EQUAL SPEECH PROTECTION

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Political speech is not special. No type of speech is. First Amendment doctrine ubiquitously claims to value speech on a hierarchy, with political speech occupying the highest and most-protected position, followed by commercial speech and speech on private matters, with low-value speech on the bottom, least-protected rung. This hierarchy is a myth. The true but hidden framework of free speech law is actually one of equal speech protection. All speech, including political speech, receives comparable protection—and that level of protection is quite moderate across the board. Specifically, the equal protection speech receives permits the state to regulate speech in order to protect a safe and informed democratic discourse. This Article explains the origins and bases of the hierarchy myth, the reasons why equal speech protection supplants the hierarchy model, and the consequences of the myth's persistence despite its failure to guide free speech doctrine.

Dismantling the myth that the First Amendment embraces a hierarchy of speech protection is critical at this precarious moment in the development of free speech law, when regulating speech—of all kinds—is essential to fostering a healthy public sphere. By excavating a robust tradition of equal and moderate speech protection out from under the shadow of the hierarchy myth, this Article recovers the hidden "social democratic theory" of speech protection—a theory that is singularly suited to addressing the modern speech challenges raised by an ever-expanding digital economy and dangerously toxic political speech environment.

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INTRODUCTION

The First Amendment's hierarchy of protection for different types of speech is a myth. The doctrine has long purported to place political speech at the highest and most protected position in this hierarchy, followed by commercial speech and speech on purely private matters, with "low-

value" speech like obscenity and fighting words on its bottom rung.[1] This basic hierarchy, however, is a doctrinal fiction. As a theory, it does not accurately describe how the First Amendment protects speech; as a doctrine, it does not guide the Supreme Court's application of free speech law. The true but hidden framework of modern free speech law is one of equal speech protection. Through a holistic reevaluation of the Supreme Court's free speech jurisprudence, this Article reveals that the First Amendment grants different types of speech comparable levels of protection *and* that this level of protection is altogether quite moderate—including for political speech. The most salient and startling consequence of exposing the hierarchy as a myth, therefore, is to uncover the constitutionality of restricting dangerous political speech to safeguard

[1] Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2358 (2020) (Breyer, J., concurring in part and dissenting in part) ("This Court's cases have provided heightened judicial protection for political speech, public forums, and the expression of all viewpoints on any given issue."); Rucho v. Common Cause, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting) ("[The First] Amendment gives its greatest protection to political beliefs, speech, and association."); Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1955 (2018) (placing criticism of government officials "high in the hierarchy of First Amendment values"); Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("'[N]ot all speech is of equal First Amendment importance,' however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.") (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)); Holder v. Humanitarian L. Project, 561 U.S. 1, 42 (2010) (Breyer, J., dissenting) ("That this speech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection is elementary." (emphasis omitted)); R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly 'unprotected,' it certainly does not follow that fighting words and obscenity receive the same sort of protection afforded core political speech." (emphasis omitted)); Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("[W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . ."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) (holding that the differences between commercial speech and "other varieties" of speech mean "a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired"); Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) ("The First Amendment affords the broadest protection to such political expression . . . ."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 271–72 (1971) ("[The First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

important public interests—namely, the protection of democratic governance.

The widely accepted view that political speech garners an exceptionally high level of constitutional protection is flawed in two ways. First, political speech does not enjoy an especially robust level of protection from state interference. The *vast majority* of political speech is routinely subject to significant government regulation or enjoys no First Amendment protection at all—this includes political speech on public and most private property, election speech, expressive political conduct, political speech crimes, and the speech of millions of government employees, students, and prisoners on matters of public importance. Second, the First Amendment does not protect political speech to a greater degree than it does non-political speech like cultural, commercial, or "low-value" speech. Rather, all speech receives essentially equal protection, notwithstanding judicial platitudes to the contrary.

This equal level of protection that all speech receives is best described as "moderate." It permits, in effect, courts to moderate speech rights to preserve democratic interests. From a doctrinal standpoint, moderate protection looks a lot like intermediate scrutiny applied to all speech. But "intermediate" does not quite capture what the Supreme Court is doing when it extends moderate protection to speech. The Court is not simply charting a middle road between strict scrutiny and rational basis review, nor is it conducting a pure balancing inquiry or employing proportionality review to speech regulations. Instead, it is applying a unique, substantive standard that permits reasonable limits on speech that are necessary for democracy to function. Under this substantive standard, the Court largely defers to the government on whether a regulation is reasonable and focuses, implicitly, on whether it is necessary to protect democratic governance. This inquiry takes two forms: it can focus on safeguarding effective *governance* or it can focus on protecting *democratic* participation. The first requires subordinating speech rights to public order and safety; the latter requires doing so to ensure a healthy and informed public discourse. The result is a doctrine that equally permits regulations on any type of speech for these purposes, in direct contradiction to the hierarchical model of speech protection nominally embraced by the Court throughout its First Amendment caselaw.

The hierarchy of speech protection is no more than a doctrinal myth. The concept of myth is integral to understanding the hierarchy model. Myths are widely held beliefs that are, at once, invented traditions and

fictitious narratives.[2] The hierarchy of speech protection embodies both elements of myth: it was invented out of whole cloth late in the development of free speech jurisprudence and has since persisted as a false narrative about how the First Amendment protects speech. Like most myths, the hierarchy is real and not real; it is pretend in that it does not control the outcome of cases, but it is powerful in that it continues to propagate widely held, but mistaken, assumptions about free speech law.[3]

This acoustic separation between myth and law has reached a critical juncture. The digital age has transformed large swaths of human behavior into speech, bringing more and more activity within the First Amendment's protective sphere and shading distinctions between types of speech. At the same time, the quantity of social and political speech that poses serious risks to democracy, the economy, and a just society has exploded. These developments demand regulations on speech, and yet the hierarchy of speech protection claims to immunize just such speech from regulation. Exposing the hierarchy as a doctrinal myth that does not reflect the law or theory of free speech protection thus illuminates the constitutional paths forward for regulating speech that risks serious social, political, and commercial harms.

Unmasking this myth has particular ramifications for the regulation of political speech. For decades the Supreme Court has perpetuated the narrative that there is a gradation of speech protection and that political speech receives the utmost protection from state interference. But its rhetoric does not match its holdings. A close examination of the protection afforded to political speech, both in the absolute and relative to other types of speech, shows that this supposed cornerstone of First Amendment law is more smoke and mirror than substantive rule. Indeed, the ruse that political speech receives near-absolute protection is perhaps the greatest misdirection accomplished by the hierarchy myth. In reality,

[2] I use the phrase "invented tradition" much as Genevieve Lakier recently employed the phrase to refer to a novel constitutional practice that is "justified on the basis of an alleged, but ultimately fictitious, continuity with the past." The Invention of Low-Value Speech, 128 Harv. L. Rev. 2166, 2168 (2015) (citation omitted). As Lakier notes, the phrase was coined by historian Eric Hobsbawm, who defined the phenomenon as "responses to novel situations which take the form of reference to old situations." Id. (quoting Eric Hobsbawm, Introduction: Inventing Traditions, *in* The Invention of Tradition 1, 2 (Eric Hobsbawm & Terence Ranger eds., Canto ed. 1992)).

[3] See infra Section I.D (explaining that the myth influences popular culture, lower court decisions, and many scholarly accounts of First Amendment doctrine).

political speech receives a moderate level of judicial protection, equal to that received by all other types of speech.

This tradition of extending equal and moderate protection to all speech works well by allowing the Court to moderate free speech rights in the interest of protecting democratic governance. But its potential is under-realized and increasingly at risk because it remains hidden behind the myth of the hierarchy of speech protection. By dismantling the myth, scholars, legislators, and judges alike can begin to reconceptualize the limits, and the possibilities, of speech regulations—including and especially political speech regulations. The advantages of doing so are manifold: it would put on the table some presumed off-the-wall restrictions on false and malicious political speech,[4] and it would serve to democratize speech protection by encouraging legislatures to claim a greater share of the governing responsibility for protecting free speech.

This Article lays bare the hierarchy myth through a comprehensive retelling of the Supreme Court's free speech jurisprudence. It explains why the hierarchy was invented, why it did not take hold doctrinally, and why it has nonetheless persisted rhetorically. In brief, the Court invented the hierarchy in two steps over a pair of cases in 1976: *Buckley v. Valeo* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[5] First, in *Buckley*, the Court shifted the role of political speech as *core* to the First Amendment to a new position as the *highest* value of the Amendment. Then, in *Virginia Pharmacy*, the Court established a counterposing point on this newly conceived spectrum of speech by extending a supposedly lower level of protection to commercial speech. What appeared in these cases as small rhetorical steps actually represented a massive doctrinal leap.

The reason for this move inheres in the subject matter of the two cases in which it appears. *Buckley* and *Virginia Pharmacy* extended First Amendment protection to campaign financing and to commercial speech, respectively, and represented a tipping point in the post-New Deal explosion of First Amendment coverage. Prior to these cases, the Court did not purport to extend different levels of protection to different types of protected speech. But the Court had spent the last forty years

[4] See Jack M. Balkin, Constitutional Hardball and Constitutional Crises, 26 Quinnipiac L. Rev. 579, 579 (2008) [hereinafter Balkin, Constitutional Hardball] (understanding that the conventions governing what legal claims are plausible "and which are 'off the wall'" are influenced by "changing political, social, and historical conditions").

[5] 424 U.S. 1, 14 (1976); 425 U.S. 748, 771 n.24 (1976); infra Section I.A.

increasingly expanding equal First Amendment protection to speech beyond core political speech—both by deepening coverage to semi-political speech and widening coverage to other types of speech—so that by 1976 the doctrine was sinking under its own weight and deeply in need of an organizing framework. It was in this novel context that the Court wholesale invented a hierarchy of speech protection, ordered according to the speech's First Amendment value, out of what had been a diverse pool of equally protected speech representing various First Amendment values.[6]

Lacking historical basis and in tension with other foundational principles of free speech law, the hierarchy failed to take root and guide the doctrine. Since its invention, the Supreme Court has continued to extend a quite equal level of protection to *all* covered speech. This equalization of speech protection results from two overriding trends: first, the Court has continued to grant political speech mostly moderate, not absolute, protection, permitting ample government regulation to facilitate the safe exchange of political ideas. In recent decades, the Court has reliably reaffirmed, or in some cases even lessened, this moderate level of protection for political speech, contrary to prevailing criticisms.[7] Second, the Court has consistently elevated protection for non-political speech to the same level as protection for political speech immediately or soon after recognizing that speech as covered by the First Amendment.[8]

These two trends—maintaining moderate protection for political speech and extending the same level of protection to non-political speech—are themselves the inevitable consequence of applying the patchwork of core doctrines that comprise First Amendment law. These doctrines consist of a series of safety valves that funnel most political speech restrictions to regulation-accommodating corners of the

[6] The reasons undergirding the hierarchy's invention are discussed *infra* Section I.A.

[7] See, e.g., infra notes 9–11 and accompanying text; Adam Liptak, Court's Free-Speech Expansion Has Far-Reaching Consequences, N.Y. Times (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/KX84-ALL5] (documenting the pervasive view among scholars that the Court's recent free speech jurisprudence is sweeping and expansionist); Thomas B. Edsall, Have Trump's Lies Wrecked Free Speech?, N.Y. Times (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/opinion/trump-lies-free-speech.html [https://perma.cc/ZA75-NT3S] (collecting opinions of numerous legal academics on the maximalist and far-reaching state of First Amendment protections, especially for political speech).

[8] A full explanation of these two trends follows *infra* Sections I.B and I.C.

jurisprudential landscape, as well as a series of neutral principles that resist drawing distinctions between types of speech.[9] Together, these doctrines exert simultaneous pressure to ratchet down protection for political speech and ratchet up protection for non-political speech to the same level, all but ensuring that a hierarchy of speech protection could never fully develop.

Scholars have previously pinpointed the 1970s as the moment in which free speech doctrine became distorted in a number of significant ways. For example, scholars have identified how the free speech cases of that decade transformed the doctrine into one that vindicates corporate speech rights, undermines economic regulations, and subordinates the interests of citizens.[10] This Article identifies another doctrinal innovation that occurred in this period: the Court's invention of a hierarchy of speech protection and the ultimate failure of this new framework to guide free speech law. This Article thus exposes the fallacy in the doctrinal truism that political speech garners especially high protection, both in the absolute and relative to other types of speech.

In so doing, this Article resituates the current scholarship on the Court's recent appetite for overturning commercial regulations under the First Amendment—a trend commonly termed the "Lochnerization" of the First Amendment. The origins and consequences of this trend have been widely discussed in recent years, almost entirely through a critical lens.[11] This Article offers a novel understanding of how Lochnerization actually fits quite neatly, and in some ways beneficially, within the far larger trend of maintaining equal speech protection amongst varying types of speech. Where the Lochnerization sub-genre of First Amendment critique has

[9] As discussed *infra* Sections I.B and I.C, these doctrines include, among others the Article will discuss: the time, place, and manner doctrine, *Anderson-Burdick* balancing, the *O'Brien* standard, the rule against viewpoint- and content-based laws, and the principle of common law analogical reasoning.

[10] See, e.g., Morgan N. Weiland, Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition, 69 Stan. L. Rev. 1389, 1393, 1396 (2017); Robert Post & Amanda Shanor, Adam Smith's First Amendment, 128 Harv. L. Rev. F. 165, 167–72 (2015).

[11] See, e.g., Jeremy K. Kessler & David E. Pozen, The Search for an Egalitarian First Amendment, 118 Colum. L. Rev. 1953, 1962 (2018); Jeremy K. Kessler, The Early Years of First Amendment Lochnerism, 116 Colum. L. Rev. 1915, 1917 (2016); Amanda Shanor, The New *Lochner*, 2016 Wis. L. Rev. 133, 135–36; Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1207–09 (2015); Elizabeth Sepper, Free Exercise Lochnerism, 115 Colum. L. Rev. 1453, 1455 (2015).

focused narrowly on the doctrinal developments (or distortions) of commercial speech law, this Article makes clear that First Amendment Lochnerization is actually one piece of a larger doctrinal framework that blurs distinctions between types of speech and renders restrictions on all speech subject to moderate judicial protection. Specifically, Lochnerization is one speech protection equalization tool among many that functions as a means of ratcheting up protection for commercial speech to the same level of protection enjoyed by all other types of speech.[12]

Finally, unlike the overwhelming majority of recent literature on the trajectory of First Amendment doctrine,[13] the doctrinal manipulation this Article identifies has the potential to be normatively valuable. Recognizing that the hierarchy of speech protection and its attendant truism that political speech garners near-absolute protection are doctrinal myths clarifies the constitutionality of speech regulations aimed at protecting a safe and healthy political discourse. It also excavates the robust, but hidden, tradition of moderate and equal speech protection, which this Article argues serves as a unifying "social democratic theory" of free speech law.[14]

But it is important from the beginning to sharpen this Article's assertion that the hierarchy of speech protection is a myth. The myth I describe is a doctrinal myth—it is a legal principle that operates rhetorically rather than analytically, meaning it has little descriptive value for explaining the landscape of speech protection and little influence on how the Supreme Court decides free speech cases. This is not to say that the myth does not do any work. Most myths persist precisely because they have social, political, and psychological power. The myth of the hierarchy of speech protection is no different. It has bolstered the Court's power and

[12] See infra Subsection I.C.1.

[13] See, e.g., Burt Neuborne, Madison's Music: On Reading the First Amendment (2015); Richard L. Hasen, Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections (2016); Laurence Tribe & Joshua Matz, Uncertain Justice: The Roberts Court and the Constitution 88–153 (2014); Steven H. Shiffrin, What's Wrong with the First Amendment? (2016); Post & Shanor, supra note 10; Lee Epstein, William M. Landes & Richard A. Posner, How Business Fares in the Supreme Court, 97 Minn. L. Rev. 1431 (2013); Steven J. Heyman, The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence, 117 W. Va. L. Rev. 231 (2014).

[14] See infra Section II.B.

reputation as a guardian of speech rights and fostered a deeply ingrained legal and popular culture of speech tolerance that shapes law and policy decisions in legislatures and boardrooms every day.[15] The myth serves the Court and free speech advocates and is also embraced by progressive scholars attempting in good faith to stem the constitutional inoculation of commercial activity from regulation. As this Article shows, however, the hierarchy myth is self-defeating and precisely the wrong doctrinal framework to accomplish progressive constitutional ends.

This Article also does not suggest that all speech *regulations* are equally permissible. Viewpoint- and content-based regulations, for example, are roundly prohibited. But such laws are equally prohibited regardless of the underlying type of speech at issue. These rules are therefore orthogonal to this Article's central observation that all speech—political and non-political alike—receives equal protection from regulation. While there are only a few ways government may not regulate any type of speech, there are many ways it can regulate all types of speech. In declaring the hierarchy of speech protection a myth, this Article is chiefly concerned with showing that, as a holistic framework for understanding speech protection under the First Amendment, the hierarchy is an invented tradition disguising a reality of routine government supervision of speech boundaries.

Part I provides a descriptive account of the invention of the hierarchy myth and its lack of substantive force in shaping the doctrine since its creation. Section I.A briefly chronicles the post-New Deal trajectory of First Amendment expansionism from the 1930s through the mid-1970s and shows the absence of gradations in the level of protection afforded to covered speech in this period.[16] The remainder of Part I then details how the newly invented tradition of a hierarchy of speech protection never amounted to anything more than a doctrinal truism. It documents how all types of speech are treated at essentially an equal, moderate level of protection. First, Section I.B catalogues the numerous ways the doctrine regularly, and uncontroversially, permits restrictions on political speech

[15] See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1789–90 (2004) (explaining the cultural "magnetism" of the First Amendment).

[16] First Amendment "coverage" refers to whether a type of speech comes within the protected ambit of the First Amendment at all, whereas First Amendment "protection" refers to whether the speech is ultimately safeguarded from government regulation. Thus, prior to 1976, the question of whether speech was covered was largely synonymous with the question of whether speech was protected. See infra notes 52–53 and accompanying text.

that are necessary for democratic government to function. It illuminates that *most* political speech is actually highly regulable under this standard, directly refuting a core tenet of the hierarchy framework that political speech garners strict constitutional protection. Section I.C then shows how the hierarchy of speech protection is also false for purporting to provide sequentially lesser protection to non-political speech. It explains that most non-political speech garners the same level of protection as political speech under various speech-specific doctrines and generally applicable rules of free speech law that have the effect of ratcheting up protection for non-political speech above what the rhetoric of the hierarchy otherwise suggests. Finally, Section I.D offers possible explanations for why the hierarchy myth has persisted and what consequences it has had on speech protection.

Part II takes up the normative question of whether an equal speech protection doctrine is desirable. It posits that equalizing speech protection—and equalizing it at a level that permits significant though specific legislative control over speech—is ultimately beneficial for maintaining a healthy speech environment and thus a healthy democracy. An equal speech framework is superior to any purported hierarchy of speech model for essentially two reasons, discussed in Sections II.A and II.B respectively. First, there is little practical or constitutional difference between political and non-political speech, making any attempt to distinguish speech by type a doomed and unwise task. Second, acknowledging that political speech is, and should be, afforded a moderate level of protection will foster a more democratic, egalitarian, and resilient First Amendment. It would invite legal reforms aimed at safeguarding the stability and vitality of our public discourse, including reforms addressing the proliferation of disinformation and toxic speech.

Recent scholarship has gone far to document the undemocratic and inegalitarian effects of current First Amendment doctrine[17] but has struggled to identify a constitutionally compelling alternative.[18] This

[17] See, e.g., Kessler & Pozen, supra note 11, at 1959–60; Leslie Kendrick, Another First Amendment, 118 Colum. L. Rev. 2095, 2098–2100 (2018); Genevieve Lakier, Imagining an Antisubordinating First Amendment, 118 Colum. L. Rev. 2117, 2118 (2018); Jedediah Purdy, Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment, 118 Colum. L. Rev. 2161, 2162 (2018).

[18] Kessler & Pozen, supra note 11, at 1960; Jack M. Balkin, Cultural Democracy and the First Amendment, 110 Nw. U. L. Rev. 1053, 1072 (2016) [hereinafter Balkin, Cultural Democracy] ("[T]he challenge for liberty theorists has always been to give an account of

Article does just that by focusing on reinterpreting the doctrine, as opposed to reinventing it. Properly understood, our current free speech doctrine is one of equal speech protection; and properly applied, this doctrine has enormous potential to produce egalitarian outcomes in which the vast majority of average citizens' public discourse and democratic participation is affirmatively protected by legislatures from interference and manipulation. Thus, while doctrinal recitations by courts and commentators have long described a hierarchy of greater and lesser protected speech under the First Amendment, I show, by exposing its historical invention and its negligible impact on actual judicial decisions, how the hierarchical First Amendment is a sham. Instead, in origin, purpose, and application, the First Amendment prescribes equal treatment of varied kinds of speech, and making this clear can sharpen and improve advocacy, decisions, and responses to calls for reform.

I. THE HIERARCHY MYTH: POLITICAL SPEECH PROTECTION AND ITS RELATION TO THE PROTECTION OF OTHER SPEECH

The myth of the hierarchy of speech protection comprises two general principles: that political speech receives the upmost protection from government regulation and that other speech receives progressively less protection in accordance with its constitutional value for enhancing public discourse. This Part documents how both propositions are false. Political speech roundly receives moderate levels of protection from government interference; and non-political speech, such as commercial, cultural, and "low-value" speech, receives comparably equal levels of protection as political speech. Beginning with why the hierarchy model was adopted and then showing how it does not accurately describe the law of free speech protection, this Part then concludes by exploring why the

freedom of speech that explains why it should have special constitutional value that traditional economic freedoms do not enjoy."). In the early 1990s, scholars including Owen Fiss, Cass Sunstein, and Robert Post began reviving the collectivist theory of free speech in the spirit of Alexander Meiklejohn, understanding the essential objective of the First Amendment to be the promotion of a rich and valuable public debate and democratic deliberation. This progressive effort to reform First Amendment doctrine may have been, counterintuitively, counterproductive. By elevating democratic deliberation to the apex of First Amendment protection, these efforts reinforced a conception of a tiered system of protection that, ultimately, kept courts in the driver's seat of guarding the political process against political reforms. See infra Section II.B.

hierarchy failed to gain traction and what the implications are of its persistence as a doctrinal myth.

A. Inventing a Tradition

The hierarchy of speech protection myth was invented in 1976, but its roots are grounded in the free speech revolution of the 1930s—specifically in that era's newly adopted rationale for extending heightened judicial protection to political speech as necessary to safeguard the democratic process.[19] The history of political speech protection prior to this period is rich and complex and quite beyond the scope of this Article, except to note that nineteenth- and early twentieth-century Supreme Court caselaw largely adhered to a tradition of extending scant judicial protection to all speech, both political and non-political alike.[20] The general, long-standing rule was that the government could broadly suppress speech when it rationally threatened public harm but could not enjoin such speech in advance except in extreme circumstances.[21] To the extent there were gradations in the level of protection different types of speech received, that was more a matter of legislative prerogative than judicial mandate.[22]

Then, during the New Deal, a perfect storm of political dynamics, legal quagmires over the framework for protecting rights, and personnel changes on the Supreme Court ushered in a new era of constitutional jurisprudence that transformed judicial protection for the freedom of speech. The Court abandoned its strict defense of economic liberty against social and commercial legislation on the basis that this exercise of judicial review was too undemocratic. Part and parcel to this transformation was a simultaneous move to heighten judicial protection for political rights to ensure a well-functioning legislative process. The First Amendment in

[19] See Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 958–60, 973 (1919) (developing the theory that a system of free expression is a cornerstone of the democratic process and thus vital to the survival of a democratic society); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (adopting Chafee's theory that the free trade in ideas is integral to a democratic society); Stromberg v. California, 283 U.S. 359, 369 (1931); Near v. Minnesota, 283 U.S. 697, 718 (1931); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 38–39 (1948).

[20] See, e.g., Lakier, supra note 2, at 2179–92.

[21] Id. at 2195; see also Schenck v. United States., 249 U.S. 47, 51–52 (1919) (replacing the previous restraints test with the new clear and present danger test).

[22] Lakier, supra note 2, at 2196.

particular took on a preferred position in the ordering of constitutional rights that entitled it to greater judicial protection on the theory that such protection is necessary to safeguard the role of political speech in the political process.

This theory of heightened protection for speech based on the democratic value of political speech launched a decades-long expansion of First Amendment protection. As this Section details in brief, the Court subsequently recognized more and more speech as politically valuable, and therefore as protected, which had the effect of collapsing distinctions between types of speech and creating increasing pressure to decrease the overall level of protection for speech. In 1976, this pressure came to a head. The solution the Court contrived was to introduce a hierarchical system of speech protection that would indeed grant political speech heightened judicial protection, in line with the "preferred position" theory of free speech, without subjecting to strict judicial scrutiny regulations on other types of speech more properly left to democratic control. To understand the invention of this hierarchy, and why it rested on such unstable footing, it is first necessary to understand the doctrinal grounds on which it was built.

