When Speech Is Not "Speech"

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First Amendment law has reached a crossroads. Over the past several years, the Supreme Court has made three analytic moves that, in combination, are putting unsustainable pressure on its current doctrinal structure. First, the Court appears to be defining the word "speech" expansively, to include all forms of communication and information sharing. Second, the Court has severely limited the scope of "low-value" speech, suggesting that except for a few historically defined categories of speech, all oral and written communication deserves full constitutional protection. Third, the Court has held that any law or regulation that regulates protected speech based on its content must be subject to extremely stringent "strict" scrutiny, and is presumptively unconstitutional. The result is that under current law, it is exceedingly difficult to regulate speech based on harms associated with its content except in a few, narrow, and usually irrelevant circumstances.

This catholic approach to free speech protections, however, is unsustainable. The reason, quite simply, is that in the world of the Internet and modern computing, information and communication are instantaneously and universally shared, impossible to suppress or control, and at times highly dangerous or destructive. As a result, the harm associated with some forms of speech has been vastly magnified, at the same time that the Court has severely constrained the ability to regulate speech to prevent such harms. In addition, the primary commodity traded and stored in the new information economy, data, is technically "speech" on the Court's current view, and so essentially immune from regulation. This tension is unsustainable.

The solution, I would posit, is that we must reconsider what exactly constitutes "speech" for First Amendment purposes—in Fred

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Schauer's words, we must reconsider the "coverage" of the First Amendment. Moreover, rather than excluding specific types of speech from coverage in an ad hoc fashion, as courts have done to date, we must develop a theoretical structure to guide those decisions. Otherwise, the entire free speech project risks descending into judicial favoritism. This Article begins the task of identifying a methodology for defining First Amendment coverage.

I begin by demonstrating that the word "speech" in the First Amendment does not, and cannot, literally refer to all uses of language. In particular, I note that language, both oral and written, can sometimes be used in noncommunicative ways, and that such uses of language may not be constitutional "speech," even if they are literally speech. I then discuss other situations where even acts of communication are and must be subject to extensive regulation based on their content for a variety of reasons. All language, then, is not "speech," nor even is all communication.

Ultimately, some gauge is necessary by which to judge when speech is, or is not, "speech." Moreover, the only possible source of guidance in developing such a standard is free speech theory. Until now, the Supreme Court has refused to adopt an overarching theory of free speech, and scholars remain divided on the issue. Moving forward, however, this studious ambiguity is unsustainable. What is needed is a new paradigm, firmly rooted in the history, text, and purposes of the First Amendment.

I ultimately conclude that the advancement of democratic self-government is the only plausible candidate for such an overarching theory. Such a reading of the First Amendment is supported by text, drafting history, and historical context, and enjoys widespread support among scholars and judges. Once this understanding is accepted, however, it has profound implications for the question of First Amendment coverage. Even if one adopts a sophisticated and capacious view of what sorts of communicative activities are relevant to self-governance—an approach that I fully endorse—clearly not all uses of language qualify. The First Amendment poses no barriers to regulating such speech, because it is not "speech" within the meaning of the Constitution.

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I. INTRODUCTION

Prayer. Private diaries. Speaking to oneself (or intrapersonal communication, in the argot). Blocking or slowing access to specific websites. These seemingly disparate human activities all have one thing in common: they involve the expression or selection of language, whether oral, written, or electronic, and so seemingly constitute speech. However, none of these activities are inherently communicative in the sense of intentionally sending a message to an audience. Are they then protected by the First Amendment?

Now consider sale or disclosure of personal information or images (including Big Data). Faulty navigation charts. Conversion Therapy. Incompetent legal or medical advice. All of these are clearly communicative uses of language and so literally speech. Nor do any of them fall within a previously recognized category of "low-value" speech.[1] Yet most people would agree that these forms of speech *must* be susceptible to some forms of regulation if vital social interests are to be protected. But does the First Amendment permit such regulation?

[1] United States v. Stevens, 559 U.S. 460, 468–69 (2010) (naming the recognized categories of unprotected speech).

Modern First Amendment doctrine can answer neither of these questions in a satisfactory manner. The first it has barely considered, and the second it impliedly answers in a manner that defies common sense. That is a fundamental failure of logic and imagination. Almost a century after Justice Holmes began constructing the edifice of modern free speech law,[2] it is astonishing that such basic issues remain so opaque.

The truth is that for the past century, courts muddled through difficult free speech issues because they had no theoretical basis for resolving such foundational questions, and because they could do so without creating unacceptable social harms. In this Article, I will argue that doctrinal and technological developments over the past several years have made this approach unsustainable. At this point, staying the course (or more accurately, having no course) threatens to produce results that are so completely unacceptable that something has to give. I suppose courts might continue to avoid the hard questions by rejecting thoroughly plausible First Amendment claims without any reasoning—as they have regularly done in the terrorism context[3]—but that is a dissatisfying and risky strategy. Instead, it is time to confront the question of what the phrase "freedom of speech" in the First Amendment actually *means*. To use Fred Schauer's language, we need a theory describing "the coverage of the First Amendment."[4]

My primary goal in this Article is to demonstrate that free speech doctrine is on a collision course with reality. I begin in Part II by describing what I call the "coverage crisis" in First Amendment law, laying out the doctrinal developments that have expanded the scope of the First Amendment's Free Speech Clause beyond reason. I further argue that while the current Court's relentless drive to create simple rules that maximize the First Amendment's coverage and stringency would probably always have been a bad idea, in today's world it is unsustainable. The reason, quite simply, is the spread of the Internet and modern information technology. These developments have two consequences. First, today information and speech spread instantaneously, ubiquitously, and without hope of retrieval. As such, the harm potentially caused by speech has increased exponentially from the era of the print, or even broadcast media, even as First Amendment doctrine makes regulation to mitigate harms ever more difficult. Second, in the information economy, data is perhaps the most valuable commodity traded in markets; but because (as we shall see) under the Court's approach data is speech, the First Amendment

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[2] Schenck v. United States, 249 U.S. 47, 52 (1919) (announcing "clear and present danger" test for suppressing incitement); Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (arguing that clear and present danger test should be applied in a speech-protective manner).

[3] *See* Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 585–604 (2014) (collecting such cases).

[4] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

would appear to shield data from most regulation. The result is a new form of Lochnerism.[5]

The above analysis strongly suggests that the Court's working assumption that all speech presumptively enjoys full constitutional protection cannot be correct. In Parts III and IV, I explore various uses of language—both communicative and noncommunicative—which appear, under the Court's current jurisprudence, to be fully protected speech, but which nevertheless must for practical purposes be subject to substantial regulation. This discussion therefore provides empirical support for the theoretical conclusion of Part II: that not all speech is constitutional "speech."

Part V turns to the positive task of developing an approach to First Amendment coverage which makes transparent judgments about the meaning and value of speech, and allocates protection based on those judgments. Such an approach must be rooted in an overarching theory of free speech, something that the Court has to date refused to adopt. I conclude that there is only one possible such theory. The text, the drafting history, and the historical context of the First Amendment all support the proposition that the primary purpose of the Amendment is to enable and advance democratic self-governance. This conclusion, however, has important implications for First Amendment coverage, because while a wide range of communicative activities are related to self-governance, some clearly are not. Finally, Parts VI and VII close by applying a self-governance approach to First Amendment coverage to the examples described in Parts III and IV.

II. THE COVERAGE CRISIS IN FIRST AMENDMENT LAW

As Fred Schauer famously pointed out twelve years ago, there are many, many uses of language, the regulation of which is generally understood to raise *no* First Amendment issues.[6] Examples include securities regulation, antitrust laws applied to information sharing, criminal solicitation, products liability based on poor instructions, and many others.[7] Yet most of these examples do not fall within any currently accepted "exception" to the First Amendment, thus making nonsense of the common assertion that all speech is protected unless it falls within a recognized exception to the First Amendment.[8] Thus was born the concept of First Amendment "coverage," which has since received significant

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[5] *See* Lochner v. New York, 198 U.S. 45, 53, 64 (1905) (striking down labor regulation as violating the Due Process Clause); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 182–91 (2016) (arguing that modern First Amendment doctrine threatens to recreate the *laissez faire* constitutional regime of *Lochner*).

[6] Schauer, *supra* note 4, at 1770–71.

