthy and Dean Erwin Chemerinsky to prohibit viewpoint discrimination by social media platforms, and separate proposals by Senators Josh Hawley of Missouri and Marco Rubio of Florida that would condition Section 230 immunity for social media platforms on their making politically neutral and/or viewpoint neutral content moderation decisions. These proposals would also appear to attack the core of the editorial right, which surely is to make ideologically based choices about the content that one carries free of governmental coercion, just as the core of the right to speak is to be free of governmental coercion based on the ideological views one expresses.

Hawley and Rubio do not address First Amendment concerns, but Krishnamurthy and Chemerinsky do. They argue that the Supreme Court’s Red Lion decision discussed earlier, upholding the FCC’s “Fairness Doctrine” and restricting broadcasters’ editorial rights, supports their nondiscrimination rule. Red Lion, however, has never been extended beyond the broadcast media, and when faced with the question the Supreme Court has repeatedly and forcefully argued that the

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88 Krishnamurthy & Chemerinsky, supra note 16.


Internet deserves full First Amendment protection\textsuperscript{91} rather than the attenuated protections granted to broadcasters.\textsuperscript{92} The reason for this is that the key justification for the \textit{Red Lion} decision was spectrum scarcity resulting in a paucity of broadcast licenses. But as the Supreme Court pointed out early in the Internet era in rejecting the \textit{Red Lion} analogy, there are almost no physical limits to how much content can be carried across the Internet.\textsuperscript{93}

Krishnamurthy and Chemerinsky also suggest that platform market power may justify treating them analogously to broadcasters. However, market power was not the basis for \textit{Red Lion}; it was the purportedly “public” nature of broadcast frequencies—an argument with no relevance to the privately-owned Internet. Furthermore, in \textit{Miami Herald v. Tornillo} the Court explicitly rejected the argument, in the context of print newspapers, that economic market power, or even monopoly, justified denial of editorial freedom.\textsuperscript{94} And even though some platforms such as Facebook probably do enjoy some level of market power, given the existence of numerous alternative platforms their market power cannot compare to that of newspapers with local monopolies, which were commonplace when \textit{Tornillo} was decided.\textsuperscript{95}

Krishnamurthy and Chemerinsky seek to distinguish \textit{Tornillo} on the grounds that “social media platforms do not and should not receive the same protections afforded to the press” (\textit{i.e.}, editorial rights) because Section 230 shields them from publisher liability. This, however, seems a bit of a non sequitur, assuming as it does that an easily modified or repealed statutory immunity can somehow strip the beneficiary of constitutional protections. Furthermore, it misses the point that the Supreme Court’s decision in \textit{New York Times v. Sullivan}\textsuperscript{96} in practice shields even newspapers from most publisher liability; yet obviously this decision did not have the consequence of stripping newspapers of editorial rights. For all of these reasons,


\textsuperscript{93} See \textit{Reno}, 521 U.S. at 870.


\textsuperscript{95} \textit{Id.} at 249 n.13 (noting that one-newspaper towns were at the time the norm).

\textsuperscript{96} 376 U.S. 254 (1964).
Krishnamurthy and Chemerinsky’s attempted extension of the Red Lion doctrine to social media does not withstand scrutiny.

Just as editorial rights are a formidable barrier to the mainly conservative proposals to require viewpoint neutrality on social media platforms, such rights similarly almost certainly doom some liberal proposals such as requiring platforms to block more falsehoods and hate speech.97 The reason is, quite simply, that both hate speech98 and falsehoods99 are fully protected under the First Amendment. And the First Amendment’s prohibition on content-based suppression of protected speech applies equally to government requirements that private actors suppress such speech.100 As such, users posting prohibited content would surely be able to successfully attack such laws; and in their absence, platforms claiming editorial rights should be able to do the same.

However, while a flat-out prohibition on falsehoods or hate speech cannot survive constitutional scrutiny, some narrower restrictions might. Thus, a narrow prohibition on falsehoods regarding, for example COVID-19 or voting rules, might survive intermediate or strict scrutiny,101 if written carefully. It is important not to lose track of the fact that the First Amendment does permit regulation even of protected speech, thereby restricting both speech and editorial rights, so long as the regulation serves urgent social goals and is written narrowly. Furthermore, when speech is unprotected there is no question that legislation can ban such speech, overriding both speech and editorial rights. Thus, there is no First Amendment barrier to laws requiring platforms to remove false commercial speech102 or hate speech that crosses the line into incitement of violence under the extant Brandenburg standard.103

97 See, e.g., Davey Alba, Facebook Must Better Police Online Hate, State Attorneys General Say, N.Y. TIMES (Aug. 5, 2020).
98 Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (plurality opinion).
101 In the Alvarez decision, which held that intentional falsehoods are protected speech, the Court splintered on the applicable standard of review for laws regulating falsehoods. 567 U.S. at 730–39 (Breyer, J., concurring in the judgment).
For similar reasons, the existence of editorial rights also does not in itself pose any obstacles to imposing greater liability on platforms for carrying unprotected speech, such as incitement meeting the Brandenburg standard, child pornography, and at least some speech that facilitates criminal activity.104 To the contrary, as noted above, normally editorial rights are linked with liability rather than immunity; it is only imposition of common carrier or nondiscrimination requirements that is inconsistent with liability. As such, recognizing platform editorial rights cuts in favor of, not against, platform liability. As of this writing Section 230 gives statutory immunity to platforms even for illegal content, but that is not constitutionally mandated. Indeed, in the 2018 FOSTA-SESTA legislation Congress carved out one area—platforms that knowingly permit their services to be used to facilitate sex trafficking—from Section 230 immunity.105 Whatever the wisdom of this legislation, which is disputed,106 there is little doubt that the First Amendment poses no barriers to it, or to other legislative proposals to expand Section 230 carve-outs.107

It should be noted, however, that the First Amendment is not entirely silent even on the question of liability for unprotected content—though the potential barrier is not (directly) editorial rights. Rather, the logic of New York Times v. Sullivan suggests that some limits on unlimited publisher liability are constitutionally required. Sullivan and its progeny famously held that the First Amendment required limits on the circumstances under which state law could impose liability for libel on newspapers, because of the chilling effects created by broad publisher liability. In particular, the Sullivan line of cases requires proof that newspapers acted with

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106 David McCabe & Kate Conger, Stamping Out Online Sex Trafficking May Have Pushed it Underground, N.Y. TIMES (Dec. 17, 2019).

Do Platforms Have Editorial Rights?

“actual malice”—i.e., with knowledge or reckless disregard of the falsity of the statement—before public officials or figures can recover for libel based on falsehoods printed in a newspaper. Moreover, the falsehood that provided the basis for the libel action in \textit{Sullivan}—a paid political advertisement—was third-party content and not the Times’s own reporting.\footnote{108} \textit{Sullivan}, 376 U.S. at 279–80; see also \textit{Curtis Publ’g Co. v. Butts}, 388 U.S. 130 (1967). A later case extends the “actual malice” rule to liability for intentional infliction of emotional distress. \textit{Hustler Magazine v. Falwell}, 485 U.S. 46, 56–57 (1988).

Just as it was unreasonable in 1964 to expect the New York Times to spot every factual inaccuracy in third-party advertising or even in its own reporting, it is surely even more unreasonable to expect social media platforms today to identify and suppress every instance of third-party posts containing false or illegal speech, given the sheer volume of postings on social media platforms.\footnote{109} The problem is compounded by the fact that the line between legal and illegal content is hardly clear, as Eric Goldman and Jess Miers point out in their contribution to this volume.\footnote{110} Obvious examples of line-drawing difficulties include the vague lines between unprotected “obscenity” and fully protected non-obscene pornography,\footnote{111} and between unprotected incitement and protected “abstract advocacy” of violence.\footnote{112} The consequence of imposing absolute liability on platforms for illegal content would therefore almost certainly be platforms engaging in massively overbroad moderation of speech—i.e., a major chilling effect on users’ speech.

And given the importance of social media platforms for social and political discourse in the modern era—at least as important as newspapers in the pre-Internet era—such chilling effects raise serious First Amendment concerns. Thus, it may well be that the First Amendment requires any reductions in Section 230 immunity to be tempered with some sort of scienter requirement for platforms, such as the...
“actual malice” standard. Importantly, this understanding—that the First Amendment protects unwitting distribution of illegal materials by platforms but not knowing distribution—is consistent with Justice Thomas’s suggestion in a recent opinion that the existing text of Section 230 is best read to not immunize knowing distribution of illegal materials (contrary to what most courts of appeals have held).¹¹³

Justice Thomas argues, as does Jack Balkin in this volume, that the better reading of Section 230, and a better legal fit for platform liability might be neither absolute immunity as courts have read Section 230, nor absolute liability as publishers historically faced, but rather common law distributor liability.¹¹⁴ Under such a regime, liability could be imposed only if a platform was aware that it was hosting illegal or unprotected content, but still refused to remove it—which in practice for platforms would mean a notice-and-take-down regime such as the one that already applies to content violating intellectual property laws. Such a regime would also displace the current rule that liability for libel may be imposed merely on a showing of negligence, with respect to claims brought by private figures regarding speech on matters of public concern.¹¹⁵ A chorus of appellate judges (in, not coincidentally, terrorism cases) have recently expressed agreement with Justice Thomas in this regard,¹¹⁶ and a group of Republican members of the House of Representatives have introduced legislation that would enact Justice Thomas’s reading into statutory text.¹¹⁷ All of this is clearly consistent with the First Amendment, and such a regime (or something much like it) may well be the minimum protection the First Amendment requires for platforms based on the reasoning in *New York Times v. Sullivan*.

Straying from constitutional law to policy for a moment, it should be noted that in the area of print publications, the Supreme Court has not interpreted the First


¹¹⁶ See, e.g., Gonzalez v. Google LLC, 2021 WL 2546675, at *32 (9th Cir. June 22, 2021) (Berzon, J., concurring) (arguing that Section 230 immunity should not extend to platform “activities that promote or recommend content or connect content users to each other”); id. at *38–*40 (Gould, J., concurring in part and dissenting in part). See also Force v. Facebook, 934 F.3d 53, 81–84 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part).

Amendment to limit publisher liability for speech not on matters of public concern (though admittedly it has been less than clear on this point). For newspapers, this is not a major problem because most content in such publications is presumed to be of public concern. Unlike with news media, however, with social media there can be no such assumption; to the contrary, much content on social media is purely private and often personal (I for one tend to use Facebook to report on nice hikes). The logic of the Court’s decisions would strongly suggest that there are no constitutional bars to imposing liability without proof of mens rea on platforms for hosting, for example, libelous private falsehoods.

Though I agree with this constitutional conclusion, I nonetheless believe that such liability would be a very bad idea. Creating a legal regime favoring political speech over personal speech on platforms, which a variable liability regime would surely do, would incentivize platforms to favor political over personal speech in their algorithms, and ultimately to sharply restrict personal posts, in order to minimize risk of liability. But many modern criticisms of social media assert that social media feeds are too politicized and tend to contribute to political polarization (though concededly serious doubts have been raised about the accuracy of these complaints). Hiking photos and cat videos do not polarize (except, I suppose, ailurophobes), but political content, especially in this day and age, often does. To create a legal regime that favors the latter over the former therefore seems, even if constitutional, utterly perverse.

Finally, I will close by considering some Section 230 reform proposals pending or recently proposed in Congress, and their constitutionality under the analysis set forth above. Most obviously, Congress of course has the power to completely repeal Section 230, as endorsed by both President Trump and President Biden during the 2020 presidential election, and by Representative Louie Gohmert of Texas in recently proposed legislation. After all, what Congress can pass it can repeal. As

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122 The proposed legislation is called the “Abandoning Online Censorship” or “AOC” Act.
the analysis set forth above argues, however, the logic of *New York Times v. Sullivan* argues that regarding third-party content on matters of public concern, the First Amendment would require proof of knowledge (or perhaps recklessness) before liability could be imposed on platforms (and with respect to matters not of public concern, policy and common sense strongly argue for the same). But statutory immunity is obviously not constitutionally mandated.

Other proposed legislation are even more likely to be constitutional. Consider, for example, the bipartisan legislation titled the “Platform Accountability and Consumer Transparency Act” or “PACT Act” (introduced by Senator Brian Schatz on March 17, 2021). This legislation imposes transparency and process obligations on platform content moderation by requiring platforms to publish their moderation policies, inform users of moderation decisions, and provide users with an appeals process to challenge such decisions (the Act also requires platforms to publish a transparency report every six months, providing statistics about its moderation decisions). Notably, the PACT Act in no way interferes with platforms’ substantive editorial discretion, but only adds fairly modest time and resource burdens on platforms in implementing their own chosen policies (importantly, the legislation exempts small individual and business providers, to ensure that the burdens it imposes are manageable). Given the important governmental interests the legislation advances in protecting users, and the minor and incidental burdens it imposes on editorial rights, it seems likely that the legislation, if passed, would and should survive any First Amendment challenge.

Similarly unproblematic is the “Limiting Section 230 Immunity to Good Samaritans Act,” introduced by a group of Republican House members in January of 2021. This law would require platforms to maintain written terms of service and adhere to them in good faith on pain of financial liability. The law also defines bad faith actions by platforms as including the use of algorithms that selectively enforce written terms of service. As I read the legislation, it does not impose any limits on what substantive provisions are contained within a platform’s terms of service, but merely requires publication and neutral adherence to such terms. So, if a platform *says* in its written terms that will not permit content that describes the result of the

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2020 presidential election as a fraud, that is fine so long as the platform neutrally enforces those terms. If this reading is correct then this legislation (unlike, say, requirements of viewpoint neutrality) imposes no burdens on platform editorial rights other than the trivial one of laying out its editorial policies in advance and in writing.\footnote{I read the word “selective” in the statute as requiring algorithms to be applied on equal terms to all users. If, on the other hand, the term is interpreted to restrict what algorithms the platform may use, or how algorithms might be trained, then the provision undoubtedly imposes severe and probably unconstitutional burdens on platform editorial rights.} Finally, requiring platforms to follow these written terms in good faith is analogous to enforcing neutral contract law against a platform, something that the Court has long held does not pose First Amendment concerns.\footnote{Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991).}

On the other hand, efforts to condition Section 230 immunity on specific, substantive changes to platform moderation practices (other than restrictions on illegal content) are far more problematic—as emblematized by Senator Hawley’s and Senator Rubio’s proposals to condition Section 230 on viewpoint neutral moderation.\footnote{See Josh Hawley, U.S. Senator for Missouri, supra note 15; Marco Rubio, U.S. Senator for Florida, supra note 89.} While presented as Section 230 reform, the Hawley and Rubio proposals in fact seek to impose an obligation on platforms—viewpoint neutrality—as a condition for a legal benefit with no relation to the condition; and which condition itself Congress has no power to impose directly. Moreover, the “benefit” Congress is granting here—Section 230 immunity—is, to some extent, constitutionally mandated for reasons already discussed.\footnote{“To some extent” because Section 230 clearly goes beyond constitutional requirements, at a minimum by not imposing liability even if scienter exists. See Eric Goldman, Why Section 230 Is Better Than the First Amendment, 95 Notre Dame L. Rev. Reflection 33 (2019).} As such, it is quite different from the financial subsidies that are the typical hook in unconstitutional conditions cases. Thus what Hawley and Rubio propose is analogous to Congress granting to the New York Times by statute immunity against libel liability somewhat greater than that constitutionally dictated by \textit{New York Times v. Sullivan}, on the condition that the Times include a mix of political perspectives, including conservative ones, in its editorial pages.

Finally, this is not a situation, such as in \textit{Rust v. Sullivan},\footnote{500 U.S. 173 (1991).} where Congress is
dictating how federal funds will be spent. It is rather leveraging a grant of immunity to interfere with constitutional rights, much as if a legislature conditioned a grant of qualified immunity to police officers on the condition that they do not publicly disclose official misconduct that they observed on the job. If the unconstitutional conditions doctrine has any meaning at all, therefore, such purported “conditions” cannot survive constitutional review.