A sea change in modern free speech law began gradually in the 1930s and picked up steam in the 1940s. The nature of the change occurred on two interconnected fronts: the Court ratcheted up protection for political speech and at the same time expanded the scope of political speech entitled to that protection.[23] First, the Court increased protection for political speech by requiring a showing of clear and imminent danger to punish it, rejecting its older precedents that allowed the state to punish speech that risked only amorphous or remote harm to the state.[24] Additionally, the Court began broadening the scope of political speech

[23] This change did not happen in a vacuum but was spurred on by calculated strategy decisions from civil liberties advocates seeking to achieve legal victories through the courts. See generally Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise (2016) (documenting how labor, business, and advocacy lawyers worked to make judicial enforcement of the First Amendment central to American democracy); Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (1991) (detailing how the civil libertarian strand of free speech law, championed by progressive jurist Zechariah Chafee, dominated the post-WWI period of free speech development).

[24] See Herndon v. Lowry, 301 U.S. 242, 258–59 (1937) (rejecting government's authority to punish a communist organizer for insurrection); Yates v. United States, 354 U.S. 298, 320–22 (1957) (adopting the clear and present danger test with an imminence requirement).

entitled to this new level of protection by accepting that government must tolerate a larger swath of speech—from subversive political speech to tangentially political speech—in order to create sufficient breathing room for speech that promotes the First Amendment values of democratic governance, self-expression, and the advancement of truth.[25] Beginning with *Stromberg v. California*, one of the first cases upholding the First Amendment speech right against government punishment, the Court recognized the display of a political "sign, symbol, or emblem" as protected political speech.[26] The recognition of non-verbal and non-textual symbols as protected speech marked a first step down a slippery slope of expanding protection to more and more kinds of political expression. Within less than a decade, the inertia of this trend rapidly drove First Amendment coverage beyond pure political speech to encompass speech on "all matters of public concern."[27] By the first half of the 1940s, the Court protected labor picketing,[28] religious solicitation, offensive religious proselytizing,[29] refusing to salute the flag in public schools,[30] and door-to-door peddling[31] as speech akin to political expression in constitutional value and thus entitled to equal constitutional protection.

These advancements in speech protection did not, however, grant political speech anything close to absolutist protection. Even as the Court expanded the First Amendment's reach, it just as often reaffirmed the government's ample authority and discretion to regulate speech for public safety and orderly participation in democratic discourse. For example, the Court upheld the government's power to prohibit a small, single-file

[25] Stromberg v. California, 283 U.S. 359, 369 (1931) (protecting the display of political signs and symbols "to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means"); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (protecting labor picketing as an "issue[] about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period").

[26] 283 U.S. at 369.

[27] *Thornhill*, 310 U.S. at 101–02.

[28] Id. at 105 (labor picketing); Am. Fed'n of Lab. v. Swing, 312 U.S. 321, 325–26 (1941) (labor picketing by non-employees).

[29] Cantwell v. Connecticut, 310 U.S. 296, 310–11 (1940) (applying same clear and present danger test for political speech to religious expression).

[30] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[31] Murdock v. Pennsylvania, 319 U.S. 105, 110–11 (1943); see also Kessler, supra note 11, at 1956–76 (discussing the series of peddling tax cases in 1942 and 1943).

religious and political march on a public sidewalk;[32] offensive political speech in public against a government official;[33] and the use of a sound truck to comment on a local labor dispute.[34] Thus, while the Court undoubtably ratcheted up protection for political speech in this period above its pre-New Deal level, it nonetheless left considerable room for government regulation of protected speech.

What emerged from the 1930s–1940s free speech revolution, therefore, was a three-dimensional transformation that increased protection for political speech, extended this same protection further and further beyond core political speech, but also preserved significant government authority to police deleterious speech, regardless of its political nature.

This trajectory continued unabated for the next several decades, leading the Court to extend equal First Amendment protection to an ever-increasing amount of artistic, religious, technological, profane, libelous, and obscene speech, often by obfuscating the distinction between these types of speech and political speech. First, in the 1950s, the Court extended protection to a large and diverse amount of speech by significantly narrowing the categories of unprotected speech. For example, in *Beauharnais v. Illinois*, the Court upheld the crime of group libel but re-characterized the category narrowly as only libel likely to cause violence and disorder.[35] It did the same for the categories of profanity,[36] blasphemy,[37] and obscenity.[38] In all these cases, the underlying rationale was that "ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"[39] are nonetheless protected because they may advance "truth, science, morality, and arts in general, [and the] diffusion of liberal sentiments on the administration of Government."[40] Speech's political *potential*, therefore, protected it as equal to political speech.

[32] Cox v. New Hampshire, 312 U.S. 569, 572, 576 (1941).
[33] Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 574 (1942).
[34] Kovacs v. Cooper, 336 U.S. 77, 89 (1949).
[35] 343 U.S. 250, 254, 258 (1952).
[36] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952).
[37] Id.
[38] Roth v. United States, 354 U.S. 476, 487–89 (1957).
[39] Id. at 484.
[40] Id. (quoting 1 Journals of the Continental Congress 108 (1774)).

The trend of simultaneously granting heightened protection to core political speech while stretching the reach of that protection further and further afield reached its apex in the 1960s and early 1970s. In those years, the Court doubled down on its protection for political speech in more provocative contexts, including political assemblies that obstruct public streets,[41] political speech by students in public school,[42] and lewd and profane political speech.[43] It simultaneously recognized ever more polemical and scandalous speech as socially and politically valuable, and thus entitled it to an equal level of protection. These were the years in which the category of unprotected obscenity all but vanished,[44] defamation acquired new constitutional armor,[45] threatening and violent speech was shielded from prosecution,[46] and even the publication of classified national security information withstood government interference.[47] So great was the explosion of free speech expansionism that the strained ties binding political speech to all these other types of speech finally snapped, and the Court ultimately dropped the pretense of protecting non-political speech as a means of protecting potentially political speech: "[T]he First Amendment does not protect speech and

[41] Cox v. Louisiana, 379 U.S. 536, 558 (1965).

[42] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[43] Cohen v. California, 403 U.S. 15, 26 (1971); Papish v. Bd. of Curators, 410 U.S. 667, 671 (1973) (per curiam).

[44] See, e.g., A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass. (Memoirs v. Massachusetts), 383 U.S. 413, 419 (1966) (plurality opinion); Redrup v. New York, 386 U.S. 767, 770 (1967) (per curiam); Miller v. California, 413 U.S. 15, 24 (1973) (cabining unprotected obscenity only to works which "depict or describe sexual conduct" and "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value"); see also John Fee, The Pornographic Secondary Effects Doctrine, 60 Ala. L. Rev. 291, 297 (2009) ("[B]y recognizing some First Amendment protection for non-obscene pornography, and by narrowing the definition of obscenity so as to exclude most pornography for practical purposes, the Supreme Court had raised mainstream pornography to the same status as political speech, subject to all the same First Amendment rules.").

[45] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (requiring a heightened standard of actual malice to sustain a claim of defamation against the press for false statements).

[46] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (protecting speech advocating for the use of force or law violation so long as it was not "directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[47] N.Y. Times Co. v. United States (The Pentagon Papers), 403 U.S. 713, 714 (1971) (per curiam).

assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'"[48]

Still, the government retained ample authority to regulate destructive speech throughout these decades. Communist political activity, in particular, continued to be lawfully inhibited when it threatened interference with state and economic security.[49] New or socially detrimental forms of speech also remained subject to a meaningful degree of government control in order to balance speech rights, public welfare, and the unknown dangers of new forms of speech technology.[50] And more radical political activity, including certain civil rights demonstrations, was denied First Amendment protection in favor of the government's interest in maintaining social order.[51] The most accurate summation of the

[48] United Mine Workers v. Ill. Bar Ass'n, 389 U. S. 217, 223 (1967) (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)); see also Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 814 (1961) (Frankfurter, J., dissenting) ("The notion that economic and political concerns are separable is pre-Victorian.").

[49] Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 411–12 (1950) (upholding the Taft-Hartley Act's requirement that labor union leaders make an anti-communist oath); Dennis v. United States, 341 U.S. 494, 516–17 (1951) (upholding a Smith Act conviction for active advocacy of the overthrow of the government by communist leaders); Adler v. Bd. of Educ., 342 U.S. 485, 490, 496 (1952) (upholding a New York law preventing members of the Communist Party from teaching in public schools); Barenblatt v. United States, 360 U.S. 109, 134 (1959) (declining to protect the refusal to give congressional testimony to the House Committee on Un-American Activities); Uphaus v. Wyman, 360 U.S. 72, 82 (1959) (declining to protect the refusal to produce information under subpoena in an investigation into suspected Communist associations); Scales v. United States, 367 U.S. 203, 205–06 (1961) (upholding a Smith Act conviction for membership in the Communist Party); Konigsberg v. State Bar of Cal., 366 U.S. 36, 39, 56 (1961) (declining to protect the refusal to answer questions about membership in the Communist Party as a condition of bar admission); In re Anastaplo, 366 U.S. 82, 97 (1961) (same); Braden v. United States, 365 U.S. 431, 435 (1961) (declining to protect the refusal to testify before a subcommittee of the House Un-American Activities Committee).

[50] Feiner v. New York, 340 U.S. 315, 321 (1951) (speech inciting a breach of the peace); Beauharnais v. Illinois, 343 U.S. 250, 261 (1952) (provocative, libelous speech against a race or religion); Roth v. United States, 354 U.S. 476, 492 (1957) (obscenity); Int'l Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284, 293 (1957) ("coerc[ive]" picketing for an unlawful purpose); Times Film Corp. v. City of Chicago, 365 U.S. 43, 44, 49 (1961) (screening films without first submitting them to government censors); Mishkin v. New York, 383 U.S. 502, 503–04 (1966) (publishing obscene books); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (speech critical of government by public employees); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 394 (1969) (upholding the fairness doctrine); United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) (upholding ban on importing obscene material).

[51] Adderley v. Florida, 385 U.S. 39, 47 (1966) (upholding criminal trespass conviction for demonstrating against prison segregation on jailhouse grounds); Walker v. City of Birmingham, 388 U.S. 307, 315 (1967) (upholding criminal conviction for disobeying

doctrine in this period, therefore, is that it extended a moderate level of protection to all speech, with no gradations in the level of speech protection afforded to different types of covered speech.[52] Put another way, the question of speech protection was synonymous with the question of speech coverage in these decades—once speech came within the ambit of the First Amendment, it enjoyed an equal, moderate level of judicial protection. Thus, when the Court invented the hierarchy of speech protection in the mid-1970s, it not only invented a tradition of different levels of speech protection but also invented a tradition that political speech occupies an invulnerable position at the apex of this hierarchy.

So why invent the hierarchy at this moment in the development of free speech law? It was the explosion of First Amendment coverage—which conferred significant protection on a vast and diverse array of speech—that ultimately necessitated (1) a new theory for why all manner of non-political speech was protected and (2) a new means of ensuring that free speech, so widely defined, could coexist with democratic governance. The new theory that developed was that the First Amendment protected not just self-expression and self-governance but also the availability of information in society.[53] The new way of managing this vast scope of protected information became the hierarchical model of speech protection.

injunction against demonstrating in a civil rights march); United States v. O'Brien, 391 U.S. 367, 369–70, 372 (1968) (upholding criminal prohibition on burning a draft card in protest of the Vietnam War). For a richer exposition on the lack of First Amendment protection for those fighting for racial justice, see Justin Hansford, The First Amendment Freedom of Assembly as a Racial Project, 127 Yale L.J.F. 685 (2018).

[52] Most scholars hail the Warren Court period as a bastion of free speech progressivism. While some scholars have surfaced the Court's far more mixed record of protecting political speech in this period, their accounts are more supplemental than revisionist. See, e.g., Louis Michael Seidman, Can Free Speech Be Progressive?, 118 Colum. L. Rev. 2219, 2229–30 (2018); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 13–14 (1996); Geoffrey R. Stone, Perilous Times: Free Speech in Wartime (2004).

[53] This new explanation was perhaps best crystalized in the 1978 case *First National Bank of Boston v. Bellotti*, wherein the Court identified "[t]he inherent worth of speech in terms of its capacity for informing the public" and reframed its cases as emphasizing not only "the role of the First Amendment in fostering individual self-expression but also . . . its role in affording the public access to discussion, debate, and the dissemination of information and ideas." 435 U.S. 765, 777, 783 (1978). The First Amendment, the Court explained, thus "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Id. at 783.

Both this novel explanation for First Amendment coverage and the new hierarchical model of speech protection were invented in a set of blockbuster 1976 cases, *Buckley v. Valeo* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.[54] First, in *Buckley*, the Court shifted its rhetoric slightly from describing protection for political speech as central to the First Amendment to describing political speech, in relative terms, as meriting "the broadest protection."[55] The Court did not cite or quote any case for this new formulation. It instead relied on precedents that had only ever identified protection for political speech as fundamental to, or a major purpose of, the First Amendment, but not as occupying a comparatively privileged constitutional position relative to other protected speech.[56]

Having introduced the concept of a hierarchy of speech in *Buckley*, the Court then gave it legs in *Virginia Pharmacy* by establishing a second, and lower, point on this newly created scale of speech protection. Employing the same free speech expansionism tactic it had perfected over the past several decades, the Court extended First Amendment protection to commercial speech by correlating it with political speech and eliding the possibility of drawing any clear line between the two.[57] It compared

[54] 424 U.S. 1 (1976) (per curiam); 425 U.S. 748 (1976).

[55] 424 U.S. at 14.

[56] Id. ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . ." (citing Mills v. Alabama, 384 U.S. 214, 218 (1966))); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (identifying a "profound national commitment" in the First Amendment "to the principle that debate on public issues should be uninhibited, robust, and wide-open"); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); see also Bond v. Floyd, 385 U.S. 116, 135–36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."). Only one case prior to *Buckley*, which *Buckley* quotes, suggested that speech protection is organized hierarchically. That case, *Monitor Patriot Co. v. Roy*, states: "[I]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." 401 U.S. 265, 272 (1971). *Monitor Patriot* was also decided in the 1970s and also does not cite any supporting caselaw for the proposition that First Amendment protection applies to varying degrees depending on the speech at issue.

[57] *Va. Pharmacy*, 425 U.S. at 765 ("[N]o line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn.").

commercial speech to political speech expressed for economic interests, such as labor picketing, books sold for profit, and handbills soliciting funds for religious and political causes.[58] It also grounded protection for commercial speech in the same rationales undergirding protection for political speech, claiming that the free flow of commercial information is indispensable to the "administration of Government,"[59] because in a "free enterprise economy," it is "a matter of public interest" that "private economic decisions" be "intelligent and well informed" to ensure "the proper allocation of resources" and "the formation of intelligent opinions as to how that system ought to be regulated or altered."[60]

Then, for the first time, the Court explicitly distinguished its holding that commercial speech merits protection *like* political speech from the conclusion that commercial speech merits the *same* protection as political speech. Buried in a footnote, it acknowledged the "commonsense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties."[61] It then delivered the sentence that finally severed the questions of coverage and protection from one another and completed the construction of a new hierarchy of speech protection: it reaffirmed that the differences between commercial and political speech do not justify a difference in First Amendment coverage, but "nonetheless suggest that a different degree of protection is necessary."[62]

The conventional wisdom is that the Court finally broke down the barrier between political and commercial speech in *Virginia Pharmacy* and thereby eliminated the last major wall between protected and unprotected information. But, in fact, the Court tried to create a middle ground via the hierarchy model. It tried to extend equal coverage without extending equal protection. As the next two Sections will show, however, the ground on which the Court attempted to build this hierarchy was entirely unstable. Divorced from precedent and incompatible with the majority of free speech doctrine, the hierarchy did not take hold. It managed to influence the analysis and resolution of a few cases in the

[58] Id. at 761–62.
[59] Id. at 762 (quoting *Roth*, 354 U.S. at 484).
[60] Id. at 765.
[61] Id. at 771 n.24 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973)).
[62] Id. at 772 n.24.

immediate years following its introduction;[63] but, by the 1980s, it had failed to acquire any analytical heft and settled into a position of rhetorical platitude.

B. Top-Down Equalization: Moderate Protection for Political Speech

Prior to the invention of the hierarchy of speech protection, all speech garnered a moderate level of protection with the government retaining significant discretion to impose regulations on speech in order to ensure public order and a healthy democratic discourse. After the hierarchy was introduced, this did not change. Political speech has acquired neither strict protection nor a comparatively high level of protection as compared to other speech. It continues to enjoy moderate protection at the same level as other speech, and the government continues to retain ample discretion to regulate speech to safeguard the health and security of the public sphere. As this Section will show, the few "seminal" cases seemingly to the contrary are at once anomalous and also not as speech-protective as their reputations suggest.

This Section walks through various types of political speech—which together comprise the overwhelming majority of political speech expressed—to show how all this political speech is reasonably and moderately protected from government interference, to the same degree as other speech spoken in that same context, with the government retaining significant authority to control for the potential public and democratic harms that such speech might inflict. To reiterate, the argument makes no claim that the government may regulate political speech in any way it desires but rather that it may and regularly does regulate political speech in myriad ways to advance legitimate interests

[63] See, e.g., Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) (bestowing lesser First Amendment protections on adult speech because such "expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . . [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see [adult films] . . . ."); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (treating in-person solicitation of legal services as commercial advertising entitled to less protection than other speech). The hierarchy may also have done some work in the outcome of *First National Bank of Boston v. Bellotti*, which recognized a First Amendment right of corporations to make contributions to ballot initiative and referendum campaigns. 435 U.S. 765, 767 (1978). The Court's reasoning relied in part on reverse-engineering a corporate political speech right from corporations' established commercial speech rights based on the hierarchy of speech. Id. at 784 n.20 ("Appellee would invert the debate by giving constitutional significance to a corporation's 'hawking of wares' while approving criminal sanctions for a bank's expression of opinion on a tax law of general public interest.").

in democratic governance. These interests specifically include maintaining well-functioning governmental systems and safe and informed democratic processes.

Such regulations on speech routinely restrict the majority of political speech expressed. They often disproportionately impact certain viewpoints. Some are overly harsh or ill-conceived from a policy standpoint. And occasionally the Supreme Court errs in its application of moderate scrutiny to these laws. But none of these issues detract from the central claim advanced here—that the vast majority of political speech is not absolutely protected from regulation and receives no preferred position compared to other speech. The takeaway from this analysis is clear: any notion that political speech garners superlative protection from government regulation is a myth that masks the doctrine's regular and prodigious support for government regulations of political speech to foster a healthy, orderly, and vibrant public discourse.

1. Core Political Speech

For all the doctrine's emphasis on protecting political speech and doing so specifically "for the bringing about of political and social changes desired by the people,"[64] the exact type of political speech most utilized for, and most influential in, accomplishing this pursuit receives only moderate protection from government regulation. Core political speech in a democracy is speech used to participate in elections, campaigns, and political debates or advocacy over the administration of government. The most basic and powerful means of using one's voice to engage in these democratic processes are through political organizing and petition, campaign contributions and expenditures, running for office, participating in a public civic debate, and, of course, voting.[65] Yet each one of these essential modes of political speech falls within a highly regulable sphere of government discretion and authority.

Beginning with the most common forms of political advocacy—petition signing, vote solicitation, and campaign donations—the state

[64] *Roth*, 354 U.S. at 484.

[65] See McCutcheon v. FEC, 572 U.S. 185, 191 (2014) ("There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign.").

retains significant discretion to ensure such political participation is orderly, noncoercive, and transparent. These interests supersede the burdens they impose on political speech, including the administrative onus of complying with disclosure requirements and the hardships of public backlash.[66] The First Amendment does not even provide robust protection against *government* retaliation for such speech, requiring a relatively high standard of proof to remedy claims of official retaliation for political expression.[67] The Court has also tolerated states' efforts to prevent coercive and disorderly political advocacy, such as by banning judicial campaign solicitations or posting political posters on telephone poles.[68] This is true even where the line between coercion and persuasion is difficult to draw, like when states create "campaign-free" buffers

[66] See Citizens United v. FEC, 558 U.S. 310, 370–71 (2010) (upholding disclaimer and disclosure requirements for independent expenditures and electioneering where there is no reasonable probability of threats, harassment, or reprisals); id. at 480–85 (Thomas, J., concurring in part and dissenting in part); Doe v. Reed, 561 U.S. 186, 199–202 (2010); see also Michelle Ye Hee Lee, Trump's Critics Are Targeting His Donors, Sparking Fears of a Backlash Against Disclosure, Wash. Post (Sept. 10, 2019), https://www.washingtonpost.com/politics/president-trumps-critics-are-weaponizing-information-about-his-donors-raising-concerns-about-federal-donor-disclosure-requirements/2019/09/10/b0b60ff8-cfe4-11e9-87fa-8501a456c003_story.html [https://perma.cc/2NS2-YZQP] (describing shaming campaigns targeting disclosed donors to President Trump); Greg St. Martin, Brand Identity, Trump Boycotts, and Social Media Backlash, News@Northeastern (Feb. 16, 2017), https://news.northeastern.edu/2017/02/16/brand-identity-trump-boycotts-and-social-media-backlash/ [https://perma.cc/J7RT-7CKY] (discussing popular boycotts of businesses seen as supporting President Trump). But see Talley v. California, 362 U.S. 60, 64–65 (1960) (striking down an ordinance requiring that all handbills identify the person who published or distributed them); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (relying on a rich history of anonymous political literature and government reprisal to strike down broad identification requirements on political literature, at least where the literature is not misleading and the identification of the author does little to advance the reader's evaluation of the document).

[67] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977) (establishing a but-for causation and burden-shifting standard of liability for official retaliation whereby the plaintiff must plead that animus towards speech was a substantial factor in the retaliatory action taken before the burden shifts to the government to show the action would have been taken regardless of the speech).

[68] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 437 (2015) (upholding ban on judicial candidates personally soliciting campaign funds); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (upholding ban on posting signs to telephone poles as applied to a political campaign flier).

around polling locations[69] or "protest zones" at political events.[70] These regulations aim to safeguard political speech in the aggregate by ensuring that political participation remains voluntary, safe, and informed.

Nowhere has the Court been more lenient on government interference with core political speech than in its acquiescence to regulations on the most quintessential form of political expression: voting itself. The framework governing the tension between political speech rights and election administration is a government-friendly test known as *Anderson-Burdick* balancing.[71] This test, which applies to nearly every voting rule or procedure, requires a simple weighing of the burdens on speech as compared to the benefits of the regulation. No extra weight is given to the protection of the political speech at issue, nor is any heightened scrutiny or narrow tailoring requirement applied to the regulation in question. It is under this framework that states routinely impose order on the electoral process by denying candidates with little support access to the ballot and to debate stages.[72] It also permits states significant discretion to determine

[69] Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding law requiring solicitors to stand 100 feet from polling places in order to prevent intimidation and fraud).

[70] See, e.g., Hartman v. Thompson, 931 F.3d 471, 481 (6th Cir. 2019) (upholding state trooper's use of a protest zone outside a private event); Menotti v. City of Seattle, 409 F.3d 1113, 1117–18 (9th Cir. 2005) (upholding an order restricting protests against the World Trade Organization); Pahls v. Thomas, 718 F.3d 1210, 1216 (10th Cir. 2013) (upholding a decision to move a group protesting a presidential visit to a protest zone); see also Wood v. Moss, 572 U.S. 744, 748–49 (2014) (displacing protestors to a location further away from President Bush than his supporters did not violate clearly established First Amendment law); Hill v. Colorado, 530 U.S. 703, 714 (2000) (upholding a buffer zone around abortion clinics); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (reviewing buffer zones under intermediate scrutiny). Most "free speech zone" policies are reviewed under the deferential time, place, and manner standard for speech restrictions on public property, discussed *infra* Subsection I.B.4.

[71] The test is named for the two Supreme Court cases that established it: *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

[72] *Anderson*, 460 U.S. at 789; see also Clingman v. Beaver, 544 U.S. 581, 584, 586 (2005) (upholding Oklahoma's semi-closed primary system); Munro v. Socialist Workers Party, 479 U.S. 189, 190–91, 194 (1986) (upholding requirement that minor-party candidates receive at least one percent of votes in a primary for their name to appear on the general election ballot); Norman v. Reed, 502 U.S. 279, 282–83, 288–90 (1992) (upholding a signature requirement to get a political party on the ballots); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 353–54, 358 (1997) (upholding anti-fusion laws preventing candidates from being listed on the ballot multiple times as members of different parties); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (holding under a comparably lenient standard of review that a public television broadcaster could exclude an independent political candidate from a debate).

the time periods for voting, the prerequisites and procedures for casting a ballot, and even the requirements for whom a citizen may vote for[73]—all of which have an enormous impact on the most powerful exercise of political expression in the interest of ensuring a safe and orderly election system.[74]

Even where the lenient *Anderson-Burdick* test does not apply, abstention doctrines often leave undisturbed government restrictions on citizens' ability to engage in political expression.[75] For example, the Court recently announced that the political question doctrine prevents the federal judiciary from reviewing political gerrymandering, leaving states free to depress the political association and speech of their residents by gerrymandering them into districts designed to minimize their political efficacy.[76] Similarly, the doctrine of qualified immunity frequently shields government actions that burden citizens' political speech rights—especially their protest rights.[77] Where abstention grants state actors room to limit speech rights to advance democratic equality, it fits comfortably within the dominant tradition of extending moderate protection to political speech to preserve legislatures' ability to safeguard democratic processes. Where, on the other hand, it leaves in place undemocratic systems of speech suppression, as the partisan gerrymandering cases did, it functions as an anomalous and distortive force in the doctrine.