[7] *Id.*

[8] *Id.* at 1768; *see also* United States v. Stevens, 559 U.S. 460, 468–70 (2010).

scholarly attention (though essentially none from the courts).[9] Schauer also pointed out, convincingly, that the scope of the First Amendment's coverage cannot possibly be determined based on "the ordinary language meaning of the word 'speech.'"[10] Finally, Schauer argued that no existing theory of the First Amendment can explain the scope of its coverage,[11] and therefore coverage can only be explained as a product of nondoctrinal "political, economic, social, and cultural" factors.[12]

I completely agree with Schauer every step of the way, except that last. I do not think that an amorphous set of factors can be the basis of a theory of coverage that can actually be operationalized (though I concede that Schauer may well be correct as a descriptive matter with regard to current practices). Schauer himself observed that in our society, the First Amendment exhibits a "magnetism" by which invocation of the First Amendment lends huge rhetorical advantages.[13] Increasingly, it leads to litigants raising plausible, and often successful First Amendment claims in unlikely situations.[14] Net neutrality is surely an example; it is hard to believe that during the twentieth century almost anyone would have believed that imposing common carrier obligations on a telecommunications carrier would even implicate the First Amendment.[15] Similarly, a rule requiring companies to (truthfully) disclose in their Securities and Exchange Commission filings whether they used conflict minerals originating in the Democratic Republic of the Congo would surely not have been thought to raise First Amendment problems even forty years ago—when First Amendment protections were extended to commercial speech[16]—yet recently the D.C. Circuit found such a rule unconstitutional.[17] As another example, regulation of professional speech has been a ubiquitous part of social practices for centuries without being thought to raise any First Amendment concerns. Recently, however, extensive litigation has been brought challenging professional speech regulations,[18] and the subject has generated substantial

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[9] Schauer, *supra* note 4, at 1769.

[10] *Id.* at 1773.

[11] *Id.* at 1784–87.

[12] *Id.* at 1765, 1800–07.

[13] *Id.* at 1787–90.

[14] *See infra* Part III.

[15] *See infra* Part III.C.

[16] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).

[17] Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n, 800 F.3d 518, 530 (D.C. Cir. 2015) (reaffirming decision to strike down statute and rule requiring disclosure of conflict minerals as violating the First Amendment).

[18] *See, e.g.*, Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) (invalidating statute prohibiting physicians from asking about, and keeping records regarding, gun ownership by their patients or their patients' families); King v. Governor of N.J., 767 F.3d 216, 241–43 (3d Cir. 2014) (upholding ban on licensed therapists conducting

scholarship.[19] Finally, Andy Koppelman has pointed out that under current doctrine, laws regulating so-called "revenge porn"—a grotesque social practice whereby former boyfriends post sexually explicit pictures of their exes without permission[20]—very probably violate the First Amendment,[21] even though such laws would surely have been thought unproblematic until quite recently.

The crisis of coverage that I describe above is very real. Here, I wish to briefly trace the three recent doctrinal developments that, in combination with modern technology, have if not created, then certainly accentuated, this crisis.

The first doctrinal development is an increasingly unyielding insistence by the Court that all technology, all communication, and all forms of information sharing constitute fully protected "speech" for First Amendment purposes. Over the past quarter century, the Court has adhered to this principle seemingly without exception. In 1994, it held that cable television operators' decisions regarding which channels to transmit on their systems are protected by the First Amendment.[22] In 1997, it extended the highest level of First Amendment protection to Internet communications.[23] In 2000, the Court held that cable television channels primarily dedicated to sexually explicit programming carry fully protected speech.[24] In 2002, it extended full protection to "virtual child pornography"—depictions that appear to be of minors engaged in sexual conduct, but not involving actual minors.[25] In 2004, it was the turn of commercial websites displaying sexually explicit content accessible to minors.[26] And in 2011, the Court held that video games, including violent video games sold to minors, received exactly the same level of protection as other communicative media, finding the interactive nature of video games irrelevant.[27] In an even more eye-opening decision in 2012, a plurality of the Court would have treated intentional lies as fully within the scope of the First

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"conversion therapy" to try and "convert" homosexual teenagers); Pickup v. Brown, 740 F.3d 1208, 1222–23, 1236 (9th Cir. 2014) (same).

[19] *See generally* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016); Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. (forthcoming 2017) (manuscript at 4 n.10), https://ssrn.com/abstract=2827762 [https://perma.cc/3Z49-L22S] (summarizing extant scholarship).

[20] Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661 (2016).

[21] *Id.* at 662.

[22] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 638–39 (1994); *see infra* Part III.C.

[23] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868–70 (1997).

[24] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811–12 (2000).

[25] Ashcroft v. Free Speech Coal., 535 U.S. 234, 248–50, 256 (2002).

[26] Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666–67 (2004).

[27] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011); *see also infra* notes 45–49 and accompanying text.

Amendment,[28] and a majority agreed that knowing falsehoods received substantial protection,[29] all despite earlier, well-considered dictum stating without caveat that false statements of fact have "no constitutional value."[30] Finally, and most stunningly, the Court strongly suggested in 2011 (though it has not yet held) that all sales of data, including mass personal data, constitute speech fully within the coverage of the First Amendment.[31] The Court's current, gung ho approach can be contrasted with previous eras, in which the Court at first granted *no* protection to motion pictures,[32] and granted quite limited protection to broadcast television and radio.[33] This is not to say that the modern approach is entirely wrong—some of these decisions (notably regarding Internet traffic and virtual child pornography) are surely correct. But there has undoubtedly been a change of attitude on the Court.

The second doctrinal development involves First Amendment "exceptions." As demonstrated by the cases just discussed, the current doctrinal structure of free speech law assumes that all speech—meaning communication—is protected by the First Amendment unless it falls within a First Amendment "exception." The implications of this broad-brush approach were, until recently, mitigated, however, by the widely shared belief, rooted in language from the Supreme Court's opinions in *Chaplinsky v. New Hampshire*[34] and *New York v. Ferber*,[35] that courts could create and announce new, unprotected categories of speech if they concluded that the speech was of minimal value, and whatever value it had was vastly outweighed by the social interest in suppressing it. These unprotected categories essentially provided a safety valve for free speech theory, permitting the courts to reconcile the general presumption in favor of free speech with the social need, in specific instances, for regulation. In *United States v. Stevens* in 2010, however, the Court renounced this form of analysis.[36] The issue in *Stevens* was the constitutionality of a statute that barred the sale or possession of depictions of animal cruelty.[37] Though the primary target of the statute was "crush videos" depicting women slowly crushing small animals to death (this is apparently a sexual fetish), Stevens was convicted for selling

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[28] United States v. Alvarez, 132 S. Ct. 2537, 2544–45 (2012) (plurality opinion).

[29] *Id.* at 2553 (Breyer, J., concurring in the judgment).

[30] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[31] Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011); *see infra* Part IV.A.

[32] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–44 (1915), *overruled by* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502–03 (1952).

[33] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386–90 (1969).

[34] Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942) (holding "fighting words" to be unprotected speech after applying a balancing analysis).

[35] New York v. Ferber, 458 U.S. 747, 774 (1982) (holding child pornography to be an unprotected category of speech under a similar balancing analysis).

[36] United States v. Stevens, 559 U.S. 460, 470 (2010).

[37] *Id.* at 464–65.

videos of dog fighting.[38] The Government argued that because depictions of animal cruelty had minimal First Amendment value, and because the Government's regulatory interest was strong, the Court should follow the approach it took in *Ferber* with respect to child pornography and declare such depictions categorically outside the First Amendment.[39] The Court refused.[40] Indeed, it described such "categorical balancing" as "startling and dangerous."[41] It held instead that unprotected categories cannot be "created," they must be rooted in long-standing historical practice.[42] And while there was a long history of barring animal cruelty, there was no such history with respect to *depictions* of animal cruelty.[43] As a result, the Court invalidated the statute.[44]

A year later, the Court reaffirmed this position in *Brown v. Entertainment Merchants Ass'n*.[45] *Brown* involved a challenge to a California statute that barred the sale or rental to minors of violent video games.[46] Again, the Government sought a ruling categorically excluding some speech—here, violent speech directed at children—entirely from the First Amendment.[47] And again, the Court refused because of the lack of any historical basis for such an exclusion.[48] In particular, the Court pointed out that literature historically deemed suitable for children, including *Grimm's Fairy Tales*, are full of extraordinary violence.[49] The consequence of the *Stevens* and *Brown* decisions is to substantially restrict the ability of courts to make judgments regarding the *value* of speech, in the course of deciding whether to extend protection to it. These cases also strongly endorse the modern view that *all* speech is fully protected, unless it falls within a narrow, historically based exemption.[50] Finally, by focusing on history, the Court provided no tools that can be used to assess whether and how to protect new forms of speech, such as Big Data, revenge porn, or broadband Internet access.

