TREAD ON ME!

Toni M. Massaro[*]

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Justice Robert H. Jackson[1]

ABSTRACT

Freedom of speech doctrine is an analytical and theoretical morass. This is primarily because expression is a ubiquitous human activity that government regulates in ways that defy simple summary.

Yet despite the complexity and vast scope of the modern freedom of expression terrain, commentators and courts strain to identify unifying, formalistic analytical principles and to propose singular theoretical prisms through which to view the terrain. I argue that this is a wrong turn. A better understanding of past and present free speech practice requires thinking that is factored, not formulaic; contextual, not trans-contextual; dynamic, not static; tentative, not absolutist; plural, not singular or even dichotomous. In fact, nuance will be increasingly important in future First Amendment cases, as new science, new technologies, and socio-political developments challenge fundamental assumptions that undergird the doctrine. This is especially apparent when one confronts the free speech canard that government cannot compel private expression.

This Article proceeds in two parts.

Part I describes in broad strokes the current state of doctrinal and theoretical affairs in the free speech realm. It offers a topography of the free speech doctrinal terrain and identifies key questions that pervade it. This section focuses in particular on the significance of "above-the-line" treatment of speech regulations that trigger elevated scrutiny. This overview shows that the doctrine offers, at most, a set of norms and questions that inform judicial analysis rather than a "fixed star" or even fixed principles.

Part II critiques three recent Roberts Court decisions that ignore this doctrinal reality. The Court

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1 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (Jackson, J.).

has insisted that speaker identity distinctions always trigger elevated scrutiny, that only traditional and historical categorical exceptions are constitutional, and that government speech is beyond the freedom of speech principles. None of these formalistic statements can be squared with other free speech doctrine, significant zones of traditional government regulation, or common sense. They also weaken the Court's ability to balance the conflicting policy concerns that arise in a host of speech-sensitive areas—such regulation of data collection, licensed professionals, or other commercial actors.

That the Court's more rigid approach to free speech is unsustainable is especially apparent if one examines the compelled speech cases. Contrary to Justice Robert Jackson's rhetorically arresting "no fixed star" celebration of individual freedom from compulsory pledges of allegiance, government often demands private expression, crafts it, or silences it altogether. Government can, and often does, "tread on me." Constitutionally mandated oaths of office, occupation-specific codes of conduct, public accommodations laws, audience and context-specific regulation of the content of information disclosures, many employment and civil rights statutes, student conduct codes, conditions on government benefits, anti-fraud laws, and many other forms of government speech regulation demonstrate that there is no across-the-board constitutional mandate against government compelled expression. In all of these cases, context, history and a host of relevant government interests matter.

In 2013, the Roberts Court struck down a condition on a government grant that it deemed unduly coercive of grantees' freedom of expression. Yet the Court also recognized that contextual flexibility matters in determining when funding conditions go beyond sensible restrictions and become unlawful compulsion. I praise this recent turn away from free speech formalism, and suggest this not only is the better analytical approach in compelled speech cases, but in free speech cases more generally.

INTRODUCTION

The basic tenets of modern free speech doctrine are as follows: content-based government regulation of expression triggers exacting scrutiny and is presumptively unconstitutional. Prior restraints are a worst case scenario. Content-neutral regulations trigger intermediate scrutiny. Expressive conduct walks an uneasy line between speech and non-speech, but even government regulations aimed at the conduct component of expressive behavior may trigger intermediate scrutiny.

Enormously significant caveats to the basic rules nearly swallow these tenets.[2] Categorical exceptions, such as "fighting words," carve impressive holes into the free speech edifice. Most government space is "non-public," and private speech may be heavily restricted or banned altogether there. Perhaps most importantly, government has vast authority to use its financial resources and bully pulpit to craft messages that serve content-, or even viewpoint-specific, ends.

2 *Cf.* Karl L. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950) (outlining his famous attack on the canons of statutory construction on the ground that even the most important canons have competing canons that have an opposite effect).

Assessments of speech "harms" and "burdens" also vary contextually in ways that may limit speech freedoms. Acceptance of a government benefit or entry into a regulated profession often means that one's expression can be very restricted, notwithstanding more general claims that government cannot compel our allegiance or impose orthodoxies.

Even more fundamentally,[3] the scope of protected expression is not as wide as the logic of the basic doctrine suggests. Extensive government content-based regulation of indisputably expressive material—for example, computer codes, financial statements, medical records, price agreements, trademarks, even web page content—often escapes meaningful First Amendment review altogether, or is placed beyond serious scrutiny through characterization as "conduct," "property," or "evidence."[4]

Efforts to reconcile these doctrinal results, or to offer one, unifying theoretical framework for First Amendment problems, fail. They are stymied by the sprawl of First Amendment coverage, the changing variables and policies that influence the free speech balance across contexts, the common law resistance to abandonment of precedent, and the internal cacophony that all of this produces. A better understanding of free speech practice requires thinking that is factored, not formulaic; contextual, not trans-contextual; dynamic, not static; tentative, not absolutist; plural, not singular.

This Article demonstrates these points in two steps.

Part I describes in broad strokes the current state of doctrinal and theoretical affairs in the free speech realm. It focuses in particular on the significance of "above-the-line" treatment of speech regulations that trigger elevated scrutiny. This overview shows that the doctrine offers, at most, a set of norms and questions that inform the judicial analysis rather than a "fixed star" or fixed principles.

Part II critiques three recent Roberts Court interventions that ignore this doctrinal reality in worrisome ways. The Court has suggested that speaker identity distinctions should always trigger elevated

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3 Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (discussing the scope of the coverage issue and its importance to First Amendment theory).

4 *Id.* at 1769 ("It is not that the speech [or anything else] is not *protected* [by the First Amendment]. Rather, the entire event . . . does not present a First Amendment issue at all, and the government's action is consequently measured against no First Amendment standard whatsoever. The First Amendment just does not show up.").

I disagree with the statement that the event does not present a First Amendment issue at all, but agree that meaningful judicial review rarely occurs. *See infra* text accompanying notes 43–46.

scrutiny, that only traditional and historical categorical exceptions are constitutional, and that government speech is wholly beyond the traditional freedom of speech principles. Yet none of these formalistic, absolutist statements can be squared with other free speech doctrines, significant zones of traditional government regulation, or even common sense. They also weaken the Court's ability to balance the conflicting policy concerns that arise in a host of speech-sensitive areas such as regulation of data collection, licensed professionals, or other commercial actors.

The Court's compelled speech cases offer especially vivid evidence that doctrinal nuance is essential, and that the Court's more rigid approach to free speech is unsustainable. Contrary to Justice Robert Jackson's rhetorically arresting "no fixed star" celebration of individual freedom from compulsory pledges of allegiance,[5] government often demands private expression, crafts it, or silences it altogether. Constitutionally mandated oaths of office, occupation-specific codes of conduct, audience and context-specific regulation of the content of information disclosures, many employment and civil rights statutes, student conduct codes, conditions on government benefits, antifraud laws, and many other forms of government speech regulation demonstrate that there is no across-the-board constitutional mandate against government-compelled expression.

Indeed, government-compelled expression or silence may often be sensible and warranted. Much existing and emerging science displays many ways in which human beings suffer from systematic cognitive weaknesses that have direct implications for debates about government-imposed, speech-sensitive interventions aimed at correcting for those deficiencies.[6] Silence about "bad science" may advance collective interests in expert disciplinary knowledge. Enforced disclosure of identity, of risks of products, or of a commercial actor's authorized exemption from general anti-discrimination laws may be warranted in some contexts, on public information or other legitimate grounds. At a minimum, uncertainty about the relative costs and benefits of mandatory expression or silence may warrant greater deference to government interventions than judicial strict scrutiny allows.

Perhaps anticipating this objection, the Court in 2013 addressed compelled speech doctrine in a refreshingly restrained and non-

5 *See Barnette*, 319 U.S. at 642. The approach I favor herein draws from the enduringly insightful account of constitutional interpretation outlined in BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

6 *See infra* text accompanying notes 232–41.

formalistic fashion.[7] I argue that this recent turn in the Court's First Amendment approach is the right one and should be followed more generally in future cases. I also offer two examples drawn from recent First Amendment scholarship that illustrate nicely how non-formalistic analysis might assist in thinking about thorny free speech issues that arise when government seeks to regulate data production, data dissemination, and expert disciplinary knowledge.

I. THE LAY OF THE LAND

That the free speech terrain is rugged is hardly news to anyone who considers the vast zone of human activity potentially covered by the phrase "freedom of speech." As Fred Schauer observed nearly a decade ago, to imagine "that the boundaries of the First Amendment are delineated by the ordinary language meaning of the word 'speech' is simply implausible."[8] If the First Amendment boundaries were construed to reach *all speech*, it would require quite a radical revision of common law principles of tort law, contract law, criminal law, property law, and much well-accepted statutory law. The implications for judicial case load alone counsel against such a reading of the First Amendment.

Yet we already are living with a greatly expanded First Amendment, if not one that extends to the farthest limits of the elastic phrase "freedom of speech." Freedom of speech's march to new territories began in earnest after 1925, when it was officially deemed to be a right incorporated into the Due Process Clause of the Fourteenth Amendment.[9] The pace of the march accelerated dramatically post-1960, when the Court added calls to criminal action that fall short of incitement,[10] vulgarity,[11] commercial speech,[12] and defamatory expression,[13] to the higher tier First Amendment fold. More recently, the Court has given "strict scrutiny" level protection to corporate campaign expenditures,[14] hate speech,[15] lies about one's military

7 Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013) (holding unconstitutional § 7631(f) of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, which required that organizations accepting federal funds to combat these diseases abroad maintain policies explicitly opposing prostitution).

8 Schauer, *supra* note 3, at 1773.

9 Gitlow v. New York, 268 U.S. 652 (1925).

10 Brandenburg v. Ohio, 395 U.S. 444 (1969).

11 Cohen v. California, 403 U.S. 15, 25 (1971).

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

13 New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

14 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

honors,[16] videos of animal cruelty,[17] and violent videos sold to minors.[18] The clear thrust of the modern case law thus has been toward expanding freedom of speech protection, even in areas of traditional state and federal regulatory control, notwithstanding the Court's claim that original understandings define free speech limits.[19]

The broader the First Amendment reach becomes, the harder it is to explain why other regulatory zones remain off limits. Likewise, if some speech remains subject to significant regulation then it becomes more difficult to explain why speech that may pose similar harms is better insulated from government regulation. Why does regulation of commercial speech, but not restriction of data mining, now excite serious freedom of speech concern? Why is commercial speech not protected when it is false or misleading, while false or misleading claims made by political candidates get a wide First Amendment berth? Why is speech that recklessly impugns a person's business reputation punishable, but not speech that viciously attacks a person based on his or her race, ethnicity, gender, sexual orientation, or other core-identity traits? The perceived harms of business or commercial speech, speech transmitted via new technologies, speech aimed at minors, or other forms of speech make strict scrutiny in many zones unpalatable. In still other areas, the nature of the expressive activity—such as the production of disciplinary standards of expert knowledge—makes government content-specific regulation of the expression arguably more beneficial than dangerous. *Yet there is no authoritative or noncontroversial hierarchy of harms that enables courts to confidently place one regulatory zone beyond the reach of the ever-expanding freedom of speech grasp, especially if one invokes the most sweeping pro-speech rhetoric and logic in many modern cases.*

The result is extremely messy free speech doctrine—both "above-the-line," where the basic speech rules currently do apply, and "below-the-line," where much expression still escapes elevated scrutiny and receives rational basis review, at the most.

This messiness is not likely to change or be solved by more free speech formalism or absolutism, though the Roberts Court seems intent upon introducing more of both.

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15 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

16 United States v. Alvarez, 132 S. Ct. 2537 (2012).

17 United States v. Stevens, 130 S. Ct. 1577 (2010).

18 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

19 *See Stevens*, 130 S. Ct. at 1586 (holding that a federal statute criminalizing the depiction of animal cruelty for commercial purposes violated the First Amendment).

One reason the messiness will endure is that we are so ambivalent about freedom of speech. We are unwilling to reject the modern boundary-crashing that has led to protection of sexually explicit expression, artistic expression, blasphemous speech, vulgarity, dangerous political speech, and deeply offensive speech. We also are unwilling to accept unfettered government power to condition its grants on private grantees' agreement to sing to the government's tune. Finally, once a new zone gains free speech protection, we are loath to remove it. We *love* our First Amendment rhetoric and many of its results, despite the analytical chaos they produce.

But we also reject free speech without meaningful limits. Context-sensitive historical, aesthetic, political, and other practical obstacles cause courts to tread softly when they apply the First Amendment to historically unprotected territory. Government regulations of speech may make us safer[20] and less likely to be deceived or seduced into making bad economic or political decisions while also making us more participatory, more democratic, better insulated from invasions of our privacy, less subject to hostile verbal environments, better served by licensed professionals, or more egalitarian. New and adventurous applications of the First Amendment therefore often generate caveats, nuances, and doctrinal complexities. These caveats create doctrinal riffs that make for further doctrinal chaos.

The more accurate statement thus is that we *love* our expanded First Amendment freedoms, except when we *hate* their costs. New technologies have intensified both of these emotions, sometimes in the same person. YouTube is great! YouTube is disgusting!

In this Part, I begin with the basic doctrinal topography. The overview is critical to appreciating the complexities of doctrinal analysis and to remembering the structure we actually have, before locating current controversies within that structure.

I then discuss three Roberts Court renovations of the basic free speech doctrine that blink at this doctrinal reality.[21] In each, the Court exalts absolutism over pragmatism, and gauzy free speech flourishes over more detailed and transparent consideration of the multiple vectors that converge in many free speech scenarios.[22] The three examples are as follows: (1) the insistence in *Citizens United v.*

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20 *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (justifying expressive burdens on national security grounds).

21 *See infra* text accompanying notes 104–52.

22 Some of these lines call to mind Ring Lardner's terrific line, "Shut up he explained." RING W. LARDNER, JR., THE YOUNG IMMIGRUNTS 78 (1920).

FEC[23] and *Sorrell v. IMS Health, Inc.*,[24] that speaker-sensitive speech regulations must trigger strict scrutiny; (2) the rule announced in *United States v. Stevens*[25] that no "new" categorical exceptions to this rule can be developed; and (3) the statement in *Pleasant Grove v. Summum*[26] that "government speech" lies beyond the scope of free speech protection.

Finally, I discuss the theoretical struts to freedom of speech doctrine and explain why we need theories, not one theory, to fully capture the normative features of our current free speech practice. Taken together, the doctrinal and theoretical insights display that modern free speech constitutional analysis is best understood as a pragmatic exercise undertaken by courts embedded in a common law tradition.[27]

A. Doctrinal Topography

California recently adopted legislation that bans the use of therapies by mental health professionals designed to change minors' sexual orientations, including efforts to "change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex."[28] Is this state law a violation of mental health professionals' free speech, as a form of "compelled silence?" If so, does similar reasoning apply to government regulations that require silence about abortion options by federal grant recipients,[29] or that prevent doctors from recommending "off-label" uses of drugs?[30]

The State of South Dakota requires doctors, as a matter of "informed consent," to warn abortion patients that this procedure puts them at "increased risk of suicide ideation and suicide."[31] And the State of New Mexico's Human Rights Act prohibits public accommodations from discriminating against people based on their sexual ori-

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23 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

24 Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

25 United States v. Stevens, 559 U.S. 460 (2010).

26 Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

27 *See* CARDOZO, *supra* note 5.

28 S. 1172, 2011-2012 Leg., Reg. Sess. (Cal. 2012), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1172. *See also* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (discussing Sentate Bill 1172's potential affect on free speech interests).

29 Rust v. Sullivan, 500 U.S. 173 (1991).

30 United States v. Caronia, 703 F.3d 149 (2d Cir. 2012).

31 Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 686 F.3d 889, 892, 894 (8th Cir. 2012).

entation.[32] New Mexico would apply this prohibition to a commercial photographer who refuses to photograph a commitment ceremony between two women. Is either law a violation of the regulated professional's freedom of expression, as a form of "compelled speech?"

Finally, the federal Food and Drug Administration adopted a cigarette packaging rule that requires that cigarette packages add a large, graphic image designed to warn purchasers of the health risks of smoking.[33] May the cigarette manufacturers refuse to redesign their packages on the ground that they have a First Amendment right not to be the Government's messenger?[34] If so, does that outcome affect the answer to either question above, especially whether doctors can be required to bear the government's suicide warnings?

The answers to these free speech questions are surprisingly unclear and complicated. Seeing this requires a peek at the basic structure of free speech doctrine and an appreciation of the many ways in which the basic structure is subject to significant contextual riffs.

The doctrinal rules can be visualized as four pyramids. The most familiar principles focus on the content and nature of the expression and how both affect whether and how the speech is protected from government regulation. They also focus on the purpose or justification for government regulation of expression—especially whether it is targeted at suppression of information versus regulation of other, content-neutral, or "secondary effects."

These free speech "first steps" look like this:

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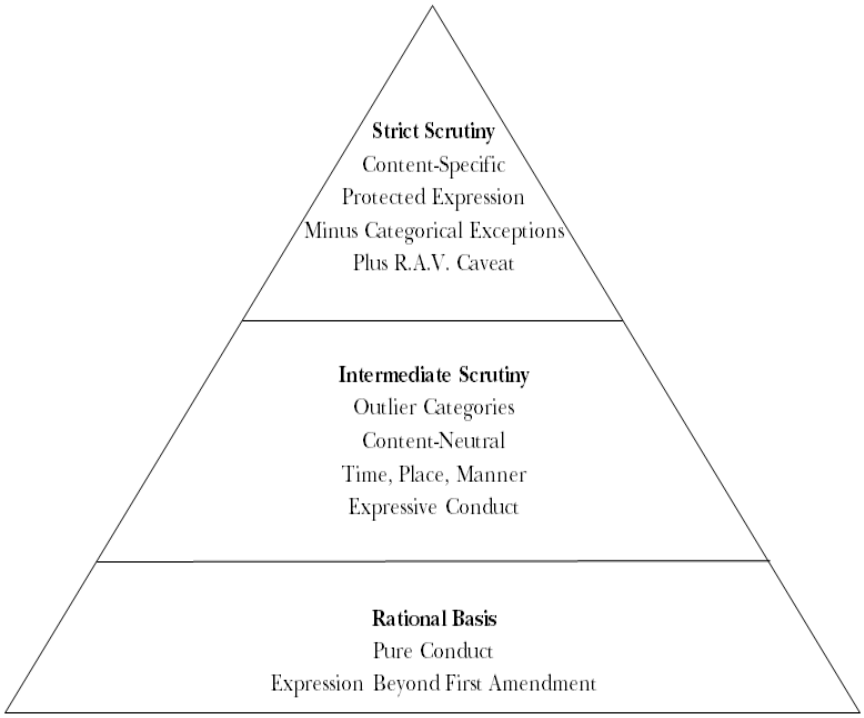
32 New Mexico Human Rights Act (NMHRA), N.M. STAT. ANN. §§ 28-1-1 to 28-1-13 (West 2014). *See also* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (holding that application of the law to a commercial photographer did not violate her freedom of expression).

