

The Deregulatory First Amendment at Work

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INTRODUCTION

It has been more than seventy years since Justice Hugo Black wrote that First Amendment rights were “essential to the poorly financed causes of little people.”¹ Since then, the well-financed causes of the powerful have discovered the First Amendment as well, deploying it to crowd out the little people in electoral politics and undo their legislative successes in the courts. The seeds for this project were planted in the 1970s—the decade in which Justice Lewis Powell joined the Court, and in which the Court decided both *Buckley v. Valeo*² and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*³—and they are now in full bloom.

In this Article, I discuss a new generation of deregulatory First Amendment theories, and their potentially calamitous effects on workers if courts accept them. This is not to suggest deregulatory First Amendment cases are missing from other areas of life; to the contrary, consumer protection, public health, securities regulation, and election law are also targets.⁴ But it is illuminating to examine challenges arising in the workplace context for two reasons: first, the great (or terrible) variety of forms that the challenges take; and second, the close analogy to the *Lochner*-era substantive due process cases that struck down workplace regulations in the name of freedom of contract. However, there is also at least one key difference between these emerging First Amendment theories and *Lochner*—only the former are

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¹ *Martin v. Struthers*, 319 U.S. 141, 146 (1943).

² 424 U.S. 1 (1976).

³ 425 U.S. 748 (1976).

⁴ *See, e.g., McCutcheon v. FEC*, 134 S. Ct. 1434, 1443 (2014) (striking down Federal Election Campaign Act’s aggregate limit on individual contributions to federal candidates and party committees); *Edwards v. Dist. of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (holding that proffered interest in ensuring that consumers receive a quality experience was insufficient D.C. licensing requirement for tour guides); *Wagner v. FEC*, 793 F.3d 1, 26 (D.C. Cir. 2015) (rejecting First Amendment challenge to Federal Election Campaign Act ban on campaign contributions from government contractors); *Am. Meat Inst. v. USDA*, 760 F.3d 18, 23–24 (D.C. Cir. 2014) (en banc) (upholding “country of origin” labeling requirement applicable to meat producers, and reversing prior D.C. Circuit opinions that struck down the SEC’s conflict minerals disclosure rule, and the NLRB’s notice-posting rule); *see also* Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 167 & n.13 (2015) (accumulating cases).

linked to an enumerated part of the Constitution, which may be important in marshaling the support of some conservative judges and justices for the greater deregulatory project.

That project is broad in scope, and it is increasingly well received by conservative judges.⁵ For instance, Judge Janice Rogers Brown of the District of Columbia Circuit recently authored a concurring opinion that argued in favor of resurrecting heightened scrutiny for economic rights in a case involving the USDA's regulation of milk prices.⁶ In Judge Brown's view (as well as that of Judge David Sentelle, who joined the opinion, and possibly even Judge Thomas Griffith, who did not join but nonetheless wrote that he was "by no means unsympathetic"), Article III courts should be able to step in when "the government has thwarted the free market" to protect a faction.⁸ Putting a finer point on it, Judge Brown added that these market interventions "just *seem* like a crime."⁹ Judge Brown's opinion did not come in a labor case, but her disdain for "collectivization" schemes would translate easily into the labor context—as evidenced by her earlier remarks arguing that New Deal precedent such as *NLRB v. Jones & Laughlin Steel Corporation*¹⁰ represented "the triumph of our socialist revolution," and analogizing the liberal welfare state to "slavery."¹¹

Yet, as Judge Brown acknowledged, these arguments are squarely closed off; with the exception of Justice Thomas, no modern Supreme Court justice has been willing to revisit them.¹² But, to proponents of the theories described in this Article, the First Amendment provides a possible work-around, if only courts can be convinced to apply it frequently and robustly to protect businesses' day-to-day activities involving speech. If these advocates

⁵ See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 574–77 (2015).

⁶ *Hettinga v. United States*, 677 F.3d 471, 475 (DC Cir. 2012) (Brown, J., concurring). The USDA's rule eliminated an exemption for certain vertically integrated milk producers, meaning that they would have to comply with the "pricing and pooling requirements of federal milk marketing orders." Judge Brown's opinion was remarkable, beginning with the observation that the Hettingas no doubt would have wished to make the long-foreclosed argument that "the operation and production of their enterprises had been impermissibly collectivized."

⁷ *Id.* at 483.

⁸ *Id.*

⁹ *Id.* (emphasis in original).

¹⁰ 301 U.S. 1 (1937); see also *id.* at 30 (upholding National Labor Relations Act as valid exercise of Congress's Commerce Clause authority).

¹¹ David D. Kirkpatrick, *New Judge Sees Slavery in Liberalism*, N.Y. TIMES (June 9, 2005), <http://www.nytimes.com/2005/06/09/politics/09brown.html>, archived at <https://perma.cc/KRE7-GDP2>.

¹² Justice Clarence Thomas's view of the Commerce Clause already has much in common with pre-New Deal Constitutional principles. See *United States v. Lopez*, 514 U.S. 549, 597–99 (Thomas, J., concurring) (characterizing the "substantial effects" test as "but an innovation of the 20th century"). And, while Justice Thomas rejects modern substantive due process, e.g., *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., concurring), he has also called for reinvigoration of the Fourteenth Amendment's Privileges and Immunities Clause; in that regard, he has argued that the *Slaughterhouse Cases*, in which the Court rejected the argument that that clause secured economic rights, were wrongly decided. *Saenz v. Roe*, 526 U.S. 489, 522–23 (Thomas, J., dissenting).

succeed, important workplace protections will be lost for many; as one scholar put it, “[b]ecause nearly all human action operates through communication or expression, the First Amendment poses near total deregulatory potential.”¹³

The purpose of this Article is primarily to identify emerging First Amendment theories aimed at deregulating the work place, many of which have escaped notice thus far.¹⁴ In addition, it urges that, although many of these theories are a stretch for now, individual deregulatory First Amendment cases should not be viewed as outliers: the outward push is occurring simultaneously on multiple fronts, and its standard-bearers include some exceedingly well-respected and influential lawyers. In that regard, the Article also urges greater attention to the potential consequences of the deregulatory First Amendment in the information economy.

Part I of this Article discusses the recent history of the deregulatory First Amendment, beginning with the Supreme Court’s adoption of First Amendment protections for commercial speech in 1976 before discussing key recent deregulatory cases. This Part is intended to provide a working overview of the deregulatory First Amendment, and to identify certain themes that are relevant to Part II of this Article. Then, Part II turns to the future: what might the deregulatory First Amendment look like if its proponents are victorious in the courts? Here, I identify three themes, which are mutually reinforcing and overlapping: First, that compelled speech and subsidization of speech, including commercial speech, should be more robustly protected than it currently is; second, that more business activities that implicate speech—even very indirectly—should be covered by the First Amendment; and third, that changing statutory baselines that alter incentives to speak can implicate the First Amendment.

I. LAYING THE GROUNDWORK

A. *The Emerging Deregulatory First Amendment at the Supreme Court*

The deregulatory First Amendment began to emerge in the 1970s, with the Court holding that commercial speech was entitled to First Amendment protection,¹⁵ that attempts to equalize election spending were constitutionally suspect,¹⁶ and that a for-profit, non-expressive corporation had its own First Amendment rights.¹⁷ Thus, in 1987, Cass Sunstein wrote that cases like

¹³ Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 133 (2016).

¹⁴ Thus, the Article does not undertake a detailed analysis or rebuttal of each argument; rather, it provides a foundation for others to engage in such work in the future.

¹⁵ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

¹⁷ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). By “expressive corporation,” I refer to a corporation formed for the purpose of conveying a substantive message. See *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 264 (1986) (holding that restriction on

Buckley—and not substantive due process-based privacy or reproductive autonomy cases—were the true descendants of *Lochner*.¹⁸ In support of his thesis, Sunstein identified key similarities between *Lochner*, and *Buckley*, as well as cases arising in other areas of law: “The key concepts here are . . . government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law.”¹⁹ More recently, other scholars have also noted a deregulatory or *Lochnerian* turn in constitutional law, and especially in First Amendment law.²⁰

independent political spending could not be applied to corporation that “was formed for the express purpose of promoting political ideas”).

¹⁸ 198 U.S. 45, 57 (1905) (striking down state law maximum hours law on grounds that it impermissibly interfered with the individual “right of free contract”). Sunstein was not the first to identify the *Lochnerian* strains in the Court’s commercial speech decisions. See Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-31 (1979) (discussing *Virginia Board of Pharmacy*, and stating that “the Supreme Court has reconstituted the values of *Lochner v. New York* as components of freedom of speech”); see also Archibald Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 28 (1980) (noting that comparisons of the Court’s commercial speech cases to *Lochner* are “hardly surprising”).

¹⁹ Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987). Sunstein explained further that, for the *Lochner* Court, as well as for the Court in more recent decisions:

Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Market ordering under the common law was understood to be a part of nature rather than a legal constrict, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.

Id. at 874.

²⁰ See, e.g., Shanor, *supra* note 13; Rebecca Tushnet, *Cool Story: Country of Origin Labeling and the First Amendment*, 70 FOOD & DRUG L.J. 25, 26 (2015) (describing First Amendment objections to country-of-origin labeling requirements as “perhaps the clearest example of the way in which the First Amendment has become the new *Lochner*”); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1453 (2015); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1212 (2015) (discussing “striking parallels between the traditional understanding of *Lochnerism* and the First Amendment critique” of privacy regulations); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts’ Role in Eroding ‘We the People’s’ Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. (2016); Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109–110 (1993) (“The generalization and universalization of freedom of speech, and the Court’s concomitant devotion to its abstract doctrine of ‘content neutrality,’ however, have combined to produce a *Lochnerization* of the First Amendment.”); Neil M. Richards, *Why Data Privacy Law is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1530 (2015) (“[I]f the lessons of the twentieth century are that government regulation is sometimes necessary in an industrial economy, we should not forget those lessons in our information economy.”); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207 (2015); Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 661 (1999) (“The courts have increasingly begun to use the First Amendment to restrict economic regulation and enforce a vision of the market freed not from politics ‘gone bad,’ but rather from all politics altogether.”); Post & Shanor, *supra* note 4, at 179 (“If the regulation of every speech act is a constitutional question, we . . . must abandon the possibility of meaningful self-determination and turn back our democracy to the juristocracy that controlled society in the days of *Lochner*.”).

The origin of this deregulatory turn in First Amendment law is sometimes attributed to Justice Powell,²¹ both because he authored key opinions extending First Amendment rights for corporations, and because of his now-infamous “Powell memo.” That memo, drafted in 1971 while Powell was in private practice, urged “a broad, multi-channel effort at mobilizing corporations and their resources to defend capitalism and the ‘free enterprise system’” on college campuses, in the media, among politicians, and in the courts.²² As to the last, Powell urged the Chamber of Commerce to model itself after the ACLU, labor unions, and civil rights groups by strategically initiating lawsuits and filing amicus briefs—a role that the Chamber took on with gusto and continues to pursue today.²³ But the Powell memo was light on specifics. The memo contained no blueprint for what a pro-business First Amendment might look like; that plan came from elsewhere, developed by lawyers and academics.²⁴

During that same period, some conservative Supreme Court litigators displayed a certain ambivalence—or even skepticism—about expanding the First Amendment to advance commercial speech interests. For example, consider the case that first clearly announced First Amendment coverage for commercial speech: *Virginia State Board of Pharmacy*, in which the Court invalidated on First Amendment grounds a Virginia statute forbidding the advertisement of prescription drug prices.²⁵ The plaintiffs in *Virginia State Board of Pharmacy* were represented not by a conservative or pro-business group, but instead by Alan Morrison of the liberal Public Citizen Litigation Group, which he co-founded with Ralph Nader in 1972.²⁶ Moreover, this

²¹ See, e.g., Robert L. Kerr, *Naturalizing the Artificial Citizen: Repeating Lochner’s Error in Citizens United v. Fed. Election Comm’n*, 15 COMM. L. & POL’Y 311, 314 (2010); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, & Implications*, 30 CONST. COMMENT. 223, 242 (2015); Shanor, *supra* note 13 at 155.

²² Coates, *supra* note 21, at 242; John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 74–75 (2011–12) (emphasizing Justice Powell’s role in deregulatory First Amendment cases); see also Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 2, 2013), <https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation>, archived at <https://perma.cc/75J6-LLCA>.

²³ See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 760–61 (2000).

²⁴ See Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) see also TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 84 (reporting Center for Applied Jurisprudence panel on the First Amendment as “mostly on commercial speech; dominated, intellectually, by Mike McConnell and Lillian BeVier”).

²⁵ See 425 U.S. at 761–62 (stating that “the speech whose content deprives it of protection cannot simply be speech on a commercial subject”). The Court had disposed of a handful of other cases involving commercial advertisements before *Virginia Bd. of Pharmacy*, but it was the first to plainly overrule *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Court held that “the Constitution imposes no such restraint on government as respects purely commercial advertising,” *id.* at 54. See Genevieve Lakier, *The Invention of Low Value Speech*, 128 HARV. L. REV. 2166, 2182 (2015).