The third doctrinal development is exemplified by the Court's 2015 decision in *Reed v. Town of Gilbert*.[51] *Reed* involved a challenge to an ordinance adopted by the Town of Gilbert regulating the placement of outdoor signs within the

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[38] *Id.* at 465–66.
[39] *Id.* at 469–70.
[40] *Id.* at 470.
[41] *Id.* at 470.
[42] *Stevens*, 559 U.S. at 471–72.
[43] *Id.* at 472.
[44] *Id.* at 482.
[45] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791–92 (2011).
[46] *Id.* at 789.
[47] *Id.* at 794.
[48] *Id.* at 794–95.
[49] *Id.* at 795–96.
[50] *Id.* at 790–92; United States v. Stevens, 559 U.S. 460, 468–70 (2010).
[51] *See generally* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

town's boundaries.[52] Reed, the pastor of an itinerant religious congregation, objected to the fact that the ordinance placed much more onerous restrictions on signs he wished to erect—directional signs to his religious services—than on "political" and "ideological" signs.[53] The Court ruled for Reed and struck down the ordinance, holding that any law that on its face regulated speech based on the content of that speech was subject to strict scrutiny, even if the law had no censorial motives.[54] In so holding, the Court rejected a contrary position adopted by some lower courts[55] (and based on language in some of the Supreme Court's own opinions)[56] suggesting that illicit motive was the *sine qua non* for invoking strict scrutiny.[57] Application of strict scrutiny means that the challenged law will be upheld only if the government can prove that the restriction furthers a compelling governmental interest and is narrowly tailored, meaning that it is the least restrictive means, to achieve that interest.[58] In the modern era, at least with respect to free speech cases, this analysis has almost invariably led to invalidation of challenged statutes.[59] Like the other doctrinal developments discussed here, the consequence of this decision is to restrict judicial flexibility

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[52] *Id.* at 2224.

[53] *Id.* at 2224–26.

[54] *Id.* at 2227–28.

[55] *E.g.*, Norton v. City of Springfield, 768 F.3d 713, 717 (7th Cir. 2014) (finding that a city ordinance that regulated the subject matter without reference to the actual content of speech was content neutral), *rev'd*, 806 F.3d 411, 413 (7th Cir. 2015) (reversing in response to the Supreme Court's contrary holding in *Reed*), *cert. denied*, 136 S. Ct. 1173 (2016); Brown v. Town of Cary, 706 F.3d 294, 297–98 (4th Cir. 2013), *abrogated by* Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, 632 (4th Cir. 2016) (abrogating the earlier case only "due to the Supreme Court's decision in *Reed*"); Foti v. City of Menlo Park, 146 F.3d 629, 638 (1998) ("A speech restriction is content-neutral if it is 'justified without reference to the content of the regulated speech.'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

[56] *Compare* Hill v. Colorado, 530 U.S. 703, 719–20 (2000) ("[G]overnment regulation is 'content neutral' if it is justified without reference to the content of regulated speech."), *and* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally . . . , is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration."), *with Reed*, 135 S. Ct. at 2227 ("We . . . have no need to consider the government's justifications or purposes for enacting the [law] to determine whether it is subject to strict scrutiny.").

[57] *Id.* at 2228.

[58] *Id.* at 2231.

[59] The only modern counterexamples are *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010), which involved national security, and perhaps *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015), which involved the fraught issue of judicial elections, and in which the Court heavily splintered.

in the face of seemingly socially beneficial regulation of speech, and therefore to reduce legislative authority as well.[60]

Finally, we come to the technological changes that have accentuated the consequences of the above-described doctrinal developments. They are, of course, the spread of the Internet and the related growth of the information economy. In a world in which anyone can communicate instantaneously to an almost unlimited audience, and in which bits and data are some of the most important commodities sold in the economy, free speech issues necessarily arise constantly, and the stakes in these disputes are hugely magnified. The reasons are three-fold.

First, the ubiquity and permanency of information on the Internet sharply increases the harms that speech can impose, as exemplified by revenge porn and other invasions of privacy or releases of personal data.[61] Conflicts between free speech and privacy are not, of course, wholly new. However, the advent of the Internet has entirely changed the magnitude of the harm caused by such communications. By making private facts or images universally and easily accessible, the victims of such invasions of privacy cannot escape them. One cannot move to another city to get a fresh start, because one cannot escape the Internet. Future employers and acquaintances will always be able to access the private information with a simple Google search. Changing one's name is not a serious option for many people because their job histories, credentials, etc., are tied to their existing names, which must therefore be disclosed at least to putative employers. And once material is on the Internet, it is notoriously difficult to scrub it even if such a legal remedy is available, as illustrated by a tragic recent revenge porn episode in Italy.[62] None of this was true in the pre-Internet era of print and broadcast media.

Second, in the information economy, economic regulation increasingly involves regulation of data.[63] However, the Court has strongly suggested that

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[60] Assuming, that is, that the lower courts follow *Reed*. For recent indications that that may not happen, see *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 403–06 (D.C. Cir. 2017) (finding a sign ordinance to be content neutral when it was obviously content based under *Reed*), and Judge Tjoflat's dissenting opinion in the *Wollschlaeger* litigation. Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1330–38 (Tjoflat, J., dissenting); *see also infra* notes 223, 227 and accompanying text.

[61] *See infra* Part IV.

[62] James Masters & Livia Borghese, *Tiziana Cantone's Family Calls for Justice After Suicide over Sex Tape*, CNN (Sept. 16, 2016), http://www.cnn.com/2016/09/16/europe/tiziana-cantone-sex-tape-suicide/ [https://perma.cc/BSA6-QE58].

[63] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 588–61 (describing state law regulating the sale of prescriber-identifying data to data-miners in the pharmaceutical industry).

data is fully protected speech, albeit in dictum,[64] but dictum entirely consistent with the Court's modern doctrine. Data regulation, moreover, almost inevitably targets specific forms of data, making the regulations content based.[65] This means that every such regulation arguably triggers strict scrutiny under *Stevens* and *Reed*, making it presumptively unconstitutional.

Finally, another consequence of the information economy is the importance of unfettered access to the Internet, for both businesses and individuals. Regulation of Internet access, however, can easily—as we shall see[66]—involve government control over data flows, meaning that such regulation also implicates the First Amendment. As with the example of data regulation, this result seems highly counterintuitive, yet both follow clearly from the collision of modern doctrine and technology.

The ultimate thesis of this Article is that the problems described above can only be resolved by adopting an overarching theory of First Amendment coverage. I begin, however, by questioning the position that is the current Court's orthodoxy: that the First Amendment presumptively protects *all* speech, unless it falls within a narrowly defined and historically recognized category of unprotected speech such as obscenity.[67] I start by identifying several examples of noncommunicative uses of language that, even though they may be speech within the dictionary definition, seem far afield from the First Amendment. I then identify some examples of communicative uses of language that nonetheless should, I will argue (perhaps more controversially), be subject to regulation without serious constitutional constraints. Together, these examples seriously undermine the Court's underlying assumptions regarding coverage.

III. NONCOMMUNICATIVE SPEECH

The leading Supreme Court decision addressing the "coverage" of the First Amendment is *Spence v. Washington*.[68] In that case, the Court held that Spence's actions in hanging an upside down flag outside his apartment with a peace symbol made of black tape attached to both sides constituted communicative conduct protected by the First Amendment.[69] The Court provided this explanation: "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the

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[64] *Id.* at 570 ("There is thus a strong argument that prescriber-identifying information [(a form of electronic data)] is speech for First Amendment purposes."); *see also infra* Part IV.

[65] *See infra* Part IV.

[66] *See infra* Part III.C.

[67] *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957).

[68] Spence v. Washington, 418 U.S. 405, 406 (1974) (per curiam).

[69] *Id.* at 406, 410.

message would be understood by those who viewed it."[70] Later cases have continued to quote this passage as the definitive test to determine whether particular conduct falls within the First Amendment's protection,[71] and *Spence*'s requirements of a speaker intending to communicate a message, along with a likely audience, seem an intuitively reasonable definition of what constitutes expression.

What is notable, however, is that all the cases exploring the limits of First Amendment coverage involve expressive *conduct*.[72] The contrary assumption has been that any use of language, either oral or written, necessarily constitutes "speech" for First Amendment purposes, and I am not aware of a single Supreme Court case questioning or even examining this proposition. Do all uses of language constitute "speech" for constitutional purposes? Here, we consider the problem of uses of language that lack an audience and/or communicative intent.