33 *See infra* note 181.

34 *Id.*



Applying this pyramid alone would suggest that all of the examples above should fall under strict scrutiny, because in each the government is regulating private expression in a content—even viewpoint—specific fashion. One could argue that treatment by a mental health professional is actually conduct,[35] even if delivered via speech, but the stronger argument is that expression is plainly involved here even though it may be regulated differently than other types of expression because of its therapeutic impact and setting. Consequently, the psychologist, the photographer, the doctor, and the tobacco company all should have very powerful claims that the government regulations are presumptively unconstitutional.

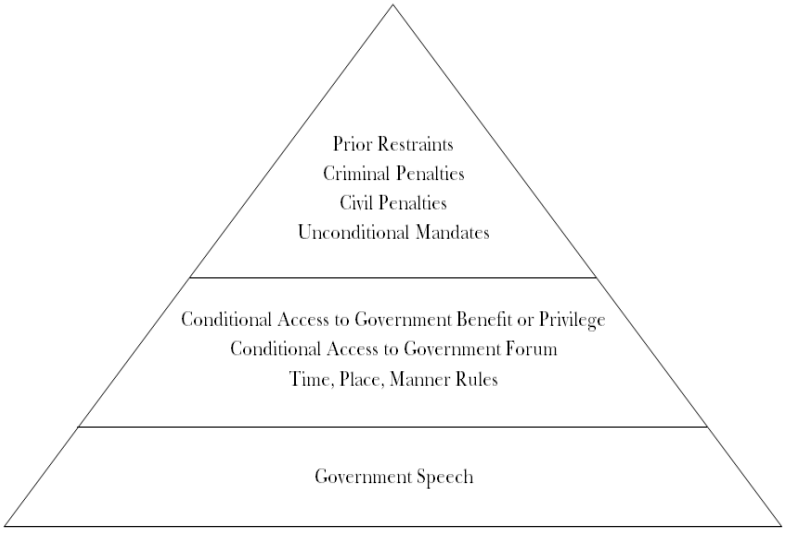
Of course, the cases are difficult because the matter is not this simple. Common sense and considerable case law show that the "content-specific-regulation-equals-strict scrutiny" principle does not

35 *See* Pickup v. Brown, 740 F.3d 1208, 1215 (9th Cir. 2014) (stating that "medical 'treatment,' . . . although effected by verbal communication nevertheless constitutes 'professional *conduct*'").

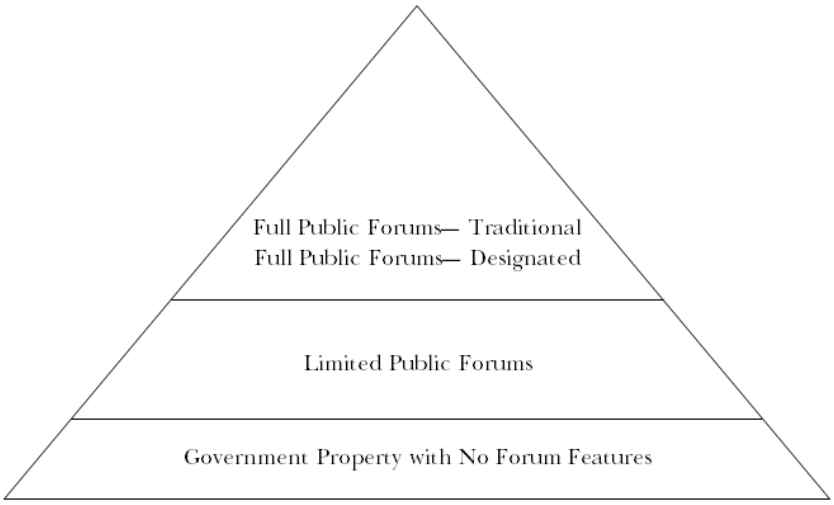
apply in many, many settings, including the ones in which these private parties operate.

One factor that can modify the basic principle has to do with the nature of the government burden in question. A criminal prohibition on purely private speech about abortion, same-sex marriage, or the health risks of smoking would receive quite different judicial treatment than conditioning a government benefit, commercial activity, or professional license on compliance with speech-sensitive messaging. Incidental or conditional burdens on expression offer government more regulatory room than do direct prohibitions.

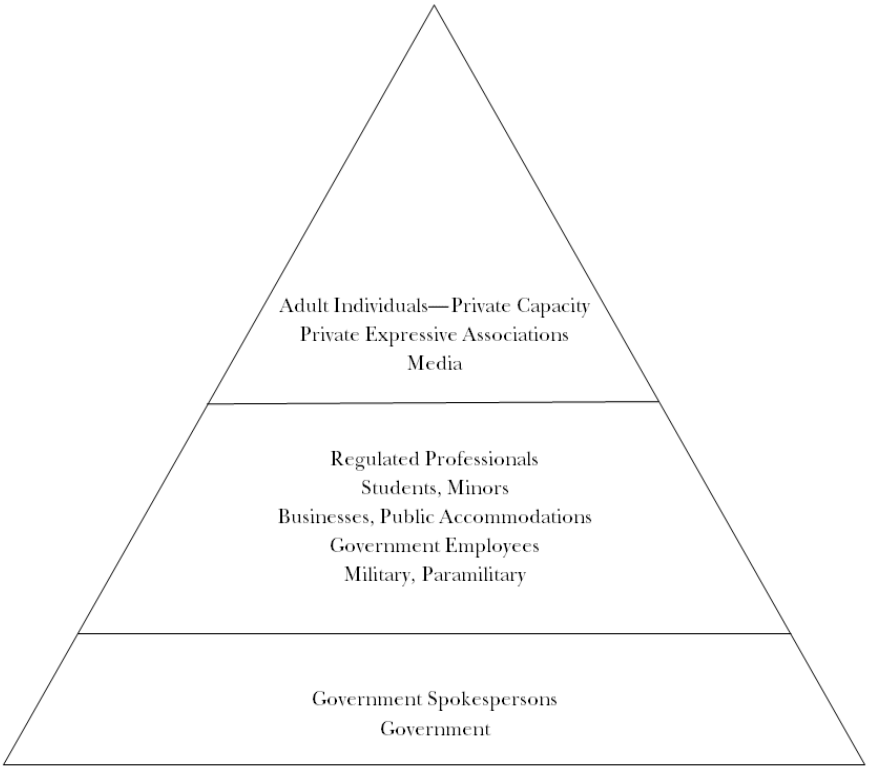
A schematic, non-exhaustive illustration of the point looks like this:



Setting also matters. A "pig in a parlor" is not tolerated in ways that it might be on the proverbial street corner. A third doctrinal pyramid that focuses on the types of forums available for private expression also must be added to the doctrinal picture. It looks like this:



A final, overlapping pyramid focuses on the speaker. Private actors often assume public roles, or otherwise affect public interests in ways that may justify government limits on their expressive autonomy. As schematic reminder of this well-rehearsed limit on expressive autonomy looks like this:



One could add a fifth pyramid, focused on whether the government is sufficiently involved in, or entangled with the expressive activity to deem the speech or its suppression to be "state action."[36] Of course, this same problem is a central part of Pyramid Four. For purposes of this discussion, state action therefore will be presumed.[37]

Implicit in all four pyramids is the free speech interest of the audience or future speaker. Regulation of the speaker obviously affects what the target audience does (or does not) hear, as well as what information future speakers may gain or lose. Most expression (though not all: think a personal diary or book of poetry, buried in one's back yard)[38] has an explicitly interactive and social element. The cost/benefit analysis that is embedded in the basic free speech tests thus cannot be fully understood without these audience interests in mind, however they are expressed.[39]

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36 This issue is of colossal importance in the Internet era, given that private actors control access to major communication channels. *See* Derek E. Bambauer, *Ghost in the Network*, 162 U. PA. L. REV. 1011, 1019 (2014) (discussing government regulation of cyberactivity); Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 869 (2012) (exploring the proper role of government in regulating the Internet which is primarily owned by private actors); Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, *in* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE, 69, 80–81 (Jeffrey Rosen & Benjamin Wittes eds., 2011) (examining how Internet companies have regulated speech).

37 One also could add a pyramid that displayed the range of harms that speech can cause and how the perceived risk or severity of the harm influences whether speech is protected. This factor, however, is an inherent assignment of the level of scrutiny applied to speech (such as compelling interest or important interest) as well as the degree to which courts will defer to government estimations of harm under an assigned level.

38 *See infra* text accompanying note 87.

39 Sometimes these audience-sensitive concerns surface as reasons to curb the speech. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 394 , 419–21 (2010) (Stevens, J., dissenting) (discussing the distortion of political speech that can occur when economically powerful voices dominate); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (overturning a statute on grounds that it did not adequately distinguish between incitement and constitutionally protected advocacy speech); Feiner v. New York, 340 U.S. 315, 320–21 (1951) (finding that speech that provokes hostile audiences is protected but loses protection once it becomes incitement); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding that fighting words are not protected speech).

Other times they surface as objections to regulation, based on the fuzzy "right to receive ideas," or arguments for a public right of access to government controlled data. *See, e.g.*, Bd. of Educ., Island Trees Sch. Free Union Dist. v. Pico, 457 U.S. 853, 872 (1982) (holding that school boards may not remove books because they dislike the ideas in the books); Stanley v. Georgia, 394 U.S. 557, 564, 568 (1969) (preventing states from criminalizing the private possession of obscene material); Lamont v. Postmaster Gen., 381 U.S. 301, 306–07 (1965) (overturning a statute that required an addressee to write to the Postmaster General in order to receive communist propaganda material).

In the theoretical arena, the audience interest is most visible within the "marketplace of ideas," or political-based theories about the reach of freedom of expression. *See also* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST.

The above points may seem embarrassingly obvious. Yet the case law and especially its most triumphant free speech rhetoric often suppress the obvious. Thus, it bears repeating as we consider the foregoing arguments of the licensed professional, the commercial photographer, and the tobacco company: content regulation of speech *often* happens without judicial strict scrutiny.

Yet much will hinge on whether they can locate their expression above-the-line and not subject to one of the many caveats to full strict scrutiny. The strict scrutiny test is extraordinarily difficult to meet when the speech falls on the tip of each of the four pyramids.[40]

The government, in turn, will argue that their otherwise above-the-line speech falls within one of the traditional exceptions to free speech (for example, incitement, fighting words, true threats), that no viewpoint discrimination *within* that exception has occurred,[41] that the expression is more conduct than speech, or that other reasons support allowing it to regulate the speech without satisfying strict scrutiny *per se*.[42] If it fails, then government has the heavy burden of proving that the regulation advances a compelling government purpose in a narrowly tailored fashion.

The government may remind the Court of how much expression by commercial actors and regulated professionals falls below the most exacting scrutiny line,[43] and may not even receive intermediate scrutiny.[44] For example, price-fixing, much speech covered by trademark law,[45] securities prospectuses, speech that has independent legal sig-

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COMMENT. 283, 283–84 (2011) (discussing theories that provide a foundation for free speech protections).

40 The test is not impossible to meet. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731 (2010) (finding that an anti-terrorism statute that abridged freedom of speech survived strict scrutiny because it provided for the common defense).

41 R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (noting traditional limited expectations to free speech).

42 The Court has said that the categorical exceptions cover speech that government has an interest in regulating because of the "distinctively proscribable content"; thus, they meet strict scrutiny. *Id.* at 384. The categories may be seen as short hand ways of assuring that government has a compelling, historically grounded reason for the regulation, and the overbreadth doctrine assures that the regulations are narrowly tailored.

43 The Court has noted that "[t]he inquiry into the protected status of speech is one of law, not fact." Connick v. Myers, 461 U.S. 138, 148 n.7 (1983).

44 Government's own speech is a special case analysis. *See infra* text accompanying notes 141–51.

45 *But see* Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737, 738 (2007) (discussing the different approach of First Amendment law and trademark law and noting that the "expansion of trademark law to include protection against dilution, which operates even when consumers are not confused or deceived, puts obvious pressure on [reasoning that trademark and false advertising laws pose no constitutional problems because they regulate only false and misleading commercial speech]").

nificance as a "performative act" (such as saying "I do!" at a wedding ceremony or "You have a deal!" in a contract case) fall below the elevated scrutiny line.[46]

The government also may argue that speech by commercial actors and professionals has long received First Amendment treatment that differs from "street corner" speech by private parties. For example, commercial speech once received only rational basis review—the level of scrutiny generally applied to socioeconomic legislation under substantive due process. That a commercial actor used pure speech to hawk his or her wares did not alter the constitutional analysis. In 1976, the Court hoisted this speech above-the-line and today, commercial speech regulations are subject to the *Central Hudson* test—but this only gives "commercial speech" (properly defined)[47] elevated, not full-blown, strict scrutiny. And the advertisement must be truthful, not misleading, and about a legal activity.[48]

Finally, the government should explain that the movement of commercial speech to elevated scrutiny status has not been smooth. Concerns about the potential dangers of commercial speech still prompt government interventions that are content-specific, speaker-specific, audience-protective, burdensome, and even viewpoint-specific.[49] The *Central Hudson* test permits these adjustments, if the government can prove that they are based on a significant government interest and are properly tailored to advance that interest. Such adjustments would doom the same measures were they aimed at pure "political speech"; and traditional First Amendment bromides about curing bad speech with counter speech mesh poorly with some commercial regulatory schemes premised on pessimistic assumptions about our cognitive capacities and decision-making skills.[50] The Court insists that regulators avoid justifications that smack of pure pa-

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46 Speech can migrate upward, though this presents doctrinal complexities. *See infra* text accompanying notes 104–25.

47 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–68 (1983) (discussing characteristics of commercial speech).

48 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (holding that protected commercial speech must concern a lawful activity and not be misleading). The same is true of many torts that are now subject to First Amendment caveats, such as defamation, intentional infliction of emotional distress, and public disclosure of private facts. The cases set forth a patchwork of tests that may limit recovery, elevate standards of proof, or require malice as a condition of recovery in ways that depart from the basic rules about content-specific regulation of speech in other contexts.

49 *See, e.g.*, Coyote Publ'g, Inc. v. Miller, 598 F.3d 592 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011) (upholding a ban on brothel ads in Nevada, which allows the sale of sexual services in some counties).

50 *Id.* at 566 (establishing a four part test to analyze commercial speech cases).

ternalism,[51] but it has not yet abandoned the intermediate scrutiny approach to commercial speech regulation.

The government also might refer to other cases in which local government is allowed to regulate commercial actors in ways that depart from traditional strict scrutiny for content-specific regulations. For example, differential zoning of adult businesses that present or sell sexually explicit expression triggers elevated but not strict constitutional attention. The Court strained doctrinal credulity to get there, by declaring that the zoning of adult businesses is prompted by a "content-neutral" justification of containing "secondary effects" rather than regulation aimed at suppressing the community effects of a particular category of undeniably expressive, but disfavored material.[52] It also imposed an amazingly weak evidentiary burden on local governments to prove that secondary effects, not distaste for sexually explicit materials and those who sell them, were the basis for the content-specific zoning decisions.[53]

These outlier cases and the many examples of commercial and professional regulation that historically have not triggered strict scrutiny make it both easier and harder to advance new arguments for locating categories of speech above-the-line. It is *easier* because more types of speech today are located above-the-line—including speech that historically was subject solely to toothless rational basis review. Commercial speech is an excellent example of a relatively recent and dramatic movement of speech to greater speech protection. Advocates can argue that the potential adverse consequences of protecting other historically unprotected speech are no worse than the potential harms of protecting Viagra, casino, liquor, or tobacco advertisements.

Yet the fuzziness also can make it *harder* to elevate traditionally non-protected expression to elevated scrutiny. The outlier cases demonstrate the many difficulties of managing grey zone cases. Fear of making the doctrinal morass worse may cause some justices to balk at moving traditionally unprotected speech to semi-protected status. Relocating expression wholly above-the-line also raises significant

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51 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (noting that "[t]he 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"). Even regulation of "misleading" commercial speech may be vulnerable if the speech is truthful.

52 *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (introducing the "secondary effects" justification).

53 City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 453 (2002) (upholding a City of Los Angeles ordinance that relied on a 1977 study). *But see* AnnexBooks, Inc. v. City of Indianapolis, 740 F. 3d 1136 (7th Cir. 2014) (striking down ordinance for lack of statistically significant evidence).

risks if one considers the public policy issues at stake and believes government regulations best promote these interests despite the private speech costs.

Finally, once lifted, speech rarely moves back downward. Common law torts that once allowed recovery for some defamatory or offensive speech but that now are subject to free speech defenses are one example.[54] Another powerful example is race or gender "hate speech." This speech currently falls above-the-line but was subject during the late 1980s and early 1990s to strenuous arguments that it should be categorically downgraded. Hate speech is a peculiarly destructive form of speech that shares features of traditional free speech exceptions such as libel, true threats, fighting words, or verbal harassment.[55] Critics maintain that hate speech also undermines democratic discourse, chills contributions to the "marketplace of ideas," and invades individual autonomy more than it advances that goal. It may compromise equality goals, which have independent constitutional salience, and are imbedded in basic free speech principles about speaker autonomy, prohibitions on viewpoint discrimination, and diversity of viewpoints.[56]

The Court nevertheless refused to permit government to regulate this speech as a categorical exception, even if it was contained within a traditional exception to strict scrutiny.[57] For example, measures that prohibit only fighting words based on race or gender were deemed to be impermissible viewpoint discrimination within a free speech exception—like selecting out only obscenity written by Democrats for prohibition.[58]

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54 *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (applying free speech principles in case involving tort of intentional infliction of emotional distress); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964) (applying free speech principles to tort of defamation).