[73] *Burdick*, 504 U.S. at 433; Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 197 (2008).

[74] See, e.g., Richard L. Hasen, Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them, 19 Election L.J. 263, 264 (2020) (noting that voting rights protections in the United States are weak and subject to inconsistent judicial control); Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 673 (1998) (critiquing the doctrine as allowing states to raise the cost of political defection and entrench political power); Spencer Overton, Voter Identification, 105 Mich. L. Rev. 631, 652 (2007) (explaining how voter identification requirements disproportionately impact protected classes of voters and are based largely on anecdote and misleading intuitive arguments).

[75] As do doctrines of statutory construction. See, e.g., Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2352–55 (2020) (applying severability principles to uphold a challenged ban on political robocalls, thereby equalizing protection for pure political speech and government debt collection speech).

[76] Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

[77] See Wood v. Moss, 572 U.S. 744, 747, 764 (2014); see also Reichle v. Howards, 566 U.S. 658, 660, 670 (2012) (shielding officers who arrested a suspect, with probable cause, but in retaliation for political speech through qualified immunity).

Finally, and perhaps most unexpectedly, compelled political speech is not as protected as the more conventionally cited caselaw in this area would suggest. The Court has stood firm against attempts by the state to use individuals as mouthpieces for its own political messages and to dictate the content of individuals' political expression.[78] But compelled political disclosures are ubiquitous, and indirect compelled political speech remains routine and permissible where it is required for the government to effectively carry out important public programs. For example, state entities commonly impose fees on certain segments of the population and then use these fees to fund political activity, transforming the compelled fees into compelled support for political speech. State university student fees, [79] state bar fees, [80] and industry fees that fund public ad campaigns[81] often operate in this way as indirect forms of compelled political speech.[82] Moreover, in the context of corporate political speech, the First Amendment effectively requires a corporation's shareholders to subsidize the corporation's political speech.[83]

Viewed in context, therefore, the few cases that appear to give outsized protection to electioneering activity—namely, to campaign financing—are quite anomalous. They are not reflective of the general rule that governments have wide latitude to regulate citizens' expressive participation in the electoral process. But the anomaly is not altogether

[78] See, e.g., W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding the First Amendment protects against being compelled to salute the flag and say the pledge of allegiance); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (striking down requirement to display the state motto "Live Free or Die" on a license plate); Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–58 (1974) (striking down a "right of reply" law which granted political candidates criticized by any newspaper the right to have their responses to the criticisms published).

[79] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 US 217, 233–34 (2000).

[80] Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990).

[81] Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557–60 (2005).

[82] The end point in this line of precedent is compelled taxation, which enjoys no First Amendment protection. Id. at 559.

[83] Of course, shareholders are not required to invest in any corporation, but neither is a citizen required to attend a state university, become a barred attorney, or participate in an industry subject to state fees. In only one similar area—that of labor dues—has the Court cut back on the state's ability to compel indirect subsidization of political speech. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211, 235 (1977) (striking down compelled dues that fund a public union's political activity); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018) (striking down all mandatory public union dues—even those that fund ostensibly non-political activities like salary and benefits negotiation—as unconstitutional compelled subsidization of political speech).

off-trend. Like the bulk of the caselaw in this area, these cases also permit the subordination of individual political speech rights to safeguard others' voices in the political process—in the context of campaign financing, however, citizens' speech is subordinated to enhance corporate speech, not to enhance other citizens' speech by ensuring an orderly and inclusive political process. By equalizing the political speech rights of corporations and citizens, the Court has again acquiesced to a regulatory regime that restricts individuals' political speech rights and the influence of their political expression under the First Amendment.[84] In this context, however, the Court has minimized the political influence of citizens and even sanctioned the compelled political speech of citizens who are shareholders to vindicate corporate speech interests as opposed to public interests in democratic self-governance. So even as the Court routinely invokes the language of the hierarchy and of the Constitution's special solicitude for political speech in these cases, it again is not meaningfully protecting political speech rights.

Thus, in the majority of circumstances, protection for pure political speech—meaning speech in the context of participating directly in the political process—does not enjoy anywhere near absolute protection. Rather, the state enjoys considerable flexibility to restrict political speech in order to administer fair, safe, and transparent elections, as well as to promote orderly and informed political debate. At the margins, this level of protection has allowed states to place a thumb on the scale of advancing certain political messages, and certain citizens' political power, over others. This is no small concern, and it is a reason to oppose some election laws and to reassess specific applications of the doctrines discussed when they disparately disempower minority groups or corrupt the democratic process. But regardless of any missteps in specific cases, the caselaw overall is clear: the most fundamental and widely employed exercises of political speech in a democracy are routinely subject to significant regulation that, at its best, aims to ensure a fair, transparent, and orderly political process.

[84] Dissenting Justices in campaign finance cases have recognized and forcefully criticized this effect. See Citizens United v. FEC, 558 U.S. 310, 467, 475–79 (2010) (Stevens, J., concurring in part and dissenting in part); 1st Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809, 815–16 (1978) (White, J., dissenting).

2. Political Speech by "Institutional Speakers"

The assumption that political speech garners outsized protection in U.S. constitutional jurisprudence is especially flawed as applied to tens of millions of citizens, namely government employees, students, the incarcerated, and electronic media providers. The caselaw has quietly created a class of "institutional speakers" out of these groups, deeming their speech in greater need of regulation due to the institutional context in which they operate. Their political speech rights are roundly subordinated to the interests of the state in the orderly administration of its duties and in the interests of the public in a free and informed political discourse.

To start, both these interests play a pivotal role in validating regulations on the political speech of the over twenty million Americans[85] who work as government employees. The First Amendment permits government employers—from police departments, to schools, to social service agencies—to regulate the political speech of its employees where there is justification for treating the employee differently from a member of the general public.[86] The employee's speech rights are balanced against the government's interests in maintaining an efficient workforce and the

[85] Employment Trend (Quarter-to-Quarter), U.S. Off. of Pers. Mgmt. (June 2020), https://www.fedscope.opm.gov/ [https://perma.cc/DW7K-M54Q] (showing 2.1 million federal employees in 2020); Elizabeth Dippold et al., Annual Survey of Public Employment & Payroll Summary Report: 2019, U.S. Census Bureau 1 (June 30, 2020), https://www.census.gov/programs-surveys/apes.html [https://perma.cc/2GAD-BY28] (showing 19.7 million state and local government employees). This figure does not include the nearly 1.4 million members of the armed services, whose political speech is severely curtailed though stands to offer some of the most pertinent and informed political expression. See, e.g., U.S. Dep't of Def., Armed Forces Strength Figures for August 31, 2021, https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports [https://perma.cc/KR7X-LB7K]; Parker v. Levy, 417 U. S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").

[86] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 146 (1983). This line of cases establishes a two-pronged test for determining whether government employee speech is protected from regulation: prong one asks if the employee's speech is spoken as a citizen on a matter of public concern; prong two asks if there is adequate justification for treating the employee differently from a member of the public. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). Together, the two prongs place a thumb on the scale against protecting government employees' speech, because whether the speech is a matter of public concern depends on the "content, form, and context" of the statement, which itself is inextricably linked with the speaker's position as a government employee. *Connick*, 461 U.S. at 147–48.

integrity and efficacy of the administration of governmental services. This rule turns out to be a fairly harsh one for government employees, impacting their freedom to both engage in political discourse and to participate in the political process. First, their political speech is only protected when expressed as private citizens, unconnected to their official roles or duties.[87] Thus, an investigator criticizing his department's unlawful handling of an arrest[88] or a prosecutor questioning how her office performs and distributes work[89]—both addressing critical concerns over the operation of government—are not protected. Then, even when employees express their grievances as private citizens, the government may use that expression as one reason among others to retaliate against the employee through an adverse employment action.[90] Most intrusive of all, the First Amendment permits the government to severely restrict the partisan activity of its employees, including their First Amendment rights to participate in political campaigns, make or solicit political donations, and run for office.[91] The reasons these restrictions survive First Amendment scrutiny are rooted in the Court's understanding that reasonable limits on government employee speech are necessary for maintaining both a well-functioning government and a fair and non-coercive democratic process.

Similarly, public school students across the country are subject to numerous restrictions on their political speech rights, both inside and

[87] *Garcetti*, 547 U.S. at 418. This dynamic may or may not be governed by employment contract, but the First Amendment determines whether such a contractual provision regulating an employee's speech is permissible. Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam).

[88] *Garcetti*, 547 U.S. at 414.

[89] *Connick*, 461 U.S. at 154.

[90] Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977) (permitting government animus towards an employee's political speech to be one but not the only cause of an adverse employment action).

[91] See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 606 (1973) (upholding state law prohibiting clearly partisan political activity, including campaigning or soliciting funds for candidates and running for office); U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 550 (1973) (upholding federal statute prohibiting executive branch employees from taking "an active part in political management or in political campaigns" under the Hatch Act); United Pub. Workers v. Mitchell, 330 U.S. 75, 78, 93 (1947) (same); United States v. Wurzbach, 280 U.S. 396, 398 (1930) (upholding federal law prohibiting federal employees from making contributions to any other federal official or candidate for "any political purpose whatever"); Ex parte Curtis, 106 U.S. 371, 371–72 (1882) (upholding statute prohibiting certain federal employees from giving money to other employees for political purposes).

outside the schoolhouse gates, before and after the bell rings. Their speech rights in school, in their communications with their peers, and in their extra-curricular activities—together accounting for the vast majority of students' time and expression—are evaluated under a highly deferential reasonableness standard "in light of the special characteristics of the school environment."[92] Their rights are not "coextensive with the rights of adults in other settings," but rather balanced against the sensibilities of other students.[93] This includes political speech that school administrators deem morally suspect or inappropriate, such as a school newspaper article on sexual mores[94] or a quizzical banner reading "BONG HiTS 4 JESUS."[95] The standard is deferential enough that even prior restraints, considered the most insidious form of censorship, regularly withstand scrutiny.[96]

This moderation of students' political speech rights is not simply a function of their status as minors, for even adult students receive less protection for their political speech within the educational environment. Over eighty-five percent of public universities in the United States enforce speech policies that restrict their students' political expression in order to foster an effective and inclusive educational environment.[97] These policies include restrictions on speech that conveys bias, discrimination, intimidation, hostility, bullying, aggression, vulgarity, incivility, offensiveness, disrespect, and intolerance.[98] Though the

[92] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (school speech regulations must only be "reasonably related to legitimate pedagogical concerns"); Mahanoy Area Sch. Dist. v. B.L., No. 20-255, slip op. at 1, 5 (S. Ct. June 23, 2021) (applying *Tinker* to a peer-to-peer communication off campus and after school hours).

[93] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681–82 (1986). Whereas *Tinker* used a "substantial disruption" or "material interference" test for restricting student speech, 393 U.S. at 514, *Fraser* held that school officials may reasonably determine "what manner of speech in the classroom or in school assembly is inappropriate" and restrict it accordingly, 478 U.S. at 683.

[94] *Kuhlmeier*, 484 U.S. at 271.

[95] Morse v. Frederick, 551 U.S. 393, 397, 408–10 (2007).

[96] *Kuhlmeier*, 484 U.S. at 276 (holding school administrators may exercise prior restraint of school-sponsored expression, such as curriculum-based student newspapers and assembly speeches, if the censorship is reasonably related to legitimate pedagogical interests).

[97] Spotlight on Speech Codes 2021, FIRE, https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2021 [https://perma.cc/25YF-5LA5] (last visited Oct. 10, 2021).

[98] Id.

Supreme Court has not often interceded to define the speech rights of students in a university setting,[99] it has signaled its approval of deferring to school administrators here, too.[100] It has also understood programs of public universities to operate as limited public forums, which (as discussed below) are a wide-ranging set of places wherein the government may exercise increased control over speech in order to ensure expression is compatible with the purpose of the forum.[101] Lower courts, in turn, employ a combination of deferential review standards in the university context, from *Tinker* to limited public forum doctrine to qualified immunity.[102] The result is universities having sufficient flexibility to tailor campus speech to their educational mission—to the overwhelming approval of college students.[103]

[99] The Court has let stand severe restrictions on college students' political speech for decades, including declining to stop the prolific use of "free speech zones" by universities from the 1980s through the 2000s, which restrict students' political expression to narrow times and places on campus. David L. Hudson & Andrew Gargano, Free-Speech Zones, First Amendment Ctr., (Nov. 8, 2017) https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/free-speech-on-public-college-campuses-overview/free-speech-zones/ [https://perma.cc/BTX7-5MFC]. Though in decline and having fared poorly in lower courts in recent years, about seven percent of universities still use them. FIRE, supra note 97.

[100] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 686 (2010) (reaffirming in a university free speech case that "judges lack the on-the-ground expertise and experience of school administrators," and cautioning courts against "substituting their own notions of sound educational policy for those of the school authorities which they review," citing numerous high school speech cases).

[101] See id. at 679 n.12 (understanding the university's Registered Student Organization program to be a limited public forum); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829 (1995) (analyzing the university's Student Activities Fund program as a limited public forum).

[102] See, e.g., Axson-Flynn v. Johnson, 356 F.3d 1277, 1282–83, 1285 (10th Cir. 2004) (applying K-12 precedents to college student's First Amendment challenge to his removal from a theater program); Univ. of S. Miss. Chapter of Miss. Civ. Liberties Union v. Univ. of S. Miss., 452 F.2d 564, 567 (5th Cir. 1971) (applying *Tinker*'s "disruption" standard to university's denial of official recognition to civil rights organization); Abbott v. Pastides, 900 F.3d 160, 175 (4th Cir. 2018) (applying qualified immunity doctrine to shield university administrators from First Amendment challenge); Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016) (applying *Kuhlmeier* to student's dismissal from nursing program for unethical Facebook posts); see also Frank D. Lo Monte, The Legislative Response to a Perceived "Free Speech Crisis" on Campus, 34 Comm. Law. 7, 9–10 (2019) (discussing cases where lower courts used the more deferential standard).

[103] See, e.g., Thompson Ctr. on Pub. Leadership, The First Amendment Under Stress: A Survey of UW-Madison Students' Views on Free Speech and Religious Liberties, https://thompsoncenter.wisc.edu/wp-content/uploads/sites/509/2021/01/Thompson-Center-First-Amendment-Survey.pdf [https://perma.cc/Q6KT-7VQ9] (finding that 63% of students think the

Faring worst of all are the constitutional speech rights of the more than two million incarcerated individuals in our federal, state, and local prisons.[104] Their political speech rights are systematically and sharply curtailed, with little prospect of relief or accommodation. Speech-restrictive policies in prison are valid so long as they are "reasonably related to legitimate penological interests"—essentially rational basis review for political speech suppression.[105] Indeed, the doctrine requires something akin to rational basis-level deference to prison officials' regulations of inmates' political speech, requiring "substantial evidence in the record to indicate that the officials have exaggerated their response to [penological] considerations," before second-guessing "their expert judgment in such matters."[106] The rationale for this standard, here again, is to advance the safe and orderly administration of a core governmental function. The rule is harsh and all-encompassing: it boasts of no exceptions,[107] and since it was announced, it has produced an unbroken

government should punish hate speech and more than 50% think the government should restrict the speech of racially insensitive people); The William F. Buckley, Jr. Program at Yale, Almost Half (49%) of U.S. College Students "Intimidated" by Professors When Sharing Differing Beliefs: Survey, McLaughlin & Assocs. (Oct. 26, 2015), https://mclaughlinonline.com/2015/10/26/the-william-f-buckley-jr-program-at-yale-almost-half-49-of-u-s-college-students-intimidated-by-professors-when-sharing-differing-beliefs-survey/ [https://perma.cc/S87N-X2R8] (finding that 72% of students "support disciplinary action for 'any racist, sexist, homophobic and otherwise offensive'" speech; 72% of students desire further policies to increase diversity of opinion on campus; and "[b]y a 51% to 36% margin, students favor their school having speech codes to regulate speech for students and faculty); see also Erwin Chemerinsky & Howard Gillman, Free Speech on Campus 10–15 (2017) (finding similar patterns in student approval for speech policies on campus).

[104] Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Pol'y Initiative (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/Z6AG-5B32]. This figure includes the roughly 120,000 individuals in juvenile detention, immigration detention, involuntary confinement, and territorial, Indian, and military prisons.

[105] Turner v. Safley, 482 U.S. 78, 89 (1987); see also Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 129 (1977) ("In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." (internal quotation marks omitted)).

[106] Pell v. Procunier, 417 U.S. 817, 827 (1974).

[107] At one point, prisoners' mail received higher protection because mail restrictions impinge on the non-prisoner correspondent's First Amendment rights, see Procunier v. Martinez, 416 U.S. 396, 408–09 (1974), but the Supreme Court later rejected "any attempt to forge separate standards for cases implicating the [First Amendment] rights of outsiders [and inmates]." Thornburgh v. Abbott, 490 U.S. 401, 410 n.9, 411 (1989). Federal circuit courts have extended greater protection to prisoners' incoming legal mail, though they recognize that the First Amendment alone does not bestow this heightened protection. Aaron C. Lapin, Are Prisoners' Rights to Legal Mail Lost Within the Prison Gates?, 33 Nova L. Rev. 703, 716–

line of cases validating every restriction on a prisoner's political speech rights to come before the Court.[108] Furthermore, judicial relief is not only hard to win legally, but it is also arduous to access procedurally, as prisoners are required to exhaust their administrative remedies before seeking to vindicate their speech rights in court.[109]

The restrictions against prisoners' political speech are severe. Incarcerated individuals have no rights to form or operate a union, meet to organize political causes,[110] correspond with one another even to provide legal assistance,[111] speak with a journalist,[112] associate with other citizens in noncontact visits,[113] or access books, newspapers, magazines, and photographs.[114] Book bans in particular are a rampant and weighty impingement on inmates' political speech rights as they deny access to the information necessary to the formation of political dialogue and opinion.[115] Books such as *The New Jim Crow*, *Just Mercy*, and those authored by President Obama are among the thousands of banned pieces of literature in prison[116]—despite numerous studies showing that access

727 (2009) (discussing circuit disagreements and various underlying rights to legal mail); Lewis v. Casey, 518 U.S. 343, 408 (1996) (holding that right to legal materials in prison derives from right of access to the courts).

[108] David M. Shapiro, Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny, 84 Geo. Wash. L. Rev. 972, 983 (2016).

[109] 42 U.S.C. § 1997e(a) (2018) ("No action shall be brought with respect to prison conditions . . . by a prisoner . . . until such administrative remedies as are available are exhausted.").

[110] *Jones*, 433 U.S. at 131–33.

[111] Shaw v. Murphy, 532 U.S. 223, 225 (2001).

[112] Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 827–28 (1974); Houchins v. KQED, Inc., 438 U.S. 1, 15–16 (1978).

[113] Overton v. Bazzetta, 539 U.S. 126, 131–36 (2003).

[114] Beard v. Banks, 548 U.S. 521, 524–25 (2006).

[115] As Michelle Alexander, author of *The New Jim Crow*, has stated: "Some prison officials are determined to keep the people they lock in cages as ignorant as possible about the racial, social and political forces that have made the United States the most punitive nation on earth . . . . Perhaps they worry the truth might actually set the captives free." Jonah E. Bromwich, Why Are American Prisons So Afraid of This Book?, N.Y. Times (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/new-jim-crow-book-ban-prison.html [https://perma.cc/3478-GRG5].

[116] PEN America, Literature Locked Up: How Prison Book Restriction Policies Constitute the Nation's Largest Book Ban 3–6 (2019); Athina Hinson-Boyte, Book Bans: First Amendment Violation of Prisoners, First Amend. L. Rev. Blog (2020), https://firstamendmentlawreview.org/2020/03/31/book-bans-first-amendment-violation-of-prisoners/ [https://perma.cc/VT48-UZNB]; Munson v. Gaetz, 673 F.3d 630, 631–32 (7th Cir. 2012)

to such reading and education in prison reduces violence and rates of recidivism.[117] But whether such regulations are defensible policy-wise is a different question from whether the Court should strike them down. And even where the Court should overturn them, the point stands that it does not—prisoner political speech goes largely unprotected by the judiciary, as does much of the political speech of the millions of other institutional speakers.

Lastly, while occupying powerful political positions in society, the political speech rights of the owners and operators of electronic media are commonly regulated to ensure a robust and diverse media speech environment. In this area, the government has substantial leeway to adopt structural regulations that impact media providers' content—including their political content—in order to foster viewpoint diversity, localism, and the free flow of information.[118] In other words, the government has some authority to redistribute political speech power when it comes to information and communication service providers.[119] Ownership caps, content obligations, and access rules are common throughout all of media regulation, pervading the Communications Acts of 1934 and 1996.[120]

(upholding ban on receiving a copy of *The Physician's Desk Reference* for an inmate to educate himself on his medication).

[117] See, e.g., Michelle Fine et al., Changing Minds: The Impact of College in a Maximum-Security Prison 16, 21 (2001); Corr. Ass'n of N.Y., Education from the Inside, Out: The Multiple Benefits of College Programs in Prison 5–9 (2009); Laura Winterfield, Mark Coggeshall, Michelle Burke-Storer, Vanessa Correa & Simon Tidd, The Effects of Postsecondary Correctional Education 12–13 (2009); Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders & Jeremy N. V. Miles, Evaluating the Effectiveness of Correctional Education 57–58 (2013).

[118] Marvin Ammori, Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine, 70 Mo. L. Rev. 59, 65 (2005); see also Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354, 365 (1999) (arguing that the line of cases from *Associated Press v. United States* through *Red Lion Broadcasting Co. v. FCC* "have adopted, in large part, the view that a concentrated information environment menaces First Amendment values").

[119] This group of entities encompasses the range of information, media, and communication service providers that transmit content by wire, radio, broadcast, cable, and Internet.

[120] See Dana A. Scherer, Cong. Rsch. Serv., The FCC's Rules and Policies Regarding Media Ownership, Attribution, and Ownership Diversity (2016) (explaining that the Federal Communications Commission's policies seek to encourage diversity, localism, and competition in broadcasting and that recent trends in consumption are contributing to debate in Congress as to whether common ownership of multiple media outlets in the same market might limit diversity of viewpoints as much today as in the past).

These regulations directly influence the content and breadth of media entities' political speech by requiring, at various points, that they present fair and balanced discussion of political issues,[121] grant candidates an equal right of access to their airwaves,[122] carry other entities' political content,[123] refrain from politically discriminating against persons or localities,[124] and maintain diverse ownership to prevent capture of the information markets.[125] Though such regulations might appear to affect a relatively small number of wealthy and powerful individuals, their impact is actually near-universal. Americans now engage in and receive most of their political expression through phone, television, and the Internet, as opposed to in person or through print mediums. They discuss, petition, consume the news, organize, and solicit through these electronic technologies far more than through leaflets, newspapers, street-corner speech, and demonstrations.[126] Media regulations, therefore, have a profound effect on the terms by which ordinary citizens consume and participate in political discourse.

3. Political Conduct

An inordinate amount of our political expression comes in the form of conduct as opposed to speech, in the conventional sense of that word. When it does, it receives moderate or even no First Amendment

[121] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969) (upholding the "fairness doctrine," requiring radio and television broadcasters to present a balanced and fair discussion of public issues on the airwaves). In *Red Lion*, the Supreme Court placed the political speech interests of viewers above those of broadcasters, subjecting the latter to content-based speech regulations if reasonably related to a legitimate government interest. Id. at 390.

[122] 47 U.S.C. § 315(a) (2018); 47 CFR § 76.205(a) (2020); CBS, Inc. v. FCC, 453 U.S. 367, 378–79 (1981).

[123] Turner Broad. v. FCC, 512 U.S. 622, 626–27, 661–62 (1994) (holding the requirement that cable operators carry local broadcast channels to be a content-neutral restriction on speech subject to intermediate First Amendment scrutiny); Turner Broad. v. FCC, 520 U.S. 180, 185 (1997) (holding the "must-carry" provisions consistent with the First Amendment under intermediate scrutiny).

[124] 47 U.S.C. § 202(a) (2018).

[125] FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 779 (1978) (upholding ownership regulations over newspapers and broadcasters because the rule enhances the diversity of information in society).