I begin with one example of nonspeech uses of language that is important, but ultimately does not, I think, advance our understanding of the First Amendment. As J.L. Austin famously noted, sometimes language does not only (or at all) communicate ideas or facts, it rather changes social reality, often by creating legal effects.[73] Examples include saying "I do," or "You're Fired." Similarly, in an important decision the Second Circuit noted that computer software has both expressive and functional elements—it not only communicates information, it also *acts* on the world.[74] Based on that distinction, the Second Circuit upheld regulation targeting only the functional element of software.[75] For the same reason, no one doubts that the government may regulate the "performative" effects of speech, such as through employment discrimination legislation or prohibiting the marriage of close relatives. Ultimately, however, these results seem unrelated to the First Amendment because the target of regulation in these instances is not speech as such, but rather distinct functional or legal changes to the world.

Aside from "performative" or "functional" speech, however, the underlying assumption of the Supreme Court's modern free speech jurisprudence is clearly that all language *is* speech, though the Court has never clearly articulated, much

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[70] *Id.* at 410–11.

[71] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 305 (1984) (Marshall, J., dissenting).

[72] *E.g.*, *Johnson*, 491 U.S. at 404–06 (holding that flag burning is expressive conduct); *Spence*, 418 U.S. at 410–11 (attaching peace symbol made of tape to flag is expressive conduct); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 514 (1969) (wearing black armbands in protest of war as expressive conduct).

[73] J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 148–52 (J.O. Urmson & Marina Sbisà eds., Harvard Univ. Press 2d ed. 1962); *see also* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16–19 (1969).

[74] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001).

[75] *Id.* at 453–58.

less examined, that assumption. The issue did, however, arise in a long-running litigation in the Second Circuit in which a religious congregation sought access to public property.[76] The result was instructive.

A. *Is Prayer Speech?*

In 1994, Bronx Household of Faith, a religious congregation, applied to use space in a public middle school in the Bronx to hold its Sunday church services.[77] Its application was denied, triggering a Dickensian twenty years of litigation that included at least five separate trips to the Second Circuit.[78] In what is for our purposes the most important chapter, *Bronx Household IV*, the Second Circuit considered the constitutionality of a Standard Operating Procedure (SOP) adopted by the New York City Board of Education which flatly barred the use of school property for "religious worship services, or otherwise using a school as a house of worship."[79] An earlier version of the board's SOP had excluded "religious services or religious instruction," but had to be amended in response to the Supreme Court's decision in *Good News Club v. Milford Central School*,[80] which had struck down an essentially identical policy as a viewpoint-based restriction on speech in a limited public forum.[81] The question in *Bronx Household IV* was whether this amendment saved the SOP from invalidation.[82]

By a two-to-one vote, the Second Circuit held that it did.[83] Judge Leval, writing for himself and Judge Calabresi, found that a ban on religious worship services did not restrict speech, but rather "bars a type of activity."[84] According to the majority, "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns, whether done by a person or a group, do not constitute the conduct of religious worship services" and so were not excluded by the SOP.[85] Indeed, the board did not even "prohibit use of the facility by a person or group of persons for 'worship.' What is prohibited by this clause is solely the conduct of a particular type of event: a collective activity characteristically done

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[76] Bronx Household of Faith v. Bd. of Educ. (*Bronx Household IV*), 650 F.3d 30, 36 (2d Cir. 2011), *cert. denied*, 565 U.S. 1087 (2015).

[77] *Id.* at 33.

[78] Bronx Household of Faith v. Bd. of Educ. (*Bronx Household V*), 750 F.3d 184, 188 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1730 (2015). *See generally* CHARLES DICKENS, BLEAK HOUSE (Nicola Bradbury ed., Penguin Books 1996) (using multigenerational litigation as a plot device).

[79] *Bronx Household IV*, 650 F.3d at 34–35, 35 n.4.

[80] *Id.* at 33–34.

[81] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

[82] *Id.* at 35–36.

[83] *Id.* at 32.

[84] *Id.* at 36.

[85] *Id.*

according to an order prescribed by and under the auspices of an organized religion, typically but not necessarily conduct by an ordained official of the religion."[86]

Judge Walker issued a sharp dissent.[87] In short, his argument was that the majority's distinction between protected religious speech and worship on the one hand, and unprotected religious worship services on the other, was indefensible because "the conduct of 'services' *is* the protected expressive activity of the sort recognized in *Good News Club*."[88] He also pointed out that in an earlier Supreme Court opinion dealing with access to public spaces by religious groups, the Court seemed to reject any distinction between religious speech and "worship."[89] Therefore, under the dissent's view, exclusion of religious worship services constituted exclusion of religious speech, which in turn the *Good News Club* Court had held was unconstitutional viewpoint discrimination.[90]

At first glance, Judge Walker seems to have by far the better of this exchange. The majority's attempt to analogize exclusion of religious worship services to the exclusion of "martial arts matches, livestock shows, and horseback riding"[91] is utterly unconvincing because unlike those other activities, religious worship is conducted almost entirely through *words* and clearly communicative gestures such as placing one's hands together in prayer or kneeling. Indeed, the entire distinction the majority draws between "worship" and "worship services" is, to put it mildly, obscure. Finally, while this is hardly the only area in which a court has resolved a difficult First Amendment problem by simply relabeling expression as "conduct,"[92] this amounts to little more than evasion.

Nonetheless, there may be something to the majority's reasoning, albeit Judge Leval clearly failed to develop the justification, and full implications, of the distinction he was drawing. Going back to *Spence*, remember that at least in the context of expressive *conduct*, the Court has suggested that the First Amendment protects only activity which includes three elements: a speaker, an intended message, and a likely audience.[93] Clearly much religious speech held

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[86] *Bronx Household IV*, 650 F.3d at 37.

[87] *Id.* at 52–65 (Walker, J., dissenting).

[88] *Id.* at 56.

[89] *Id.* (citing Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981)).

[90] *Id.* at 57.

[91] *Id.* at 37 (majority opinion).

[92] *See, e.g.*, Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 13, 15, 29 (2012) (recounting numerous instances in which courts labeled disclosure of data as "conduct" to avoid First Amendment issues); Bhagwat, *supra* note 3, at 613–14 (describing cases where courts labeled contribution of funds to terrorist groups as conduct, even though contributions to political candidates have been designated protected association).

[93] Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam).

to be protected by the First Amendment, including proselytizing,[94] commenting on public issues from a religious perspective,[95] and religious education,[96] easily satisfy those requirements. Prayer and worship, however, raise difficult questions. Sometimes these activities, when engaged in by groups, are at least to some degree intended to send messages within the group, or even to outside observers. But both prayer and worship can also be solitary activities, in which circumstances there is no intended human audience—the intended "audience" presumably is a deity, but a court applying the Constitution surely cannot treat this as an act of communication without adopting highly problematic theological assumptions. Moreover, even when prayer and worship are conducted jointly and/or in public, determining the extent to which, if at all, the participants intend to express a message to other people is extremely difficult, and quickly descends into a theological quagmire. In this sense, then, the *Bronx Household IV* majority may be on to something in suggesting that a worship service might be meaningfully different from other forms of religious speech.

Though then again, perhaps not. To say that prayer and worship are different from, say, proselytizing, does not answer whether they should be within the coverage of the Free Speech Clause. Prayer and worship are of course within the coverage of the Free Exercise Clause, but given the Court's evisceration of Free Exercise protections in *Employment Division v. Smith*,[97] that does not buy plaintiffs much—which is no doubt the reason why the Free Speech Clause has become the primary source of constitutional protection for religious activities. First of all, to determine whether the word "speech" in the First Amendment encompasses such arguably noncommunicative uses of language as (some) prayer and worship, we need a theory of the First Amendment. And as noted earlier, that is something the Court has yet to articulate or adopt. Second, even if noncommunicative prayer falls outside the First Amendment, this does not mean that the New York SOP successfully targets unprotected activity, as we shall see in Part V.

B. *Private Diaries and Intrapersonal Communication*

Many people keep diaries. Some of those diaries are—overly optimistically—intended for history (i.e., a future audience), while others are

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[94] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 310 (1940); Lovell v. City of Griffin, 303 U.S. 444, 452–53 (1938).

[95] *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995).

[96] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–97 (1993).