55 *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 453 (1990) (discussing the differences between racial insults and protected speech); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357–58 (1989) ("Racist speech . . . presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence . . . it is properly treated as outside the realm of protected discourse."); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 178–79 (1982) (arguing that freedom of expression generally benefits society, but racism and hate speech "further[] all the evils caused by the suppression of speech"). For a recent, especially ambitious theoretical work arguing that hate speech should be regulable, see JEREMY WALDRON, THE HARM IN HATE SPEECH 15–17 (2012).

56 *See* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 214 (1991) (discussing the tension between equality and liberal theories of freedom of expression, as applied to hate speech).

57 R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992).

58 *Id.* at 388.

As I will explain, downgrading speech also has gotten harder in recent years. The Roberts Court recently stated that the *only* legitimate, categorical exceptions are historical and traditional ones: new ones cannot be coined, only "discovered."[59] Consequently, the constitutional ratchet arguably works upward only.[60]

The Court's ostensibly formulaic and tiered approach to free speech has produced applications, holdings, and exceptions that make the "rules" hard to take seriously. They also constrain the Court's own ability to balance relevant concerns.

Again, the history of hate speech regulation is instructive. Because the case law regards most regulation of hate speech as impermissible content-specific regulation, the government must adopt broader rules to capture the worst forms of hate speech (for example, it must prohibit *all* fighting words, including hate speech), or write rules aimed only at the "conduct" component of hate speech.[61] Government also can regulate racist speech in bounded settings, such as the workplace and public schools, but in ways that are difficult to square with general claims that government cannot impose viewpoint orthodoxy or impose "political correctness."[62] At the same time, the private social, economic, and professional penalties for using race- or gender-inflamed speech have mounted.[63] Not all speech regulation derives from law, and the state action doctrine insulates private speech sanctions from constitutional control. Context therefore still matters to regulation of hate speech, as it does for all above-the-line speech. But its offensive *content* also still matters, in ways that betray residual unease with simplistic statements that the First Amendment protects speaker rights even if the speaker is bigoted, vile, cruel, or disgusting.[64]

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59 *See infra* text accompanying notes 130–31.

60 An important caveat to this are cases in which the Roberts Court has weakened protection of other expression, such as public employee speech. *See infra* note 97.

61 Mitchell v. Helms, 530 U.S. 798, 809 (2000).

62 For example, government employers could discipline an employee for racist speech that disrupts the workplace or creates a hostile working environment. *See* Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 Geo. L.J. 627 (1997) (discussing workplace speech restrictions and implications for freedom of speech values).

63 Consider, for example, the recent controversy over food show celebrity Paula Deen, who lost multiple business contracts after evidence surfaced that she used racist epithets in the past.

64 The emerging problems of "revenge porn" and nonconsensual sharing or re-publication of sexually explicit texts—called "sexts"—show how complicated the doctrinal issues can become even when the "speech" in question is truthful, not misleading, was self-created, and meant for purely intimate exchange. *See, e.g.*, Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2032–33 (2014) (discussing harms and solutions regarding the sharing of

In short, current free speech doctrine is very multi-factored *and* fractured. Traditional pro-speech bromides and Pyramid One principles suppress this complexity.

B. Methodologicial Coherence

Yet despite the many ambiguities and caveats within free speech doctrine, especially at the boundary line between elevated scrutiny and rational basis scrutiny, there is a methodological "there there," *of sorts*. Tiers matter; the basic rules of Pyramid One matter; aspirational free speech rhetoric matters; but flexibility and realism *also* matter.

This is best seen by re-examining the four pyramids, as well as the quite strong consensus among scholars, judges and lawyers about how to argue *within* them.

1. Pyramid One

Pyramid One displays how the expressive dimension of conduct must dominate for the expression to make it above-the-line. Also, if the expression is being regulated for other *speech-neutral* reasons, and is aimed at behavior that is more properly characterized as *conduct*, then the government often need only satisfy rational basis. For example, if a political activist resorts to violent acts to express her political views—say, by soliciting a co-conspirator to assassinate the President, or by hurling a dirty bomb into a Fourth of July celebration—the First Amendment offers *no refuge*. Both acts are "expressive" and political; yet neither is protected, and neither is subject to freedom of speech basic rules. Rational basis applies, and is easily satisfied.

In some cases, however, the government regulation in question may aim at conduct in a manner that scoops up substantial expression. In this grey zone between the basic rules (strict scrutiny) and rational basis, the Court will conduct an analysis to determine whether the government *purpose* for regulating the conduct is speech neutral, and whether the regulation leaves open ample alternative avenues of expression.[65]

A similar "grey zone" analysis involves content-specific regulation of expression where the government insists its primary goal is to con-

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intimate media such as sexts); John A. Humbach, '*Sexting*' *and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 438–49 (2010) (considering the implications of sexting and First Amendment protections).

65 *See* United States v. O'Brien, 391 U.S. 367, 381–82 (1968) (holding that the governmetal interest prohibiting the destruction of draft cards was aimed to ensure the functioning of the Selective Service System rather than prohibiting the plaintiff's speech).

tain the "secondary effects" of the speech (for example, zoning of adult businesses).[66] Aiming at expression to suppress knowledge triggers the loudest free speech alarms, and courts are most aggressive when they conclude this is the government's true purpose. Aiming at speech to suppress crime or preserve order triggers a lower level of scrutiny.

Pyramid One is the most formidable one in the freedom of speech landscape because it sets forth the most fundamental distinctions on which all subsequent characterization moves depend. This is why judges and scholars fret *most* over locating speech above or below the elevated scrutiny line in that frame: the doctrinal, normative and practical consequences of this categorization move are the most profound.

2. Pyramid Two

Pyramid Two shows that the nature of the burden imposed may alter the fate of a speech restriction. For example, when the only burden imposed on the speech is a legitimate time, place, manner limit—not an absolute prohibition of the speech—then intermediate scrutiny applies.[67] Also key to this inquiry is the government's *purpose* in regulating the expression—specifically, whether the regulation is adopted "without reference to the content of the regulated speech."[68]

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66 *See supra* text accompanying notes 52–53.

67 *See, e.g.*, Thomas v. Chi. Park Dist., 534 U.S. 316, 321–22 (2002) (upholding permit system as valid, content-neutral licensing ordinance); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (setting forth content-neutrality test).

68 Hill v. Colorado, 530 U.S. 703, 719–20 (2000); *see also id.* (holding that a government regulation is "'content neutral' if is justified without reference to the content of regulated speech"); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 384–85 (1997) (upholding fixed buffer zones around abortion clinics because such injunctions were not content based); Madsen v. Women's Health Ctr., 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.").

This can be a fraught inquiry, as recent abortion protest, funeral protest, and free speech "bubble" cases show. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (finding a funeral protest to be protected speech); *see also* McCullen v. Coakley, 134 S. Ct. 2518 (2014) (striking down buffer zones around abortion clinics); *see generally* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000) (noting that almost every recent free speech case turned on whether the law was characterized as content neutral); Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 34 (2003) (discussing how lawmakers may draft overbroard speech regulations to obscure an illicit discriminatory legislative purpose); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 46 (1987) (analyzing the Court's content-neutral versus content-specific distinction).

A bad government purpose, under the First Amendment, is to regulate speech "because of disagreement with the message it conveys."[69]

Pyramid Two makes especially vivid why flexible, rather than formalistic, approaches to free speech analysis better anticipate the range of regulatory burdens courts may encounter, and why results may change as burdens lighten. It is—and should be—easier for government to justify non-funding of expression than prohibition of expression. Likewise, it is—and should be—easier for government to justify speech burdens on private persons who voluntarily enter professions, commercial or public settings, or assume other roles in which their speech is constrained in ways that would not be allowed "off the job." Of course, there also are limits on the government power to set these speech conditions, and drawing that constitutional line is an intensely context-specific matter.[70]

3. Pyramid Three

Pyramid Three adds one of these context-sensitive caveats: the *place of expression* must be a public forum for elevated scrutiny—even the more relaxed scrutiny given to content-neutral time, place, manner regulations or other "grey zone" regulations—to kick in. If an adult political speaker wishes to "parade" through a military base, then the speech falls below even the grey zone line of First Amendment elevated scrutiny. Put a familiar way, no "pigs in the non-public forum parlor."

4. Pyramid Four

Finally, Pyramid Four shows that speaker identity matters. Contrary to statements by the Roberts Court that imply that speaker-sensitive speech rules always trigger strict scrutiny,[71] the doctrine plainly points to an opposite conclusion.[72] Speaker-identity distinctions explain much of the vast terrain below the elevated scrutiny line, where the constitutional presumption strongly favors government decisions about whether, and how, to burden expression. In many of these cases, the speakers are defined according to occupa-

69 *Ward*, 491 U.S. at 791.

70 *See infra* text accompanying notes 217–18.

71 See *infra* text accompanying notes 104–27.

72 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 419–25 (2010) (Stevens, J., concurring in part and dissenting in part) (denouncing language in the Court's opinion regarding the speaker identity restriction as a rationale for treating corporate and union campaign expenditures the same as individual expenditures).

tional, trade, or other roles that determine their expressive autonomy and responsibilities.[73] Indeed, the Constitution itself makes this point: it contains an explicit and mandatory script for the Presidential oath of office.[74] This is surely "compelled speech" yet also clearly allowed. In sum, who you are determines—in a dizzying array of circumstances—what you can say without significant, even criminal consequences. This is closely related to how different speech burdens affect the inquiry, as outlined in Pyramid Two: role-specific burdens tend not to be absolute prohibitions on speech and thus trigger a lower level of scrutiny.[75]

C. Theoretical Struts

The doctrinal landscape also is undergirded by common theoretical struts. These likewise are expansive and context-sensitive, include leaps of faith, are internally contradictory, but nevertheless are a crucial part of understanding how courts approach freedom of expression problems. The most influential theoretical justifications take three forms: arguments from democracy, or political-based theories;[76] arguments from autonomy, or liberalism-based theories;[77] and consequentialist arguments from knowledge or "truth."[78] Each suggests an important value served by free speech protection that courts invoke to grant protection to speech despite its harmful consequences. All thus help explain the case law that elevates certain expression, in proper contexts, to elevated scrutiny. Yet none *by itself* adequately explains all of the terrain below the line of elevated scrutiny, or offers a complete explanation for speech that falls above-the-line but is unprotected due to the many doctrinal caveats.

First Amendment theoretical work to date that attempts to craft a unifying free speech lens comes in two forms. The first begins with actual and potential applications of freedom of expression principles

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73 *See infra* text accompanying notes 252–53.

74 U.S. CONST. art. II, § 1.

75 See *supra* text accompanying notes 67–70.

76 *See, e.g.*, MEIKLEJOHN, *infra* note 81, at 27 ("[C]onflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant.").

77 *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978) (arguing that voluntary speech is an act of creative self-definition or expression); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled 'individual self-realization.'").

78 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

and tries to knit them into a more unified and convincing whole.[79] The second form begins with theoretical baselines, and proceeds from these baselines to doctrinal applications.[80] All seek to make an analytical *whole* of this constitutional right. Many focus primarily on the *scope* of the First Amendment, i.e. its "coverage," rather than on the specific rules about how to deal with speech that falls within this coverage.[81]

Unfortunately, even the most heroic efforts fall short.

Theories that are analytically crisp enough to *limit* applications of freedom of speech in a meaningful way often cannot be squared with a vast amount of modern doctrine and contemporary free speech intuition,[82] which makes them practically and normatively suspect. These theoretical works rarely make a dent in the doctrine itself because they blink at too much doctrinal rhetoric and practice to prevail. Judges are massively reluctant to dislodge or substantially narrow bodies of case law that already protect certain expression, even when the case law may be analytically or theoretically indefensible. The theories also are normatively suspect because they omit coverage of speech that we have grown accustomed to protecting, or block protection to expression many people believe is worthy of constitutional protection.

Theories that attempt to map their normative framework onto existing doctrine, and develop normative explanations for its limited scope,[83] raise another concern: they sound like "just so stories." For example, in his analysis of free speech and expert knowledge, Robert Post has argued that the First Amendment stands for protection of "forms of conduct we deem necessary for the free formation of public opinion,"[84] and then links his theory to preferred doctrinal results. He focuses in particular on the collision between theories of speech

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79 *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 5 (2012) ("To determine the purposes of the First Amendment, therefore, we must consult the actual shape of entrenched First Amendment jurisprudence.").

80 *See generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) (setting forth an autonomy-based theory of freedom of expression).

81 *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1984) (setting forth a democracy-based theory of freedom of expression that attempts to restrict the scope of the First Amendment to political speech, narrowly defined).

82 *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 4 (1948) (discussing the popular belief in governmental limitation of "dangerous" speech); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (lamenting the lack of a consistent theory within constitutional law).

83 *See, e.g.*, POST, *supra* note 79.

84 *Id.* at 15.

that insist upon content- and viewpoint-neutrality, and the production of expert knowledge.[85]

Nobody wants a free-wheeling world of expert speech in which government has greatly restricted power to regulate speech of quacks or charlatans, or cannot umpire expertise disputes in ways that are content-specific and value-laden. Post therefore is plainly right that content-neutrality driven theories that subject all such speech to a presumption of unconstitutionality make no real-world sense. But even Post's well-crafted alternative theoretical account, which he links to "systematic patterns" in doctrine,[86] leaves the reader wondering why the doctrine he mostly accepts places things like animal crush videos or funeral picketing under the First Amendment umbrella, but not—say—obscenity. Or why things we say privately, with no design or hope of influencing public opinion, should not be protected from content-based government regulation.[87]

Even if one accepts his view that the "free formation of public opinion" is *the* organizing principle for freedom of speech coverage, this does not irrefutably demonstrate why speech "between dentists and their patients, between corporations and their shareholders, between product manufacturers and their customer" is *not* "normatively necessary for influencing public opinion."[88] A political theory of free speech, such as his, ultimately must define the boundaries of "political" and "public"—no easy task. This is especially so if one accepts the insight that "the personal is the political" or views existing doctrine as "consistent with the view that the fundamental purpose of the First Amendment is political, rather than ethical."[89]

As I explain more fully below, however, Post's proposals should not be condemned on this basis alone. All doctrine-respectful theories that attempt to *limit* the scope of free speech protection, to offer a unifying theory of that limit as expressed in the case law, and to explain more precisely where the boundary lines of protection should be drawn inevitably fall short of this very ambitious, perfectionist goal. There is no one unifying theory that does the line-drawing job alone.

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85 *Id.* at 9.

86 *Id.* at 13.

87 *See, e.g.*, Baker, *supra* note 77, at 993 (discussing the problem of private expression); BAKER, *supra* note 80, at 6–46 (offering an especially thorough critique of marketplace and political process theories of free speech and offering an autonomy-based theory instead).

88 POST, *supra* note 79, at 18.

89 *Id.* at 13.

Theories that attempt to *expand* constitutionally protected expression, and that likewise seek to justify currently protected expression, typically fail in a different way. The open-armed theories often are too capacious to explain why *any* expression is *not* protected, or why some speech regulations receive strict scrutiny under current doctrine and others receive only rational basis or so-called intermediate scrutiny.

These theories are great at explaining why speech is valuable in a liberal democracy that prizes individual autonomy, even if the content seems worthless to others; but even the best of them offer too little *by themselves* to inform or justify much past, present, or future judicial line-drawing that excludes some speech from the constitutional fold.[90] For example, autonomy-based theories of freedom of expression better explain protection of sexually explicit expression and a lot of what passes for entertainment[91]—think of the fascination some have with the Kardashians or Honey Boo Boo—than do political theories based on democratic self-governance and enlightened voters. But they ignore that "[m]uch speech that may be of great importance to the autonomy of individual speakers receives no First Amendment coverage at all."[92]

In short, all theories that begin with existing doctrine as a baseline, or as strong evidence of what should be protected speech, inevitably suffer from the problems of doctrine itself: internal inconsistency, competing policy concerns, historical and political barriers, and analytically imperfect boundary decisions.

Recognizing this—or seeking to evade the problem—some constitutional theorists simply ignore doctrine.[93] They begin instead with "big theory" musings and let the doctrinal chips fall where they may. These are often intriguing works but present the "smell of the lamp"

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90 The best ones see the concern about meaningful limits and seek to meet it. For example, Baker distinguishes between protected expression under his liberty theory and uses of property within a market exchange to explain why commercial speech is subject to regulation. *See* BAKER, *supra* note 80, at 196–224. Key to his account of protected speech is whether it is "an attempt to create or affect the world in a way that has any logical or intrinsic connection to anyone's substantive values or personal wishes." *Id.* at 196.

91 *See* Ronald K.L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 785 (1993) (offering a decidedly unromantic look at how electronic technologies "affect the very logic of much thought and discourse" and outlining a "cultural approach" to freedom of expression that takes this drive to entertainment rather than enlightenment into account).

92 POST, *supra* note 79, at 11.

93 *See, e.g.*, Shiffrin, *supra* note 39 (advocating for a "thinker-based foundation," rather than a speaker-based or listener-based justification, for freedom of speech protections).

problem, because they are conceived in a context removed from real world pressures—especially stare decisis.

Doctrine-free theorizing thus is of limited usefulness to those who respect the "one artery" insight that motivates these First Amendment theorists, but who *also* wish to translate First Amendment theory into modern judicial practice. At some point, judges must operationalize constitutional theory, and must consider the powerful constraints of stare decisis and the common law method of decision-making.[94]

So we are left with an intractable dilemma. Work that seeks to reconcile normative theory with doctrine suffers inevitably and critically from the normative incommensurables within the doctrine, as well as from the analytical gaps that are inherent in our common law method of constitutional interpretation. Work that ignores the doctrine risks irrelevance to real-world constitutional problem solving. And work that refuses to consult theory at all risks being normatively rudderless, especially when it confronts new forms of expression or government regulation that fall outside conventional doctrinal categories.