A slightly more difficult question is posed by the Protecting Americans from Dangerous Algorithms Act introduced into Congress by Representative Tom Malinowski in March of 2021. The Act, in effect, seeks to reverse the holding in the Second Circuit decision in Force v. Facebook by amending Section 230 to permit civil actions under specific civil rights or anti-terrorism statutes to be brought against platforms, when the content that is the basis for the action was amplified or promoted by a platform’s algorithms. Senator Rubio’s recently proposed legislation contains a similar provision.

Given the analysis of editorial rights presented in Part III of this paper, there is no doubt that this sort of legislation burdens editorial rights since the use of algorithms to decide what content to promote is clearly, under that analysis, a core exercise of platform editorial rights (the analogy, recall, was to a newspaper’s decision regarding what stories to present on the front page). At first cut, however, the intrusion seems a relatively minor one, since it only covers content that could be the basis for civil liability under specific statutes, and therefore is itself unprotected. In practice, however, the burden on platforms would be enormous. After all, the driving force behind Section 230 immunity is the realization that platforms cannot

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132 934 F.3d 53, 66–68 (2d Cir. 2019).

133 MARCO RUBIO, U.S. SENATOR FOR FLORIDA, supra note 89.

134 In this regard, Senator Rubio’s proposal has similarities to proposals to read or amend Section 230 to eliminate immunizing of knowing distribution of illegal content. See sources cited supra notes 113–117. Difficult questions arise, however, about the extent to which algorithmic amplification can be defined as “knowing” conduct by a platform, given that mainstream platforms obviously do not write their algorithms to intentionally amplify unprotected content. But that is a question for another day.
effectively police the legality of third-party content. Given this reality, to deny immunity to algorithmically amplified content would in practice force platforms to entirely abandon algorithmic promotion or amplification, such as Facebook’s use of algorithms to choose what content to display prominently in users’ Newsfeeds, because of the risk that illegal content would be amplified (indeed, the Force litigation was based on the theory that algorithmically generated Facebook Newsfeeds contributed to several terrorist attacks by Hamas).

The legislation recognizes this reality by creating a safe harbor if platforms sort content “chronologically or reverse chronologically; by average user rating or number of user reviews; alphabetically; randomly; and by views, downloads, or a similar usage metric,” rather than using proprietary algorithms. The legislation thus, in practice if not in name, entirely strips platforms of a key editorial right—the decision on what content to emphasize or deemphasize. And while the government interest driving the legislation is undoubtedly substantial, the Supreme Court has repeatedly held that laws may not prohibit protected First Amendment activity in the name of proscribing unprotected content. Therefore, this legislation likely violates the First Amendment.

In conclusion, as the above discussion demonstrates, recognizing robust editorial rights for social media platforms does not spell the end of all regulation of content moderation practices. Reasonable, content-neutral efforts to protect consumers remain permissible, as do efforts to hold platforms responsible for the knowing hosting or distribution of illegal content. But the very purpose of First Amendment editorial rights is to keep the core decisions about what legal content to host, and what legal content to emphasize, in the hands of rights holders, in this case platforms. As such, legislative efforts to interfere with those fundamental decisions are necessarily unconstitutional unless they are necessary to protect extremely strong governmental interests, which is rarely the case.

CONCLUSION

In this paper, I argued that under both extant doctrine and first principles, social media firms should be entitled to significant First Amendment “editorial

rights” to control the content that is carried and highlighted on their platforms, despite the fact that that content is almost exclusively generated by third parties rather than the platforms themselves. I also explored the implications of finding such editorial rights for a slew of current regulatory proposals directed at social media. In brief, many of the more aggressive proposals—such as imposing common carrier status, requiring viewpoint neutrality in content moderation, or requiring greater moderation of falsehoods and hate speech—almost certainly violate the First Amendment. However, more modest proposals such as imposing liability on platforms for carrying content falling outside First Amendment protections, if coupled with a strong scienter requirement, is probably permissible.

My analysis here has been focused on social media firms, not other platforms such as Google’s search engine. Search is arguably different from social media because it is a less curated service, but Google undoubtedly does employ algorithms to determine what search results to prioritize, meaning that it is undoubtedly exercising some degree of editorial discretion. As a consequence, some commentators (including Eugene Volokh) have argued that the First Amendment fully protects search results.136 Whether services such as search should be treated as platforms possessing editorial rights is, however, an issue beyond the scope of this paper.

Regulation of web-hosting services such as Amazon Web Services (AWS) poses yet different questions. At first glance services like AWS are far less expressive or selective than social media platforms, and so nondiscrimination requirements seem less troubling. In other words, AWS and other web-hosting services may not enjoy any significant editorial rights because they are meaningfully distinct from both social media platforms and search in their relationship to, and control over, the content they host. Indeed, imposing nondiscrimination requirements on such services may actually strengthen the argument for granting social media platforms editorial rights because it would ensure that competing platforms, such as Parler, cannot be subjected to the sort of deplatforming that occurred in January of 2021,137 and so will remain viable alternatives to the dominant platforms such as Facebook and Twitter. For now, however, such questions must also be left for another day.


137 Apple, Google and Amazon Kick Parler off Their Platforms, N.Y. TIMES (Jan. 9, 2021).
The Commercial Difference

Felix T. Wu
THE COMMERCIAL DIFFERENCE

FELIX T. WU*

ABSTRACT

When it comes to the First Amendment, commerciality does, and should, matter. This Article develops the view that the key distinguishing characteristic of corporate or commercial speech is that the interest at stake is “derivative,” in the sense that we care about the speech interest for reasons other than caring about the rights of the entity directly asserting a claim under the First Amendment. To say that the interest is derivative is not to say that it is unimportant, and one could find corporate and commercial speech interests to be both derivative and strong enough to apply heightened scrutiny to the restrictions that are the usual subject of debate, namely, restrictions on commercial advertising and restrictions on corporate campaigning.

Distinguishing between derivative and intrinsic speech interests, however, helps to uncover three types of situations in which lesser or no scrutiny may be appropriate. The first is in the context of compelled speech. If the entity being compelled is not one with intrinsic speech rights, this undermines the rationale for subjecting speech compulsions to heightened scrutiny under the First Amendment. The second is in the context of speech among commercial entities. In these cases, the transaction may be among entities none of which merit intrinsic First Amendment concern. The third is in the context of

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unwanted marketing. It makes no sense to protect listeners’ access to information they do not want to receive.

Highlighting the difference that commerciality makes helps to better explain certain exceptions, or apparent exceptions, that existing case law already makes to heightened scrutiny. It also provides insight into a number of current controversies, such as those over cigarette and product labeling. It has particularly important implications for consumer privacy regulation, suggesting that regulation of both the consumer data trade and commercial data collection merit significantly less scrutiny than might be applied to restrictions on the privacy-invasive practices of ordinary individuals.
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INTRODUCTION

Courts and commentators have struggled for some time to determine what, if anything, is different about “commercial speech” or “corporate speech,” as compared to “fully protected speech.” Many share an intuition that either commercial speech, corporate speech, or both are in some way lesser forms of speech, less deserving of the protections of the First Amendment and more readily subject to government regulation.\(^1\) Others say there is no principled way to distinguish corporate and commercial speech from types of speech that the court fully protects, and thus see doctrines that treat commercial speech or corporate speech as their own First Amendment categories as unwarranted and unprincipled encroachments upon free expression.\(^2\)

This Article develops the view that corporate and commercial speech are different, but that whether the difference matters varies with the context in which the question arises. The key distinguishing characteristic of corporate or commercial speech is that the speech interest at stake in these contexts is “derivative,” in the sense that we care about the speech interest for reasons other than caring about the rights of the entity directly asserting a claim under the First Amendment.\(^3\) We assign such speech rights to the entity asserting them for instrumental purposes, to vindicate what are really the speech rights of others. In some cases, we may mean to vindicate the rights of others as listeners; in other cases, the rights

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1. See, e.g., Ohrailik v. Ohio State Bar Ass’n, 436 U.S. 447, 455-56 (1978) (recognizing a “commonsense” distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech” (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976))); First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting) (“[A]n examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not.”).


of others as speakers. To be sure, those third-party interests are potentially implicated in every dispute over speech. What makes corporate and commercial speech different is that those third-party interests are the only interests that matter.

The fact that a speech interest is derivative need not undermine its strength or importance. The key Supreme Court opinions on corporate and commercial speech have thus far arisen largely in the context of restrictions on commercial advertising and restrictions on corporate campaigning. In these contexts, the derivative nature of the speech interests at stake is entirely consistent with an argument that commercial speech and corporate speech should receive full protection under the First Amendment. Even if third-party interests are the ones that really matter, one could view those interests as being equally harmed whether the speech being restricted is commercial or noncommercial, corporate or noncorporate. For example, one could take the view that in all cases speech restrictions undermine the autonomy of willing listeners.

Distinguishing between derivative and intrinsic speech interests, however, helps to uncover three types of situations in which the regulation of corporate or commercial speech does not deserve the same First Amendment scrutiny as an equivalent regulation of noncommercial, noncorporate speech. The first is when the regulation compels speech rather than restricts it. Speech compulsions are problematic primarily because of their effects on the person being compelled. If the compulsion is directed not to a person, but to an artificial entity with no intrinsic rights to “freedom of mind,” then the rationale for heightened scrutiny of speech compulsions dissolves. The same can and should be said about compulsions directed to individuals who are acting in a commercial, rather than personal, capacity.

A second context in which the derivative nature of speech interests matters is that of speech that occurs among commercial

4. See id. at 1234 (distinguishing between a “passive derivative speech right,” one which is meant to protect the interests of listeners, and an “active derivative speech right,” one which is meant to protect the interests of other speakers).
7. See infra Part II.
entities. The paradigmatic commercial speech case envisions an advertiser communicating with a consumer. The paradigmatic corporate speech case is usually one in which corporations are speaking to voters. If heightened scrutiny of corporate or commercial speech is justified primarily by the interests of the noncommercial listener, then such scrutiny may no longer be justified when the listener is equally commercial. In that case, none of the parties to the transaction may have an intrinsic First Amendment interest, and thus, there is no third-party interest to protect by giving the speaker a derivative claim.

The third situation in which recognizing derivative interests matters is in the context of unwanted marketing. The problem of unwanted speech has often been conceptualized as a conflict between the speaker’s right to speak and the listener’s desire to avoid that speech. When the speech is commercial, however, there are no longer two sides in conflict. If the commercial speaker’s protection is derivative of the listener’s interests, then only the listener really matters. And if listeners’ access to information is the value being protected, then listeners who are trying to reject that information neither need nor want such protection.

Highlighting the derivative nature of corporate and commercial speech interests helps to better explain certain exceptions, or apparent exceptions, that existing case law already makes to heightened scrutiny. For example, antitrust laws have long prohibited price collusion among competitors, without worrying about any First Amendment limits on the government’s ability to stop one company from conveying price information to another.
Within the framework developed here, this result is easily understood as a natural consequence of the information being passed solely from one commercial entity to another. Similarly, the Fair Credit Reporting Act’s restrictions on disseminating consumer reports make perfect sense under a similar analysis.14

Understanding the “commercial difference” also has important implications for current controversies, ranging from cigarette and other product labeling to privacy regulation. In prior work, I examined the constitutionality of consumer privacy regulation, concluding that most such regulation should be subject to minimal First Amendment scrutiny as either a form of commercial compelled speech or a regulation of speech among commercial entities.15 This Article provides the general theoretical framework for the conclusions of that earlier work and broadens the application of the framework beyond the examples explored there.

This Article draws upon a broad literature that so far has generally addressed the relevant issues in isolation, with respect to commercial speech, corporate speech, compelled speech, or the interface between privacy law and freedom of expression.16 Bringing the disparate theories together within a single framework exposes the discontinuities among them and reveals why protection for commercial speech and compelled speech separately need not lead to the conclusion that commercial compelled speech should be equally protected or why skepticism about some types of privacy laws on free expression grounds need not suggest skepticism for all privacy laws on such grounds.

In what follows, Part I explains the theory of derivative speech interests and shows how a wide variety of conceptions of corporate or commercial speech fit the model. Part I.C describes why this framing does not necessarily change the results of the existing jurisprudence around corporate campaigning or commercial adver-

14. See infra Part III.A.
tisements. The subsequent Parts describe the types of cases in which the derivative status of corporate and commercial speech makes an important difference. Part II explores the implications for speech compulsions. Part III examines transactions among commercial entities. Finally, Part IV addresses restrictions on unwanted marketing.

I. DERIVATIVE SPEECH INTERESTS

Sometimes we recognize a First Amendment claim because there is intrinsic value in protecting the interests of the claimant. In the paradigmatic First Amendment case, the government has tried to prevent someone from speaking, and the silenced person is asserting a personal right not to have the government interfere with his or her speech.17 There may also be other people whose speech rights are at stake, but the claimant’s speech rights are at least among them.

In other cases, however, the entity asserting the First Amendment claim may not be one whose speech rights we actually care about. Instead, we allow such an entity to assert the claim in order to protect the interests of others. In such cases, we might say that the relevant speech interests are “derivative” rather than intrinsic.18 It could be that the ultimate interests are those of the audience or recipients of the speech.19 Or it could be that the First Amendment claim helps to protect someone else’s ability to speak.20

Corporate speech and commercial speech should both be understood to be derivative speech interests. In each case, the major justifications for generally protecting freedom of expression point toward protecting corporate and commercial speech only to protect the speech interests of others, not to protect any direct interest of the corporate or commercial speaker. This understanding of

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18. See Dan-Cohen, supra note 3, at 1233-34.
19. Dan-Cohen calls these “passive” derivative speech interests. See id. at 1234.
20. Dan-Cohen calls these “active” derivative speech interests. See id.
corporate and commercial speech need not undermine the existing doctrinal structures that the Supreme Court has built around these types of speech, but it does have important implications that the subsequent Parts will explore.

A. Corporate Speech

The status of corporations, as compared to natural persons, has been a pervasive and continuing source of controversy across many different areas of law. Prominent among the controversies is the question of what sort of protection corporate speech receives under the First Amendment, particularly in the area of corporate campaign speech and financing. The Supreme Court has alternately recognized a First Amendment right of corporations to contribute to campaigns, upheld a prohibition on using general corporate treasury funds to support or oppose political candidates, and then reversed course by striking down a prohibition on the use of general corporate treasury funds for electioneering. The Court’s decision in \textit{Citizens United v. FEC} in particular has generated not just academic commentary, but much public discussion about its merits both as a legal and social policy matter.

The debate over \textit{Citizens United} has sometimes been popularly framed as one about whether “corporations are people.” That

\begin{itemize}
framing, however, is not necessarily helpful to determine what rights (or obligations) corporations should have under the law or the Constitution. On the one hand, corporations certainly do not have the moral valence of human beings. On the other hand, corporations are legal constructs to which legal rights or duties can attach, just as they can to individuals.27

The academic debate over the nature of the corporation similarly does not determine how we ought to regard corporate speech.28 One view of the corporation is that it should be understood as a “natural entity,” in the sense that it arises in society through private, rather than state, action.29 The fact of private creation, though, does not determine the constitutional status of the thing created. Many objects of private creation, a building, say, surely lack constitutional rights.

Alternatively, a corporation may be nothing more than an aggregation of individuals.30 Yet, while in some circumstances aggregation seems to maintain or even create constitutional rights,31 in other circumstances, rights that are recognized at the individual level may not be recognized at the aggregate level.32

Finally, others have viewed a corporation as an artificial entity that owes its existence entirely to the state’s largesse.33 The artificial entity view might suggest that because the corporation is a

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27. See 1 U.S.C. § 1 (2012) (“In determining the meaning of any Act of Congress, unless the context indicates otherwise ... the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”).


29. See David Millon, Theories of the Corporation, 1990 Duke L.J. 201, 211.

30. See id. at 222-23.

31. Freedom of association, for example, arises fundamentally from the aggregation of individuals rather than from a single individual standing alone. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-59 (1958).

