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## ARTICLES

### THE BOUNDARIES OF THE FIRST AMENDMENT: A PRELIMINARY EXPLORATION OF CONSTITUTIONAL SALIENCE

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*Although the First Amendment refers to freedom of "speech," much speech remains totally untouched by it. Antitrust law, securities regulation, the law of criminal solicitation, and most of the law of evidence, for example, involve legal control of speech lying well beyond the boundaries of the First Amendment's concern. It is not that such regulation satisfies a higher burden of justification imposed by the First Amendment. Rather, the First Amendment does not even show up in the analysis. The explanation for lack of First Amendment coverage lies not in a theory of free speech or in legal doctrine, but instead in an often serendipitous array of political, cultural, and economic factors determining what makes the First Amendment salient in some instances of speech regulation but not in others. Because the First Amendment's cultural magnetism attracts a wide variety of claims, nonlegal factors, far more than legal ones, determine which opportunistic claims to First Amendment attention will succeed and which will not. Legal doctrine and free speech theory may explain what is protected within the First Amendment's boundaries, but the location of the boundaries themselves — the threshold determination of what is a First Amendment case and what is not — is less a doctrinal matter than a political, economic, social, and cultural one. And although the First Amendment's historical and political place in American culture makes this Article more than just a case study commenting on larger issues of constitutional salience, looking at these dimensions of the First Amendment has suggestive implications for questions of constitutional salience and the mysterious way in which policy issues are or are not understood to present constitutional issues.*

#### I. INTRODUCTION

The history of the First Amendment is the history of its boundaries. Though the strength of American free speech doctrine is located chiefly in the formidable barriers that countervailing interests must overcome in order to prevail against free speech values, these barriers have emerged within the boundaries of a largely accepted understand-

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ing of the scope of the First Amendment itself. There have been many important disagreements about what rules should apply when a law or practice infringes upon the First Amendment, but far fewer disagreements about whether, as a threshold matter, the First Amendment is even implicated at all. We may not always have known how to resolve First Amendment cases, but at least we knew them when we saw them.

As contemporary debates about the threshold applicability of the First Amendment to topics such as copyright,<sup>1</sup> securities regulation,<sup>2</sup> panhandling,<sup>3</sup> telemarketing,<sup>4</sup> antitrust,<sup>5</sup> and hostile-environment sex-

<sup>1</sup> See, e.g., *Eldred v. Ashcroft*, 123 S. Ct. 769, 788–90 (2003) (dismissing First Amendment objections to the Copyright Term Extension Act), *aff'g* *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–60 (1985) (holding that the First Amendment does not require a public figure exception to the fair use doctrine); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) (rejecting a First Amendment challenge to the Digital Millennium Copyright Act); see also C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 951 (2002) (urging First Amendment protection for noncommercial copying); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 169 (1998) (arguing for an extension of First Amendment prior restraint principles to intellectual property issues); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 4–5 (2001) (arguing for increased First Amendment scrutiny of copyright law); cf. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900–01, 904–07 (9th Cir. 2002) (discussing First Amendment aspects of trademark law).

<sup>2</sup> See, e.g., *Lowe v. SEC*, 472 U.S. 181, 203–11 (1985) (holding that a published newsletter was not an investment adviser); see also Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 225–26 (1990) (arguing that the First Amendment should protect securities advertising); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 6–9 (1989). See generally Symposium, *The First Amendment and Federal Securities Regulation*, 20 CONN. L. REV. 261 (1988).

<sup>3</sup> See, e.g., *Gresham v. Peterson*, 225 F.3d 899, 903–07 (7th Cir. 2000) (holding that an aggressive panhandling statute did not violate the First Amendment); *L.A. Alliance for Survival v. City of Los Angeles*, 224 F.3d 1076, 1076 (9th Cir. 2000) (affirming a preliminary injunction against enforcement of a solicitation ordinance); *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 955 (11th Cir. 1999) (upholding a regulation proscribing begging); *Loper v. New York City Police Dep't*, 999 F.2d 699, 706 (2d Cir. 1993) (invalidating a statute prohibiting loitering for purposes of begging); see also Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1228–38 (1996) (suggesting that the First Amendment should distinguish between different forms of commercial solicitation, such as between panhandling and performing); Helen Herschkoff & Adam S. Cohen, *Begging To Differ: The First Amendment and the Right To Beg*, 104 HARV. L. REV. 896, 897 (1991) (arguing that begging should be fully protected).

<sup>4</sup> See, e.g., *Mainstream Mktg. Servs. v. FTC*, 283 F. Supp. 2d 1151, 1161–63 (D. Colo. 2003) (enjoining the federal do-not-call registry), *overruled by* Nos. 03-1429, 03-6258, 03-9571, 03-9594, 2004 WL 296980 (10th Cir. Feb. 17, 2004); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1228 (10th Cir. 1999) (invalidating a regulation requiring affirmative customer permission prior to the use of proprietary customer information); *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995) (upholding a ban on prerecorded calls to customers).

<sup>5</sup> Compare *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425–28 (1990) (holding that the First Amendment did not constrain antitrust prosecution of an organized boycott), with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–15 (1982) (holding that the First Amendment precluded antitrust prosecution of a politically motivated consumer boycott).

ual harassment<sup>6</sup> demonstrate, however, questions about the involvement of the First Amendment in the first instance are often far more consequential than are the issues surrounding the strength of protection that the First Amendment affords the speech to which it applies.<sup>7</sup> Once the First Amendment shows up, much of the game is over. But the question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed. This inattention to the boundaries of the First Amendment does not make the question any less important, however, and a comprehensive examination of this long-neglected<sup>8</sup> dimension of the First Amendment is well overdue. Such an examination would help us not only to understand

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<sup>6</sup> See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596–97 (5th Cir. 1995) (discussing free speech concerns in enforcing Title VII); *Black v. City of Auburn*, 857 F. Supp. 1540, 1549–50 (M.D. Ala. 1994) (holding speech creating a hostile work environment unprotected); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991) (dismissing a First Amendment objection to injunctive relief in a Title VII action); *Jew v. Univ. of Iowa*, 749 F. Supp. 946, 961 (S.D. Iowa 1990) (same); see also J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2295–96 (1999) (arguing against First Amendment protection for hostile-work-environment speech); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 484 (1991) (arguing that Title VII censors speech and should be subject to the First Amendment); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 695 (1997) (arguing for qualified protection for hostile-work-environment speech); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 56 (urging the “development of distinctive First Amendment norms governing sexual harassment in the workplace”); Judith Resnik, *Changing the Topic*, 8 CARDOZO STUD. L. & LITERATURE 339, 341–44 (1996) (arguing that First Amendment analysis is used to shift focus away from the victims of sexual harassment); Frederick Schauer, *The Speech-ing of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 348 (Catharine MacKinnon & Reva Siegel eds., 2004) (exploring the shift “of sexual harassment from a topic about workplace abuse of power into a topic about the First Amendment”); Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment — Avoiding a Collision*, 37 VILL. L. REV. 757, 766–68 (1992) (arguing that sexual harassment guidelines create both First Amendment and equality problems); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627, 648 (1997) (“[H]arassment law puts at risk speech . . . whether or not it’s severe or pervasive.”), updated at <http://www1.law.ucla.edu/~volokh/harass/breadth.htm> (last visited Mar. 4, 2004).

<sup>7</sup> Additional debates center around computer source code, see, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434–35 (2d Cir. 2001), computer “spam,” see, e.g., Michael A. Fisher, *The Right To Spam? Regulating Electronic Junk Mail*, 23 COLUM.-VLA J.L. & ARTS 363, 418 (2000), and labor organizing and election, see, e.g., James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right To Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 949–55 (1999).

<sup>8</sup> The noteworthy exceptions are KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989); and Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, both of which I discuss in Part VII below and both of which focus on that vast quantity of crime-assisting speech that had not (and still has not) generated First Amendment attention. See *infra* pp. 1801–03. Like my inquiry here, Greenawalt’s is devoted not to expressing shock at a blatant neglect of the First Amendment, but to explaining the obvious though usually unspoken limitations on its scope.

the First Amendment and the forces that shape its development, but also, perhaps more importantly although here more preliminarily, to understand the determinants of *constitutional salience* — the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not.

At times the First Amendment's boundaries have figured in the case law and academic commentary, as with the familiar debates about whether obscenity, libel, fighting words, and commercial advertising are inside or outside the coverage of the First Amendment. But more often, the boundary disputes have been invisible. Little case law and not much more commentary explain why the content-based restrictions of speech in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the law of fraud, conspiracy law, the law of evidence, and countless other areas of statutory and common law do not, at the least, present serious First Amendment issues. Indeed, although warnings of the dangers of so-called "exceptions" to the First Amendment are a staple of civil-libertarian rhetoric,<sup>9</sup> even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule.

If we examine the speech that the First Amendment ignores, we can begin to perceive the boundaries of the First Amendment. But recognizing where those boundaries lie gives us less assistance than we might suppose in understanding and applying them as a matter of legal doctrine. Rather, the boundaries of the First Amendment, far more than the doctrine lying within those boundaries, turn out to be a function of a complex and seemingly serendipitous array of factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals of the First Amendment. If it is true that more of the First Amendment is explained by its boundaries than we have previously thought, it may also be the case that less of the First Amendment can be explained by the tools of legal and constitutional analysis than we have formerly recognized.

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<sup>9</sup> See, e.g., Nina Bernstein, *A Free Speech Hero? It's Not That Simple*, N.Y. TIMES, Dec. 22, 1996, § 2, at 1; Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 42; Nat Hentoff, *Co-Conspirators: Khallid and Safir*, VILLAGE VOICE, Sept. 22, 1998, at 24; see also EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS, at xvii–xix (2001) (organizing the materials on obscenity and the like under the heading "Exceptions").

## II. THE COVERAGE OF THE FIRST AMENDMENT

To set the stage, it will be useful to explain the distinction between the *coverage* and the *protection* of the First Amendment.<sup>10</sup> All rules — legal or otherwise — apply only to some facts and only under some circumstances.<sup>11</sup> Even before we see what a rule *does*, we must make the initial determination of whether it *applies* at all — whether we are within its scope of operation. So too with the First Amendment, which of course is not infinitely applicable. Though many cases involve the First Amendment, many more do not. The acts, behaviors, and restrictions not encompassed by the First Amendment at all — the events that remain wholly untouched by the First Amendment — are the ones that are simply not *covered* by the First Amendment. It is not that the speech is not *protected*. Rather, the entire event — an event that often involves “speech” in the ordinary language sense of the word — 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.

When the First Amendment does show up, the full arsenal of First Amendment rules, principles, standards, distinctions, presumptions, tools, factors, and three-part tests becomes available to determine whether the particular speech will actually wind up being protected. Perhaps the speech is an intentional and explicit incitement to likely imminent lawless action and thus regulable under *Brandenburg v. Ohio*.<sup>12</sup> Or perhaps it is a knowingly false disparagement of a named

<sup>10</sup> What follows is a brief version of an analysis I have developed at much greater length elsewhere. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89–92, 134–35 (1982); Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225 (1981); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) [hereinafter Schauer, *Categories and the First Amendment*]; Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285 [hereinafter Schauer, *Codifying the First Amendment*]. Precursors include Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1444 (1962), which distinguishes scope from strength; and Harry Kalven, Jr., *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 278, which differentiates between the “ambit” and the “level” of protection. For a critique of the basic distinction between coverage and protection, see Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983).

<sup>11</sup> The philosophical and jurisprudential literature on rules refers to the conditions of a rule’s application in various ways. See, e.g., GIDON GOTTLIEB, *THE LOGIC OF CHOICE* 39, 43–47 (1968) (*protasis* of a rule); NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 43, 45 (1978) (operative facts); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 23–24 (1991) (factual predicate); WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* 137–40 (2d ed. 1982) (“Any rule . . . can be analyzed and restated as a compound conditional statement . . .”).

<sup>12</sup> 395 U.S. 444, 447 (1969) (per curiam) (holding that the First Amendment “do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such

individual and thus subject to libel damages even after *New York Times Co. v. Sullivan*.<sup>13</sup> Or maybe the regulation of some item of nonmisleading commercial advertising directly advances a substantial government interest in the least restrictive way possible, in which case the advertisement may be regulated in accordance with the test in *Central Hudson Gas & Electric Co. v. Public Service Commission*.<sup>14</sup> But the fact that the tests in *Brandenburg*, *New York Times*, and *Central Hudson* are the ones to be applied reflects the coverage of the First Amendment. And because these First Amendment tests impose greater burdens than the negligible scrutiny of rationality review,<sup>15</sup> the First Amendment makes a difference in the categories that it covers even when the particular speech that is a member of some covered category winds up unprotected.<sup>16</sup>

By contrast, no First Amendment-generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional, whether corporate executives may be imprisoned under the Sherman Act for exchanging accurate information about proposed prices with their competitors, whether an organized crime leader may be prosecuted for urging that his subordinates murder a mob rival, or whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool. Each of these examples involves some punishment for speech, and each involves liability based both on the content<sup>17</sup> and on the communicative

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advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

<sup>13</sup> 376 U.S. 254, 280 (1964). When the victim is neither a public official nor a public figure, the burden on a plaintiff lessens, but it still reflects the constraints of the First Amendment. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985) (plurality opinion); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332, 347 (1974).

<sup>14</sup> 447 U.S. 557, 566 (1980) (holding that regulation of nonmisleading commercial advertising is only permissible if narrowly tailored and directly advancing a substantial governmental interest).

<sup>15</sup> Prominent examples of just how minimal "minimal" scrutiny is include *New Orleans v. Dukes*, 427 U.S. 297 (1976); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>16</sup> The distinction is especially visible in Canada, where the coverage of the right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" is specified in section 2(b) of the Canadian Charter of Rights and Freedoms, but the test for protection of covered activity is set forth in a separate section specifying that the rights covered shall be protected "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 1, 2(b). For a discussion of the Canadian distinction using the specific coverage/protection language, see Roger A. Shiner, *Freedom of Commercial Expression*, in *FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY* 91, 92-94 (W.J. Waluchow ed., 1994).

<sup>17</sup> See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

impact<sup>18</sup> of the speech. And yet no First Amendment degree of scrutiny appears. In these and countless other instances, the permissibility of regulation — unlike the control of incitement, libel, and commercial advertising — is not measured against First Amendment-generated standards.