The real value of the free speech theories is that they remind judges of the normative stakes of doctrinal decisions. Even the most romantic rhetoric is of practical use because it cautions judges about pathological fears—that "[m]en feared witches and burnt women."[95] It harkens back to baseline democratic values and respect for individual autonomy, which place decision making in individual hands even though they are not particularly skillful. This push away from government regulation surely is not always prudent, but we abandon it at our peril. Even progressives fear a world in which too much speech is controlled by government, "for our own good."[96] The traditional theoretical struts of the First Amendment have a homily effect that may serve a worthy civic purpose, despite our lapses into magical thinking about individual cognitive abilities. Holding fast to free speech protection is hardly a natural or historically consistent instinct: recall that most of the law we now have has developed since 1960, with the support of the more expansive theoretical expressions and free speech aphorisms. The key is to cabin the magical thinking

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94 *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3028–31 (2010) (refusing to overturn the post-*Slaughter-house Cases* case law that rendered the Fourteenth Amendment Privileges or Immunities Clause a virtual dead letter, on the ground that too much time and doctrine stood in the way).

95 Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

96 J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 419 (1990).

that our most soaring free speech rhetoric inspires while preserving its positive effects, and to see more clearly free speech doctrine and practice as a complex balance between liberal aspirations and practical realities.

D. Summary

Speech must land above *multiple* lines to receive full-dress, strict judicial scrutiny. Most speech does not make it there.

Speech that *is* placed above-the-line—even in the grey zones—and is not subject to a traditional exception, gains extremely significant protection. Speech that rises to the peaks of all four pyramids is nearly invulnerable. Thus, it matters greatly where speech is placed, and its berth—once identified—is quite hard to adjust.[97]

But the four pyramids and their theoretical struts leave courts with tremendous room to modify the basic rules thought to govern content-specific regulation of speech. Taken together, they show that

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97 As explained below, however, the current Court has made this last statement far less convincing than it was only a decade ago. *See infra* text accompanying notes 102–22. The Court has fortified the protection afforded to above-the-line speech. But it also has cast doubt on the ongoing viability of *all* of the Pyramid Four distinctions in ways that may destabilize many government regulations that are premised on speaker identity. It has done so using absolutist language that cannot be squared with the shape of Pyramid Four (it flattens the pyramid), or the context-specific float it anticipates. It also counters the Court's long-standing practice of recognizing the First Amendment difference between statements made in one's individual, wholly "private" capacity, and those made through corporate status, regulated professional status, commercial actor status, or other roles that may bear materially on whether one's speech is "free." It cannot even be squared with some of the Roberts Court's own recent rulings. For example, speech by government employees made during the course of their official duties now is *categorically* below the line. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline"); *cf.* Lane v. Franks, 134 S. Ct. 2369 (2014) (holding unanimously that a public employee who testifies truthfully at trial, pursuant to a subpoena, is protected from discipline for that speech, where the testimony was not made pursuant to duties as an employee); Demers v. Austin, 729 F.3d 1011 (9th Cir. 2013) (holding *Garcetti* inapplicable to teaching or writing on academic matters by teachers employed by the state in higher education).

The biggest problem with all of these newer cases is that they speak in absolutist terms. *See, e.g.*, Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 7–8 (2009) (arguing for a new constitutional framework for government speech that is more context sensitive); Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1187 (2007) (critiquing the rejection of balancing in the context of public employee speech cases). The lines between the categories of "protected" and "unprotected" are better viewed as permeable in practice, and properly so.

strict scrutiny still is more of the *exception* than the rule when it comes to judicial review of government regulations of private expression.

In a vast number of settings, the government can regulate the content—not just the time, manner, or place—of our expression.[98] This applies even to our political expression.[99] The landscape of free speech doctrine thus is undulating, not flat. What we see most visibly are the peaks of speech protection, but they are undergirded by considerable land that is not subject to meaningful review.

Saying that freedom of speech is a "fundamental right" and a highly favored one is a true statement, but it also is a misleading one. The most famous aphorisms of free speech—for example, one cannot cry "fire" falsely in a crowded theater;[100] "one man's vulgarity is another's lyric";[101] the best response to bad speech is counter speech, "[i]f there be time"[102]—describe only a small fraction of the doctrinal pyramids.

And even speech that falls within the First Amendment sweet spot of strict scrutiny—at the peak of all four pyramids, and not within a categorical exception—*still* may be regulated, in extreme cases: strict in theory is *not* necessarily "fatal in fact."[103] The big blanket of freedom of expression is revealed to be, on closer scrutiny, a hanky.

In sum, the doctrine is messy for enduringly important historical and policy reasons. Speech is ubiquitous, of widely varying value to society, and can cause countless harms that the government properly should try to prevent. Application of free speech principles to common law and statutory zones developed without these principles in mind have their own, competing logic.

Given this, absolutist approaches to free speech *do not work*, and the only viable alternative is messy: balancing of interests. Judges thus can hardly be blamed for producing case law that seems internally incoherent if one looks through a First Amendment lens *alone*.

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98 *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that government employees have no freedom of speech protection for speech pursuant to their official duties).

99 *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976) (discussing when restraints on political management and campaigning by public employees may be justified by government interests in efficiency and efficacy).

100 Schenck v. United States, 249 U.S. 47, 52 (1919).

101 Cohen v. California, 403 U.S. 15, 25 (1971).

102 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

103 Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *cf.* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2421 (2013) (noting that "[s]trict scrutiny must not be strict in theory, but fatal in fact") (citation and internal quotation marks omitted).

Correlatively, neither doctrinal work nor theoretical work should be tossed aside simply because it too is analytically fissured, or does not alone solve the persistent problem of defining free speech boundaries. *No* theory or proposed doctrinal reconstruction can, or will, mend all of the fissures or resolve all of the boundary disputes.

Nor do these types of imperfections within the doctrine and leading theoretical works necessarily *matter*. On the contrary, many of these imperfections serve other important values that may include protection of other constitutional rights.

The right *doctrinal* question is not whether a specific area of free speech doctrine includes analytical flaws, but whether the flaws are irrational and harmful. Do they make it harder to reach sound results in that particular zone, compromise the integrity of free speech reasoning in other zones, or cause significant, real-world injuries?

The right *theoretical* question is not whether a theory solves every free speech problem, but whether it *casts meaningful light* on the difficult task of explaining the fundamental purpose of the First Amendment. Does it better guide judges and scholars than other theories do, while respecting other legitimate government purposes?

Finally, the best approach to both inquiries is incrementalist, multi-factored, realistic, non-formalist, non-perfectionist, and evolutionary. There is no one "fixed star" in the free speech universe. Judges must follow multiple lights to make their way.

II. ROBERTS COURT RENOVATIONS COURT RENOVATIONS: METHODOLOGICAL AND THEORETICAL MISSTEPS

The Roberts Court has made effecting the right balance between free speech realism and perfectionism much harder, and having an open judicial conversation about the internal complexities almost impossible.

Rather, the Court seems intent upon modifying the basic free speech architecture with new, calcifying statements from which it cannot easily back up. In an effort (apparently) to fortify freedom of speech protections in *some* contexts, the Roberts Court has embraced "open the floodgates" free speech rhetoric and theories in formalistic ways that are utterly blind to the well-known problems of open floodgates and formalism. It has done this while ignoring completely the practical and significant limits on freedom of expression that the Court *itself* has imposed in other cognate areas *simultaneously*. Three of the new moves are especially worrisome.

A. The Speaker Identity Renovation

The Court in 2011 struck down a Vermont law that banned the sale or disclosure by pharmacies of information about physicians' prescribing habits, provided that the information would be used to market drugs by the pharmaceutical companies.[104] The law did not apply to sale of the same information to private or academic researchers.[105] Detailers seek this information about doctor prescribing habits in order to hone their sales pitches. Pharmacies have a mother lode of information about these habits and sell the information to data-mining companies.[106] Vermont sought to regulate this practice. The primary goals of the Vermont law singling out this practice of selling prescriber-specific information were to protect doctor privacy[107] and to reduce the cost of medical services by shielding them from information by detailers (pharmaceutical company representatives) about brand-name drugs.[108]

The Court concluded in *Sorrell v. IMS Health, Inc.*, that the Vermont law violated the First Amendment. Writing for the majority, Justice Anthony Kennedy emphasized that the statute in question "burdens disfavored speech by disfavored speakers."[109] It thus was both content- and speaker-identity specific.

The opinion is an important one for many reasons: it gives speech status to data; it treats the effort to regulate access to the data as regulation of expression rather than conduct; and it rejects the justifications offered by Vermont for treating detailers differently than other "speakers" as insufficient, despite their commercial interest in, and ultimate use of, the data. Justice Kennedy also dismissed the State's argument that detailing may result in a feeling of being "coerced" or "harassed" on the part of physicians.[110] As he stated, "[a]bsent circumstances far from those presented here, the fear that

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104 Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011).

105 *Id.* at 2660.

106 *See id.* ("Pharmacies . . . receive prescriber-identifying information when processing prescriptions . . . . Many pharmacies sell this information to 'data miners,' firms that analyze prescriber-identifying information and produce reports on prescriber behavior.").

107 *See id.* at 2668 ("[T]he State contends that its law is necessary to protect medical privacy, including physician confidentiality.").

108 *See id.* at 2670 ("The State contends that [its law] advances important public policy goals by lowering the costs of medical services and promoting public health.").

109 *Id.* at 2663.

110 *See id.* at 2669 ("It is doubtful that concern for 'a few' physicians who may have 'felt coerced and harassed' by pharmaceutical marketers can sustain a broad content-based rule like § 4631(d).").

speech might persuade provides no lawful basis for quieting it."[111] Doctors are "'sophisticated and experienced' consumers."[112]

In stressing the speaker-identity specific feature of the law as a reason to subject it to elevated scrutiny, Justice Kennedy revisited a theme that was central to his opinion in *Citizens United v. Federal Election Commission*.[113] In that case, the disfavored speaker was a corporation. The Court rejected the argument that the corporate status of a speaker is a compelling reason to treat the "speech"—independent expenditures advocating the election of political candidates—differently from the electoral speech of individuals.[114]

The idea is neither novel nor unimportant in thinking about levels of speech protection. As Justice Lewis Powell said in *First National Bank of Boston v. Bellotti*, if we view the value of speech as informing the audience, then it follows that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[115] Justice Kennedy agrees strongly with this view of restrictions based on the identity of the speaker.[116]

Yet his claim in *Citizens United* that "[n]o case before *Austin* [*v. Michigan Chamber of Commerce*] had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity"[117] should not be taken out of context, or reduced to a less qualified assumption that *all* speaker-identity based restrictions trigger strict scrutiny. Nevertheless, the passage about speaker identity in *Sorrell*—also written by Justice Kennedy—comes perilously close.

Again, there is considerable free speech wisdom in compelling government to be agnostic about the source of speech when it engages in regulation. Distinctions based on speaker identity have the powerful whiff of viewpoint discrimination, and may violate the internal equality dimension that the First Amendment polices, if not the Equal Protection Clause itself.

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111 *Id.* at 2670 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (*per curiam*)).

112 *Id.* at 2658 (quoting Edenfield v. Fane, 507 U.S. 761, 775 (1993)).

113 558 U.S. 310 (2010) (holding that government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity).

114 *See 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.").

115 435 U.S. 765, 777 (1978).

116 *See Citizens United*, 558 U.S. at 340 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

117 *Id.* at 348.

But the unthinking application of this principle makes for immediate mischief if one considers how much of the doctrine is doing just that—distinguishing among speakers.[118] The source of speech matters greatly to a vast swath of regulation that limits what commercial speakers can say about their products, what professionals can say in delivering professional services, what government employees can say about internal matters, and what K–12 teachers can say about their subject matter.

There may be—in fact, I am sure there are—"compelling" reasons why all of these "speaker-identity" driven regulations are not struck down on that basis. Not all speakers, speaking on the same topics, whose speech is of undeniable value to "decisionmaking in a democracy,"[119] are situated similarly or speaking with similar motivations or incentives. One therefore can concede, for example, that speech about the properties of a drug conveys valuable information to consumers that deserves *some* First Amendment protection,[120] yet resist a move to place speech by a product manufacturer on the same rung as speech by an individual actor about that drug. In *Sorrell*, however, the Court chided Vermont for distinguishing between requests for prescription-pattern data by pharmaceutical companies and requests by researchers for the same data, on the ground that this was speaker-identity discrimination.

Yet it is *commonplace* for government to distinguish among types of speakers in this manner—i.e. based upon their very different occupational roles, motivations, control over the uses of information, market power, institutional commitment to speech values, and so on. Restrictions on attorney speech, for example, do not immediately excite strict scrutiny under the First Amendment simply because they are

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118 *Cf.* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 113–18 (1998) (arguing that although American free speech doctrine is uncomfortable distinguishing among institutions, institutional specificity nevertheless surfaces in cases that involve journalists, broadcast media, and education).

119 This is especially true if one gives a broad definition to speech that is "indispensable to decisionmaking in a democracy." *Bellotti*, 435 U.S. at 777; *see, e.g.*, Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 18, 30 (1979) (warning that treatment of commercial speech as protected speech risks resurrecting economic due process, "clothed in the ill-fitting garb of the [F]irst [A]mendment").

120 *See* Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 6 (2000) ("A pharmacist who advertises drug prices is said to engage in commercial speech, but the publication of these same prices by *Consumer Reports* would likely merit full First Amendment protection."); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 433–34 (1971) (discussing the importance of First Amendment protection for commercial advertising).

aimed solely at lawyers. On the contrary, the fact that the speaker is a lawyer often justifies greater speech restrictions that government can, and does, take into account. Restrictions on public employee speech likewise can impose very significant limits, which the Roberts Court has emphatically reinforced.[121] In fact, *all* of Pyramid Four is potentially imperiled by the argument that speaker identity-specific speech restrictions lead to strict scrutiny, as is much of the terrain below the elevated scrutiny line in Pyramid One. This is a huge potential shake-up of the free speech landscape.

If all regulation aimed at a subset of speakers on the same topic is "speaker-identity" sensitive and therefore presumptively unconstitutional, then the courts will be very busy indeed determining if all of these regulations can satisfy strict scrutiny. If one replies that this is of little concern because all of the regulations will easily pass strict scrutiny,[122] then one either is assuming that all of this regulation is narrowly tailored to advance a compelling government interest in ways that meet strict scrutiny—a most dubious assumption—or one is willing to dilute strict scrutiny to accommodate this wide range of regulations. Strict in theory may not be fatal in fact;[123] but as Justice Kennedy himself has said recently, in another context,[124] it still needs to be *strict*.

In the free speech context, true strict scrutiny has been construed to set an extremely high bar for the government.[125] In fact, Justice Kennedy once wrote that in his view, content-based regulation of protected speech—which triggers strict scrutiny—should *never* be upheld.[126] Although this is not the law, it comes rather close given how

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121 *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that the First Amendment does not insulate public employees from employer discipline); *see generally supra* note 97.

122 For example, Jane Bambauer argues that expanding the reach of free speech coverage to data flow problems will not wreak havoc with the doctrine, and she describes fear that it will do so as "far-fetched." *See* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 111 (2014).

123 Gunther, *supra* note 103, at 8 (explaining that there is minimal fact and scrutiny in "old" equal protection).

124 Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2421 (2013) ("Strict scrutiny must not be strict in theory but feeble in fact.").

125 For an especially rigorous display of strict scrutiny analysis in the First Amendment context, see Justice Scalia's opinion for the Court in Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002) (holding that a prohibition promulgated by the Minnesota Supreme Court fails strict scrutiny because it is "woefully underinclusive").

126 *See id.* at 793 (Kennedy, J., concurring) ("[C]ontent-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests."). Yet, even Kennedy backed off of this firm line when he joined the majority opinion in Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2730–31 (2010) (using a strict scrutiny analysis to conclude that it is not a viola-

rare it is for the Court to uphold restrictions on speech that qualify for full strict scrutiny under current law.[127]

Here is my first point: the Court risks moving *too much* speech to above-the-line, strict scrutiny treatment when it applies a presumption against speaker-identity distinctions that makes considerable sense in *some* contexts to *all* contexts. This is a very unwise trend within the current case law that should be halted. If *Citizens United* stood alone, one might view this concern as overstated. Given *Sorrell*, however, the concern is a real one, with potential tectonic consequences for the huge body of below-the-line, or previously loosely scrutinized, government regulation of expressive activity.

B. The "No New Exceptions" Renovation

In *United States v. Stevens*, the Court stated that it would be "startling and dangerous" to create new exceptions to strict scrutiny of content-based restrictions on speech based on a "free-floating test for First Amendment coverage" that relies upon "an ad hoc balancing of relative social costs and benefits."[128] Instead, the content-based restrictions, "'[a]s a general matter,'" must be confined to "'historic and traditional categories long familiar to the bar.'"[129] The list of these categories is as follows: advocacy intended and likely to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain."[130] It is perhaps significant that the Court did not include this last exception in its string of historic and traditional examples in *Stevens*. Rather, this example was added two years later when the Court applied *Stevens* in *United States v. Alvarez*.[131]

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tion of the freedom of speech to prohibit citizens from providing material support to terrorist groups).

127 *See id.* at 2730 ("[T]his is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny . . . . [W]e in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreigh terrorist organizations.").

128 130 S. Ct. 1577, 1585 (2010).

129 *Id.* at 1584 (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

130 United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (internal citation omitted).

131 *Id.* (explaining that content-based speech restrictions include speech presenting threats preventable by the Government).

In rejecting the argument that new exceptions can be developed based on case-by-case balancing, Chief Justice John Roberts noted that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."[132] Therefore, the government's argument that animal "crush videos" deserve categorical treatment as low value speech failed. Depictions of animal cruelty are not necessarily "an integral part of conduct in violation of a valid criminal statute."[133]

The Chief Justice acknowledged that there may be "some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[134] But the clear and inflexible rule set forth in *Stevens* was that a categorical exception must be "historic and traditional."[135] That the Court meant what it said in *Stevens* also is borne out by the Court's invocation of this rule in two subsequent cases: *Alvarez*[136] and *Brown v. Entertainment Merchants Asssociation*.[137] Like depictions of animal cruelty, lies about one's military awards that are not hooked to concrete harm[138] and violent interactive videos sold to minors without parental consent[139] do not fall under any traditional and historical exception. This in turn means that regulations aimed at such speech, in a content-specific way, trigger classic strict scrutiny under the First Amendment.