[126] Marvin Ammori, Challenging the Constitutional Framework for Media Regulation, Marvin Ammori & Friends on Tech. Pol'y (Dec. 23, 2009), https://ammori.org/2009/12/23/threatening-the-constitutional-framework-for-media-regulation/ [https://perma.cc/8NET-BWMX].

protection. From private business and consumer choices reflecting our political views to public acts undertaken for political purposes, our conduct is integral to and often the sole medium of our political expression. Yet a good deal of that conduct unremarkably garners no First Amendment protection, and the rest is again subject to reasonable restrictions to advance important public interests in a safe, orderly, and vibrant public sphere.

First, there are certain conventionally regulated types of conduct—including traditional criminal offenses and contract and business activity—that garner no First Amendment protection even when undertaken as an overtly political act. For example, vandalizing a Confederate statute, occupying a government building, and bias-motivated assaults[127] obviously claim no protection. Likewise, the First Amendment is no barrier to government enforcement of antitrust and contract laws against political publications and organizations, or of business and zoning ordinances against political shops and institutes.[128] Similarly, where a government regulation inhibits a consumer's ability to purchase a product or frequent a business for political purposes, the First Amendment offers no protection.[129]

Expressive conduct that falls outside these traditionally unprotected categories is also subject to frequent, routine government regulation. Because such speech occurs through conduct and conduct has innumerable incidental externalities on the safety, welfare, and order of society, the Supreme Court has fashioned a flexible and moderate level of protection for expressive conduct: the government may restrict it to further an important public interest that is unrelated to the suppression of expression if the restriction does not burden substantially more speech

[127] See Wisconsin v. Mitchell, 508 U.S. 476, 479, 490 (1993) (upholding enhanced sentencing law for bias-motivated crimes).

[128] See, e.g., Associated Press v. United States, 326 U.S. 1, 19–20 (1945) (upholding antitrust enforcement against a newspaper for restraint of trade under the Sherman Act); Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (holding the First Amendment does not bar contract suit against the press for breaching a promise of confidentiality to a source); Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding law banning residential picketing).

[129] Take, for example, a buyer who seeks to purchase a renewable energy lamp because they decide to go green: a political choice. Imagine that the store does not have the lamp in stock because a newly implemented government import tax caused delays in the company's distribution. The buyer's ability to exercise political conduct was impeded by their inability to purchase the lamp, but they do not have a First Amendment claim against the government.

than necessary to fulfill this interest.[130] Here again, the Court is clear that judicial deference to the government's judgment about the appropriate calibration of speech rights with other governmental interests is wise and proper.[131]

Under this standard of protection, known as the *O'Brien* standard, regulations that aim at nothing more than suppressing the message of the conduct at issue—such as anti-flag-burning statutes—are unlawful;[132] but regulations that reasonably advance a legitimate governmental interest are valid even if they significantly and directly impinge on political speech rights.[133] It is under this rule that the government may still prohibit burning a draft card to protest the draft,[134] sleeping in a public park to raise awareness about the plight of the homeless,[135] burning a cross to reject racial integration,[136] and damaging military documents to protest nuclear proliferation.[137]

[130] United States v. O'Brien, 391 U.S. 367, 377 (1968); Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

[131] *Rock Against Racism*, 491 U.S. at 798 ("We do not believe . . . that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the [parks department] as the manager of the [city's] parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." (quoting Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 299 (1984))).

[132] Texas v. Johnson, 491 U.S. 397, 399 (1989); see also United States v. Eichman, 496 U.S. 310, 315–18 (1990) (holding flag-desecration statutes unconstitutional even when cabined to non-communicative desecration because such regulations still relate to suppressing disrespect for the flag); Spence v. Washington, 418 US 405, 405–06 (1974) (per curiam) (overturning application of a law against displaying a U.S. flag affixed with any symbol to a protester who hung his flag with a peace sign taped onto it).

[133] See *Rock Against Racism*, 491 U.S. at 798 (reaffirming that regulations of expressive conduct "need not be the least restrictive or least intrusive means" of advancing the government's interests).

[134] *O'Brien*, 391 U.S. at 382.

[135] *Clark*, 468 U.S. at 289.

[136] Cross burning occupies a sui generis position in expressive conduct doctrine. The Supreme Court has charted a middle ground for this uniquely potent and historically fraught example of political expression: cross burning solely to communicate messages of shared group identity and ideology are protected, but cross burning for any other impermissible motive, such as to threaten or intimidate, is proscribable. Virginia v. Black, 538 U.S. 343, 363 (2003). Critics of this compromise rightly question whether a burning cross can ever not communicate a message of intimidation and therefore fall outside the scope of protection. See id. at 388–91 (Thomas, J., dissenting). The practical effect of this compromise, therefore, is it imposes a drafting requirement on cross burning legislation rather than actually protecting a hypothetical swath of "purely political" cross burnings.

[137] United States v. Albertini, 472 U.S. 675, 677, 686–89 (1985).

The rules governing the protection of expressive conduct are a case study in how the expansion of First Amendment coverage to more and more types of speech—here, to the "expression of an idea through activity"[138]—has an equalizing impact on the level of protection that speech receives, in contravention of a hierarchical model of speech protection. Scholars have warned that collapsing speech and conduct will indeed create pressure to level down the protection for political speech.[139] Their concern, however, has been that expanding coverage to *non-political* conduct will water down protection for political expression. Their prediction is likely correct, but its premises are flawed. It was the expansion of First Amendment protection to *political* conduct in *O'Brien* that has moderated protection for much political expression communicated through activity. Furthermore, the warning assumes that First Amendment protection for political speech is (and perhaps should be) higher than protection for non-political speech. But as this Article makes clear, protection amongst types of speech is (and perhaps should be) largely equal.

4. Political Speech on Public Property

This same level of moderate protection that gives the government ample discretion to regulate political conduct also applies to political speech uttered on public property.[140] Public property is of course pervasive, from streets and sidewalks to plazas and parks. These are the most prominent physical places where political speech naturally and traditionally occurs, and are often the only feasible places for many of the

[138] Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam).

[139] Mark Tushnet, The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law, 25 Wm. & Mary Bill Rts. J. 1073, 1114–16 (2017) (arguing that one level of protection for all speech might force the Court to level all protection for speech downwards); Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 271–72 (1981) [hereinafter Schauer, Categories and the First Amendment] (warning that if truly all activity involving speech is protected, then "[w]e must either water down the test for protection . . . or conclude that certain categories of speech are to be tested under drastically different standards of protection"); Frederick Schauer, On the Distinction Between Speech and Action, 65 Emory L.J. 427, 427 (2015) (questioning whether "the First Amendment's necessary distinction between speech and action [is] fundamentally unsustainable").

[140] *Clark*, 468 U.S. at 298 (clarifying that the *O'Brien* standard for regulating expressive conduct "is little, if any, different from the standard applied to time, place, or manner restrictions" on government property).

most potent forms of political speech, such as rallies, protests, marches, proselytizing, and leafletting. Yet the First Amendment permits ample, direct regulation of political speech in these spaces and makes no distinction between types of speech.[141] The Supreme Court has long held that the right "to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order."[142]

The government has at least four levers for controlling political speech on public property to ensure it comports with public order and the safe and effective exchange of ideas. It may directly regulate the time, place, and manner of the speech itself; re-designate the property into a limited or nonpublic forum where the government has more leeway to moderate or ban speech altogether; regulate the secondary harmful effects of political speech; and use its own speech to exclude or amplify messages in these forums.

Turning first to time, place, and manner regulations, the government has broad discretion to regulate the scope, volume, duration, location, mode, and method of speech on public property so long as the regulation is content-neutral, meaning it does not discriminate between different types of speech. The requirement of content-neutrality is a primary example, discussed further below, of how foundational First Amendment doctrine actually works to equalize protection among different types of speech, in contravention of the invented hierarchy model of speech protection. In public forums, the time, place, and manner of political speech is as regulable as that of commercial, artistic, or even nonsensical speech. These regulations are widely permissible, having only to be narrowly tailored to serve a significant government interest. Under this standard the government may, for example, prohibit individuals from approaching others to engage in political expression outside an abortion

[141] See Tabatha Abu El-Haj, The Neglected Right of Assembly, 56 UCLA L. Rev. 543, 548–54 (2009) (describing extensive government interference and elimination of public dissent on government property); Ronald J. Krotoszynski, Jr., Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward, 78 Ohio St. L.J. 779, 801–03 (2017) (documenting the wide latitude government has in restricting speech on public property).

[142] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).

clinic,[143] ban picketing in residential neighborhoods,[144] or require a performer to use government equipment and technicians to play her message.[145] The "significant interests" undergirding these permissible restrictions all relate to ensuring the safe, orderly, and healthy exchange of political information. As such, political speech on public property receives the same moderate protection as other political speech—a level of protection that permits reasonable speech regulations on public property even when they apply only to certain speakers or have a disproportionate effect on certain topics, viewpoints, and speakers.[146]

Second, on other public land of the government's own choosing, the state may impose more direct and more targeted restrictions on political (and all other) speech to ensure the property conforms with the government's intended use for it. Courts have divided public property into essentially three categories, each with its own tolerance for speech regulation: traditional public forums are "places which, by long tradition or by government fiat have been devoted to assembly and debate;" limited or designated public forums are "public property which the State has opened for use by the public as a place for expressive activity[;]" and nonpublic forums are "[p]ublic property which is not by tradition or designation a forum for public communication."[147] In a traditional public forum, the government may regulate the time, place, and manner of speech under the standards just discussed; the same is true for speech in a limited public forum, except the government may also exclude speech that

[143] Hill v. Colorado, 530 U.S. 703, 707–08, 712–14 (2000) (upholding a law against approaching another person within 100 feet of an abortion clinic to pass "a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with [that] person" as a content-neutral place and manner regulation); see also Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647–55 (1981) (allowing ban on non-stationary solicitation and distribution of written materials at state fair as a permissible place and manner regulation).

[144] Frisby v. Schultz, 487 U.S. 474, 488 (1988).

[145] Ward v. Rock Against Racism, 491 U.S. 781, 784, 803 (1989) (upholding city requirement that performers use city sound equipment and technicians as a valid manner restriction).

[146] McCullen v. Coakley, 573 U.S. 464, 479–83 (2014); see also United States v. Kistner, 68 F.3d 218, 219, 221 (8th Cir. 1995) (upholding free speech zones at the St. Louis Arch).

[147] Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983). Admittedly, public forum doctrine is less than clear, and lower courts have recognized a conflicting number of sub-categories of forums within the doctrine. See Aaron H. Caplan, Invasion of the Public Forum Doctrine, 46 Willamette L. Rev. 647, 647, 654 (2010) (describing public forum doctrine as a "kudzu," wherein "there is not even agreement as to how many levels of forum exist within the public forum doctrine").

is incompatible with the purpose of the forum. Finally, in a nonpublic forum, the government may subject speech to any "reasonable" regulation so long as the restriction is "not an effort to suppress expression merely because public officials oppose the speaker's view."[148]

As these definitions make clear, it is the government itself that primarily controls how public property is designated and thus the extent of its own authority over speech on that property. The government determines the purpose for opening a limited public forum and may restrict speech or speakers incompatible with that purpose; it may also close the forum entirely at its discretion.[149] It may ensure, for example, that student spaces are only open to student speech, that museums are dedicated to only certain types of art, and that children's programming is restricted to child-appropriate content.[150] The government may also determine that its land is not a forum for public expression at all. For example, the government may prohibit political expression in the public spaces surrounding its buildings by dedicating that space to individuals engaged in government business, by enacting a regulation against disruptive behavior there, or even by declining to explicitly dedicate that space to expression.[151] Courts broadly defer to government decisions to label public lands as nonpublic forums, including such sites as parks, plazas, and memorials.[152] Thus, speakers wishing to engage in political speech on public land are largely limited to property the government approves for that type of speech.

Third, the government has substantial leeway to address the unsafe or disorderly secondary effects of speech, even where such regulations

[148] *Perry Educ. Ass'n*, 460 U.S. at 46.

[149] See id. at 45–46, 46 n.7.

[150] Cf. Widmar v. Vincent, 454 U.S. 263, 267–68, 267 n.5 (1981) (university meeting spaces may be limited to student groups); City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Rels. Comm'n, 429 U.S. 167, 169, 172–77 (1976) (school board meeting may be limited to board business).

[151] United States v. Kokinda, 497 U.S. 720, 727–30 (1990) (plurality opinion) (upholding ban on political solicitation on sidewalk outside post office because the government had constructed the space to allow patrons to enter the post office and had not expressly dedicated the space to expression).

[152] See Krotoszynski, supra note 141, at 781 n.1, 801; see also Lee v. Int'l Soc. for Krishna Consciousness, 505 U.S. 672, 685 (1992) (per curiam) (holding airport terminal is a nonpublic forum wherein the government may ban all solicitation as a reasonable restriction on speech); Hodge v. Talkin, 799 F.3d 1145, 1158–61 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 2009 (2016) (holding Supreme Court plaza is a nonpublic forum); Oberwetter v. Hilliard, 639 F.3d 545, 552–54 (D.C. Cir. 2011) (holding that the Jefferson Memorial is a nonpublic forum).

burden the speech right itself.[153] Courts consider regulations aimed at the secondary effects of speech as content-neutral time, place, and manner restrictions even if the law facially discriminates against certain types of speech or speakers.[154] The secondary effects doctrine has thus far been used to restrict sexually explicit speech, but the Court has implied that the doctrine applies equally to political speech as it does to any other type of speech.[155] The secondary effects of congestion, noise, blight, or litter that attend permanent political installations like political encampments or the clustering of many political organizations headquartered in a residential area may well permit the government to explicitly limit such political speech, and only that speech, under the lenient time, place, and manner standard.

Finally, the government may uninhibitedly use its own speech to exclude messages from public forums by deciding which messages to promote using its resources. Very often, citizens will seek government assistance in expressing their political messages in public spaces, such as by asking the government to exhibit a political art show, place a monument in a park, or print a license plate with a political message on it. It is fully within the government's discretion to accept or deny these requests based on whether it agrees with the message seeking to be conveyed.[156] This level of power over public messaging has an immense

[153] City of Renton v. Playtime Theaters, 475 U.S. 41, 43 (1986) (permitting a city to zone out adult movie theaters because of the deleterious effects these establishments tend to have on their neighborhoods); City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438–39 (2002) (plurality opinion) (upholding a ban on more than one adult entertainment business in the same building on the basis of a study that a concentration of such businesses is associated with an increase in crime).

[154] *City of Renton*, 475 U.S. at 46.

[155] See R.A.V. v. City of St. Paul, 505 U.S. 377, 394 n.7 (1992) (analyzing whether the emotive effects of political speech are secondary effects, subject to time, place, and manner restrictions); Boos v. Barry, 485 U.S. 312, 320–21 (1988) (plurality opinion) (analyzing whether a regulation prohibiting the display of certain political signs near embassies targets the secondary effects of that political speech); id. at 334 (Brennan, J., concurring) (criticizing the majority's secondary effects analysis for applying that doctrine to political speech). Neither *Renton* nor *Alameda Books* upheld the challenged regulations under the secondary effects doctrine by relying on the fact that the speech at issue was sexually explicit speech, and both cite cases involving other types of speech. *City of Renton*, 475 U.S. at 51–52; *Alameda Books*, 535 U.S. at 430.

[156] Pleasant Grove City v. Summum, 555 U.S. 460, 472–73, 481 (2009) (holding the government may determine what group's monuments are placed in a public park because that choice is a form of government speech); Walker v. Tex. Div., Sons of Confederate Veterans,

influence over public discourse—and indeed has enabled propaganda campaigns and speech-control programs throughout U.S. history.[157] It is nonetheless compatible with the First Amendment's embrace of equal and moderate protection for speech as an important tool for directly fostering a more robust, vibrant, and equal democratic discourse.

5. Political Speech on Private Property

Where the First Amendment permits ample regulation of political speech on public property, it accepts near limitless interference with political speech on private property.[158] This is because the First Amendment, like most constitutional provisions, only applies to government conduct, and thus is no barrier to private restrictions of speech on private property. The consequences of this rule for free speech—and especially for the right to engage in political speech—have always been weighty, as most adult speech surely occurs within the private premises of our homes, worksites, and the businesses we frequent. It has taken on an entirely unprecedented dimension, however, in the context of the Internet and the rise of social media on private platforms.

Yet notwithstanding that such virtual forums essentially operate as the modern public square,[159] the Supreme Court has steadfastly refused to extend the First Amendment to private forums.[160] As a result, prominent and important political speech that contributes immensely to our national political discourse is fully unprotected by our supposedly robust constitutional free speech doctrine and is open to all manner of private restriction, removal, and retaliation. Kneeling during the national anthem at a sports game, wearing a "Black Lives Matter" shirt to work, or attempting to unionize a private shop all garner no First Amendment

Inc., 576 U.S. 200, 216 (2015) (holding that the approval or rejection of license plate design applications is government speech).

[157] Tim Wu, Is the First Amendment Obsolete? 117 Mich. L. Rev. 547, 551–53 (2018).

[158] See Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (holding that picketers did not have a First Amendment right to enter a shopping center with the purpose of advertising their strike); Lloyd Corp. v. Tanner, 407 U.S. 551, 567–70 (1972).

[159] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (identifying "cyberspace—the vast democratic forums of the Internet . . . and social media in particular" as "the most important places (in a spatial sense) for the exchange of views" (internal quotation marks omitted) (citation omitted)).

[160] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) ("[T]his Court's longstanding precedents[] establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. . . . [It] does not prohibit *private* abridgment of speech.").

protection from private censorship. Neither does a political post on Facebook or the organization of a political movement on Twitter. Not even the President's speech is immune from being altered, deleted, or banned from such platforms.

In these privately owned and operated spaces, both virtual and physical, the absence of First Amendment protection is the great equalizer of speech protection. *All* speech, from commercial to political to the inane, is equally unprotected from private suppression, interference, and manipulation. In these prolific spaces, the supposed boast that our free speech jurisprudence vigorously protects all political speech does not just come up short; it does not make it past go. At the same time, as with other political speech, the absence of First Amendment protection opens up more room for the government to impose affirmative obligations on private entities to foster a safe and healthy democratic discourse on their property.

6. Political Speech Categorically Unprotected

Another category of political speech that receives no First Amendment protection is political "speech crimes." These are crimes that do not simply involve speech but whose criminal element consists entirely of speech. Such crimes can be roughly divided into three categories: verbal mistreatment, such as threats, cyberbullying, and harassment;[161] malicious falsehoods, including fraud, perjury, hoaxing, and other harmful lies;[162] and coordinated speech intended to harm a third party, like conspiracy, anticompetitive agreements, incitement, and

[161] See Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (declining to review Title VII's prohibition on verbal harassment that creates a hostile work environment under the First Amendment); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (defining prohibitable harassment in the educational context as speech that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); Virginia v. Black, 538 U.S. 343, 358–60 (2003) (defining threats outside the scope of First Amendment protection as statements made "with the intent of placing the victim in fear of bodily harm or death").

[162] See, e.g., 18 U.S.C. § 1001 (criminalizing knowing and willful materially false statements in any government matter); Model Penal Code § 250.3 (Am. L. Inst. 1980) (criminalizing false reports of crimes or catastrophes that cause "public inconvenience or alarm"); Louis W. Tompros, Richard A. Crudo, Alexis Pfeiffer & Rahel Boghossian, The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-*Alvarez*, Social Media-Obsessed World, 31 Harv. J.L. & Tech. 65, 82–84 (discussing false reporting statutes).

espionage.[163] Such crimes, even when perpetrated for purely political purposes, are not balanced against any First Amendment values at stake.[164] In fact, the First Amendment does not apply at all.[165]

These crimes stand to sweep in a not insignificant amount of obviously political speech. For example, refusing to file taxes to protest a war, declining to testify at the trial of a political dissident, verbally haranguing a racist coworker, conspiring to obstruct traffic for a political demonstration, inciting a crowd to riot over a stolen election, and disclosing classified information about a surveillance program to the press are all unprotected criminal speech. Speech crimes demonstrate how particularly harmful political speech is fully and routinely prohibited by law. They also show how zeroing out protection for such speech—political and otherwise—serves once more to equalize the level of protection (or lack thereof) for political speech and other speech.

Understanding the broad range of permissible speech crimes, including speech that touches on matters of public concern, properly situates the few contrary cases as both narrow and marginal. In particular, *United States v. Alvarez*, *Snyder v. Phelps*, and *Brandenburg v. Ohio*[166]—all touted as foundational cases that confirm expansive protection for dangerous and malicious speech—are anything but. These cases, respectively, appear to provide expansive protection for false statements,

[163] See, e.g., Associated Press v. United States, 326 U.S. 1, 19–20 (1945) (holding that the First Amendment does not protect speech or press activity from antitrust laws); Dennis v. United States, 341 U.S. 494, 516–17 (1951) (holding that conspiracies to overthrow the government are constitutionally prohibitable); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (per curiam) (allowing states to forbid advocacy of the use of force where it is directed to inciting and likely to produce that force); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915, 927–28 (1982) (finding no liability for a civil rights organizer who made impassioned speeches, but noting that the analysis would be different if those speeches were likely to incite lawless action); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 425–28 (1990) (finding that the First Amendment did not protect a boycott with the objective of gaining economic advantage for those participating); United States v. Rosenberg, 195 F.2d 583, 591–92 (2d Cir. 1952) (holding that the communication of secret information to a foreign government is not protected under the First Amendment).

[164] For the argument that courts should balance First Amendment values against public harms in whistleblower cases, see Yochai Benkler, A Public Accountability Defense for National Security Leakers and Whistleblowers, 8 Harv. L. & Pol'y Rev. 281, 285–86, 306 (2014).

[165] The definition and scope of these crimes is subject to First Amendment scrutiny, as all crimes are. But speech that falls within their definitions is entirely unprotected, regardless of its political nature.

[166] 567 U.S. 709 (2012); 562 U.S. 443 (2011); 395 U.S. 444 (1969) (per curiam).

emotionally disturbing speech, and incitement. Yet each is riddled with loopholes and exceptions, such that they ultimately only protect a narrow band of deleterious speech—that is, falsehoods with no injurious impact;[167] nondisruptive vile speech spoken on public property concerning matters of public import;[168] and general advocacy of lawless action that is neither intended nor likely to cause imminent harm.[169] As such, they do little to protect analogous speech that is both more treacherous and more naturally employed to accomplish harmful ends, like lies of consequence, harassment, and conspiracy to commit violence. These cases are thus uninfluential in moving the doctrine away from allowing the criminalization of speech that is but a hairsbreadth different from the speech protected in these cases, and that is the more common and precarious form of deceiving, inflicting distress, and provoking violence. In other words, these cases do not prevent the government from restricting speech that seriously threatens public harm and endangers the orderly and informed exchange of political discourse.

The underlying rationale for denying First Amendment protection to speech crimes shines one of the brightest lights on the doctrinal instability of the notion that political speech garners strict protection. Speech crimes receive no constitutional protection because of a long-standing and uncontroversial calculus that such speech is anathema to civilized society. Though the Supreme Court has recently based the exclusion of such speech on a "long-settled tradition of subjecting that speech to regulation,"[170] the significant evolution of the First Amendment's application to speech crimes belies this simple explanation.[171] For example, the scope of prohibitable incitement and false statements has shifted dramatically since the post-New Deal speech revolution, complicating any notion of a "long-settled tradition" in this area.[172] A tradition of sanctioning speech crimes, therefore, cannot alone explain their constitutional status. Rather, speech crimes lay beyond the bounds

[167] *Alvarez*, 567 U.S. at 718–21, 725–26.
[168] *Snyder*, 562 U.S. at 453–58.
[169] *Brandenburg*, 395 U.S. at 447–49.
[170] United States v. Stevens, 559 U.S. 460, 469 (2010); see also Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) (limiting speech excluded from the First Amendment to those categories that are "part of a long (if heretofore unrecognized) tradition of proscription").
[171] See generally Lakier, supra note 2 (documenting the evolving protection standards for low-value speech).
[172] Id. at 2168, 2197–99.

of First Amendment protection not only by tradition, but also by continuing acceptance that such speech is incompatible with an ordered democratic society. Despite the Court's platitudes that the First Amendment prevents suppression of socially objectionable speech,[173] the doctrine permits exactly this. Acknowledging that value judgments *do* animate aspects of the doctrine in turn undercuts one of the central tenets underlying strict protection for political speech: that the government may not restrict speech based on a judgment as to the value of that speech. In fact, the doctrine is laden with value judgments, which makes that principle a shaky pillar on which to rest absolute protection for political speech.

7. Political Speech and National Security Exceptionalism

Finally, protection for political speech is especially relaxed in the context of protecting U.S. foreign and domestic security. Beginning with political speech that threatens foreign national security interests, the government has ample authority to restrict, ban, and punish political speech that is likely to cause national security harm—and receives substantial deference in determining the likelihood of whether such harm will occur. *Holder v. Humanitarian Law Project* is exemplary.[174] There, the Court upheld a restriction on providing nonviolent dispute resolution training to a designated terrorist organization.[175] The Court did not independently assess the likelihood that such support would harm national security interests; it instead deferred to executive and congressional "empirical" findings that *any* form of support to terrorist organizations poses a serious threat of furthering terrorist activity.[176] The Court explained that "when it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked . . . and respect for the Government's conclusions is

[173] Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., Inc., 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.").