Securities violations, antitrust violations, criminal solicitation, and many other categories of “speech” remain uncovered by the First Amendment, and it is these uncovered categories that are our concern here. The circumstances under which the First Amendment actually protects covered speech are important, but this Article concerns itself with the logically prior and long-neglected issue of speech that is not encompassed by the First Amendment in the first place. The focus is on the domain in which the First Amendment is not even considered relevant to the case; in which an argument from the First Amendment would be seen as an argument from the wrong area of law; and in which, consequently, no First Amendment principle guards, even to a limited extent, against infringement. Questions about the boundaries of the First Amendment are not questions of strength — the degree of protection that the First Amendment offers — but rather are questions of scope — whether the First Amendment applies at all.

As noted above, the logical distinction between coverage and protection is pertinent to all constitutional rights — indeed, to all legal rules.<sup>19</sup> “Speed Limit 65,” for example, is but shorthand for a rule, articulated more formally, that applies to particular persons driving on a particular stretch of highway, and that limits those persons’ — and only those persons’ — speed to sixty-five miles per hour. Elaborating the rule in full would expose the two parts, the first of which can be understood as a predicate — the scope of coverage — and the second as the consequent, such that application of the rule occurs only as a consequence of the predicate conditions being met. *If* you are driving a motor vehicle, *and if* you are not a police officer or driving an emergency vehicle, *and if* you are driving between these points on this highway — *then* you are prohibited from driving in excess of sixty-five miles per hour.

Constitutional rules can similarly be specified in *if-then* form. *If* (and only if) a person is on trial for treason, *then* a constitutionally

<sup>18</sup> See generally *United States v. O'Brien*, 391 U.S. 367 (1968); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988); Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 *HASTINGS L.J.* 921 (1993); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482 (1975); Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 *UCLA L. REV.* 925 (1990).

<sup>19</sup> See sources cited *supra* note 11.



valid conviction requires two witnesses to the same overt act.<sup>20</sup> If state legislation discriminates against interstate commerce, *then* it is invalid unless it serves a legitimate local purpose in the least discriminatory way possible.<sup>21</sup> If governmental action interferes with a fundamental right<sup>22</sup> or classifies on the basis of a suspect classification,<sup>23</sup> *then* (but not otherwise) the government must demonstrate a compelling interest for its action.

Questions of coverage typically remain hidden because the answers are so obvious that they attract scant controversy. Determining when the two-witness rule applies is a question of coverage, but the question is easily answered — and thus invisible — because it is ordinarily clear whether a trial is for treason.<sup>24</sup> Similarly, the coverage of the Fourth Amendment is determined in part by the comparatively clear (though not undisputed) contours of what constitutes a seizure.<sup>25</sup> In much the same way, the coverage of the Eighth Amendment is substantially determined by whether something is a punishment,<sup>26</sup> an issue on which there is less disagreement than about, say, whether some action is a “search.” We may often debate about which seizures are unreasonable and about which punishments are cruel and unusual, but disagreements about whether we are dealing with a seizure or a punishment are comparatively rare.

The scope of freedom of speech, however, is much harder to define. The First Amendment’s coverage questions are difficult because the normal tools for delineating the coverage of a constitutional rule are

<sup>20</sup> U.S. CONST. art. III, § 3.

<sup>21</sup> See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

<sup>22</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–54, 164 (1973).

<sup>23</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Indeed, those who resist the distinction between coverage and protection should contemplate equal protection doctrine. Occasionally, as was notoriously the case in *Korematsu*, the Court will find that strict scrutiny is the applicable standard, but will consider the standard satisfied by the existence of a compelling governmental interest. The distinction between coverage and protection is the First Amendment analogue to the distinction between heightened and rational basis scrutiny under the Equal Protection Clause. There is a difference between cases in which strict scrutiny is inapplicable and cases in which strict scrutiny is applicable but satisfied. Similarly, the fact that defendants who are never prosecuted and defendants who are prosecuted but acquitted both get to walk the streets freely does not mean that there is no difference between the two — so too with the distinction between lack of coverage and coverage but nonprotection.

<sup>24</sup> Much the same can be said about burden-of-proof rules. Proof beyond a reasonable doubt is required only in criminal cases, but because of the structure of our court system, the distinction between criminal and civil cases is not one that can be expected to generate any disagreement. If we had a court system in which civil and criminal actions were merged but in which the criminal portion required proof beyond a reasonable doubt while the civil portion required proof only by a preponderance of the evidence, the initial determination of which parts of the case were criminal (that is, the coverage of the proof-beyond-a-reasonable-doubt rule) would be more visible.

<sup>25</sup> See generally 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(a) (1996).

<sup>26</sup> See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 327–34 (1998) (finding that currency forfeiture constituted punishment).

unavailing. Here the counterpart to “seizure” in the Fourth Amendment and “punishment” in the Eighth Amendment is “speech,” a word that is of far less value in setting boundaries. “Speech” is what we use to enter into contracts, make wills, sell securities, warrant the quality of the goods we sell, fix prices, place bets, bid at auctions, enter into conspiracies, commit blackmail, threaten, give evidence at trials, and do most of the other things that occupy our days and occupy the courts. That the boundaries of the First Amendment are delineated by the ordinary language meaning of the word “speech” is simply implausible.<sup>27</sup>

The obvious rejoinder at this point is to object that the boundaries of the First Amendment are set not by the word “speech” standing alone, but by the words “the freedom of speech,” because it is “the freedom of speech” and not “speech” that the First Amendment forbids Congress (and now the states<sup>28</sup>) to abridge. But transforming the inquiry in this way does not solve the problem; it only exposes it. If the coverage of the First Amendment is determined by the meaning of “the freedom of speech,” then we still need an explanation for why the speech with which we make contracts is, in general, not within the scope of “the freedom of speech” and thus not covered by the First Amendment, but the speech with which we urge civil disobedience is, in general, part of “the freedom of speech” and thus covered. Now, at this juncture, we could consult history, original intentions, moral theory, tradition, or any of the other conventional, albeit contested, sources of constitutional guidance; but let us postpone that inquiry. For present purposes, the important task is to identify boundary disputes as disputes not about the protection of the First Amendment, but about its coverage. To be sure, the formal structure of the distinction between coverage and protection can be formulated in different ways. First, though, it is important to recognize that the distinction exists. For now, the primary point is that the strictures of the First Amendment plainly apply not only to a subset of all legal controversies, but also to a subset of those legal controversies involving what would be called “speech” in ordinary language. The focus of the current inquiry is how this latter subset comes to be defined<sup>29</sup> — what distinguishes

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<sup>27</sup> In *Frohwerk v. United States*, 249 U.S. 204 (1919), Justice Holmes observed that “the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language.” *Id.* at 206.

<sup>28</sup> See *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>29</sup> Although the distinction between coverage and protection is a formal one concerning the logic of rules, and although coverage and protection are importantly distinct as a conceptual matter, it may well be that actual decisions about coverage are made with ultimate questions of protection in mind. One of the worries about First Amendment coverage for commercial advertising, for example, is that including commercial advertising within the coverage of the First Amend-

First Amendment cases from other cases involving words, language, communication, and expression.

### III. THE VISIBLE BOUNDARIES OF THE FIRST AMENDMENT'S HISTORY

A few disputes about the boundaries of the First Amendment have been highly visible, and a quick survey will set the stage for exploring those areas that are even more significant precisely because they have been taken for granted.

The most notorious of the First Amendment's visibly contested boundary disputes has been about obscenity.<sup>30</sup> For much of the First Amendment's history, both legislation restricting obscenity and individual prosecutions for trafficking in obscene materials were explicitly treated as beyond the First Amendment's borders simply because of the category in which the restriction or prosecution was placed.<sup>31</sup> When in the nineteenth century the Supreme Court offhandedly dismissed suggestions that the First Amendment might preclude obscenity prosecutions,<sup>32</sup> it did so not by reasoning that particular publications presented dangers sufficient to override the First Amendment, but by treating the First Amendment as no more applicable to obscenity prosecutions than to prosecutions for assault — in neither instance would the government's action even bring the First Amendment into play.

Although the Court in 1957 finally acknowledged that obscenity proceedings could touch on free speech concerns when restricting par-

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ment might exert downward pressure on the degree of protection of covered speech in general, thus producing less protection for core political and ideological speech. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1194–1201 (1988). Although it is certainly possible that decisions about coverage might be based on these and other strategic considerations, that should not serve to blur the line between the two at a conceptual or logical level.

<sup>30</sup> Compare David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 114–15, 126–27 (1994) (arguing that pornography and obscenity cannot meaningfully be distinguished from political speech and that they should be covered by the First Amendment), and David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 82 (1974) (asserting that obscenity should fall within the coverage of the First Amendment), with Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 43–45 (suggesting that only hardcore pornography lies outside the First Amendment's scope), Frederick Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 932–33 (1979) (same), and Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807–08 (1993) (arguing that some classes of pornography lie "far from the center of First Amendment concern").

<sup>31</sup> See generally FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 14–29 (1976) (describing pre-1957 obscenity prosecutions and First Amendment challenges to them).

<sup>32</sup> See, e.g., *In re Rapier*, 143 U.S. 110, 134–35 (1892); *Ex parte Jackson*, 96 U.S. 727, 736–37 (1877); see also *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

ticular works guarded by the First Amendment,<sup>33</sup> it still insisted that works actually determined to be obscene according to First Amendment-shaped standards lay outside the coverage of the First Amendment.<sup>34</sup> By proceeding in this manner, the Court — mistakenly, in the eyes of all but a handful of commentators<sup>35</sup> — avoided subjecting the rationales for obscenity regulation to anything more than rational basis review.<sup>36</sup> Though these rationales seem tenuous even to those who are sympathetic, excluding obscenity from First Amendment coverage enabled the Court to treat obscenity control as no more subject to First Amendment standards than the regulation of pushcart vendors in New Orleans<sup>37</sup> or opticians in Oklahoma<sup>38</sup> (to take two cases in which state regulatory schemes based on highly dubious justifications were saved only by the stunningly minimal nature of rational basis review).

The continuing objections to the Supreme Court's approach to obscenity are premised on the view that even materials found to be legally obscene under the test later crystallized in *Miller v. California*<sup>39</sup> ought to be within the reach of the First Amendment. To most commentators, the fact that legally obscene materials remain outside the First Amendment is inconsistent with the fact that certain other categories of speech that were once outside the reach of the First Amendment are now wholly within its grasp. Defamation, for example, was formerly not covered, with the Supreme Court declaring in 1952 that libel was one of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."<sup>40</sup> But commencing with *New York Times Co. v. Sullivan*,<sup>41</sup> libelous utterances now fall within

<sup>33</sup> See *Roth v. United States*, 354 U.S. 476, 488 (1957).

<sup>34</sup> See *id.* at 485. For a contemporaneous analysis, see Kalven, *supra* note 30, at 7-28; and William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

<sup>35</sup> Critiques of the Court's approach include Cole, *supra* note 30; David E. Engdahl, *Requiem for Roth: Obscenity Doctrine Is Changing*, 68 MICH. L. REV. 185 (1969); Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Kalven, *supra* note 30; Henry P. Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 130-31 (1966); Richards, *supra* note 30, at 70-83; and *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 160-75 (1973). Among the few defenders of the basic analytical structure are John M. Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967); Schauer, *supra* note 30; and Sunstein, *supra* note 30.

<sup>36</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-63 (1973).

<sup>37</sup> See *City of New Orleans v. Dukes*, 427 U.S. 297, 303-06 (1976) (per curiam).

<sup>38</sup> See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 486-91 (1955).

<sup>39</sup> 413 U.S. 15, 24 (1973).

<sup>40</sup> *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)) (internal quotation marks omitted).

<sup>41</sup> 376 U.S. 254 (1964).

the scope of the First Amendment.<sup>42</sup> The standards for the constitutionality of punishing libel may vary according to the nature of the victim (whether the victim is a public official, a public figure,<sup>43</sup> or a private individual<sup>44</sup>) and possibly according to the nature of the speaker (whether the speaker is part of the media or not<sup>45</sup>). So while obscenity remains outside the scope of the First Amendment, libelous utterances are now tested against standards heightened by First Amendment coverage.

The same is true of commercial advertising. As with defamation, the Supreme Court had earlier treated the entire category of commercial advertisements as not covered by the First Amendment.<sup>46</sup> Starting in 1976,<sup>47</sup> however, the category of utterances that "d[o] no more than propose a commercial transaction"<sup>48</sup> became subject to regulation only when the regulation satisfied a test molded by the First Amendment.<sup>49</sup> That test is less protective than the test in *Brandenburg*, but

<sup>42</sup> See *id.* at 268–73.

<sup>43</sup> See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154–55 (1967) (plurality opinion).

<sup>44</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–48 (1974).

<sup>45</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–63 (1985); see also Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 915–17 (1978).

<sup>46</sup> See *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942).

<sup>47</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

<sup>48</sup> *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

<sup>49</sup> The test is most prominently associated with *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), but it has been the subject of subsequent explanation and modification, see 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–16 (1996) (plurality opinion); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486–87 (1995); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475–81 (1989). See generally Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123. Whether all commercial speech is in fact now covered by the First Amendment is a slightly more complex issue than suggested in the text of this Article. The *Central Hudson* approach demands a threshold inquiry into whether the speech is misleading. Thus, misleading commercial advertisements are akin to legally obscene materials in that they are regulable under minimal rational basis scrutiny without regard to First Amendment standards or values. Indeed, misleading commercial speech is arguably simply not covered by the First Amendment. The determination that something is legally obscene and thus not covered by the First Amendment is subject to "independent" appellate review (something close to *de novo* review), see *Jacobellis v. Ohio*, 378 U.S. 184, 187–90 (1964) (plurality opinion), as is the determination that libelous material is unprotected because it was published with actual malice, see *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989); *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984); see also Susan M. Gilles, *Taking First Amendment Procedure Seriously*, 58 OHIO ST. L.J. 1753 (1998); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985). Yet if the independent-review standard were to be applied to misleading advertising, most of the work of the Federal Trade Commission, for example, would be subject to independent constitutional appellate review, something that has not happened and is not likely to happen. As long as this state of affairs persists, the regulation of misleading commercial advertising will be analogous to pre-*Roth* obscenity law, with the nature of the proceeding rather than the actual falsity (or obscenity) of the material determining noncoverage.

the fact that it demands more heightened scrutiny than simple rationality review shows that commercial advertising now falls within the scope of the First Amendment.