[97] Emp't Div. v. Smith, 494 U.S. 872, 878 (1990) (holding that generally applicable laws which incidentally burden religious exercise raise no Free Exercise issues).

meant to be shared with therapists or others. But often diaries are meant to be *private*, meaning for the eyes and benefit of the diarist alone.

Similarly, many people speak out loud to themselves.[98] Indeed, the phenomenon is sufficiently common that it has generated a name—intrapersonal communication[99]—and a substantial literature.[100] As with private diaries, such speech is not directed at others, and is usually not intended to be heard. Rather, as with private diaries, the function of speaking to oneself appears to be to organize one's thoughts and (in the case of diaries) ensure that thoughts are not forgotten. Are these activities protected by the First Amendment?

I freely admit that the question posed here is largely a thought experiment. Actual prosecution for the contents of a private diary seems unlikely, since the most likely candidate would presumably be obscenity law but *Stanley v. Georgia* would seem to preclude such a prosecution.[101] Intrapersonal communication might conceivably trigger prosecution if done in public and unintentionally overheard, but the possibility seems remote. Nonetheless, exploring the question is useful because it sheds important light on the relationship between the First Amendment and language.

As with prayer, whether the First Amendment protects private diaries and intrapersonal communication turns on whether the word "speech" in the First Amendment refers to language, or to communication. The answer, however, is not self-evident. Certainly, one natural meaning of "speech" could be all uses of language. But another, equally plausible and widely held understanding is that speech is communication, requiring both a speaker and an intended audience (albeit the audience need not be immediately present, as in the case of books or other recorded expression). And again, absent a theory of the First Amendment, it is far from clear how one is to make that choice.

C. *Net Neutrality*

In March of 2015, the Federal Communications Commission (FCC) released what is generally labeled the 2015 Open Internet Order.[102] The Order

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[98] I am focusing here on individuals who do not suffer from mental illness such as schizophrenia, which raises complex and difficult questions beyond the scope of this Article.

[99] *Intrapersonal Communication*, QUESTIA, https://www.questia.com/library/communication/human-communication/intrapersonal-communication [https://perma.cc/Y3UZ-7Y6G].

[100] *See e.g.*, INTRAPERSONAL COMMUNICATION: DIFFERENT VOICES, DIFFERENT MINDS (Donna R. Vocate ed., 1994) (collecting works from various authors on the subject of intrapersonal communication); Paul N. Campbell, *Language as Intrapersonal and Poetic Process*, 2 PHIL. & RHETORIC 200, 204–05 (1969); Patrick Jemmer, *Intrapersonal Communication: The Hidden Language*, 9 J. CLINICAL HYPNOSIS 37, 38 (2009).

[101] Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the First Amendment prohibits prosecution for private possession of obscene materials in one's home).

[102] Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5601 (2015).

implemented a policy commonly known as "net neutrality."[103] The history of the FCC Order was long and complex and involved two previous attempts to adopt similar policies that had been struck down by the D.C. Circuit,[104] none of which is terribly relevant for our purposes. The third time, however, was the charm, and on appeal, the D.C. Circuit upheld the FCC Order by a two-to-one vote.[105] Most of the decision turned on complex issues of statutory interpretation and telecommunications policy that are not pertinent to this Article.[106] Our focus is on a claim brought by a handful of broadband providers that net neutrality violates the First Amendment.[107] However, to understand the nature of the FCC Order and the D.C. Circuit's First Amendment holding, some background is necessary.

The starting point to understanding the Open Internet Order must be the Telecommunications Act of 1996, which amended the Communications Act of 1934[108] to adopt the statutory framework at issue in the FCC Order.[109] The Act distinguishes sharply between two sorts of services offered by telecommunications providers: "telecommunications services" and "information services."[110] The former constitutes what is at heart transparent transmission between two points of information chosen by the customer, while the latter typically involves some sort of information processing by the telecommunications provider.[111] Crucially, the Telecommunications Act subjects telecommunication services to so-called common carrier regulation, meaning in essence that the provider must offer services to all comers, and may not unjustly discriminate among customers or with respect to the services it provides.[112] Information services, in contrast, are exempt from common carrier and most other regulations.[113]

The overarching statutory question underlying the net neutrality debate concerns how broadband Internet access services should be classified under the Act. Broadband providers connect Internet end users to the Internet

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[103] *See id.* at 5607, 5613.

[104] *See* Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014); Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010). Under the Trump Administration, the FCC has announced its intention to repeal its net neutrality rules. *See generally* Restoring Internet Freedom, 82 Fed. Reg. 25,568 (proposed June 2, 2017) (to be codified at 47 C.F.R. pts. 8, 20).

[105] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

[106] *See id.* at 690–739.

[107] *Id.* at 740–44.

[108] Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56.

[109] *U.S. Telecom Ass'n*, 825 F.3d at 745 (Williams, J., dissenting).

[110] *Id.* at 691 (majority opinion) (citing 47 U.S.C. § 153 (2012)).

[111] *Id.*

[112] *Id.*

[113] *Id.*

backbone network—a worldwide web of fiber optic cables that eventually connects the users to "edge providers," meaning websites such as Amazon and Netflix.[114] Almost all residential customers receive broadband service from either their cable company via cable modem service, or their telephone carrier via digital subscriber line (DSL) service.[115] Large-scale users can also obtain broadband service via dedicated fiber optic lines.[116] When broadband services in the form of DSL first became available, the FCC classified DSL services as a telecommunications service, subjecting it to onerous regulation.[117] A few years later, however, the FCC classified cable modem service as an information service.[118] After the Supreme Court upheld that decision,[119] the FCC reclassified DSL and other forms of broadband, including mobile broadband provided by cellular telephone companies, as information services.[120]

Enter net neutrality. The basic concern driving net neutrality is that broadband providers, because they possess substantial market power and control bottlenecks that end users must pass through to access the Internet, can use their power to interfere with an open Internet where end users and edge providers can communicate with each other without interference or preferentialism.[121] To prevent that, the FCC's net neutrality rules in the Open Internet Order prohibit broadband providers from blocking access to particular websites, slowing down access to particular websites, or engaging in "paid prioritization" whereby broadband providers favor some Internet traffic over other traffic in exchange for compensation.[122] The rules also impose general prohibitions on broadband providers, forbidding them from interfering with either end users' abilities to access lawful content, or edge providers' abilities to offer lawful content.[123]

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[114] *Id.* at 690.

[115] *See U.S. Telecom Ass'n*, 825 F.3d at 690.

[116] *Id.*

[117] *Id.* at 691–92 (citing Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd. 24011, ¶¶ 3, 35–36 (1998)).

[118] *Id.* at 692 (citing Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 FCC Rcd. 4798, ¶¶ 39–40 (2002)).

[119] *See generally* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1002–03 (2005) (upholding FCC decision to classify cable services as information services).

[120] *U.S. Telecom Ass'n*, 825 F.3d at 692–93.

[121] *See* Larry Downes, *The Tangled Web of Net Neutrality and Regulation*, HARV. BUS. REV. (Mar. 31, 2017), https://hbr.org/2017/03/the-tangled-web-of-net-neutrality-and-regulation [https://perma.cc/2RLG-8RGT].

[122] *U.S. Telecom Ass'n*, 825 F.3d at 696.

[123] *Id.*

When the FCC first tried to impose net-neutrality-type restrictions on broadband providers in 2007 (in an enforcement action against Comcast), the D.C. Circuit rejected its efforts on the grounds that the FCC had not identified any statutory authority for its actions.[124] In response, in 2010 the FCC adopted regulations imposing net neutrality requirements on broadband, but the D.C. Circuit again rejected its efforts.[125] This time the court held that while the FCC had identified statutory authority for its rules,[126] the impact of its rules was to impose common-carrier-like requirements on broadband providers, which was inconsistent with the FCC's continuing classification of broadband as an information service.[127] Finally, therefore, in the 2015 Open Internet Order the FCC faced up to the inevitable and reclassified broadband service as a telecommunications service subject to common carrier requirements (though the FCC exempted broadband from many common carrier requirements such as network unbundling or price regulation).[128] This in turn created the legal justification for imposing net neutrality rules on broadband.[129]