This last absolute rule is arguably not as worrisome as a practical matter as the first two; after all, there are many other ways to curb even above-the-line speech that falls outside one of the traditional exceptions. But the rule plainly is a theoretical disaster. Why should the balancing test the First Amendment allegedly already conducts be

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132 *Stevens*, 130 S. Ct. at 1585.

133 *Id.* at 1586 (quoting New York v. Ferber, 458 U.S. 747, 761–62 (1982) (internal quotation marks omitted)); *see also id.* (distinguishing regulation of child pornography on this basis).

134 *Id.*; *see also id.* (declining to carve out new categories of speech outside the scope of the First Amendment).

135 *Id.* at 1584.

136 132 S. Ct. 2537, 2544 (2012) (finding invalid an act criminalizing false statements, which had been made to claim military awards).

137 131 S. Ct. 2729, 2734 (2011) (extending *Stevens* to prevent creation of new categories).

138 *See Alvarez*, 132 S. Ct. at 2549 (explaining that offensive conduct alone is not sufficient to warrant regulation of protected speech).

139 *See Brown*, 131 S. Ct. at 2735–36 (2011) ("No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed.") (internal citation omitted).

a one-way ratchet? Does *Stevens* mean no new exceptions to full First Amendment protection for speech that falls above the current line, *and no more migration of speech from below-the-line to above-the-line status?* If so, how does the migration of commercial speech from "unprotected" to protected, under *Central Hudson* limits, fit this mandate? For that matter, how do we justify robust, modern protection for seditious libel? Or for defamation leveled at a public figure? If not, then what is the role of First Amendment history here—which of course began with application solely to the federal government and not to state and local governments?

Why should public employees (and perhaps public school children) have *any* freedom of speech at work (or at school)? Why ask mock questions during oral arguments that press the "original intent" point on the ground that the Justice is asking—foolishly—what James Madison thought about violent videos?[140]

Finally, and more fundamentally, how exactly do we decide if speech that falls outside a traditional exception, and is therefore subject to elevated scrutiny, is "protected speech" without conducting case-by-case balancing of the harm of the speech weighed against its value? The self-assured "no new exceptions" language ignores the dynamic judicial interpretation process, post-1925, that led to a greatly expanded application of the First Amendment—to include regulations of state and local governments via the Due Process Clause of the Fourteenth Amendment—and a greatly expanded scope of the freedoms it confers. It also ignores the basic structure of Pyramid One, which shows how *much* expression currently lies below the line of elevated scrutiny. If the logic of *Stevens* holds, then the Pyramid is now fossilized. This may lend some stability to the doctrine; but to bind future courts to this close-ended commitment is impossible to square with significant swaths of the First Amendment work of the Court pre-2010.

Here is my second point: the Court in *Stevens* foolishly introduced an ostensibly history- and tradition-based hard brake on the categorical exceptions within free speech doctrine without adequately considering the wider, logical, and normative implications of doing this. By strictly cabining the exceptions, it also placed a lot of stress on strict scrutiny, just as it did with its line in the sand rule about speaker-identity in *Sorrell* and *Citizens United*. This is another potentially

140 *See* Transcript of Oral Argument at 17, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448) ("[W]hat Justice Scalia wants to know is what James Madison thought about video games"); *cf. Brown*, 131 S. Ct. at 2729 (2011) (holding that video games are protected under the First Amendment).

significant flaw in the free speech architecture because it allows too little room for growth, changed circumstances, and evolving wisdom.

C. The Government Speech Renovation

In *Pleasant Grove City v. Summum*, the Court held that when the government is the speaker, the First Amendment does not apply at all, apart from Establishment Clause limits on government speech.[141] In the words of Justice Samuel Alito, "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[142] The Court in *Summum* relied on an earlier case involving compelled subsidies for Government advertising messages, in which the Court stated that the Government's own speech is "exempt from First Amendment scrutiny."[143]

Like the foregoing close-ended statements about speaker-specific restrictions on speech and no new exceptions, this absolute statement about government speech is either not meant to be as absolute as it sounds, or constitutes a very worrisome gap in free speech protection. It surely is hard to square with the free speech logic that undergirds the prohibition on speaker-identity restrictions: government information is of enormous value to "decision-making in democracy." To place government power over that information and its presentation to the public *wholly* beyond the First Amendment's reach is a very scary proposition.

One can readily appreciate the problem of judicial second-guessing of the millions of value-laden choices that government makes daily in the form of speech.[144] Yet experience with government power over "its" speech, and how it can slide from persuasion to propaganda,[145] from bully pulpit to billy club, should make us all wary of unlimited government power over the vast sea of information that the government creates, controls, interprets, and yes—spins.

The problem goes even deeper into constitutional logic. The Court long ago declared that as a general matter, only government

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141 555 U.S. 460, 467–68 (2009); *see id.* (explaining that government speech must comport with the Establishment Clause).

142 *Id.*

143 Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005).

144 The problem of judicial capacity as it relates to doctrinal development has been beautifully explored by Andrew Coan. *See* Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 424–58 (2012).

145 *See* MAGEDAH E. SHABO, TECHNIQUES OF PROPAGANDA AND PERSUASION 116 (2008) (discussing the negative uses of propaganda); *see also infra* note 242.

can violate our federal constitutional rights;[146] thus, only "state action" triggers the First Amendment. Government restrictions on its *own* speech do not fit neatly into the basic rule that only *government* action that burdens *private parties*' liberty mobilizes constitutional liberty concerns.[147]

Yet just as we know that private parties can exercise frightening, channel-choking power over information without governmental participation or direct endorsement—think Google[148]—we know government can exercise similarly scary power without directly regulating any private party. To place either actor completely beyond the First Amendment may serve constitutional formalist logic, but it also leaves us impoverished in ways that are best described as First Amendment losses.

Within state action doctrine, the point is especially vivid in *Marsh v. Alabama*: even though the private company owned the whole town, this did not mean that a Jehovah's Witness had no constitutional right to engage in expressive activity on the streets of that "private town."[149] Rather, the Court treated the private company as the government because of its pervasive control over ostensibly municipal functions; the private entity, in *Marsh*, was tantamount to the government because it engaged in a "public function."[150]

Correlatively, freedom of speech doctrine also should include an exception to the "government speech" doctrine for the rare circumstances in which the government exerts *so much* expressive power that its actions are tantamount to direct speech regulation. This much free speech breathing room is worth preserving, despite the general and sensible assumption that government may engage in content- and even viewpoint-specific regulation of its own speech, with virtually no First Amendment brakes. One factor, though not the only one, that should be relevant to determining the contours of this caveat is the extent to which government has monopoly power over the in-

146 The notable exception is the Thirteenth Amendment. *See* U.S. CONST. amend. XIII.

147 I will set aside here the liberty-based argument in favor of "states' rights." *See* Bond v. United States, 131 S. Ct. 2355, 2360 (2011) (finding that an individual has standing to challenge a federal statute's validity on the grounds that it infringes upon rights reserved to states).

148 *See* Bambauer, *supra* note 36, at 919 (recognizing that while Google has great power over information, it does not operate in "near governmental fashion" as the company towns did in cases such as *Marsh v. Alabama*, 326 U.S. 501 (1946)); *see also* Rosen, *supra* note 36, at 69 (describing a future hypothetical feature of Facebook allowing users to track each other walking around via live-streaming public "camera networks").

149 Marsh v. Alabama, 326 U.S. 501, 509 (1946) (explaining that private ownership does not preclude access to fundamental liberties unfer the First Amendment).

150 *Id.* at 506–09.

formation in question. The lack of options matters. We might think we have a choice of horses, but when Thomas Hobson runs the only stable in town, our horse is always the horse that Hobson selects.

Summum, weirdly, ignores this concern. I say "weirdly" because the Roberts Court has been viewed as exceptionally pro-speech,[151] and because the more conservative justices in particular worry openly about the ways in which government may constrain private choices. Consider, for example, how outraged Justice Alito was in *Christian Legal Society v. Martinez*, where he exclaimed that there is "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."[152] Why should "political correctness" allegedly inculcated by one set of government actors be so outrageous, but not other forms or the same form of "indoctrination" performed without direct subsidies or regulation?

I have no difficulty with the case law that presumes, even in cases that involve subsidies to private parties, or direct regulation of their behavior, that government *usually* gets to control its own property, funds, and messages. But even a little splash of legal realism is enough to wake us up to how government can achieve its viewpoint-narrow ends without direct regulation of individuals or conditions on grants, simply by speaking stentorianly in its own voice.

Here is my third point: *Summum* moves too much speech categorically below the line, *forever*. It is imprudently and unnecessarily absolute, in ways that violate the Court's own sense of the primary value of freedom of expression.

D. Summary: Misunderstanding Doctrine and Theory

The Court is on the wrong path in these cases. The tension between what it says in them, and what it has done elsewhere (and likely will do in the future) is completely untenable. It is too enamored by the most aspirational statements about the First Amendment in some of them, too willing to substitute aphorisms for analysis in all of them, and too reluctant to lift to plain view the balancing test that actually informs its choices in any of them.

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151 However, these appearances can be deceiving. *See* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724–25 (2011) (discussing the Roberts Court rulings against free speech claims).

152 130 S. Ct. 2971, 3000 (2010) (Alito, J., dissenting).

On the contrary, it harshly chides litigants who attempt to make the doctrinal balance between speech harms and benefits explicit.[153] At the same time, it banishes an entire, extremely powerful category of speech to First Amendment irrelevance, with alarmingly little room for reconsideration in a future worst-case-scenario.

Instead, it should have embraced a more pragmatic, incrementalist, and methodological approach that better tracks the messy doctrinal reality—without sacrificing free speech passion or analytical rigor.

E. The Court's Compelled Speech Cases

A particularly complex area of free speech law—compelled speech—illustrates quite vividly the wisdom of doctrinal pragmatism. These cases are a rich, trans-substantive zone of sticky speech regulation dilemmas that trigger *bipartisan* anxieties about government power, and they are an area in which the Roberts Court recently revealed that it can write opinions that are notably and refreshingly elastic and realistic.

In *Agency for International Development v. Alliance for Open Society International, Inc.* ("*AID*"), Chief Justice Roberts embraced the soaring "fixed star" rhetoric of Justice Robert Jackson in *West Virginia State Board of Education v. Barnette*,[154] to strike down a condition on a federal grant that restricted the free speech of grant recipients.[155] Yet it also acknowledged the analytical messiness and doctrinal fluidity of the compelled speech case law. In the latter respect, the case was surprising and—I argue—a turn in the right direction.

1. Agency for International Development v. Alliance for Open Society International, Inc.

The Court in *AID* overturned government conditions on access to federal funding that required recipients to adopt a "policy explicitly opposing prostitution" and prohibited recipients from engaging in any activities inconsistent with an anti-prostitution stance.[156] The fed-

153 *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (explaining that the benefits of First Amendment restrictios on the Government outweigh the costs).

154 319 U.S. 624, 642 (1943) (stating that "[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

155 133 S. Ct. 2321, 2332 (2013).

156 *Id.* at 2325–32 (striking down the condition on freedom of speech grounds).

eral program in question aimed at reducing HIV/AIDS behavioral risks, and conditioned funding on two conditions: first, no funds made available to carry out the law "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking"; and second, no funds could "provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking."[157] The second condition was the condition that was challenged by program fund recipients, who argued that the adoption of such a policy would make it more difficult for them to work with prostitutes in the fight against HIV/AIDS.[158]

The Court in *AID* set forth the following standard for unconstitutional conditions on funding: "the relevant distinction . . . is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[159] It then openly acknowledged that "[t]he line is hardly clear, *in part because the definition of a particular program can always be manipulated to subsume the challenged condition.*"[160]

In a subsequent passage, the Court admitted (with remarkable understatement) that the distinction it has drawn "between conditions that define the federal program and those that reach outside it" is "*not always self-evident.*"[161] Chief Justice Roberts invoked Justice Benjamin Cardozo—an intellectual leader of evolutionary or dynamic constitutional interpretation adherents[162]—who said that "[d]efinition more precise must abide the wisdom of the future."[163] Chief Justice Roberts expressed "confiden[ce] that the Policy Requirement [fell] on the unconstitutional side of the line,"[164] but surrounded this assurance with apparent humility about judicial capacity to impose categorical order on this area of speech doctrine.

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157 *Id.* at 2326 (quoting 22 U.S.C. § 7631(e)–(f)).

158 *Id.*

159 *Id.* at 2328.

160 *Id.* (emphasis added).

161 *Id.* at 2330 (emphasis added).

162 *See* CARDOZO, *supra* note 5, at 17 (noting that "[t]he great generalities of the constitution have a content and significance that vary from age to age" and outlining the elements of a common law method of constitutional decision-making).

163 Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937).

164 *Agency for Int'l Dev.*, 133 S. Ct. at 2330.

The Court distinguished prior conditional funding decisions, such as *Rust v. Sullivan*,[165] on the ground that the funding condition in *AID* reached beyond the scope of the funded program.[166] The program in *Rust* was defined by Congress up front to encourage only selected family planning methods. The grantees also were not restricted from engaging in abortion advocacy outside the scope of the funded program; they were only prohibited from engaging in abortion advocacy on the funded job.[167]

The policy requirement in *AID*, in contrast, was not merely a selection criterion for grant recipients who would further the program's ends. This legitimate government goal was already protected by the *first* condition on funding, i.e. that *no funds* "be used to promote or advocate the legalization or practice of prostitution or sex trafficking."[168] Adding the second condition—requiring adoption of a policy against prostitution—took this limit one step further: it compelled grant recipients to affirmatively "adopt—as their own—the Government's view on an issue of public concern" in a way that went beyond the scope of the Program.[169] This was a restraint *on the grantee*, not the program or service it provided with federal funds. Chief Justice Roberts therefore viewed the case as more comparable to *FCC v. League of Women Voters of California*, which struck down a condition on federal funding to noncommercial broadcast television and radio stations that prohibited editorializing, even with private funds.[170] That condition went beyond assuring that no federal funds went to editorializing; it leveraged the funding to "regulate the stations' speech outside the scope of the program."[171]

In *AID*, the condition likewise went too far. Even if the grantee had an affiliate that could express the disfavored views, and even though a potential grantee could "just say no" to the funds, demanding adoption of the policy as a condition of funding was an impermis-

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165 500 U.S. 173 (1991); *see id.* at 195 n.4 ("Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.").

166 *Agency for Int'l Dev.*, 133 S. Ct. at 2329–30 (analyzing the Court's finding in *Rust* that a condition on funding in Title X was not unconstitutional under the First Amendment).

167 *See id.* (analyzing *Rust*).

168 *Id.* at 2324, 2326 (quoting The Leadership Act, 22 U.S.C.A. § 7631(e) (West 2008), *declared unconstitutional by Agency for Int'l Dev.* v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013)).

169 *Agency for Int'l Dev.*, 133 S. Ct. at 2330.

170 468 U.S. 364 (1984).

171 *Agency for Int'l Dev.*, 133 S. Ct. at 2329 (discussing the Court's treatment of a condition on federal financial assistance in *FCC v. League of Women Voters of California*, 468 U.S. 364, 399 (1984)).

sible restraint on the grantee's freedom of expression.[172] Unconstitutional conditions on funding are not restricted to situations in which a "condition is actually coercive, in the sense of an offer that cannot be refused."[173] Rather, the distinction drawn in prior cases is "not so limited."[174]

The policy requirement thus went "beyond preventing recipients from using private funds in a way that would undermine the federal program. It require[d] them to *pledge allegiance* to the Government's policy of eradicating prostitution."[175] This was compelled affirmation of belief not confined to the scope of the funded government program. In short, impermissible government compulsion comes in many forms, and is not limited to cases of actual coercion. One of those forms—but not the only one—is the leveraging of funding to regulate speech outside the contours of the program itself.

2. *Doctrinal Backdrop to* AID

The Court in *AID* invoked the oft-quoted and facially absolutist language from *Barnette*: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[176] But the Court acknowledged that the whole First Amendment story is hardly consistent with this stirring "no indoctrination" passage.[177]

A moment's reflection on the wide range of circumstances in which government can, and does, prescribe what is orthodox in matters of public opinion and compel individual speech makes clear that even this most cherished liberal right to resist orthodoxy bows *often* to democratic reality. Distinguishing between permissible and impermissible government coercion requires nuance and a willingness to bend speech principles to accommodate conflicting political, historical, and other regulatory realities.

For example, consider the following "compelled speech" scenarios:

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172 *Agency for Int'l Dev.*, 133 S. Ct. at 2328–30.
173 *Id.* at 2328.
174 *Id.*
175 *Id.* at 2332 (emphasis added).
176 *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, (1943)).
177 *Id.* at 2330.

☐Government requires physicians to offer counseling to terminally ill patients about available palliative care.[178]

☐Government conditions Medicare funding on recipients' compliance with rules regarding disclosure of treatment options to patients.[179]

☐Government requires commercial speech to include "purely factual and uncontroversial information," if it is "reasonably related to the State's interest in preventing deception of consumers."[180]

☐Government requires that a graphic image be included on tobacco product packaging to warn consumers of health dangers of smoking.[181]

☐Government requires that cell phone retailers post certain informational posters developed by the Department of the Environment that warn of health dangers of cell phones.[182]

☐Government requires that doctors warn abortion patients that the procedure puts them at "increased risk of suicide ideation and suicide."[183]

☐Government requires that any organization that provides information about pregnancy-related services and does not pro-

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178 N.Y. PUB. HEALTH LAW § 2997-c(2) (McKinney 2012).