32. Under the doctrine of associational standing, for example, not every association can assert the rights of its members. See Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333, 343 (1977).

33. See Millon, supra note 29, at 206.
creation of the state, the state is free to impose whatever conditions it likes on its creation and that the corporation cannot have constitutional rights as against the state. The state’s power to create or destroy, however, does not necessarily entail a power to restrict constitutional rights in the objects of its creation, and thus, even under the artificial entity view, corporations might or might not deserve free speech rights.

Rather than looking to theories of the corporation, we need to look instead to theories of free expression to understand whether and why corporate speech deserves protection. Under any of the major theories of free expression, corporations might contribute in some way to the goals underlying those theories, but they do so instrumentally, rather than intrinsically.

One major strand of free speech theory values free expression because of the integral role it plays in the self-development of individuals. Speech and communication are necessary parts of defining one’s identity. If the government restricts the abilities of its citizens to express themselves, then it is also limiting those citizens’ abilities to construct their own identities and to choose their beliefs and values. Control over expression becomes control over thought. Such a situation upends the democratic order, allowing the government to control the identities of its citizens, rather than the other way around.

Values of autonomy and self-development, however, are grounded in the intrinsic worth of human beings as such. They matter because people matter. Corporations lack such intrinsic worth, and

34. Somewhat analogously, for example, the state’s power to create or eliminate limited public fora does not give the state carte blanche to discriminate among speakers within the fora it creates. See, e.g., Widmar v. Vincent, 454 U.S. 263, 267 (1981) (“Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.”).

35. See generally Tamara R. Piety, Brandishing the First Amendment: Commercial Expression in America (2012).


38. See, e.g., id. at 287 (taking as a foundational assumption “that, for the most part, we are individual human agents with significant (though importantly imperfect) rational capacities, emotional capacities, perceptual capacities and capacities of sentence—all of which
there is little reason to attach intrinsic value to the “self-development” of corporations, if such a concept even exists. Corporations themselves do not think or believe; they lack the “rational capacities, emotional capacities, perceptual capacities and capacities of sentience” that form the foundation for autonomy-based theories of free expression.

Another strand of free speech theory values free expression for its role in fostering deliberative democracy. Here too, individuals, not corporations, are the fundamental units of democracy, and it is the ability of individuals to make collective decisions that forms the basis for evaluating whether democratic ideals are being served.

Still another major strand of free speech theory posits that free expression is the means by which knowledge and truth are developed. Dissent should be tolerated not necessarily for its own sake, but because the dissenters might turn out to be right, and the dissenting views of one era might be the orthodoxy of the next. Governments cannot and should not be relied upon to establish what is true. Instead, truth will emerge, so long as all views are permitted to vie with each other in the marketplace of ideas.

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39. See Piety, supra note 35, at 58 (“Corporations are not human beings, so they lack the expressive interests related to self-actualization and freedom that human beings possess. Corporations are not moral subjects or ends in themselves. They are a means to an end.”).

40. See Shiffrin, supra note 37, at 287.

41. See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 12-16 (1948); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 24-26 (1971) (arguing that “the discovery and spread of political truth” is the only principled basis upon which to protect freedom of expression (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))).

42. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.”).

43. See id. (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market .... That at any rate is the theory of our Constitution.”); see also Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Calif. L. Rev. 2353, 2363 (2000) (“The theory of the marketplace of ideas focuses on ‘the truth-seeking function’ of the First Amendment.” (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988))). Daniel Farber takes the metaphor of the marketplace one step further, arguing that “because information is a public good, it is likely to be undervalued by both the market and the political system,” and therefore, information deserves special constitutional protection against regulation. Daniel A. Farber, Commentary, Free Speech Without Romance:
Truth-seeking theories of free expression are relatively listener-oriented and, thus, are most naturally regarded as ones in which speaker interests are derivative of listener interests, regardless of whether the speaker is a corporation. The concept of the marketplace of ideas paints a picture in which many competing ideas are all made available in the public square so that individuals have access to them all and, importantly, can exercise their own choices among them.44 Those individuals, the listeners, are the ultimate beneficiaries of robust competition among ideas, much as antitrust law posits that consumers are the ultimate beneficiaries of robust competition in the market for goods and services.

Nevertheless, one might see truth-seeking theories as implicating speakers’ interests as well as listeners’ interests. The way to truth might not be only through listeners’ access to competing views, but also through speakers giving voice to their own views. Many an idea that seems good in our heads may seem far less so once put into words.

But even if we acknowledge that speakers have an interest in truth seeking, that interest should still be regarded as derivative with respect to corporate speakers. Knowledge and truth can be understood as intrinsic values with respect to individuals, but for corporations, truth is fundamentally instrumental. Better information helps companies make money and increases overall economic efficiency. Those may be worthwhile social goals, but they are not the sorts of expressive goals protected by the First Amendment.45 In other words, the ultimate value of knowledge is the knowledge that individual people have. Corporations may play an important intermediate role—more on that in subsequent Parts—but corporate knowledge is not an end in itself.

Thus, regardless of which of the major theories of free expression one might adopt, corporate speech is a derivative interest under any of them. The fundamental values that the First Amendment protects, whatever they are, inhere in individuals, not corporations.

44. See, e.g., Hustler Magazine, Inc., 485 U.S. at 51.
45. See Neil M. Richards, Reconciling Data Privacy and the First Amendment, 52 UCLA L. REV. 1149, 1217-21 (2005) (highlighting the dangers of blurring the line between political and economic rights in First Amendment jurisprudence).
The *Citizens United* case is perfectly consistent with this view of corporate speech. Despite the sharp disagreements among the Justices in the case about the relative value—and danger—of corporate campaign speech, the competing opinions can all be read to focus at least in some measure on the derivative, rather than intrinsic, value of the speech. Perhaps unsurprisingly, the dissent quite explicitly adopted the view of corporate speech as a derivative speech interest. The dissent then went on to argue that a business corporation cannot be understood to speak for any particular individuals, whether customers, employees, shareholders, or officers or directors. The dissent further argued that protecting listeners’ interests is precisely what regulation of corporate campaign speech is designed to do.

But the majority opinion also described the relevant speech interests in derivative terms, focusing on the nature of the speech itself and particularly its value to listeners, rather than on any intrinsic rights in the corporation. The Court wrote that “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” Similarly, the Court focused on the need for corporate “voices and viewpoints” to “reach[] the public and advis[e] voters on which persons or entities are hostile to their interests.”

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46. Compare, e.g., *Citizens United v. FEC*, 558 U.S. 310, 446 (2010) (Stevens, J., concurring in part and dissenting in part) (“Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to ‘[p]reserve[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,’ protect the expressive interests of shareholders, and ‘[p]reserve ... the individual citizen’s confidence in government.’” (alterations in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 206-07, 206 n.88 (2003))), with id. at 360 (majority opinion) (“The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.... The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse ‘to take part in democratic governance’ because of additional political speech made by a corporation or any other speaker.” (quoting *McConnell*, 540 U.S. at 144)).

47. See id. at 466 (Stevens, J., concurring in part and dissenting in part) (“Corporate speech, however, is derivative speech, speech by proxy.”).

48. See id. at 467.

49. See id. at 469-72.


51. *Id.* at 354.
The focus in *Citizens United* was on the electorate, the recipients of the political speech at issue, not on the corporate speakers.

To be sure, there is other language in the majority opinion that seems to personify corporations and to cast them as “disadvantaged” or “disfavored” speakers, whose “voices” have been “muffled.” In each case though, such language is followed up with a focus on voters, or some other set of underlying individuals. In distinguishing cases in which the Court has allowed speakers to be disadvantaged, the Court wrote that “[b]y contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.” Later, in specifying who had been disfavored, the Court characterized the campaign restrictions as creating “disfavored associations of citizens,” suggesting a concern for individual speakers that might underlie the corporate form. Finally, the trouble with muffling voices was not the muffled entities’ inability to speak, but that then “the electorate [has been] deprived of information, knowledge and opinion vital to its function.”

Thus, the competing opinions in *Citizens United* can be understood not as disagreeing about whether voters should be the ultimate focus of the inquiry, but as disagreeing about whether voters’ interests would ultimately be served by preventing corporate voices from “drowning out ... noncorporate voices,” or by respecting those voters’ ability to receive all “voices and viewpoints” and then “to judge what is true and what is false.” The dissenters saw

52. *Id.* at 340-41 (“By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”).

53. *Id.* at 341 (“We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.”).

54. *Id.* at 354 (“The censorship we now confront is vast in its reach. The Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’” (alteration in original) (quoting McConnell v. FEC, 540 U.S. 93, 257-58 (2003) (Scalia, J., concurring in part and dissenting in part))).

55. *Id.* at 341.

56. *Id.* at 356.

57. *Id.* at 354 (alteration in original) (quoting United States v. CIO, 335 U.S. 106, 144 (1948) (Rutledge, J., concurring in the result)).

58. *Id.* at 470 (Stevens, J., concurring in part and dissenting in part).

59. *Id.* at 354-55 (majority opinion); see also Kathleen M. Sullivan, *The Supreme Court, 2009 Term—Comment: Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 144-45
government intervention as appropriate to protect voters, whereas those in the majority found the very idea of protecting voters from speech to be illegitimate. But all of the Justices seemed to agree that what ultimately matters is the relationship between government and voters, rather than the relationship between government and corporations and, in that sense, that corporate speech interests are derivative.

The Supreme Court’s decision in Burwell v. Hobby Lobby Stores, Inc., while in the distinct context of religious freedom rather than freedom of expression, similarly emphasized the instrumental nature of corporate rights. There the Court explained that the purpose of the “familiar legal fiction” of including corporations within the definition of persons “is to provide protection for human beings”:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.... Protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.
As in *Citizens United*, the Court in *Hobby Lobby* made clear that corporate rights are essentially a fiction, a means by which the rights of natural persons are protected.\(^63\)

Academic commentary on corporate speech supports the view that corporate speech interests are derivative. For example, in rejecting a distinction between commercial and noncommercial speech, Professor Martin Redish argues that the corporate nature of most commercial speech is no reason not to protect it.\(^64\) In doing so, however, he emphasizes “the free speech benefits that may flow to the listener or reader from reading or hearing speech emanating from corporations,” whether or not “the speaker itself deserves the benefits of the constitutional protection,” as well as the ways in which “resort to the corporate form can be viewed as a type of ‘catalytic self-realization’ that facilitates individuals’ efforts to realize both their goals and their potential.”\(^65\) Both of these are arguments about the derivative value of corporate speech, either to the audience or to individuals who underlie the corporate form. Thus, even those who view corporate speech as fully protected have done so on the basis of interests that lie outside the corporation itself.

**B. Commercial Speech**

Much of what has been labeled “commercial speech” under First Amendment doctrine is also corporate speech, and thus, the derivative nature of corporate speech interests carries over to most real-world examples of commercial speech. Not all commercial speech is corporate though,\(^66\) and moreover, the theory of commercial speech has not necessarily been thought to hinge on whether the speech is

\(^{63}\) Of course, the outcome of the *Hobby Lobby* case perhaps suggests that the derivative nature of corporate interests may not make much difference to whether those interests should be protected, at least according to the Court, but the outcome in *Hobby Lobby* need not dictate similar outcomes in the circumstances addressed in this Article. See infra note 179.


\(^{65}\) Id. at 87 (quoting Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998)).

corporate. Thus, the nature of commercial speech interests deserves its own analysis. What that analysis shows is that commercial speech interests are also derivative, in that it is the interests of the consumer-listeners that the doctrine is meant to protect.

Like corporate speech, protection for commercial speech has been both controversial and in flux over the past few decades. In the early part of the twentieth century, commercial speech fell wholly outside the First Amendment. Then, in the 1976 decision *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court held that commercial speech was protected by the First Amendment, albeit not necessarily to the same extent as noncommercial speech. Not long after, the Court articulated the intermediate scrutiny test for commercial speech restrictions that it continues to apply today. In the decades since, the Court has tended to strike down laws under the *Central Hudson* test, rather than uphold them, leading some commentators to suggest that in practice, the distinction between commercial and noncommercial speech may be disappearing.

Throughout the evolution of the commercial speech doctrine, even as its protection under the First Amendment has seemingly gotten stronger, the Supreme Court has consistently viewed the doctrine

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68. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no ... restraint on government as respects purely commercial advertising.”).
71. See Redish, *supra* note 64, at 67-68 (“In every recent commercial speech case decided by the Supreme Court, the First Amendment argument prevailed... While it would be incorrect to suggest that commercial speech is today deemed fungible with fully protected speech in all contexts, it is at least true that the gap between the two is far narrower than it was in 1976.” (footnote omitted)).
as designed to protect the interests of the audience. The Court has explained that “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”72 In Virginia Board itself, the Court emphasized the importance of the “free flow of commercial information” to both consumers and society as a whole.73 Two decades later, in suggesting that some circumstances might warrant more stringent review of commercial speech restrictions, Justice Stevens focused on the effect on consumers to distinguish less troubling restrictions from more troubling ones.74 The focus on the audience also helps to explain why false or misleading commercial speech falls entirely outside the First Amendment.75 Such information harms consumers, rather than helps them, and pollutes, rather than promotes, the flow of information.76

Commentators have taken many different approaches to conceptualizing commercial speech and are sharply divided about whether the modern trend toward greater protection for commercial speech is desirable.77 Nevertheless, there appears to be relatively broad agreement that commercial speech interests are primarily, if not exclusively, listener-based, and thus derivative.

This is clearest with respect to those who view commercial speech as deserving little or no protection under the First Amendment. For example, Professor Edwin Baker advances a primarily speaker-based view of the First Amendment that requires the government to respect the individual autonomy of speakers, and thus he

74. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (opinion of Stevens, J.) (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”).
76. See Va. State Bd. of Pharmacy, 425 U.S. at 771-72 (“The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”).
77. Compare, e.g., C. Edwin Baker, The First Amendment and Commercial Speech, 84 Ind. L.J. 981, 981 (2009) (“The world would do well not to follow the lead of the United States in its view that commercial speech is an aspect of free speech.”), with Redish, supra note 64, at 69 (“Criticism of commercial speech ... comes dangerously close to a constitutionally destructive form of viewpoint-based regulation.”).
ultimately rejects protection for commercial speech because listener interests are not at the core of the First Amendment under his views.78 Professor Tamara Piety accepts that listeners might matter, but she too is ultimately skeptical of protection for commercial speech, arguing that the crucial question is “whether the net effect of commercial speech is to enhance listeners’ self-fulfillment and autonomy interests” and finding “reason to think that it is not.”79

Others have defended, at least in some measure, the current view of commercial speech as entitled to some, but subordinate, First Amendment protection, and that view too is consistent with a listener-based approach to commercial speech. In defending its intermediate status, Professor Robert Post defines commercial speech as “the set of communicative acts about commercial subjects that within a public communicative sphere convey information of relevance to democratic decision making but that do not themselves form part of public discourse.”80 For Professor Post, a key distinction is between acts that have value as part of public discourse and acts that simply convey information.81 Acts that are part of public discourse have intrinsic value to both speakers and listeners, whereas acts that merely convey information—the set into which commercial speech falls—derive their value from the value of that information to those who receive it.82

Even those who argue that there is no principled basis upon which to distinguish commercial from noncommercial speech have done so with at least a significant emphasis on the value of the speech to the listener. For example, in his seminal article arguing for protection of commercial speech, Professor Redish notes that “[s]ince advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the

78. See Baker, supra note 77, at 985.
79. Piety, supra note 35, at 80.
80. Post, supra note 67, at 25.
81. See id. at 20.
82. Professor Post’s conception of commercial speech is not based solely, or even primarily, however, on the distinction between the value to the speaker and the value to the listener. Rather, the concept of “public discourse” is central to his theory of the First Amendment, so that he further distinguishes between conveying information that contributes to public discourse and conveying information that does not, with only the former receiving heightened protection under the commercial speech doctrine. See id. at 4, 24. In any event, when the focus is on conveying information and on the nature of the information conveyed, what matters is the listener’s perspective, rather than the speaker’s.
seller, as the frame of reference." 83 Similarly, Professor Redish argues that if the First Amendment protects criticism of commercial products of the sort found in, say, *Consumer Reports*, then it should equally protect promotion of those same products by their producers. 84 Seeing these two forms of speech as two sides of the same coin makes sense primarily if one takes the consumer’s perspective. Surely the First Amendment value of *Consumer Reports* lies in its value to its readers, not its intrinsic value to the consumer organization itself. 85 Casting commercial speech as analytically similar to *Consumer Reports* thus also highlights the listener value of the speech. 86

To be sure, commentators sometimes suggest that commercial speech may have First Amendment value for speakers as well. For example, some argue that commercial advertisements involve just as much artistry as artistic works that are fully protected under the First Amendment. 87 The implication then is that all of the reasons for protecting artistic works, including reasons that focus on the creators and disseminators of those works, apply equally to commercial advertisements. 88

The trouble with this line of reasoning is that it wrongly assumes that speech protected in one way is necessarily protected in all. Debates over the regulation of commercial advertisements are about the regulation of advertisements as advertisements, 89 not about

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84. See Redish, supra note 64, at 131-32.
85. See Farber, supra note 43, at 566 (discussing the value of the information in product reviews to consumers).
86. See also Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 643 (1990) (arguing that restricting commercial speech can lead to the result that “the opinion of one of the groups most interested in the debate has been obliterated from public view” (emphasis added)).
87. See, e.g., id. at 639 (characterizing a television commercial as “a thirty-second mini-drama that can stand on its own as a piece of film”).
88. See Redish, supra note 83, at 446-47 (“[T]he first amendment does recognize an interest existing in the speaker as well as the listener, and purely persuasive materials may serve that end. Much advertising which does not convey concrete information nevertheless represents the artistic creation of an individual, and as such deserves recognition as first amendment speech.” (footnote omitted)).
their regulation as artistic works. What is being targeted is not the artistic choices that might conceivably be “a form of individual self-expression” for the “ad-men,” but rather the commercial messages that those artistic choices are being used to convey.