The primary issues on appeal in the D.C. Circuit concerned the permissibility under administrative law principles of the FCC's decisions to reclassify broadband as a telecommunications service, to exempt broadband from many common carrier requirements, and finally, to adopt the net neutrality rules themselves.[130] Ultimately, a majority of the court (Judges Tatel and Srinivasan) voted to uphold the FCC Order, while Judge Williams dissented.[131] Tucked away at the end of the majority opinion, however, is a section addressing an interesting First Amendment challenge to the net neutrality rules brought by two broadband providers (Judge Williams did not address this issue).[132] The providers argued that net neutrality violated broadband providers' First Amendment right of editorial control "by forcing broadband providers to transmit speech with which they might disagree."[133] The majority rejected this position, essentially on the grounds that common carriers have always been subject to nondiscrimination rules, which have never been thought to raise First Amendment issues because those rules "affect a common carrier's neutral

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[124] Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).
[125] Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).
[126] *Id.*
[127] *See id.* at 650–59.
[128] *U.S. Telecom Ass'n*, 825 F.3d at 695–96.
[129] *Id.*
[130] *Id.* at 689.
[131] *Id.*
[132] *Id.* at 740–44.
[133] *Id.* at 740.

transmission of *others'* speech, not a carrier's communication of its own message."[134]

This simple analysis, however, was not really complete, as the majority acknowledged.[135] The First Amendment has long been interpreted to protect not only a speaker's choice of his or her own message, but also under certain circumstances the speaker's editorial discretion to select what speech produced by others the editor wishes to convey.[136] Thus in *Miami Herald Publishing Co. v. Tornillo*,[137] the Court struck down a statute that required newspapers to publish a response by political candidates who had been attacked in the newspaper, holding that the statute burdened the newspapers' editorial discretion.[138] More on point, in the two *Turner Broadcasting System v. FCC* decisions, the Court acknowledged that "must-carry" obligations imposed by Congress on cable operators (and administered by the FCC) burdened cable operators' First Amendment editorial rights.[139] The "must-carry" rules were adopted for reasons very similar to the justification for net neutrality: to address concerns that cable operators would abuse their bottleneck control over consumer access to video programming to disadvantage a class of video programmers, over-the-air television broadcasters, who directly competed with cable operators.[140] In response, Congress adopted legislation requiring most cable operators to dedicate up to one-third of their channel capacity to carry, free of charge, the signals of local television broadcast stations.[141] Cable operators and programmers challenged the legislation as violating the First Amendment, and in response the Court acknowledged that the legislation burdened the editorial rights of cable operators by reducing the number of channels whose content they controlled (it also found that the rules burdened the speech rights of nonbroadcast cable programmers by reducing the number of channels available to them).[142] Ultimately, the Court rejected the challenge because it concluded that the must-carry rules were content neutral,[143] and survived

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[134] *U.S. Telecom Ass'n*, 825 F.3d at 740.

[135] *See id.* at 743.

[136] *Id.* at 742.

[137] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[138] *Id.*

[139] Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 214 (1997); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 662, 636–37 (1994).

[140] *Turner I*, 512 U.S. at 646.

[141] *Id.* at 630–32.

[142] *Id.* at 644–45. The legislation, and litigation, occurred during the era of analog cable television, when channel capacity was relatively limited. The move to digital cable has largely eliminated such limits.

[143] *Id.* at 652.

intermediate scrutiny.[144] Importantly, however, because the Court acknowledged that must-carry regulations implicated the First Amendment, it reached its ultimate conclusion only after an extensive factual inquiry into the merits of the legislation,[145] and over the votes of four dissenting Justices who believed the rules did *not* satisfy even intermediate scrutiny.[146]

The tension between the *Turner* decisions and the majority's First Amendment analysis in the D.C. Circuit's net neutrality litigation should be clear. Both litigations raised claims of First Amendment editorial rights by owners of a new telecommunications technology used primarily to transmit content provided by others.[147] In the *Turner* cases, the Supreme Court acknowledged the existence of such rights, and so subjected the challenged regulation to close scrutiny.[148] In *United States Telecom Ass'n*, the net neutrality case, the D.C. Circuit majority denied that any editorial rights were implicated, and so engaged in essentially no First Amendment scrutiny.[149] Its primary justification for this, that broadband service (unlike cable television or newspapers) is a common carrier service,[150] is entirely circular because remember, the very issue in the case was whether the First Amendment permitted broadband service to be reclassified as a common carrier service (which it had not been for most of its existence in the case of DSL, and all of its existence in the case of cable modem service). Surely the *Turner* dispute could not have been avoided if Congress or the FCC had announced, by *ipse dixit*, that cable operators were now common carriers.

A more promising argument made by the D.C. Circuit majority was that broadband was distinguishable from cable (and newspapers) because it does not face the same sorts of capacity constraints and so providers are not *forced* to exercise editorial discretion.[151] That is true enough, but also I think, inadequate. Certainly one reason why a speaker may exercise editorial discretion is to decide what content should occupy limited space; but another entirely separate reason is that the speaker may not wish to be associated with, or otherwise aid, particular speech. The former consideration is tied to capacity constraints, but the latter is not. The government presumably cannot force me to put up a political sign of its choice in my lawn, or for that matter a political banner on my website, even if I cannot prove that the requirement has displaced other speech of my choice. Similarly, is it truly impossible to imagine a broadband

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144 *Turner II*, 520 U.S. at 224–25.

145 *Id.* at 189–223.

146 *Id.* at 229–58 (O'Connor, J., dissenting).

147 *Turner II*, 520 U.S. at 185; *Turner I*, 512 U.S. at 626–27.

148 *See Turner II*, 520 U.S. at 189.

149 U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 743–44 (D.C. Cir. 2016).

150 *Id.* at 742–43.

151 *Id.* at 743.

provider who generally allows access to all websites, but chooses to block access to white supremacist, or Jihadist sites?

Note that these examples also demonstrate that the majority's related argument, that broadband operators historically have not chosen to limit customers' access to websites,[152] also fails because it ignores the possibility that a conduit provider may generally be agnostic about the speech it carries, but still object to a few ideological exceptions. More fundamentally, this argument ignores the fact that what the plaintiffs in the net neutrality litigation were *seeking* was the right and ability to block or disadvantage Internet traffic of their choice (or conversely, to favor specific traffic of their choice).

Finally, the majority argued that no editorial rights were at stake here because outsiders would not normally impute traffic carried by a broadband provider to the provider, and so the providers are not truly "speaking" when they carry traffic.[153] Again, this argument is facially attractive, but ultimately cannot carry the day. For one thing, this assertion, while true enough, utterly fails to distinguish *Turner*, since it seems highly dubious that viewers attribute the content of the cable programming they view to their cable operator. Surely Comcast does not want to be seen as endorsing CNN, Fox News, MSNBC, and the pornography it offers on demand! In addition, cases confirm that the First Amendment protects not only a right not to speak, but also a right not to advance or support speech with which one disagrees. Otherwise, cases such as *Knox v. Service Employees International Union*[154] and *United States v. United Foods, Inc.*,[155] holding that the First Amendment forbids at least some mandatory financial assessments used to fund speech, make no sense. It is very hard to believe that observers would have imputed to the nonunion employees in *Knox* the political speech of the public sector unions they were required to contribute to, given that they had refused to join those same unions.[156] Nonetheless, the Court still upheld those employees' right to insist that their contributions not be used for political speech or activities.[157] In doing so, it confirmed that the right at issue was the right to resist "compelled funding of the speech of other private speakers or groups,"[158] *not* the right to refuse to speak for oneself.

Ultimately, then, the First Amendment conundrum posed by net neutrality rules is unresolvable through the application of extant doctrine. Just as we have no existing tools to determine what uses of language constitute "speech," or who is a "speaker," we also have no way to determine who should be treated as an "editor" for First Amendment purposes. These kinds of judgments cannot be

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[152] *Id.*

[153] *Id.* at 743–44.

[154] Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2295–96 (2012).

[155] United States v. United Foods, Inc., 533 U.S. 405, 415–16 (2001).

[156] *See Knox*, 132 S. Ct. at 2286.

[157] *Id.* at 2295–96.

[158] *Id.* at 2288–89.

made based on some abstract notion of what the phrase "freedom of speech" means, because there is no reason to believe that the word speech has one single meaning, appropriate in all circumstances. Instead, we need a definition of "speech" for *First Amendment* purposes. In the next Part, I will argue that this conundrum is implicated by some *communicative* uses of language, in addition to the noncommunicative uses discussed above.

IV. COMMUNICATIVE "SPEECH" (?)

Even if the First Amendment might exclude some noncommunicative uses of language or (in the net neutrality context) forms of editorial discretion, this still does not undermine the Court's existing assumption that all communicative speech is at least presumptively protected by the Constitution. In this Part I will discuss some examples of expressive activity which, I will tentatively suggest, might despite the fact that they satisfy the *Spence* test nonetheless be unworthy of constitutional protection.