²⁶ Tony Mauro, *Moving On: A Nader Protégé With Friends in High Places*, 27 LEGAL-TIMES 21 (May 24, 2004).

was not a case of strange bedfellows; amazingly, by today's standards, the case drew almost no amicus brief submissions at all, and none from either conservative or liberal movement groups.²⁷ (This lack of amicus interest partially reflects the fact that fewer amicus briefs were filed in prior decades than today; still, amicus briefs were becoming increasingly common by the time Public Citizen litigated *Virginia State Board of Pharmacy*.²⁸)

This relative disinterest might be shocking to a modern-day observer, but it was at the time consistent with much academic and judicial thought about commercial speech among both liberals and conservatives.²⁹ For example, in 1971, Robert Bork, who would become a District of Columbia Circuit Judge and Supreme Court nominee, wrote that “[c]onstitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”³⁰ It is telling that Judge Bork felt no need even to list “advertising” as a form of speech outside First Amendment protection, as though that point was self-evident. Similarly, throughout his career, Chief Justice William Rehnquist authored dissents in key cases that advanced commercial speech rights, including in *Virginia State Board of Pharmacy* and *Central Hudson Gas & Electric Corp. v. Public Service Commission*,³¹ where he charged that by elevating the First Amendment status of commercial speech, the Court “returns to the bygone era of *Lochner v. New York*.”³² This is not to say this view was unanimous; liberal-leaning Martin Redish famously argued in 1971—the same year that Justice Powell wrote his memo—that commercial speech could be as equally valuable to listeners as other types of speech and therefore deserved similar First Amendment protection, and some movement conservatives made similar arguments.³³

This skepticism was in part linked to doctrinal concerns. Much of the conservative legal movement of the 1970s and 1980s responded to perceived

²⁷ See Docket, *Virginia State Bd. of Pharmacy*, No. 74-895 (U.S.) (reflecting amicus briefs filed by the American Association of Retired Persons & National Retired Teachers Association; Osco Drug, Inc. and the Association of National Advertisers, Inc.).

²⁸ Kearney & Merrill, *supra* note 23 at 751.

²⁹ See C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 982 (2009) (discussing history of scholarship and judicial opinions regarding commercial speech); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 355 (1978) (criticizing *Virginia Pharmacy* as “not justified either by principle or by pragmatic or institutional concerns related to principle”); Jackson & Jeffries, *supra* note 18 at 5–6 (arguing that *Virginia Pharmacy* was “decided wrongly” because commercial speech does not advance First Amendment values).

³⁰ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

³¹ 447 U.S. 557 (1980).

³² E.g., *id.* at 591; see also Earl M. Maltz, *The Strange Career of Commercial Speech*, 6 CHAP. L. REV. 161, 167 (2003) (discussing Chief Justice Rehnquist’s views on commercial speech and noting that “[i]n 1976, then-Justice Rehnquist’s views were seen as epitomizing conservative jurisprudence”).

³³ See generally Redish, *supra* note 24; Shanor, *supra* note 13, at 140–42.

excesses of the Warren and Burger Courts by calling for more restraint in constitutional interpretation; arguments for First Amendment coverage for commercial speech would have sat in tension with this approach.³⁴ Additionally, Stephen Teles has posited that conservatives' initial lack of attention, and even hostility, to the deregulatory First Amendment was because "[t]he most mobilized interest of conservatives in the early 1970s was business, a problematic ally for the cause because of its unreliable opposition—and frequent support—for state activism."³⁵ In other words, business supporters of newly forming conservative legal activist groups had learned to work within existing regulatory frameworks (perhaps even concluding that they benefitted from those frameworks), and therefore felt little need to prioritize toppling those frameworks through litigation. Relatedly, many conservative attorneys and scholars simply had other First Amendment priorities. Thus, when President Ronald Reagan's Office of Legal Policy generated a pair of lengthy documents about the Department of Justice's positions on a variety of constitutional issues, they contained nothing about advancing business interests under the First Amendment. Instead, they focused more closely on "culture war" issues, such as religious freedom and the right of groups to exclude unwanted members.³⁶

Moreover, some key early cases involving commercial First Amendment rights arose in the context of "culture war" issues, in which the socially conservative position was not aligned with the pro-speech position. *Virginia State Board of Pharmacy* is not such a case—but it followed on the heels of *Bigelow v. Virginia*,³⁷ in which the Court struck down on First Amendment grounds the conviction of a newspaper editor under a criminal ban on the advertisement of abortion services.³⁸ The two amicus briefs filed in *Bigelow* are telling. In one brief, Public Citizen previewed the argument that it would successfully make in *Virginia State Board of Pharmacy*: that the advertising restrictions at issue in the case harmed listeners' interests in obtaining information.³⁹ In the other brief, the group Virginia Right to Life argued that "commercial advertisement . . . has no protection under the First

³⁴ See, e.g., BeVier, *supra* note 29 at 304 (arguing that "the only legitimate sources of constitutional principle are the words of the Constitution itself, and the inferences that reasonably can be drawn from its text, from its history, and from the structure of government it prescribes").

³⁵ TELES, *supra* note 24, at 58.

³⁶ See U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988), <http://www.ialsnet.org/documents/Patersonmaterials2.pdf> [hereinafter GUIDELINES], archived at <https://perma.cc/Y98J-GQ4D>; U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988), <http://www.scribd.com/doc/7888685/The-Constitution-in-the-year-2000-choices-ahead-in-constitutional-interpretation>, archived at <https://perma.cc/P35D-HZ97>.

³⁷ 421 U.S. 809 (1975).

³⁸ See *id.* at 825.

³⁹ Brief for Public Citizen and Center for Women Policy Studies as Amici Curiae Supporting Petitioner, *Bigelow*, 421 U.S. 809 (No. 73-1309), 1974 WL 186260.

Amendment.”⁴⁰ Then, the following year, the Court rejected a First Amendment challenge brought by “operators of two adult motion picture theaters” to an “anti-skid row ordinance.”⁴¹ Again, amicus participation was scant, with just the American Civil Liberties Union and the Motion Picture Association of America weighing in on the theaters’ side.⁴² Arising in these contexts, First Amendment protections for commercial speech must have seemed like a mixed bag, at best, to many conservatives.

Still, *Virginia State Board of Pharmacy* represented a turning point, providing a toe-hold for deregulatory and pro-business First Amendment cases, which soon (and inevitably, given our common law system⁴³) began to emerge.⁴⁴ By 1980, when Justice Powell announced the primary test applicable to the regulation of commercial speech in *Central Hudson*,⁴⁵ the players in the deregulatory First Amendment landscape had begun to line up in a way that would be more recognizable today. In that case, three conservative movement groups and the Chamber of Commerce filed amicus briefs in opposition to New York’s ban on advertising by electric utilities;⁴⁶ environmental and consumer groups filed amici in support of the state.⁴⁷ Academics, too, developed creative new ways to push at the boundaries of the First

⁴⁰ Brief for Va. Right to Life, Inc. as Amicus Curiae Supporting Respondent, *Bigelow*, 421 U.S. 809 (No. 73-1309), 1974 WL 186261 at *4.

⁴¹ *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 55 (1976).

⁴² Docket, *Young v. American Mini Theatres, Inc.*, 127 U.S. 50 (2007) (No. 75-312).

⁴³ Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM & MARY L. REV. 1613, 1625–26 (2015) (discussing why lawyering is “opportunistic,” in the sense that when courts embrace novel First Amendment theories, litigants will tend to recast their claims in First Amendment terms).

⁴⁴ For example, several conservative groups and the Chamber of Commerce filed amicus briefs in support of the petitioners in *Bellotti*, in which the Court struck down a Massachusetts law prohibiting banks and corporations from making contributions or expenditures to influence certain voter referenda, *see* 435 U.S. at 768. *See, e.g.*, Motion of the Chamber of Commerce of the United States of America for Leave to File a Brief Amicus Curiae and Brief Amicus Curiae in Support of Appellants, *Bellotti*, Case No. 76-1172, June 2, 1977; Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae Northeastern Legal Fdn. And Mid-America Legal Fdn. In Support of Appellants, *Bellotti*, Case No. 76-1172, June 10, 1977.

⁴⁵ Justice Powell wrote:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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

⁴⁶ Brief for Mid-Atlantic Legal Foundation and Donald Powers as Amici Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1980 WL 339968; Brief for Washington Legal Foundation as Amicus Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 200000; Brief for New England Legal Foundation as Amicus Curiae Supporting Petitioner, *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 2000011979.

⁴⁷ Brief for the Natural Resources Defense Council, Friends of the Earth et al., as Amici Curiae Supporting Respondent *Cent. Hudson Gas*, 447 U.S. 557 (No. 79-565), 1979 WL 200002.

Amendment, while establishing closer ties to conservative legal groups—especially the Federalist Society—and allowing new theories to more easily be put into practice.⁴⁸ Ultimately, even Judge Bork took a more favorable view of First Amendment protection of commercial speech, concluding that “evidence makes clear that the ‘the freedom of the press’ protected by the Constitution extends to that which we now characterize as ‘commercial speech.’”⁴⁹

Whatever the reasons, advances under the First Amendment by business interests have been inexorable over the past two decades. As an empirical study by John Coates IV recently concluded, “[n]early half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals.”⁵⁰ Further, these pro-business cases do not involve core expression, but rather entail “attacks on laws and regulations that inhibit ‘speech’ . . . in areas of activity incidental or instrumental to their core profit-making activity.”⁵¹

While Justice Powell’s early call to action and later First Amendment jurisprudence helped begin the process of deregulation by First Amendment, the Roberts Court has significantly furthered the project, as discussed below. This trend is consistent with the generally pro-business orientation of the Roberts Court, which was found to be “much friendlier to business than either the Burger or Rehnquist Courts” in a study by Lee Epstein, William M. Landes, and Judge Richard Posner.⁵² Moreover, the study found that “five of the ten Justices who . . . have been the most favorable to business are currently serving, with two of them ranking at the very top among the thirty-six Justices in our study.”⁵³ Unsurprisingly, they are, in order, Justice Samuel Alito, Chief Justice John Roberts, Justice Clarence Thomas, Justice Anthony Kennedy, and the late Justice Antonin Scalia, with Justice Alito and Chief Justice Roberts in positions one and two, respectively of the thirty-six justices studied.⁵⁴ Justice Powell ranked number nine—ranking below four of the current Justices, and only one spot above Justice Scalia.⁵⁵

⁴⁸ See TELES, *supra* note 24, at 82–84 (noting that “by the mid-1980s the conservative movement had developed a cadres of activists and thinkers whose primary commitment was to a set of ideas rather than the defense of particular interests or constituencies,” and describing a conference featuring panels “mostly on commercial speech [] dominated, intellectually, by [Michael] McConnell and Lillian BeVier”).

⁴⁹ Robert Bork, *Activist FDA Threatens Constitutional Speech Rights*, AM. ENTERPRISE INST. (Jan. 19, 1996), <http://www.aei.org/publication/activist-fda-threatens-constitutional-speech-rights/>, archived at <https://perma.cc/4VHT-SA6H> (arguing that proposed FDA restrictions on cigarette advertising were unconstitutional); see also Jonathan H. Adler, *Robert Bork & Commercial Speech*, 10 J.L. ECON. & POL’Y 615, 616 (2014).

⁵⁰ Coates, *supra* note 21, at 223.

⁵¹ *Id.* at 249.

⁵² Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013).

⁵³ *Id.*

⁵⁴ *Id.* at 1450 (table 7).

⁵⁵ *Id.*

B. Recent Cases: A Preview of Things to Come?

All this is to say that much has already changed in the last three decades of First Amendment jurisprudence. But, as the next section discusses, the new generation of legal challenges would expand First Amendment protections significantly beyond today's (already expanded) limits. These new challenges rely on several different strands of First Amendment law, but three cases, each authored by Justice Kennedy, deserve special mention: *United States v. United Foods, Inc.*,⁵⁶ *Citizens United v. FEC*,⁵⁷ and *Sorrell v. IMS Health Inc.*⁵⁸ Together, these cases: (1) expand the scope of activity to which the First Amendment applies, covering more economic activity that incidentally involves or affects speech; (2) embrace a more absolutist approach to the First Amendment than the balancing favored by many earlier Courts and Justices, including Justice Powell, by ratcheting up the level of First Amendment scrutiny for restrictions on commercial or economically motivated speech or compelled subsidization of speech; and (3) signal the Court's willingness to entertain new or aggressive forms of deregulatory First Amendment challenges, in turn prompting more litigants to advance novel free speech arguments. Given these cases' pivotal position in advancing the deregulatory First Amendment, it is worth briefly discussing their significance.⁵⁹

First, in *United Foods*, the Court held that the Department of Agriculture could not require mushroom producers to contribute to a generic advertising fund when the contributions were not part of a comprehensive scheme of economic regulation. The Court decided the issue narrowly and avoided explicitly overruling any prior cases, including *Glickman v. Wileman Brothers & Elliott, Inc.*,⁶⁰ in which the Court upheld mandatory contributions to a slightly different generic advertising scheme.⁶¹ Yet, the decision matters for two reasons relevant to this Article. First, the Court muddied the difference between compelled speech and compelled subsidization of speech, suggesting that the two were equivalent in at least some contexts.⁶² (The Court later further elided that difference in *Knox v. Service Employees International Union, Local 1000*,⁶³ describing mandatory union fees as "a form of

⁵⁶ 533 U.S. 405 (2001).

⁵⁷ 558 U.S. 310 (2010).

⁵⁸ 564 U.S. 552 (2011).

⁵⁹ I have previously discussed these cases in more detail. See Charlotte Garden, *Citizens United and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 585–86 (2014); Charlotte Garden, *Meta Rights*, 83 FORDHAM L. REV. 855, 880–81 (2014).

⁶⁰ 521 U.S. 457 (2001).

⁶¹ See *id.* at 474.

⁶² See 533 U.S. at 410–11 (citing cases concerning compelled speech and compelled subsidization of speech); cf. *Glickman*, 521 U.S. at 470–71 ("The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths.").

⁶³ 132 S. Ct. (2012) 2277.

compelled speech and association” and citing *United Foods*.⁶⁴) Then, once the Court had identified the challenged constitutional harm as tantamount to compelled speech, it decided heightened scrutiny should apply; in contrast, earlier decisions had suggested that, to the extent compelled subsidization of speech implicated the First Amendment at all, a more generous balancing test was appropriate.⁶⁵ Thus, *United Foods* is significant in large part because of its discussion of the level of scrutiny to be applied to claims involving mandatory subsidization of economic speech or association.