More generally, the invocation of a First Amendment interest in “individual self-expression” suggests the argument that commercial speech contributes to the individual self-expression of the seller, at least when the seller is not a corporate entity. The concept of individual self-expression has thus far mostly been raised on the buyer, or listener, side, with courts and commentators characterizing the receipt of commercial speech as being no less important to self-development than the receipt of many types of fully protected speech. One could conceivably argue that the same self-development occurs on the speaker side, regardless of whether the speech is commercial or noncommercial.

Even with respect to the listener-centric version of this argument, there may be reasons to be skeptical. Buyers may have an interest in receiving commercial speech, but having an interest is not the same thing as having a First Amendment interest. The interest could be a purely private, property interest—that of wanting to buy the best possible products at the lowest possible prices—rather than the broader social interest in individual self-expression.

Moreover, even an interest in self-development or identity formation, while arguably a social rather than merely private interest, may not necessarily be an interest the First Amendment is designed to protect. One could easily view virtually any human activity as contributing in some way to individual self-development and

91. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) (“As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”); Redish, *supra* note 83, at 445 (“Just as we require a free flow of information regarding the political process because we value the concept of political self-realization, so too, should we require an open exchange of ideas and information in the marketplace that will help the individual govern his personal life.”).
92. See Brudney, *supra* note 89, at 1183-86.
93. See *id.* at 1185 (“[C]ommercial speech’s persuasive or informative function is only to induce the purchase or sale of the products it proposes by or to individuals for their own consumption or enjoyment. Speech with so limited a function focuses only on individuals’ private or personal good, not on matters of public interest or the societal values or attitudes with which the First Amendment is concerned.” (footnote omitted)).
The First Amendment, though, is premised on the idea that speech is special. If the speech exception is not to swallow the rule, and I think it ought not do so, then the relevant First Amendment interest cannot be conceived of as broadly as self-development or identity formation generally. Otherwise, the First Amendment could require scrutiny of every government restriction.

Still, one could argue (and some have argued) that commercial speech contributes not just to identity formation generally, but specifically to the development of the capacity for rational thinking and decision-making, because information about commercial products, perhaps especially such information, encourages people to engage in these processes. An interest in this kind of “rational self-fulfillment” is arguably an important First Amendment value. But this view, even if persuasive, simply drives home the point that protection of commercial speech is justified by taking the perspective of the listener, rather than the speaker. It is the listener who engages in “consider[ing] the competing information, weigh[ing] it mentally in the light of the goals of personal satisfaction he has set for himself” and who is thereby using commercial speech to contribute to his “rational self-fulfillment.” The commercial speaker does no such thing.

A final line of argument is to suggest that commercial speech should be as fully protected as noncommercial speech because there is simply no way to distinguish one from the other. If the category is incoherent, then its use to diminish protection for certain types of speech must be illegitimate. This would presumably mean that whatever speaker-based values the First Amendment protects generally would also be implicated by speech in the supposedly illusory category of “commercial speech.”


95. See Redish, supra note 83, at 444 (“Some rational development is better than none, and given the current apathy on the part of many segments of the public towards issues of great political and social concern, it is arguable that for many, the only realistic means to stimulate use of the rational processes is to encourage the rational solution of problems that face individuals in their everyday life.”).

96. See id. at 443-44.

97. Id.

98. See Kozinski & Banner, supra note 86, at 638-48.

99. See Redish, supra note 64, at 122 (characterizing the use of the commercial speech category as unprincipled, and hence a form of “viewpoint discrimination”).
There is certainly truth in the claim that the Supreme Court has never been very clear on precisely what counts as commercial speech. At times, the Court has characterized commercial speech as that which “does ‘no more than propose a commercial transaction.’”\textsuperscript{100} In other cases, the Court has held that the category extends beyond that narrow formulation, and it has articulated factors that, at least in conjunction with one another, can trigger the commercial speech doctrine.\textsuperscript{101} In \textit{Central Hudson}, the Court suggested that commercial speech is “expression related solely to the economic interests of the speaker and its audience.”\textsuperscript{102} All of those formulations have been criticized as underinclusive, overinclusive, or both.\textsuperscript{103}

It is precisely the speaker’s First Amendment interests, or lack thereof, though, that not only justify treating commercial speech differently, but also provide a coherent way to define the category, even if its boundaries are fuzzy. The seller hawking his wares is not thereby expressing himself in the First Amendment sense, \textit{at least no more so than the very act of selling is itself expressive}. If commercial transactions fall outside the protection of the First Amendment—and they must if the First Amendment is to have any meaningful limits—then one can sensibly draw a distinction based on the extent to which certain speech is sufficiently akin to a commercial transaction to be treated like one, and thus to at least merit different First Amendment treatment from fully protected speech. The transactional nature of such speech sets it apart.

We can evaluate this question of whether speech is, or should be construed as, no more than a part of a commercial transaction, from either of two perspectives: the speaker’s perspective or the listener’s perspective. Those perspectives need not align. The category of what

\begin{itemize}
\item \textsuperscript{101} See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (pointing to the “fact that these pamphlets are conceded to be advertisements,” “the reference to a specific product,” and “the fact that [the speaker] has an economic motivation for mailing the pamphlets” and holding that the “combination of all these characteristics ... provides strong support for the ... conclusion that the informational pamphlets are properly characterized as commercial speech,” even though any one factor standing alone might not have been sufficient).
\item \textsuperscript{103} See, e.g., Kozinski & Banner, \textit{supra} note 86, at 639-41.
\end{itemize}
has traditionally been called “commercial speech” is precisely that which is merely transactional from the speaker’s perspective.

For example, in the case of an ordinary commercial advertisement, the advertiser’s interest is in the ability of the advertisement to increase sales of its goods or services—that is, to drive commercial transactions. For that reason, an ordinary commercial advertisement is commercial speech. We can remain agnostic, though, as to the interests of the audience viewing the advertisement. The recipients may be using the advertisement simply to increase the efficiency of their consumption of goods and services, and thus, the speech may be effectively transactional from the audience’s perspective as well. But alternatively, the advertisement may be serving the audience’s general interest in knowing more about the world, including about the goods and services that the advertiser sells. In that case, the value of the speech from the audience’s perspective potentially goes beyond its value for commercial transactions.

The fact that we are asking the question of whether the speech is merely transactional, but only from the speaker’s perspective, helps to explain several aspects of the commercial speech doctrine as it has developed. First, it explains why commercial speech includes that which “does no more than propose a commercial transaction,” but the category is not limited to that speech. Proposing a commercial transaction is surely a part of the transaction itself, but it need not be the only way to be a part of the transaction. Moreover, the idea that it is the speaker’s perspective that matters explains why tests for commercial speech often look to the interests and motivations of the speaker. Looking for economic interests and motivations, however, is merely the means to determine whether speech is transactional, rather than being the defining characteristic of commercial speech.

Finally, the asymmetric nature of the inquiry explains why even those who agree on what commercial speech is potentially disagree on how to treat it. Speech can be merely transactional from the

104. See supra note 100 and accompanying text.
105. See Bolger, 463 U.S. at 67 (considering the “economic motivation” of the speaker); Cent. Hudson Gas & Elec. Corp., 447 U.S. at 561 (considering the “economic interests of the speaker”).
106. See Redish, supra note 64, at 87-88 (“The institutional media ... are as much profit-making corporations as is any commercial advertiser.”).
speaker's perspective and still leave the full range of options as to how to characterize it from the listener's perspective. It is one's view of the listener's perspective that determines the appropriate treatment under the First Amendment. But it is the listener's perspective that matters. In other words, the commercial speaker's First Amendment claim is derivative.

C. Derivative Interests in Traditional Settings

To say that corporate and commercial speech interests are derivative is not necessarily to undercut their strength. One could recognize those interests as derivative, and largely listener-based, and nevertheless advocate heightened, even strict, scrutiny in the core cases in which those interests have traditionally arisen.

The issue of corporate speech has arisen largely in the context of corporate campaigning.107 Even if the intrinsic interests at stake in such cases are those of the voters who are the target of such campaigns, rather than the corporations mounting the campaigns, one could justify heightened scrutiny of government attempts to restrict such campaigning.108 Particularly in the political context, one could argue that voters need the fullest possible information in order to make informed voting decisions.109 Thus, we might be skeptical of any government regulation that restricts the speech available to voters.110 One might even suggest that certain viewpoints are only likely to be voiced by corporations, rather than individuals—for example, viewpoints that are pro-business or anti-labor.111 In that case, restricting corporate campaigning might deprive voters of information necessary to evaluate particular sides of contested issues.112

108. See, e.g., id. at 354-55.
109. See, e.g., id. at 354.
110. See, e.g., id. at 355-56.
111. Cf. Redish, supra note 64, at 69 (arguing that attacks on commercial speech protection “constitute[], facilitate[], or, at the very least, come[] dangerously close to a constitutionally destructive form of viewpoint-based regulation”). But see Robert C. Post, Viewpoint Discrimination and Commercial Speech, 41 LOY. L.A. L. REV. 169, 169 (2007) (arguing that Professor Redish’s conception of viewpoint discrimination “is too confused and uncertain to carry the weight that Redish imposes on it”).
112. See Citizens United, 558 U.S. at 356 (“When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or
Similarly, the question of commercial speech has been prominent in the context of commercial advertisements, particularly advertisements for vices such as tobacco, liquor, and gambling.\textsuperscript{113} Even if we think that advertisers do not have an intrinsic right against interference with their advertisements, we might think that consumers do have an intrinsic right not to have the government dictate what information about lawful products they can receive.\textsuperscript{114} We might be particularly wary of what seem to be paternalistic laws that hide information from people supposedly for their own good.\textsuperscript{115}

To be sure, the arguments in favor of fully protecting corporate campaigning or commercial advertisements are not necessarily persuasive. One could instead think that corporate participation in campaigns distorts the available speech, rather than simply adding to it.\textsuperscript{116} One could largely take the same view of most commercial advertisements.\textsuperscript{117}

Framed in this way, these debates can be understood as a microcosm of much larger debates over the proper relationship between the government and citizens under the Constitution. On the one hand, there is the libertarian perspective, under which the prime directive is to ensure that the government does not interfere unduly with the private choices of individuals.\textsuperscript{118} Under this perspective, any government interference with the receipt of infor-


\textsuperscript{115} See 44 Liquormart, 517 U.S. at 503 (opinion of Stevens, J.) (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.”); id. at 518 (Thomas, J., concurring in part and concurring in the judgment) (“In cases such as this, in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace ... such an ‘interest’ is per se illegitimate.”).

\textsuperscript{116} See Citizens United, 558 U.S. at 469-72 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{117} See Piety, supra note 35, at 64-65.

\textsuperscript{118} See Sullivan, supra note 59, at 145.
An alternative is to take an egalitarian perspective, which posits that the government’s role is to try to create a level playing field within which individuals can exercise their choices. Under this perspective, restrictions on corporate and commercial speech may be appropriate to correct disparities between the power of corporations or commercial sellers and individuals. In this way, debates over corporate campaigning and commercial advertisements are not only analytically similar to each other; they are similar to debates over, say, affirmative action as well.

These questions are not settled one way or another merely by recognizing the derivative nature of corporate or commercial speech interests. Indeed, given the centrality of the broader questions to which they connect, it would be quite startling if they were. Framing the issue in terms of derivative interests does not resolve whether the government can restrict corporate campaigning or commercial advertisements. In other types of situations, however, the derivative nature of the speech interests does matter, and it is to those situations that we now turn.

II. IMPLICATIONS FOR COMPELLED SPEECH

One implication of corporate and commercial speech interests being derivative is that compelling these forms of speech need not raise the usual First Amendment concerns. In the context of fully protected speech, the Supreme Court has held that compelling speech is just as problematic as restricting it. But that shorthand equivalence elides the fact that the rationales for scrutinizing speech compulsions differ substantially from the rationales for

119. See id.
120. See id. at 144-45.
121. See id.
122. Compare, e.g., Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”), with Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”).
scrutinizing speech restrictions. When primarily listener interests are at stake, there is little reason to be concerned about compelled speech.

A. The Misfit Between Listener Interests and Scrutiny of Compelled Speech

At first glance, it is not at all clear why compelled speech should be problematic under the First Amendment. For example, if we are concerned primarily about protecting the marketplace of ideas, then compelled speech seems only to be adding to that marketplace, and so long as we do not then restrict how people can respond to the compelled speech, we should be confident that truth and right thinking will win out in the end regardless of what has been compelled. 124

The problem, if there is one, seems to be in the way that such compulsions interfere with the “individual freedom of mind.” 125 Compelling individuals to speak, even in circumstances in which it is clear that they might or might not be sincere, fails to accord due respect for those individuals as autonomous, thinking human beings whose views are independent of those of the state. 126 It also undermines First Amendment values of sincerity and truth that should be nurtured in citizen-speakers. 127 And it coerces thought in a manner that is illegitimate because it bypasses the speaker’s critical faculties in favor of persuasion through repetition. 128

In other words, compelled speech is problematic because of its effects on the speaker. These speaker-based rationales for scrutinizing compelled speech are irrelevant when our primary concern is with listeners rather than speakers. From the listeners’ point of view, compelled speech is not much different from the government


124. Cf. Barnette, 319 U.S. at 664 (Frankfurter, J., dissenting) (“It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute.”).
125. Wooley, 430 U.S. at 714 (quoting Barnette, 319 U.S. at 637).
127. See id. at 125-27.
128. See id. at 128-29.
choosing and promoting a view, which it is permitted to do under the government speech doctrine.129 Unlike the speaker, the listener is being persuaded through reason, and with respect for the listener's ability to make autonomous choices.130 In situations in which the speaker has no intrinsic speech interest, then the compelled speech harms neither the speaker nor the listener.