179 Medicare Condition of Participation: Patient's Rights, 42 C.F.R. § 482.13(b) (2010).

180 Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

181 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201.4(d), 123 Stat. 1776, 1845 (2009). *But see* R.J. Reynolds Tobacco Co. v. Food and Drug Admin., 696 F.3d 1205, 1222 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (striking down a rulemaking made pursuant to the Family Smoking Prevention and Tobacco Control Act on compelled speech grounds).

182 *See, e.g.*, CTIA—The Wireless Ass'n v. City and County of San Francisco, 827 F. Supp. 2d 1054, 1057 (N.D. Cal. 2011) (upholding requirement that cell phone retailers provide consumers with informational fact-sheets prepared by San Francisco Department of the Environment regarding potential health effects of cell phone use).

183 *E.g.*, Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 686 F.3d 889, 892–94 (8th Cir. 2012) (en banc) (upholding South Dakota law requiring that physicians provide an abortion patient with a written description of medical risks and statistically significant risk factors of the procedure); *cf.* Conan v. Walters, 309 F.3d 629 (9th Cir. 2002) (holding government policy of investigating physicians who recommend use of marijuana to patients violated free speech of physicians); Stuart v. Loomis, 992 F. Supp. 2d 585 (M.D.N.C. 2014) (striking down "speech and display" provision that required doctors to display ultrasound images and describe them to patient). *See generally* Robert C. Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 948 (distinguishing between speech "by a professional" and "professional speech").

vide information about abortions or certain types of birth control post a conspicuous sign in the waiting room notifying clients that it "does not provide or make referral for abortion or birth-control services."[184]

- ☐ Government bans therapies by mental health providers designed to change minors' sexual orientations, including efforts to "change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex."[185]
- ☐ Government prohibits a web-site owner from posting trade secrets on his Internet Website, where he knows or has reason to know the secrets were acquired by improper means, i.e. through reverse engineering in violation of a license agreement that deals with content scrambling technology of DVDs.[186]
- ☐ Government denies registered student organization status to law student organizations that do not comply with an "all-comers" anti-discrimination policy.[187]

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184 The Evergreen Ass'n v. City of New York, 740 F.3d 233 (2d Cir. 2014), *cert. denied*, No. 13-1462, 2014 WL 2586961 (U.S. Nov. 3, 2014); Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 721 F.3d 264, 271 (4th Cir. 2013).

185 S. 1172, 2011-2012 Leg., Reg. Sess. (Cal. 2012), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1172; Pickup v. Brown, 740 F.3d 1208, 1221–23 (9th Cir. 2013). *See generally* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005) (discussing the First Amendment tensions in some regulation of professional speech).

186 DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 8–10 (Cal. 2003) (upholding a grant of injunctive relief under California trade secret laws on ground that the law in question served significant state interests, burdened no more speech than necessary to serve these interests, and did not contribute significantly to any public debate about use of encryption software or DVD industry efforts to limit unauthorized copying of DVDs); *see also* Bartnicki v. Vopper, 532 U.S. 514, 532–33 (2001) (addressing the constitutionality of statutes that punish the disclosure of illegally intercepted communications, and distinguishing between matters of public versus purely private concern). *See generally* Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003 (2000) (arguing in favor of common law protection of trade secrets); Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099 (2002) (analyzing Supreme Court cases that address tension between freedom of expression and use of illegally intercepted communications).

187 Christian Legal Soc'y v. Martinez, 561 U.S. 661, 669–73 (2010). *See generally* Toni M. Massaro, Christian Legal Society v. Martinez*: Six Frames*, 38 HASTINGS CONST. L.Q. 569 (2011) (using the decision in *Martinez* to analyze the government's right to condition funds while being limited by the sometimes conflicting goals of diversity and freedom of expression).

- ☐ Government requires all students who attend a public university in that state to pay a student-activity fee, which supports a range of student organizations.[188]
- ☐ Government requires colleges and universities that receive federal funding to allow military recruiters onto their campuses on same terms as recruiters for other employers.[189]
- ☐ Government applies anti-fraud laws to religious actors seeking financial contributions.[190]
- ☐ Government requires individuals who sign ballot proposition petitions to reveal their identity.[191]
- ☐ Government requires public high school students to wear ID badges, which include photos and names of the students, barcodes tied to students' social security numbers, and radio frequency identification chips that pinpoint the exact location of the individual students, including after school.[192]
- ☐ Government requires a public middle school student to reveal her Facebook password after posting a message about an adult hall monitor at her school.[193]
- ☐ Government requires individuals who engage in door-to-door solicitation to first register with the local authorities and obtain an identification badge.[194]
- ☐ Government bans the sale or disclosure by pharmacies of information regarding the prescribing habits of doctors when the information would be used for marketing purposes by pharmaceutical manufacturers.[195]

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188 *See, e.g.*, Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 221 (2000) (upholding student activity fee to facilitate extracurricular speech, provided the program was viewpoint neutral and neutrally applied).

189 Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47, 59–60 (2006) (upholding a conditional spending requirement mandating that law schools who receive certain federal funds afford equal access to military recruiters).

190 United States v. Ballard, 322 U.S. 78, 79 (1944).

191 *See, e.g.*, John Doe No. 1 v. Reed, 561 U.S. 186, 190–91 (2011) (upholding Washington state public records disclosure law, on facial challenge).

192 *See, e.g.*, A.H. v. Northside Indep. Sch. Dist., 916 F. Supp. 2d 757, 761–62 (W.D. Tex. 2013).

193 *E.g.*, R.S. v. Minnewaska Area Sch. Dist., 894 F. Supp. 2d 1128, 1133–34 (D. Minn. 2012).

194 *See, e.g.*, Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 154–56 (2002).

195 Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011).

- ☐ Government imposes criminal sanctions for the promotion by a drug salesperson of an FDA-approved prescription drug for "off-label" uses.[196]
- ☐ Government bans physicians from prescribing an FDA-approved drug, except in the dosage and manner prescribed by the FDA in 2000.[197]
- ☐ Government requires private parties to subsidize an advertising campaign for certain agricultural products.[198]
- ☐ Government requires public employees to pay an annual fee to cover the costs of the union's collective bargaining activities, but allows dissenting nonmembers of the union to affirmatively object to dues deductions used for political activities rather than requiring that all nonmembers opt in to this use of union dues.[199]
- ☐ Government requires individuals arrested for serious crimes to produce a DNA sample[200]
- ☐ Government requires commercial photographers that operate places of public accommodation to respect non-discrimination laws that prohibit discrimination based on sexual orientation.[201]

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196 *See, e.g.*, United States v. Caronia, 703 F.3d 149, 168–69 (2d Cir. 2012); Michelle M. Mello et al., *Shifting Terrain in the Regulation of Off-Label Promotion of Pharmaceuticals*, 360 NEW ENG. J. MEDICINE 1557, 1561 (2009), *available at* http://www.hsph.harvard.edu/michelle-mello/files/2012/10/Off-label_PDF.pdf.

197 *See, e.g.*, Okla. Coal. for Reprod. Justice v. Cline, 292 P.3d 27, 27–28 (Okla. 2012) (per curiam) (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) to hold that a statute, which prohibited the reckless or knowing prescription of abortifacient medication, was facially unconstitutional).

198 *Compare* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 477 (1997) (upholding federal marketing program that subsidized ad campaign for California fruit), *with* United States v. United Foods, Inc., 533 U.S. 405, 413 (2001) (striking down compelled subsidization of advertising program aimed at promoting mushrooms). *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (upholding a requirement that cattle producers subsidize ads for beef, on the ground that this was "government speech," not private expression).

199 Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2295 (2012) (holding that there must be an opt-in, not merely opt-out, mechanism for distributing dues deductions from wages of non-union members to union political activities); *cf.* Harris v. Quinn, 134 S. Ct. 2618 (2014) (holding First Amendment prohibited collection of an agency fee from "partial public employee" home health care workers).

200 Maryland v. King, 133 S. Ct. 1958, 1980 (2013).

201 Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (holding a commercial photography business could not refuse to photograph same-sex commitment ceremony based on personal religious objections to same-sex marriage).

In all of the above cases, and in countless more,[202] the government is actively involved in shaping, prohibiting, or outright compelling speech. Predicting when a court will conclude that the scenario crosses the First Amendment line is extremely difficult, even if one knows the doctrinal results in all of the above examples.

This is all entirely unsurprising, given the Janus-faced principles that the Court has invoked in compelled speech cases.

On the one hand, the Court has said that "the right of freedom of thought . . . includes both the right to speak freely and the right to refrain from speaking at all."[203] It also has upheld the right not to disclose one's identity, in some contexts, as part of this right to refrain from speaking.[204] Yet it has upheld numerous demands that speakers disclose their identity[205] when this is necessary to protect consumers, the integrity of electoral processes, or other important government objectives.

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202 *See, e.g.*, Wollschlaeger v. Farmer, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (striking down on free speech grounds Florida's "Firearm Owners' Privacy Act," which forbade doctors from including information about patients' firearm ownership in medical records, asking patients whether they own firearms, unless relevant to patients' medical care, or discriminating against patients because they own a firearm), *rev'd*, Wollschlaeger v. Florida, 760 F.3d 1195 (11th Cir. 2014).

The complexities of mandatory disclosures and disclaimers in the context of campaign finance and electoral process cases are beyond the scope of this article but are clearly relevant to the more general question of whether government can compel expression. *See infra* notes 204–05. The problem is also pervasive within the area of constitutional limits on public employee discipline. *See generally* Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence: *The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85 (2006) (discussing the unconstitutional conditions doctrine in the context of public employment). A rapidly emerging free speech conundrum lies ahead for the Securities Exchange Commission, among other agencies, which is facing First Amendment challenges of some of its disclosure regimes. *See* Nat'l Ass'n of Mfrs. v. S.E.C., 748 F.3d 359, 364 (D.C. Cir. 2014), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (invalidating a requirement that companies use specific language when regulated entities declare that their products "have not been found to be DRC conflict free," on compelled speech grounds); *cf.* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (affirming lower court order that the industry is unlikely to succeed on free speech claims, and objecting to federal country-of-origin labeling requirements for "muscle cuts" of meats).

201 Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citation omitted).

202 *See* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) (holding a requirement that initiative-petition circulators wear identification badges unconstitutional); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (holding a prohibition on distribution of anonymous campaign literature unconstitutional); Talley v. California, 362 U.S. 60 (1960) (holding a ban on anonymous handbills unconstitutional); *see also* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Scranton, 536 U.S. 150, 166–67 (2002) (holding a village ordinance prohibiting canvassers from going in and on private residential property too broad and thus unconstitutional).

203 *See, e.g.*, Doe v. Reed, 561 U.S. 186 (2010) (holding that a state requirement that petition signers disclose their identities constitutional).

On the one hand, the Court has stated that "First Amendment values are at serious risk if the government can compel a particular citizen, or discrete group of citizens, to pay special subsidies for speech on the side that it favors."[206] Yet it has upheld requirements that effectively compel expression through mandatory assessments for government sponsored ad campaigns,[207] on the ground that the assessments were "ancillary to a more comprehensive program restricting marketing autonomy."[208]

On the one hand, the Court has said that conditioning a government benefit on forgoing speech is "in effect to penalize them for such speech."[209] Yet it has said that a mere refusal to fund speech is not a burden on expression where there is "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect."[210] Put another way, "[g]overnment can . . . selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[211]

In fact, in most cases, the "just turn down the money" response to claims that conditions on benefits are coercive proves to be dispositive. But there are exceptions, as *AID* and other cases prove.

The Court's "yes, but" doctrinal statements have led to important critiques, many on the ground that the outcome in the specific case cannot be squared with outcomes in other cases, which in turn often leads to indictments of the entire area of law as unprincipled.[212] This lack of order, though, is unremarkable when one realizes that the compelled speech problem is but one piece of the larger and intractable "unconstitutional conditions" conundrum.

Nor is the right answer "more formalism" or stricter tests to constrain judicial balancing—as tempting as that may be. Even the most heroic efforts of scholars to assist judges in forging one clear path

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204 United States v. United Foods, Inc., 533 U.S. 405, 411 (2001).

205 Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997) (holding that assessments for generic advertising do not amount to a restriction of free speech).

206 *United Foods*, 533 U.S. at 411–12 (distinguishing *Glickman*).

207 Speiser v. Randall, 357 U.S. 513, 518 (1958).

208 Regan v. Taxation With Representation of Washington, 461 U.S. 540, 548 (1983).

209 Rust v. Sullivan, 500 U.S. 173, 193 (1991).

210 *See, e.g.*, Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 VAL. U. L. REV. 555, 557–58 (2006) (critiquing case law on compelled commercial speech).

through this constitutional thicket have failed, and no theorist drawn to these seductive rocks has survived unbruised.[213]

A primary reason for the muddle is that there are "Unconstitutional Conditions Questions *Everywhere*."[214] As Fred Schauer has observed, "what looks like an unconstitutional condition from one angle may look strikingly like government speech, or government support of its own activities and policies, from another."[215] This makes reconciling the cases "too hard," and the search for consistency a "chimera."[216] There also are compelled speech questions *everywhere*, and the search for consistency among them is likewise a chimera. What looks like compelled speech from one angle may look strikingly like government speech, or government regulation of conduct, or promotion of sensible government regulatory policy, from another. Even the famous Holmes adage that one cannot cry fire falsely in a crowded theater is a form of compelled speech insofar as compelled silence is viewed as a burden on expressive autonomy. Moreover, stare decisis—among other factors—operates as a huge constraint on analytical purity.

Regulation aimed at professional or expert expression nicely illustrates these points: when do these regulations permissibly require a person to curb or shape his or her professional or expert speech to conform to *professional standards*, versus impermissibly "affirm ideological truths to which they might well object"?[217] This in turn, of course, begs another question: well, when are professional standards themselves unduly "ideological?"

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211 For especially influential efforts to make sense of the doctrine, see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1216–20 (1990); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 26–28 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights In A Positive State*, 132 U. PA. L. REV. 1293, 1378–95 (1984); Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached,* 54 CALIF. L. REV. 443, 444 (1966); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1499–1505 (1989). For more pointed skepticism about the doctrine itself, see Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 595–608 (1990); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 339–42 (1989).

212 Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. OF LEGAL ANALYSIS 61, (2012), *available at* http://ssrn.com/abstract=2186423 (discussing exit and sorting dynamics in constitutional litigation).

213 Schauer, *supra* note 118, at 102.

214 Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995) (exploring views of constitutional ontology).

215 Post, *supra* note 183, at 959.

The questions quickly turn Escher-like. When can a professional regulatory body claim that there is sufficient scientific or other evidence to justify the compelled speech? Which is to say, when is the regulation not promoted by a desire to suppress *knowledge*? Are there *ever* speech-suppressive measures that may not also suppress knowledge? If so, how do we square such measures with the First Amendment assumptions that there is no such thing as a false idea, that the best remedy for bad speech is counter speech (if there be time), or that we should just avert our eyes in the face of bad speech? How do we reconcile such a conclusion or justification for speech regulation—content– and speaker-specific regulation at that!—with the First Amendment's underlying commitment to an ever-evolving construction of "truth," including truth as it relates to professional standards? Why not just say instead that one man's quackery is another's sound medical treatment?

Courts may draw a line between speech *by* a professional and *professional speech* to help understand the doctrinal decisions about the line between free speech and permissible professional regulation that we already have. Speech by a psychotherapist in her office is different from speech on the same topic by the psychotherapist on the street corner. But this does not solve the problem of free speech limits within the former context, and it does not explain what the *precise* First Amendment differences between the two contexts should be.[218]

F. Common Factors, Common Questions?

Navigating this thicket requires a compass, not a map. It also requires a healthy respect for paradox within constitutional law. Yet, although the cases are gnarly, courts do ask *common questions* that inform their hard choices.

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216 The free speech lines become even muddier when the person is a minister or other religious official, who may be providing counseling that will have as great of an impact on the person being counseled as would a psychotherapist. There are independent, constitutional reasons why ordinary malpractice rules do not apply to religious officials who engage in mental health "quackery," but they are not obviously free speech, versus freedom of religion, lines. In fact, affording religious speakers greater speech protection than non-religious speakers should excite concern about speaker-identity discrimination, if viewed through the free speech lens alone. A related problem of religious speaker exceptionalism surfaces in consumer fraud scenarios, where courts struggle to balance religious freedoms with consumer protection laws. *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944); *see also* Bernadette Meyler, *Commerce in Religion*, 84 NOTRE DAME L. REV. 887, 898–901 (2009) (discussing *Ballard* and the insulation of some commercial religious speech from typical fraud rules). This problem is sure to get even gnarlier, post *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which extended Religious Freedom Restoration Act coverage to for-profit businesses.

Within the vast terrain covered by the "compelled speech" problem and the often conflicting first principles and contextual caveats, several common factors and questions surface throughout the doctrine. Each falls on a continuum, with government power to require the expression stronger on the left side than on the right side of the continuum.

Toward Government Power	**Against Government Power**
Idenity-only disclosure	More detailed information disclosure
Selectively disclosed information	Secret-to-all information
Public Information	Private information
Memorialized data production	Affirmative oral recitation of government script
Expert technical information	Non-expert, non-technical information
Objective content	Subjective content
Secular content	Religious content
Factual information	Ideological information
Information that can be detected in the speaker	Information that must be extracted from the speaker
Compelled silence	Compelled expression
Government as an option	Government monopolization
Conditions of participation in a government program	General prohibitions beyond the scope of the government program
Consistent with the normal functioning of the speaker	A distortion of the normal functioning of the speaker

Proportional to the scope of the program	Beyond the program conditions
Prevention of direct harms to third parties	Indirect or diffuse harms to others
Prevention of physical harms	Cognitive effects
Government objective of persuasion	Government objective of inculcation
Choice-facilitating government objective	Choice-narrowing government objective
Controlled government setting	"Street corner" setting
Public accommodation regulation	Private setting regulation
Neutrally applied regulation	Selectively applied regulation
Expressive conduct	Pure speech
Traditional area of government regulation	Novel area of government regulation
Commercial speaker	Non-commercial speaker
Minor speaker	Adult speaker
Government's own speech	Individual speech

These factors,[219] rather than bright line tests or stirring quotations from *Barnette*, therefore best describe the extant case law on compelled speech. They also show why efforts to capture all of them within one non-permeable, theoretical membrane falter. Even if one could explain the left side of the list as a normatively coherent set of concerns, the right side must be squared with that account. Moreover, we obviously may disagree about whether some expression falls

219 The list is non-exhaustive.

on the left versus right side of the line in many cases. Debates about "informed consent" in abortion cases or about the limits of nondiscrimination laws, for example, illustrate how slippery the "ideological versus factual" distinction can be. Consequently, the best answer to the question of whether government constitutionally can "compel our allegiance" is neither unitary nor unequivocal: "[i]t depends."