Finally, we have “fighting words.” When the Supreme Court in 1942 upheld Walter Chaplinsky’s conviction for delivering a vituperative public speech against religion and then harshly denouncing the police officers who sought to control him,<sup>50</sup> Justice Murphy’s opinion for a unanimous Court rejected Chaplinsky’s First Amendment argument by saying, in now-famous words, that the “classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” included “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>51</sup> To the Court, the fighting words Chaplinsky uttered were regulable not because the state interest in controlling them was so powerful as to trump the First Amendment, but because the words lay entirely outside the scope of the First Amendment.<sup>52</sup> Subsequent developments have narrowed the class of fighting words considerably,<sup>53</sup> but at least in theory, the Supreme Court still does not view the presence of “words” as a sufficient condition for testing the regulation of fighting words against First Amendment standards.

#### IV. BEYOND THE BORDER: THE DOMAIN OF THE BARELY CONTESTED

There are those who appear to believe that the aforementioned exclusions, whether still good law or not, represent the universe of speech lying outside the First Amendment.<sup>54</sup> Yet to take that position is to be afflicted with the common ailment of spending too much time with the casebooks — defining the domain of constitutional permissibility by reference to those matters that have been considered viable enough to

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<sup>50</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569–70, 574 (1942).

<sup>51</sup> *Id.* at 571–72.

<sup>52</sup> *Chaplinsky* is not quite as clean a case on this score as the obscenity cases, because the *Chaplinsky* language makes reference both to the degree of the injury and to the lack of First Amendment value. See *id.* at 571–73. It is thus unclear whether the Court’s threshold evaluation of the harm of fighting words, and thus of the strength of the state’s interest in controlling them, was an application of First Amendment standards. In the obscenity, commercial advertising, and defamation cases, by contrast, the initial determination that the speech was not covered by the First Amendment was seemingly made solely on the basis of the absence of First Amendment value, without regard to the strength of the state’s interest in regulation.

<sup>53</sup> This narrowing occurred primarily in *Gooding v. Wilson*, 405 U.S. 518, 525–27 (1972); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (mem.); and *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (mem.). See also *Cohen v. California*, 403 U.S. 15, 26 (1971). The category was narrowed still further in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384–90 (1992).

<sup>54</sup> See *supra* p. 1768.

be litigated in, and close enough to be seriously addressed by, the courts, especially the Supreme Court. But if we are interested in the speech that the First Amendment does not touch, we need to leave our casebooks and the Supreme Court's docket behind; we must consider not only the speech that the First Amendment noticeably ignores, but also the speech that it ignores more quietly.<sup>55</sup> In undertaking this task, a nonexhaustive survey of what lies well beyond the First Amendment's borders may be instructive.

A prime example of speech residing almost imperceptibly outside the First Amendment's boundaries is the speech that is the primary target of federal securities regulation. It might be hyperbole to describe the Securities and Exchange Commission as the Content Regulation Commission, but such a description would not be wholly inaccurate.<sup>56</sup> When exercising its authority under the Securities Act of 1933,<sup>57</sup> the Securities Exchange Act of 1934,<sup>58</sup> and various other statutes regulating the securities markets, the SEC engages in pervasive content-based control over speech. Under the registration provisions of the 1933 Act, securities may be neither offered nor sold without registration, except under narrowly defined circumstances typically reserved for small offerings.<sup>59</sup> And as the registration provisions operate in practice, neither offers nor advertisements may be made, published, or delivered without advance approval by the SEC — approval contingent upon the Commission's determination that the materials are neither false nor misleading.<sup>60</sup> Even after registration has been completed, SEC civil and criminal enforcement actions,<sup>61</sup> as well as private suits,<sup>62</sup> combine to produce a milieu in which materials pertaining

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<sup>55</sup> On the theoretical question whether the First Amendment encompasses all behavior describable as "speech" in the ordinary language sense of that word, see Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1089 (1983), which argues that "many coercive threats simply lie outside the boundaries of free expression altogether"; Robert Post, *Recovering First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995), which asserts that "First Amendment analysis is relevant only when the values served by the First Amendment are implicated" and that "[t]hese values do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication"; SCHAUER, *supra* note 31; Schauer, *Categories and the First Amendment*, *supra* note 10; and Schauer, *Codifying the First Amendment*, *supra* note 10.

<sup>56</sup> "Securities regulation is essentially the regulation of speech," observed a former SEC Commissioner. Roberta S. Karmel, *Introduction*, 55 BROOK. L. REV. 1, 1 (1989) (introducing a symposium entitled *The First Amendment and Government Regulation of Economic Markets*).

<sup>57</sup> 15 U.S.C. §§ 77a–77aa (2000).

<sup>58</sup> *Id.* §§ 78a–78mm.

<sup>59</sup> *See id.* §§ 77c, 77e.

<sup>60</sup> *See* THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* §§ 3.4–3.6 (2d ed. 1990).

<sup>61</sup> *See* 15 U.S.C. § 77t.

<sup>62</sup> *See id.* § 77l.

to a company's securities are written and distributed under the threat of sanction for false, misleading, or omitted disclosure.

Much the same is true of the highly controlled world of proxy solicitation. Although a proxy contest is an election, it is an election in which what the candidates can say — and when and to whom they can say it — is tightly constrained by the 1934 Act and the regulations promulgated pursuant to it. As with its control of registration under the 1933 Act, the SEC is concerned with whether the materials used in the proxy process are false or misleading — even when the grounds for a proxy challenge are explicitly political — and equally with the timing and style of the communications.<sup>63</sup> Because a persistent issue in proxy contests is the ability of management to control the channels of communication with shareholders, much of the regulatory activity, occasionally litigated, revolves around the demands of corporate pirates and dissident shareholders to compel management to distribute, as an accompaniment to management's own materials, literature and statements directly opposed to management's positions.<sup>64</sup>

Although content regulation in the world of securities regulation is not limited to the registration and proxy processes (prohibitions on insider trading typically sanction the transmission of accurate inside information from "tipper" to "tippee"), the above description is sufficient to make the point: restrictions and requirements that in other contexts would set off a host of First Amendment alarm bells — prior restraint by virtue of mandatory government approval in advance of publication,<sup>65</sup> content regulation,<sup>66</sup> compelled speech,<sup>67</sup> and official management of representations made in elections<sup>68</sup> — are not seriously

<sup>63</sup> See *id.* § 78n(d)–(e).

<sup>64</sup> See 15 C.F.R. § 240.14a-8(a) (2002); *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970); *New York City Employees' Ret. Sys. v. Dole Food Co.*, 795 F. Supp. 95 (S.D.N.Y. 1992), *vacated as moot*, 969 F.2d 1430 (2d Cir. 1992); see also Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97 (1988).

<sup>65</sup> Although most twentieth-century prior-restraint cases dealt with injunctions, see, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), the classic prior restraint involves the licensing of speech by a bureaucracy, see, e.g., *Lovell v. City of Griffin*, 303 U.S. 444, 447, 452–53 (1938) (invalidating an ordinance banning all distribution of leaflets without prior written permission from the City Manager).

<sup>66</sup> See, e.g., *Carey v. Brown*, 447 U.S. 455, 471 (1980) (invalidating a statute that "discriminates among pickets based on the subject matter of their expression"); *Police Dep't v. Mosley*, 408 U.S. 92, 101–02 (1972) (same). See generally Stone, *supra* note 17.

<sup>67</sup> See, e.g., *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 4, 20–21 (1986) (plurality opinion) (holding that the California Public Utilities Commission may not require a privately owned utility company to incorporate undesired third-party speech in its billing materials); *Woolley v. Maynard*, 430 U.S. 705, 706–07, 717 (1977) (holding that New Hampshire may not require individuals to display the state motto, "Live Free or Die," on their vehicle license plates).

<sup>68</sup> See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982) (holding that a state may not regulate the truth of campaign representations except in accordance with *New York Times Co. v. Sullivan* standards).



thought to pose free speech issues in the contexts of registration and proxy regulation.<sup>69</sup>

Until the assimilation of commercial speech into the First Amendment, it would scarcely have occurred to anyone that the First Amendment could be relevant to securities regulation. For a few years after *Virginia Pharmacy*,<sup>70</sup> however, things were quite different. Starting in the early 1980s, claims that the entire scheme of securities regulation needed to be tested against First Amendment standards became more common.<sup>71</sup> Some of these claims were made by academics, but others were made in domains inhabited by practicing lawyers. Indeed, James Goodale, an influential Wall Street lawyer with a substantial media practice, ominously announced in 1983 that securities regulation and the First Amendment were on a "[c]ollision [c]ourse."<sup>72</sup>

The collision never happened. Although the Supreme Court and the lower courts occasionally brandished the First Amendment when securities regulation appeared to trench upon the editorial content of newspapers and newsletters<sup>73</sup> or upon the behavior of journalists,<sup>74</sup> a frontal First Amendment assault on the securities regulation system never got off the ground. The few court challenges that were mounted appear not to have succeeded, even in lower courts.<sup>75</sup> Today, a quarter of a century after the first warnings were sounded and twenty years after those warnings were loudest, securities regulation goes on as before, remaining a domain largely outside the coverage of the First Amendment.

<sup>69</sup> See *Pacific Gas*, 475 U.S. at 38–40 (Stevens, J., dissenting).

<sup>70</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>71</sup> See Estreicher, *supra* note 2; Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 847 (1985); Neuborne, *supra* note 2; Michael E. Schoeman, *The First Amendment and Restrictions on Advertising of Securities Under the Securities Act of 1933*, 41 BUS. LAW. 377 (1986).

<sup>72</sup> James C. Goodale, *The First Amendment and Securities Act: A Collision Course?*, N.Y.L.J., Apr. 8, 1983, at 1.

<sup>73</sup> See *Lowe v. SEC*, 472 U.S. 181, 203–09 (1985) (interpreting the Investment Advisers Act of 1940 as not applying to financial newsletters in order to prevent potential First Amendment problems); see also *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 701–02 (D. Md. 2000) (applying *Lowe* to the electronic publication of investment information).

<sup>74</sup> See 8 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 3647–48 (3d ed. 1991) (discussing *Carpenter v. United States*, 484 U.S. 19 (1987)); see also *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 369–71 (E.D. Pa. 1992) (analogizing to *Lowe* to provide First Amendment protection to a security rating agency).

<sup>75</sup> See, e.g., *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) ("If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible — and that result has long since been rejected."). Indeed, even *Lowe* has been interpreted relatively narrowly. See, e.g., *R & W Technical Servs. v. Commodity Futures Trading Comm'n*, 205 F.3d 165, 174–76 (5th Cir. 2000) (declining to extend *Lowe* to the Commodity Exchange Act).

The story of the First Amendment and antitrust is similar but less overt. There are many ways to violate the Sherman Act,<sup>76</sup> the Clayton Act,<sup>77</sup> the Federal Trade Commission Act,<sup>78</sup> and the other sources of American antitrust regulation; but most of the effective ones involve speech. Fixing prices is typically facilitated by the transfer of accurate information; yet were the president of the Ford Motor Company to convey to the president of General Motors entirely accurate information about Ford's proposed prices for the forthcoming model year, the consequences would more likely be treble damages and time in the penitentiary than praise for contributing to the marketplace of ideas. So too with organizing a boycott — an effective method of attracting the attention of the Justice Department and class action lawyers — even though another way of describing a boycott is as advocacy of the virtues of collective action. Indeed, the very language of the Sherman Act — “contract[s], combination[s] . . . , or conspirac[ies] in restraint of trade”<sup>79</sup> — appears to anticipate that many anticompetitive practices will occur as a result of the verbal or written exchange of information.

Like securities regulation, antitrust law has occasionally been checked by the First Amendment when it has invaded traditional First Amendment domains, as with concerted action to urge legislation (the so-called *Noerr-Pennington* doctrine<sup>80</sup>) or with otherwise unlawful boycotts that are more political than economic in motivation.<sup>81</sup> Apart from such rare exceptions, however, antitrust law restricts the exchange of accurate market, pricing, and production information, as well as limits the advocacy of concerted action in most contexts;<sup>82</sup> yet it remains almost wholly untouched by the First Amendment.<sup>83</sup> As early as 1921, Oliver Wendell Holmes found the constitutional acceptability of these antitrust restrictions “surprising in a country of free

<sup>76</sup> 15 U.S.C. §§ 1–7 (2000).

<sup>77</sup> *Id.* §§ 12–27.

<sup>78</sup> *Id.* §§ 41–58.

<sup>79</sup> *Id.* § 1.

<sup>80</sup> See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). See generally Daniel R. Fischel, *Antitrust Liability for Attempts To Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977). For the current state of the doctrine, see *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). For a discussion of the frequently litigated “sham” exception, see *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56–66 (1993).

<sup>81</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–15 (1982); see also *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980).

<sup>82</sup> See *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 414, 436 (1990) (holding that a public agreement by lawyers not to represent indigent criminal defendants was subject to per se antitrust regulation).

<sup>83</sup> See *State v. Blyth*, 226 N.W.2d 250, 262–63 (Iowa 1975) (curtly dismissing an attempted First Amendment defense in a price-fixing case).

speech,"<sup>84</sup> but Holmes was in dissent then and would be in dissent today. Despite the occasional pleas of commentators,<sup>85</sup> despite dire warnings that antitrust law, like securities regulation, "is on a collision course" with the First Amendment;<sup>86</sup> and despite the constitutionalization of commercial speech, antitrust law has proceeded unhindered — its constraints on speech, advocacy, and the exchange of accurate information remaining beyond the First Amendment's reach.

Labor law is more complex, but the basic story is the same. Though the First Amendment has occasionally been invoked to protect some forms of public labor picketing,<sup>87</sup> and though free speech ideas have been incorporated into some dimensions of statutory labor law,<sup>88</sup> most of labor law proceeds unimpeded by the First Amendment.<sup>89</sup> Perhaps because of organized labor's crucial role in the formative years of modern First Amendment thinking,<sup>90</sup> the relative invisibility of labor law in First Amendment doctrine has been the subject of considerable commentary<sup>91</sup> — but to little avail. Although a good deal of labor law is about managing the speech that takes place in union certification and representation elections, the law permits content-based management of elections and election campaigns — including restrictions on accurate representations by employers about the future consequences of unionization — to an extent that would never be counte-

<sup>84</sup> *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 413 (1921) (Holmes, J., dissenting).

<sup>85</sup> See Stanley D. Robinson, *Reconciling Antitrust and the First Amendment*, 48 ANTITRUST L.J. 1335 (1979).