One straightforward conclusion of this analysis is that, from a First Amendment perspective, compelling a corporation to speak harms nothing with respect to the corporation itself.131 Corporations are not autonomous, thinking beings that the state must respect as such. Nor are they citizens to be nurtured. Repeated utterances do not have the psychological effects on corporations that they do on individuals.

The rationales for scrutinizing speech compulsions are equally misplaced with respect to noncorporate commercial speech. To see why, we first need to understand what we mean by commercial compelled speech. As previously described, the defining characteristic of commercial speech is that it should be regarded from the speaker's perspective as no more than a part of a commercial transaction.132 When the government compels such speech, it is commercial compelled speech.

This focus on the connection to a commercial transaction is necessary to make sense of the category of commercial compelled speech. Many of the usual indicia of commercial speech do not translate well into the realm of compelled speech. For example, it makes no sense

130. See Caroline Mala Corbin, Compelled Disclosures, 65 A LA. L. REV. 1277, 1302-03 (2014). There may be circumstances in which the means for conveying a message are so manipulative that they impinge upon the autonomy of the listener. See id. at 1304-08. For purposes of such an analysis, however, it should make no difference whether the government directly conveys the message or conveys it through private parties. If the latter, it would not be the compulsion itself that would be the source of any First Amendment difficulties.
131. See Blasi & Shiffrin, supra note 126, at 127 n.123 (stating that the rationale in Barnette applies "only to natural persons," rather than "corporate entities").
to look for an economic motivation in a compelled speaker because the very point of the compulsion is to overcome the absence of any motivation to speak at all. Similarly, because the government dictates the form of the speech, the form need not have any particular relationship to whether the speech is commercial.

When the speech that is compelled is incidental to a commercial transaction, it is far less likely to raise the usual concerns over compelling speech. Scrutiny of compelled speech is rooted in concerns over a disrespect for, or undue influence over, the speaker’s capacity for thought and decision-making. But commercial speech does not implicate the speaker’s capacity for thought and decision-making, at least no more so than commercial transactions do. Whether compelled or not, commercial speech is conveyed by the speaker with a measure of detachment not found in ordinary speech. A pledge of allegiance is meaningless without its being recited by the person compelled. Commercial speech can be attached to the product being sold, or posted on a website, and have the intended effect. The point of the pledge is its effect on the speaker, while the point of commercial compelled speech is the availability of the speech to the listener, rather than any effect on the speaker. The result is that the speaker-based concerns over compelled speech do not apply to commercial compelled speech.

Thus, until one can identify some other speech interest at stake, the starting point of the analysis should be that because corporate and commercial speakers do not themselves have intrinsic speech interests, their speech can be compelled without triggering any form of heightened First Amendment scrutiny. Thus far, courts have largely gotten this analysis exactly backwards, assuming the existence of a general First Amendment prohibition on compelled speech.  

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134. Cf. id.
135. See supra notes 125-28 and accompanying text.
139. See infra Part II.C.
speech from which any exceptions need to be justified. But when
the interests usually at stake with respect to compelled speech are
absent, it is coverage under the First Amendment, rather than its
absence, that needs justification.

B. The Zauderer Standard

The rationales for scrutinizing compelled speech do not apply
when the only First Amendment interests are those of the listeners.
In particular, because commercial speech is defined by the speech
being merely transactional from the speaker's perspective, commer-
cial compelled speech should generally merit no First Amendment
scrutiny.

This understanding of the relationship between compelled speech
and commercial speech is what should inform the proper interpreta-
tion of the Supreme Court's decision in Zauderer v. Office of Disci-
plinary Counsel, a key case that lower courts have consistently
misinterpreted. In Zauderer, the Court applied a relatively relaxed
form of scrutiny to a requirement that attorneys include certain
information in advertisements. Lower courts have interpreted the
case as creating an exception, and a narrow one at that, to the usual
rule of heightened scrutiny under the First Amendment. The key
question with respect to Zauderer, though, is not why the Court
applied a lower form of scrutiny than Central Hudson. The
question is why the Court applied any kind of scrutiny at all.
Zauderer involved an attorney disciplinary action based on the attorney’s failure to make certain disclosures in his advertisements. The attorney advertised that he took cases on a “contingent fee basis” and that “[i]f there is no recovery, no legal fees are owed by our clients,” but he failed to disclose that clients might still be liable for costs, as opposed to attorneys’ fees, even if they lost their case.

The Court rejected the application of strict scrutiny to the disclosure requirement in the case, distinguishing earlier cases involving noncommercial compulsions. It explained:

Ohio has not attempted to “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.” The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in not providing any particular factual information in his advertising is minimal.

The Court then went on to hold that while some scrutiny under the First Amendment was appropriate, a relatively minimal level of scrutiny would suffice:

sometimes been characterized as a form of rational basis review. See, e.g., R.J. Reynolds, 696 F.3d at 1212 (describing the Zauderer standard as “akin to rational-basis review”). To the extent that scrutiny under the Zauderer standard is substantially weaker than an application of the Central Hudson test, it is perhaps more like rational basis review. At the same time though, the analysis the Court did to establish that the “disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers” seems more extensive than what one would ordinarily expect from rational basis review. Zauderer, 471 U.S. at 651. For example, it seemed to matter to the Court that “the possibility of deception is ... self-evident ... in this case,” rather than “speculative,” whereas even a speculative interest could pass rational basis review so long as it is rational. Id. at 652-53.

147. Id. at 630-31, 633.
148. Id. at 651 (internal citations omitted) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
We do not suggest that disclosure requirements do not implicate the advertiser’s First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.149

Because the laypersons at whom the advertisements were targeted would have no idea about the distinction between “legal fees” and “costs,” the Court found the possibility of deception to be “self-evident” and the required disclosure to be a perfectly reasonable way of trying to cure that deception.150

Lower courts have consistently framed the standard articulated in Zauderer as an exception to a general rule of heightened scrutiny of compelled speech, grappling only with the question of just how far the Zauderer “exception” extends. For example, the D.C. Circuit held en banc that Zauderer applies even when the government’s interest in disclosure is something other than “preventing deception of consumers,” overruling previous panel decisions that had held or suggested otherwise.151 While recognizing that the interest in avoiding deception need not be the only legitimate interest, the D.C. Circuit continued to require some sufficient government interest in order to justify applying the Zauderer standard.152 Moreover, the D.C. Circuit appears to have continued to limit Zauderer to disclosures of “purely factual and uncontroversial information.”153 Both of these limits to Zauderer assume that relaxed scrutiny is the exception, rather than the rule.

149. Id.
150. Id. at 652-53.
152. See Am. Meat Inst., 760 F.3d at 23 (“Beyond the interest in correcting misleading or confusing commercial speech, Zauderer gives little indication of what type of interest might suffice.”).
153. Id. at 27 (quoting Zauderer, 471 U.S. at 651); see also R.J. Reynolds, 696 F.3d at 1216 (quoting Zauderer, 471 U.S. at 651).
But as previously explained, there is little justification for scrutinizing compulsions directed to corporate or commercial speakers.\textsuperscript{154} Thus, relaxed scrutiny of such compulsions ought to be the rule, not the exception. If anything, what requires explanation is why the Court in \textit{Zauderer} bothered to evaluate the government’s interest for anything beyond bare plausibility.

In fact, the Court appears to have scrutinized the compelled disclosure in \textit{Zauderer} not because it was a compelled disclosure per se, but because it was a regulation of attorney advertising. The First Amendment issue that it identified was that of “chilling protected commercial speech.”\textsuperscript{155} And it repeatedly referred to the First Amendment rights as those of the “advertiser.”\textsuperscript{156} The state’s regulation was described as only an attempt “to prescribe what shall be orthodox in commercial advertising.”\textsuperscript{157}

Viewed as a regulation of advertising, it makes sense that the Court treated the \textit{Central Hudson} test as the baseline for evaluating the state’s disclosure requirement and that the Court needed to justify its departure from that baseline. The \textit{Central Hudson} test was designed to establish the level of scrutiny for government attempts to restrict commercial advertising.\textsuperscript{158} Because the required disclosure in \textit{Zauderer} was triggered by the attorney advertising,\textsuperscript{159} it could be understood as a limitation on that advertising: effectively, Ohio was saying that attorneys could not advertise “no fees” without also explaining that “no fees” did not mean no costs. The speech that really mattered for First Amendment purposes in \textit{Zauderer} was the original “no fees” claim, not the required add-on, and scrutiny was necessary to ensure that the “no fees” speech would not be chilled.\textsuperscript{160}

In that sense, \textit{Zauderer} might be an exception, but an exception only to the scrutiny that would otherwise apply to a restriction on commercial speech. What it says is that if a disclosure is of “purely factual and uncontroversial information,” then it can be required of

\begin{itemize}
  \item\textsuperscript{154} \textit{See} Part II.A.
  \item\textsuperscript{155} \textit{Zauderer}, 471 U.S. at 651.
  \item\textsuperscript{156} \textit{Id}.
  \item\textsuperscript{157} \textit{Id}. (emphasis added).
  \item\textsuperscript{159} \textit{Zauderer}, 471 U.S. at 652.
  \item\textsuperscript{160} \textit{See id}. at 653 & n.15.
\end{itemize}
an advertisement without unduly chilling that advertisement, and thus, the government needs only a sufficient interest to support such a requirement, rather than needing to satisfy the full Central Hudson test.\footnote{161}

\textit{Zauderer} says nothing about what happens if the disclosure requirement is triggered not by commercial advertising, but by some other nonspeech commercial activity. Without the threat that a disclosure requirement might chill speech, the analysis should fall back to the baseline of no scrutiny for compulsions of corporate or commercial speakers.

The D.C. Circuit has gotten this exactly backwards, somehow finding that the more relaxed scrutiny in \textit{Zauderer} was justified only because commercial advertising was involved, and declining to apply the \textit{Zauderer} standard beyond the contexts of “advertising or product labeling at the point of sale.”\footnote{162} Such a result runs directly contrary to an analysis of the First Amendment interests at stake. The D.C. Circuit applied heightened scrutiny to, and struck down, an SEC rule requiring certain securities issuers to state whether the minerals they use are “conflict free” because the disclosures were “to be made on each reporting company’s website and in its reports to the SEC” rather than in “advertising or ... point of sale disclosures.”\footnote{163} Nowhere in its opinion did the court explain what First Amendment interests were being protected by the scrutiny it imposed, let alone why the distinction it drew would sensibly protect those interests.\footnote{164}

Nor is it necessary to limit relaxed scrutiny to compelled disclosures of “purely factual and uncontroversial information,” as the

\footnote{161. See id. at 651.}
\footnote{162. Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518, 522, 524 (D.C. Cir. 2015).}
\footnote{163. Id. at 522.}
\footnote{164. See id. at 535-36 (Srinivasan, J., dissenting). The majority opinion attempted to support its distinction with two Supreme Court cases, \textit{Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.}, 515 U.S. 557 (1995), and \textit{United States v. United Foods, Inc.}, 533 U.S. 405 (2001). See \textit{Nat’l Ass’n of Mfrs.}, 800 F.3d at 533 (majority opinion). Neither case supports the majority’s analysis. \textit{Hurley} involved a noncommercial speaker. See \textit{Hurley}, 515 U.S. at 559 (“The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey.” (emphasis added)). \textit{United Foods} was part of a distinct line of cases involving compelled funding of advertisements that in any event eventually resulted in a permissive First Amendment standard. See Wu, \textit{supra} note 15, at 86-87.}
D.C. Circuit has done.\textsuperscript{165} As I have argued previously, distinguishing between factual and normative compulsions is murky and a shaky basis upon which to hinge the level of scrutiny.\textsuperscript{166} Virtually any seemingly factual disclosure conveys some implicit viewpoint. The inclusion of trans fat contents on a nutrition label surely suggests that trans fats matter, and given the social context, it probably suggests they should be avoided.

More importantly, if compelling corporate or commercial speakers does not interfere with any First Amendment interests because the entity compelled has none, then it does not matter whether the speech is factual or normative. To be sure, less factual information might also be less tied to a commercial transaction and therefore less likely to be commercial compelled speech. But the compulsion of information tied to a transaction should not be scrutinized just because the information might implicitly convey a viewpoint.\textsuperscript{167}

\textit{Zauderer} may have limited its holding to factual disclosures, but that was because the case was about restricting commercial advertisements. Requiring a nonfactual, controversial disclosure in a commercial advertisement might well discourage the speaker from advertising in the first place, in a way that a factual, noncontroversial disclosure would not. Of course, the same could be said of commercial transactions—that requiring disclosures could discourage those transactions. The crucial difference is that commercial

\footnotesize{\textsuperscript{165}. See Nat'l Ass'n of Mfrs., 800 F.3d at 527. Some commentators have argued in favor of a similar distinction. See Keighley, supra note 16, at 569 ("[W]hen the government moves beyond compelled speech that provides descriptive information about a given product or service, to compelled speech that urges the audience to take a certain course of action, the government no longer compels the provision of factual and uncontroversial information. Instead, the government compels 'normative speech,' and such compelled speech should not be subject to rational basis review."); Post, supra note 16, at 901 (defending the view "that government may require the disclosure only of purely factual and 'uncontroversial' information"); see also Corbin, supra note 130, at 1303-04 (arguing that compelled speech is more problematic "when it attempts to persuade rather than just inform" or when it is "manipulative").

\textsuperscript{166}. See Wu, supra note 15, at 77, 81.

\textsuperscript{167}. Cf. Nat'l Ass'n of Mfrs., 800 F.3d at 530 ("The label [not] conflict free is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility.") (alteration in original) (quoting Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 371 (D.C. Cir. 2014)))}
advertisements are protected by the First Amendment, but commercial transactions are not.\textsuperscript{168}

Thus, for example, in \textit{R.J. Reynolds Tobacco Co. v. FDA}, the D.C. Circuit was wrong to impose heightened scrutiny on the FDA’s requirement of graphical warning labels on cigarette packages.\textsuperscript{169} The FDA had sought to update the mandatory cigarette warning labels with new text and with graphical images to accompany each of the new warnings.\textsuperscript{170} The D.C. Circuit held that because the graphical warnings did not consist solely of “purely factual and uncontroversial information,” the mandatory warnings were subject to at least intermediate scrutiny—scrutiny which the regulation was not able to bear.\textsuperscript{171}

But R.J. Reynolds is a corporate, commercial speaker, and thus the government’s insistence that certain speech be made available as part of the transaction of buying and selling cigarettes harms no First Amendment interests. This remains true even if some of the messages implicitly or explicitly encourage consumers to quit smoking.\textsuperscript{172} Such messages are certainly against the cigarette companies’ financial interests, but they hardly constitute some form of disrespect for the rational faculties of the cigarette sellers, even if those sellers were individuals. The compulsion of even normative commercial messages potentially merits little First Amendment scrutiny.

\textbf{C. Limitations on Compelled Corporate or Commercial Speech}

The government’s ability to compel corporate or commercial speech is not unlimited, however, and there are a number of situations in which compelled corporate or commercial speech might appropriately merit some greater level of First Amendment scrutiny. Greater scrutiny might apply to compulsions directed at certain types of corporations, particularly those that are more expressive in nature. Greater scrutiny might also apply when the compulsion is a condition of the compelled entity’s own speech. Finally, we might

\begin{itemize}
\item 168. See supra Part I.B.
\item 170. Id. at 1208-09.
\item 171. Id. at 1216-17, 1222.
\item 172. See id. at 1216-18.
\end{itemize}
scrutinize any government compulsion in which the government attempts to hide its own speech as that of another.

1. Distinctions Among Corporate Speakers

Corporations come in a wide variety of types, and some might more plausibly assert speaker-based interests than others. The key concept developed by Professor Meir Dan-Cohen is that of “role-distance.” When a person’s role within an organization is closely tied to her own personal identity, we say that the role-distance is small; when the organizational and personal roles are relatively distinct, we say that the role-distance is large. When the role-distance is small, we might worry that a compulsion on the corporate entity will function like a compulsion on an individual or set of individuals, in such a way as to raise the “freedom of mind” concerns previously discussed.