The second aspect of *United Foods* relevant to this Article is the Court’s conclusion that, as a matter of “First Amendment values,” the “general rule is that the speaker and the audience, not the government, assess the value of the information presented.”⁶⁶ That is, courts cannot be entrusted to decide whether an objection to generic mushroom advertising contributes significantly to democratic deliberation and self-governance, the marketplace of ideas, or any other abstract First Amendment value;⁶⁷ instead, courts must leave it to speakers to decide what matters. Put another way, if a speaker concludes that a generic advertising assessment is worth making a federal case over, who is the court to say otherwise?⁶⁸

⁶⁴ *Id.* at 2289.

⁶⁵ *Compare* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977) (holding that “important government interests . . . presumptively support the impingement upon association freedom created by the agency shop”), *with* *Knox*, 132 S. Ct. at 2289 (stating that strict scrutiny applies to “mandatory associations” and citing *United Foods*); see also, *Glickman*, 521 U.S. at 469–70 (distinguishing agricultural advertising subsidies from previous compelled subsidization of speech cases including *Abood* because: “First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views”).

⁶⁶ 533 U.S. at 411 (quotation mark omitted) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). *Edenfield* itself is a significant case for the development of the deregulatory First Amendment; in that case, the Court, in an opinion authored by Justice Kennedy, struck down a Florida law banning certified public accountants from making direct personal solicitations to potential clients. See 507 U.S. at 763–64. Justice Kennedy wrote that the law “threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard,” *id.* at 767, though he also squarely applied traditional intermediate scrutiny in striking down the law, see *id.* at 767.

⁶⁷ See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 9–10 (2000) (arguing that First Amendment scrutiny “is brought to bear only when the regulation of communication affects a constitutional value specifically protected by the First Amendment”); Horwitz, *supra* note 20, at 113 (“Such a ‘content neutral’ approach [to the First Amendment] necessarily ignores what had originally been the central practical goal of modern First Amendment history: the use of free speech doctrine to ‘level the playing field’ in order to provide economically or socially weak political dissidents with a chance to engage in political debate.”).

⁶⁸ See Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 SUP. CT. REV. 195, 216 (2005) (reasoning that the *United Foods* principle that “‘First Amendment concerns apply’ whenever the state requires persons to ‘subsidize speech with which they disagree’” is “false” because “First Amendment concerns are not automatically aroused when persons are forced to speak in ways that they find objectionable”); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1122 (2015) (First Amendment decisions including *Sorrell* are “are infused with the neoliberal tropes of economic liberty and consumerist participation, and the label ‘speech’ has become a fig leaf

This approach is a significant turn from Justice Stevens' analysis in *Glickman*. For Justice Stevens, it was easy to conclude that a stone fruit subsidy did not "compel the producers to endorse or to finance any political or ideological views," or to refrain from expressing any views—even contrary ones—on their own dime.⁶⁹ With that conclusion, Justice Stevens took the compelled advertising scheme out of the realm of the First Amendment altogether, grouping it instead with other forms of ordinary market regulation that have been subject only to rational basis review since the Court's rejection of *Lochner* in 1937.⁷⁰ Thus, the mere fact that advertising involves speech was not enough to bring the First Amendment into play for the *Glickman* majority; instead, the Court looked to the general character of the regulation to assess whether it implicated genuine First Amendment concerns, or whether the case was instead an attempt at an end-run around the Court's rejection of heightened scrutiny for economic due process-type claims.

In declining to overrule *Glickman*, Justice Kennedy was left to backfill a basis to distinguish that decision. The one he chose was that the advertising order in *Glickman* was part of a more extensive scheme of economic regulation that prohibited certain market competition between producers.⁷¹ Thus, after *United Foods*, governments may compel producers to subsidize private advertising only when it also restricts their market freedom in ways that do not involve speech.⁷² Yet all market participants are restricted in innumerable ways that do and do not involve speech—for example, most market participants must comply with prohibitions on anticompetitive activity, with labor and employment law, and with deceptive advertising rules. Thus, Kennedy's *United Foods* rule must be more limited; presumably confined to those situations in which the same regulatory scheme both restricts market behavior and compels producers to subsidize advertising, with the restriction and the subsidy aimed at the same goal.⁷³ The upshot is that, under *United Foods*, more market regulation comes in for more rigorous

strategically deployed to denote and legitimize proprietary claims over the patterns of information flow.").

⁶⁹ *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 469–70 (2001).

⁷⁰ See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the [state] has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted . . .").

⁷¹ See 533 U.S. at 412 ("The California tree fruits were marketed 'pursuant to detailed marketing orders that ha[d] displaced many aspects of independent business activity.'").

⁷² Alternatively, the government may assess fees if it then uses them to fund its own speech. See *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005) ("When . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.").

⁷³ 533 U.S. at 412 ("[A]most all of the funds collected under the mandatory assessments are for one purpose: generic advertising. Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions.").

First Amendment scrutiny; in contrast, the *Glickman* rule left government a freer hand with respect to compelled subsidization of speech, provided that there was no recognizably ideological or political component involved. Or, as the *United Foods* dissenters put it, the majority's rule risks "creat[ing] through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect."⁷⁴

Several years later, the Court in *Sorrell* compounded the effects of *United Foods* by holding that regulations targeting commercial dealings in information can be content- and speaker-based discrimination deserving of "heightened" First Amendment scrutiny.⁷⁵ Specifically, the Court struck down a Vermont law prohibiting pharmaceutical marketers from buying or using pharmacy records that revealed individual physicians' prescribing practices.⁷⁶ The statute did not prohibit pharmaceutical marketing—it simply made the marketing harder by depriving marketers of information that might allow them to better target their efforts at individual physicians. Thus, Vermont and some of its amici argued that the law did not regulate speech at all, but rather banned a species of commerce. That argument had been accepted by the First Circuit, which put it like this:

[T]his is a situation in which information itself has become a commodity. The plaintiffs, who are in the business of harvesting, refining, and selling this commodity, ask us in essence to rule that because their product is information instead of, say, beef jerky, any regulation constitutes a restriction of speech. We think that such an interpretation stretches the fabric of the First Amendment beyond any rational measure.⁷⁷

The *Sorrell* majority, however, rejected that argument because "the creation and dissemination of information are speech within the meaning of the First Amendment."⁷⁸ Then, the Court focused on the fact that the law targeted a single type of market actor—pharmaceutical marketers—who wanted to use physician information to facilitate their speech.⁷⁹ Thus, the Court concluded not only that the law implicated the First Amendment, but also that it dis-

⁷⁴ 533 U.S. at 425 (Breyer, J., dissenting).

⁷⁵ See 131 S. Ct. at 2659 (holding that a statute restricting on "sale, disclosure, and use of pharmacy records . . . must be subjected to heightened judicial scrutiny" because the statute targets "[s]peech in aid of pharmaceutical marketing").

⁷⁶ *Id.*

⁷⁷ *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 53 (1st Cir. 2008), *abrogated sub nom Sorrell*, 131 S. Ct. at 2659.

⁷⁸ *Sorrell*, 131 S. Ct. at 2667.

⁷⁹ See *id.* at 2663 ("On its face, Vermont's law enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.").

criminated based on viewpoint.⁸⁰ The result is at least a strong implication that laws targeting data-mining operations or otherwise protecting the privacy of certain information will now be subject to heightened First Amendment scrutiny.⁸¹ As to what level of heightened scrutiny, the Court held that *at least* intermediate scrutiny would apply, but it intimated that something “stricter” might be called for when laws target commercial information purchasers or users only, leaving others (such as academics or non-profits) unregulated.⁸²

Despite the Court’s occasional protestations to the contrary, regulations that come in for heightened scrutiny are usually not long for this world,⁸³ and *Sorrell* was not an exceptional case. Much as he did in *Edenfield*, Justice Kennedy began by describing pharmaceutical marketing—the end result of the data trade in which the *Sorrell* respondents engaged—as “effective and informative.”⁸⁴ Later in the decision, he wrote that “[i]f pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive.”⁸⁵ For Justice Kennedy, then, physicians are presumptively *homo economicus*, immune to irrational responses to marketing efforts that could lead to worse outcomes for patients.⁸⁶ Thus, it would not be enough for Vermont to point to changes in physician behavior resulting from personalized marketing approaches; instead, the state would also have to demonstrate worse (or more expensive) patient outcomes as a result of pharmaceutical marketing. But the process of generating this data would be difficult and expensive. If generated, perhaps it would show that Vermont’s premise was flawed all along. Perhaps not. The point, though, is that whereas Vermont’s efforts to regulate the pharmaceutical industry would generally be subject to rational basis review, *Sorrell* stands for the proposition that some form of heightened scrutiny applies where the exchange of data is restricted; those restrictions will often wither under such scrutiny. The result will be not just

⁸⁰ See *id.* (“‘In its practical operation,’ Vermont’s law ‘goes even beyond mere content discrimination, to actual viewpoint discrimination.’” (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992))).

⁸¹ See Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 867–68 (2012).

⁸² *Sorrell*, 131 S. Ct. at 2667.

⁸³ Cf. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006) (concluding, based on empirical analysis of how often government prevails in cases in which strict scrutiny applies, that “strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right”); Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court’s Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 391 (2012) (“The U.S. Supreme Court has not upheld a commercial speech restriction since 1995.”).

⁸⁴ 131 S. Ct. at 1663 (citing *Edenfield*’s description of in-person solicitation as having “considerable value”).

⁸⁵ 131 S. Ct. at 2670.

⁸⁶ See also Reza R. Dibadj, *The Political Economy of Commercial Speech*, 58 S.C. L. REV. 913, 927 (2007) (discussing the role of listeners in commercial speech law, and observing that “the Court is shifting attention away from the rights of an artificial, putatively profit-seeking entity, toward those of a much more sympathetic class—the audience”).

less regulation of speech, but also less regulation of markets. To be sure, this result is, in a sense, a consequence of First Amendment protection for commercial speech generally,⁸⁷ but *Sorrell*'s broad language enables new arguments that (1) heightened scrutiny should apply to regulation targeting a particular set of commercial actors who are doing business via speech; and (2) regulation of the sale of raw data or data-mining services that might lead to commercial expression should be treated as equivalent to more direct regulation of speech.⁸⁸ Or, as Justice Breyer put it in his *Sorrell* dissent, "[b]y inviting courts to scrutinize whether a State's legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today's majority risks repeating the mistakes of the past in a manner not anticipated by our precedents."⁸⁹

I have left for last *Citizens United*, which has the greatest symbolic importance of the cases discussed in this Part. *Citizens United* is sometimes wrongly characterized as having announced for the first time that "corporations are people" (which is in turn shorthand for the principle that corporations have First Amendment rights), or that "money is speech." Neither of those principles was original to *Citizens United*, though that case did apply them aggressively.⁹⁰ Obviously *Citizens United* matters a great deal to campaign finance law; among other things, the importance of its holding that only *quid pro quo* corruption can justify limits on political spending should not be understated.⁹¹

But beyond election law, *Citizens United* embraced the principle that speaker-based discrimination is offensive to the First Amendment: "Prohibited, too, are restrictions distinguishing among different speakers . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content."⁹² That principle laid the groundwork for *Sorrell*,

⁸⁷ See Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech*, 47 U. RICH. L. REV. 1171, 1173–74 (2013) (discussing Supreme Court decisions that rejected "paternalistic" justifications for limiting advertising).

⁸⁸ See Pomeranz, *supra* note 83 at 422–23 & 424–25 (noting *Sorrell*'s concern with content-based regulation of speech, whereas "[c]ommercial speech is by its very definition content-based: speech that 'propose[s] a commercial transaction;'" and contrasting *Sorrell*'s treatment of speaker-based distinctions to that of other commercial speech cases); Tamara Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. & TECH. L. 1, 20 (2016) (arguing that "that a statute which treats marketing differently than other speech, is constitutionally infirm *on that ground*, makes a hash of the commercial speech doctrine because, by definition, the commercial speech doctrine is applicable only to a specific type of content—commercial content). Cf. Richards, *supra* note 20 at 1501 ("Laws regulating the collection, use, and disclosure of personal data are (mostly) constitutional, and critics who suggest otherwise are wrong").

⁸⁹ 131 S. Ct. at 592 (Breyer, J., dissenting)

⁹⁰ See Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953, 955 (2011) (criticizing *Citizens United* because "the Court considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all" in support of that proposition).

⁹¹ See *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

⁹² *Id.* at 898–99; see also Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FL. ST. L. REV. 765, 766 (2015) (arguing that *Citizens United* "gave full-

where the Court was similarly distrustful of a speaker-based distinction. In addition, *Citizens United* served an important signaling function—namely, that five members of the Court were willing to reach major First Amendment holdings to strike down federal law, even when more narrow or incremental holdings were available.⁹³ Specifically, the Court rejected several narrow arguments that the Bipartisan Campaign Reform Act’s ban on spending from corporate general treasuries on certain independent political advocacy did not apply (or could be construed not to apply) to *Citizens United*’s proposed speech.⁹⁴ Instead, the Court concluded that an incremental approach would be time-consuming, leading to “an inevitable, pervasive, and serious risk of chilling protected speech” while the law was developing.⁹⁵ In contrast, the Court had previously proceeded in the more cautious manner that it eschewed in *Citizens United*.⁹⁶ In that sense, *Citizens United* made the First Amendment a more salient vehicle for challenging regulatory frameworks by suggesting that the Court viewed incremental or narrow holdings—usually a sign of desirable judicial restraint—as problematic when First Amendment rights are at stake. Thus, among *Citizens United*’s most important contributions to the greater deregulatory project may have been its signal that the Roberts Court is open for business, when business wants to advance new and aggressive First Amendment theories.⁹⁷

* * *

throated articulation to the principle that discrimination on the basis of the identity of the speaker is offensive to the First Amendment, even when there is no content discrimination” and that “[t]his newly articulated doctrine has the potential to reshape free speech law far beyond the corporate and election contexts”); Charlotte Garden, *Citizens United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 10 (2012) (arguing that “*Citizens United* . . . rejected [the Court’s] previous conclusion that a speaker’s purpose or motivation, including profit motive, could be determinative of his or her First Amendment rights”); Piety, *supra* note 88, at 20 (“What . . . flowered in *Citizens United*, was this notion that regulation of a corporation is somehow discriminatory and that similarly, regulation of commercial speech on different terms than that of other protected speech is likewise discriminatory.”).