<sup>86</sup> Gordon F. Hampton, *Commentary: The Bill of Rights as a Limitation upon Antitrust*, 48 ANTITRUST L.J. 1417, 1417 (1979).

<sup>87</sup> See *Thornhill v. Alabama*, 310 U.S. 88, 91, 101–02 (1940) (invalidating a statute prohibiting all picketing).

<sup>88</sup> See, e.g., 29 U.S.C. § 158(c) (2000) ("The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."). The historical background of this 1947 amendment to the National Labor Relations Act is described in Shawn J. Larsen-Bright, Note, *Free Speech and the NLRB's Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204 (2002).

<sup>89</sup> See *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284, 285–87, 295 (1957) (upholding an injunction against picketing); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 491–92, 504 (1949) (same).

<sup>90</sup> For an extensive discussion of the role of labor disputes and the labor movement in the development of free speech ideas and free speech culture, see David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055 (1994). See also David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 519 (1981).

<sup>91</sup> See, e.g., Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984); Pope, *supra* note 7; James Gray Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 191 (1984) ("On the ladder of First Amendment values . . . labor speech is relegated to a 'black hole' beneath the ladder.").

nanced in domains covered by the First Amendment.<sup>92</sup> Moreover, much of the balance of modern labor law involves unashamedly content-based restrictions on boycotts, strikes, and picketing. In some contexts unions may say and do things that employers may not, and in other contexts employers may say and do things that unions may not — the two schemes together constituting a complex but content-based system of government regulation of speech.

Expressions of concern about the absence of First Amendment analysis in the development of labor law, frequent in the 1980s,<sup>93</sup> have largely disappeared, perhaps because of a recognition that the Supreme Court would not be sympathetic to these concerns, or perhaps because of a fear that the Supreme Court would be too sympathetic. Whatever the reasons, however, the objections have faded away, and much of labor law retains its position as an outsider to the First Amendment.

The history of securities regulation, antitrust law, and labor law has been replicated in numerous other domains. Copyright law, especially recently, has been the subject of some criticism, but its pervasive regime of content regulation and prior restraint remains largely unimpeded by the First Amendment.<sup>94</sup> So too with the law of sexual harassment, which, in both its quid pro quo and hostile-environment aspects, regulates speech, but which, with Supreme Court approval<sup>95</sup> and occasional anguish by commentators,<sup>96</sup> remains unencumbered by the First Amendment's constraints. Less visibly still, much the same degree of First Amendment irrelevance holds true for the content-based regulation of trademarks,<sup>97</sup> the pervasive and constitutionally

<sup>92</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616–20 (1969) (holding that an announcement of a plant closure could be sanctioned as a threat); *Farris Fashions, Inc. v. NLRB*, 32 F.3d 373, 376 (8th Cir. 1994) (upholding a determination that a company unlawfully threatened employees by asserting that it would close if employees voted for a union); see also Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 *BERKELEY J. EMP. & LAB. L.* 356 (1995).

<sup>93</sup> See sources cited *supra* note 91.

<sup>94</sup> See sources cited *supra* note 1.

<sup>95</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (“[S]exually derogatory ‘fighting words,’ among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices.” (citations omitted)). In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Supreme Court failed even to mention the First Amendment despite active discussion of First Amendment issues in the briefs. On the meaning of this silence, compare Fallon, *supra* note 6, which criticizes the Supreme Court for failing to discuss First Amendment issues in *Harris*, with Schauer, *supra* note 6, at 356, which argues that the Supreme Court’s silence was its way of forcefully rejecting the relevance of the First Amendment.

<sup>96</sup> See sources cited *supra* note 6. For an explanation of the absence of First Amendment coverage for sexually harassing speech in the workplace consistent with the themes of this Article, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 421–28.

<sup>97</sup> See *Friedman v. Rogers*, 440 U.S. 1, 15–16 (1979) (“[T]he restriction on the use of trade names has only the most incidental effect on the content of . . . commercial speech . . .”).

untouched law of fraud,<sup>98</sup> almost all of the regulation of professionals,<sup>99</sup> virtually the entirety of the law of evidence,<sup>100</sup> large segments of tort law,<sup>101</sup> and that vast domain of criminal law that deals with conspiracy and criminal solicitation.<sup>102</sup> Indeed, the examples noted in this Part are largely ones in which the speech is propositional rather than performative (to use the distinction common among philosophers).<sup>103</sup> If we do not restrict our inquiry to propositional speech — that is, if we include the speech by which we make wills, enter into contracts, render verdicts, create conspiracies, consecrate marriages, admit to our crimes, post warnings, and do much else — it becomes still clearer that the speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives.

## V. OUTCOMES IN SEARCH OF A THEORY

Now that we have glimpsed part of the vast expanse of human communication that lies beyond the boundaries of the First Amendment, it is tempting to suppose that the line between what is inside and what is outside, even if not explicable in terms of constitutional text or Framers' intent, is nonetheless susceptible of theoretical explanation. Perhaps there exists an organizing principle — a descriptive or positive theory — coherently explaining which speech winds up within the First Amendment and which speech winds up without.

Yet however hard we try to theorize about the First Amendment's boundaries, and however successful such theorizing might be as a normative enterprise, efforts at anything close to an explanation of the

<sup>98</sup> See *Cnty. Trend Serv. v. Commodity Futures Trading Comm'n*, 233 F.3d 981, 993 (7th Cir. 2000) ("Laws that primarily prohibit fully protected speech *along with* potentially fraudulent speech often violate the First Amendment, even if the law's stated purpose is to prevent fraud . . . ." (emphasis added)).

<sup>99</sup> See *Lowe v. SEC*, 472 U.S. 181, 211–36 (1985) (White, J., concurring); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) ("Professional regulation is not invalid, nor is it subject to first amendment strict scrutiny, merely because it restricts some kinds of speech."); see also Alfred C. Aman, Jr., *SEC v. Lowe: Professional Regulation and the First Amendment*, 1985 SUP. CT. REV. 93; Balkin, *supra* note 96, at 396; Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 693–94 (1997).

<sup>100</sup> For a recent argument challenging this state of affairs, see Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705 (2004).

<sup>101</sup> See David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002); Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161 (1990).

<sup>102</sup> Explaining and analyzing the irrelevance of the First Amendment to much of criminal law is the topic of Kent Greenawalt's important work. See *supra* note 8.

<sup>103</sup> See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 4–7 (J.O. Urmson & M. Sbisà eds., 2d ed. 1975); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 29–33, 68 (1969). The classic examples of performative utterances include saying "I do" at a wedding, writing "I bequeath" in a will, or declaring "Guilty" at a trial.

existing terrain of coverage and noncoverage are unavailing. Prescriptive theories abound, but descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory. Although any account of what the First Amendment "is all about" will include some communicative acts and exclude others — and so too with accounts that recognize that the First Amendment has multiple explanations — none of the existing normative accounts appears to explain descriptively much of, let alone most of, the First Amendment's existing inclusions and exclusions. Theories based on self-government or democratic deliberation<sup>104</sup> have a hard time explaining why (except as mistakes, of course<sup>105</sup>) the doctrine now covers pornography, commercial advertising, and art, inter alia — none of which has much to do with political deliberation or self-governance, except under such an attenuated definition of "political" that the justification's core loses much of its power.<sup>106</sup> "Search for truth" or "marketplace of ideas" accounts<sup>107</sup> are similarly at a loss to explain the coverage of utterances without much truth value, including self-expression generally and the self-expressive aspects of most art and literature in particular. Indeed, if we were concerned about actually increasing knowledge and exposing error, it is far from clear that we would so easily protect both communication that is largely emotive and communication that is demonstrably factually false. Personal autonomy and self-expression accounts of the First Amendment are also difficult to justify descriptively. For these theories, the inclusion of commercial speech and noncommercial corporate speech is problematic,<sup>108</sup> since it is not clear whose autonomy or self-expression is fostered as a result; equally prob-

<sup>104</sup> See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 119–78 (1995); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

<sup>105</sup> See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); see also Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 326–27 (1978) (recognizing the theoretical difficulties in using the First Amendment to protect nonpolitical speech, but also recognizing the difficulties of trying to change existing doctrine).

<sup>106</sup> See Greenawalt, *supra* note 8, at 734–35 (arguing that greatly expanding the scope of political or self-government theories of the First Amendment "virtually destroys the significance of [the] basic distinction").

<sup>107</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 181 F.2d 34, 40 (2d Cir. 1950) (noting the importance of "debate and dispute" in the search for truth); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

<sup>108</sup> See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 194–224 (1989); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) ("[A] complete denial of first amendment protection for commercial speech is not only consistent with, but is required by, first amendment theory.").

lematic is the inclusion of plainly harmful speech, for it is not normally thought that rights to autonomy and self-expression extend to the right to injure others.<sup>109</sup>

Not only are existing normative theories substantially narrower in some respects than current doctrine, but in other respects they are also substantially broader. "Distrust of government" theories,<sup>110</sup> for example, cannot explain why that distrust has not been extended to the SEC, the FTC, the FDA, the Justice Department, or judges managing a trial — all of which involve government officials making content-based decisions about speech, and none of which is now covered by the First Amendment.

Thus, if there exists a single theory that can explain the First Amendment's coverage, it has not yet been found. Yet if *all* of the historically recognized and judicially mentioned normative theories are available — self-expression,<sup>111</sup> individual autonomy,<sup>112</sup> dissent,<sup>113</sup> democratic deliberation,<sup>114</sup> the search for truth,<sup>115</sup> tolerance,<sup>116</sup> checking governmental abuse,<sup>117</sup> and others — then their collective coverage is so great as to be of little help in explaining the existing state of First Amendment terrain. For if every underlying theory of the First Amendment can be conscripted into service to justify either an inclusion or an exclusion, and if the array of such theories is as large and diverse as it actually is, then all of the work is being done not by the theories, but by as-of-yet unarticulated factors. Like Karl Llewellyn's claims about the consequences of myriad frequently inconsistent can-

<sup>109</sup> Although Chapter Two of Mill's *On Liberty* is one of the landmarks of free speech theory, it is in Chapter One that Mill makes clear that rights to individuality are limited to those expressions of individuality that do not cause harm to others. See JOHN STUART MILL, *ON LIBERTY* 68–69 (Gertrude Himmelfarb ed., Penguin Books 1985) (1859).

<sup>110</sup> See generally SCHAUER, *supra* note 10, at 73–86 (1982).

<sup>111</sup> See, e.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

<sup>112</sup> See, e.g., Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303 (1991); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979).

<sup>113</sup> See, e.g., STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 86–109 (1990); see also STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 91–120 (1999) [hereinafter SHIFFRIN, *DISSENT*]; CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

<sup>114</sup> See, e.g., sources cited *supra* note 104.

<sup>115</sup> See, e.g., sources cited *supra* note 107.

<sup>116</sup> See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

<sup>117</sup> See, e.g., Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

ons of statutory construction,<sup>118</sup> the proliferation of available First Amendment normative theories produces a universe in which the actual grounds for inclusion and exclusion remain successfully camouflaged.

That the existing justifications for a free speech principle cannot individually or collectively explain the First Amendment's development does not imply that the theories are inadequate as *normative* accounts of the idea of free speech. Still, it remains the case that although theories of the First Amendment's domain have proliferated, and although the full proliferation of these theories has been utilized by the courts, it does not follow that one or a small number of those theories can function as a descriptive account of the First Amendment's boundaries.

The fact that even the best of the currently available normative accounts diverges so substantially from existing doctrine, and thus from the shape of the First Amendment as we know it, means that if we are looking to explain this existing terrain — rather than prescribe what it ideally should look like — then it would be fruitful to look elsewhere. To put it differently, existing normative theories seem of little relevance to achieving a descriptive understanding of how the First Amendment came to look the way it does<sup>119</sup> and of how it came to include what it includes and exclude what it excludes. In light of this failure of normative free speech theory to explain the existing shape of the First Amendment, it may be more promising to shift course and consider the possibility that the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, cultural, historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed.

## VI. THE MAGNETISM OF THE FIRST AMENDMENT

If we abandon — at least here — the pursuit of a normative theory of inclusion and exclusion, and instead seek description or explanation,

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<sup>118</sup> See Karl N. 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 (1950).

<sup>119</sup> It is true that understanding the shape of the First Amendment requires recognizing that it, like much of American constitutional law, has developed in common law fashion. See Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 470 & n.41 (1989) (book review); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). But that observation itself has limited explanatory power if not accompanied by an account of how the common law develops — an account, as Holmes first observed, that sees the development of the common law as not a strictly logical process. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897). Holmes surely was correct to stress the role of experience rather than logic, yet he seemed not to consider the role played by the contingent body of cases actually decided in shaping the path of common law development.



our search may be more revealing. So rather than supposing that the domain of the actual First Amendment has been inscribed by its purposes, functions, or philosophical explanations, let us examine the political, social, cultural, historical, psychological, and economic functionings of the First Amendment in society. When we define our task in this way — as exploring the political psychology of the First Amendment — we obtain a better picture of why the First Amendment notices what it actually notices, and perhaps more significantly, why it ignores what it ignores. Accordingly, I will suggest that the coverage of the First Amendment<sup>120</sup> is best understood as the outcome of a competitive struggle among numerous interests for constitutional attention<sup>121</sup> and that the factors determining the winners in this competition for constitutional salience are worth not only closer inspection, but the kind of systematic research I can only hint at here.

Although I mean to focus on those domains of speech that the First Amendment has not covered and still does not cover, understanding the dynamics of the First Amendment's remaining noncoverage of vast areas of speech requires exploring how the First Amendment has come to cover as much as it does. For once we see that most of the expansion of the First Amendment beyond its theoretical or historical core is a function of largely nondoctrinal forces, we can see as well that the

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<sup>120</sup> Although some might think that the explanations to follow apply to questions of protection as well as of coverage, thus making the distinction between coverage and protection unnecessary, such an interpretation would be more extravagant than can be supported. My argument, more modest but more accurate than a full Legal Realist account of First Amendment adjudication would offer, is decidedly not a denial that questions of protection within the domains of coverage can be substantially, albeit not completely, explained by current First Amendment doctrine. Once we recognize that the First Amendment is the area of law with which we are dealing, legal doctrine appears to do a considerable amount of real work. But neither the doctrine nor free speech theory appears to do much, if anything, to explain when First Amendment law applies in the first place. What I offer here is thus a largely *nondoctrinal* account of the ambit of coverage — an account not inconsistent with a largely *doctrinal* explanation of the level and type of protection applied within that ambit of coverage.