A. *Personal Data*

One of the most difficult issues facing legislators and regulators over the next few years concerns potential disclosure or sale of personal data regarding private individuals, collected as a consequence of those individuals' use of online services.[159] The range of such data is huge, encompassing purchasing histories at websites such as Amazon; the content of emails scanned by Google when using Gmail, or by Apple when using an Apple device; lists of friends and acquaintances gathered by social networks such as Facebook or Instagram; lists of professional connections gathered by networking sites such as LinkedIn; and video viewing histories gathered by companies such as YouTube and Netflix.[160] Being able to put together combinations of such data would permit possessors to know essentially every personal and professional detail of an individual's life. Leaving aside the serious Fourth Amendment concerns raised when the government seeks to access such data, there are also obvious and profound privacy concerns raised when companies gather, store, and sell such data.

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[159] *See* Brian Fung, *What To Expect Now that Internet Providers Can Collect and Sell Your Web Browser History*, WASH. POST (Mar. 29, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/03/29/what-to-expect-now-that-internet-providers-can-collect-and-sell-your-web-browser-history/?utm_term=.4fea01ac5af8 [https://perma.cc/2AXD-NWFK].

[160] *See* Maciej Zawadziński, *The Truth About Online Privacy: How Your Data Is Collected, Shared, and Sold*, CLEARCODE (Sept. 2015), http://clearcode.cc/2015/09/online-privacy-user-data/ [https://perma.cc/G2XN-L9HM]; *see also Data Policy*, FACEBOOK (Sept. 29, 2016), https://www.facebook.com/policy.php [https://perma.cc/FDD2-3DYP]; *Privacy Policy*, GOOGLE, https://www.google.com/policies/privacy/ [https://perma.cc/H6HS-AL8E] (last modified Oct. 2, 2017).

Should the government be able to restrict such activities, absent truly compelling reasons such as national security or the like?

Surprisingly, if one applies the Supreme Court's current First Amendment doctrine, the answer to that question appears to be "no." I, and others, have analyzed this issue in depth elsewhere,[161] and so I will briefly summarize here. While the Supreme Court has not definitively answered the question of whether the sale of data constitutes protected speech for First Amendment purposes, the one time it faced the issue it strongly hinted that it was.[162] The issue in the *Sorrell v. IMS Health* case was the constitutionality of a Vermont statute that forbade pharmacies from selling data regarding the prescribing habits of doctors if such information was to be used by pharmaceutical companies for marketing purposes.[163] The Court ultimately resolved the case (against Vermont) on narrow grounds, invoking the "commercial speech" doctrine.[164] The Court did, however, consider and reject an argument made by Vermont (and endorsed by the First Circuit in another case) that the sale of prescriber-identifying data was equivalent to the sale of a commodity such as "beef jerky," and so could be freely regulated.[165] The Court's response was that "the creation and dissemination of information are speech within the meaning of the First Amendment" because "[f]acts . . . are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[166] And nowhere in that response was there any hint that the Court attributed any relevance to the fact that the "facts" here were data about the habits of private individuals.[167]

The Court's analysis (probably dictum) in *Sorrell*, moreover, is consistent with recent doctrinal developments. The sale of data is a communicative activity, since data communicates facts. Nor is there any historically recognized "exception" to the First Amendment for personal data.[168] Therefore, under *Stevens* and *Brown*, the sale of personal data is fully protected speech. Second, regulations of data disclosure are necessarily content based, because they specify what types of data may not be disclosed. Therefore, under *Reed*, such

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[161] *E.g.*, Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60–61 (2014); Ashutosh Bhagwat, Sorrell v. IMS Health*: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 855–56 (2012); *cf.* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1151 (2005) (arguing that data privacy laws can be reconciled with the First Amendment).

[162] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011).

[163] *Id.* at 558–59.

[164] *Id.* at 571–72.

[165] *Id.* at 570 (citing IMS Health Inc. v. Ayotte, 550 F.3d 42, 52–53 (1st Cir. 2008)).

[166] *Id.* (citation omitted).

[167] *See id.*

[168] *See* Schauer, *supra* note 4, at 1774–77.

laws are subject to strict scrutiny. And as noted earlier, such scrutiny is almost always fatal in the First Amendment realm.[169]

But this cannot be correct. In the modern information economy, information, which is to say personal data, is perhaps the key commodity being traded by firms and individuals. For technology firms, the importance of data is obvious—data is central to the business model of many of the largest modern firms, including Google, Facebook, and increasingly, Amazon. For individuals it is no less significant. After all, I "pay" Google and Facebook for free service by exchanging my personal data for their services.[170] To conclude that the First Amendment forbids essentially all economic regulation of such transactions returns to the age of *Lochner* with a vengeance.[171] But that is where the Court appears to be leading us.

B. *Revenge Porn*

Revenge porn is a thoroughly vile recent development in which former boyfriends or husbands (the perpetrators are almost always male)[172] post onto the Internet nude or revealing images of their former partners, which had in most cases been voluntarily shared with them during the relationship.[173] Several operators of dedicated revenge porn websites have been successfully prosecuted, but generally on charges unrelated to the revenge porn itself.[174] In recent years, a number of states and foreign countries have adopted statutes specifically criminalizing revenge porn, and

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[169] *See supra* notes 51–60 and accompanying text.

[170] *See* Jathan Sadowski, *Companies Are Making Money from Our Personal Data—But at What Cost?*, GUARDIAN (Aug. 31, 2016), https://www.theguardian.com/technology/2016/aug/31/personal-data-corporate-use-google-amazon [https://perma.cc/U6YG-5L4P].

[171] *See supra* note 5 and accompanying text.

[172] *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 353 (2014).

[173] For a recent media description of the phenomenon, see Lucy Clarke-Billings, *Revenge Porn Laws in Europe, U.S. and Beyond*, NEWSWEEK (Sept. 16, 2016), http://www.newsweek.com/revenge-porn-laws-europe-us-and-beyond-499303 [https://perma.cc/9HRC-M6MV]. For a discussion of some of the legal issues raised by revenge porn, see Zak Franklin, Comment, *Justice for Revenge Porn Victims: Legal Theories To Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CAL. L. REV. 1303, 1313–16 (2014).

[174] *See, e.g.*, Steve Almasy, *'Revenge Porn' Operator Gets 18 Years in Prison*, CNN (Apr. 4, 2015), http://www.cnn.com/2015/04/03/us/califomia-revenge-porn-sentence/ [https://perma.cc/WLN4-BEHF]; Abby Ohlhelser, *Revenge Porn Purveyor Hunter Moore Is Sentenced to Prison*, WASH. POST (Dec. 3, 2015), https://www.washingtonpost.com/news/the-intersect/wp/2015/12/03/revenge-porn-purveyor-hunter-moore-is-sentenced-to-prison/ [https://perma.cc/NA8V-E4TE].

this legislative trend appears to be gathering force.[175] The interesting question for our purposes is whether, in the United States, the First Amendment permits such restrictions.[176]

As with data, the short and troubling answer is that current First Amendment doctrine almost certainly protects revenge porn. Andrew Koppelman has recently, and convincingly, laid out why this is so,[177] but the analysis is for us a familiar one. Revenge porn usually is not unprotected speech. It will rarely qualify as "obscenity" under the strict *Miller* standard,[178] and as Koppelman points out there is no other historically established exception that can plausibly be said to extend to revenge porn[179]—a result consistent with the Supreme Court's unfailing extension in recent years of full protection to nonobscene sexual speech.[180] So, *Stevens* and *Brown* again decree that revenge porn is fully protected speech. Finally, revenge porn statutes are inevitably content based, and indeed arguably viewpoint based, because they specify what sorts of images are banned.[181] So, once again, *Reed* decrees strict scrutiny. And while the governmental interest in protecting the privacy of revenge porn victims is certainly strong, history suggests that this will not be enough to permit suppression of revenge porn. In particular, in two cases in the 1970s and 1980s, the Court was faced with challenges to statutes banning the publication of the names of victims of sexual assault (the victims or their families had relied on these statutes to bring civil damages actions against media outlets).[182] In both cases, the media won before the Supreme Court, largely because the media defendants in both cases had obtained the information legally.[183] The difficulty, of course, is that in a typical revenge porn scenario the images at issue were voluntarily shared, and so obtained legally. Admittedly, in the more recent of these cases the Court did rely in part on the notion that the information

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[175] Clarke-Billings, *supra* note 173; Koppelman, *supra* note 20, at 661–62, 661 n.2.