⁹³ See Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 183 (2009) (“In *Citizens United*, the Court failed to dispose of the case initially through a plausible reading of a statute, setting itself up to address a constitutional question head-on that was not properly presented to the Court.”).

⁹⁴ 558 U.S. at 326–27.

⁹⁵ *Id.*

⁹⁶ See, e.g., *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 263–64 (1986) (holding that independent spending restriction could not be applied to non-profit entity because it was “formed for the express purpose of promoting political ideas,” its fundraising “cannot be considered business activities,” and it “was not established by a business corporation or labor union”).

⁹⁷ Relatedly, Julie Cohen has observed that the *Citizens United* Court privileged the ownership of “the means of communication.” As she put it, “[t]he invocation of media companies [by the *Citizens United* Court] as the paradigmatic example of corporate freedom of speech signals that the ultimate touchstone of expressive freedom is ownership of the means of communication. One who owns resources has the means to speak; one who owns the means of communication may speak most fully and completely.” Cohen, *supra* note 68, at 1124.

The legal evolution described in Part I threatens something of a perfect storm for the deregulatory First Amendment in the workplace, given the combined effects of the Court's willingness to expand First Amendment coverage and the increase in "information work" in America. It is unsurprising, then, that employers and business advocacy groups like the International Franchise Association, the Chamber of Commerce, and the National Federation of Independent Business are aggressively pursuing novel First Amendment theories in the federal courts. Part II describes these theories.

II. NEXT GENERATION THEMES OF THE DEREGULATORY FIRST AMENDMENT

As Professor Coates's research shows, there is a frequently invoked pro-business First Amendment "core," which encompasses application of ordinary commercial speech principles. This Part is not about those cases. Instead, it identifies a new wave of deregulatory and pro-business First Amendment arguments that push at the First Amendment's boundaries. This is not to predict that litigants will convince courts to adopt all of these theories—perhaps none of them will become law; perhaps some of them will, though their chances significantly decreased with Justice Scalia's death in February 2016. But it is nonetheless significant that these arguments are being made, particularly because they are often advanced by high-profile litigators who may hope to begin the process of moving arguments from "off the wall" to "on the wall." Further, it is an actuarial certainty that the composition of the Supreme Court will change significantly over the next ten years; future nominees, as well as the eventual confirmation of a Justice to fill Justice Scalia's seat, will determine whether or not these First Amendment theories gain traction.

The remainder of this Article discusses themes of the emerging deregulatory First Amendment. While the arguments overlap and reinforce each other, I have attempted to tease apart significant strands.

A. *Compelled speech or subsidization of speech should routinely be subject to strict scrutiny, requiring detailed justifications for economic regulations that involve speech or spending.*

First, a new generation of arguments seeks to expand the Court's precedents on compelled speech and subsidization of speech. Many of these cases involve the constitutionality of mandatory union fees or even union representation itself in the public sector, although novel uses of First Amendment compelled speech principles have also occurred outside of the union fees context. These arguments have had some success already, and until Justice Scalia's death, more successes were likely to come; now, the permissible scope of public sector labor relations likely rests with Justice Scalia's successor.

1. Public Sector Union Cases

In the previous Part, I argued that the Roberts Court's First Amendment decisions have put wind in the sails of advocates who would make novel and aggressive use of the First Amendment as a deregulatory tool. But there is a much more specific sense in which the Court has invited recent challenges to mandatory union fees in the public sector. It is not a stretch to say that Justice Alito is the primary architect of the legal theories advanced in these cases,⁹⁸ and that he has all but called for advocates to run with his ideas.

Justice Alito's invitation came wrapped in the Court's 2012 decision in *Knox v. SEIU Local 1000*. The pre-*Knox* baseline rules governing unions in the public sector—which, as discussed below, still apply—are roughly as follows. First, the National Labor Relations Act (“NLRA”) does not apply to public sector employers,⁹⁹ leaving governments at the federal, state, and sometimes local levels to define the scope of their employees' collective bargaining rights.¹⁰⁰ The resulting legal regimes differ significantly; a small list of states have made public sector collective bargaining illegal, while others provide their public sector workers more robust bargaining rights than private sector employees enjoy under the NLRA.¹⁰¹ However, most states allow at least some public sector workers to bargain collectively, as does the federal government.¹⁰² Virtually all states that allow collective bargaining require elected unions to become the exclusive representative for an entire group of employees, with the union in turn required to fairly represent each worker in the bargaining unit.¹⁰³

While governments have a range of options regarding the scope of public sector union representation, there are also some constitutional limits.¹⁰⁴ The First Amendment protects workers' rights to refrain from union membership, and to decline to contribute money to an elected union's activities

⁹⁸ Justice Alito's role in inviting challenges to aspects of public sector collective bargaining was most evident in *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012), and is discussed below.

⁹⁹ 29 U.S.C. § 2(2) (definition of “employer” “shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof”).

¹⁰⁰ Joseph Slater, *The Strangely Unsettled State of Public-Sector Labor in the Past Thirty Years*, 30 HOFSTRA LAB. & EMP. L.J. 511, 512–13 (2013).

¹⁰¹ *Id.*; Ann C. Hodges, *Lessons From the Laboratory: The Polar Opposites on the Public Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 735–36 (2009) (discussing “two of the jurisdictions at opposite ends of the legal spectrum, Illinois and Virginia”).

¹⁰² Slater, *supra* 100, 512–13 & 518–19.

¹⁰³ Only three states have ever experimented with a “members only” or “proportional representation” model, in which a union represents only the employees in the bargaining unit that choose to be so represented, allowing subsets of workers within a single bargaining unit to choose representation by different unions. MARTIN H. MALIN, ANN C. HODGES, & JOSEPH E. SLATER, *PUBLIC SECTOR EMPLOYMENT: CASES & MATERIALS*, 340 (2d ed. 2011). The only state that currently allows proportional representation in Tennessee. TENN. CODE ANN. § 49-5-605 (2011) (permitting any representative chosen by fifteen percent of teachers to participate in “collaborative conferencing”).

¹⁰⁴ *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 233–34 (1977).

that are unrelated to its duties as the collective bargaining agent for a group of employees.¹⁰⁵ Thus, the law currently reflects a compromise—or, as Professor Cynthia Estlund puts it, a *quid pro quo*¹⁰⁶—involving two parts. First, where required by a statute or a collective bargaining agreement, public sector workers can be required to pay an agency fee representing their pro-rata share of a union’s costs associated with collective bargaining and contract administration. Second, they cannot be required to fund the union’s other activities, including its political advocacy. Finally, where employees are required to pay an agency fee, the divide between chargeable and non-chargeable expenses is protected by a minimum set of procedures, known as *Hudson* procedures, which were first developed by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*.¹⁰⁷

For decades, the “right to work” movement has fought agency fees in legislatures and the courts.¹⁰⁸ It received oblique encouragement in 2007, when Justice Scalia, upholding a state law requiring employees to affirmatively consent to contributing to union political activity, wrote that “it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees.”¹⁰⁹ But it was 2012’s *Knox* that all but issued a request for claimants to bring cases seeking to undo *Abood*’s fundamental compromise. That invitation came in two forms. First, although the issue in *Knox* was whether a public sector union violated the First Amendment rights of represented workers when it levied a mid-year dues increase without providing a fresh *Hudson* notice, the majority characterized the *Abood* rule as “something of an anomaly.”¹¹⁰ Second, the Court granted more relief than the challengers sought: whereas the petitioners argued that they were entitled to a fresh *Hudson* notice and opportunity to opt out of non-mandatory fees when the union levied the dues increase,¹¹¹ the Court held that the First Amendment instead required that the union obtain affirmative consent before charging represented non-members for its expenses unrelated to collective bargaining.¹¹² Although the *Knox* Court for-

¹⁰⁵ *Id.*; see also Cynthia Estlund, *Are Unions A Constitutional Anomaly?*, 114 MICH. L. REV. 169, 184–85 (2015).

¹⁰⁶ *Id.* at 169.

¹⁰⁷ 475 U.S. 292 (1986). These procedures require unions to issue an annual notice of the employees’ right to opt out, a calculation of the agency fee based on the union’s spending during the previous year, and the right to challenge that calculation before an impartial arbitrator. *Id.* at 305–06.

¹⁰⁸ Estlund, *supra* note 105, at 179–85; see generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* (2014).

¹⁰⁹ *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 184 (2007).

¹¹⁰ *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2290 (2012).

¹¹¹ *Br. for Petitioners, Knox v. Serv. Emps. Int’l Union, Local 1000*, No. 10-1121, 2011 WL 4100440, at *i (stating that question presented is whether “a State, consistent with the First and Fourteenth Amendments, may condition employment on the payment of a special union assessment intended solely for political purposes—a statewide ballot initiative campaign—without first providing a *Hudson* notice that includes information about that assessment and provides an opportunity to opt out of supporting those political exactions?”).

¹¹² *Knox*, 132 S. Ct. at 2293.

mally limited its holding to mid-year dues increases, the implication was clear: this was an area of law in which challengers should think big.

I have argued elsewhere that the *Knox*'s conclusions were unsupported by existing caselaw or logic,¹¹³ and I do not repeat those arguments here. Suffice it to say, the Court's invitation did not fall on deaf ears; many of the cases discussed in the remainder of this subsection were filed after, and apparently in response to, *Knox*. However, that was not strictly true of 2014's *Harris v. Quinn* decision, in which the Court held that Medicaid-funded home healthcare workers could not be required to pay an agency fee.¹¹⁴ *Harris* was filed before *Knox*, although the Court took it up two Terms later.¹¹⁵ Nonetheless, the *Harris* challengers significantly expanded the scope of their arguments between their *certiorari* petition and merits briefing, presumably in response to *Knox*'s encouragement.¹¹⁶ Ultimately, the *Harris* Court ruled for the challengers on relatively narrow grounds, holding that the *Abood* compromise was not justified in the context of "partial" or "quasi" public employees, such as the state-funded, but privately supervised, home healthcare aides.¹¹⁷ However, Justice Alito, again writing for the majority, devoted several pages to criticizing *Abood* even as applied to traditional public employees.¹¹⁸ Given that this discussion was officially dicta, Supreme Court kremlinologists were left to speculate about its purpose: did it reflect that Justice Alito had tried and failed to win four additional votes to overrule *Abood* in *Harris*? Or was it that he was signaling that a future head-on challenge to *Abood* would meet a warm reception at the Court?¹¹⁹

¹¹³ See generally Garden, *Meta Rights*, *supra* note 59, at 895–98 & 899–906.

¹¹⁴ 134 S. Ct. 2618, 2639–40.

¹¹⁵ The timing of the grant of *certiorari* in *Harris v. Quinn* was, to use Justice Alito's word, anomalous. The Seventh Circuit ruled for the state and the union, and against the challengers, on Sept. 1, 2011, and the challengers filed their cert. petition on Nov. 29, 2011, several months after the Court granted cert. in *Knox*. Compare Docket, *Knox v. SEIU Local 1000*, No. 10-1121, with Docket, *Harris v. Quinn*, No. 11-681. That timing would have made it difficult (though not impossible) for the Court to have granted and heard *Harris* the same Term as *Knox*. However, not only did the Court not grant *Harris* for the same Term, it did not grant it for the following Term either; instead, it relisted the petition six times, ultimately granting it on Oct. 1, 2013 and hearing argument on Jan. 21, 2014.

¹¹⁶ Compare Pet. for Writ of Cert., *Harris v. Quinn*, No. 11-681, at *11 (Nov. 29, 2011) (arguing that home health aides could not be compelled to financially support a labor union because they were not "actual government employees"), with Br. for Petitioners, *Harris v. Quinn*, No. 11-681 at *16 (arguing that "*Abood* should be overruled").

¹¹⁷ *Harris*, 134 S. Ct. at 2638.

¹¹⁸ *Id.* at 2630–34.

¹¹⁹ See Laurence H. Tribe, *Supreme Court Breakfast Table*, SLATE (June 30, 2014) http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_harris_v_quinn_forgets_the_lesson_of_the_new_deal.html ("*Harris* could well portend a far broader decision in a future case"); Charlotte Garden, *Harris v. Quinn Symposium: Decision Will Affect Workers & Limit States' Ability to Effectively Manage Their Workforces*, SCOTUSBLOG (July 2, 2014), <http://www.scotusblog.com/2014/07/harris-v-quinn-symposium-decision-will-affect-workers-limit-states-ability-to-effectively-manage-their-workforces/>, archived at <https://perma.cc/Z7JY-KX8P> ("I do not anticipate that it will be the precursor to overturning *Abood* in the next couple of years"); Terry Pell, *Harris v. Quinn*

In addition, Justice Alito offered a curious basis on which to distinguish *Harris* from other public employee speech cases, in which the Court had permitted government employers to limit the speech of their employees, even outside of work.¹²⁰ Specifically, he reasoned that whereas some other employee speech cases concerned an individual employee's grievance, *Harris* involved spending in support of union bargaining for raises for all home healthcare aids, which "would almost certainly mean increased expenditures in the Medicaid program."¹²¹ Thus, he continued, only the latter was a matter of public concern.¹²² This reasoning was remarkable for at least three reasons. First, it implies that collective speech is entitled to more First Amendment protection than individual speech, a principle that stands at odds with the Court's cases addressing labor union speech in other contexts.¹²³ Second, it seems to suggest that a single worker who asks for a raise for all workers would be entitled to more First Amendment protection than a single worker who asks for a raise only for herself—unless there is some additional limiting principle, such as that this rule applies only when the collective speech has some likelihood of success. Third, even assuming that speech that could result in greater public expenditures is more likely to be of public concern, *Harris* ultimately concerned individual workers' agency fees—any one of which, taken alone, is unlikely to have any effect on public expenditures.