[174] 561 U.S. 1, 7–15 (2010).

[175] Id. at 7–10, 36–39.

[176] Id. at 29, 32–34.

appropriate."[177] How much respect is appropriate? The Court found it "vital in this context not to substitute . . . [its] own evaluation . . . for a *reasonable* evaluation" by the government as to the necessity of banning speech to prevent national security harm.[178] Once again, the government's reasonable assessments as to the potential harm of political speech are controlling.

The government's power and latitude to restrict speech to protect against foreign security threats is pervasive, wide-ranging, and severe. It has consistently been employed, in a mostly unchecked fashion, to limit speech in reaction to every serious national security threat since the Founding.[179] It has justified sweeping restrictions on communications, relations, and associations between citizens and foreign nationals, including information-sharing bans, travel bans, bans on accessing or distributing foreign literature, and bans on accepting foreign campaign contributions.[180] The government's power here is not just expansive; it is exacting. It permits steep prison terms for engaging in such speech,[181]

[177] Id. at 34 (internal quotation marks omitted) (citation omitted).

[178] Id. (emphasis added) (internal quotation marks omitted); accord Schenck v. United States, 249 U.S. 47, 52 (1919) (concluding courts owe greater deference to government during wartime); see also David Cole, The First Amendment's Borders: The Place of *Holder v. Humanitarian Law Project* in First Amendment Doctrine, 6 Harv. L. & Pol'y Rev. 147, 158 (2012) (describing *Holder*'s relatively low level of protection for speech implicating national security concerns).

[179] See generally Stone, Perilous Times, supra note 52 (documenting an unbroken history of government responding to foreign threats by cracking down on free speech, with near total acquiescence by the Supreme Court).

[180] Timothy Zick, The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation, 52 B.C. L. Rev. 941, 942–43, 949–69 (2011) (describing the lack of any meaningful protection for cross-border First Amendment rights, including only a limited right to receive and distribute foreign materials, to host foreign speakers, to travel abroad for the purpose of gathering information about foreign cultures, to send communications to audiences abroad consisting solely of aliens, to associate with aliens located abroad, to access and distribute materials disseminated by a foreign government, to communicate with foreign regimes and agents without government authorization, and to freely share certain scientific and technical information with aliens working in the United States).

[181] For example, the Department of Justice has secured lengthy prison terms for individuals who used social media to disseminate information, pledge support, or provide encouragement to foreign terrorist organizations. See, e.g., United States v. Mehanna, 735 F.3d 32, 41–42, 69 (1st Cir. 2013) (affirming a 210-month sentence for convictions of conspiracy to provide material support to terrorists, conspiracy to kill persons in a foreign country, and for translating al-Qa'ida propaganda into English); Al Bahlul v. United States, 967 F.3d 858, 863–64, 877 (D.C. Cir. 2020) (affirming conviction of conspiracy to commit war crimes for production of a propaganda video and remanding to review the imposed life-sentence under harmless error

allows for preventive restrictions on speech in response to potential threats,[182] and more regularly enables prior restraints.[183] Again, whether or not Congress and the Executive have erred as a policy matter in limiting political speech in response to national security threats, the Court has applied only moderate scrutiny to these decisions, leaving them in place where the government offers reasonable justifications for restricting speech to protect public safety and the preservation of democracy, both here and abroad.

Political speech fares little better in the context of maintaining domestic security. Threats to internal peace and stability regularly justify significant restrictions on expressive freedoms, including political speech. For example, the Supreme Court has taken a far more lenient stance on restrictions to union-organized labor protests in light of the domestic security implications of widespread, organized labor discord and disruption.[184] It has also permitted far greater restrictions on speech in the context of immigration enforcement, including permitting the government to base deportation decisions on an alien's statements or associations.[185] Similarly, it has insulated law enforcement decisions from

standard); United States v. Hassan, 742 F.3d 104, 110–11, 145, 151 (4th Cir. 2014) (affirming a 180-month sentence for one defendant's convictions of conspiracy to provide material support to terrorists and related crimes, for which social media profiles, posts, and videos were used as evidence).

[182] Citizens United v. FEC, 558 U.S. 310, 362 (assuming constitutionality of 2 U.S.C. § 441e, the contribution and expenditure ban on "foreign national[s]," without discussing the necessity of the ban for preventing foreign influence in U.S. elections).

[183] See, e.g., Twitter, Inc. v. Barr, 445 F. Supp. 3d 295, 298–99, 302–03, 305 (N.D. Cal. 2020) (upholding prior restraint on Twitter publishing a report on the number of foreign intelligence surveillance orders it received); N.Y. Times Co. v. United States (The Pentagon Papers), 403 U.S. 713, 730–33, 740, 742–43 (1971) (indicating, in seriatim opinions signed on to by a majority of the Justices, that a statute banning the publication of the type of report at issue would be constitutional); id. at 726 (Brennan, J., concurring) ("[T]he First Amendment's ban on prior judicial restraint may be overridden . . . . only when the Nation 'is at war.'"); Near v. Minnesota, 283 U. S. 697, 716 (1931) ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.").

[184] Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226–27 (1982) (upholding ban on secondary boycotting); NLRB v. Retail Store Emps. Union, 447 U.S. 607, 616 (1980) (same). See generally Julius Getman, Labor Law and Free Speech: The Curious Policy of Limited Expression, 43 Md. L. Rev. 4 (1984) (discussing the Court's balancing of the government's interest in economic regulation against workers' and unions' rights of speech and association).

[185] Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 474, 488, 491–92 (1999) (holding a person may not challenge deportation on grounds they were selectively prosecuted

First Amendment challenge by imposing stringent pleading requirements on cases alleging police retaliation for speech[186] and by maintaining a robust qualified immunity doctrine that protects all manner of speech-suppressive police conduct.[187] By shielding law enforcement decisions from First Amendment scrutiny, the Court has in effect weighed the risk to public safety from law enforcement inaction against the risk to speech from law enforcement action and determined that, where there is even a sliver of doubt, domestic tranquility outweighs the freedom of speech. This standard ultimately subordinates speech to the stable and efficient protection of domestic security.

* * *

The dominant framework of political speech protection embraces moderation by routinely subjecting the vast majority of political speech to reasonable regulations aimed at ensuring a well-functioning democratic government. It comprises various lenient protection standards that afford significant discretion to the government to identify and respond to specific speech harms across all types of political speech. This account directly contradicts the mythologized narrative that the First Amendment grants near-absolutist protection to political speech. It shows that political speech protection is actually quite moderate, is equal to the protection enjoyed by other speech in the same context, and permits ample government discretion to regulate for speech that harms. This account suggests that one reason the hierarchy myth has escaped notice is because the bulk of political speech regulations are quite uncontroversial. In short, they make sense. The idea of moderate protection for political speech, therefore, is not just conventional; it is constructive.

for their speech); Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (rejecting First Amendment challenge to deportation); see also Zick, supra note 180, at 975.

[186] Hartman v. Moore, 547 U.S. 250, 254, 265–66 (2006) (requiring plaintiffs plead the absence of probable cause for an investigation challenged on First Amendment retaliation grounds); Nieves v. Bartlett, 139 S. Ct. 1715, 1722–23 (2019) (same as applied to an arrest).

[187] See, e.g., Reichle v. Howards, 566 U.S. 658, 660, 670 (2012) (holding Secret Service officers were entitled to qualified immunity for a retaliatory arrest); Wood v. Moss, 572 U.S. 744, 764, 747–48 (2014) (finding Secret Service officers who moved protestors away from the President were entitled to qualified immunity from First Amendment violations); Bianchi v. McQueen, 818 F.3d 309, 318–19 (7th Cir. 2016) (finding that absolute prosecutorial immunity and qualified immunity barred all claims against a state's attorney for bringing a political retaliatory prosecution).

C. Bottom-Up Equalization: Elevated Protection for Non-Political Speech

At the same time that the Court has maintained a moderate level of protection for political speech, it has worked to ratchet up protection for non-political speech to an equivalent level of protection. This Section explains *why* non-political speech inevitably garners the same level of protection as political speech. It describes how foundational principles of judicial review exert pressure on the Court to equate the value and purpose of non-political speech with that of political speech and to evenly apply generally applicable rules of speech protection to all types of speech. These pressures have the incidental effect of treating political and non-political speech alike. The upshot is a robust body of caselaw on commercial, cultural, social, and "low-value" speech, confirming an equal level of protection for all these types of speech as well as for political speech.

1. Commercial Speech (or, the "Lochnerization of the First Amendment")

Upon first extending a "limited measure of protection" to a small category of commercial advertising in *Virginia Pharmacy*—"commensurate with its subordinate position in the scale of First Amendment values"[188]—the Supreme Court immediately began broadening the category and elevating the protection of commercial speech. In the intervening decades, the Court has recognized a prolific expanse of economic and business-related expression as protected commercial speech and bestowed a level of protection on such speech commensurate with that enjoyed by all other speech, including political speech. As the Court's prior experience with political speech expansionism foretold, the expansion of commercial speech coverage influenced its level of protection. Like political speech before it, commercial speech's level of protection also settled quickly around the same level of protection enjoyed by all other speech. Unlike political speech, however, this calibration has meant that the Court has had to ratchet up protection for commercial speech above the level it purports to apply under the hierarchy of speech myth.

[188] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 445, 447, 456 (1978).

The upward trajectory of protection for commercial speech has been identified and roundly criticized by scholars as a sort of "Lochnerization" of the First Amendment—a way to constitutionally immunize economic activity from regulation via the First Amendment.[189] The phenomenon they describe is no doubt accurate, but the impetus for *why* the doctrine evolved this way remains undertheorized. It was the natural result of foundational doctrinal principles governing First Amendment law, all of which resist treating different speech differently, that ensured commercial speech would never receive subordinate constitutional protection. These principles include the generally applicable prohibitions on content and viewpoint discrimination; the analogical reasoning model for deciding cases, which relies on likening speech to other speech; and an institutional reluctance by the judiciary to remove government discretion from the spheres of government administration. These principles have consistently overpowered the weak analytical force of the hierarchy model and ensured its failure.

At the start of this trajectory, the Court extended First Amendment protection to a specific category of purely commercial speech "which does no more than propose a commercial transaction"—essentially advertisements and solicitations for goods and services.[190] The limiting effect of this definition quickly fell way to the analogical reasonableness of treating a commercial advertisement the same as the exchange of any other commercial information, such as commercial data, product disclosures, or business reports. From here, the natural progression of such reasoning inevitably led courts to recognize marketing data,[191]

[189] See sources cited supra notes 10–11 and accompanying text.

[190] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (internal quotation marks omitted).

[191] Sorrell v. IMS Health Inc., 564 U.S. 552, 557, 566–67 (2011) (identifying speech in aid of pharmaceutical marketing as protected speech).

commercial signs,[192] business disclosures,[193] union dues,[194] trademarks,[195] and product labels[196] as protected speech.

At the same time, and despite its rhetoric to the contrary, the Supreme Court has elevated the level of protection for commercial speech to an equal level as that enjoyed by political speech. Nominally, a regulation on commercial speech is valid if it directly advances a "substantial" governmental interest and "is not more extensive than is necessary to serve that interest."[197] The government must show that the harms from commercial speech "are real and that its restriction will in fact alleviate them to a material degree"[198] but need only establish a "reasonable" or "proportion[al]" fit between the government's interests and the means chosen to serve them.[199] This is the exact same level of protection applicable to expressive conduct and speech on public property, which in practice is the same level of protection for election-related expression, the speech of institutional speakers, and speech that implicates national security harms. Across the board, this level of constitutional protection permits regulations on speech that are narrowly tailored to advancing legitimate public safety and welfare interests and requires courts to defer to the government's reasonable evaluation of the harms speech poses and the means for countering them.

At first, the Court did endeavor to establish a lower level of protection for commercial speech by establishing certain protection carve-outs. For example, the Court originally declared commercial speech regulations constitutional even if they are overbroad, constitute a prior restraint, discriminate on the basis of content, or compel speech.[200] But these gaps

[192] Reed v. Town of Gilbert, 576 U.S. 155 (2015) (recognizing commercial signs as protected speech).

[193] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (reviewing a business disclosure as protected speech).

[194] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222, 233–35 (1977) (finding the payment of union dues to be protected speech).

[195] Matal v. Tam, 137 S. Ct. 1744, 1763–64 (2017).

[196] Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 637 (1985) (finding that advertisements for legal services constitute commercial speech).

[197] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[198] Edenfield v. Fane, 507 U.S. 761, 771 (1993).

[199] Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

[200] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (permitting prior restraints, compelled disclosures, and content-discrimination to regulate commercial speech); *Zauderer*, 471 U. S. at 650–51 (permitting compelled disclosure

in protection soon closed under older and stabler doctrinal principles that denounce the compatibility of such regulations with the First Amendment. The protection for commercial speech thereby equalized at the same level of protection of other speech, namely protection against overbroad regulations, prior restraints, content and viewpoint discrimination, and compelled disclosures.[201]

In this way, the symbiotic expansion of commercial speech coverage and commercial speech protection has led to fully equalized protection for nearly all commercial and noncommercial speech. But what made the relationship between the growth of coverage and the elevation of protection symbiotic? Why could the Court not disaggregate the two and permit protection to run to more commercial speech without ratcheting up protection for that speech? The answer lies in three doctrinal developments that exerted upward pressure on the level of protection for commercial speech based on *how* the Court went about expanding the First Amendment's coverage to commercial speech in the first place.[202]

of commercial information); see also *Edenfield*, 507 U.S. at 774 (presuming content discrimination in commercial speech regulations is permissible).

[201] See United States v. Stevens, 559 U.S. 460, 482 (2010) (striking down a law criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty on overbreadth grounds); Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (holding a bar on "immoral or scandalous" trademarks overbroad); N.Y. Mag. v. Metro. Transp. Auth., 136 F.3d 123, 131 (2d Cir. 1998), cert. denied, 525 U.S. 824 (1998) (extending protection against prior restraints to commercial speech); Desert Outdoor Advert. Inc. v. City of Moreno Valley, 103 F.3d 814, 818–19 (9th Cir. 1996) (same); In re Search of Kitty's E., 905 F.2d 1367, 1371–72 & n.4 (10th Cir. 1990) (same); Sorrell v. IMS Health Inc., 564 U.S. 552, 557, 579–80 (2011) (prohibiting content discrimination in a commercial regulation); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371, 2375, 2378 (2018) (same, and prohibiting the compelled disclosure of controversial commercial information); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 15–18 (1986) (protecting against compelled commercial speech); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2464 (2018) (same).

[202] The answer also lies in the Court apparently missing the trend. By the time these transformations were fully underway, the Court declared in *City of Cincinnati v. Discovery Network* that it was constricting the category of commercial speech so that less speech was subject to a lower level of protection. 507 U.S. 410, 423 (1993). Also in *Bolger v. Young Drug Corp.*, the Court narrowed the definition of commercial speech in an explicit effort to minimize the amount of speech afforded less protection. 463 U.S. 60, 66–69 (1983). The Court was misdiagnosing its own interventions, however. In effect, the reverse was occurring: the scope and definition of protected commercial speech was expanding while the level of protection for that speech increased as a greater percentage of it began to touch on matters of public concern.

First, the Court justified applying the First Amendment to commercial speech by equating its constitutional value with that of political speech. In *Virginia Pharmacy*, the Court stressed that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[203] It also reasoned that such information "enlighten[s] public decisionmaking in a democracy" because it is "indispensable to the proper allocation of resources in a free enterprise system, . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered."[204] Subsequently, in case after case, the Court reaffirmed the value of commercial speech as vital to democratic decision making, often describing it as more important than "urgent political dialogue" and as "perform[ing] an indispensable role" to citizens' engagement with a free market political economy.[205] As it did so, the line between property regulations and speech regulations immediately began to fall away, as it did, for example, in a case striking down a law regulating the appearance of a state license plate as compelled political speech.[206] It has since likened obstructing the free flow of commercial information to banning political parades, slogans, and picketing,[207] to withholding life-saving information,[208] to hindering the administration of justice,[209] and to "compel[ling] individuals to contradict their most deeply held beliefs."[210] In sum, by elevating the constitutional function of commercial speech to that of political speech, the Court created pressure to equalize the levels of protection for both types of speech.

Second, the Court has adopted the same theoretical justifications for protecting commercial speech that have long supported granting strong protection to political speech—namely that the speech advances both individual and civic rights. Originally, the Court extended protection to

[203] *Va. Pharmacy*, 425 U.S. at 763.

[204] Id. at 765.

[205] Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977). For identical reasoning, see, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995); *Discovery Network*, 507 U.S. at 421 n.17.

[206] Wooley v. Maynard, 430 U.S. 705, 714–17 (1977).

[207] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011).

[208] Thompson v. W. States Med. Ctr., 535 U.S. 357, 376–77 (2002).

[209] *Bates*, 433 U.S. at 375–76, 376 n.32.

[210] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

commercial speech as a function of protecting the rights of listeners to the free flow of information but did not recognize any corresponding right of speakers. This distinction did not hold. By the very next term, the Court began to premise protection for commercial speech on both speakers' and listeners' rights to exchange information.[211] Protection for political speech is also premised on both the rights of speakers and listeners—it inheres in the natural law rights of individual liberty and of equal citizenship.[212] Put differently, protection for political speech is based in both the liberal and the republican traditions of rights, whereas protection for commercial speech was originally conceived as only advancing the republican tradition.[213] As the Court began to recognize both the speaker and listener rights inherent in commercial speech, however, it aligned the theoretical justifications for protecting political speech with those for

[211] *Bates*, 433 U.S. at 364; see also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457–59 (1978) (emphasizing the deleterious effects of in-personal legal solicitation on recipients).

[212] Post & Shanor, supra note 10, at 170–71. For rich discussions of the dual speaker-listener/individual-collectivist interests supporting free speech, see Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26 (1960); C. Edwin Baker, Human Liberty and Freedom of Speech (1989); Owen M. Fiss, The Irony of Free Speech (1996); Robert C. Post, Citizens Divided 3–43 (2014).

[213] These two traditions describe the two competing, though complimentary, justifications for the freedom of speech: the liberal tradition protects speech to safeguard the individual's interest in free expression and the republican tradition protects speech to advance society's interest in democratic discourse. See Weiland, supra note 10, at 1402–12. Weiland has argued persuasively that the Court has subsequently corrupted the republican tradition by reconceptualizing "listeners" as individuals whose interests are best served by more information, rather than as stand-ins for the public whose interests are best served by accurate and tailored information. She argues the Court has also corrupted the liberal tradition by transforming the right of autonomy into a naked right to be free from state regulation. The result is a deregulatory doctrine that undermines both the rights of speakers and listeners, as properly conceived. Her argument then goes further by stating that the Court has abandoned listeners' rights entirely. A review of both commercial and political speech caselaw, however, reveals that the listener rights model has not so much disappeared but rather has amalgamated with the speaker rights model to form a hybrid theory of speech protection that draws on both speaker and listener (liberal and republican) rights across all types of speech. For example, in the political speech context, the doctrines governing protection for expressive conduct, speech on public property, election and campaign speech, and government employee speech are all influenced by the listener rights model as they seek to ensure government has the authority and discretion to promote a safe, transparent, and free information ecosystem. While the Court may have corrupted these traditions, both continue to undergird speech protection for all types of speech.

protecting commercial speech, creating more pressure to equalize the level of protection afforded to both types of speech.[214]

Finally, the Court has often opted to resolve cases involving speech at the intersection of political and commercial speech by sidestepping the question of what level of protection the speech in question deserves. This tactic, though ostensibly an exercise in judicial restraint, further obscures the line between commercial and political speech and thereby obfuscates any differences in their levels of protection. The Court has employed this tactic most frequently when confronting a regulation of commercial speech on a matter of public policy or a regulation of commercial speech by a political actor.[215] Instead of fine-tuning where such speech should fall on the hierarchy of speech protection, the Court has assumed without deciding that the regulation is invalid under the lowest level of protection. But to reach this result, the Court does not actually subject the regulation to anywhere near a "low" level of protection. The analysis thereby distorts the meaning of low protection and effectively raises it to a higher level. Both effects contribute to the vanishing of any truly low level of protection for commercial speech and its transformation into a heightened level of protection akin to that enjoyed by all other protected speech—including political speech.

2. Cultural Speech—from Memes to Memoirs

This "other" speech that is neither political nor commercial, but is nonetheless fully and equally protected, is best described as cultural speech. It is the body of artistic, social, and cultural production that includes everything from a Jackson Pollock painting to a restaurant review to a diatribe about a flailing sports team. It consists of great works of literature as well as common and benign utterances about the everyday vagaries of life. It includes speech that inspires and provokes and also

[214] For example, the Court reasoned that both speakers and listeners are served by the speech at issue in *Citizens United v. FEC*, 558 U.S. 310, 353–56 (2010) (political expenditures, i.e., purely political speech), *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2464–67 (2018) (public union dues, i.e., indirect or quasi-political speech), and *Becerra*, 138 S. Ct. at 2374–75 (2018) (commercial service disclosures, i.e., purely commercial or professional speech) and accordingly applied similar protection to all three types of speech.

[215] See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 (1996); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423–24 (1993); *Becerra*, 138 S. Ct. at 2375, 2378; Matal v. Tam, 137 S. Ct. 1744, 1764 (2017); cf. *Janus*, 138 S. Ct. at 2465.

speech that does little more than earn a chuckle or a quizzical glance. It can be opinionated, solely informative, or simply a passing remark or sketch or post lacking any real purpose or even meaning.

It is also the majority of speech individuals engage in. Most discussion is not directly on politics or business in the narrow sense, or even about matters of public concern more generally. Rather, "[*m*]*ost* of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from Government regulation."[216] The First Amendment draws no distinction between worthy cultural contributions and mere gibberish. "Even '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'"[217] The underlying assumption for this rule is that *all* cultural speech is integral to the core purposes of free speech, and so merits equal protection on par with that received by political speech.[218]

The doctrine embraces this assumption for several astute reasons. The first is that it is nearly impossible to draw any clear lines between cultural, political, and even commercial speech, rendering any attempt to assign different levels of protection to each an exercise in futility and prone to extensive error. Two recent cases illustrate the point: a law banning the distribution of animal crush videos can be read alternatively as a law banning artistic speech in the form of a film, commercial speech in the form of a sale, or political speech in the form of a message about animal

[216] United States v. Stevens, 559 U.S. 460, 479 (2010) (internal quotation marks omitted).

[217] Id. at 479–80 (quoting Cohen v. California, 403 U.S. 15, 25 (1971)).

[218] Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984) ("[E]ven though political speech is entitled to the fullest possible measure of constitutional protection, there are a host of other communications that command the same respect. An assertion that 'Jesus Saves,' that 'Abortion is Murder,' that every woman has the 'Right to Choose,' or that 'Alcohol Kills,' may have a claim to a constitutional exemption from the ordinance that is just as strong as 'Roland Vincent — City Council.'"); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 796 n.4 (2010) ("Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not *constitutional* ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them [are entitled to the same protection as political speech]."); Winters v. New York, 333 U.S. 507, 510 (1948) ("Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

cruelty.[219] The same problem arises with a law banning the sale of violent video games to minors, which also bans artistic video expression, commercial solicitation speech, and political messaging about violence and the treatment of women and minorities in particular.[220]

Second, even where the line is clear, the state is ill-positioned to draw it. The very act of engaging in cultural speech of any kind is a form of democratic empowerment and legitimation. For the state to exercise control *within* this sphere by imparting value judgments and carving it into separate zones of protection would negate the very purpose of extending protection to cultural speech in the first place. Cultural free speech allows individuals to help shape the cultural systems of power that surround them, including the work, family, and religious systems that undergird and transcend the power of the state.[221] It also serves democracy by freeing citizens to think and discuss what matters to them, as well as by facilitating proxy discussions of "mores, values, customs, meanings, and emotions even if people do not want to talk about politics or public policy in a narrower sense."[222] Similarly, cultural speech empowers citizens to participate in the formation of public opinion, which in turn influences governmental decision-making.[223] This process bolsters democratic legitimation by giving citizens a "warranted belief that their government is responsive to their wishes."[224] In short, every cultural utterance contributes in some way, big or small, to public discourse, making every expression of cultural speech constitutionally valuable.[225]

[219] *Stevens*, 559 U.S. at 465. The Court left open whether videos depicting acts of *extreme* animal cruelty is protected speech, id. at 472; however, this logic applies equally to videos of hunting or Spanish bullfights, which the Court presumed to be protected speech under the First Amendment. Id. at 479–80.

[220] *Brown*, 564 U.S. at 789–90.

[221] Balkin, Cultural Democracy, supra note 18, at 1061.

[222] Id. at 1070–71, 1078.