For the usual for-profit corporation, no one, whether employee, executive, or shareholder, has such a small role-distance, and as a result, compulsions applied to such corporations are unproblematic. This is particularly true with respect to major publicly traded corporations, which are often the ones trying to assert speech rights. Employees, executives, and shareholders of such corporations are particularly likely to have detached roles. For example, compelling R.J. Reynolds to place a particular image on its cigarette packages is far removed from compelling speech from any particular employee, executive, or shareholder of the company. Even with respect to a close corporation, corporate laws themselves operate to encourage and enforce a certain measure of separation between individual and corporate identity. Absent circumstances that would support piercing the corporate veil, even the owners of a close corporation should generally be regarded as occupying a detached role.

174. See id. at 1238.
175. See Nelson, supra note 28, at 1586-91.
176. See id. at 1587-91.
177. See id.
178. See id. at 1591-95.
179. Arguably, the Supreme Court’s Hobby Lobby decision cuts against the proposition that the role of a close corporation’s owner should be regarded as a detached one, given that the Court upheld such a corporation’s ability to raise a claim under the Religious Freedom
Membership in a church, on the other hand, is an example of a role that is much more tightly bound to an individual’s identity. Thus, to compel a church to speak should attract greater scrutiny, even though the church may be organized as a nonprofit corporate entity.

Media entities may well be ones that engender more “nondetached” roles. For example, in finding that a newspaper’s “exercise of editorial control and judgment” should be protected, the Supreme Court characterized the First Amendment intrusion as one of “intrusion into the function of editors.” In speaking specifically about editors, rather than simply about the newspaper as a whole, the Court’s holding may have been animated by an understanding of editors as occupying a nondetached role. That is, editors may be understood as speaking not only for the newspaper, but for themselves as well, in a way that the average corporate executive does not. One can imagine similar results with respect to a director of a movie, for example, even if the director is understood to also be speaking for the movie studio. Thus, compulsions directed at media entities, entities in the business of speech, may raise constitutional questions beyond those raised by compulsions directed at corporate entities generally. This means that the First Amendment treatment of media corporations need not extend to all corporations.

Restoration Act in order to vindicate the owners’ claim that their “exercise of religion” had been burdened. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2769 (2014). The Hobby Lobby decision, however, need not control the question of how to regard corporate compelled speech under the First Amendment. For one thing, Hobby Lobby was a statutory case, not a constitutional one, and Congress can grant statutory rights to corporations independent of any theory of the First Amendment. See id. at 2767 (“By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.”). Moreover, freedom of religion and freedom of speech are distinct constitutional rights, with potentially distinct contours. In particular, while the Supreme Court has been hesitant to evaluate what counts as a religious belief, it has shown little hesitation in evaluating what counts as speech. Compare id. at 2777-78 (framing the appropriate question with respect to RFRA as “whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs” and rejecting “a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)”), with Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 64-65 (2006) (finding that “a law school’s decision to allow recruiters on campus is not inherently expressive” and “[n]othing about recruiting suggests that law schools agree with any speech by recruiters”).

180. See Nelson, supra note 28, at 1616-17.
182. This runs counter to the argument that some have made that First Amendment
2. Compulsions Conditioned on Speech

Compulsions that are triggered by the compelled entity’s speech merit greater scrutiny than compulsions that are triggered by something other than expression. In such cases, we could be concerned that the compulsion will chill the entity’s voluntary speech, to the detriment of the audience for that speech.

Most, if not all, of the existing Supreme Court cases scrutinizing compulsions directed at commercial entities can be explained by the Court’s concern to avoid chilling those entities’ speech. For example, the case of *Miami Herald Publishing Co. v. Tornillo* involved a Florida statute that required newspapers to print a reply from any political candidate criticized by a newspaper editorial. In holding the statute unconstitutional, the Court characterized the compulsion as one that could chill the newspaper’s own speech, because the paper might avoid coverage and criticisms that would trigger the right of reply. Later, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court applied similar reasoning in striking down a requirement that a privately owned utility company include materials in its billing envelopes from a ratepayers group with views contrary to those of the utility. In that case, the compulsion was not directly triggered by the utility’s speech, but because access was “awarded only to those who disagree with appellant’s views and who are hostile to appellant’s interests, appellant must contend with the fact that whenever it speaks out on a given issue, it may be forced ... to help disseminate hostile views.” Under such circumstances, the utility might well decide that “the safe course is to avoid controversy,” thereby reducing the free flow of information and ideas that the First Amendment seeks to protect.
to promote.” Thus, the focus was again on ensuring the free flow of information.

Even when the problem has not been one of chilling competing views, the Court has also expressed concern over compulsions that might simply displace the entity’s own speech. In *Tornillo*, the Court noted the practical constraints that precluded an “infinite expansion of [the newspaper’s] column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.” In *Pacific Gas & Electric Co.*, the concurring opinion of Justice Marshall, who provided the crucial fifth vote in the case, emphasized that “[b]y appropriating, four times a year, the space in appellant’s envelope that appellant would otherwise use for its own speech, the State has necessarily curtailed appellant’s use of its own forum.”

The Court has sometimes in parallel adopted rationales that suggest that the compulsions are inherently problematic, as when the Court suggested that the forced inclusion of the ratepayers group’s speech “impermissibly requires [the utility] to associate with speech with which [it] may disagree,” causing it to “be forced either to appear to agree with [the ratepayers group’s] views or to respond.” Even then, though, the Court emphasized “[t]he danger that [the utility] will be required to alter its own message.” What was protected by the First Amendment was “the message itself,” rather than the corporate messenger, which is consistent with the

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188. *Id.* (quoting *Tornillo*, 418 U.S. at 257).
190. *Pac. Gas & Elec. Co.*, 475 U.S. at 24 (Marshall, J., concurring in the judgment). Similarly, in holding that intermediate scrutiny applied to the requirement that cable operators carry local broadcast stations, the Court characterized the requirement as more of a restriction than a compulsion. *See* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994) (“By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining.” (emphasis added)).
192. *Id.* at 16; *see also* *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006) (“The compelled-speech violations in *Tornillo* and *Pacific Gas* also resulted from interference with a speaker’s desired message.”).
view that what really matters is whether speech has been restricted, rather than whether the corporation has been compelled.

3. Deception About the Source of Speech

Finally, greater scrutiny of compelled speech might also be warranted if the government fails to make it clear that it is the ultimate source of the compelled speech. In general, if our focus is on listeners, then not only is the government justified in trying to eliminate deceptive speech, it should not itself be the source of deception. This means, first, that the government probably should not be permitted to compel speech that would be false or misleading under the *Central Hudson* test, speech that would be within its power to restrict without First Amendment constraints.194

This also means that the government should not be permitted to deceive as to the source or identity of the ultimate speaker. There are circumstances in which we want to protect the anonymity of private speakers in order to protect their speech. Otherwise, fear of either government or private retribution might lead such speakers to self-censor their speech.195 No such rationale applies when it is the government that is speaking. Governments are not subject to retribution in the same way as private speakers.

Indeed, the potential for political “retribution” against the government should not only be permissible; it should be encouraged. Compelling a commercial entity to say something it does not agree

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195. See Doe v. Reed, 561 U.S. 186, 200 (2010) (“Plaintiffs explain that once on the Internet, the petition signers’ names and addresses can be combined with publicly available phone numbers and maps, in what will effectively become a blueprint for harassment and intimidation.” (internal quotation omitted)); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341-42 (1995) (“The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”); Talley v. California, 362 U.S. 60, 65 (1960) (“Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts.”).
with can be framed as the government simply co-opting the resour-
ces of a private party in order to disseminate its own government
speech, an act not so different from the imposition of a special tax. 196
The check on abuse of such government power is mainly political,
namely, the ability of majorities to decide who will be elected to
office, and thus what messages the government will espouse. 197 In
order for such political accountability to function, however, the elec-
torate needs to understand that the message is indeed the govern-
ment’s, and thus subject to political control. If the government could
co-opt private parties to spread a message without revealing that it
is a government message, it could improperly insulate itself from
that accountability. 198

III. IMPLICATIONS FOR SPEECH AMONG COMMERCIAL ENTITIES

Recognizing the distinction between derivative and intrinsic
speech interests also matters in those situations in which none of
the parties to the transaction have intrinsic interests. These provide
another category of cases in which diminished First Amendment
scrutiny is warranted.

A. Transactions Among Commercial Entities

In the paradigmatic corporate or commercial speech scenario, the
speaker may be corporate or commercial, but the listener is an
individual, with at least some noncommercial interests. In that case,
we may protect the speech in order to protect the listener’s First
Amendment interests. If the listener is just as corporate or commer-
cial as the speaker though, then the basis for protecting the speech
disappears, and restrictions on that speech should merit little
scrutiny.

196. See Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 559 (2005) (“We have generally
assumed, though not yet squarely held, that compelled funding of government speech does not
alone raise First Amendment concerns.”).
198. See Johanns, 544 U.S. at 571-72 (Souter, J., dissenting); Norton, supra note 197, at
596.
For example, this framing demonstrates why the Fair Credit Reporting Act (FCRA) should be regarded as obviously constitutional. On its face, the FCRA appears to restrict speech, since it prohibits “consumer reporting agencies” from disclosing “consumer reports” to third parties, except under specified conditions.\textsuperscript{199} From the perspective of a consumer reporting agency, a consumer report is merely an item of commerce, something to be sold for profit, rather than a means of expression. Still, we might want to protect consumer reports under the First Amendment if they had expressive value for the recipients, as they might if the recipients were individuals, acting in their capacity as citizens.

In fact, the FCRA precludes the possibility that noncommercial individuals are the ones receiving consumer reports because it defines a “consumer report” in terms of the commercial purposes to which it is put. A “consumer report” under the FCRA is:

\textbf{[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for:}

\begin{itemize}
  \item[(A)] credit or insurance to be used primarily for personal, family, or household purposes;
  \item[(B)] employment purposes; or
  \item[(C)] any other purpose authorized under section 1681b of this title.\textsuperscript{200}
\end{itemize}

By definition, the recipient of a consumer report will be using it as an input into a commercial transaction, such as deciding whether to extend credit to the subject of the report. In that way, from the listener’s perspective, the material restricted by the FCRA is transactional, not expressive, much as a commercial advertisement is transactional from the speaker’s perspective. But this means that an FCRA consumer report is commercial from both the speaker’s

\textsuperscript{199} See 15 U.S.C. § 1681b(a) (2012) (“Subject to subsection (c) ... any consumer reporting agency may furnish a consumer report under the following circumstances and no other.”).

\textsuperscript{200} Id. § 1681a(d)(1).
and the listener’s perspectives. The result is that even though we might want to protect a commercial advertisement in order to protect the listener’s First Amendment interests, there is nothing to protect and no reason to impose any heightened scrutiny in the FCRA context because neither speaker nor listener has a relevant First Amendment interest.

The FCRA has in fact withstood First Amendment challenges, but only after facing scrutiny under the Central Hudson test. In Trans Union, the D.C. Circuit appropriately recognized that “the information about individual consumers and their credit performance communicated by Trans Union target marketing lists is solely of interest to the company and its business customers,” but it failed to recognize that the consequence should have been minimal scrutiny. The D.C. Circuit attempted to draw guidance from the Supreme Court’s decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., but that decision relied mainly on the credit reports at issue involving no “matter[s] of public concern,” a characterization that on its face applied regardless of whether the recipients were commercial or noncommercial. While the ultimate result of the Trans Union case was the same as if minimal scrutiny had been imposed, that will not always be the case.

Another situation that ought to involve minimal First Amendment scrutiny is that of regulation of data brokers or of transfers of personal data among commercial entities. For example, in Sorrell v. IMS Health Inc., the Court invalidated a Vermont law that prohibited the sale, disclosure, or use of pharmacy records about the prescribing practices of individual doctors for marketing purposes. The main form of disclosure targeted by the regulation was the transfer of the data from the pharmacy through an intermediary like IMS Health to the pharmaceutical companies, which would then use the information to customize their sales pitches to doctors. Ultimately, the Court ruled that the infirmity in the

201. See Trans Union Corp. v. FTC, 245 F.3d 809, 818-19 (D.C. Cir. 2001).
202. Id. at 818.
204. See Wu, supra note 15, at 81-82.
205. See id. at 90.
206. See 564 U.S. 552, 557 (2011). Those records are referred to as “prescriber-identifying information.” Id. at 558.
207. See id. at 558. The process of promoting drugs to doctors is known as “detailing.” Id.
Vermont law was in denying to the pharmaceutical companies access to the prescriber-identifying information, while permitting access by many others, including groups interested in countering the pharmaceutical companies and promoting the use of generic drugs. In dicta, however, the Court suggested that perhaps the restriction on transfer was itself directly problematic, insofar as “the creation and dissemination of information are speech within the meaning of the First Amendment.”

Whatever the merits of treating the transfer of information from the pharmacy to the pharmaceutical company as “speech” in the abstract, this “speech” occurs entirely between two parties, neither of which have intrinsic First Amendment interests. In the usual case, both parties will be major for-profit corporations. But even if the transaction was between individuals, it would still be commercial with respect to both the speaker and the listener. For the pharmacist-speaker, the prescription data is an item of commerce because its value is entirely private, no more than the counter-party’s willingness to pay for it. It is not a means for the pharmacist to express herself. Similarly, for the pharmaceutical company-recipient, the data is an input into the commercial transaction of marketing drugs to doctors. This commercial use is certainly not the only possible use that could be made of the data, but it is the one the statute covered. Just as the FCRA merits minimal scrutiny because it is limited to recipients who are receiving the information for commercial purposes, so too should a regulation on the transfer of prescription data merit minimal scrutiny when it is limited to recipients making a commercial use of the data.

at 557.

208. See id. at 564.

209. Id. at 570.

210. See Ashutosh Bhagwat, Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy, 36 VT. L. REV. 855, 875-76 (2012) (arguing that such a transfer should receive full First Amendment protection “only when the speech contributes meaningfully to the democratic process of self-governance”).

211. Cf. IMS Health Inc. v. Ayotte, 550 F.3d 42, 53 (1st Cir. 2008) (describing the situation as one “in which information itself has become a commodity,” not unlike “beef jerky”).

212. See id.

213. See Sorrell, 564 U.S. at 558-59.

214. See supra text accompanying notes 199-204.
B. Privacy Invasions by Commercial Entities

Some commentators have argued that privacy laws burden freedom of expression and should receive heightened scrutiny under the First Amendment.215 This potentially includes not only laws that stop people from talking about others,216 but also laws that inhibit the gathering and creation of information in the first place.217 Those that have advocated First Amendment scrutiny of privacy laws have not generally distinguished between commercial entities and individuals acquiring the same information.218

The broader question of whether there is or should be a First Amendment right to gather information is beyond the scope of this Article. Even if there should be, however, it should be one that attaches to noncommercial individuals, rather than corporate or commercial entities. In the context of privacy laws, the person from whom the information is being extracted is often not a willing participant in the transaction.219 There is no willing “speaker,” and thus, no speaker-based interests to protect. When the entity collecting the information lacks intrinsic First Amendment interests, restrictions on that collection merit little First Amendment scrutiny, just as in the case of a commercial speaker transacting with a commercial recipient.

Thus, even if we protect the newsgatherer or the photographer or acts of gathering information that “inform[] people,”220 we need not similarly protect, for example, the large-scale consumer data tracking that is now pervasive.221 An entity that gathers information about users’ web browsing in order to target advertisements to those users is collecting information that is, from that entity’s perspective, nothing more than a component of commercial activity. In this way,

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216. See Volokh, supra note 215, at 1050-51.

217. See Bambauer, supra note 215, at 61.

218. See id. at 106-09.

219. See, e.g., Dietemann v. Time, Inc., 449 F.2d 245, 246 (9th Cir. 1971) (involving a recording made of a conversation in someone’s home without his consent).