Building on *Harris*'s dicta, a group of public employees—California teachers—soon called for the Court to overturn *Abood* and establish a constitutional "right to work" in the public sector by filing their complaint in *Friedrichs v. California Teachers Association*.¹²⁴ In addition, the *Friedrichs* plaintiffs built on *Knox* to argue that there should be a First Amendment right to an "opt in" default rather than an "opt out" default as to any non-mandatory portion of union dues.¹²⁵ If the Court had adopted the petitioners' arguments in their entirety, then it would have created a new First Amendment right not to contribute money to an elected public sector union repre-

Symposium: A Preview of Things to Come (July 1, 2014), <http://www.scotusblog.com/2014/07/214665/>, archived at <https://perma.cc/X2DZ-NNZU>.

¹²⁰ *Harris*, 134 S. Ct. at 2642 (listing public employee speech cases in which the Court ruled for the government employer).

¹²¹ *Id.*

¹²² *Id.* at 2643.

¹²³ Many scholars have identified significant differences in the Court's treatment of speech by labor unions, as compared to other speakers, including other social movement groups. See, e.g., James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 191 (1984) ("On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a 'black hole' beneath the ladder.").

¹²⁴ 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *cert. granted*, No. 14-915, 135 S. Ct. 2933 (U.S. 2015) (mem); Br. for the Petitioners, *Friedrichs v. Cal. Teachers Ass'n*, No. 14-915, at i, <http://www.scotusblog.com/wp-content/uploads/2015/09/friedrichs-opening-brief.pdf>, archived at <https://perma.cc/RZB3-UAZ3>.

¹²⁵ *Id.*

sentative, and required unions to obtain affirmative consent from represented non-members before charging them any money.

The Supreme Court heard argument in *Friedrichs* on January 11, 2016, and the five more conservative Justices' questions suggested a likely win for the challengers.¹²⁶ In particular, Justice Scalia—the most likely conservative swing vote based on his prior opinions as well as his skeptical questioning of the challengers in *Harris*,¹²⁷ seemed inclined to vote to overrule *Abood*.¹²⁸ However, a decision overturning *Abood* was not to be. After Justice Scalia's death in February 2016, the Court issued a single-sentence opinion stating that the Ninth Circuit's opinion (which had simply applied *Abood*) was "affirmed by an equally divided Court."¹²⁹ The unanimous consensus was that public sector unions had dodged a bullet, escaped a sword of Damocles, and escaped by the skin of their teeth.¹³⁰ Colorful metaphors aside, at the time this Article went to print, there was no end in sight to the Court's division over *Abood*, as Senate Republicans took the position that they would not act to confirm a new justice until after the 2016 presidential election.¹³¹ For their part, the *Friedrichs* plaintiffs have sought to keep their case alive by filing a Petition for Rehearing,¹³² presumably hoping the Court will hold the case until it is back to full strength.

In the meantime, other recent and pending cases ask the courts to go beyond overruling *Abood* and limit public sector union representation in even more fundamental ways. First, at least three cases litigated by the National Right to Work Legal Defense Foundation argue that exclusive representation—decoupled from the issue of who pays for that representation—is

¹²⁶ Post-argument commentary generally shared this assessment. *E.g.*, Brian Mahoney & Josh Gerstein, *SCOTUS Signals Support for Anti-Union Plaintiffs*, POLITICO (Jan. 11, 2016), <http://www.politico.com/story/2016/01/supreme-court-public-sector-unions-fees-217572>, archived at <https://perma.cc/A8PY-J26R>; Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback*, N.Y. TIMES (Jan. 11, 2016), <http://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html>.

¹²⁷ See Catherine Fisk, *Guest Post: Scalia May Be Critical Vote in Friedrichs v. California Teachers' Ass'n*, ONLABOR (June 30, 2015), <https://onlabor.org/2015/06/30/guest-post-scalia-may-be-critical-vote-in-friedrichs-v-california-teachers-assn/>, archived at <https://perma.cc/9PYE-B7MA>; Garden, *Harris v. Quinn Symposium*, *supra* note 119.

¹²⁸ For example, in the course of questioning the Solicitor General of California, Justice Scalia stated that "[t]he problem is that is everything is collectively bargained with the government is within the political sphere, almost by definition." Transcript of Oral Argument at 45, *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016).

¹²⁹ 136 S. Ct. 1083 (2016).

¹³⁰ See, *e.g.*, Kevin Mahnken, *Public Sector Unions Dodge a Bullet in Friedrichs Case*, THOMAS B. FORDHAM INST. (Apr. 1, 2016), <http://edexcellence.net/articles/public-sector-unions-dodge-a-bullet-in-friedrichs-case>, archived at <https://perma.cc/WUN8-259L>; Richard Wolf, *Public Employee Unions Dodge a Supreme Court Bullet*, USA TODAY (Mar. 30, 2016), <http://www.usatoday.com/story/news/politics/2016/03/29/supreme-court-public-employee-unions-mandatory-fees-scalia/81123772/>, archived at <https://perma.cc/R9UB-MK28>.

¹³¹ Ted Barrett & Manu Raju, *Senate Republicans Rule Out Garland Confirmation in Lame Duck Session*, CNN (May 10, 2016), <http://www.cnn.com/2016/05/10/politics/merrick-garland-supreme-court-senate-republicans/>, archived at <https://perma.cc/W7JQ-V6ZM>.

¹³² Petition for Rehearing, *Friedrichs v. California Teachers Association*, No. 14-915 (Apr. 8, 2016).

illegal as to partial public employees.¹³³ That is to say, the Plaintiffs argue that, as to publicly funded but privately supervised workers, it is unconstitutional for a public employer to choose to bargain with an elected union official over state-determined pay and other working conditions. For example, in *Bierman v. Dayton*,¹³⁴ the plaintiffs' only claim is that certification of an exclusive representative for home healthcare workers is a First Amendment violation.¹³⁵ The plaintiffs' argument, in summary, is that exclusive representation is equivalent to forced association and petitioning and is therefore unconstitutional, at least with respect to partial public employees. As they put it in an appellate brief, "Minnesota is forcing individual providers to lobby the State over its Medicaid policies through an entity the State itself designated."¹³⁶

To be clear, this argument has not prevailed to date,¹³⁷ nor is it likely to do so in the future. For one thing, several members of the Court seemed distinctly skeptical of this argument during oral argument in *Harris*.¹³⁸ In addition, the plaintiffs will have to distinguish or seek to have overruled the Court's decision in *Minnesota State Board for Community Colleges v. Knight*,¹³⁹ which upheld Minnesota's exclusive representation rule against argument by a group of employees that they should have the same rights as an elected union to meet and confer with their employer.¹⁴⁰ In their Eighth Circuit brief in *Bierman*, the plaintiffs argued that *Knight* was inapposite because, unlike in that case, the plaintiffs were not seeking bargaining rights of their own; they simply aimed to displace the union as their representative.¹⁴¹ In other words, the plaintiffs' argument was that partial public employees have a constitutional right to have public employers set terms and conditions of employment unilaterally—an argument with undeniably Lochnerian overtones. Still, the gravamen of *Knight* was that government employers are free to consult whomever they choose (and to exclude others) in setting employ-

¹³³ *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) (holding exclusive representation of childcare providers does not violate the First Amendment); *Bierman v. Dayton*, 817 F.3d 1070 (8th Cir. 2016) (affirming denial of preliminary injunction); Complaint, *Mentele v. Inslee*, No. 15-cv-05134 (W.D. Wash. Mar. 4, 2015).

¹³⁴ No. 14-3021 (MJD/LIB), 2014 WL 4145410 (D. Minn. Aug. 20, 2014).

¹³⁵ See Amended Complaint, ECF No. 57, *Bierman*, 2014 WL 4145410.

¹³⁶ Appellants' Brief at 12, *Bierman*, No. 14-3468 (8th Cir. 2014). This brief was filed in connection with an interlocutory appeal of the District Court's decision to deny a preliminary injunction. See *Bierman*, 2014 WL 4145410.

¹³⁷ *D'Agostino*, 812 F.3d at 242–43 (distinguishing *Harris v. Quinn* to reject plaintiffs' arguments) *Bierman v. Dayton*, No. 14-3021 (MJD/LIB), 2014 WL 5438505 *1 (D. Minn., Oct. 22, 2014) (denying motion for preliminary injunction because "Plaintiffs are unlikely to succeed on the merits of their claim").

¹³⁸ Transcript of Oral Argument at 7–10, 19, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681).

¹³⁹ 465 U.S. 271 (1984).

¹⁴⁰ See *id.* at 280–87.

¹⁴¹ See Appellants' Brief, *supra* note 136, at 30 ("*Knight* is not controlling here because the Providers do not allege that they are wrongfully excluded from union negotiation sessions.").

ment policies; it is not clear why it should matter that an employer decided with whom to consult based on a union election.

In other cases, advocacy groups seek to limit unions' member recruitment opportunities or strategies. For example, in *Bain v. California Teachers Association*,¹⁴² the plaintiffs are targeting unions' abilities to offer membership incentives and limit the right to vote in union elections to members. The *Bain* challengers, represented by the high-profile appellate lawyer Ted Bontros, argue that represented public sector employees "should not be forced to make the untenable choice of either (a) abandoning their First Amendment rights or (b) abandoning the employment-related benefits and voting rights that the State and the unions make available *only* to union members."¹⁴³ Instead, they argue that represented workers should be free to opt out of contributing to union political activity while still enjoying the benefits of union membership.¹⁴⁴ The district court rejected this argument—in my view, correctly—holding that the relationship between the union and its members did not implicate state action.¹⁴⁵ However, the District Court left open the possibility that the Plaintiffs could establish state action if they "establish[ed] a connection between the unions' relationship with a government actor and the specific decision to bundle membership requirements."¹⁴⁶ Accordingly, litigation may continue in this and other cases.

Alvarez v. Inslee involves a different issue, but also concerns opportunities for unions to convince represented workers to become union members. The plaintiff in *Alvarez* challenges provisions of the collective bargaining agreement between Washington state and the union that represents "quasi-public" home healthcare workers in bargaining with the state over terms and conditions of employment that the state sets.¹⁴⁷ Those provisions permit the union opportunities to make its case for membership during meetings and trainings that workers are required to attend, to post literature on bulletin boards likely to be seen by workers, and to display messages on the state payroll system.¹⁴⁸ The plaintiff's theory is that these opportunities for the union to convey its message constitute unconstitutional "compelled receipt of speech."¹⁴⁹ The plaintiff's further argue that strict scrutiny is appropriate because the provisions at issue are content based.¹⁵⁰

Similar to the exclusive representation cases, the plaintiff acknowledges that the government may unilaterally subject workers to its own speech,¹⁵¹ in

¹⁴² No. 15-cv-02465 (C.D. Cal. 2015).

¹⁴³ *Id.*, Second Amended Complaint *6, Dkt. 88 (Oct. 28, 2015).

¹⁴⁴ *Id.* at *38.

¹⁴⁵ *Bain v. Cal. Teachers Ass'n*, 156 F. Supp. 3d 1142, 1149–54 (C.D. Cal. 2015)

¹⁴⁶ *Id.* at *7.

¹⁴⁷ Complaint, *Alvarez v. Inslee*, Dkt. No. 3:16-cv-0511, at *5 (W.D. Wash., Feb. 11, 2016).

¹⁴⁸ *Id.* at *6-9.

¹⁴⁹ *Id.* at 1.

¹⁵⁰ *Id.* at 15.

¹⁵¹ *Id.* at 16.

his view, the problem arises only when the entity engaged in speech is a private entity chosen by workers themselves. The novelty of the argument is illustrated by the Supreme Court case *Perry Education Association v. Perry Local Educators' Association*, in which an insurgent union challenged a collective bargaining agreement provision that allowed only the exclusive bargaining representative access to teacher mailboxes.¹⁵² The claim was somewhat different in that case—the insurgent union wanted equal access to the mailboxes, rather than to preclude the exclusive representative's access.¹⁵³ Still, the Court did not seem to question that schools could allow “outside organizations” access to communicate with public employees in a manner similar to that challenged in *Alvarez*.¹⁵⁴

Taken together, these cases illustrate the substantial resources devoted to challenging aspects of public sector union representation on First Amendment grounds. This focus should not be taken as a sign that public sector union representation is the primary context in which compelled speech or subsidization occurs—as Robert Post has shown, many instances of compelled speech and subsidization have escaped First Amendment challenge altogether.¹⁵⁵ So why the focus on public sector unions? To answer this question, one might look to unions' activity away from the bargaining table: as Daryl Levinson and Benjamin Sachs have written, “because unions are critical institutional supporters of the contemporary Democratic Party, undermining the efficacy of labor unions is a well-understood means by which incumbent Republican leaders can increase their reelection prospects.”¹⁵⁶ Along those lines, Michael Carvin, who argued on behalf of the *Friedrichs* challengers before the Supreme Court, pointedly commented that the case “may impede [unions] ability to become the largest political contributors to the Democratic Party.”¹⁵⁷ Similarly, the CEO of the Freedom Foundation, the group funding *Mentele v. Inslee*, reportedly “told supporters he wants to force unions to spend money playing defense,” “because they bankroll liberal causes and Democratic candidates.”¹⁵⁸ And, to the extent that decreased union participation in electoral politics means Democrats are less likely to be elected, *Friedrichs* and cases like it could have knock on effects beyond just

¹⁵² 460 U.S. 37 (1983).