[223] See Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 7 (2000).

[224] Id.; see also Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 601 (1990) (noting that the Court's extension of First Amendment protection to outrageous or offensive speech reflects a desire to foster the development of public opinion); Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. Colo. L. Rev. 1109 (1993) (identifying the values in both traditional and collectivist theories of free speech to preserve robust systems of self-determination and self-government).

[225] A particularly memorable expression of cultural "gibberish" in the caselaw—a student banner with the phrase "BONG HiTS 4 JESUS"—itself resulted in thousands of media stories,

In recognition of the myriad, often unexpected, ways cultural speech equally contributes to the core purposes for protecting speech, the Court has extended equal protection to it.

3. Speech-Conducive Conduct

As the Court has affirmed equal protection for all manner of social, cultural, and economic expression, it has also expanded the reach of that protection further afield to certain social and economic conduct. In other words, it has further blurred the boundaries between speech and conduct at the same time it has blurred the boundaries between types of speech. This blurring has driven the extension of First Amendment protection to reach an increasing amount of "speech-conducive" conduct, meaning conduct that may incidentally communicate a message on the part of the doer simply by their engaging in that conduct. For example, the Court has extended the protection applicable to political, social, cultural, and commercial speech to such political, social, cultural, and commercial conduct as, respectively, paying union dues,[226] baking a wedding cake,[227] nude dancing,[228] and pharmaceutical marketing.[229]

The extension of First Amendment protection to speech-conducive conduct follows on the coattails of the extension of protection to expressive conduct. At its start, the Court drove First Amendment protection down the speech/conduct continuum in a series of cases all involving overtly expressive conduct, such as saluting the flag,[230]

countless dinner table and classroom conversations, and several court cases including a major Supreme Court case on student speech rights. See Morse v. Frederick, 551 U.S. 393 (2007).

[226] Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2463–65 (2018) (applying "exacting scrutiny" to agency-fee requirements).

[227] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1723, 1728 (2018). The majority opinion in *Masterpiece* did not explicitly hold that baking a custom wedding cake is protected speech but alluded as much, describing the designing and creation of a wedding cake as the baker's "own personal expression" and cryptically asserting that seeing the creation of a wedding cake as an exercise of protected speech can "deepen our understanding" of the First Amendment. See also id. at 1744, 1744 n.3 (Thomas, J., concurring) (describing the creation of custom wedding cakes as "expressive" and "artistry").

[228] City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (applying the *O'Brien* standard to an ordinance on nude dancing).

[229] Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (applying "heightened judicial scrutiny" to a regulation on "[s]peech in aid of pharmaceutical marketing . . . [as] a form of expression protected by the Free Speech Clause of the First Amendment").

[230] W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

displaying a red communist flag,[231] conducting a silent sit-in,[232] or wearing a black armband.[233] This type of conduct is best described as "speech-conduct," as it is a form of silent communication incidentally actuated through behavior. The Court took the next step down the continuum by extending protection to less obviously communicative acts, best labeled "expressive conduct," such as nude dancing[234] and selecting participants in a cultural parade.[235] As discussed above, the Court claimed to apply less stringent protection to expressive conduct, though in reality it enjoys essentially the same level of protection as other protected speech.[236] Finally, the outward trajectory of First Amendment coverage to conduct has reached activities that only incidentally communicate a message, best termed "speech-conducive conduct." This category of "speech" consists of routine, often commercial, conduct usually engaged in for entirely non-expressive purposes, but that is conducive to being a vehicle for the expression of a message, such as data collection, artful product production, and information sharing. By extending equal First Amendment protection to such conduct, the Court has again elevated a broad swath of activity to the same constitutional position as speech that more integrally serves the political, cultural, and individual values underlying the freedom of speech.

This trajectory has been driven in large part by the Court's reluctance to delineate any clear distinction between speech and conduct. It attempted a test at the height of the explosion of First Amendment coverage in *Spence v. Washington*, defining a category of symbolic conduct as an activity that is "sufficiently imbued with elements of communication[,]" based on the "nature of [the] activity [and] the factual context and environment in which it was undertaken."[237] Lacking both clarity and comprehensiveness, the *Spence* test has failed to govern a line

[231] Stromberg v. California, 283 U.S. 359, 369–70 (1931).

[232] Garner v. Louisiana, 368 U.S. 157, 201–02 (1961) (Harlan J., concurring) (sit-ins at segregated lunch counters); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (silent sit-in at a library to protest segregation).

[233] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[234] City of Erie v. Pap's A.M., 529 U.S. 277, 285 (2000) (plurality opinion).

[235] Hurley v. Irish-Am. Gay, Lesbian, Bisexual Grp. Bos., 515 U.S. 557, 568–70 (1995).

[236] See supra Subsection I.B.3 (describing the *O'Brien* standard of protection).

[237] Spence v. Washington, 418 US 405, 409–10 (1974). The Court also identified as instructive whether "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Id. at 410–11.

between protected speech and unprotected conduct.[238] Instead, courts tend to avoid the question of whether an act is speech for the conclusory view that certain conduct is naturally or obviously speech and other conduct is not.[239] This lack of criteria has pushed the First Amendment to cover an increasing amount of speech-conducive conduct, elevating a broad swath of social and commercial activity to the constitutional status of protected speech.[240]

The potential consequences of constitutionalizing ordinary activity like paying for a service, using information gathered from customers, and creating a product are striking. Yet this is where First Amendment doctrine has landed on the speech/conduct continuum with insufficient judicial second thought. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, for example, no member of the Court paused to consider whether paying union dues implicates the freedom of speech, assuming uncritically that this employment-related transaction is a form of compelled political speech.[241] The Court has similarly never deliberately assessed why certain political expenditures, such as those that go towards campaign operational costs, are protected speech as opposed to unprotected employer transactional costs.[242] The Court elided the same question in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Sorrell v. IMS Health Inc.*, assuming without analysis that the creation of a commercial product and the use of a commercial dataset both implicate the freedom of speech.[243]

If such business and employer-related activity is protected speech simply because it involves the use of information or potentially

[238] Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1250–60 (1995) (discussing the incoherence and shortcomings of the *Spence* test).

[239] See Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark, 1994 Sup. Ct. Rev. 1, 13 (observing that courts tend to presuppose whether the First Amendment applies to the conduct at issue); Schauer, Categories and the First Amendment, supra note 139, at 267–82 (describing the incongruences in First Amendment doctrine between protected and unprotected speech, including between speech and conduct).

[240] Amanda Shanor, First Amendment Coverage, 93 N.Y.U. L. Rev. 318, 322–23 (2018); Frederick Schauer, The Politics and Incentives of First Amendment Coverage, 56 Wm. & Mary L. Rev. 1613, 1619 (2015) [hereinafter Schauer, Politics and Incentives].

[241] 138 S. Ct. 2448 (2018).

[242] See Davis v. FEC, 554 U.S. 724, 738 (2008) (analyzing political expenditures solely as facilitating political messaging as opposed to operational costs); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 736 (2011) (same).

[243] See 138 S. Ct. 1719, 1723 (2018); 564 U.S. 552, 557 (2011).

communicates a message, it is hard to imagine what activity would not be entitled to First Amendment protection—especially in the digital age. Everything from pension contributions and healthcare fees to selling a product or using information for purchasing decisions would seemingly be protected speech-conducive conduct.

Having explored the issue of First Amendment coverage of communicative conduct in great depth, Frederick Schauer recently left it to future scholarship to discuss the normative arguments for tweaking the levels of speech protection in light of this outward expansion of coverage.[244] This Article begins to address just this question in Part II. Here, it is simply important to note that the expansion of coverage to speech-conducive conduct through a process of equating it with speech-conduct has resulted in a body of previously unprotected or less protected expression receiving equal speech protection.

4. Low-Value Speech

Another category of speech that has garnered increased protection to the point that much of it now enjoys equal protection with political speech is "low-value" speech. This category includes solacious, violent, threatening, deceitful, obscene, and defamatory speech. Under the myth of the hierarchy of speech protection, the Court has claimed to place such speech on the hierarchy's lowest rung where it receives minimal protection commensurate with its minimal value for advancing the core functions of the freedom of speech. This framework existed in rhetoric but not so much in reality. Both before and after inventing the hierarchy, the Court has consistently analyzed whether low-value speech is protected by considering whether the expression at issue is categorically unprotected, not whether it is less protected.[245]

The Court finally abandoned its purported reliance on a hierarchical, value-based framework for protecting low-value speech in a trio of successive cases: *United States v. Stevens*, *Brown v. Entertainment Merchants Association*, and *United States v. Alvarez*.[246] In its place, the

[244] Schauer, Politics and Incentives, supra note 240, at 1636.

[245] See, e.g., Roth v. United States, 354 U.S. 476 (1957); Stanley v. Georgia, 394 U.S. 557 (1969); Watts v. United States, 394 U.S. 705 (1969) (per curiam); United States v. Reidel, 402 U.S. 351 (1971); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Virginia v. Black, 538 U.S. 343 (2003); United States v. Stevens, 559 U.S. 460 (2009).

[246] 559 U.S. 460 (2009); 564 U.S. 786 (2010); 567 U.S. 709 (2012).

Court adopted an explicit categorical approach: low-value speech is either entirely excluded from First Amendment protection or entitled to equal First Amendment protection as "high-value" speech.[247] These cases are widely studied for having developed a somewhat novel historical test for deciding *whether* speech falls inside or outside First Amendment coverage. A lesser analyzed consequence of the Court's intervention here, however, is that it explicitly abandoned the hierarchical model of speech protection for this category of speech. In effect, the Court lopped off the bottom rung of the hierarchy and thus began to realign its methodological approach away from myth and towards a more accurate description of the doctrine.[248]

By narrowing the categories of unprotected speech to only those that have a historical tradition of being regulated, the Court effectively ratcheted up protection for a significant amount of speech that purportedly had received low protection. The very speech at issue in *Stevens*, *Brown*, and *Alvarez* is instructive. In each case, the Government unsuccessfully argued that the underlying speech—depictions of animal cruelty, violent video games, and false statements—is entitled to minimal protection and is thus more broadly regulable to prevent the substantial social harms such speech poses.[249] In rejecting this proposition entirely, the Court extended equal First Amendment protection to a body of lies, violence, and vitriol as it has to art, protest, and poetry.[250] However, because this level of protection is properly understood as moderate, not absolute, legislatures have retained the authority to regulate vile and hazardous speech to the

[247] *Stevens*, 559 U.S. at 468–72; *Brown*, 564 U.S. at 791–93; *Alvarez*, 567 U.S. at 717–22. But see infra Subsection I.C.5 (discussing how even categorically excluded speech is protected from content- and viewpoint-based discrimination).

[248] Genevieve Lakier has argued that the categorical approach is inconsistent with the Court's historical treatment of low-value speech, even if, as this Article argues, it is more consistent with the doctrine in other ways. See Lakier, supra note 2.

[249] *Stevens*, 559 U.S. at 469–70 (discussing government's argument that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs"); *Brown*, 564 U.S. at 792–93 (seeing government compare violent video games to obscenity); *Alvarez*, 567 U.S. at 718 (discussing government's argument that lies have no First Amendment value and hence are not entitled to full First Amendment protection).

[250] Another notable consequence of embracing the categorical approach is it leaves the Court with a very blunt tool for "referee[ing] the paradigmatic conflicts of a modern, pluralistic political order." Jamal Greene, Foreword: Rights as Trumps? 132 Harv. L. Rev. 28, 30 (2018).

extent it substantially threatens a safe, healthy, and informed public discourse.

Discarding the category of lesser-protected low-value speech has also opened another door for newer forms of speech, long thought of as having little or no First Amendment protection, to claim equal protection from regulation. This category of speech includes technological speech like data and digital information, as well as speech that has only recently come under the regulation of modern labor, financial, and civil rights laws.[251] Because none of this speech has a long tradition of regulation, it stands to reason that it also should receive First Amendment protection on par with other protected speech—and in this case, extending only moderate protection to such speech will be necessary to preserve a well-functioning, vibrant, and inclusive economic sphere.

5. Content- and Viewpoint-Based Laws

Lastly, the Supreme Court has not only directly equalized protection for non-political and political speech in contravention of the hierarchy of speech protection, but it has also doubled down on certain neutral and generally applicable principles in the doctrine that incidentally push all types of speech to the same level of protection. In particular, the Court's sweeping prohibitions on viewpoint- and content-based laws exert an equalizing force on all speech that contributes to the doctrine only supporting one equal level of protection for speech.

Content-based regulations are laws that apply to only certain speech depending on the topic, subject-matter, or idea expressed.[252] "As a general matter, such laws 'are presumptively unconstitutional.'"[253] Viewpoint-based laws target speech based on the particular ideology, opinion, or perspective conveyed, and are "thus an egregious form of content discrimination."[254] The Court "stringent[ly]" protects all speech against both types of laws, reflecting the "fundamental principle that

[251] For example, myriad social and economic expression has come under the regulation of modern anti-discrimination statutes, including architectural design choices under the Americans with Disabilities Act and organization membership, employment hiring, and business service decisions under anti-discrimination public accommodations laws.

[252] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[253] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 576 U.S. at 163).

[254] Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829 (1995).

governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[255] Viewpoint-based restrictions on speech are seemingly never allowed, and content-based restrictions are only permissible in limited circumstances, such as to single out traditionally unprotected categories of speech for regulation.[256]

The prohibition on viewpoint- and content-based laws is a general principle of speech protection that applies as equally to high-value speech as it does to everyday speech. It thus serves not only to equalize protection amongst categories of protected speech but also to elevate the mundane "speech of life" to this same level of protection. The Court has confirmed that the bar against content- and viewpoint-based restrictions applies as equally to political,[257] commercial,[258] religious,[259] and cultural speech,[260] as it does to low-value speech,[261] trademarked speech,[262] and speech by institutional speakers.[263] Even within *unprotected* categories of speech,

[255] *Becerra*, 138 S. Ct. at 2371 (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

[256] Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 791 (2010) (noting that the First Amendment permits content-based restrictions in "limited areas" such as obscenity, incitement, and fighting words).

[257] Boos v. Barry, 485 U.S. 312, 315, 318, 334 (1988) (striking down ban on signs within a certain distance of a foreign embassy that would tend to bring the embassy's government into "public disrepute,"—termed "classically political speech"—as impermissible content-based restriction on speech).

[258] Sorrell v. IMS Health, Inc., 564 U.S. 552, 564 (2011) (striking down a law prohibiting the use of data for marketing purposes as an impermissible content-based regulation on speech); *Becerra*, 138 S. Ct. at 2371 (striking down a requirement that certain reproductive service providers post an informational disclosure relating to their businesses as an impermissible content-based regulation on speech).

[259] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (striking down prohibition on using public school property for religious meetings during non-school hours as impermissible viewpoint-based discrimination).

[260] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–16 (1991) (striking down law imposing financial burdens on literary works mentioning the author's crimes as impermissible content-based restriction on speech).

[261] Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126, 131 (1989) (striking down ban on indecent interstate commercial telephone messages as impermissible content-based regulation).

[262] Iancu v. Brunetti, 139 S. Ct. 2294, 2297, 2302 (2019); Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (striking down content and viewpoint-based restrictions on registering a trademark).

[263] Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 822–23, 837 (1995) (striking down university regulation limiting the use of student activity funds for activities that primarily promote a belief in a deity); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (requiring the state "show that its action was caused by something more than a mere

the government may not regulate only some speech on the basis of content or viewpoint.[264] The breadth of these prohibitions means they reach entirely clerical speech, such as debt collection calls[265] and directional signage.[266] By constitutionally immunizing such speech from government regulation to the same degree as all other speech, the uncompromising principle against content- and viewpoint-based laws exerts a strong equalizing force on the First Amendment's protection for all speech.

The rule against content and viewpoint discrimination in First Amendment law is foundational, and yet it also directly conflicts with the hierarchy of speech model. It wins out over the hierarchy every time, however, because it has a long tradition in the caselaw,[267] is a highly rational and effective means of ferreting out speech restrictions enacted for illicit purposes,[268] and is entirely consistent with the other fundamental principles that create the scaffolding of free speech jurisprudence.[269] Additionally, it serves the interests underlying granting political speech preferred protection more successfully than the hierarchy does because it does not depend on the impossible task of distinguishing between political and non-political speech. Rather, content neutrality operates as an overinclusive means of achieving the kind of political neutrality that is necessary to ensure the democratic legitimacy of government regulation.

desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

[264] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[265] Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2343 (2005).

[266] Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015).

[267] See, e.g., Grosjean v. Am. Press Co., 297 U.S. 233, 249 (1936); Schneider v. State, 308 U.S. 147, 161–62 (1939); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

[268] Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996); see also City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) ("[The rule against content-based laws] reflects important insights into the meaning of the free speech principle—for instance, that content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate. . . . And, perhaps most importantly, no better alternative has yet come to light.").

[269] The content-neutrality principle crystalized around the same time as the hierarchy of speech protection was invented, yet it was the rule against content discrimination that became the most important principle in free speech jurisprudence. See, e.g., Geoffrey Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 189 (1983) (calling it "the most pervasively employed doctrine in the jurisprudence of free expression"); Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231, 232 (2012) (noting that for forty years it has served as the "touchstone of First Amendment law").

In contrast, as discussed in the next section, the hierarchy of speech protection lacks all these attributes: it was a late and unmoored doctrinal invention that does a poor job of protecting the legitimacy of the democratic process. For these reasons, the hierarchy was never able to truly acquire any methodological heft, persisting instead as little more than a doctrinal myth—rhetorically powerful but analytically toothless.

D. Reasons the Hierarchy Failed but the Myth Persisted

The preceding reevaluation of the doctrine of free speech protection reveals that the oft cited and widely accepted hierarchy of speech protection is a myth. At one end, the doctrine does not strenuously protect political speech from government regulation, nor does it highly privilege protection for political speech over other speech. At the other end, the doctrine roundly resists bestowing minimal protection on non-political speech and levels up the protection for such speech to the point that the protection enjoyed by all speech equals out. The questions remain, however, why did the hierarchy of speech protection, and its central tenet that political speech garners strict protection, only ever amount to a doctrinal myth? And given that it did not ultimately take hold in the doctrine, why has the myth persisted? Finally, what effects has the hierarchy myth had on the doctrine, if any? This section addresses each question.

First, why did the hierarchy's foundational tenet that political speech garners upmost protection never come to fruition? The answer here likely lies in the Court's consistent understanding, both stated and implied, that absolute political autonomy rarely serves the interests of the First Amendment. Very high levels of political autonomy produce a slanted, crowded, and inefficient marketplace of ideas dominated by noise, chaos, danger, power, and inequality. The effect of such a marketplace is ultimately to undermine the principle of political autonomy itself. Thus, much like economic autonomy in a laissez faire market, political autonomy requires some regulation for its own survival and requires that individual autonomy be subordinated at times to the welfare of a political system in which political liberty can flourish.[270] The Court has consistently woven this logic into its political speech cases, as seen above

[270] Cf. Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1410 (1986) (arguing that autonomy is protected not as an intrinsic value but as an instrumental value for freedom of speech).

in Section I.B. That reevaluation of political speech caselaw shows how the Court's embrace of moderate speech protection resembles a substantive form of proportionality review—one focused on balancing speech rights and democratic governance. And while this observation supports proposals to explicitly adopt proportionality review for political speech regulations,[271] it more so reveals that the Court is already doing this under the cover of differently labelled doctrinal standards.

Importantly, where the Court departs from this moderate standard of protection for political speech, it is not comporting with the hierarchy of speech by privileging political speech over other speech. Rather, it is applying a heightened level of protection across the board to political and non-political speech alike. When it does this, as in its campaign finance cases, the Court is acting anomalously. It is abandoning its long-standing wariness of absolute political autonomy and risking the doctrinal integrity of the free speech project as a whole. Speech equalization is not the problem in these cases so much as the heightening of speech protection is; outsized protection, not equal protection, is what risks undermining the interests served by the freedom of speech and is inconsistent with the majority of political speech doctrine.

Second, why did the hierarchical model of speech protection not take hold after the Court adopted it? Three foundational deficiencies are responsible for the hierarchy's failure: it lacks a solid historical basis, it lacks internal cohesion, and it lacks coherence with other fundamental principles and theories of free speech protection. It thus ultimately proved incompatible with how the doctrine developed after its invention.

The hierarchy's lack of historical basis was explored in Section I.A above, which showed how the hierarchy was untethered from and in conflict with the doctrine's long tradition of extending equal protection to

[271] Proportionality review more evenly balances a regulation's speech-related harms against its public interest justifications, giving due deference to legislative judgments without blindly invoking political autonomy as an intrinsic value onto itself. Justice Breyer has been a vocal proponent of adopting such a standard. See Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2362–63 (2020) (Breyer, J., dissenting in part); United States v. Alvarez, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring in judgment); Reed v. Town of Gilbert, 576 U.S. 155, 179 (2015) (Breyer, J., concurring in judgment); see also Vicki C. Jackson, Constitutional Law in an Age of Proportionality, 124 Yale L.J. 3094, 3140–41 (2015) (discussing proportionality review and *United States v. Alvarez*); Grégoire Webber, Proportionality and Limitations on Freedom of Speech 1 (LSE Legal Studies Working Paper No. 7, 2019) (reviewing the use of proportionality in the judiciary); Alexander Tsesis, Free Speech in the Balance 49 (2020) (suggesting that proportionality has a place in the judiciary).

all types of covered speech. Without the benefit of historical vetting, the invented hierarchy ultimately betrayed serious internal and external inconsistencies, creating an unstable and ultimately unusable doctrine.

The hierarchy's internal cohesion was undermined from the start as the Court invented the hierarchy in the process of expanding protection to commercial speech by comparing the value of commercial speech to that of political speech.[272] In this way, commercial speech doctrine contained the seeds of its own radicalization at inception. The idea to tether speech's protection to its varying values was thus elusive from the beginning.[273] This incoherence made the hierarchy entirely self-defeating. The lynchpin of the model is that political speech garners special, outsized protection in our constitutional system; yet this principle then justified granting the same level of protection to other speech that *might* have political value—which is, in all reality, *all* speech. Elevating political speech to a vaulted status thus exerted a gravitation pull on all other speech, making the myth itself partly responsible for its own nonrealization.

The hierarchy also fits uncomfortably with other principles and theories undergirding free speech protection. It is inconsistent with the two most central principles of free speech law: the generally appliable bans on viewpoint and content discrimination, which oppose drawing distinctions between types of speech. It is also incompatible with the dominant theories of free speech protection because a hierarchy model does not accurately reflect the degree to which different types of speech contribute to achieving First Amendment interests. As Part II will describe in greater detail, all speech, in varied, complex, and changing ways, advances the values of self-expression, self-government, and the discovery and acquisition of knowledge and truth.

For all these reasons, the hierarchy was fundamentally at odds with the direction free speech theory developed after its invention. Many scholars have recognized that there are essentially two competing theories of the freedom of speech: one based in democracy, equality, and republicanism

[272] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–65 (1976).

[273] The other case responsible for the invention of the hierarchy, *Buckley v. Valeo*, began the process of grafting the value of core political speech onto peripheral political speech, like campaign spending, by comparing campaign finance disclosure laws to an Alabama law the Court overturned in *NAACP v. Alabama*, 357 U.S. 449, 451, 466 (1958), which attempted to shut down the NAACP's political advocacy in the state by forcing the organization to disclose its membership list. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

(the "political equality" theory), and the other based in autonomy, liberty, and liberalism (the "political liberty" theory).[274] When in tension, political liberty has predominately won out over political equality since the 1970s.[275] The political liberty theory of speech protection understands speech as a system involving the free flow of information.[276] Political liberty is not the same as political autonomy, which the Court has guarded against, but rather is concerned with preserving the free movement of information independent of government regulation.[277] The liberty theory of speech protection accords with the Court's rationales for extending First Amendment protection to commercial speech,[278] campaign finance speech,[279] and low-value speech.[280] Once the Court (liberals and conservatives alike) determined to prioritize the free flow of *information*, there was little doctrinal hook left to justify differentiating between *types* of information as the hierarchy purports to do. Under a theory of political liberty, *all* information is equally entitled to equal protection.

Third, why has the hierarchy myth persisted? A number of social and cultural forces are responsible for the myth's persistence. First, the hierarchy myth has likely endured in no small part because lawyers employ it and law professors teach it. The myth reflects the legal position

[274] See, e.g., Kathleen M. Sullivan, Two Concepts of Freedom of Speech, 124 Harv. L. Rev. 143, 144–45 (2010); Meiklejohn, supra note 212, at 36–37 (identifying a freedom of speech distinct from a liberty of speech); Zechariah Chafee Jr., Free Speech in the United States 33 (1941) (describing an individual and a social interest in free speech); Fiss, supra note 212, at 3 (distinguishing between the libertarian and democratic theory of speech). For discussion and refinement of these theories, see Weiland, supra note 10, at 1402–12; Balkin, Cultural Democracy, supra note 18, at 1054; Kessler & Pozen, supra note 11, at 1979–81.