220. See Bambauer, supra note 215, at 60-61, 77-81.

the targeted advertising company is similarly situated to the recipient of a consumer report under the FCRA or the pharmaceutical companies in Sorrell.\textsuperscript{222} As in those cases, the targeted advertising company lacks intrinsic First Amendment interests. Because regulation of targeted advertising does not generally impinge upon the users’ First Amendment interests, there are no First Amendment interests at stake in such regulation, and thus any First Amendment scrutiny of such regulations should be minimal.\textsuperscript{223}

C. Indirect Regulation of Noncommercial Transactions

In some situations, though surely not all, commercial entities might be receiving or collecting information that they will ultimately pass on to individuals.\textsuperscript{224} In those cases, we might be concerned that restricting the activities of these commercial entities might ultimately restrict noncommercial ones, and thus First Amendment scrutiny would still be appropriate, even if the interest of the commercial entities were understood as merely derivative.

At the outset, it is important to note that not every restriction on a commercial entity impinges upon a derivative interest. The pharmaceutical companies in Sorrell did not acquire prescriber-identifying information in order to thereby pass that information on to individuals.\textsuperscript{225}

Even when there may be an underlying noncommercial interest at stake, however, and therefore some First Amendment inquiry is appropriate, recognizing the commercial interest as a derivative one circumscribes the nature of any resulting First Amendment review. The direct effects of a privacy regulation on a commercial entity like

\textsuperscript{222} See supra Part III.A.

\textsuperscript{223} To the extent that a regulation impedes willing users’ ability to provide information for use in advertising, perhaps there are still some First Amendment interests at stake. The nature and strength of such interests, however, are quite different from those premised on intrinsic interests on the part of the advertisers. See infra Part IV.

\textsuperscript{224} Professor Bambauer gives the example of LexisNexis. See Bambauer, supra note 215, at 106-07.

LexisNexis are legitimate. It is only the indirect effects on potential noncommercial recipients that are cause for concern.

When the government legitimately targets one kind of activity, but the government action might have problematic indirect speech effects, First Amendment review is substantially more deferential than when the direct effects of the government action are the subject of review. Consider, for example, the scrutiny applied to a content-neutral regulation. Such a regulation is constitutional:

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 226

The O'Brien test has often been called an intermediate scrutiny test, 227 just as the Central Hudson test has been called an intermediate scrutiny test in the context of commercial speech. 228 The “intermediate scrutiny” of the O'Brien test is not nearly as exacting as the “intermediate scrutiny” of the Central Hudson test, though. If the Central Hudson test has been applied in a manner that sometimes borders on strict scrutiny, the O'Brien test has sometimes been applied in a manner that borders on rational basis review.

Consider the O'Brien case itself, which involved the constitutionality of a law against burning draft cards. 229 The defendant in that case argued quite reasonably that the burning of a draft card made no real difference to the actual operation of the draft system. 230 It was not as if the holder of the draft card were burning the actual record of his registration held by the government. The draft card itself was a mere receipt, a document that recorded relevant facts, such as the identity and registration status of a particular individual, but that did not itself make any of those facts more or less true. 231 And yet the Court found that burning the draft card would

229. See O'Brien, 391 U.S. at 375.
230. See id. at 375.
231. See id.
impede “the smooth and proper functioning” of the draft system.\textsuperscript{232} According to the Court, Congress had a “substantial interest” in preventing the destruction of these “receipts,” so as to avoid “a mix-up in the registrant’s file,” to make it easier for the registrant to contact his local board, and to remind the registrant to notify the board of any address changes.\textsuperscript{233} In justifying the law under these rationales, the Court made no real attempt to ask whether there was a serious problem with any of these issues or whether the regulation would be at all effective in addressing these problems.

Contrast this with the commercial speech cases involving restrictions on advertising for alcohol, cigarettes, and gambling.\textsuperscript{234} In applying the \textit{Central Hudson} test in those cases, courts have rigorously scrutinized the government’s evidence to determine how much the government’s interests would in fact be advanced by the challenged regulations.\textsuperscript{235} What potentially justifies the difference between the stringent \textit{Central Hudson} review and the relatively more relaxed \textit{O'Brien} review is that in the commercial speech cases, the effects on speech are the direct and intended effect of the regulations, rather than merely a byproduct, leading the courts to be much more skeptical of such regulations.

In the context of indirect regulation of noncommercial transactions, it is the more relaxed \textit{O'Brien}-type review that should apply.\textsuperscript{236} Thus, just as a content-neutral regulation is valid so long as it is tailored to the permissible noncontent aim and does not have excessive impermissible content-based effects,\textsuperscript{237} regulation of commercial data collection, itself a permissible aim, should at a minimum be permitted so long as the regulation is tailored to that aim and does not have excessive effects on the ability of individuals to collect information. Such an analysis recognizes that the commercial actor directly collecting the information lacks intrinsic First Amendment interests, while accounting for the interests of noncommercial individuals that the regulation may affect.

\textsuperscript{232} Id. at 381.
\textsuperscript{233} Id. at 378-80.
\textsuperscript{234} See cases cited supra note 113.
IV. IMPLICATIONS FOR COMMERCIAL SPEECH DIRECTED AT UNWILLING LISTENERS

The derivative nature of corporate and commercial speech also has important implications in cases involving listeners who wish to block out a commercial entity’s speech. In a noncommercial context, the listener’s interests potentially need to be balanced against the speaker’s.238 In a commercial context, though, once we understand that the commercial speaker’s interests are merely derivative of the listener’s interests, then it becomes easy to see that as between the commercial speaker and the unwilling listener, it is only the interests of the unwilling listener that matter. Thus, unwilling listener cases are much more easily resolved in commercial contexts than in noncommercial ones.239

For example, there is no sensible argument that “do-not-call” regulations violate the First Amendment.240 The telemarketing calls restricted by the do-not-call regulations are corporate or commercial speech,241 and thus are protected only to protect the recipients’ access to such speech. If those recipients have specifically indicated that they do not wish to receive such calls, the telemarketers have no intrinsic First Amendment interest in speaking nevertheless.242 While the Tenth Circuit ultimately upheld the do-not-call regulations against a First Amendment challenge, it did so only after applying the Central Hudson test.243 In so doing, the court relied heavily on the evidence the government had put forward about the extent of the problem of unwanted telemarketing and the inadequacy of proposed alternatives.244 There should have been no need, however, to clear a hurdle designed to preserve listeners’ access to

238. See supra note 12.
239. See Jaynes v. Commonwealth, 666 S.E.2d 303, 313 (Va. 2008) (striking down a law prohibiting false routing information in unsolicited bulk e-mail, where the law was “not limited to instances of commercial or fraudulent transmission of e-mail”).
240. See Mainstream Mkts., Inc. v. FTC, 358 F.3d 1228, 1232-33 (10th Cir. 2004).
241. See id. at 1236 (“The national do-not-call registry’s telemarketing restrictions apply only to commercial speech.”).
242. See supra Part I.
243. See Mainstream Mkts., Inc., 358 F.3d at 1236, 1246.
244. See id. at 1241, 1244-45.
information in a case about whether those listeners could refuse to receive that information.

And the level of scrutiny can make a real difference to the outcome of a case, particularly when privacy interests are involved.\textsuperscript{245} In an earlier case, \textit{U.S. West, Inc. v. FCC}, the Tenth Circuit had come to the opposite conclusion about the constitutionality of an FCC order restricting telecommunications carriers from using customer information for marketing purposes, striking down the order after applying the \textit{Central Hudson} test.\textsuperscript{246} In that case, the court expressed its “concerns” about the privacy justification the government proffered, and it required the government to “specify the particular notion of privacy and interest served” and to establish that the interest was “substantial.”\textsuperscript{247} Construing the relevant privacy interest narrowly to be that of avoiding embarrassment,\textsuperscript{248} the court found no evidence that embarrassing disclosures would occur in the absence of the challenged order, and thus no evidence of real harm to justify the order.\textsuperscript{249}

But if the First Amendment claim here is supposed to protect the customer’s access to marketing information, and that customer objects to having his personal information used for those marketing purposes, there is simply no First Amendment claim to raise at all. Any First Amendment interest that the carrier has is derivative of the interests of the very individual against whom the carrier is opposed.

It is possible that some of the customers were not in fact unwilling recipients, and that those customers’ interests in receiving marketing information on the basis of their data were burdened by the

\textsuperscript{245} See Wu, supra note 15, at 81-82.
\textsuperscript{246} See U.S. West, Inc. v. FCC, 182 F.3d 1224, 1240 (10th Cir. 1999). The challenged order applied to “customer proprietary network information,” which included call data, and it largely prohibited carriers from using or disclosing the information except to provide the relevant telecommunications service. See id. at 1228 & n.1; see also 47 U.S.C. § 222 (2012).
\textsuperscript{247} U.S. West, 182 F.3d at 1234-35.
\textsuperscript{248} See id. at 1235. The government had justified the order on the basis that information about “to whom, where, and when a customer places a call” was information that could be “extremely personal to customers” and “equally or more sensitive [than the content of the calls].” Id. at 1235 (alteration in original) (quoting Implementation of the Telecommunications Act of 1996, 13 FCC Rcd. 8061, 8064, 8133 (1998)). The potential for embarrassment is but one possible privacy interest at stake in the use or disclosure of call data. See Neil M. Richards, \textit{The Dangers of Surveillance}, 126 HARV. L. REV. 1934, 1955 (2013).
\textsuperscript{249} See U.S. West, 182 F.3d at 1237-38.
order’s requirement to opt in to the use of their data. One could then argue that scrutiny might be warranted in order to ensure access by these willing customers to valuable marketing information, particularly if an opt-in requirement is seen as a substantial barrier to the flow of that information. The First Amendment might be implicated to the extent necessary to protect the speech interests of willing listeners, the ones who wanted to have their information used for marketing.

Framed in this manner, however, the First Amendment interests are easily seen to be far less weighty than the courts have generally characterized them, and thus even if some scrutiny might be warranted in these circumstances, it surely should not be at the level of the Central Hudson test. The government regulation does not constrain the speech that consumers can choose to receive. In order to receive a particular kind of marketing, the consumer need only affirmatively choose to receive it. Moreover, just as the economic incentive of the commercial speaker is thought to be sufficient to minimize any chilling effect from the imposition of liability for misleading commercial speech, that same economic incentive can overcome the barriers created by the need to obtain opt-in consent. Commercial speakers have every incentive to make it as easy as possible for consumers to opt in to marketing.

This same analysis could have been applied in the case of Sorrell v. IMS Health Inc. In that case, the Supreme Court ultimately grounded its decision to strike down the Vermont law not in the law’s restriction of the transfer of data from pharmacies to pharmaceutical companies, but in the law’s restriction of the pharmaceutical companies’ marketing practices to doctors. Here too, as in U.S. West, the real First Amendment interests were not those of the companies marketing to doctors, but those of the doctors interested...

251. See id. at 765.
252. See id.
254. See Jeff Sovern, Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information, 74 WASH. L. REV. 1033, 1101 (1999).
256. See id. at 571.
in receiving information about brand-name drugs from the companies.\textsuperscript{257} And again, the law at issue did not prevent the doctors from receiving detailing visits, or even detailing visits tailored to their prescription practices.\textsuperscript{258} The doctors need only have opted in to such marketing. On that view, it would seem that the Court's heightened scrutiny was misplaced.

Still, the Court's decision seems to have been animated by its view that the Vermont law was not really about marketing that the doctors did not want, but rather about marketing that the state did not want. As the Court put it, the defect in the law was that it “burdened a form of protected expression that it found too persuasive.”\textsuperscript{259} This rationale is very much in line with the core rationale expressed by the Court in its corporate and commercial speech cases, namely that the First Amendment casts doubt on any regulation meant to limit particular advertising messages.\textsuperscript{260} If the Court viewed the Vermont statute to have been aimed at suppressing the message that doctors should prescribe brand-name drugs, then perhaps some First Amendment skepticism was warranted.

Read in this way, the \textit{Sorrell} decision is a narrow one. It perhaps limits the government's ability to restrict marketing on the basis of the message conveyed, but it does not limit the government's ability to restrict marketing on the basis of whether the listener wants it.\textsuperscript{261} It should thus pose no impediment, for example, to a regulation requiring websites to honor a do-not-track or do-not-target signal.\textsuperscript{262} Such a requirement might seem superficially similar to the one at issue in \textit{Sorrell}, insofar as both requirements restrict the use of

\begin{itemize}
  \item \textsuperscript{257} See id. at 578.
  \item \textsuperscript{258} Id. at 573.
  \item \textsuperscript{259} See id. at 580.
  \item \textsuperscript{260} See, e.g., 44 Liquormart v. Rhode Island, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.).
  \item \textsuperscript{261} See \textit{Sorrell}, 564 U.S. at 575 (suggesting that a statute designed to give physicians greater control over the use of their information might pass muster because then the statute's design would be “unrelated to any purpose to advance a preferred message”). \textit{But see id. (“Many are those who must endure speech they do not like, but that is a necessary cost of freedom.”); Piety, supra note 73, at 4-5 (arguing that \textit{Sorrell} represents a “major doctrinal shift” in “turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis”).}
\end{itemize}
certain personal information for marketing purposes. A restriction on behavioral advertising, however, would be aimed not at limiting particular messages, but at recognizing the consumers’ preferences not to have their information used to market to them in particular ways.

Similarly, the First Amendment imposes no impediment to the government regulating marketing techniques that unduly take advantage of consumer weaknesses. Thus, for example, the government can restrict in-person solicitation by lawyers, at least to the extent that such solicitation involves “fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct.” Again, because the First Amendment value of the solicitation speech lies in its value to the recipient, rather than the speaker, there can be no infringement on First Amendment rights in a regulation that protects the recipient in that encounter. If there is a potential First Amendment problem, it would lie only in the possibility that a regulation aimed at protecting some listeners ends up restricting valuable speech to other listeners. More broadly, the First Amendment should not restrict government attempts to control forms of undue influence in marketing. In the marketing transaction, the First Amendment interests are those of the consumers, and thus, unless there is a conflict among consumers, consumer protection measures cannot run afoul of the First Amendment.

CONCLUSION

Courts and commentators have tended to think that the corporate or commercial nature of speech makes either no difference or all the difference. In fact, the choice need not be so stark. By understanding the derivative nature of these speech interests, one can see why commerciality can make a difference in some scenarios and not

264. See id. at 468-69 (Marshall, J., concurring in part and concurring in the judgment) (expressing “concern that disciplinary rules not be utilized to obstruct the distribution of legal services to all those in need of them”).
266. “Consumer protection” here means protecting consumers from overreach by sellers, not “protecting” consumers from themselves.
others. Compelled speech, transactions among commercial entities, and unwanted speech are all settings in which commercial speech can be regulated with minimal First Amendment scrutiny, even if the equivalent regulation of noncommercial speech would attract much more stringent review.

Underlying the commercial difference is the speech difference—that is, the idea that there is something different about speech as compared to other human activity. Failing to recognize the difference between commercial and noncommercial speech in the settings in which it should matter is often rooted in a failure to differentiate between speech and commercial conduct. The blurring of that distinction creates a situation in which First Amendment protection becomes unhinged from any theoretical underpinnings. When that occurs, both free speech and sensible government regulation lose out.
June 17, 2022

The Hon. Gary Gensler  
Chair  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: File No. S7-10-22  
Climate-Related Disclosures for Investors

Dear Chair Gensler,

We write on behalf of twelve First Amendment scholars regarding proposed rules that would require public companies to provide certain climate-related information in their registration statements and periodic reports. The Commission has received several comments raising concerns that the proposed rules violate the First Amendment. The undersigned believe that those concerns are misplaced. The proposed rules seek to protect investors by providing them with information about climate-related financial risks and metrics associated with securities that are sold to the public. Disclosure requirements of this kind do not ordinarily raise First Amendment concerns. To the contrary, they have long been understood to be an integral part of the regulation of securities. If the proposed rules trigger First Amendment scrutiny at all, they should be evaluated under the deferential standard of review that applies to compelled disclosures of factual information in the commercial context. The proposed rules appear to easily satisfy that standard.