¹⁵³ *Id.* at 44-45.

¹⁵⁴ *Id.* at 47.

¹⁵⁵ Robert Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Ass'n*, 2005 SUP. CT. REV. 195, 211-12 (2005)

¹⁵⁶ Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 436 (2015); see also Linda Greenhouse, *Scalia's Putsch at the Supreme Court*, NY TIMES (Jan. 21, 2016), <http://www.nytimes.com/2016/01/21/opinion/scalias-putsch-at-the-supreme-court.html> (“It’s no secret that in recent years, major segments of the Republican Party have declared open season on public employee unions.”).

¹⁵⁷ Nina Totenberg, *Is it Fair to Have to Pay Fees to a Union You Don't Agree With*, NPR (Jan. 11, 2016), <http://www.npr.org/2016/01/11/462607980/scotuspublicunions>.

¹⁵⁸ Jordan Schrader, *Freedom Foundation has Unions in its Sights*, NEWS TRIBUNE (Oct. 4, 2015), <http://www.thenewstribune.com/news/local/politics-government/article37688484.html>, archived at <https://perma.cc/9GUQ-EK87>.

their precedential holdings: they could also make it more likely that judges who are more inclined towards the deregulatory First Amendment will be appointed to the federal bench.

2. *Workplace Compelled Speech Theories Outside the Agency Fee Context*

Novel compelled speech arguments are not limited to the agency fee context. For example, in *National Association of Manufacturers v. NLRB* (“*NAM*”),¹⁵⁹ the D.C. Circuit struck down on compelled speech grounds a National Labor Relations Board rule requiring employers to post a notice informing employees of their rights under the NLRA, and imposing penalties for failing to post the notice.¹⁶⁰ Even though that case was later overturned in part by the D.C. Circuit sitting *en banc*, the panel’s decision has had continuing effects in terms of the notice posting requirement itself, as well as uncertainty regarding the NLRB’s ability to compel employers to notify employees of their rights.

The panel decision in *NAM* rested on NLRA § 8(c), which protects employers’ rights to express “any views, argument, or opinion,”¹⁶¹ but the Court also drew heavily on First Amendment caselaw.¹⁶² That discussion began with a citation to *Sorrell* for the proposition that “the ‘dissemination’ of messages others have created is entitled to the same level of protection as the ‘creation’ of messages.”¹⁶³ Then, the Court discussed cases concerning the right against compelled speech and subsidization of speech, before rejecting the Board’s arguments that the notice posting requirement was valid because the message was non-ideological, because the poster was drafted by the Board and identifiable as the Board’s (and not the employer’s) speech, and because the Court had upheld a similar notice-posting requirement in 2003.¹⁶⁴

This decision was surprising on several grounds, chief among them that mandatory “know your rights” posters are ubiquitous in American workplaces, with little suggestion that they violate the First Amendment. Moreover, the D.C. Circuit’s opinion seemed to push at the boundaries of even *United Foods*, as the notice-posting requirement was a part of the broader regulatory scheme imposed by the NLRA. Alternatively, as Charles Morris

¹⁵⁹ 717 F.3d 947 (D.C. Cir. 2013).

¹⁶⁰ *Id.* at 960.

¹⁶¹ 29 U.S.C. § 158(c).

¹⁶² 717 F.3d at 956 (“We approach the question by considering some firmly established principles of First Amendment free-speech law.”).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 957–58; see also *UAW-Labor & Emp. Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003). The plaintiffs in this case did not argue that the notice posting requirement violated the First Amendment. *Id.* at 364 (noting “plaintiff raises no free-standing First Amendment claim”); see also *Kendrick*, *supra* note 20, at 1203 (discussing tension between this case and *NAM*).

has argued,¹⁶⁵ one could also view the decision as standing in tension with cases involving content-neutral government regulations, including *Turner Broadcasting System, Inc. v. FCC*,¹⁶⁶ in which the Court rejected a First Amendment challenge to the federal requirement that cable television systems carry local programming. Significantly, *Turner* did not analyze the “must-carry” provision as a case of compelled speech at all—instead, it applied the *O’Brien* test associated with content neutral laws that have the effect of hampering expressive conduct.

Importantly, *NAM* also read narrowly *Zauderer v. Office of Disciplinary Counsel*,¹⁶⁷ in which the Court held that “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers,” at least where the disclosure involves truthful and non-controversial information.¹⁶⁸ The *NAM* Court concluded that *Zauderer* applied only to mandatory disclosures necessary to fight deception.¹⁶⁹ However, the *en banc* D.C. Circuit, rejected this reading in partially overruling *NAM* in *American Meat Institute v. US Department of Agriculture (AMI)*.¹⁷⁰

Still, the *NAM* decision has had lasting effects. First, *AMI* came too late for the NLRB notice posting requirement, which the Board withdrew in light of *NAM* and a Fourth Circuit case rejecting the rule on different grounds; perhaps the Board will attempt to revive the notice posting rule in the future, but there is currently no sign of such an effort.¹⁷¹ Second, *AMI* held that *NAM* construed *Zauderer* too narrowly, but did not actually address its application to the NLRB notice. As a result, employers can (and do) rely on *NAM* in other cases. For example, when the NLRB exercised its separate authority to conduct elections to require employers to post notices of employee rights—without the possibility of unfair labor practice liability—employer groups relied on *NAM* to argue that the requirement violated NLRA § 8(c).¹⁷² (The ensuing litigation, and the rulemaking it sought to invalidate,

¹⁶⁵ Charles J. Morris, *Notice-Posting of Employee Rights: NLRB Rulemaking and the Upcoming Backfire*, RUTGERS L. REV. 1397–99 (2015) (arguing that *Turner* “is directly on point”).

¹⁶⁶ 520 U.S. 180 (1997).

¹⁶⁷ 471 U.S. 626 (1985); see also Shanor, *supra* note 13, at 147 (discussing tension between *Zauderer* and D.C. Circuit cases striking down compelled disclosures).

¹⁶⁸ 471 U.S. at 651.

¹⁶⁹ 717 F.3d at 959 n.18.

¹⁷⁰ *Am. Meat Inst. v. USDA*, 760 F.3d 18, 23–24 (D.C. Cir. 2014) (*en banc*) (stating that “[t]o the extent that other cases in this circuit may be read as . . . limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them,” and citing *NAM*).

¹⁷¹ See *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013).

¹⁷² *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 190 (D.D.C. 2015) (rejecting argument that *NAM* controlled Board’s authority to require employers to post notice of employee rights once a petition for a union election has been filed “because the D.C. Circuit specifically distinguished the general employee rights notice involved in that case, which carried with it the unfair labor practice penalty, from the then-existing NLRB election notice posting requirement”).

are discussed in greater detail in Part II.C, below.) In other words, *AMI* did not foreclose arguments that *NAM*'s conclusion should be affirmed on other grounds. These could include arguments that NLRA § 8(c) is broader than *Zauderer*, or that *Zauderer* was inapplicable because an employer found the Board's notice to be controversial.¹⁷³ Third, the Court's compelled speech analysis is a blueprint for making compelled speech arguments in other cases involving regulation of businesses, such as the one discussed in the next paragraph.

Shortly after *NAM*, compelled speech and subsidization arguments made another appearance in former-NLRB Member Johnson's dissent in *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*,¹⁷⁴ in which the NLRB held that NLRA § 7¹⁷⁵ protects employees' rights to use their work e-mail addresses for union activity.¹⁷⁶ His argument was twofold. First, he argued that employers would effectively be required to pay for employees "hostile speech," either because it would be contained in e-mails composed on work time, or because of costs associated with network maintenance and storage.¹⁷⁷ Second, he argued that the use of a work e-mail address lent "indicia of authority and thus the real potential of confusion."¹⁷⁸

Former Member Johnson's second argument reflects an empirical judgment about how recipients are likely to interpret e-mail that comes from an address linked to an employer; the NLRB majority had a different assessment, and therefore rejected the argument.¹⁷⁹ But Member Johnson's first argument relies heavily on a string of First Amendment caselaw beginning with *Harris* and *Knox*, as well *NAM*.¹⁸⁰ Thus, following the *Knox* Court in equating compelled speech with compelled subsidization of speech, he concluded that "we are really telling employers they must subsidize the speech of their employees, and, thus 'have employers say whatever the employees want them to.'" ¹⁸¹ While this argument came in a dissent, it is a near certainty that employers appealing unfair labor practice charges based on the *Purple Communications* rule will continue to advance it.

¹⁷³ In this regard, *United Foods*' broad and speaker-defined approach to identifying controversial speech lends support to the argument that, for example, a speaker could find it controversial to inform employees of statutory rights to participate in collective action.

¹⁷⁴ 361 NLRB 126 (2014).

¹⁷⁵ 29 U.S.C. § 157 (2012).

¹⁷⁶ See *Purple Communication*, 361 NLRB No. 126 at *1, slip op. at 1.

¹⁷⁷ *Id.* slip op. at 56 (Member Johnson, dissenting).

¹⁷⁸ *Id.* slip op. at 58 (Member Johnson, dissenting).

¹⁷⁹ *Id.* slip op. at 16 ("We are simply unpersuaded that an email message, sent using the employer's email system but not from the employer, could reasonably be perceived as speech by, or speech endorsed by, the employer.").

¹⁸⁰ *Id.* slip op. at 57.

¹⁸¹ *Id.*

In short, the boundaries of compelled commercial speech, spending, and association are acutely contested.¹⁸² Like many of the arguments discussed in this Part, the outcome of these cases will matter significantly for workers' free speech and association; in a real sense, expanding employers' or union objectors' rights to avoid compelled First Amendment activity would come at the expense of the rights of groups of workers to engage in their own collective speech and association.

B. The First Amendment Should Cover, and Should Protect Robustly, More Business Activities That Involve Speech.

Another group of recent deregulatory First Amendment theories seek to expand the field that the First Amendment covers—that is, to bring activity formerly thought to be beyond the reach of First Amendment scrutiny within its ambit.¹⁸³ Others have made this observation as well, noting that the Court's recent decisions in cases including *United States v. Stevens*¹⁸⁴ and *Brown v. Entertainment Merchants Association*¹⁸⁵ “might be understood to create a strong presumption” that activities involving speech or expression are covered by the First Amendment.¹⁸⁶ These cases sometimes arise in the workplace setting when enterprises that do their work through the “sweat of their jaws” seek to overturn limits on what they may say. But, as discussed below, some cases go further, challenging on First Amendment grounds even restrictions on their spending on activities other than speech.

One set of cases argues for heightened scrutiny of occupational speech, an issue on which the circuit courts have splintered. Until recently, courts have generally held that “when [occupational] speech consists of advice or recommendations made in the course of business and is in any way tailored to the circumstances or needs of the listener, licensing that speech raises no cognizable First Amendment claim.”¹⁸⁷ But several more recent cases have sought to undo that principle. Many of these new cases arise in politically

¹⁸² For an argument that *Zauderer* should be read narrowly, see Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know”*, 58 ARIZ. L. REV. 421, 434–37 (2016).

¹⁸³ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768–69 (2004) (describing concept of First Amendment coverage, and stating that “even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule”).

¹⁸⁴ 599 U.S. 460 (2010).

¹⁸⁵ 564 U.S. 786 (2011).

¹⁸⁶ Schauer, *Politics and Incentives*, *supra* note 43, at 1624; Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 433–34 (2012–13) (discussing “absolutist” thread in *Stevens* and *Brown*); see also Lakier, *supra* note 25, at 2170 (critiquing *Stevens* as an “unjustified and undesirable” departure from “longstanding historical practice”).

¹⁸⁷ Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 187–88 (2015).

charged contexts; these include challenges to a ban on physicians asking their patients about guns in the home,¹⁸⁸ therapists engaging in so-called “gay conversion” therapy,¹⁸⁹ and a proscription against recommending medical marijuana.¹⁹⁰ As was true of *Bigelow*, one can see these cases through the lens of viewpoint discrimination relatively easily. But just as *Bigelow*’s argument against a politically charged ban on advertising abortion services soon translated to the more general *Virginia State Board of Pharmacy*, the argument that the First Amendment should robustly protect occupational speech will extend to decidedly more pedestrian contexts—for example, *Hines v. Alldredge*, in which a retired veterinarian challenged a statute forbidding the dispensation of veterinary advice without an in-person physical exam.¹⁹¹

The argument that the First Amendment prohibits occupational speech restrictions may be appealing in some of these contexts and repulsive in others, depending on one’s take on the culture war issues implicated by various challenged statutes. For example, many readers will have a strong reaction to *Wollschlaeger*, in which court began by describing Florida’s restrictions on physicians asking patients about guns in the home as codifying “the commonsense conclusion that good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient’s care.”¹⁹² But stripping away the subject matter of the cases reveals uncertainty and disagreement among and within the courts of appeals regarding what level of First Amendment scrutiny applies to occupational speech restrictions. For example, the Ninth Circuit has stated both that “professional speech may be entitled to ‘the strongest protection our Constitution has to offer’”¹⁹³ in the context of doctor recommendations, but also that once those recommendations become “the actual provision of treatment,” they lose First Amendment protection altogether.¹⁹⁴ The Third Circuit took a middle ground, analogizing to commercial speech, and applying intermediate scru-

¹⁸⁸ See *Wollschlaeger v. Florida*, 814 F.3d 1159 (11th Cir. 2015) *reh’g en banc granted, vacated*, 2016 WL 2959373 (11th Cir. Feb. 3, 2016) (rejecting facial First Amendment challenge to statute that restricted physicians from asking patients about firearm ownership, or recording such information, in most circumstances, because statute could survive any level of scrutiny).