[275] Weiland, supra note 10.

[276] Sullivan, supra note 274, at 158, 174.

[277] Id. But see Weiland, supra note 10, at 1396–97 (arguing that the Court has transformed the principle of political liberty into one of political autonomy, replacing the interest in the free flow of information with a naked interest in simply being free from government regulation).

[278] See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 (1976); Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 533–35 (1980). But see Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 4, 12–15 (striking down regulation requiring more information be given to consumers); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371, 2378 (2018) (same).

[279] See Citizens United v. FEC, 558 U.S. 310, 339–41, 354–56 (2010); 1st Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776, 781–83 (1978). But see Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 728 (2011) (striking down campaign finance program that produces more political speech).

[280] See Stanley v. Georgia, 394 U.S. 557, 564 (1969).

advanced by all of the most powerful free speech interest groups across the ideological spectrum, including corporations, labor unions, and nonprofit organizations dedicated to protecting First Amendment rights. These groups have invested in this narrative from the beginning to accomplish their preferred policy outcomes through the courts.[281] More widely, in briefs, casebooks, legal scholarship, and popular literature alike, the legal community has continued to revere a common set of supposedly groundbreaking "speech-vindication" cases,[282] and largely ignored or relegated "speech-restrictive" cases as narrow, uncharacteristic, or presumptively incorrect.[283] The impression this gives is that the speech-vindication cases are leading and foundational, whereas the speech-restriction cases are fact-bound and uninfluential. In reality, the foundational cases are highly idiosyncratic and full of bluster, while the countless periphery cases are far more representative of free speech law's actual dimensions.[284]

The popular prominence of the mythologized First Amendment may help explain why the Supreme Court has never disavowed it, and indeed continues to strongly propagate it. The myth enables the Court to appear highly speech-protective without much risk of downside. The Court tends to employ the hierarchy myth most robustly in cases that affect very little speech, very few individuals, or that have very few public safety implications. For example, it relies on the hierarchy in cases involving

[281] See sources cited supra note 23. A common trope employed to advance this narrative is the notion of American exceptionalism as a nationalist project, in this case through the argument that the First Amendment proudly grants incomparable protection to speech.

[282] These include such prominent cases as *Brandenburg v. Ohio*, *New York Times v. Sullivan*, *The Pentagon Papers Case*, and *Citizens United*. These cases comprise a sort of First Amendment "public canon." See, e.g., Greene, supra note 250, at 40. Greene argues that courts rarely weigh whether an infringement on protected speech goes too far and instead only ask whether the speech is protected at all, using *Buckley* and *Citizens United* as support. But as this Article makes clear, those cases are more anomalous than representative and more speech-restrictive than their reputations acknowledge.

[283] Cases that fit this narrative include those discussed at length *supra* Section I.B, including *Humanitarian Law Project* and *Nieves* (providing minimal protection for speech that threatens national security); *Pickering*, *Safely* and *The Time Warner Cases* (permitting ample restriction of institutional speakers' political rights), or *Williams-Yulee*, *Taxpayers for Vincent*, *Anderson-Burdick*, and *Burson* (all permitting widespread regulation of core political speech).

[284] Cf. Ammori, supra note 118, at 63–64 (documenting a similar trend in teaching First Amendment law that marginalizes electronic media cases and focuses on cases involving lesser-used methods of communication like leafletting and burning flags).

eccentric speech,[285] cases of extreme speech suppression that enable the Court to strike down the challenged regulation while upholding (or creating) a speech-restrictive standard,[286] and cases challenging statutes that can easily be tweaked to still address the social harms at issue.[287] In this way, the Court can use the rhetoric of the hierarchy to appear to vindicate speech rights with little danger of public backlash, social discord, or public safety consequences.[288] Conversely, the Court shelves the hierarchy myth, or uses it as analytical window dressings only, in cases that risk more widespread disruption to public order and safety.[289] The myth thus permits the Court to advance the illusion of rights without consequences.

[285] United States v. Alvarez, 567 U.S. 709, 715 (2012) (lying about receiving the Medal of Honor); United States v. Stevens, 559 U.S. 460, 481–82 (2010) (producing animal crush videos); Reno v. ACLU, 521 U.S. 844, 849 (1997) (sending indecent messages to minors); Nat'l Socialist Party v. Village of Skokie, 432 U.S. 43, 43–44 (1977) (marching in Nazi uniforms).

[286] See, e.g., Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 505–06, 513–14 (1969) (overturning ban on wearing armbands in school while establishing a low standard for school speech protection); Turner v. Safley, 482 U.S. 78, 81 (1987) (overturning ban on inmate marriages while establishing rational basis standard of review for restricting fundamental rights, including First Amendment rights, in prison); Texas v. Johnson, 491 U.S. 397, 406–07 (1989) (reaffirming the lenient *O'Brien* standard for political expressive conduct).

[287] See, e.g., *Alvarez*, 567 U.S. at 715 (plurality opinion) (permitting the criminalization of lying about the Medal of Honors for gain or profit, which Congress subsequently enacted through the Stolen Valor Act of 2013, Pub. L. 113-12); *Stevens*, 559 U.S. at 481–82 (declining to protect the depiction of extreme animal cruelty, which Congress subsequently criminalized); Virginia v. Black, 538 U.S. 343, 363 (2003) (permitting criminalization of cross burnings that threaten or intimidate). These cases thus appear to be strong "speech vindication" cases but are ultimately fairly inconsequential.

[288] The political speech cases that do garner public backlash consistently seem to be those that overturn speech restrictions affecting many thousands or millions of individuals, such as *Citizens United* and *Janus*. Mimi Murray Digby Marziani, Growing Backlash Against 'Citizens United', Brennan Ctr. for Just. (Jan. 24, 2012), https://www.brennancenter.org/our-work/research-reports/growing-backlash-against-citizens-united [https://perma.cc/E5SB-GGB4]; Alena Semuels, Is This the End of Public-Sector Unions in America?, The Atlantic (June 27, 2018), https://www.theatlantic.com/politics/archive/2018/06/janus-afscme-public-sector-unions/563879/ [https://perma.cc/S6QB-6Y4H].

[289] See, e.g., *supra* Section I.B, for discussion on the national security cases (including *Holder v. Humanitarian Law Project*, *Nieves v. Bartlett*, and *Hartman v. Moore*), the time, place, and manner standard for regulating speech in public, the lenient standards for restricting speech in schools, prisons, and around election sites, and the qualified immunity and other abstention doctrines as all providing ample authority to law enforcement to ensure public order and safety.

Fourth, what effects has the myth had on First Amendment law? The strongest impact the hierarchy myth has had on the law is having fostered a robust free speech culture that shapes the environment in which legal decisions are made. The myth has seeped into both legal and popular perceptions about the meaning of free speech and the scope of the First Amendment's protection for speech. These perceptions impact legislatures, government officials, culture makers, and business leaders in crafting laws and policies that affect speech. It is impossible to measure the number of speech-restrictive bills never passed or government and business actions never taken based on ingrained presumptions about, and entrenched commitments to, the mythologized speech right.[290]

An attendant effect of the myth is making First Amendment law appear more unique and exceptionally stringent as compared to the free speech jurisprudence of other democratic nations. The myth masks the significant and pervasive use of rights balancing in the doctrine, as well as the high levels of deference given to the government in weighing speech rights against social harms—both of which are hallmarks of the European model of speech protection but widely presumed antithetical to the First Amendment's approach.[291] Though U.S. free speech doctrine employs unique methodologies and reaches some singular outcomes, it is not an outlier in following the general international standard for protecting free speech by substantively balancing individual rights and public interests, as well as by extending significant deference to democratically elected legislatures to calibrate this balance. The upshot of exposing the myth of this particular narrative is acutely consequential in the digital age as communications infrastructure globalizes and falls under multiple legal jurisdictions.[292]

Beyond perpetuating an impactful cultural and legal narrative of robust speech tolerance, the persistence of the hierarchy myth has affected First Amendment law in two important ways. First, as discussed, the hierarchy has paradoxically contributed to the equalization of speech protection, and thus to the overall lowering of speech protection below what the public imagines it to be. Second, the myth *has* guided (or at least

[290] See Balkin, Cultural Hardball, supra note 4, at 580 (discussing how law is shaped by governing political, social, and historical constraints).

[291] See Alexander Tsesis, Free Speech in the Balance 49–50 (2020).

[292] See Jack M. Balkin, Free Speech is a Triangle, 118 Colum. L. Rev. 2011, 2032–33 (2018) [hereinafter Balkin, Free Speech] (discussing how free expression must adapt in a digitalized and globalized speech ecosystem).

accurately reflects) First Amendment law in one, possibly two, areas: false political speech and, possibly, private political expression.

As to the latter, private political discussion does garner near absolute protection from government regulation. It is not clear, however, whether private political speech is *relatively* more protected than any other speech uttered in the home or in private conversation. Additionally, even if it were more protected, it is far from clear whether its strict protection derives from the First Amendment, as opposed to (or in conjunction with) the liberty rights safeguarded by the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment protects the rights of privacy in the home and family life and of bodily and intellectual autonomy.[293] Query then whether it does not also protect the right to engage in private political discourse. Indeed, where the Court has reviewed laws that invade speech within the home, it has consistently relied on their affront to individual liberty in finding a First Amendment violation.[294]

The protection that false political speech enjoys, however, comports exactly with the hierarchy of speech model. False speech may be the *only* speech that receives different levels of constitutional protection depending on what type of speech is at issue. False political speech is

[293] See Obergefell v. Hodges, 576 U.S. 644 (2015) (privacy in family life); Lawrence v. Texas, 539 U.S. 558 (2003) (privacy in home); Roe v. Wade, 410 U.S. 113 (1973) (bodily autonomy); Griswold v. Connecticut, 381 U.S. 479 (1965) (family life, home, and bodily autonomy); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (intellectual autonomy); Meyer v. Nebraska, 262 U.S. 390 (1923) (same); see also Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (finding the liberty protected under the Due Process Clause extends to those rights that are "deeply rooted in this Nation's history and tradition"); cf. United States v. Valle, 807 F.3d 508, 511 (2d Cir. 2015) (stating that criminal law may not punish private fantasy because "a person's inclinations and fantasies are his own and beyond the reach of the government" (citation omitted)).

[294] See, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law[;] . . . that principle has special resonance when the government seeks to constrain a person's ability to speak there. . . . Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unavoidable[,] . . . its need to regulate temperate speech from the home is surely much less pressing . . . ." (emphasis omitted) (citations omitted)); Osborne v. Ohio, 495 U.S. 103, 108–09 (1990) (reaffirming the specific holding in *Stanley v. Georgia*, 394 U.S. 557 (1969), that the government may not criminalize private possession of books or materials in the home out of "a paternalistic interest in regulating [the] mind").

protected to the same degree as any other type of political speech.[295] Even defamatory political speech garners robust protection and occupies a privileged position in First Amendment law—so much so that it uniquely supplants the general prohibitions against speaker-based and content-based distinctions by pegging protection for defamatory statements to the content of the speech and the public role of the defamed party.[296] Conversely, false commercial speech is certainly less protected and may even be fully unprotected.[297] Similarly, false statements made under oath or for personal or financial gain are categorically unprotected under the First Amendment as types of perjury and fraud. There are, therefore, a few corners of the law governing torts involving speech that do incorporate aspects of the hierarchy—but they are corners only.

Lastly, it is possible that the hierarchy myth will do some salvaging work in addressing the growing deregulatory effects of the Court's robust prohibition on content-based laws. There are, at this moment, countless content-based statutes on the books, especially in the realm of industry regulations and professional standards. Clearly, to maintain a safe and effective financial sector, medical profession, environment, and manufacturing industry (to name just a few), the government must be able to regulate professional and commercial speech by content in some way.[298] Yet it is far from clear whether the Court will resist equalizing speech protection in these contexts. If it does, the hierarchy myth provides

[295] United States v. Alvarez, 567 U.S. 709, 721–22 (2012) (explaining instances in which false speech is regulable, but rejecting that false speech is a presumptively unprotected category).

[296] Defamation law requires a showing of actual malice if the defamed party is a public figure and the speech involves a public issue, whereas the same speech involving a private figure only requires negligence for liability (and a showing of actual malice for punitive damages). N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (articulating the actual malice standard); Gertz v. Robert Welch, Inc., 418 U.S. 323, 323–24 (1974) (declining to extend the *Sullivan* standard to media defamation of private persons). Falsity alone permits recovery for defamatory speech against a private figure involving a private matter. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) ("In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.' ").

[297] See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (cabining protected commercial speech to that which is lawful and not "misleading").

[298] See, e.g., Post & Shanor, supra note 10, at 178 (outlining the practical necessity of content-based regulations in medicine to ensure patients receive accurate and reliable health information).

a doctrinal hook for protecting industry-speech at a lower level that permits content-based regulations.

* * *

Scholars and Justices alike have often warned against the harmful effects of equalizing speech. In particular, they caution that speech equalization will result in the dilution of protection for political speech.[299] But it seems their worries are somewhat outdated, having missed that speech protection is already largely equalized, and that their concern of dilution is not a prospective challenge but a present and unremarkable aspect of the doctrine. Political speech protection *is* diluted, and it *is* largely equivalent to the protection enjoyed by all other speech. Whether this tempered level of protection for political speech, and its equal application to all other speech, is normatively desirable is the question Part II takes up.

II. THE NORMATIVE VALUE OF EQUAL SPEECH PROTECTION

Discarding the myth of a hierarchy of speech protection and embracing the principle of speech equality has enormous normative potential. "Every theory of free speech protection is also a theory of free speech

[299] See, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 27 (1971); Frederick Schauer, Commercial Speech and the Architecture of the First Amendment, 56 Cin. L. Rev. 1181, 1194 (1988) ("Were existing first amendment rules to be applied to commercial speech, we can foresee similar dangers of doctrinal dilution, where 'doctrinal dilution' refers to the possibility that some existing first amendment rule would lose some of its strength because of the number of unacceptable applications it would generate when its new applications were added."); Reed v. Town of Gilbert, 576 U.S. 155, 178 (2015) (Breyer, J., concurring) ("I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force."); R.A.V. v. City of St. Paul, 505 U.S. 377, 403 (1992) (White, J., concurring) ("By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category."); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.").

regulation."[300] Equal speech protection is thus also about equal speech regulation. As Professor Tim Wu has astutely insisted: "The protection of a healthy speech environment in our times demands a rethinking of what it means to protect the channels of political speech . . . ."[301] The rethinking needed is not a reconstruction of the doctrine itself but rather a *reconceptualization* of it—understanding that the doctrine roundly permits regulations on political speech to advance democratic governance and translating this lesson into the modern-day speech context.

Free speech has always permitted the government to protect citizens' ability to healthily engage with political information. Today, this means it must permit regulation of the channels of political discourse to protect against deception, harassment, and manipulation. Where policymakers discount this approach, they have misunderstood the doctrine; and where the Supreme Court has disallowed such regulations, it has misapplied the doctrine. Shattering the hierarchy myth and explicitly foregrounding the principle of equal speech protection ought to illuminate the many constitutional paths forward for safeguarding a healthy, honest, and informed public discourse.

The countervailing arguments supporting a hierarchy of speech protection and near-absolute protection for political speech are flawed and obsolete. It is logical to strongly insulate political speech from regulation when the greatest threats to a robust political speech environment are information scarcity and government censorship.[302] Today, however, the primary dangers to a healthy and diverse political discourse are attention scarcity and private manipulation of information.[303] This latter threat comes from individuals, corporations, and information service providers that have captured outsized power to distort and dominate the political speech ecosystem with their own speech.

Accordingly, political speech *itself* has become a major censor of other political speech and a serious threat to safe and informed political discourse. Political speech today comprises intolerable levels of harassment, propaganda, deceit, and bigotry, all of which risk very real

[300] Balkin, Cultural Democracy, supra note 18, at 1063.
[301] Wu, supra note 157, at 549.
[302] Id. at 553–54.
[303] Cf. Zeynep Tufekci, Twitter and Tear Gas: The Power and Fragility of Networked Protest 226 (2017) (discussing these phenomena at work in Egypt in 2011).

and harmful political consequences to our democracy and to individuals' political participation and development. Political speech is responsible for overwhelming, distorting, and manipulating the political sphere.[304] Most importantly, political speech risks harming the free and open exchange of ideas as much as other types of speech, and is often the more powerful and direct means of doing so.[305] Misinformed beliefs, prejudice, self-interest, manipulation, social conditioning, bias, and propaganda are all as prevalent and as dangerous in the realm of political speech as they are in the social, cultural, and commercial spheres.[306] Where the harms resulting from speech are equal, their regulation ought to be too.

Reconceptualizing free speech doctrine around a shared understanding that the First Amendment bestows an equal and moderate level of protection to all speech, including political speech, would not only align theory and doctrine but would empower the public, through their representatives, to better align public policy with public opinion on free speech issues. This rethinking of the doctrine does not carry with it any

[304] Wu, supra note 157, at 560 (identifying these harmful uses of political speech, including through political harassment, propaganda, and flooding).

[305] See Yochai Benkler, Robert Faris & Hal Roberts, Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics 105–87 (2018) (documenting how Fox News, other right-wing media sites, and Twitter personalities distort truth and politics through their protected political speech); see also Wu, supra note 157, at 552–53 (discussing the dangerous conditions created by "constitutional scrutiny of censorship coupled with a free ride for propaganda"); Jane Mayer, How Russia Helped Swing the Election for Trump, New Yorker (Sept. 24, 2018), https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump [https://perma.cc/BNP5-A4VT] (discussing how Russian misinformation campaigns impacted the election); Andrew Marantz, Free Speech is Killing Us, N.Y. Times (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html [https://perma.cc/NQD3-PPX9] (documenting the violence caused by online hate and conspiracy speech and rejecting an "all-or-nothing" approach to the First Amendment); James A. Piazza, Politician Hate Speech and Domestic Terrorism, International Interactions, 46:3, at 431–53 (2020) (documenting how political hate speech fuels domestic polarization and terrorism); Ernesto Verdeja & Bettina Spencer, The Short Fuse: Autocrats, Hate Speech, and Political Violence, Just Security (July 22, 2020), https://www.justsecurity.org/71405/the-short-fuse-autocrats-hate-speech-and-political-violence/ [https://perma.cc/T3GX-3L4V] (same).

[306] See, e.g., Heyman, supra note 13, at 268 (discussing *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 327–32 (7th Cir. 1985), which accepted that pornography causes serious harm to women but held that the First Amendment does not permit regulation of such harm); Dan Barry, Mike McIntire & Matthew Rosenberg, 'Our President Wants Us Here': The Mob That Stormed the Capitol, N.Y. Times (updated Sept. 29, 2021), https://www.nytimes.com/2021/01/09/us/capitol-rioters.html [https://perma.cc/3PSE-9H88]; Amanda Robb, Anatomy of a Fake News Scandal, Rolling Stone (Nov. 16, 2017), https://www.rollingstone.com/feature/anatomy-of-a-fake-news-scandal-125877/ [https://perma.cc/D3H4-PGJY].

constitutional imperatives. It does not require greater restrictions on political speech nor find a constitutional duty for regulating political speech. It merely recognizes that the floor for regulating political speech is lower than the canon suggests. It is for legislatures to consider what regulations are needed based on democratic input, and it is for courts to exercise appropriate deference in reviewing such regulations under the First Amendment.

Robust protection for political speech is not inherently detrimental. The myth of the hierarchy of speech protection has valuably fostered a strong free speech norm, which has generated important speech-protective outcomes in state houses and boardrooms across the country. That norm need not change. But constitutionalizing it is harmful. And constitutionalizing it in myth only, where it elides public scrutiny even as the government routinely restricts political speech rights, is even worse. The hierarchy myth does not reflect how speech functions, and thus obscures the true value that different forms of speech have for advancing communal and individual progress. It also does not reflect free speech doctrine, and thus obfuscates the constitutionality of critical legal reforms and shields free speech law from public scrutiny.

In place of the hierarchy myth, it is time to highlight the robust tradition of moderate and equal speech protection in First Amendment jurisprudence. This tradition represents the leading doctrinal organizing principle of free speech law and undergirds a unifying theory of free speech protection best characterized as the social democratic theory of free speech.[307] Moderate, equal speech protection is, and should be, the keystone to the First Amendment. Section II.A will discuss why the equalization principle is both beneficial and necessary to free speech protection. Section II.B will discuss why moderate protection for all speech is also normatively compelling.

[307] This article thus begins to push back on the dominant consensus that content-neutrality is the central organizing principle of modern free speech law. As Part I documented, the doctrine permits content discrimination when it is in function of preserving social-democratic order, see supra Section I.D, such as when states restrict speech to protect women's access to healthcare clinics, student equality and inclusion in public schools, health privacy under laws like HIPAA, the creation of art and literature through copyright, or municipal aesthetics and public safety through zoning ordinances.

A. The Equalization Principle

Political and non-political speech are materially indistinguishable. Political decisions have myriad social and economic implications, and social and economic decisions have important political consequences. The function and value of these different types of speech are interchangeable and impossible to untangle. The already unmanageable task of drawing distinctions between them is becoming more of a Sisyphean effort in the information age. The digital economy has completely blurred traditional distinctions between news, commentary, art, protest, and advertisement, as well as skewed the boundaries between private and public speech. The result is not only the melding of different types of speech but also the merging of different spheres of human capacity, leaving little room between our roles as sovereign citizen, neighbor, and consumer. This leaves little constitutional reason for drawing distinctions between types of speech and little pragmatic interest for doing so as the harms each type of speech may inflict grow equivalent.

As the Supreme Court has often recognized, speech is crosscutting, serving many individual, societal, and constitutional interests at the same time.[308] The speech at issue in *New York Times v. Sullivan* and *Bigelow v. Virginia* is representative. In *Sullivan*, civil rights groups published an advertisement protesting the treatment of Martin Luther King, Jr. and appealing for funds to support their cause;[309] in *Bigelow*, a nonprofit organization offered women in states that outlawed abortion access to abortion at low cost in New York.[310] Were these advertisements commercially soliciting revenue, journalistically imparting information of public import, or politically commenting on a divisive political

[308] See Sorrell v. IMS Health, Inc., 564 U.S. 552, 579 (2011) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." (citation omitted)).

[309] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256–57 (1964). The Court rejected characterizing the ad as "purely commercial advertising," because "[i]t communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." Id. at 266.

[310] Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (extending First Amendment protection to this ad because it contained "information of potential interest and value to a diverse audience").

issue?[311] As the Court soon recognized in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the line between "commercial" advertising and "public interest" advertising is nonexistent.[312] Even where an ad does nothing more than promote a product for sale, it is nonetheless disseminating commercial information relevant to making commercial decisions, which in a free enterprise system always carries some political and socioeconomic impact.[313] The interchangeability of political and commercial speech in the advertisement context is replicated throughout the speech ecosystem. In *Morse v. Frederick*, for example, was the student's sign reading "BONG HiTS 4 JESUS" advocating the legalization of marijuana, promoting a religious belief, or presenting sensationalist fodder for passing television cameras?[314] Even if the sign meant one thing to the speaker, could it not convey myriad other messages to a viewer?

Attempting to differentiate speech by type or purpose is especially unrealistic in light of the intrinsic relationship between speech and property. Individuals require things, places, and time to speak—all of which cost money. Speech opportunities thus reflect property distributions. The content of speech expressed and the substance of public discourse are dictated by political, social, and economic priors.[315] This is equally true for all speech—political, commercial, and cultural alike.

The rise of the digital economy has also exacerbated this blending of different types of speech. The seismic shift from industrial output to information production has infused speech into large swaths of the economy, further undercutting any distinction between commercial and non-commercial speech.[316] It has also erased traditional divisions between

[311] See also City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419 (finding it impossible to "draw[] bright lines that will clearly cabin commercial speech in a distinct category" separate from journalism and noting that the commercial handbills at issue "share important characteristics with the publications that the city classifies as 'newspapers'").

[312] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) ("[N]o [such] line . . . could ever be drawn.").

[313] Id.

[314] Morse v. Frederick, 551 U.S. 393, 401 (2007) ("The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed 'that the words were just nonsense meant to attract television cameras.'").

[315] Seidman, supra note 52, at 2232, 2238.