I. Disclosure requirements that inform and protect investors do not ordinarily raise First Amendment concerns.

As one SEC report notes, “[d]isclosure is and has from the outset been a central aspect of national policy in the field of securities regulation.” SEC, Disclosure to Investors–A Reappraisal of Federal Administrative Policies under the '33 and '34 Acts (The Wheat Report) 10 (1969); see also SEC v. Cap. Gains Rsch. Bureau, 375 U.S. 180, 186 (1963) (noting that the “fundamental purpose” of federal securities legislation is to “substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry”). The Securities Act of 1933 requires companies offering securities to the public to disclose truthful information about these securities and the risks associated with investing in them. Securities Act of 1933, 15 U.S.C. § 77e. The Securities Exchange Act of 1934 requires companies with publicly traded securities to periodically report certain information on an ongoing basis. Securities Exchange Act of 1934, 15 U.S.C. §§ 78m–78n. This includes annual and quarterly information about a company’s business and financial conditions, and current information about major events relevant to shareholders. Id.

The main purpose of these laws is to protect investors from information asymmetries, and capital markets from inefficiency and instability. Disclosure reduces information asymmetries among investors, and between investors and the issuers of securities, by arming all potential investors with information that is material to investment and voting decisions. See The Wheat Report 10 (describing the purpose of the ’33 and ’34 Acts as “seeing to it that investors and speculators had access to enough information to enable them to arrive at their own rational decisions”). Addressing information asymmetries can, in turn, improve the price-setting function of the market by empowering investors to better assess and price risk. See H.R. Rep. No. 95-910, vol. 1, at 562–63 (1977) (noting that the Acts were “founded on the theory that informed investors seeking to maximize their own investment needs and objectives resulted in the most efficient allocation of capital,” and that the “competing judgments of informed buyers and sellers as to the value of a security in a free and open securities market reflected fair values for that security”).

Historically, disclosure mandates that seek to inform and protect investors have not been required to satisfy First Amendment scrutiny. See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1778 (2004). Although the Supreme Court has not squarely addressed the issue, it has repeatedly suggested that the regulation of information about securities does not raise First Amendment concerns. For example, in Ohralik v. Ohio State Bar Association, the Court
observed that “[n]umerous examples can be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, [and] corporate proxy statements,” and that “[e]ach of these examples demonstrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.” 436 U.S. 447, 456 (1978) (cleaned up); accord Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 758 n.5 (1985). Similarly, in Paris Adult Theatre I v. Slaton, the Court remarked: “[N]either the First Amendment nor ‘free will’ precludes States from having ‘blue sky’ laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.” 413 U.S. 49, 64 (1973).

The underlying rationale for this rule is clear: generally speaking, securities laws regulate information about securities not as speech, but rather incidentally, as part of a broader regulatory scheme aimed at securities dealing. As the Supreme Court has repeatedly explained, “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011); accord Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA), 138 S. Ct. 2361, 2373 (2018); cf. United States v. O’Brien, 391 U.S. 367 (1968). This is especially true when a restriction is part of a finely reticulated regulatory scheme. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) (citing antitrust and labor laws as examples); see also Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997) (upholding a compelled subsidy for speech in the context of a broader regulatory system). Thus, in SEC v. Wall Street Publishing Institute, the D.C. Circuit observed that the government’s power to impose securities disclosure requirements on public companies derives from its “broad powers” to regulate securities markets. 851 F.2d 365, 372 (D.C. Cir. 1988); see also Bangor & A. R. Co. v. Interstate Com. Comm’n., 574 F.2d 1096, 1107 (1st Cir. 1978) (similar). “In areas of extensive federal regulation,” the court said, “we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme.” Wall St. Publ’g Inst., 851 F.2d at 373. This is true of the detailed regulatory scheme that governs securities disclosures. Id.2

II. At most, the proposed rules should be evaluated under Zauderer’s lenient standard of review.

We understand that the proposed rules seek to further the purposes of securities regulation by protecting both investors and capital markets. The proposed rules would require public companies to include certain climate-related disclosures in their registration statements and periodic reports, including “information about climate-related risks that are reasonably likely to have material impacts on [their] business or consolidated financial statements, and [greenhouse gas] emissions metrics that could help investors assess those risks.” The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,345 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249). Underlying this requirement is a recognition that climate change creates financial risk for companies, as well as for capital markets as a whole, and that existing disclosures of climate-related risks “do not adequately protect investors.” Id. at 21,335. The proposed rules seek to standardize these disclosures to reduce information asymmetries—both among investors and between investors and firms—thus empowering investors “to make more informed investment and voting decisions” in line with their risk preferences. Id. at 21,413. The idea is that this, in turn, would enable climate-related risks to be “more fully incorporated into asset prices,” contributing to a more efficient allocation of capital. Id.

Protecting investors and capital markets is an entirely traditional function of securities laws, and an important objective of regulatory policy in a market society. Congress vested the SEC with broad authority to mandate disclosures that are “necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. §§ 78l, 78m, 78o. The Commission has routinely used this authority to modify the disclosure regime in light of changes in the economy and capital markets. For example, in 2014, the Commission adopted new rules requiring the disclosure of information about asset-backed securities because “the financial crisis highlighted that investors and other participants in the securitization market did not have the necessary information and time to be able to fully assess the risks underlying asset-backed securities and did not value asset-backed securities properly or accurately.” Asset-Backed Securities Disclosure and Registration, 79 Fed. Reg. 57,184, 57,186 (Sept. 24, 2014). In 2020, the Commission adopted rules requiring companies to disclose detailed information about their workforces in the recognition that “human capital accounts for and drives long-term business value much more so than it did 30 years ago.” Remarks of Chair Jay Clayton, Modernizing the Framework for Business, Legal Proceedings and Risk Factor Disclosures (Aug. 26, 2020), https://perma.cc/R3DF-MJXF. The proposed rules seek to reflect the impacts of climate-related risks on
individual businesses and the financial system overall. 87 Fed. Reg. at 21,336. Accordingly, they fall squarely within this tradition.3

If the rules trigger First Amendment scrutiny at all, they should be evaluated under the framework that the Supreme Court established in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985). In Zauderer and its progeny, the Court has made clear that, in the commercial context, compelled disclosures of “purely factual and uncontroversial” information that relate to the good or service offered by the regulated party should be assessed less stringently than compelled disclosures of other forms of protected speech. Zauderer, 471 U.S. at 651; see also NIFLA, 138 S. Ct. at 2372. The reason is that commercial speech is protected primarily because of its informational function—“the value to [listeners] of the information such speech provides”—and compelling disclosures about commercial goods and services can serve this function by increasing the flow of information to an audience. Id.; see also Cent. Hudson, 447 U.S. at 562–62 n.5 (noting that commercial speech “link[ing] a product to current public debate” is not entitled to greater protection because “many, if not most, products may be tied to public concerns”). Thus, although Zauderer itself concerned a law intended to address deception in commercial advertising, its reasoning applies more broadly, as every court of appeals to consider the question has recognized. See NetChoice, LLC v. Att’y Gen., Fla., 34 F.4th 1196, 1227 (11th Cir. 2022); CTIA—The Wireless Ass’n v. City of Berkeley, 928 F.3d 832, 844 (9th Cir. 2019) (collecting cases from other circuits); see also NIFLA, 138 S. Ct. at 2376 (noting that “health and safety warnings” have “long [been] considered permissible,” as have “purely factual and uncontroversial disclosures about commercial products”); NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1717–18 (2022) (order vacating stay of preliminary injunction) (Alito, J., dissenting) (suggesting that Zauderer may apply to disclosure requirements on social media companies).

The proposed rules satisfy the predicates for Zauderer review because they require the disclosure of factual and uncontroversial information about the risks associated with securities that companies offer to the investing public. Cf. Full Value Advisors, LLC v. SEC, 633 F.3d 1101, 1104, 1109 (D.C. Cir. 2011) (applying Zauderer to uphold a securities provision that required an institutional investment manager to submit to the SEC “among other things, the names, shares, and fair market value of the securities over which the institutional manager[] exercise[d] control”); United States v. Wenger, 427 F.3d 840, 848–51

That the information concerns the impacts of climate-related risks does not render the proposed disclosures controversial. The Ninth Circuit’s decision in CTIA is instructive. In that case, the Ninth Circuit upheld a city ordinance requiring cell phone retailers to provide prospective cell phone purchasers with information about federal radiofrequency radiation exposure guidelines regarding cell phone use. The court evaluated the ordinance under Zauderer because it compelled the disclosure of “purely factual and uncontroversial” information about a commercial product. CTIA, 928 F.3d at 846–48. Although the court recognized that there is a “controversy” concerning whether radiofrequency radiation can be dangerous to cell phone users, it did not consider the required disclosure controversial for this reason. Id. at 848. The court distinguished NIFLA because in that case the relevant disclosure required clinics to wade into a “heated political controversy”—namely, abortion—and to convey a message that was not only “fundamentally at odds with [their] mission,” but that also did not relate to a service they provided. CTIA, 928 F.3d at 845. In the court’s view, the cell phone disclosure did no such thing. Id.

Neither do the proposed rules. Although the general issue of climate change might be controversial, the rules do not require companies to convey a message to which they are morally or religiously opposed, or to make an admission of moral culpability. Cf. Nat’l Ass’n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (explaining that the label “DRC conflict free” is “hardly factual and non-ideological” because it is “a metaphor that conveys moral responsibility for the Congo war” and is tantamount to “compelling an issuer to confess blood on its hands”); but see id. at 538–39 (Srinivasan, J., dissenting) (describing the label as uncontroversial because the question whether a product contained conflict minerals originating in the DRC merely “call[ed] for a ‘factual’ response”). Nor do the rules require companies to disclose information that is unrelated to their products or services. They merely require companies to disclose certain factual information about climate-related risks and metrics that may affect their financial performance. 87 Fed. Reg. at 21,462. Disclosure requirements of this kind have long been understood to be an integral part of the regulation of securities.

III. The proposed rules appear to easily satisfy Zauderer’s standard of review.

Under Zauderer’s deferential standard of review, compelled disclosures of commercial information are constitutional so long as they are “reasonably related” to a legitimate government interest and are not “unjustified or unduly burdensome.” 471 U.S. at 651; see also
The proposed rules appear to easily satisfy these requirements.

First, the proposed rules further legitimate government interests. As we understand it, the main purpose of the proposed rules is to “provide consistent, comparable, and reliable—and therefore decision-useful—information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments.” 87 Fed. Reg. at 21,335. The proposed rules also seek to improve the efficiency of capital markets by enabling this information “to be more fully incorporated into asset prices.” Id. at 21,445. These interests are manifestly important. See Nat’l Elec. Mfrs. Ass’n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (describing as “significant” the government’s interest in “better inform[ing] consumers about the products they purchase”); Am. Hosp. Ass’n v. Azar, 983 F.3d 528, 540 (D.C. Cir. 2020) (describing as “legitimate” the government’s interest in “promoting price transparency and lowering healthcare costs”); cf. Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) (finding “substantial” the government’s interest in country-of-origin labeling because the labels “enable[d] consumers to choose American-made products,” responded to consumer interest in such labeling, and addressed “individual health concerns and market impacts” arising from food-borne illness outbreaks). 4

Second, the proposed rules appear to be “reasonably related” to the government’s interests. The SEC has identified a gap in investment-and voting-relevant information being provided to investors, and the proposed rules would fill that gap by requiring disclosure of such information. See Wenger, 427 F.3d at 851 (holding that a rule requiring those paid to promote securities to disclose the amount of compensation they received was reasonably related to the SEC’s goals of preventing deception and increasing investment-relevant information to “promot[e] open capital markets”). This “fit” between ends and means makes the proposed rules categorically different from the conflict-mining rule invalidated in National Association of Manufacturers v. SEC, which required companies to disclose whether or not their products were “DRC conflict free.” 800 F.3d at 518. In that case, a divided panel of the D.C. Circuit assumed that the SEC’s stated interest of “ameliorating the humanitarian crisis in the DRC” would be sufficient if Zauderer governed, but found that the rule would fail Zauderer’s “reasonably related” test because neither the SEC nor Congress demonstrated that the compelled disclosure was likely to be “effective[]” in “achieving” that interest. Id. at 524–25. The court

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4 The Ninth Circuit has held that the government interest justifying a compelled disclosure must be “substantial—that is, more than trivial.” See CTIA, 928 F.3d at 844. The Supreme Court has not yet resolved the question whether the state’s interest must be “substantial” or “legitimate,” but the SEC’s interests appear to easily satisfy either description.
reasoned that the idea that this disclosure “will decrease the revenue of
armed groups in the DRC and [that] their loss of revenue will end or at
least diminish the humanitarian crisis there” was “entirely unproven
and rests on pure speculation.” Id. at 525.\(^5\) The proposed disclosures at
issue here, by contrast, appear to be much more tightly connected to the
government’s interests. See Am. Hosp. Ass’n, 983 F.3d at 540–41
(explaining that strict “evidentiary parsing” is not required when “the
government uses a disclosure mandate to achieve a goal of informing
consumers about a particular product trait” (cleaned up)).

Third, the proposed rules do not appear to be unjustified. Unlike the
disclosure at issue in NIFLA, the proposed rules here seek to “remedy
a harm that is potentially real[,] not purely hypothetical.” NIFLA, 138
S. Ct. at 2377 (cleaned up). The SEC and others have documented that
“climate-related risks have present financial consequences that
investors . . . consider in making investment and voting decisions.” 87
Fed. Reg. at 21,335–36; see also id. at nn.10–11; U.S. Gen. Acct. Off.,
Public Companies: Disclosure of Environmental, Social, and
Governance Factors and Options to Enhance Them 9–13 (2020); Cynthia
Williams & Donna M. Nagy, ESG and Climate Change Blind Spots:
Turning the Corner on SEC Disclosure, 99 Tex. L. Rev. 1453, 1453–54
(2021). As the SEC notes, investors have “increased their demand for
more detailed information” about these risks as a result. 87 Fed. Reg.
at 21,337. The current regime of largely voluntary climate-related
disclosures has not met this demand, however, because voluntary
disclosures “provide different information, in varying degrees of
completeness,” and are “not subject to the full range of liability and
other investor protections that help elicit complete and accurate
disclosures by public companies.” 87 Fed. Reg. at 21,335. Given the
SEC’s documentation of a currently existing gap in necessary investor
information, the proposed rules appear to directly address a harm that
is “real” and not merely “hypothetical.”

Finally, the proposed rules do not appear to be unduly burdensome
in the relevant sense—that is, they do not appear to chill protected
speech. See Zauderer, 471 U.S. at 651; see also Am. Hosp. Ass’n, 983
F.3d at 541 (making clear that “to prevail” under Zauderer, the
challenger “must demonstrate a burden on speech” rather than a
financial one). The proposed rules do not interfere with any expression
companies wish to convey. Cf. Ibanez v. Fla. Dep’t of Bus. & Prof. Regul.,
Bd. of Acct., 512 U.S. 136, 146 (holding that a disclosure was “unduly
burdensome” when it “effectively rule[d] out” the regulated entity’s
ability to speak). They simply require that certain factual climate-
related information be included in “registration statements” and
“Exchange Act annual reports” in “separate, appropriately captioned

\(^5\) Because the panel concluded that Zauderer did not apply, its application
of Zauderer was an “alternative ground for [its] decision.” Nat’l Ass’n of Mfrs.,
800 F.3d at 524.
section[s],” as well as “in a note to the [company]'s audited financial statements.” 87 Fed. Reg. at 21,345-46. Because the proposed rules neither require companies “to endorse a particular viewpoint nor prevent[] them from adding their own message” in those statements or other reports they wish to publish, Am. Hosp. Ass'n, 983 F.3d at 541, it is unlikely that they would unduly burden companies’ protected speech.

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Thank you for your consideration of these comments.

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