<sup>121</sup> See generally Herbert Blumer, *Social Problems as Collective Behavior*, 18 SOC. PROBS. 298 (1971). Much of the existing literature on agendas starts from the accurate premise that the public agenda is a scarce resource. See, e.g., FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); Roger W. Cobb & Marc Howard Ross, *Agenda Setting and the Denial of Agenda Access: Key Concepts*, in *CULTURAL STRATEGIES OF AGENDA DENIAL: AVOIDANCE, ATTACK, AND REDEFINITION* 3 (Roger W. Cobb & Marc Howard Ross eds., 1997); Anthony Downs, *Up and Down with Ecology — the "Issue-Attention Cycle"*, 28 PUB. INT. 38 (1972). The constitutional agenda is potentially different insofar as an issue will not appear to the judge of a court with mandatory jurisdiction as a matter involving an agenda, but rather as one requiring a decision. Nevertheless, the scarce resource model is still applicable in terms of attracting public attention to sponsor and support litigation, attracting the interest of advocacy organizations, influencing which cases courts take seriously and which they do not, and, of course, determining which cases are heard and which are not through courts' discretionary jurisdiction.

same forces determine much of the distinction between the covered and the noncovered.

Any account of the political, cultural, and economic dynamics of the First Amendment must start with what we can call the First Amendment's *magnetism*.<sup>122</sup> All cultures have their quasi-authoritative symbols, metaphors, and ideas;<sup>123</sup> and understanding a society's rhetorical terrain requires understanding how public actors seek to appropriate those symbols, metaphors, and ideas to their own causes.<sup>124</sup> Indeed, the nondisciplined nature of American politics may make the political contest for symbols more important than in more disciplined parliamentary systems.<sup>125</sup> Occasionally these symbols are negative — Communism, Prohibition, Munich — and political actors seek to dissociate themselves from symbols that recall failed policies or great evils. More often, however, those who influence and make policy compete to claim various positive symbols. A symbol might be a historical era, such as the founding period of the United States, the creation of the State of Israel, the U.S. civil rights movement, or South Africa's transformation from apartheid. Symbols might be particular individuals, such as Thomas Jefferson,<sup>126</sup> Abraham Lincoln, Chairman Mao, or Nelson Mandela. They might be physical artifacts, like the flag or the cross; or they might be abstract ideas, like rights or equality; or they might be books, such as the Koran or the Bible. When Antonio in *The Merchant of Venice* observes that even "the devil can cite Scripture for his purpose,"<sup>127</sup> he refers not only to the linguistic indeterminacy of the Bible, but also to how its rhetorical authority leads

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<sup>122</sup> The First Amendment's magnetism generates the phenomenon on the part of legal and public advocates that I have previously referred to as *opportunism*. See Frederick Schauer, *First Amendment Opportunism*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). The present Article can be understood as the further development of that preliminary exploration.

<sup>123</sup> For a discussion on policy symbols and culture, see Mark Schlesinger & Richard R. Lau, *The Meaning and Measure of Policy Metaphors*, 94 AM. POL. SCI. REV. 611 (2000).

<sup>124</sup> See generally MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964); CHARLES D. ELDER & ROGER W. COBB, *THE POLITICAL USES OF SYMBOLS* (1983). For the systematic development of these ideas, see especially HAROLD D. LASSWELL ET AL., *THE COMPARATIVE STUDY OF SYMBOLS* (1952); and ITHIEL DE SOLA POOL ET AL., *SYMBOLS OF DEMOCRACY* (1952). On the relevance of these ideas to law, see J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993).

<sup>125</sup> See Anthony King, *The Vulnerable American Politician*, 27 BRIT. J. POL. SCI. 1, 18–19 (1997).

<sup>126</sup> This same phenomenon applies to Thomas Jefferson at the University of Virginia. Anyone who has spent any time at Mr. Jefferson's university cannot help but notice the way in which appeals to what Jefferson did or would have done, or thought or would have thought, loom large in public discussion.

<sup>127</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act I, sc. iii, l. 95, at 82 (W. Moelwyn Merchant ed., Penguin Books 1967).

participants in social and political discussions to strive constantly to enlist it in their causes.

In important respects, the First Amendment appears to serve a similar function in American society. To an extent unmatched in a world that often views America's obsession with free speech as reflecting an insensitive neglect of other important conflicting values,<sup>128</sup> the First Amendment, freedom of speech, and freedom of the press provide considerable rhetorical power and argumentative authority.<sup>129</sup> The individual or group on the side of free speech often seems to believe, and often correctly, that it has secured the upper hand in public debate. The First Amendment not only attracts attention, but also strikes fear in the hearts of many who do not want to be seen as opposing the freedoms it enshrines.<sup>130</sup>

The reasons why the First Amendment has these effects are undoubtedly diverse and complex. One such reason might be that events of dissent and protest, and thus of freedom of speech and press — the Boston Tea Party, John Peter Zenger, Thomas Paine, John Brown, the origins of the labor movement, and the civil rights movement in the 1960s — have pride of place in the popular conception of American history. Another might be the belief that the First Amendment was *first* because it was most important, rather than because, as was actually the case, it moved from third to first after the first two amendments failed to secure ratification.<sup>131</sup> Still another might be the First Amendment's essentially *negative* quality. Various constitutional values such as federalism, equality, and separation of powers have both

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<sup>128</sup> See IAN LOVELAND, *POLITICAL LIBELS: A COMPARATIVE STUDY* 83–85 (2000); Eric Barendt, *The First Amendment and the Media*, in *IMPORTING THE FIRST AMENDMENT: FREEDOM OF EXPRESSION IN AMERICAN, ENGLISH AND EUROPEAN LAW* 29, 43 (Ian Loveland ed., 1998); Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 *LAW & CONTEMP. PROBS.* 77, 102–03 (1992); Michel Rosenfeld, *Hate Speech in Comparative Jurisprudence: A Comparative Analysis*, 24 *CARDOZO L. REV.* 1523, 1529–30 (2003); Stephen Sedley, *The First Amendment: A Case for Import Controls?*, in *IMPORTING THE FIRST AMENDMENT: FREEDOM OF EXPRESSION IN AMERICAN, ENGLISH AND EUROPEAN LAW*, *supra*, at 23, 24–25.

<sup>129</sup> Consider in this regard the focus on “silencing” within much of the feminist antipornography movement. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 129–32 (1987). An important feature of the silencing argument — as opposed to, say, arguments based on equality or the incidence of sexual violence — is that its claim that pornography silences women challenges the First Amendment forces on their own ground by insisting that speech faces a greater threat from pornography than from action against pornography. For present purposes, what is important is not the soundness of the silencing argument, but rather the background political culture that led astute political advocates to employ it.

<sup>130</sup> See SHIFFRIN, *DISSENT*, *supra* note 113, at 129 (noting that it is “better political strategy to claim [the free speech principle] than to hold out oneself as an enemy of a cherished right”).

<sup>131</sup> See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 530–31 (1992).

positive and negative, policy and principle,<sup>132</sup> dimensions. Freedom of speech, however, while in theory definable both positively and negatively, has in reality developed more negatively — understood to be at its core about protecting against danger rather than about making conditions better.<sup>133</sup> Given that fears tend to be retransmitted more than hopes, competition to claim the mantle of the First Amendment, especially in a country where citizens may harbor more distrust of government than most other places in the world,<sup>134</sup> is predictably fierce.

Such possible explanations for the First Amendment's magnetism likely have at least some explanatory force, yet in the complex array of reasons why the First Amendment has become one of the symbols that opposing political forces fight to claim, a principal one is surely that relying on the First Amendment is, not surprisingly, a good way of attracting the attention and sympathy of the press.<sup>135</sup> If, as the literature on agenda-setting tells us, press attention is a major factor in moving issues from the back burner to the front<sup>136</sup> and in converting claims of

<sup>132</sup> On the distinction between policy and principle, see RONALD DWORKIN, *LAW'S EMPIRE* 221–24, 243–44, 310–12 (1986); and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–23, 90–100 (1977). On the application of this distinction to freedom of speech and freedom of the press, see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 373–80 (1985).

<sup>133</sup> The literature recounting the First Amendment's essentially negative (in the “negative liberty” sense) history is voluminous. See, e.g., Kathleen M. Sullivan, *Free Speech Wars*, 48 *SMU L. REV.* 203, 210 (1994) (urging use of the First Amendment as a “shield,” not as a “sword”); see also L.A. Powe, Jr., *Scholarship and Markets*, 56 *GEO. WASH. L. REV.* 172 (1987); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 *MICH. L. REV.* 1517 (1997) (reviewing OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996)). For more positive prescriptive accounts of the First Amendment — accounts that would empower the state to facilitate speech even at the cost of allowing it to draw more content-based distinctions than are now permissible — see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); and Owen M. Fiss, *Why the State?*, 100 *HARV. L. REV.* 781 (1987).

<sup>134</sup> For analysis of this distrust in America and elsewhere, see *WHY PEOPLE DON'T TRUST GOVERNMENT* (Joseph S. Nye, Jr. et al. eds., 1997).

<sup>135</sup> There is a debate in the literature about the extent to which interest groups can attract the attention of the press directly, rather than through mobilizing the public. Compare JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 119–52 (1999) (discussing the ways interest group mobilization can attract press interest), with TIMOTHY E. COOK, *GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 173–75 (1998) (emphasizing a focus on practical news over political messages). See generally Maxwell McCombs, *Building Consensus: The News Media's Agenda-Setting Roles*, 14 *POL. COMM.* 433 (1997); Maxwell McCombs & Donald Shaw, *The Agenda-Setting Function of the Mass Media*, 36 *PUB. OP. Q.* 176 (1972). Regardless, it seems a plausible hypothesis that press interest is more likely to be piqued by press-related issues than by issues in which the press is not itself an interested participant.

<sup>136</sup> The point is central to JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2003), the locus classicus for research on agenda-setting. See also ROGER W. COBB & CHARLES D. ELDER, *PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING* 141–50 (2d ed. 1983); WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986); Michael D. Cohen et al., *A Garbage Can Model of Organizational*

special interest into matters of public concern,<sup>137</sup> then the shrewd interest group<sup>138</sup> or public advocate will attempt to devise a strategy to attract press attention. Accordingly, claiming the support of — or even better, the presence of a threat to — the First Amendment is often a wise course of action.<sup>139</sup> Because the press is not nearly as disinterested an observer of First Amendment controversies as it is of constitutional issues involving due process, equal protection, federalism, or

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*Choice*, 17 ADMIN. SCI. Q. 1, 3 (1972); Everett M. Rogers et al., *The Anatomy of Agenda-Setting Research*, 43 J. COMM. 68 (1993); Jack L. Walker, Jr., *Setting the Agenda in the U.S. Senate: A Theory of Problem Selection*, 7 BRIT. J. POL. SCI. 423 (1977) (discussing the effect of the media as one among many factors setting the agenda of the U.S. Senate).

<sup>137</sup> See Shanto Iyengar, *Agenda Setting and Beyond: Television News and the Strength of Political Issues*, in AGENDA FORMATION 211, 211–12 (William H. Riker ed., 1993); W. Russell Neuman, *The Threshold of Public Attention*, 54 PUB. OP. Q. 159, 160–61 (1990); James H. Watt et al., *Agenda-Setting Effects of Television News Coverage and the Effects Decay Curve*, 20 COMM. RES. 408 (1993); Jian-Hua Zhu, *Issue Competition and Attention Distraction: A Zero-Sum Theory of Agenda-Setting*, 69 JOURNALISM Q. 825 (1992).

<sup>138</sup> For a discussion of the media as part of interest group strategy, see KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986); Andrew J. Nownes & Patricia Freeman, *Interest Group Activity in the States*, 60 J. POL. 86 (1998).

<sup>139</sup> A search of all newspaper articles in the LEXIS “News” database, conducted on February 17, 2003, and encompassing the last two years, is instructive: “New York Times and first amendment” revealed 2997 instances, and coupling “New York Times” with “freedom of speech or free speech” exceeded 3000. By contrast, coupling “New York Times” with “fourth amendment” produced 284 references, “fifth amendment” 657, “equal protection” 404, “fourteenth amendment” 208, and “due process” 1208. The results substituting “Boston Globe” for “New York Times” were similar, with 603 “First Amendment” references compared to 317 for “due process,” 123 for “fifth amendment,” 64 for “equal protection,” 51 for “fourth amendment,” and 23 for “fourteenth amendment.” And substituting “Washington Post” produced 2273 for “free speech or freedom of speech” and 2164 for “first amendment,” but only 853 for “due process,” 490 for “fifth amendment,” 278 for “equal protection,” 195 for “fourth amendment,” and 113 for “fourteenth amendment.” Significantly, there is no indication that these disparities in press attention simply mirror underlying disparities in the number of controversies; for the dockets of the Supreme Court, the lower federal courts, and the state courts all show a pattern in which the number of First Amendment cases is roughly equivalent to the number of equal protection and due process cases, and in which the number of criminal procedure cases vastly exceeds any other category of constitutional controversy. The “Statistics” section of the *Harvard Law Review*’s annual review of the previous Supreme Court Term reveals that for the ten Terms from 1993 to 2002, the Court decided, with full opinion, 36 freedom of speech cases, 26 equal protection cases, 18 due process cases, and, including habeas corpus cases, 125 criminal procedure cases. See 117 HARV. L. REV. 480, 489 tbl.III (2003); 116 HARV. L. REV. 453, 462 tbl.III (2002); 115 HARV. L. REV. 539, 548 tbl.III (2001); 114 HARV. L. REV. 390, 399 tbl.III (2000); 113 HARV. L. REV. 400, 409 tbl.III (1999); 112 HARV. L. REV. 366, 375 tbl.III (1998); 111 HARV. L. REV. 431, 437 tbl.III (1997); 110 HARV. L. REV. 367, 373 tbl.III (1996); 109 HARV. L. REV. 340, 346 tbl.III (1995); 108 HARV. L. REV. 372, 377 tbl.III (1994). Nor is there any indication that the disparities in press attention reflect disparities in the underlying importance of the cases, because other measures of case importance — discussion in the annual Supreme Court issue of the *Harvard Law Review*, for example — do not show anything like the obsession with the First Amendment that the above numbers reveal about the institutional press. For the same ten-year period, the *Review* committed 268 out of its 2291 total pages devoted to “Leading Cases,” slightly less than twelve percent, to freedom of speech and freedom of the press cases.

the rights of criminal defendants, for example, a First Amendment argument has a special resonance with the very people who substantially influence which topics will become public and which will not.