[316] Kessler & Pozen, supra note 11, at 1971–73 (discussing how the current era of information capitalism has profound implications for the freedom of speech).

news, commentary, art, entertainment, politics, and lived experience. Social media and news media have intermingled, newsgathering relies on popular remarks and observations, and journalists aggregate everyday speech to spot trends and break stories.[317] Interactive media and virtual reality blend commercialism with art, life, and entertainment. As Justice Scalia quipped in discussing the difficulty of categorizing an interactive video game, "it is difficult to distinguish politics from entertainment, and dangerous to try."[318]

The larger consequence of the expanding role and intersectionality of speech in the digital age is that it melds the different spheres of human capacity. Intellectuals like John Locke,[319] Louis Brandeis,[320] and Alexander Meiklejohn[321] recognized an inherent difference between a person acting in their capacity as a private citizen with private economic interests and their acting as a public citizen with social and political obligations. More recently, Robert Post and Amanda Shanor have similarly argued that when citizens engage in commercial speech, they are not participating in democratic self-determination but only transacting business in a marketplace.[322] But this can no longer be right, if it ever was. When engaging in commercial speech, citizens are contributing in deliberate ways to our political and social economy; and in transacting business, citizens are making politically and socially consequential choices. Our private lives influence our role as citizens, and our role as citizens has immense consequence for our private affairs.[323] As Justice Kennedy recognized in *Citizens United*, our private identities, which include our wealth, are closely connected to our political identities, and our private choices and resources are a part of our political personhood.[324] Acting in the role of "sovereign citizen," therefore, goes beyond

[317] See Benkler, Faris & Roberts, supra note 305, at 225–33, 269–93 (discussing the role of social media in spreading propaganda and "clickbait," including "microtargeting" of advertisements); Tompros, Crudo, Pfeiffer & Boghossian, supra note 162, at 71 (documenting how most social media speech, 85% in one 2010 study, is related to news events).

[318] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

[319] 2 John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[320] Whitney v. California, 274 U.S. 357, 373–75 (1927) (Brandeis, J., concurring).

[321] Meiklejohn, supra note 212, at 79–83.

[322] Post & Shanor, supra note 10, at 172.

[323] See Heyman, supra note 13, at 263, 309.

[324] Citizens United v. FEC, 558 U.S. 310, 350 (2010).

participating in public discourse to also engaging in the political economy in a socially conscious manner.

Finally, beyond the indistinguishability of different types of speech, there is also little distinction between how vulnerable different types of speech are to government suppression. First, political speech is no longer uniquely vulnerable to government suppression, as it is now private capital, private messaging, and private ownership of the mediums of speech that most constrain and mold individuals' capacities to act as sovereign citizens and engage in self-determination through expression.[325] Second, the government no longer has greater incentive to suppress political speech as compared to other speech. A hierarchy model of speech protection would make sense in a world in which political speech needed more protection because it was more vulnerable to attack. In this world, a hierarchy model of speech protection would actually function as a speech equalization tool by adjusting speech's level of protection to account for its different category of risk.[326] But granting heightened protection to political speech and reduced protection to commercial speech based on the assumption that the government less often acts for self-interested or ideological reasons when regulating in the commercial sphere is untenable. Commercial regulations are laced with moral and ideological value judgments,[327] and plenty of political speech regulations are advanced independent of partisan ideology.[328] Where politics is steeped in culture and inseparable from the economy, different types of speech are equally vulnerable to government suppression for ideological purposes.

[325] See Balkin, Free Speech, supra note 292, at 2012, 2021; Fiss, supra note 270, at 1415 (arguing that the private sector is as dangerous an enemy to free speech as the government because of its equal, if not greater, capacity to control the political marketplace of ideas); Kagan, supra note 268, at 513.

[326] This was then-Professor Elena Kagan's theory of First Amendment protection. Kagan, supra note 268. She posited that the First Amendment was centrally concerned with preventing illicitly motivated speech regulations, and that the matrix of First Amendment rules that comprise the doctrine, including the hierarchy of speech principle, all work to ferret out illicit governmental motive. Id. at 413–15.

[327] Think only of liquor laws, drug laws, or adult entertainment ordinances.

[328] The statutes at issue in *United States v. Alvarez*, 567 U.S. 709 (2012) (Stolen Valor Act), *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) (restricting sale of violent video games to minors), and *United States v. Stevens*, 559 U.S. 460 (2010) (criminalizing certain depictions of animal cruelty) all fit this narrative, as they all restrict speech with clear political undertones.

In sum, considering that the distinctions between types of speech have dissipated—in their practical function, individual and democratic value, role in supporting private and public citizenship, and vulnerability to government attack—there is little constitutional or prudential reason for attempting to assign differential First Amendment treatment to different types of speech.

B. The Moderation Principle

The hierarchy of speech protection fails not only for attempting to treat speech unequally, but also for attempting to elevate protection for political speech beyond democratic input. In purporting to immunize political speech from legislative regulation, the hierarchy model advocates a "Lochnerization" of political speech protection.[329] But because no principled line can be drawn between political and non-political speech, the hierarchy model actually risks Lochnerizing all of free speech law. Discarding the hierarchy myth to embrace the First Amendment's robust tradition of moderate speech protection for all speech—including for political speech—is therefore instrumental for staving off the Lochnerization of the First Amendment.

For the First Amendment to remain anti-Lochnerian in the modern speech era, the freedom of speech must parallel the anti-Lochnerian freedom of contract. Namely, it must permit democratic regulation of speech to account for power disparities in the speech ecosystem and to protect the welfare and safety of participants in the political speech economy. Like the modern contract right, the modern free speech right should not treat all speakers and audiences as equals in the formation of public discourse; it should instead acknowledge the real power imbalances between them that create a tilted and dangerous speech economy in the absence of regulation. Just as the right to contract was never fully unregulated but had to adapt to accommodate egalitarian

[329] See Lochner v. New York, 198 U.S. 45 (1905). I use the Lochner moniker to refer to a separation of powers scheme in which the judiciary exercises outsized prerogative to overturn democratically enacted legislation on constitutional grounds. The term is often employed in the more specific context of judicial usurpation of legislative authority in the commercial and economic sphere only. Shanor, First Amendment Coverage, supra note 240, at 361–64; Kessler & Pozen, supra note 11, at 1962–64. However, as this Article has argued, there is little distinction between commercial and political speech, and thus the Lochner label is appropriately used to describe the robust role the Court has claimed for itself in reviewing and overturning all categories of speech regulations.

constraints, so too the political speech right—also never immune from regulation—must permit regulations justified by egalitarian interests. The task at hand, therefore, is to reconceptualize free speech doctrine and the role of the courts in protecting speech by reclaiming the strong, but hidden, tradition of moderate protection for all speech. This tradition is the central organizing principle of an unrecognized unifying theory of free speech law best described as the "social democratic theory" of speech protection.[330]

1. The Social Democratic (or Anti-Lochnerian) Theory of Speech Protection

The social democratic theory of free speech protects speech as an instrument of social democracy to safeguard the liberal-democratic state as well as economic and cultural progress. A fully realized social democratic theory of speech protection openly and unequivocally embraces the moderate level of protection for all speech that dominates much of the doctrine. It does so to safeguard the health, safety, and general welfare of society. In other words, it aims to ensure that information flows "cleanly as well as freely,"[331] and in this way, it is fundamentally anti-Lochnerian.

Moderate protection permits government regulations on speech to protect important social democratic interests, including the physical, economic, and political welfare of the populace. In this way, moderate protection is a substantively democratic version of "intermediate" or "exacting" scrutiny. It does not permit government to regulate speech for moral harms or harms to the government's own interests, such as sedition harms.[332] It also does not permit the restriction of expression based on the

[330] The theory is "social" in that it focuses on the health of society and acknowledges that social interactions are the building blocks of political, cultural, and economic power; it is "democratic" in that the theory preserves room for majoritarian institutions to protect the speech right. By treating all speech equally and subjecting speech to moderate democratic control, the theory treats speech in an analogous way as the social democratic state treats citizens: as equals whose rights are moderately subordinated to democratic constraints to promote collective welfare.

[331] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976).

[332] Legislatures have less claim to restrict speech to protect against moral harms because citizens have a greater degree of control over their own moral safety, whereas their physical, economic, and political safety directly depend on the actions of others and thus require communal protection. Preventing harms to the government itself is also an improper interest

government's approval or disapproval of a message, belief, or idea, otherwise known as viewpoint discrimination. Nor does it treat any type of information as inherently dangerous and thus does not leave any category of speech fully unprotected.[333] Rather, it permits the government to regulate the standards and mediums by which speech is expressed where there is a substantial likelihood of social, political, or economic injury that is material and provable, and not morally or ideologically constructed, and where the regulation is narrowly tailored to addressing this injury.[334] This type of scrutiny permits laws that foster a more inclusive and egalitarian public discourse without compromising the democratic legitimacy of governmental lawmaking because it does not permit the total exclusion of any speech but rather allows for a wider segment of the populace to meaningfully contribute to the definition and scope of the free speech right.

Most importantly, the social democratic theory of speech protection permits the government to regulate speech in recognition of the reality that citizens are unequally situated and that most are interdependent, vulnerable, and insecure. Just as commercial speech doctrine explicitly "allows governments to assume that consumers may not be able to assess market information and market risks without compelled disclosures and prohibitions on misleading advertisements,"[335] the social democratic theory of free speech permits the government to assume that citizens are not able to assess political information and risks without regulations that impose transparency, honesty, and accountability on speakers. This

because the government, unlike citizens, does not have natural rights to protect from public harm. See Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246, 309, 309 n.283 (2017).

[333] See *Va. Pharmacy*, 425 U.S. at 770 ("There is, of course, an alternative to this highly paternalistic approach [of restricting all pharmaceutical ads]. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication, rather than to close them.").

[334] See Ams. for Prosperity Found. v. Bonta, No. 19-251, slip op. at 3 (S. Ct. July 1, 2021) (confirming a narrow tailoring requirement for "exacting" scrutiny).

[335] Balkin, Cultural Democracy, supra note 18, at 1086; cf. Bates v. State Bar of Ariz., 433 U.S. 350, 383 n.37 (1977) ("The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. Thus, different degrees of regulation may be appropriate in different areas." (citation omitted)).

standard of speech protection most evenly balances the rights of speakers and audiences across the speech ecosystem.[336]

These rules permit the government to address harms wrought by speech while preserving courts' authority to overturn paternalistic and illicitly motivated speech regulations. The social democratic theory of speech protection thus focuses on ferreting out governmental *abuse* of the speech regulation power, not with neutering the use of that power altogether. After all, it is governmental abuse of power, not government power itself, that threatens the freedom of speech and the preservation of our social democracy.[337]

2. The Normative Benefits of a Social Democratic Theory of Speech Protection

Embracing the social democratic theory of speech protection will best refortify the freedom of speech at this precarious moment in its development. At a similar moment of constitutional inflexion in the 1930s, the Court adapted its jurisprudence to a fundamental change in economic production by abandoning *Lochner* and adopting a new separation of powers dynamic that better served political and economic prosperity. The same crossroads now lies before the freedom of speech. As economic production moves towards information acquisition and processing, the Court must reaffirm the anti-Lochnerian First Amendment and invite the government to reshare in the role of protecting and enhancing the freedom of speech.[338] This is not to suggest that the shift

[336] In this way, the social democratic theory differs from the democracy theory of free speech, which prioritizes the public's role as an audience. See generally Meiklejohn, supra note 212 (prioritizing the maintenance of an informed electorate to the continued existence of self-governance).

[337] A theory of speech protection based on ferreting out governmental abuse of power compliments, but is somewhat broader than, Elena Kagan's theory that the First Amendment is primarily concerned with ferreting out illicitly motivated speech restrictions. See Kagan, supra note 268, at 413–15.

[338] See Kessler & Pozen, supra note 11, at 1971. Kessler and Pozen have begun to recognize the need for this shift, id. at 1985–86, as has Tim Wu, supra note 157, at 568. Owen Fiss has long recognized a more active role for the state in protecting free speech. See, e.g., Owen Fiss, Why the State?, 100 Harv. L. Rev. 781, 783 (1987). And Cass Sunstein early on criticized judges for invalidating legislative efforts to enhance popular sovereignty by fostering and diversifying the spread of information. Cass Sunstein, Introduction *to* Democracy and the Problem of Free Speech, at xi–xx (1995). Many other First Amendment scholars agree but tend to confine the legislative role to the media sphere or campaign finance sphere. See, e.g., Jack M. Balkin, The Future of Free Expression in a Digital Age, 36 Pepp. L. Rev. 427, 428–

be as dramatic for freedom of speech as it was for freedom of contract, nor that such a shift requires as dramatic a change in the doctrine. To the contrary, the doctrine roundly supports a social democratic, or anti-Lochnerian, speech right with its moderate level of speech protection. But this tradition is in danger of being obscured and abandoned at the very moment it must burst out from behind the shadow of the hierarchy myth and resoundingly be embraced.

Such a move would have numerous beneficial consequences for free speech, which the remainder of this Article will begin to unpack. It will, firstly, better address the harms associated with the rise of "new speech"; secondly, better promote a healthy and democratic public discourse; and thirdly, better prevent large swaths of our social, political, and economic lives from running through the courts. These advantages will, in turn, augment democratic legitimation, transparency, and accountability. In sum, embracing the social democratic theory of First Amendment jurisprudence will best serve political freedom in the twenty-first century.

First, a social democratic theory of free speech would better address the problems raised by "new speech." New speech includes data, analytics, and information sharing, and thus comprises an infinite amount of social, political, and economic activity—everything from securities transactions, to healthcare information, to voter analytics and political disinformation. Under current doctrine, new speech stands to receive full First Amendment protection. To the extent this level of protection remains moderate—which this Article has shown would be unexceptional—then the government will be fully equipped to regulate new speech to avoid economic and political catastrophe.

The other major problem new speech poses, apart from its pervasive breadth, is its sheer quantity. Today, the greatest threat to free speech is that there is too much of it. Attention deficit ensures that an overabundance of private speech crowds out, suppresses, and manipulates the information ecosystem.[339] Modern censorship thus works by targeting audiences, not speakers.[340] This flip in the dominant method of speech censorship means that countering new speech censorship requires

33 (2009) (net neutrality); Jerome A. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641 (1967) (mass media); Post, supra note 212, at 3–5 (campaign finance).

[339] See Tufekci, supra note 303, at xxiii–xxix.

[340] Wu, supra note 157, at 548.

information regulation, not information proliferation.[341] Affirmative government intervention is most desirable precisely when private incentives promote harmful behavior.[342] Speakers and content providers have ample incentive to prioritize false, sensationalist, and siloed speech to spread their message and gain support in the form of followers, revenue, and traffic. Government interventions to reform incentive structures in the speech ecosystem, therefore, would serve to counter the censoring effects of information bias and overload to support audiences' access to information.[343]

Similarly, the "new speech" ecosystem is highly vulnerable to distortion based on societal and economic inequalities because it predominately occurs on private platforms and within private enterprises governed by rules of property. Where public discourse is distorted based on participants' inequality of resources and access, their speech is left *unprotected* when it is shielded from regulation. Put simply, the First Amendment cannot protect speech in the "new speech" environment by requiring government to stand by while private entities censor, manipulate, and control that environment.

Second, the social democratic theory of free speech does not undercut individual speech rights; it reinforces them. As this Article has extensively laid out, a vast amount of political and non-political speech is routinely and unremarkably regulated without unduly restricting the speech right. The rationale for permitting regulation in these contexts is that the speech at issue risks disrupting the underlying function and goals of the environment in which the speech is expressed. By protecting the speech environment, these regulations enhance speech opportunities. And in rejecting the theory that the speech right trumps nearly all regulation, these cases foster a stronger relationship between constitutional law and democracy. This reasoning holds true for physical locations like parks,

[341] See Martha Minow, Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech 5–9 (2021) (discussing government's role in protecting a healthy media and information-sharing environment through innovative media regulations).

[342] Copyright offers an excellent model of this type of speech protection system. See Rebecca Tushnet, Copyright as a Model for Free Speech Law, 42 B.C. L. Rev. 1, 36 (2000) (explaining how copyright encourages a broad, diverse array of ideas and expressions by protecting the marketplace and incentivizing particular types of expression, e.g., original and generative expression, over other types, e.g., copies).

[343] Other countries that have adopted more of a proportionality standard of speech protection understand this principle well. See R. v. Keegstra, [1990] 3 S.C.R. 697, 763 (Can.) ("[T]he state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas.").

schools, and the polls just as it does for metaphysical spheres like the criminal justice system and the commercial economy. The same rationale ought easily to apply to the workings and goals of a functioning democracy—that metaphysical space in which citizens are equipped to engage in fair, honest, and healthy public discourse.

Permitting government leeway to set the rules of engagement in democracy sounds anathema but is, in truth, a big part of our free speech tradition that should be respected and replicated. For example, under the First Amendment's time, place, and manner doctrine, the government regularly determines that certain speech is only appropriate for certain times and in certain places, and restricts speech expressed outside these bounds without totally closing off the opportunity for expression. Sometimes the restriction concerns the appropriateness of the content of the message, and sometimes it concerns the manner in which it is expressed.[344] Either way, this time-tested approach to ensuring an orderly, safe, and healthy public discourse in the physical public sphere might easily be imported to the virtual and metaphysical spaces in which more and more public discourse now occurs.

Third, there are significant advantages to supporting legislative attention to speech protection and discouraging judicial hegemony in this area. It is widely accepted that courts ought not to exercise a robust role in reviewing commercial legislation, including commercial speech legislation, because doing so would open up large swaths of the administrative state and the economy to judicial scrutiny, running our social and economic lives through the courts.[345] The mythologized First Amendment would permit exactly this with respect to our public discourse; it would run political and cultural speech through the courts, leaving the terms by which citizens engage with one another and with their government in the unreviewable hands of the judiciary. In the absence of a more robust dialogue between legislative experimentation and judicial review, the laws governing citizens' social and political welfare will suffer from a lack of democratic legitimation, accountability, and creativity. They will also fail to adequately address the prevalent

[344] For example, the government regularly restricts speech in educational settings, museums, or public programming when the content is incompatible with that forum, as well as regularly restricts speech that is too loud, disorderly, or disruptive for certain times and places like residential neighborhoods. See supra notes 144, 149 and accompanying text.

[345] See Shanor, supra note 240, at 359.

harms speech has on third parties, [346] as judges are disinclined to acknowledge and account for harms to non-litigants.

The policy implications of this move are significant. Reaffirming the social democratic theory should encourage reforms to the speech ecosystem that policy experts are currently tiptoeing around for fear they run afoul of the mythologized protection for political speech.[347] Such reforms include obligating platforms to remove, reduce, and counter misinformation;[348] capping speech to prevent any speaker from dominating the speech market;[349] requiring disclosure of speaker identities in specific contexts;[350] or imposing common carrier or public utility responsibilities on platforms.[351] It is beyond the scope of this Article to evaluate the merits of any one of these reforms. Rather, the central contribution here is confirming the constitutionality of such policy proposals under the dominant First Amendment tradition of equal speech protection. Uncovering this tradition reaffirms that government may regulate speech in myriad ways based on its institutional context, its manner, its proximity to the voting process, and if it creates tangible harms to democratic discourse. These regulation frameworks are sufficiently protective of the speech right and leave open ample

[346] See Kessler & Pozen, supra note 11, at 1999.

[347] See, e.g., Daphne Keller, Six Constitutional Hurdles for Platform Speech Regulation, The Ctr. for Internet and Soc'y (Jan. 22, 2021), cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation [https://perma.cc/YV79-VGS9] (listing robust First Amendment parameters for regulating platforms); Susan Ness, Platform Regulation Should Focus on Transparency, Not Content, Slate (Dec. 2, 2020), https://slate.com/technology/2020/12/platform-regulation-european-commission-transparency.html [https://perma.cc/LU93-B2KN] (assuming content-moderation reforms are likely to infringe the First Amendment); Noah Feldman, Constitution Can't Stop Trump From Blocking Tweets, Bloomberg (June 7, 2017), https://www.bloomberg.com/opinion/articles/2017-06-07/constitution-can-t-stop-trump-from-blocking-tweets [https://perma.cc/F6HL-EXJT] (arguing that imposing content-moderation obligations on social media platforms violates the First Amendment).

[348] This type of obligation is analogous to indirect compelled speech through the imposition of fees; to time, place, and manner restrictions on speech that disallow amplification of speech in public forums; and to defamation and false reporting statutes. See supra Section I.B.

[349] Such a reform mirrors the application of antitrust law to the press and to communications entities. Associated Press v. United States, 326 U.S. 1, 19–20 (1945).

[350] As discussed *supra* Subsection I.B.1, compelled disclosure of political speech furthers the First Amendment's interest in preserving a free and informed political discourse.

[351] These reforms would model the regulatory frameworks applicable to electronic media providers, as discussed *supra* Subsection I.B.2.

opportunity for expression, while permitting the government to foster the free and healthy dissemination of political information.

Several recent cases challenging regulations that impact speech to foster a healthy and informed political discourse show how the social democratic theory works in practice. The Supreme Court case *Americans for Prosperity v. Bonta*, which struck down a California law requiring nonprofit organizations to submit a list of their major donors to the state, was correctly decided under the social democratic theory of speech protection.[352] Such disclosure laws are generally perfectly constitutional under this theory; but in this case, California required the information without intention of making it public or of using it to enforce its tax code. The regulation was not, therefore, narrowly tailored to the interest of fostering democratic discourse or of supporting a necessary government function in a social democracy. Put simply, the regulation failed moderate review. Conversely, a pending First Amendment challenge to a state board's authority to censure one of its members for their political speech ought to fail because state board members are institutional speakers and the censure tool serves the interest of maintaining a well-functioning government administration without unduly restricting the individual speech right. In the same vein, novel regulations prohibiting reporting on agricultural facilities, colloquially known as ag-gag laws, generally violate the First Amendment because they do not prevent tangible harms to democratic discourse (in effect, they do the opposite), and the economic harm they pose to the agricultural businesses is not a sufficient interest under the social democratic theory to restrict speech and newsgathering. Finally, a recent case striking down a state election law requiring social media platforms, broadly defined, to disclose certain information about the political ads on their websites was wrongly decided, as such a law directly relates to promoting a more healthy and informed political discourse in connection to an election.[353]

Finally, the major structural implication of reaffirming the social democratic theory of speech protection is to rethink the grand New Deal compromise that bifurcated the protection of economic and political rights between the legislative and judicial branches. The protection of the freedom of speech ought to be a collaborative endeavor, made possible

[352] No. 19-251, slip op. at 1–2 (S. Ct. July 1, 2021).
[353] Wash. Post v. McManus, 944 F.3d 506, 510 (4th Cir. 2019).

by a First Amendment that provides an equal and moderate level of protection to all speech. Few scholars have attacked the New Deal compromise directly, presumably out of a reluctance to lower judicial protection for political speech.[354] But a comprehensive review of the doctrine reveals that political speech already receives moderate First Amendment protection. And the few places where it receives higher protection are its true problem areas, not the other way around. Moreover, there is little historical or theoretical basis for thinking that the judiciary is more effective at protecting the speech right than legislatures. Politics, as opposed to litigation, is the optimal place to mediate conflicts of rights, which is a task that requires compromise, value judgments, and public input. Legislatures have proven time and again their sensitivity to proactively protecting free speech and other civil liberties by passing strong and dynamic protections for democratic discourse, including by subsidizing speech, redistributing speech rights, and protecting speech from economic or political reprisal. Conversely, the Supreme Court's track record exercising judicial review of such laws consists of more false positives, whereby the Court overturns a pro-democracy law, than true positives, wherein the Court blocks an anti-democratic abuse of the speech regulation power. Confining the courts to scrutinizing speech-restrictive laws for abuses of power—i.e., for regulations not narrowly tailored to safeguarding a governmental function or the democratic process—ensures a stopgap measure of protection for speech without neutering the government's ability to promote democracy and social welfare. Where legislatures err by restricting too much speech or the wrong type of speech, that is more often a matter of policy disagreement than constitutional infirmity, and public discontent should be registered with our representatives rather than with a court that is unlikely to alter the law from the bench anyways.

The inevitable conclusion of these observations is that moderate protection for speech across the board best accomplishes the reformist agenda of enhancing a healthy public discourse; and moderate protection for all speech, including and especially political speech, requires not only

[354] Kessler & Pozen, supra note 11, at 2009 (acknowledging that progressive civil libertarianism of the pre-New Deal model "does not claim at this time any significant constituency within the legal academy"); cf. Seidman, supra note 52, at 2237 (arguing for a reexamination of the New Deal compromise because speech depends on property, and therefore, free speech cannot neatly be separated from economic liberty).

abandoning the myth of the hierarchy of speech protection, but also abandoning the New Deal compromise.

CONCLUSION

The hierarchy of speech protection is a doctrinal myth that masks a rich tradition of moderate and equal speech protection. As the freedom of speech reaches a critical juncture in its constitutional development, it is imperative to uncover this hidden tradition and translate its potential to the modern speech environment. This Article has taken a significant step in that direction by holistically reevaluating the Supreme Court's speech protection jurisprudence, and in so doing, reconceptualizing free speech law's contours, limits, and possibilities. The next step for scholars and policy experts is to discern the legislative potential of embracing the hidden social democratic theory of speech protection. What laws can and should pass under this free speech tradition that are most likely to tame our dangerously toxic political speech environment and foster a healthy, diverse, and truthful political discourse? Because putting all its rhetoric and mythology aside, the First Amendment is not actually committed to protecting "uninhibited, robust, and wide-open" public debate.[355] It is committed to safeguarding a healthy, orderly, and informative public sphere. It does so, and should continue to do so, through the tradition of equal speech protection.

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