As a normative matter, of course, where we draw the line between impermissible and permissible compulsion matters greatly. Paternalism rankles. We value autonomous decision making, fear government overreaching, and exalt notions of democratic processes premised on an engaged and competent citizenry, even if they are myths.[220] We are not—at least not ideally or theoretically—government sock puppets.[221] The left line shows this, and calls to mind the factors that inspire our greatest liberalism-based concerns about government power to compromise these norms. The conventional theories that support freedom of expression all play a role in the left-line emphasis on skepticism about compelled speech, though none by itself captures all of them or—and this matters—their limits.

But the right side reminds us that we also *are* government, which means we can be conscripted into making government work effectively *through* us, in various roles that are sometimes heavily regulated. It also reminds us that there are competing speech-based values in *most* freedom of speech conversations, and that restricting a speaker's freedom sometimes will enhance the audience or future speaker's understanding. We therefore often accept right-side limits on speaker autonomy without First Amendment grumbling, even without First Amendment notice, and even with First Amendment enthusiasm.

Finally, the right line cautions us about viewing social problems with *only* a free speech lens in hand. The practical upshot of the competing tugs is the doctrine we have, with its common questions but also its complex and at times internally contradictory answers.

1. Back to AID

Contrast the inflexibility of the three Roberts Court rules critiqued in Part I—speaker-identity distinctions always trigger elevated scrutiny, no new categorical exceptions, and no free speech limits on

220 See ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 17–37 (2013), for a recent, chilling account of how ignorant we are.

221 My colleague Derek Bambauer's delightful phrase.

government speech—with the majority opinion in *Agency for International Development v. Alliance for Open Society International*.[222]

True, the Court began its opinion with hornbook, hard-to-take-completely-seriously, law: "[i]t is . . . a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'"[223] As we have seen, this is just not true in many circumstances.

But the Court also recognized that a direct prohibition on speech is very different from government funding conditioned on compliance with specific, value-laden limits on the use of the funds.[224] In general, a party who objects to the conditions can merely refuse to accept the government funds. When a party has a choice, however constrained, it is much harder to claim that its speech is *compelled* by the government.

Most importantly, the Court in *AID* recognized that the constitutional matter is not so black-and-white. *AID* set forth one *factor* for determining when conditions on funding cross the free speech line, i.e. conditions that restrict a grantee off the funded job, rather than merely assuring government funds are spent for program purposes only.[225] The Court also admitted that the factor is potentially manipulable, and then offered several reasons why it believed that the factor pointed toward unconstitutionality.[226] It rejected the dissent's more restrictive and formalistic interpretation of precedent, and left open to future cases the task of making the standard more precise.[227] The opinion openly confessed that the standard is hardly one that leads to self-evident line-drawing.[228] It then firmly placed *this case* on one side of the line.

But it did so in a very narrow context: the government *already* had imposed viewpoint-specific limits on use of its funds. What government could not do was carry that one step further and require the recipient to adopt a policy pledging its commitment to the viewpoint-specific policy the government favors. How this requirement will play out in future cases—such as speech-based challenges to government requirements that recipients of funding or commercial actors comply

222 133 S. Ct. 2321 (2013).

223 *Id.* at 2327 (quoting Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61 (2006)).

224 *Id.* at 2328.

225 *Id.* at 2329–30.

226 *Id.* at 2330.

227 *Id.*

228 *Id.*

with nondiscrimination policies that prohibit discrimination based on sexual orientation—remains to be seen.

One can argue that the opinion is still woefully thin on clear markers for future cases. One can disagree about where the Court drew the line in this case. One surely can debate whether the distinction drawn between the facts of this case and those in *Rust* was persuasive.[229] One also can object to some of the misleadingly absolute statements dotting the opinion that celebrate the allegedly clear prohibition of government compulsion of speech.

But the caveat-laced opinion, taken as a whole, is remarkably pragmatic—a *very* welcome departure from the self-assured sermonizing of other Roberts Court First Amendment cases. Moreover, the case "goes small" in terms of its potential clear application in future cases. It emphasizes a question to ask—does a funding scheme (versus a direct prohibition—see Factors 7, 8 and 9 above) unnecessarily force applicants to "pledge allegiance" in ways that go beyond the funded job? (see Factor 13 above, on proportionality)—but leaves open many ways for courts to answer this question.

To this provisional, hedged, and doctrinally conservative aspect of the opinion I say, "Bravo!" and "Encore, please!" This aspect of the case shows a much deeper understanding freedom of expression than earlier Roberts Court cases that repress virtually all nuance and potentially hamstring government regulators seeking to limit or proscribe harmful expression in ways that make sound, contemporary sense.

2. A Word About New Science Implications

Factors, rather than formalism, also will enable the Court to better adapt to emerging science that is potentially relevant to First Amendment thinking. In particular, the Court will need to consider growing evidence of how weak our cognitive abilities may be, how disengaged some of us are from democratic deliberations, and how technological advances may undermine any robust sense of our analytical autonomy. No matter what theory of freedom of speech one embraces, the scientific and social science literature presents some very serious challenges to fundamental assumptions on which the most widely accepted theories are based.

We have long recognized the unicorn nature of a robust marketplace of ideas that operates as a crucible that leaves "truth" as a resi-

229 I do not think it was, but no matter here.

due.[230] We also long ago categorized as mythical another creature in the freedom of speech forest: the *rational autonomous* thinker.[231] But we nevertheless have found it *extremely difficult* to abandon either myth completely.

Holding on to the rational thinker myth is rapidly getting harder. New literature is displaying just how poorly we reason, in fairly predictable ways, with worrisome implications for First Amendment doctrine and theory.[232] The literature shows how we can be moved—suckered—into choices that are not in our best interests due to cognitive weaknesses that make us extremely vulnerable to manipulation. Moreover, these works are not political screeds but socio-biological, neurological, and psychological investigations into human cognition and behavior. They are attempts to know us as we are, not as we would like to imagine ourselves. They have implications for legal norms and principles, but they did not arise in that political value-laden context with particular policy axes to grind.

How should we reconcile the traditional freedom of speech triumphalism about individual capacity for reasoning with the emerging evidence about human beings' undeniable susceptibility to bad, misleading, or ideologically tilted messages, often with no awareness or concern that we are being led astray? Rather obvious is that the worse we are at thinking, the harder it becomes to treat us as autonomous, to reject as "paternalistic" measures that help guide us, or to insulate us from influences that are in many ways—even in good ways—"coercive." Also, if social science studies indicate that we are not seeking enlightenment from the marketplace of ideas, as much

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230 *See, e.g.*, Baker, *supra* note 77, at 965–66 (discussing problem with marketplace model posed by lazy thinkers in the audience for speech); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 651 (2006) (critiquing the marketplace model on grounds of the many cognitive biases that undermine its assumptions); Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991) (discussing market dysfunctions and possible benign speech effects of government regulation); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (critiquing the metaphor on grounds that truth is not a natural upshot of the speech market); Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY AND SOC. PSYCHOL., 995, 996–97 (2000) (discussing how multiple choices can create effects that can paralyze rather than liberate decision making); Troy A. Paredes, *Blinded By the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 456–57 (2003) (discussing the difficulties even experts have in sorting out information in the relevant marketplace of ideas).

231 This is a recurring theme in Critical Legal Studies work. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983).

232 *See infra* text accompanying notes 237–42.

free speech theory supposes, but rather mere distraction and often crass entertainment,[233] then we not only are cognitively weak thinkers, but we are also not even trying to be careful thinkers in many of our protected expression pursuits.

Lofty claims about free thinking and oppressive government thus are in potentially fatal tension with more realistic appraisals of the average First Amendment actor and her limited capacity to sort through data flow, commercial speech, political messages, entertainment, and other expression that receives the significant First Amendment protection.

Even a quick peek into the burgeoning psychological and neurobiological literature on our many cognitive weaknesses, our susceptibility to seductive or selective presentation of information, and the countless ways in which we can be "indoctrinated," "coerced," or "tricked" into bending ourselves to viewpoints that the government (among others) seeks to influence makes casual claims about our *right* to be free from government *compulsion* seem quaint. At the same time, it may make government interventions designed to nudge us toward government-favored choices more worrisome.

For example, the literature arguably makes objections to government regulation aimed at guiding us through our "marketplace of ideas" choices weaker: we need far more help than we might imagine. It also suggests that our resistance (some might say imperviousness) to abstract and statistical messages—however accurate they may be—and our responsiveness to (some might say seduction by) vivid and salient messages means government interventions need to lay it on really thick, simple, and visual to even get our attention.

Thus, very graphic warnings on cigarette packages may be *necessary*, not unduly paternalistic, if we are serious about deterring people from smoking.[234] Mere disclosures of the calorie content of a Big Mac may not suffice to combat the growing health crisis of obesity. We may instead need a picture of a blind, Type II, diabetic person with a leg amputation or severe neuropathy. Or, we may need some *other* prompt to steer us to healthier choices. First Amendment doctrine thus may need to arc its compelled speech thinking to meet specific

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233 *See, e.g.*, Collins & Skover, *supra* note 91, at 785 ("TV is the talk of our times . . . ."); Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 404–06 (2012) (noting, for example, the popular observation that "we live in a vulgar world—one in which modern mass media shifted our taste norms . . . .").

234 *See supra* text accompanying note 181; *see also* Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 MD. L. REV. 458 (2014).

problems, rather than intoning stale general formulas about paternalism that may block worthy and life-saving regulation.

Yet it also suggests that some government use of graphic images to nudge us into government-endorsed behaviors may work exceptionally well, with implications for government speech that veers into propaganda or more purely ideological messaging of other kinds. Alternatively, government interventions could boomerang and produce consequences that undermine government goals. The most we likely can say is that free speech thinkers ought to consider this emerging science, and assess both how it relates to our constitutional framework and how doctrine should be applied to specific speech problems.

In some ways, this newer work is simply a more sophisticated version of earlier work and case law that already recognized the ways in which we think poorly, especially under stress. The slow march from treating criminal syndicalism laws deferentially to demanding a very high level of threat before verbal incitement to illegal activity can be punished "consciously or not, recognized the risk that highly emotional times of political emergency are likely to evoke the kinds of cognitive illusions that lead people to overestimate perceived risks."[235] Likewise, the lukewarm protection of commercial speech is premised in part on the recognition that consumers are "subject to pervasive cognitive illusions."[236] In other words, the notion that we are poor thinkers, or that we are more socially constructed than autonomous is hardly news.

What has changed is that the scholarly investigation into the *patterns* within our cognitive illusions is becoming much more sophisticated. Scholars are starting to explain more precisely how, when, and where we are thrown off, with important implications for regulators seeking to protect us and judges seeking to protect us from overzealous government regulators. Finally, scholars are noticing the normative (and thus theoretical) implications of these observations, in the free speech arena and elsewhere.

Simply put, the more we know about the human brain and human behaviors, the more we may need to adjust the law that applies to them. First Amendment law is one such area, though it is hardly the only one.[237]

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235 Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 36 (2003).

236 *Id.* at 49; *see also* Bambauer, *supra* note 230.

237 *See, e.g.*, Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349 (2011).

This may not mean new government mandates are the right answer. In some cases, regulation may be the wrong answer, because it may produce worse outcomes. It does mean that we should take the mandate option seriously. The multiple, systematic errors that humans tend to make in thinking about problems clearly relate to federal regulatory approaches that are designed, per Executive Order 13563, to "reduce burdens and maintain flexibility and freedom of choice for the public."[238]

If we know that humans rely on default rules, engage in procrastination, use framing devices to process information, are more inclined to avoid loss than is reasonable, are vulnerable to social influences, suffer from baseless optimism, use unnuanced heuristics, and let emotions skew decision making,[239] then how should government respond? If we have an aversion (or imperviousness) to abstract and statistical presentations, as opposed to vivid imagery,[240] this may affect whether and how government should "compel speech"—for example, by forcing companies to make particular types of disclosures to credit card applicants, health care consumers, and others.[241] In other words, a lot hinges on whether and where we really are good at thinking—as much free speech rhetoric assumes—though one of our cognitive biases seems to be an exaggerated sense that we are good at thinking, or at least much better than average.

In the First Amendment context, these insights corrode the baseline. Ignorance may not be bliss; it may be quite injurious to our physical health, financial security, political stability, civil liberties, and our well-being more generally. Again, *this does not answer whether government regulation of a particular form is better than leaving us to our own, muddled-thinking devices.* Our acute vulnerability to framing and heuristics, for example, can be manipulated and abused by government as well as by MasterCard.[242] It does counsel caution about close-ended

238 Exec. Order No. 13563, 3 C.F.R. 215, 216 (2011).

239 *Id.*; *see also* DAN ARIELY, PREDICTABLY IRRATIONAL (2009); DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011); ROBERT TRIVERS, THE FOLLY OF FOOLS: THE LOGIC OF DECEIT AND SELF-DECEPTION IN HUMAN LIFE (2011).

240 *See* Sunstein, *supra* note 237, at 1352–54 (stating that information that is "vivid and salient can have a larger impact on behavior than information that is statistical and abstract"); *see also* CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2013) (arguing for more government "nudges" such as product warnings and other disclosure rules rather than prohibitions or prescriptions).

241 *Id.*; *see also* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012) (discussing the implications of behavioral economics for consumer contracts).

242 *See generally* EDWARD L. BERNAYS, CRYSTALLIZING PUBLIC OPINION (1923); EDWARD BERNAYS, PROPAGANDA, (IG Publishing, 2005); JACQUES ELLUL, PROPAGANDA: THE

and cross-contextual conclusions about government as freedom of speech villain (or hero, for that matter). And it points decidedly against the approach to freedom of speech problems that the Roberts Court took in the three scenarios outlined above.

As we learn more about the precise nature of our cognitive weaknesses, courts will be confronted with starker choices about how—or whether—to address them within free speech doctrine. Should government be given greater power to adopt regulations designed to correct for our cognitive flaws? How much should the scientific evidence weigh in the free speech calculus, before the traditional objection to "paternalism" kicks in? And at what point, if ever, does the "marketplace of ideas" metaphor finally collapse under the weight of *so much* evidence that undermines its basic assumptions about rational speakers and audiences, or "truth" as its residue?

My point again is that the Court would be wise to avoid formalisms that will make it much harder for free speech doctrine to accommodate the emerging evidence about who we *really* are and how we *really* think. It also needs to preserve breathing room for ways in which both of these things may change in the years ahead.[243] Cheery, romanticized accounts of who we wish we were, or who we used to be, will only make it harder for constitutional law to "stay real."

G. Operationalizing the Non-Formalistic Approach – Two Helpful Illustrations

Two elegant scholarly treatments of important free speech problems illustrate how courts might better tailor free speech analysis and theoretical justifications to doctrinal reality. In the first, the writer argues for above-the-line treatment of "data." In the other, the writer urges caution about above-the-line treatment of expert knowledge or professional speech. The shared features of the arguments, if not

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FORMATION OF MEN'S ATTITUDES (1965); EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (2002); FRANK L. GOLDSTEIN, PSYCHOLOGICAL OPERATIONS: PRINCIPLES AND CASE STUDIES (1996); WALTER LIPPMANN, PUBLIC OPINION (1930); J. MICHAEL WALLER, FIGHTING THE WAR OF IDEAS LIKE A REAL WAR (2007).

243 This concern is not unique to free speech doctrine. The modern Court's stress on historical practices as a primary tether for constitutional interpretation, as well as its preference for formalism over balancing tests, make it especially and pervasively impervious to the ways in which saving room for innovation matters. *See* Toni M. Massaro, *Substantive Due Process, Black Swans, and Innovation*, 3 UTAH L. REV. 987, 987–88, 990 (2011) (discussing the problem in the context of substantive due process doctrine); *see also* E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW, 222–38 (2013).

their specific proposed outcomes, illuminate how to analyze contemporary free speech problems like the introductory problems in a manner that is both descriptively accurate and normatively grounded but not rigidly formalistic.

1. "Big Data" as Speech

An important free speech line-drawing debate is being played out now in scholarly works that address production, collection, and interpretation of huge data sets. Is this data speech? If not, when is data protected speech and what level of protection does it enjoy? Can we live with the effects of locating data—raw or refined—presumptively in the same free speech territory as political expression? Does the "big data" revolution, with its potential to radically alter our notions of personal privacy, change the answer? What are the doctrinal, theoretical, and practical consequences of the answers to all of these questions?

Jane Bambauer makes a powerful case for presumptively treating data as above-the-line speech.[244] Her article is an excellent vehicle for demonstrating how the existing free speech framework shapes the discussion, and is best understood as multi-factored and flexible rather than dichotomous and inflexible.

Like all arguments for expanding free speech to embrace a new category, Bambauer invokes the normative claims that favor broader readings of speech protection. In particular, she relies on the "thinker-based" theory of freedom of expression advanced by Seana Valentine Shiffrin,[245] which sheds helpful light on the audience or future speaker aspect of First Amendment rules that protects expressive activity. For Bambauer, free speech is not just about the current speaker's interests, but how one speaker's data flow leads to another's new idea.

Tracking doctrine and influential analyses of doctrine, Bambauer then posits that where First Amendment coverage is ambiguous, government motives for suppressing it matter.[246] Regulation that is designed to interfere with knowledge offends her preferred thinker-

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244 *See* Bambauer, *supra* note 122, at 105–06 (discussing why data should not be relegated to a lower form of protection in all cases).

245 *See* Shiffrin, *supra* note 39, at 283–84, 303–04 (describing the "thinker-based" theory of freedom of expression).