Somewhat more debatably, a disproportionate interest in the First Amendment may exist within the larger intellectual milieu that encompasses, in addition to the press, the worlds of education, academic research, the professions, and perhaps most importantly, the law, including the judiciary.<sup>140</sup> In part because of their own beliefs, and in part because they are unlikely to be totally unconcerned with what is said about them in the press,<sup>141</sup> judges are also likely to be, or at least to *seem* to be, disproportionately sympathetic to First Amendment arguments.

These empirical assertions are testable and possibly false, but they do seem to explain a substantial part of the magnetic effect of the First Amendment: the way in which legal and constitutional arguments migrate to claims of freedom of speech and press. Time and again, legal arguments that initially appear to have little to do with free speech turn up in First Amendment clothing, far more often than free speech arguments turn up in, say, equal protection clothing.<sup>142</sup> Objections to the military's "Don't Ask, Don't Tell" policy are framed not primarily as arguments about equality, about sexual orientation as a potentially suspect or quasi-suspect class, or even about personal liberty. Rather, the "Don't Tell" dimension is used to portray the policy as a free speech problem more than, or at least as well as, an equality or personal liberty problem.<sup>143</sup>

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<sup>140</sup> For explanations of the First Amendment's importance that stress its comparative personal importance to elites, and thus promote a form of interest group theory of the First Amendment, see MARTIN SHAPIRO, *FREEDOM OF SPEECH* (1966); R.H. Coase, *Advertising and Free Speech*, 6 J. LEG. STUD. 1 (1977); and Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

<sup>141</sup> I explore this delicate topic at somewhat greater length in Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

<sup>142</sup> For the intellectual underpinnings of this latter idea, which has gone nowhere in litigation or public perception, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975), which argues that "[t]he principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the 'central meaning of the First Amendment.'" *Id.* at 21.

<sup>143</sup> See *Steffan v. Aspin*, 8 F.3d 57, 66-67 (D.C. Cir. 1993), *aff'd en banc sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994); *Cammermeyer v. Aspin*, 850 F. Supp. 910, 928-29 (W.D. Wash. 1994). For a discussion of the strategy, see Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993). For defenses of the argument that "Don't Ask, Don't Tell" violates the Free Speech Clause, see Taylor Flynn, *Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military's Anti-Gay Policy*, 80 IOWA L. REV. 979 (1995); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000); and Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997).

Similarly, objections to government regulation of business that were originally based on concern for economic liberty have become objections to the regulation of commercial advertising,<sup>144</sup> just as objections to hostile-environment sexual harassment law on the ground of alleged intrusiveness have become objections to regulating speech in the workplace.<sup>145</sup> The anti-Microsoft and anti-Hollywood claims of the open-source movement focus on the way in which computer source codes can be conceived of as a language and therefore as speech;<sup>146</sup> equality and dignity objections to the (mis)treatment of the homeless become First Amendment arguments for the right to beg;<sup>147</sup> and the sexual liberty and antipaternalism claims of those who object to laws restricting sexual conduct typically focus on those aspects of the sex industry — nude dancing, most obviously — that can be conceptualized as involving free speech issues.<sup>148</sup> Indeed, even businesses claiming a share of the money raised from antidumping tariffs have managed to translate their arguments into First Amendment language.<sup>149</sup>

In these and numerous other instances, the First Amendment's magnetism leads strategic actors to embrace it as easily as politicians embrace motherhood, the flag, and apple pie. As Professor Carol Steiker observes, when those opposed to so-called "identity politics" wished to shore up their objections to hate crime laws, they latched on to tenuous First Amendment "content neutrality" arguments — with some political if not doctrinal success — in order to mask the extent to which hate crime laws were situated well within the nonproblematic traditions of the criminal law.<sup>150</sup> And when his advisors were discussing the controversy about sampling versus "actual" enumeration with respect to the 2000 Census, President Clinton suggested, by all ac-

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<sup>144</sup> See Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5 (1979). For an explicit acknowledgment of the role of the First Amendment in providing a rhetorically and doctrinally powerful "hook" for what is essentially an argument for laissez-faire economics, see Peter M. Gerhart, *Constitutional Limits on State Regulatory and Protectionist Policies*, 48 ANTITRUST L.J. 1351, 1353-54 (1979). For a strong critique of that strategy, see Allen D. Boyer, *Free Speech, Free Markets, and Foolish Consistency*, 92 COLUM. L. REV. 474 (1992) (book review).

<sup>145</sup> I document this phenomenon at some length in Schauer, *supra* note 6.

<sup>146</sup> See sources cited *supra* note 7.

<sup>147</sup> See sources cited *supra* note 3.

<sup>148</sup> See *Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986); see also Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992).

<sup>149</sup> See Neil King, Jr., *Why Uncle Sam Wrote a Big Check to a Sparkler Maker*, WALL ST. J., Dec. 5, 2002, at A1 (quoting a lawyer who describes the distribution of benefits from a tariff law as a "free-speech issue").

<sup>150</sup> See Carol S. Steiker, *Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857, 1807-72 (1999) (reviewing JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* (1998)).

counts with a straight face, that the administration's position on sampling be characterized in First Amendment terms. Clinton expressly added that doing so would likely generate press sympathy for the position.<sup>151</sup> This tactic turned out to be too much of a reach, but even the suggestion reinforces the view that using the First Amendment for non-First-Amendment-y claims is not infrequently a subject of speculation by those who wish to affect public opinion, especially among elite segments of society.

The magnetic force of the First Amendment is likely to generate two different consequences. First, actors (not including the courts) in the public arena can be expected to rely on the First Amendment in pressing their causes — believing, often justifiably, that doing so will attract allies, generate favorable attention by the press, and arouse sympathy from other actors. Second, lawyers representing clients with claims and causes not necessarily lying within the First Amendment's traditional concerns have reason to add First Amendment arguments to their core claims, or to modify their core claims to connect them with First Amendment arguments, in the hope that doing so will increase the probability of success.

These two predicted consequences of the First Amendment's magnetism are distinct but connected. From the perspective of an interest group using the First Amendment to launch or reinforce its public arguments, the public attention that the First Amendment attracts will likely make a First Amendment claim more appealing to a lawyer and more plausible, or at least less frivolous, to a judge than other legal claims would be. In this respect, using the First Amendment as public rhetorical strategy may both fuel litigation and increase the likelihood of its success. Moreover, by tapping into the media's and the public's well-documented interest in conflict,<sup>152</sup> litigation will attract more press and public attention than would raising a nonlitigated or non-conflictual policy question on the same issue involving the same parties.<sup>153</sup> When taken together, therefore, the two phenomena reinforce

<sup>151</sup> I am indebted for these observations (made at the Kennedy School of Government's Faculty Research Seminar on September 16, 2002) to Elaine Kamarck, who was present at the meeting at which President Clinton offered this suggestion.

<sup>152</sup> See JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 9–12, 170–208 (1997); ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 115–20, 122 (2000); THOMAS E. PATTERSON, *OUT OF ORDER* 136–41, 153–57 (1993); THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* 55–56 (2002); Matthew A. Baum, *Sex, Lies, and War: How Soft News Brings Foreign Policy to the Inattentive Public*, 96 AM. POL. SCI. REV. 91, 91 (2002) (explaining how “soft news” frames compelling policy issues as “compelling human dramas”).

<sup>153</sup> See Roy B. Flemming et al., *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947–92*, 41 AM. J. POL. SCI. 1224, 1224 (1997) (discussing the Supreme Court's ability to cause “long-term shifts in issue attention”).



each other and produce an environment in which the magnetic force of the First Amendment attracts topics and claims that would otherwise be beyond the First Amendment's boundaries, and in which that litigation then attracts a degree of press, public, and interest-group attention that further contributes to the First Amendment's magnetic force. This cycle can be expected to bring issues into the First Amendment that previously had been outside its domain, but no equivalent force pushes out those issues that had previously been inside.<sup>154</sup> The consequence is considerable outward pressure on the boundaries of the First Amendment.

This outward pressure is increased to the extent that courts themselves engage in the same form of First Amendment opportunism as do advocates and interest groups. When courts, having reached their decisions, need to choose among various plausible justifications for those decisions, they not surprisingly reach for justifications with greater persuasive appeal, even controlling for the degree of actual precedential support for their decisions. A Supreme Court deciding to rule in favor of easier ballot access, for example, would likely be able to rely on the Equal Protection Clause, could resort to the Elections Clause of Article I, and might even consider rehabilitating the Guaranty Clause;<sup>155</sup> but the way in which ballot access opinions migrate to

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<sup>154</sup> This exposes a larger issue: how the relative absence of interest groups urging the constriction rather than the expansion of the First Amendment affects First Amendment doctrine generally. The reasons for this phenomenon are complex, but a few possibilities are worth mentioning. One is that the existence of a contingent-fee system for attorneys representing plaintiffs in tort liability cases, as well as the relative lack of plaintiff classes (as opposed to individual plaintiffs) in libel cases, against the background of strongly press-protective libel and privacy laws, has stifled the development of a plaintiff's libel or privacy bar, despite there being a strong libel and privacy defense bar. And because those whose privacy is invaded or whose reputation is damaged by the media are rarely repeat players, the fact that there are few repeat-player plaintiffs and few repeat-player plaintiffs' attorneys is likely to make challenges to existing doctrine less organized and thus less powerful. More broadly, it may be that First Amendment questions are such that the paucity of repeat players injured by speech is a phenomenon that exists across most domains of the First Amendment. It is true that on specific issues, even if not on issues such as defamation, there are single-issue groups or single-issue movements concerned with increasing the scope of government power and decreasing the constraints of the First Amendment. We see this with pornography and obscenity, with flag desecration, and with many dimensions of national security. Yet what is illuminating is that these are groups and movements focused on a specific issue or a small cluster of issues. We do not see groups urging the constriction of the First Amendment in as broad-based a way as we see groups like the American Civil Liberties Union, People for the American Way, the Association of American Booksellers, and the American Society of Newspaper Editors defending the current understanding of the First Amendment and even urging its expansion. A full account of the political economy of the First Amendment would examine this topic systematically and would explore carefully the extent to which First Amendment issues, more than many others, are ones in which repeat players and other aggregations of influence are arrayed substantially more on one side of a constitutional right than on the other.

<sup>155</sup> U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."). The clause was held nonjusticiable in *Luther v. Borden*, 48 U.S. (7 How.) 1, 84-98 (1849).

the no-less-but-no-more-plausible First Amendment rather than to these other not implausible routes to the same result suggests that the rhetorical power of the First Amendment exists both within and without the domain of judicial decisionmaking.<sup>156</sup> Often, of course, the attraction of the First Amendment will arise simply because the most logical doctrinal support would need to surmount substantial procedural or precedential obstacles, as with the Court's preference for First Amendment rather than economic liberty arguments in *Virginia Pharmacy*;<sup>157</sup> but just as often the preference seems more strategic than doctrinal. In such cases, courts behave like others who seek to persuade, recognizing that relying on the First Amendment is often a wise strategy even when it is not the most direct source of doctrinal support.

The First Amendment's magnetism is part of a larger dynamic pushing the boundaries of the First Amendment generally outward. Although there are no data that would support more than a loose impression, one can say with some confidence that courts rarely find stretched First Amendment claims to be frivolous.<sup>158</sup> One reason for this might be that the capacious language of the First Amendment, the indeterminacy of the First Amendment's purposes, and the omnipresence of speech (in the ordinary language meaning of the word) combine to produce a world in which it would be extremely difficult to

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<sup>156</sup> Compare *Clements v. Fashing*, 457 U.S. 957 (1982) (equal protection analysis of ballot access issues), *Lubin v. Panish*, 415 U.S. 709 (1974) (same), *Bullock v. Carter*, 405 U.S. 134 (1972) (same), and *Williams v. Rhodes*, 393 U.S. 23 (1968) (same), with *Cook v. Gralike*, 531 U.S. 510, 530–32 (2001) (Rehnquist, C.J., concurring in the judgment) (First Amendment analysis), *Burdick v. Takushi*, 504 U.S. 428 (1992) (same), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (same). On the migration from equal protection to the First Amendment, see Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299.

<sup>157</sup> See Jackson & Jeffries, *supra* note 144, at 4–6. Much the same might be said about the way in which cases are framed, including by the courts, as First Amendment cases rather than, say, as equal protection cases, even though there are many instances in which equal protection issues are as available as free speech ones. See Akhil Reed Amar, *The Supreme Court, 1991 Term—Comment: The Case of the Missing Amendments*: *R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 151–55 (1992); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 348 (1991) (“Judges and university administrators have no . . . a priori way of choosing between [free speech and equal protection].”). Consistent with the themes of this Article, however, framing is a larger phenomenon, and the framing of an issue as a free speech controversy has a documented advantage for a strategic or political actor. See generally Thomas E. Nelson et al., *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567 (1997).

<sup>158</sup> This intuition is supported by a LEXIS search for such cases. Although First Amendment, Fifth Amendment, and equal protection cases appear with roughly the same frequency (2329, 2850, and 3189, respectively, for the year 2000, according to a search in the “Federal and State Cases Combined” LEXIS database conducted on February 8, 2004), a non-date-restricted search of federal and state cases reveals 25 cases in which equal protection claims were pronounced frivolous or totally without merit, 15 for Fifth Amendment claims, and only 8 for First Amendment claims.

dismiss almost any First Amendment claim as wildly implausible. So even if we believe that there are “off the wall” or frivolous claims with respect to many statutes, some common law doctrines, and some constitutional provisions,<sup>159</sup> and even if we believe that whether a claim is deemed frivolous is at least partly a function of the effect of traditional legal materials such as texts and precedents and documented original intentions, it is possible that the First Amendment does not fit this mold. It may be the case that judges — even if they feel no greater intrinsic sympathy for First Amendment claims than for the universe of legal or constitutional claims generally, and even if they make no attempt to reach decisions that would be publicly, politically, or journalistically well received — would be especially reluctant to dismiss First Amendment claims as frivolous even when they border on frivolity according to existing doctrine and existing First Amendment traditions. To the extent that this is so, there will be outward pressure on the boundaries of the First Amendment both in the courts and outside of them.