¹⁸⁹ See *King v. New Jersey*, 767 F.3d 216, 220, 233 (3d Cir. 2014) (upholding statutory prohibition against practicing “gay conversion” therapy, and holding that “prohibitions of professional speech are constitutional only if they directly advance the State’s interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest”); *Pickup v. Brown*, 740 F.3d 1208, 1231–32 (9th Cir. 2014) (upholding state ban on “gay conversion” therapy and concluding that treatment was conduct rather than speech, and therefore subject to rational basis review).

¹⁹⁰ See *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002) (striking down federal prohibition against doctors recommending medical marijuana after concluding that the ban was viewpoint discriminatory).

¹⁹¹ See *Hines v. Alldredge*, 783 F.3d 197, 198–99 (5th Cir. 2015).

¹⁹² *Wollschlaeger*, 814 F. 3d at 1168.

¹⁹³ *Conant*, 309 F.3d at 637.

¹⁹⁴ *Pickup*, 740 F.3d at 1229.

tiny.¹⁹⁵ And the Eleventh Circuit concluded that credible arguments supported the application of either intermediate or strict scrutiny, depending on whether the operative inquiry was whether the statute regulated professional speech, or whether it was a content-based speech restriction.¹⁹⁶

The outcome of this debate could have significant ramifications for the mine run of ordinary occupational regulations. To see why, consider *Hines*. The challenged statute was probably adopted with the goal of promoting best veterinary practices, which a legislature could reasonably decide should involve seeing the patient. But Ronald Hines, the retired veterinarian who challenged the statute, acted responsibly by all accounts—mostly, he provided advice, often free of charge, to those who could not afford other veterinary care or who received conflicting advice from other vets. The Fifth Circuit concluded the First Amendment did not apply to regulation of the “practice of veterinary medicine” even when the regulation had an incidental burden on speech.¹⁹⁷ But, had the Fifth Circuit gone the other way on that initial question (as some other circuits have in more charged cases), the application of First Amendment heightened scrutiny in the context of an as-applied challenge would at minimum present a significant question. And, although the answer to that question may not matter greatly in the context of a single well-intentioned veterinarian, the cumulative effect of legal challenges to the application of occupational regulation affecting speech could quickly become crippling, leading states to abandon their attempts to meaningfully enforce these regulations. Dissenting from denial of rehearing en banc in *Pickup*, Judge O’Scannlain acknowledged as much, while arguing against the panel’s conclusion that the First Amendment did not apply to treatment:

Perhaps what really shapes the panel’s reasoning in these cases is not the principles supposedly distilled from the case law, but rather problematic and potentially unavoidable implications of an alternative conclusion. By subjecting SB 1172 to any First Amendment scrutiny at all, the panel may fear it will open Pandora’s box: heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice will now attract meritless challenges merely on the basis that such provisions prohibit speech.¹⁹⁸

It is probably unsurprising that advocates of the deregulatory First Amendment have begun to challenge restrictions on professional communications—after all, those restrictions do directly limit activity that recognizably qualifies as speech, even if there might be good reasons to treat it as

¹⁹⁵ *King v. New Jersey*, 767 F.3d 216, 233 (3d Cir. 2014).

¹⁹⁶ *Wollschlaeger*, 814 F.3d at 1185–86.

¹⁹⁷ *Hines*, 783 F.3d at 201.

¹⁹⁸ 740 F.3d at 1220.

something else. But in another case, high-profile litigator Paul Clement has recently argued that depleting the money available for speech can implicate the First Amendment.¹⁹⁹ This First Amendment theory is probably the greatest “reach” of those discussed in this Article; conversely, it has the greatest potential for damage to the regulatory state. If accepted, it would have the potential to do what many conservatives and libertarians had previously (but futilely) hoped the doctrine of regulatory takings would accomplish,²⁰⁰ and what *Lochnerism* did before that.

Though unsuccessful before a district court and the Ninth Circuit at the preliminary injunction phase,²⁰¹ this argument was advanced in a lawsuit by the International Franchise Association (“IFA”) challenging the treatment of franchises under Seattle’s \$15 hourly minimum wage law.²⁰² The law groups franchises as large businesses, which are required to phase in the minimum wage more quickly than small businesses, provided the entire franchise network, taken together, meets the threshold number of employees.²⁰³ As the IFA asserted in its complaint:

Commercial speech “is a form of expression protected by the Free Speech Clause of the First Amendment,” and the Ordinance will curtail franchisee commercial speech in at least three important respects. First, by increasing the labor costs of franchisees, the Ordinance will reduce the ability of franchisees to dedicate funding to the promotion of their businesses and brands. Second, the increased labor costs the Ordinance mandates may cause some franchisees to shut their doors, reducing the amount of relevant commercial speech they engage in to zero. Third, and relatedly, the Ordinance will likely cause potential franchisees to forgo purchasing a franchise because of the associated higher operation costs, again eliminating all associated speech.²⁰⁴

This argument, if taken seriously, could be cause for alarm, depending on one’s risk tolerance or willingness to embrace *Lochner*-style arguments. Because *any* money could eventually be spent on speech, nearly any regulation that requires an individual or entity to spend risks interfering with speech, and, under this reasoning, must be justified under heightened scrutiny. Read more charitably, the IFA’s argument seems to be that Seattle’s decision to classify franchises as large businesses will *differentially* decrease franchises’ ability to engage in speech. But business regulations almost always draw

¹⁹⁹ *Infra* Part II.C.

²⁰⁰ Colby & Smith, *supra* note 5, at 570–01.

²⁰¹ Int’l Franchise Ass’n v. Seattle, 803 F.3d 389, 408–09 (9th Cir. 2015).

²⁰² *Id.* at 397.

²⁰³ Seattle Ordinance No. 124490 §§ 2(T) & 4 (2014); Seattle Mun. Code §§ 14.19.010(T) & 14.19.030

²⁰⁴ Complaint at 32, Int’l Franchise Ass’n v. City of Seattle, No. 2:14-cv-00848 (W.D. Wash. June 11, 2014) (internal citation omitted).

coverage distinctions. By focusing on speech, the IFA is attempting to get what it elsewhere acknowledged was unobtainable under the Equal Protection Clause—heightened scrutiny.²⁰⁵

Additionally, in its briefing in support of a preliminary injunction, the IFA made an alternative First Amendment argument based on free association rather than on free speech. The argument asserts that the Seattle ordinance violates the rights of free speech and association by defining franchise employers as “a business that operates ‘under a marketing plan prescribed or suggested in substantial part by a grantor or affiliate’ and is ‘substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol.’”²⁰⁶ As the IFA’s argument goes, “[m]arketing, trademarks, and advertising all involve protected speech, and a franchisee’s decision to associate itself with a franchisor’s trademark or engage in coordinated marketing and advertising is protected by the First Amendment.”²⁰⁷ Similar to the IFA’s primary argument, this argument was fundamentally similar to an Equal Protection claim, and if brought under the Equal Protection Clause would have been subject to rational basis review. Yet the IFA called for heightened scrutiny because a franchise has a contractual relationship with a franchisor.

The argument stretches the right of association a long way from its origins in *NAACP v. Alabama ex rel. Patterson*,²⁰⁸ or even its more recent incarnation in *Roberts v. U.S. Jaycees*²⁰⁹ and related cases. Moreover, Justice Sandra Day O’Connor disavowed all but minimal protections for the commercial right of association in her concurrence in *Roberts*.²¹⁰ There is neither a privacy component to the IFA’s argument, nor a claim that Seattle is attempting to dictate who should be employed by franchises (though Seattle could certainly do that under the framework established by *Roberts* and *Boy*

²⁰⁵ Though not arising in the work law context, Verizon made a similar argument against the FCC’s net neutrality rule, though the D.C. Circuit ultimately did not reach the argument. See *Verizon v. FCC*, 740 F.3d 623, 634 (2014); see also Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 FL. L. REV. 111, 143–44 (2013) (discussing a First Amendment theory of equal protection, but limiting her theory to instances where the differential treatment is imposed to engage in viewpoint discrimination).

²⁰⁶ Seattle Mun. Code § 14.19.010(T).

²⁰⁷ Plaintiffs’ Motion for a Limited Preliminary Injunction at 21, Int’l Franchise Ass’n v. City of Seattle, No. 2:14-cv-848 (W.D. Wash. Aug. 5, 2014).

²⁰⁸ 357 U.S. 449 (1958).

²⁰⁹ 468 U.S. 609 (1984).

²¹⁰ See *id.* at 634 (“[T]here is only minimal constitutional protection of the freedom of commercial association. . . . The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.”); see also James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 464 (2015) (“Although the Supreme Court has never explicitly endorsed the distinction between expressive associations and commercial associations, that basic dichotomy is commonly accepted in the law.”).

*Scouts of America v. Dale*²¹¹). Rather, the argument is an attempt to adapt the approach of cases such as *Citizens United* and *United Foods* in two ways: first, the argument assumes that if there is a First Amendment right enjoyed by individuals and certain associations, surely it must be enjoyed equally by corporations; second, it posits that courts should generally not be in the business of distinguishing between First Amendment activity for economic purposes, versus for other purposes. So given that First Amendment protection for individuals to associate for expressive purposes is established, it is unsurprising that the argument that corporations should be able to associate freely for economic purposes was not far behind.

C. *Changing statutory baselines can disrupt First Amendment entitlements.*

A key element of Sunstein's theory of post-1970's First Amendment Lochnerism was the treatment of "the existing distribution of wealth and entitlements, and the baseline set by the common law," as a constitutional imperative.²¹² But some new First Amendment arguments go a step further, arguing that statutory baselines can also create First Amendment entitlements. The argument is that moving a statutory baseline in a way that makes private speech more difficult or less desirable should be scrutinized under the First Amendment, particularly if the baseline was moved with an intent to make speaking less appealing. Or, as the Chamber of Commerce put it in a challenge to the Department of Labor's rule expanding the universe of professionals obligated to disclose their union avoidance "persuader" activity, "a new intervention by the federal government into the marketplace of ideas" raises "serious First Amendment doubts."²¹³

An early, and high profile, example of this argument came in response to the Employee Free Choice Act ("EFCA"),²¹⁴ which was introduced in 2007 and again in 2009,²¹⁵ but never became law. One important aspect of EFCA would have changed the way workers elect a union representative. Specifically, instead of permitting an employer to insist on a union election conducted by the NLRB, it would have required the Board to certify a labor union as the exclusive representative of a group of employees once a majority of those employees signed cards authorizing the union to represent them.

²¹¹ 530 U.S. 640, 648 ("The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.").

²¹² Sunstein, *supra* note 19, at 874.

²¹³ Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Plaintiffs' Motion for Preliminary Injunction, *Associated Builders & Contractors of Arkansas v. Perez*, Dkt. No. 4:16-cv-169 (KGB) at *18 (E.D. Ark., Apr. 14, 2016).

²¹⁴ S. 1041, 110th Cong. (2007); H.R. 800, 110th Cong. (2007). In 2007, EFCA passed the House, but failed cloture in the Senate.

²¹⁵ S. 560, 111th Cong. (2009); H.R. 1409, 111th Cong. (2009).

This election process—which is currently permissible but not required under the NLRA—is known as “card check.”

In 2008, Richard Epstein argued that the card-check provisions of the proposed EFCA violated the First Amendment. His argument was that if EFCA made it possible for an organizing campaign to take place in secret, employers would lose their most meaningful opportunity to oppose a union drive. But, EFCA did not ban employer speech; rather, Epstein’s argument was that depriving employers of knowledge of a union drive would violate the First Amendment because (1) the knowledge would give employers an incentive to speak; and (2) employers would have received the information under the pre-EFCA NLRA.²¹⁶ Epstein further elaborated on his First Amendment argument in his monograph, *The Case Against the Employee Free Choice Act*. There, he argued that card check would “infringe the ordinary rights of political association that are guaranteed to workers, and perhaps their employers, under the First Amendment.”²¹⁷ The details of the argument are somewhat opaque, but in general, Epstein argues that card check is more likely to violate the Constitution in the private sector than in the public sector because government is binding private firms rather than itself; that a desire to increase union density cannot overcome intermediate scrutiny because the motivation behind EFCA was “partisan, not social”; and that in sum, card check “has no clear legitimate end, and . . . [would] terminate any and all rights of workers to participation in union affairs, while forcing employers to deal with unions when they are denied all opportunity to make their case against the union.”²¹⁸

Given that EFCA never became law, there was no opportunity to test Epstein’s theories in courts. However, lawyers have recently relied on a similar theory in challenging the NLRB’s new election procedures rule.²¹⁹ This new rule implements a suite of procedural changes that, taken together, shorten the time between the filing of an election petition and the date an NLRB election is held.²²⁰

The argument against this aspect of the rule is nearly identical to Epstein’s argument against EFCA—by shortening the time between when a union files for an election and when the election is held, employers are de-

²¹⁶ See Richard A. Epstein, *The Employee Free Choice Act is Unconstitutional*, WALL STREET J. (Dec. 19, 2008), <http://www.wsj.com/articles/SB122964977342320545>; Richard A. Epstein, *The Employee Free Choice Act: Free Choice or No Choice for Workers*, MANHATTAN INST. FOR POLICY RES. (Mar. 29, 2009), archived at <https://perma.cc/DJF5-YHEU> (“The entire process can take place without a single word of public debate. It is not only the employer who does not speak. It is also workers who are denied a chance to participate in collective deliberation of the sort that is consistent with . . . union democracy . . .”).

²¹⁷ RICHARD A. EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT* 95–96 (2009).

²¹⁸ *Id.* at 97–98.

²¹⁹ Representation - Case Procedures, 79 Fed. Reg. 74,308, 74,311–15 (Dec. 15, 2014).