246 Bambauer, *supra* note 122, at 89–91. See also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414–15 (1996), for an earlier important work on the importance of government purpose in free speech analysis.

based theory of the First Amendment; other regulation may not. Second, Bambauer underscores doctrinal outcomes that best support her theory as well as her specific claim for expanded protection for data. She carefully canvasses other speech that enjoys special protection, and shows why much data deserves similar treatment, despite concerns about invasions of individual privacy or other potential harms that unregulated data collection, disclosure, and use regulations may cause.[247]

Unlike less prudent arguments for expanded free speech protection, Bambauer adds a crucial third step to her free speech argument: *she refuses to state the level of scrutiny that should apply to regulations of data flow because "the answer will depend on context."*[248] She also notes that data above-the-line is subject to the further qualification that all such speech receives—for example, is it commercial speech? Is it a matter of public or merely private concern?[249] In other words, whether this "protected" speech is really protected in a significant way from regulation *depends*.

This is a wise caveat that leaves substantial play in the regulatory joints to accommodate context variable government interests in regulating data. Of course, it also leaves data (and regulators of data) in a bit of a haze: data is above-the-line, but barely, and is not always protected. But the weakness of the proposal is also its strength. Bambauer's argument for above-the-line scrutiny combines order *and* flexibility. She proposes a thumb on the free speech scale in data flow cases and makes a compelling case that data is presumptively expressive, not mere authorless "conduct." Yet she expressly notes that facts and context matter.

Although Bambauer favors a normative theory that has the capacity to contain her pro-speech recommendations, she curbs her pro-speech enthusiasm. She does not dictate how the courts should treat the dizzying array of potential applications of free speech principles to all forms of data flow. Instead, she carefully highlights the most important free speech questions and values at stake, then leaves the balancing to careful, case-by-case judicial consideration, while effectively undermining reflexive arguments against her that would treat data collection as less-protected "conduct."[250]

Surely some will critique her article for failing to offer greater doctrinal or normative crispness to guide courts and restrain data

247 Bambauer, *supra* note 122, at 70–72.
248 *Id.* at 105.
249 *Id.*
250 *Id.*

regulators. Yet, for the reasons offered herein, Bambauer did exactly the right thing in sailing past the sirens calling her to the rock of "categorical protection!" or the whirlpool of "no protection!"

Similar caution is warranted whenever one is advancing a new claim for above-the-line treatment of expression. Again, the judicial capacity to intelligently umpire these disputes is untested, and the risk is always that courts will fall back onto old free speech bromides that work best in traditional contexts rather than carefully consider the context-sensitive nuances and potential harms of newly protected speech. And again, courts rarely retreat: speech that attains above-the-line status tends to keep it forever.

Bambauer's "data as speech" problem makes clear the value of doctrinal incrementalism and the importance of preserving room for potentially colliding policy interests. The most serious question about her proposal thus is not whether her incrementalism is normatively or doctrinally sensible—it is both—but whether the current Court will display similar restraint and respect for nuance when it confronts the looming "big data" regulatory issues in future cases.

2. Expert, Disciplinary Knowledge as Speech

A second, increasingly important line-drawing debate involves whether and when government regulation of the circulation of expert, disciplinary knowledge violates freedom of expression. Here again, we are of two, contradictory minds.

Free speech anxieties plainly are mobilized when the government regulates professional or expert speech on politically charged topics—think of the controversy in California over prohibitions on therapists treating minors with the "gay cure"[251] or laws that require doctors to deliver particular messages to patients seeking lawful abortions.[252] Few people want a politically driven legislature to capture or control expert, professional speech in ways that distort disciplinary knowledge, however they define "distort".

Nevertheless, government regulation of professional or expert speech traditionally has more often been treated as a below-the-line problem, under which content-based distinctions, speaker-based regulation, and compelled speech happen frequently, without serious

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251 *See* S. 1172, 2011-2012 Leg., Reg. Sess. (Cal. 2012), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1172; Pickup v. Brown, 740 F.3d 1208, 1215 (9th Cir. 2013).

252 *See* Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 686 F.3d 889, 892 (8th Cir. 2013); Post, *supra* note 183, at 948–49.

First Amendment consternation. Moreover, few people want politically-driven, incompetent, or unscrupulous "quacks" to administer medical treatment or deliver professional advice based on idiosyncratic or indefensible notions of best practices. They expect government to police "malpractice" and "fraud."

In his illuminating examination of this important area of freedom of expression, Robert Post defends the conventional approach to regulation of expert knowledge, which permits much greater government control of "professional speech" than would be allowed for speech by a professional, in a non-professional capacity.[253] Post invokes doctrine that allows such regulation, and relies upon a political theory of free speech that comports best with this outcome. Specifically, he draws heavily on the public/private concern dichotomy often deployed in freedom of speech cases,[254] and argues that the best normative account of elevated speech protection is that it covers speech that facilitates successful self-governance, which he then argues supports distinctions between professional and private expression.[255]

Post's argument for presumptive but not absolute government power to regulate expert knowledge is cautious, context-sensitive, and non-formalistic. It respects doctrine and its normative underpinnings, but avoids close-ended declarations that would foreclose courts from making adjustments *in situ*.

There is again a "thumb on the scale" here in favor of regulation, but with a theoretical premise that is sufficiently complex to capture an enduring complexity within freedom of speech: government interventions can *advance* knowledge, not merely interfere with it. His approach therefore leaves room for courts to adjust their rulings accordingly.

3. Common Insights

The Bambauer argument for expanding free speech coverage to include data flow, and the Post argument to restrain free speech constraints on production of expert knowledge, follow quite similar and sensible methodological steps. These shared features show the commonalities that often bind superficially contradictory approaches to speech coverage problems.

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253 POST, *supra* note 79, at 15.

254 *Id.*

255 *Id.* at 6.

Both Bambauer and Post begin with a *subset* of speech problems (with Bambauer, data; with Post, expert knowledge).[256] Both work out from their conclusions to a doctrinal presumption that suits their favored outcomes (with Bambauer, protection of data flow from government interference; with Post, protection of expert knowledge from government interference).[257]

Both worry about—though perhaps not to the same degree—the normative implications of blurring the lines between public and private communications and between protected and unprotected communications.[258] Both also worry about the obstacles to knowledge that government regulation of information may impose, but understand that laissez-faire responses too may thwart knowledge.[259]

Both anticipate practical limits on their doctrinal preferences (Bambauer, "context matters"; Post, "context matters").[260] Neither embraces free speech absolutism.

Finally, both arguments, for all of their elegance, inevitably raise a question that is endemic to all non-absolutist approaches: "[w]hy draw the protection line *there*, but not *here*?"

This last objection is legitimate, but ultimately is not enough to justify a more absolutist approach. Bambauer's thinker-based approach to First Amendment boundary drawing in data flow cases likely is not more useful than is Post's political theory-based boundary drawing in expert knowledge cases, once one moves away from the specific cases both of them address. Bambauer likely needs to more specifically define knowledge worth protecting, and Post likely needs to more specifically define public purposes worth pursuing, if they hope to assist judges in drawing future lines. As I have explained, however, this is not a reason to reject either contribution.[261] *All viable* constitutional arguments must work within a common law tradition, and thus must match the common law process itself—i.e. they should inch out, case by case, from past decisions and adapt to new examples.

All viable free speech theories also beg important application questions. The best of them blunt regulation and underscore the importance of liberty norms, even when speech is disturbing or disruptive. Nevertheless, even the best of them cannot cover all of the

256 *See supra* Part II.G.1–2.
257 *See supra* text accompanying notes 245–47, 253–54.
258 *See supra* text accompanying notes 244–47, 253–54.
259 *Id.*
260 *See supra* text accompanying notes 248–49, 253–55.
261 *See supra* text accompanying notes 77–97.

existing First Amendment terrain and offer a bright-line test for where all future boundary lines should be drawn. This is why we have theor*ies*, not one theory, that courts invoke as they traverse the vast and bumpy doctrinal terrain. The theoretical "n" equals "*more than two*, but . . . *finitely many*."[262] Taken together, they remind us that freedom of speech is an essential feature of a liberal democracy and tends to promote a marketplace of ideas, protects speaker autonomy, and advances truth and knowledge.

Bambauer and Post thus are on the right doctrinal track when they underscore how much the location of speech *above-the-line* matters, despite the many caveats to protection that still apply up there. They are also on the right theoretical track when they explain *why* holding (or pushing) the line matters, as a normative matter, in the areas they consider. Line-drawing doubts remain, but such doubts are inescapable.

Finally, they deal persuasively with the doctrine we have, rather than ignore it, and accept the mushiness of free speech principles within that case law. Then, they wisely leave things open for future, contextual analysis. This is how the best First Amendment arguments can and should proceed, even though we may disagree with the ultimate success of a specific doctrinal or theoretical claim.

Neither work is flawless. For example, Post seeks to explain the line between protected professional speech and unprotected speech as an outgrowth of a theory of protected speech that aims primarily at protecting speech that communicates information necessary "to enlighten public decisionmaking in a democracy."[263] Yet as we have seen, there are at least two problems with his explanation. First, we may not agree that this is the primary purpose of the First Amendment. Second, we may not agree that much government regulation of professional speech is consistent with this theory of what should be protected speech.

Why aren't *most* professional communications between a doctor and her patient important vehicles of information? Patients use these communications to advance their personal interests—their health—in ways that resemble how voters use political communications to their potential legislative representatives to advance their personal interests—including, but not limited to, their health. In both cases, the audience has a right to receive information. Why does regulation of

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262 Eve Kosofsky Sedgwick & Adam Frank, *Shame in the Cyberkinetic Fold: Reading Silvan Tomkins*, 21 CRITICAL INQUIRY 496, 511 (1995) (emphasis in original).

263 Post, *supra* note 183, at 976 (quoting Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1975)).

the communication in one context merely facilitate "informed consent" and not in the other?

Post replies that we should worry about physician speech regulation that "does not merely compromise the ability of individual members of the public to receive accurate information; [but] also undermines public trust that professional physician speech will reflect the expertise of the 'medical community.'"[264] He goes on to say that this "strips physician-patient communications of their unique authority and dependability, and . . . jeopardizes the capacity of the medical profession to serve as a reservoir of expert knowledge that can reliably be communicated to the public through physician-patient disclosures."[265]

These are all compelling justifications for regulating professional speech, but they are not unique. Presumably many other private actors also are reservoirs of expert knowledge, including about health. Why should the American Medical Association or other professional organizations stand on higher ground than these other actors, and be more immune from government regulation (read: compulsion) of their communications?

Post's analysis of the medical profession's insulation from unduly partisan or distorted speech regulations makes perfect sense only if one agrees that this professional speech has uniquely powerful consequences, and is governed by professional standards that may better protect patient health than government interference will do. But the power of medical professionals' speech cuts in competing directions: it justifies some governmental interference (to assure its integrity), and makes suspect other governmental interference (to assure its integrity).[266] In neither case does the integrity of the expert advice turn on whether the physician is *compelled* to say (or not say) something scripted by the government.

Nor is the matter resolved in either case by determining whether the government regulation requires a form of government "ventriloquism," as some commentators have argued.[267] Many ostensibly private actors are directed by government to speak according to quite precise government standards. Private employers may not say many specific things without government consequences. Recipients of government grants may be obliged to post notices with government-drafted words. Private newspapers cannot run ads that list "Male On-

264 *Id.* at 979.

265 *Id.* at 979–80.

266 Post acknowledges this. *Id.* at 987.

267 *See* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 49–53 (2000).

ly" jobs. Private mental health professionals whose specialty is cognitive or "talk therapy" cannot dispense psychological advice that state regulatory bodies deem to be malpractice. Issuers of securities must follow extremely precise and arguably paternalistic rules regarding disclosures about the risks of investing.

We are all, in other words, vulnerable to becoming government sock puppets, *in appropriate roles and circumstances*.

This is not only true when we are paid to channel government messages, in the more classic example of agreeing to engage in "government speech" in exchange for a government benefit. It is also true in cases of direct regulation of our private speech, such as when we are selling products,[268] delivering medical care, or engaging in a very wide range of speech activity that involves—implicitly or explicitly—conveying information to other people who have a need to rely on the integrity of that information.

Nor is the compelled speech problem a simple exercise of line drawing between commands and incentives, between controversial and non-controversial material, or between facts and opinion. Government has many ways to influence our thinking short of direct prohibitions or even the softer tool of selective funding. These messages *typically* are not content- or value-neutral ones.[269]

As Lawrence Lessig wrote years ago, "the proscription of speech is just one of many means to the establishment of orthodoxy—indeed, perhaps the least effective way."[270] Government has extremely broad power to control its "own" information, data, and property.[271] And, when government does speak, the Court has said the First Amendment does not even apply.[272] This is so even when the message is ex-

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268 *Cf.* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 578–85 (2012) (defending compelled disclosure of factual commercial speech, subject to certain conditions that include not spreading the government's "normative message").

269 *See* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L. J. 983 (2005) (discussing the pervasiveness of government efforts to influence others, and how it often pursues its persuasive ends non-transparently).

270 Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1039 (1995).

271 *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion).

272 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009); *see also* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013) (critiquing *Summum* and noting multiple ways in which the Constitution limits government speech in ways that belie the *Summum* language); William Van Alstyne, *The 'Competition of the Market': "Enter the Elephant!" [A Reintroduction of a Most Perplexing First Amendment Conundrum]* (Duke Law School Working Paper), *available at* http://ssrn.com/abstract=238907 (critiquing government speech doctrine); *infra* text accompanying notes 141–52 (discussing *Summum*).

plicitly ideological, and not merely a message designed to improve the integrity of discourse, promote knowledge, advance respect for prevailing expert or scientific knowledge, or expand the marketplace of ideas.

The public school curriculum is a particularly vivid vehicle of public values inculcation through "government speech." The availability of private school options mitigates the effect of public school curricula on all students, but the messages conveyed by public schools still may influence the millions of students who attend them. Even a home-schooling option does not mean the government has no power over educational content in these settings: states constitutionally can require that basic educational standards are met.

Other examples of government inculcation of thought abound, and the line between permissible government promotion of worthy ends and offensive, non-factual or paternalistic government coercion is often very cloudy. Is it merely factual and non-coercive for government to require that tobacco products warn us about the health hazards of smoking? Or is it spreading a normative message in ways that cross the First Amendment line?[273] Should government be allowed to require that menu labels inform us of the nutritional content of all items? Or is this an incursion into private speech that treats patrons paternalistically?[274] Even if it does, what does this speech have to do with public discourse? Does that matter, as Post believes it does, to the baseline question of whether the speech deserves full First Amendment protection?

One person's government propaganda or paternalism is another's sound government effort to promote sensible public policy by regulating professionals, commercial actors and others—even if it means leading them (and us) by the nose to better private decisions.[275] Thinking about how to draw this often ideologically and scientifically contested line matters, especially in the contemporary moment of widespread, bipartisan distrust of government mandates and incen-

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273 *See* Keighley, *supra* note 268, at 573 (concluding that graphic tobacco warnings cross the line).

274 *See* Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL'Y 159, 188–92 (2009) (arguing in favor of menu label laws).

275 Of course, government can lead us by instructing us directly through its own "government speech" rather than regulating private parties' speech. *See* Greene, *supra* note 267, at 2 (identifying three "monopoly, coercion, or ventriloquism" concerns with government speech, but defending strong government power to engage in government speech even when it involves great social costs if the government is one voice among many, is non-coercive, and reveals its public source).

tives designed to promote individual welfare. Government regulation that constrains full expressive autonomy inevitably will continue.

The attractiveness of Post's approach therefore is not that it solves all problems irrefutably: it is that it helps in thinking about ways to proceed through this gnarly thicket, rather than denying that a thicket of options exists, and it tackles concrete illustrations with uncommon doctrinal and theoretical rigor. That Post's account also includes leap-of-faith moments in which he assumes the value of some expression, in service of leap-of-faith, romantic theoretical assumptions about the value of freedom of speech more generally, is not a fatal flaw. It is an *inescapable* feature of analysis that respects the messy First Amendment world we have, yet also embraces the hope it reflects.

CONCLUSION

The free speech paradox is this: we are unwilling to pitch altogether the First Amendment myths of our impressive autonomous thinking skills and political process engagement that drive so much of the doctrine—for what, pray tell, will we substitute for this rosy construction of liberal democracy?[276] But we also are unlikely to ignore it completely *because of our commitment to this rosy construction*.

The First Amendment myth of the rational thinker, which the scientific literature and much common sense undermine, compels us to take a closer look at the doctrine we have, the limits of our theories about it, and the fissures that both display. Freedom of speech rhetoric and its mythology, more than any other constitutional rhetoric and mythology, remind us that everything we currently believe may be *wrong*. Again, the crucial constitutional leaps of faith are that there is no such thing as a false idea, that the marketplace is the best proving ground for politically charged thought, that we can handle factual complexities, and that we will listen to speakers who strike us as disgusting, threatening, stupid, biased, lazy, bloviating, craven, or

276 *See* Massaro & Stryker, *supra* note 233, at 439 (2012) (noting that "[i]t may well be . . . that reason is developed strategically," but that nonetheless, democracy cannot "'hold such a pessimistic view of the citizen and still believe in meaningful debate'" (quoting Leon Wieseltier, *The Fear of Reason*, NEW REPUBLIC, July 14, 2011, at 36)); *see also* Larissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 (2010) (recognizing the many problems with the rational audience model, yet concluding that "[t]o reject the possibility of a rational citizenry . . . is to reject the democratic ideal"); *cf.* Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992) (arguing that the question "what should we do instead?" is a powerful brake on some of the critical legal studies work that rigorously critiques accepted norms and standards in conventional legal thinking).

plumb crazy. These heroic assumptions counsel many virtues, despite their obvious descriptive flaws. The most important of these virtues is intellectual and judicial *humility*.

Genuine intellectual and judicial humility, in turn, should mean rejecting free speech formalisms, one-theory chimeras, grand doctrinal syntheses, and the farthest reaches of free speech mythology and fantasies. The Court can, and should, heed these cautions and recalibrate its approach accordingly.

A multi-factored, pragmatic and non-formalist approach to freedom of speech best describes the free speech doctrine we have, and is a better way to develop that doctrine going forward than is close-ended formalism. It also leaves the door open to consider the rapidly changing scientific scene that bears on individual autonomy and cognition.