In addition to the properties of First Amendment claims that may make them less likely to appear legally frivolous, the First Amendment’s magnetism may assist in ensuring that those claims will not arise in isolation. There will often be multiple lawyers, multiple litigants, and multiple public actors who perceive the virtues of the same opportunistic strategy at roughly the same time, or who even may be in active coordination with each other — as with the multiple challenges to the “Don’t Ask, Don’t Tell” policy, the proliferation of First Amendment rhetoric surrounding legal arguments regarding computer source code, and the panoply of parallel claims about First Amendment limitations on copyright. When this is the case, the multiplicity of individually tenuous claims may produce a cascade effect<sup>160</sup> such that the claims no longer appear tenuous. The combination of, say, four scarcely plausible but simultaneous court challenges and twenty scarcely plausible public claims of a First Amendment problem could

<sup>159</sup> See Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything At All?*, 24 OSGOOD HALL L.J. 353, 362 (1986) (distinguishing frivolous cases from those that are weak but nonfrivolous).

<sup>160</sup> For general background on information cascades, see Lisa R. Anderson & Charles A. Holt, *Classroom Games: Information Cascades*, 10 J. ECON. PERSP. 187 (1996); Lisa R. Anderson, *Pay-off Effects in Information Cascade Experiments*, 39 ECON. INQUIRY 609 (2001); Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 QUART. J. ECON. 797 (1992); Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151 (1998); Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992); and David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades*, in *THE NEW ECONOMICS OF HUMAN BEHAVIOR* 188 (Mariano Tommasi & Kathryn Ierulli eds., 1995). For an application of the concept of information cascades to law and regulation, see Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

make all these individually implausible claims seem more credible than they actually are.<sup>161</sup> From the standpoint of an interest group seeking to achieve change and to mobilize public support or the support of other interest groups,<sup>162</sup> winning is better than losing publicly, but losing publicly is perhaps still preferable to being ignored.

Once the claim or argument achieves a critical mass of plausibility, the game may be over. Even if individual courts reject the claim, the multiplicity of now-plausible claims may give the issue what is referred to in inside-the-Beltway political jargon as "traction" and in newsroom jargon as "legs." Interestingly, this phenomenon sometimes survives even authoritative rejection of the claim. With respect to the argument that hostile-environment sexual harassment enforcement has serious First Amendment implications, for example, neither the Supreme Court's rejection of this argument in dicta in *R.A.V. v. City of St. Paul*<sup>163</sup> nor the Court's silent dismissal of the same claim in *Harris v. Forklift Systems, Inc.*<sup>164</sup> has slowed the momentum of those who would wage serious First Amendment battle against hostile-environment sexual harassment law.<sup>165</sup> Similarly, decades of judicial rejection of the argument that copyright law must be substantially restricted by the commands of the First Amendment have scarcely discouraged those who urge otherwise; and in some respects the Supreme Court's recent decision in *Eldred v. Ashcroft*<sup>166</sup> can be considered not a defeat, but rather one further step toward the entry of copyright into the domain of the First Amendment: the Supreme Court did grant certiorari, in part to determine "whether . . . the extension of existing and future copyrights violates the First Amendment,"<sup>167</sup> and the seven-Justice majority, as well as Justice Breyer in dissent,<sup>168</sup> acknowledged that the First Amendment was not totally irrelevant.

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<sup>161</sup> Indeed, this dynamic appears to explain the current movement with respect to copyright and the First Amendment, see sources cited *supra* note 1, and the previous movement with respect to First Amendment challenges to "Don't Ask, Don't Tell," see sources cited *supra* note 143.

<sup>162</sup> See LEE ANN BANASZAK, WHY MOVEMENTS SUCCEED OR FAIL: OPPORTUNITY, CULTURE, AND THE STRUGGLE FOR WOMAN SUFFRAGE 222 (1996) ("For social movements opposing the status quo, the development of values and perceptions that encourage confrontation, reform, or challenge of the political system is vital."); COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS (Doug McAdam et al. eds., 1996); SYDNEY TARROW, POWER IN MOVEMENT (1994).

<sup>163</sup> 505 U.S. 377, 389–90 (1992).

<sup>164</sup> 510 U.S. 17 (1993). For discussion of this point, see *supra* note 95.

<sup>165</sup> See sources cited *supra* note 6.

<sup>166</sup> 123 S. Ct. 769 (2003).

<sup>167</sup> *Id.* at 777–78.

<sup>168</sup> See *id.* at 801 (Breyer, J., dissenting) ("The Copyright Clause and the First Amendment seek related objectives — the creation and dissemination of information.").

In order to understand the occasional but curious persistence of First Amendment arguments even after authoritative rejection, we should take seriously the possibility that those who continue to press such claims are being entirely rational. We and they certainly know that courts change their position, and we and they also know that the pressures on the boundaries of the First Amendment are typically outward. As a result, a judicial defeat may be perceived as but a temporary impediment, or perhaps even as a way of attracting additional attention — attention that may itself have litigation advantages. Consider, for example, the existing research on decisions by the Supreme Court to grant certiorari: If it is the case, as several studies have shown, that the very existence of amici increases the probability that certiorari will be granted,<sup>169</sup> then the ability to mobilize the kinds of interest groups — many with small staffs and few resources — who would file amicus briefs is of crucial importance in determining which cases will be heard and which will not, and thus is instrumental in laying the path of constitutional law. And if what this research shows about the certiorari process is relevant to the case selection process and to the setting of judicial agendas generally, it may be that the existence of persistent interests in limitations on copyright and persistent interests in limitations on the use of hostile-environment sexual harassment law may turn out to explain more about the shape of the First Amendment than do the (current) judicial rejections of those claims.

## VII. THE INDICIA OF COVERAGE

Although many of the forces operating on the boundaries of the First Amendment tend to push it increasingly outward, it remains the case that this outward movement is far from infinite and that large areas of communication still remain untouched by the First Amendment. Yet once we have seen that the contours of what the First Amendment does touch are substantially influenced by nondoctrinal factors, we can see as well that similarly nondoctrinal factors may also explain why the First Amendment does not touch what it still does not touch. This is not to say that doctrine is irrelevant in shaping the First Amendment. Far from it. It is to hypothesize, however, that the factors de-

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<sup>169</sup> See Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1110 (1988) ("[T]he presence of amicus curiae briefs [filed prior to the decision on certiorari] significantly and positively increases the chances of the [J]ustices' binding of a case over for full treatment . . ."); *id.* at 1109 ("[T]he decision to review a case ranks as important as — if not more important than — the decision on the merits."). See generally H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717 (1993).

termining what will and what will not be taken as constituting an important First Amendment issue may not be limited to the doctrinal. And it is to hypothesize as well that the explanation for what is ultimately treated as covered by the First Amendment and what ultimately remains uncovered appears to be the result of a highly complex array of factors, some of which are doctrinal but many of which are not. Although these factors may not be susceptible to systematic ranking, a look at the wider domain of inclusions and exclusions from the coverage of the First Amendment reveals a list of the factors that appear to make a difference. More importantly, examination of these factors may help to explain why, even if not inevitably and even if not permanently, so much speech continues to remain *outside* the First Amendment. The First Amendment's magnetism and the consequent opportunism of legal and political actors may explain much of the First Amendment's invasiveness — both the corollary and the consequence of its expansion — but we need to look elsewhere to see why that expansion is not infinite.

A useful place to begin is the criminal law, for this is an area in which numerous verbal acts stand far outside the purview of the First Amendment. In his landmark analysis of the absence of First Amendment coverage in numerous verbal aspects of criminal law — most notably criminal conspiracy and criminal solicitation, but also various other forms of verbal participation in and facilitation of crime — Kent Greenawalt identifies a number of factors that bear upon why this absence occurs.<sup>170</sup> We can identify four issues mentioned by Greenawalt that seem noteworthy and that are especially important for our purposes. Thus, it might be reasonable to interpret Greenawalt as suggesting that when the defendant's speech is public rather than face-to-face, when it is inspired by the speaker's desire for social change rather than for private gain, when it relates to something general rather than to a specific transaction, and when it is normative rather than informational in content, the First Amendment plainly appears to be implicated.<sup>171</sup> Conversely, therefore, when speech is face-to-face, informational, particular, and for private gain, the implication would be that the First Amendment is irrelevant. So when Susan whispers to Max that the combination to the office safe is "22 left, 14 right, 37 left," the ability to prosecute Susan for being an accessory based solely on her verbal behavior, even though it is the communication of accurate information to a willing recipient, is unconstrained by the First Amendment because Susan's words are private, informational, specific, and devoted solely to private gain. But when Fred makes a

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<sup>170</sup> See *supra* note 8.

<sup>171</sup> See GREENAWALT, *supra* note 8, at 676, 742–56.

speech to an audience in Central Park urging his listeners to rob banks in order to finance the revolution, the public, noninformational, and ideological nature of this speech brings the First Amendment — specifically *Brandenburg* — into play.

Although Greenawalt addresses only the criminal law, many of the factors I understand him to be highlighting might also apply in the civil realm, especially with respect to tort liability on the basis of print or broadcast materials.<sup>172</sup> As with criminal conspiracy and criminal solicitation, here again the universe of First Amendment-free liability is huge. Liability for misleading instructions, maps, and formulas, for example, is generally (and silently) understood not to raise First Amendment issues.<sup>173</sup> At the same time, the pressures to hold publications liable for harm they have caused (in the traditional tort sense of that word) is increasing. If we look at a series of cases starting with a California decision involving a sexual assault modeled after one in the television movie *Born Innocent*,<sup>174</sup> and continuing to the recent and ultimately settled litigation regarding the book *Hit Man*,<sup>175</sup> the issues appear especially complex. Yet when we try to unravel this complexity, it turns out that Greenawalt's factors, intended by him to apply only to the criminal law, may be useful but not fully sufficient to provide a complete account of the wide range of decisions of coverage and

<sup>172</sup> For a discussion of the intersection between tort law and the First Amendment in "media harm" cases, see David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002).

<sup>173</sup> See, e.g., *Brocklesby v. United States*, 767 F.2d 1288, 1295 n.9, 1296 (9th Cir. 1985) (mentioning no First Amendment issues with respect to liability for a defective airplane approach procedure chart); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 342–43 (9th Cir. 1980) (same); *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992) (same with regard to a map that mistakenly identified the location of an electric cable); *Rozny v. Marnul*, 250 N.E.2d 656, 658–59 (Ill. 1969) (same with regard to a faulty survey map).

<sup>174</sup> *Olivia N. v. Nat'l Broad. Co.*, 178 Cal. Rptr. 888, (Cal. Ct. App. 1981) (dismissing on First Amendment grounds a suit based on a sexual assault patterned on a similar assault portrayed in a television show).

<sup>175</sup> *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997) (holding that the publisher of an instruction book for hit men was not entitled to protection under the First Amendment), *rev'd* 940 F. Supp. 836 (D. Md. 1996). Although there are lower court cases on the foreseeable misuse of books and other media, see, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (holding that a magazine article on autoerotic asphyxia did not "incite" an adolescent's death); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988) (holding that musical compositions expressing the view that suicide is an acceptable alternative to life were protected by the First Amendment), there remains no Supreme Court case directly on point with respect to the question of tort liability for authors or publishers based on foreseeable misuse of a book, magazine, or broadcast. Because the quantity of such litigation is increasing, those who desire a strong pronouncement from the Supreme Court on the impermissibility of such liability under the First Amendment, see, e.g., *Bruce W. Sanford & Bruce D. Brown, Hit Man's Miss Hit*, 27 N. KY. L. REV. 69 (2000), would want to ensure that the case presenting the issue would be one with more sympathetic facts than the *Hit Man* case, a factor possibly explaining the settlement of that case prior to trial without a petition for certiorari.

noncoverage in the civil context. Covered cases exist for each of the foregoing indicia of noncoverage — as with the covered nonpublic speech in *Givhan v. Western Line Consolidated School District*,<sup>176</sup> the covered informational and instructive speech in *Herceg v. Hustler Magazine, Inc.*,<sup>177</sup> the covered profit-seeking speech in the commercial speech cases, and the covered particular speech in most libel cases. Conversely, noncovered cases exist for each of the supposed indicia of coverage — including the noncovered public speech in securities offerings, the noncovered ideological speech in cases involving ideological solicitation to crime,<sup>178</sup> the noncovered noninformational advocacy in the same cases, and the noncovered general speech in cases involving maps and plans. Although each of the factors is nondispositive and not a strict test for coverage or noncoverage, these examples suggest that the indicia for coverage versus noncoverage may include factors other than those suggested by Greenawalt — very likely nondoctrinal ones. And because questions of noncoverage have rarely been before the courts — courts declining to extend coverage have almost always, as with the sexual harassment cases, done so with virtually no explanation — we are left to speculate about the reasons for noncoverage and to infer the pattern of noncoverage more from the legal system's silence than from its words.

One possible nondoctrinal factor helping to explain judicial determinations or social understandings of noncoverage may be the existence of a sympathetic litigant or class of litigants. Although the history of First Amendment doctrine has been, as is well documented, forged by some “not very nice people”<sup>179</sup> — Clarence Brandenburg,<sup>180</sup> Frank Collin,<sup>181</sup> Jay Near,<sup>182</sup> Robert Welch,<sup>183</sup> and Larry Flynt,<sup>184</sup> for example — the standard account that First Amendment doctrine and coverage have been *built* on a foundation of such undesirables may be

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<sup>176</sup> 439 U.S. 410, 413 (1979) (holding that communications between a public employee and employer do not forfeit First Amendment protections even though held in private). For discussion on this point, see Frederick Schauer, “Private” Speech and the “Private” Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217 (1979).

<sup>177</sup> 814 F.2d 1017 (1978); see *supra* note 175.

<sup>178</sup> See *Berhanu v. Metzger*, 850 P.2d 373, 375–76 (Or. Ct. App. 1993) (affirming the awarding of civil judgment against White Aryan League leader Tom Metzger for instigating a murder for racist ideological reasons).