²²⁰ *Id.*; see also Jeffrey M. Hirsch, *NLRB Elections: Ambush of Anticlimax?*, 64 EMORY L.J. 1647, 1557–63 (explaining aspects of the election procedures rule that decrease time between filing and the election, such as streamlining pre-election challenges).

prived of the opportunity to oppose the union. The three Board Members who voted for the final rule rejected these arguments, offering a two-pronged response. First, they argued that “neither the proposed rule nor the final rule imposes any restrictions on the speech of any party.”²²¹ That is, it leaves employers free to engage in the same anti-union speech as before the rule—for example, the rule would do nothing to prevent an employer from beginning every workday with an anti-union message to its employees. Second, the majority “emphatically disclaim[ed] any . . . motivation”²²² to limit employer influence in elections by shortening the time to campaign against a union. “As previously discussed, the problems caused by delay have nothing to do with employer speech.”²²³

On the other hand, Board Member Philip Miscimarra and then-Board Member Harry Johnson were persuaded by the argument against this rule, writing that:

In short, in respect to free speech concerns, the Final Rule has two infirmities. First, the Rule single-mindedly accelerates the time from the filing of the petition to the date when employees must vote in representation elections (indeed, the Rule overtly requires election voting as soon as “practicable” after a petition is filed). Second, the Rule irrationally ignores the self-evident proposition that, when one eliminates a reasonable opportunity for speech to occur, parties cannot engage in protected speech. In combination, these problems inescapably reflect the same uniform purpose and effect: To limit pre-election campaigning and curtail protected speech, contrary to the First Amendment, the Act and decades of case law establishing that all parties—and the Board—regard pre-election campaigns as vitally important.

The Chamber of Commerce echoed this argument in suing to invalidate the NLRB rule. The Chamber of Commerce argued in part that the rule violated the First Amendment, reasoning that “the Board’s rationale for limiting the opportunity for free speech is ‘the hallmark characteristic associated with every infringement on free speech: the government simply determines the speech is not necessary.’”²²⁴

A district court rejected the Chamber’s First Amendment argument.²²⁵ As the court put it, “the Final Rule does not specifically burden *employer* speech, because all parties to the election proceeding are constrained by the

²²¹ Representation - Case Procedures, 79 Fed. Reg. at 74318.

²²² *Id.* at 74323 n.68.

²²³ *Id.*

²²⁴ Plaintiff’s Motion for Summary Judgment and Memorandum in Support at 43–44, 2015 WL 5656568, Chamber of Commerce v. NLRB, No. 1:15-cv-9-ABJ, 2015 WL 4572948 (D.D.C. Jul. 9, 2015).

²²⁵ See *Chamber of Commerce*, 2015 WL 4572948, at *13–15.

same timeframe in disseminating their views to employees.”²²⁶ Moreover, the court noted that the NLRB Regional Director, a government official charged with setting union elections, “retains discretion” to set the election date so as to ensure an adequate opportunity for employer speech.²²⁷

In addition, the court might have pointed to existing First Amendment case law regarding the rights of unions and union-represented employees, including *Davenport v. Washington Education Association*²²⁸ and *Ysursa v. Pocatello Education Association*.²²⁹ Both of those cases involved changes to state law that made it more difficult for unions to collect fees from represented non-members. In *Davenport*, Washington changed its law to prohibit unions from using non-members’ fees for political expenditures without written authorization, and in *Ysursa*, Idaho changed its law to prohibit automatic payroll deduction of union PAC contributions. In both cases, the Court had little difficulty determining that the First Amendment was not implicated by a state changing its statutory baseline in a way that declined to facilitate union speech.²³⁰

Moreover, a statutory baseline, to which both Epstein and the NLRB rule challengers claim a First Amendment entitlement, is at most a legislative choice that facilitates speech—but it does not actually regulate either speech or communicative conduct—it merely sets out timeline for the NLRB to complete its own election process.²³¹ *Davenport* suggests that the First Amendment does not even apply to such legislative choices; to the extent there is a contrary argument, it would support at most very deferential review. And, that principle suggests it should not be fatal for the rule even if the NLRB *had* an intention to limit employer speech in order to improve the employee voice and association at work, though conceivably a problem could have arisen if, say, the rule had (counterfactually) represented a naked attempt to promote union membership in order to enhance electioneering in support of Democratic candidates for office.²³²

²²⁶ *Id.* at *25.

²²⁷ *Id.*

²²⁸ 551 U.S. 177 (2007).

²²⁹ 555 U.S. 353 (2009).

²³⁰ *Davenport*, 551 U.S. at 185 (“The mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny.”); *Ysursa*, 555 U.S. at 355 (“The First Amendment prohibits government from ‘abridging the freedom of speech’; it does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression.”). *Hudson* procedures are explained above, *supra* Part II.A.I.

²³¹ See *Davenport*, 551 U.S. at 191 (“Quite obviously, no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission.”); see also *id.* (noting that “First Amendment does not require the government to enhance a person’s ability to speak”).

²³² *Id.* (statute intended to “protect the integrity of the election process, . . . which the voters evidently thought was being impaired by the infusion of money extracted from non-members of unions without their consent” was constitutional even if content-based, because it was not viewpoint discriminatory). Significantly, Justice Scalia did not state that viewpoint neutrality was required in order for the statute to be considered constitutional; he instead said

CONCLUSION

It is not just the Supreme Court, but also the economy, that has changed. “Today’s workers manipulate information, not wood or metal. Yet the modern, information-based workplace, no less than its more materially based predecessors, requires the application of community standards.”²³³ But the First Amendment theories discussed above—which would cover more routine business activity, while also preventing government from either implementing collective regulatory schemes that require participant contributions, or making adjustments to existing law that affects incentives to speak—could threaten this regulatory project. This is especially true as the shift to an information economy means that more employers are dealing in data — even when workers are not.²³⁴ As Ernest Young put it, “[i]t is . . . no longer possible to classify ‘free speech’ as a personal right separate from the concerns of ‘economic regulation.’”²³⁵ Young continued, “[i]f much economic regulation is also speech regulation, then the Court must either fundamentally narrow First Amendment doctrine to allow application of traditional rational basis review to economic regulation of speech or reintroduce meaningful judicial scrutiny into a large swath of regulatory activity.”²³⁶

Consider the following: First, Verizon and other internet service providers (“ISPs”) have advanced the argument that the federal government could not mandate “net neutrality” because that step would “violate[] the First Amendment by stripping [ISPs] of control over the transmission of speech on their networks.”²³⁷ That argument implies that the decision to slow download speeds for certain websites should be treated the same as an editorial decision to include or exclude an article in a newspaper.²³⁸ And, while the D.C. Circuit has not yet reached the issue,²³⁹ it is likely to recur.²⁴⁰ Sec-

that “Even if it be thought necessary that the content limitation be reasonable and viewpoint neutral,” the statute satisfied those requirements. *Id.* Cf. *Minneapolis Star & Tribune Co. v. MN Comm’r of Rev.*, 460 U.S. 575, 591 (1983) (tax on paper and ink was unconstitutional where it was targeted only a small group of newspapers).

²³³ Stephen Breyer, *Our Democratic Constitution*, 77 NYU L. REV. 245, 255 (2002).

²³⁴ Kendrick, *supra* note 20 at 1209 (discussing incentive to file deregulatory First Amendment cases in “an information economy, where many activities and products involve communication”).

²³⁵ Ernest A. Young, *Sorrell v. IMS Health and the End of the Constitutional Double Standard*, 36 VT. L. REV. 903, 904 (2012).

²³⁶ *Id.* at 925.

²³⁷ Joint Brief for Verizon and MetroPCS at 3, 2012 WL 9937411, at *3, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); see also *AT&T Inc. v. FCC*, Statement of Issues to be Raised, D.C. Cir. No. 15-1092 (May 15, 2015).

²³⁸ See Joint Brief for Verizon and MetroPCS, *supra* note 237, at 43 (arguing that “broadband providers possess ‘editorial discretion’”).

²³⁹ See *Verizon*, 740 F.3d 623, 634 (D.C. Cir. 2014) (rejecting net neutrality order on other grounds).

²⁴⁰ In addition, the argument has spawned a large amount of scholarship, both pro and con. See, e.g., James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 893 (2014) (arguing that search engines are more like “advisors” than “editors”); Jane Bambauer, *Is Data Speech?*,

ond, Uber, the ridesharing app, and other companies in the “1099 economy”²⁴¹ have sought to avoid “employer” status by emphasizing that they are technology platforms that simply enable workers to “be their own bosses”—albeit “bosses” subject to significant constraints imposed by Uber itself.²⁴² While Uber has not, to my knowledge, argued that the First Amendment protects its business model from interference by regulators, it is easy to see how the argument might go based on the arguments discussed above. For example, Uber might argue that its business model is about communicating information about the location of people who need rides to drivers who are willing to provide them for a certain price. If courts accept that premise, then it is a short jump to the argument that, by regulating (or even refusing to license) Uber, a city is suppressing a disfavored speaker.

That may sound farfetched (just as many of the arguments described in Part II may sound farfetched), but it is not purely theoretical. When the Federal Aviation Administration restricted the operation of the website Flytenow.com—essentially, a cross between Uber and Airbnb, the short-term accommodation sharing platform, for private planes—the Goldwater Institute argued that the regulation was invalid because “[p]rivate pilots have a First Amendment right to communicate their travel plans with others.”²⁴³ The D.C. Circuit rejected this argument, focusing first on the FAA’s ban on operating as a “common carrier” without a commercial pilot’s license, and then reasoning that “the advertising of illegal activity has never

66 STAN. L. REV. 57, 57 (2014) (arguing “data must receive First Amendment protection”); Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1151 (2008) (arguing that the First Amendment “does not prohibit” “some regulation of the ability of search engines to manipulate and structure their results”).

²⁴¹ The phrase “1099 economy” is used interchangeably with “gig economy,” “on-demand economy,” and “sharing economy.” These phrases refer to “new labor relationships being enabled by digital technology,” in which workers accept assignments on a piecework basis. Justin Fox, *The Rise of the 1099 Economy*, BLOOMBERG VIEW (Dec. 11, 2015), <http://www.bloombergvie.com/articles/2015-12-11/the-gig-economy-is-showing-up-in-irs-s-1099-forms>, archived at <https://perma.cc/6JSN-BML6>.

²⁴² See Tom Simonite, *When Your Boss Is an Uber Algorithm*, MIT TECH. REV. (Dec. 1, 2015), <http://www.technologyreview.com/news/543946/when-your-boss-is-an-uber-algorithm/>, archived at <https://perma.cc/9L92-7XN6>; Alex Rosenblat & Luke Stark, *Uber’s Drivers: Information Asymmetries & Control in Dynamic Work*, DATA & SOCIETY 2 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227 (noting that “Uber makes claims that its platform fosters entrepreneurship in drivers, while simultaneously exerting significant control over how drivers do their jobs through constant monitoring, predictive and real-time scheduling management, routine performance evaluations, and implicit and explicit rules about driver performance”).

²⁴³ GOLDWATER INST., *FAA Meets Internet: Ruling On General Aviation Limits The Sharing Economy* (Jan. 23, 2015), <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/free-speech/faa-meets-internet-ruling-on-general-aviation-limi/>, archived at <https://perma.cc/33UJ-TWPQ>; see also Petitioner’s Opening Brief, *Flytenow, Inc. v. FAA*, D.C. Cir. No. 14-1168, Jan. 5, 2015 at *39 (“By concluding that all expense-sharing flight operations resulting from Internet-based communications are *per se* “common carriage,” . . . the FAA not only chills, but freezes out Internet-based speech”).

been protected speech.”²⁴⁴ However, that means that the D.C. Circuit’s rejection of the First Amendment challenge hinged on the fact that the government already regulated underlying non-speech conduct—it is less clear what that Court might have done in a scenario in which the non-speech conduct was not so easily identified.

Similarly, consider the app MonkeyParking, which “lets users auction off their public parking spaces” by posting to the app when they are about to vacate a public parking space and allowing other users to bid for information about the space’s location.²⁴⁵ When San Francisco took the position that the app was facilitating the sale or rental of public parking spaces in violation of city law, MonkeyParking claimed in the media (though not in litigation to date) that “it auctions off information *about* the parking spaces,” invoking the “First Amendment right to express and sell such information.”²⁴⁶

Finally, even First Amendment arguments that are unlikely to be accepted can matter; for example, Chicago reportedly considered a minimum wage ordinance modeled on Seattle’s, but abandoning it in light of the IFA’s challenge. As Jedediah Purdy recently put it: “The availability of these arguments imposes (1) costs in litigation, (2) caution in drafting, and (3) general uncertainty on those who support, design, and implement the policies that the novel arguments call into question.”²⁴⁷ Thus, one problem with the emerging deregulatory First Amendment is that it can accomplish some of its aims without the courts ever adopting it; the increasingly real threat of expensive litigation by high-profile litigators can stay regulators’ hands. Thus, in one sense, those advancing the deregulatory First Amendment are right—the translation of First Amendment doctrines developed in a pre-digital age are in need of an update. But key questions remain about how big the First Amendment will grow under any new approach, and the extent to which it will eclipse government regulation of the workplace.

²⁴⁴ *Flytenow, Inc. v. FAA*, 808 F.3d 882, 894 (D.C. Cir. 2015).

²⁴⁵ Gene Maddaus, *Kicked Out of San Francisco, MonkeyParking App Plans a Fresh Start in Santa Monica*, LA WEEKLY (Sept. 18, 2014), <http://www.laweekly.com/news/kicked-out-of-san-francisco-monkeyparking-app-plans-a-fresh-start-in-santa-monica-5080436>.

²⁴⁶ Cyrus Farivar, *Parking Spot Auction Startup Defies San Francisco’s Orders to Shut Down*, ARSTECHNICA (Jan. 26, 2014), <http://arstechnica.com/tech-policy/2014/06/parking-spot-auction-startup-defies-san-franciscos-orders-to-shut-down/>.

²⁴⁷ Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 209 (2014).