<sup>179</sup> *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

<sup>180</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

<sup>181</sup> *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

<sup>182</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>183</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>184</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).



a misleading oversimplification.<sup>185</sup> Indeed, it may simply be false.<sup>186</sup> If we look at the cases in which the First Amendment has been taken in a genuinely new direction or has been brought into a novel arena, the chief protagonist has rarely been as unappealing as those on the foregoing list. More often, the litigants at the forefront of genuine First Amendment breakthroughs have been either individually sympathetic or at least have been parties that the courts (and some of the public) were likely to perceive as having been unduly or unfairly persecuted. Not only was libel brought into the First Amendment on the shoulders of the sympathetic litigants in *New York Times Co. v. Sullivan*,<sup>187</sup> but the same phenomenon also exists in other areas of First Amendment expansion. The early commercial speech cases did not involve tobacco and liquor advertisers seeking to employ the best of Madison Avenue techniques in order to increase the market for their products,<sup>188</sup> but generally concerned upstarts frozen out by entrenched professional oligopolies like the "independent" pharmacists in *Virginia Pharmacy*<sup>189</sup> and the established lawyers and law firms in *Bates v. State Bar of Arizona*.<sup>190</sup> The litigants in the breakthrough fighting words cases were people whose primary crime was backtalk to bullying police officers,<sup>191</sup> and even the significant breakthroughs in obscenity law came largely as a consequence of the prosecution in the 1960s of works of plausibly serious literature such as *Lady Chatterley's Lover*<sup>192</sup> and *Memoirs of a Woman of Pleasure*.<sup>193</sup> Although it is true that people you might not invite to lunch have been the major forces in crystallizing and reinforcing First Amendment doctrine, the doctrinal rules seem often to have arisen initially in the context of relatively more sympathetic litigants.<sup>194</sup> By contrast, when arguments for

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<sup>185</sup> Compare RONALD K.L. COLLINS & DAVID M. SKOVER, *THE TRIALS OF LENNY BRUCE: THE FALL AND RISE OF AN AMERICAN ICON* (2002), with Frederick Schauer, *The Heroes of the First Amendment*, 101 MICH. L. REV. 2118 (2003) (book review).

<sup>186</sup> I develop and substantiate this claim in Schauer, *supra* note 185.

<sup>187</sup> 376 U.S. 254 (1964).

<sup>188</sup> See *supra* notes 46–49 and accompanying text.

<sup>189</sup> Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

<sup>190</sup> 433 U.S. 350 (1977).

<sup>191</sup> See *supra* notes 50–53 and accompanying text.

<sup>192</sup> See *Grove Press, Inc. v. Christenberry*, 276 F.2d 433 (2d Cir. 1960).

<sup>193</sup> See *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *People v. Bookcase, Inc.*, 252 N.Y.S.2d 433 (N.Y. 1964).

<sup>194</sup> See Schauer, *supra* note 185, at 2120–21. Implicit in this statement is the assumption that a doctrine or approach created in the context of a sympathetic litigant will be subsequently available in the case of a less sympathetic one. At least in the context of the First Amendment, this assumption appears sound. See Mark J. Richards and Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002) ("[F]reedom from review or electoral accountability does not prevent the [J]ustices themselves from erecting other constraints that shape their decision-making processes and/or outcomes." (citations omitted)).

expanding the boundaries of the First Amendment have been surrounded by unsympathetic litigants or classes of litigants — offerors of securities, telemarketers, price fixers, workplace gropers, con artists, terrorists, racist murderers, and indeed even music pirates, for example — the results have been different,<sup>195</sup> and the borders of the First Amendment have not shifted.

The existence of a link with currently covered First Amendment items or domains may also make a difference. Tort liability for written or printed materials has set off First Amendment alarms when the materials have resembled the traditional mass media, but less so otherwise.<sup>196</sup> Although hostile-environment sexual harassment prohibitions have yet to be overturned in the name of the First Amendment, the shift from categorical rejection to serious consideration of First Amendment arguments occurred in the context of sexual harassment scenarios arising in familiar First Amendment domains — colleges and universities, most notably<sup>197</sup> — or with familiar First Amendment items. Posting a *Playboy* centerfold on a woman worker's locker may not differ conceptually from making a crude sexual suggestion to her, but *Playboy* calls forth First Amendment images in a way that verbal suggestion does not.<sup>198</sup> Even the pathway to commercial speech protection was paved, in part, by newspapers in cases like *Pittsburgh Press Co. v. Human Relations Commission*.<sup>199</sup> And though the First Amendment is rarely invoked when a criminal defendant's motives are inferred from his presence at a meeting at which others have *spoken*, inferring a motive from words in a book that the defendant simply *owns* raises plausible First Amendment claims that might otherwise seem silly.<sup>200</sup>

Possibly even more significant is the presence or absence of an existing and well-entrenched regulatory scheme.<sup>201</sup> Most of the domains in which significant content-based regulation of propositional speech has persisted — unimpeded by the First Amendment — have been domains in which an elaborate regulatory scheme, often managed by

<sup>195</sup> See sources cited *supra* notes 1–6.

<sup>196</sup> See *supra* note 175.

<sup>197</sup> See generally Mary Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEX. L. REV. 1591 (1988).

<sup>198</sup> See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); see also *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Arnold v. City of Seminole*, 614 F. Supp. 853 (E.D. Okla. 1985); *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986).

<sup>199</sup> 413 U.S. 376 (1973) (5–4 decision upholding the application of a sex discrimination ordinance to a daily newspaper).

<sup>200</sup> See *United States v. Giese*, 597 F.2d 1170, 1193–95 (9th Cir. 1979) (allowing a book owned by a defendant to be used as evidence against him).

<sup>201</sup> I am grateful to Vince Blasi for very helpful discussion on this issue.

an agency dedicated to that form of regulation, is already in place.<sup>202</sup> Thus, the well-developed roles of the Securities and Exchange Commission, the National Labor Relations Board, the Federal Trade Commission, the Antitrust Division of the Justice Department, the Office of the Register of Copyrights, the law of evidence, regimes of professional regulation, and quite a few other established mechanisms are likely important not only in regulating speech, but also in raising the stakes for its protection (and thus its nonregulation). It is one thing to make it harder to regulate a certain type of utterance, but another thing entirely to dismantle a longstanding regulatory structure. Because a decision to extend coverage is rarely compelled by existing doctrine or accepted theories, such a decision will always be in some sense discretionary, and that discretion is less likely to be exercised when the stakes (and thus the costs) of doing so are great.

Moreover, the existence of an established regulatory scheme may also produce an environment in which the likely challengers to that scheme have become comfortable with it and have learned how to use it to their advantage.<sup>203</sup> When as a result of the *Lowe*<sup>204</sup> case thousands of publishers were freed from the legal obligation to register with the SEC, only twenty took advantage of the privilege.<sup>205</sup> This fact alone speaks volumes about the extent to which the nominal victims of pervasive content regulation, especially in highly regulated business environments, desire significant change. In many regulatory environments, the more respectable regulated parties — for example, those who offer FDA-approved diet supplements rather than those who sell diet earrings or soap that washes off fat<sup>206</sup> — have a stronger interest in regulation that differentiates them from some of their less reputable competitors than they have in being freed from regulation entirely. And if changes to the existing terrain of coverage and non-coverage require not just one litigant, but something approaching a genuine movement,<sup>207</sup> the failure to understand the dynamics of when those groups exist and of when they are mobilized to seek change will

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<sup>202</sup> Robert Post correctly argues that the First Amendment is generally understood not to cover those instances in which government acts within its managerial capacity. See ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 234–40 (1995). Post is plainly right about this, but my point is a larger one, extending not only to Post's category of governmental controls on internal operations, but also to regulation of activities external to government.

<sup>203</sup> See Neuborne, *supra* note 2, at 62–63 (predicting, correctly, the limited success of the movement to subject securities regulation to the First Amendment).

<sup>204</sup> *Lowe v. SEC*, 472 U.S. 181 (1985).

<sup>205</sup> See *Despite Lowe, Few Advisers Deregister, SEC Official Says*, 17 SEC. REG. & L. REP. (BNA) 2087 (1985); see also 7 LOSS & SELIGMAN, *supra* note 73, at 3400 n.166 (3d ed. 1991).

<sup>206</sup> I am not making this up. See BUREAU OF CONSUMER PROTECTION, FED. TRADE COMM'N, DECEPTION IN WEIGHT-LOSS ADVERTISING WORKSHOP 13 (2003).

<sup>207</sup> See *supra* pp. 1798–99.

result in a deficient understanding of the dynamic forces that determine the shape of the First Amendment.

Finally, we can return to the First Amendment's magnetism and its ability to place some First Amendment issues at the center of public and media attention. As many of the examples here suggest, coverage may often be a function simply of the persistent visibility of First Amendment rhetoric, and noncoverage may conversely be a function of the failure of such rhetoric to take hold. In important respects, public and media attention to First Amendment claims may produce a kind of self-fulfilling prophecy in which First Amendment rhetoric newly applied to topics previously outside the First Amendment creates the visibility that itself helps to bring the entire topic into the domain of the First Amendment. Public and press attention may not have much influence over how courts decide First Amendment cases, but some of the examples discussed in this Article — copyright may be the strongest — suggest that such attention may have considerably more influence over which topics are deemed covered and which are not.

Although all of the factors described above seem tentatively important in determining both the willingness to challenge noncoverage decisions and the receptiveness of courts to those challenges, there are likely to be other factors as well. Still, if we look more systematically than I can here at the universe of examples of coverage and noncoverage, we may discover that the magnetism of the First Amendment plays a large role in determining which noncoverage decisions are challenged. Moreover, the existence of attractive litigants and a hook to traditional First Amendment items or topics, coupled with the non-existence of an established regulatory scheme, may turn out to explain — as much as, if not more than, conventional doctrinal factors — which of those challenges succeed and which do not. Success, however, cannot be measured, at least in the short term, solely in terms of litigation results; ultimately, the most significant factor in determining the shape of the First Amendment may be the ability of advocates to place their First Amendment-sounding claims on the public agenda. When those advocates succeed in doing so, the boundaries of the First Amendment, even as a matter of formal legal doctrine, seem more likely eventually to expand. But when First Amendment issues of novel coverage lack the attributes necessary to put those issues on the larger agenda, the pressures on the boundaries of the First Amendment often appear to be much weaker.

### VIII. CONCLUSION: IN SEARCH OF CONSTITUTIONAL SALIENCE

Superficial appearances to the contrary, this Article's scope is not limited to the First Amendment. It is also about *constitutional salience*, the mysterious phenomenon by which issues become constitu-

tionalized.<sup>208</sup> The phenomenon applies importantly to the First Amendment but pertains to other dimensions of American constitutional law as well. How some but not other equality issues get on the agenda of equal protection scrutiny, for example, is likely a process analogous to that involving freedom of speech and the press, although the precise factors involved are almost certainly different.

What makes the topic of constitutional salience important is precisely the way in which the incentives and dynamics of constitutional litigation are often substantially different from the incentives and dynamics of purely private litigation. Led by George Priest and Benjamin Klein, scholars have made important progress in identifying the economic and incentive factors that determine which private disputes will be contested in court, which court contests will proceed to verdict, and which verdicts will generate appellate opinions.<sup>209</sup> Undergirding this standard model of the selection of disputes for litigation is the notion that parties will not wage a court contest unless they each have a justified belief in the possibility that they might prevail.

When we depart private litigation for public law, however, these factors are likely to be quite different, particularly in the realm of constitutional law. When litigation is less a cost and more a consumption item, as it may be for many incarcerated prisoners (and as it was even more so prior to the enactment of the Prison Litigation Reform Act of 1995<sup>210</sup>), the shape of criminal procedure litigation can no longer be assessed by the standard economic selection model. When visible losses may generate more sympathy than less visible victories, as was the case with the Indianapolis antipornography ordinance,<sup>211</sup> it seems misguided to use likelihood of success as a factor to predict inclination to litigate. And when the conflict reflected in litigation is itself a good way of attracting a press that finds conflict newsworthy and slow progress tedious, bringing a lawsuit may be a valuable public relations strategy independent of the likelihood of success on the merits. Moreover, the complex institutional, bureaucratic, and ideological incentives of ideologically driven claimants and organizations make understand-

<sup>208</sup> On political salience, see KEN KOLLMAN, *OUTSIDE LOBBYING: PUBLIC OPINION AND INTEREST GROUP STRATEGIES* (1998). On the importance and mysteries of salience as a matter of game theory, see Judith Mehta et al., *The Nature of Salience: An Experimental Investigation of Pure Coordination Games*, 84 AM. ECON. REV. 658 (1994); and Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1028 n.74 (1989).

<sup>209</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1 (1984); see also Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

<sup>210</sup> Pub. L. No. 104-34, §§ 801-810, 110 Stat. 1321, 1321-66 to -77 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.). On the effect of the Act on the incentives for prisoner litigation, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

<sup>211</sup> See *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001, *reh'g denied mem.*, 475 U.S. 1132 (1986).

ing the initiation and pressing of constitutional litigation a complex affair scarcely explained by the economic selection model.

Political scientists, historians, and legal academics have contributed significantly to our understanding of the role of social movements in the initiation of litigation<sup>212</sup> and, conversely, to our knowledge of the role of litigation in fueling social movements. Undoubtedly, some of that learning can be applied to understand the growth of the First Amendment's boundaries. But the special magnetic effect of the First Amendment not only makes the First Amendment an example of what we know about social movements and constitutional litigation, but also underscores the unique dynamics of the First Amendment itself. President Clinton did not suggest that the Democratic position on the Census be couched in due process or even in equal protection terms; the opponents of "Don't Ask, Don't Tell" did not rely as much on the Fifth Amendment self-incrimination claim as they did on the First Amendment free speech claim; and economic libertarians now, unlike in the 1930s, gravitate to the First Amendment rather than to the Due Process or Contracts Clauses.<sup>213</sup>

In all of these instances, the First Amendment has emerged, formal doctrine notwithstanding, as the argument of choice both inside and outside the legal arena; and those who have chosen this strategy can hardly be said to be misguided. They have identified and seized upon the First Amendment's rhetorical place in American political and legal argument, and have sought, hardly irrationally, to use this phenomenon in support of their causes. When we can fully explain both the causes and the consequences of this phenomenon, and thus when we fully appreciate the political psychology as well as the doctrine of the First Amendment, we will have made a large step toward understanding the unique role that the First Amendment has come to play in American constitutional politics and toward comprehending the way in which that role, as much as the doctrine, has determined the contours of the First Amendment itself.

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<sup>212</sup> See, e.g., *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* (Howard Gillman & Cornell Clayton eds., 1999).

<sup>213</sup> More recently, a student note in the *Columbia Law Review*, Marla Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202 (2003), addressing the contested question whether courts may prohibit the citation of unpublished opinions, formulated its argument entirely in free speech terms, an argument that is simultaneously doctrinally tenuous and politically shrewd.

The case that spawned the controversy was *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000). For an overview of the controversy, see Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002).