[176] The First Amendment is not the only legal barrier to revenge porn prosecutions; at least with respect to operators of such websites, federal laws immunizing website owners from liability for materials posted by third parties are another issue. *See* Franklin, *supra* note 173, at 1305.

[177] Koppelman, *supra* note 20, at 662.

[178] *See* Miller v. California, 413 U.S. 15, 24 (1973).

[179] Koppelman, *supra* note 20, at 666–67.

[180] *See supra* notes 20–31 and accompanying text.

[181] Koppelman, *supra* note 20, at 666–67.

[182] Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471–74 (1975).

[183] *Fla. Star*, 491 U.S. at 533–34; *Cox Broad. Corp.*, 420 U.S. at 494–95; *see also* Bartnicki v. Vopper, 532 U.S. 514, 525 (2001) (emphasizing that media gained possession of private materials legally in rejecting civil lawsuit even though the speech at issue was a product of an illegal wiretap).

conveyed was "a matter of public significance";[184] but as Koppelman points out, this principle has never been applied by the Court to uphold content-based, much less viewpoint-based laws, as revenge porn statutes arguably are.[185] Moreover, in recent years the Court has, if anything, moved away from the notion that the First Amendment gives special protection to speech with high social value.[186] Precedent therefore suggests that, as in most cases, bans on revenge porn are unlikely to be able to survive strict scrutiny.

C. *Products Liability*

Another example of speech which is communicative but which nonetheless we do not treat as "speech" for First Amendment purposes can be found in the area of products liability. Many products liability claims such as, for example, claims against makers of defective brakes, of course raise no First Amendment concerns. But some products liability and negligence claims, even outside the sphere of malpractice (which I discuss next), are in fact based on words. Fred Schauer gives the example of "whether a chainsaw manufacturer may be held liable in a products liability action for injuries caused by mistakes in the written instructions accompanying the tool."[187] Robert Post mentions inaccurate navigation charts, and cites cases treating such charts as "products" rather than speech, even though they are clearly communicative.[188] And of course tort liability for failure to warn, especially in the context of prescription drugs, is very common.[189] All these examples involve imposing liability for the content of speech (or failure to speak), and so seemingly implicate the First Amendment. And yet no one seems to take seriously even the possibility of a First Amendment defense in such cases.[190] Why?

Current doctrine cannot answer that question. Certainly the "commercial speech" doctrine is no help here, for two distinct reasons. First, navigational charts are not commercial speech, they are a communicative product that is sold in the market, just like the *New York Times*. And even faulty instructions do not seem to be commercial speech, since they not qualify as "speech which does 'no

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[184] *Fla. Star*, 491 U.S. at 533 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

[185] Koppelman, *supra* note 20, at 670–72.

[186] United States v. Stevens, 559 U.S. 460, 479–80 (2010) ("[T]he protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception . . . ."); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 570–71 (2011) (extending First Amendment protection to prescriber-identifying data, despite lack of any suggestion that such information addresses matters of public significance).

[187] Schauer, *supra* note 4, at 1770.

[188] Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1254 & nn.20–21 (1995).

[189] *E.g.*, Wyeth v. Levine, 555 U.S. 555, 574–75 (2009).

[190] Schauer, *supra* note 4, at 1765.

more than propose a commercial transaction.'"[191] Second, under modern law, commercial speech is not entirely outside the First Amendment; to the contrary, it receives quite extensive constitutional protection.[192] So, the commercial speech doctrine cannot explain why the First Amendment "does not even show up" in these products liability cases.[193]

Second, the fact that the speech that provides the basis for liability in these cases is arguably false or misleading is also not sufficient to explain these cases. In a recent decision in the *Stevens/Brown* line, the Court has made clear that outside the context of commercial speech regulation, false or misleading speech does *not* stand wholly outside the First Amendment, because there is no historical tradition of treating *all* false speech as categorically unprotected.[194] As with the professional speech cases discussed next, perhaps such liability can ultimately be justified, especially because the exact level of protection for false and misleading speech remains uncertain; but current doctrine cannot explain why *no* First Amendment analysis is required, as most people (and courts) seem to assume.

D. *Professional Speech*

Finally, consider professional speech. The practice of many professions, including medicine, law, and psychiatric counseling, consists to a large degree of professionals providing clients with expert advice through speech, either oral or written. And for as long as these professions have been subject to regulation, professionals have been disciplined by regulators for incompetence or negligence in providing such professional advice.[195] Furthermore, professionals have also been subject to malpractice liability to their clients for most of our history.[196] Such regulation of the professions had never, until recently, been thought to raise any significant First Amendment issues. As recently as 1992, the Supreme Court, in an important abortion decision, brusquely dismissed a First Amendment challenge to regulation of physicians' speech because the speech at issue was a "part of the practice of medicine, subject to reasonable

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[191] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 US. 376, 385 (1973)).

[192] *See, e.g.*, *Sorrell*, 564 U.S. at 566–67; Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553–54 (2001).

[193] Schauer, *supra* note 4, at 1765.

[194] United States v. Alvarez, 132 S. Ct. 2537, 2544–47 (2012) (plurality opinion); *id.* at 2551–53 (Breyer, J., concurring in the judgment).

[195] *See, e.g.*, Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 479 (2001) (noting that lawyers were subject to discipline even prior to the American Revolution).

[196] *See, e.g.*, *id.* at 483 (tracing tort of legal malpractice to 1796).

licensing and regulation by the State."[197] And numerous cases hold that the First Amendment does not bar licensing requirements for professionals who speak as part of their profession.[198] Recently, however, professional speech regulation has generated substantial controversy.

The largest set of disputes regarding professional speech have involved so-called "conversion therapy."[199] Conversion therapy is a form of counseling, including "aversive and non-aversive treatments," designed to "change an individual's orientation from homosexual to heterosexual."[200] It has been widely condemned in recent years, and remains highly controversial.[201] In 2012, California adopted legislation prohibiting licensed mental health professionals from providing conversion therapy to minors, and defining the provision of such therapy as unprofessional conduct.[202] Two different sets of providers challenged the legislation, leading to diverging results in the district courts.[203] The Ninth Circuit ultimately upheld the California statute, concluding that because it regulated the provision of professional treatment, the statute was actually a regulation of conduct, not speech.[204] This conclusion, however, drew a vociferous dissent when the court denied rehearing en banc, on the grounds that speech by professionals, though perhaps entitled to less protection than political speech, should not and cannot (consistent with Supreme Court precedent) be placed entirely beyond the protection of the First Amendment.[205]

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[197] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (O'Connor, Kennedy, and Souter, JJ., concurring).

[198] *See, e.g.*, Moore-King v. Cty. of Chesterfield, 708 F.3d 560, 570 (4th Cir. 2013) (fortune telling); Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054–55 (9th Cir. 2000) (psychoanalysis). *But see* Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014) (striking down a licensing requirement for tour guides in Washington, D.C., without considering the "professional speech" aspect of the case).

[199] *E.g.*, King v. Governor of N.J., 767 F.3d 216, 220 (3d Cir. 2014) (upholding ban prohibiting licensed therapists from engaging in conversion therapy to try and convert homosexual teenagers); Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014) (upholding similar ban on conversion therapy).

[200] *Pickup*, 740 F.3d at 1222.

[201] *See generally The Lies and Dangers of Efforts To Change Sexual Orientation or Gender Identity*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy [https://perma.cc/X7YV-ZJKW] (setting out objections to conversion therapy).

[202] CAL. BUS. & PROF. CODE § 865.1–.2 (West Supp. 2017).

[203] *Pickup*, 740 F.3d at 1221–22.

[204] *Id.* at 1229.

[205] *Id.* at 1218–21 (O'Scannlain, J., dissenting) (dissenting from the denial of rehearing en banc).

There seems little doubt that as a doctrinal matter, the dissent has the better of the argument. Providing professional advice *is* literally speech as it is undoubtedly a communicative use of language, even if in a professional context. And there is no existing category of unprotected speech that seems relevant to the dispute. As such, it is hard to say, consistent with *Stevens* and *Brown*, how the majority justified granting conversion therapy no First Amendment protection at all. Indeed, when faced with a constitutional challenge to a New Jersey statute banning conversion therapy, this is precisely what the Third Circuit said when it flatly rejected the Ninth Circuit's conclusion that conversion therapy bans do not implicate free speech at all.[206] Ultimately, however, the Third Circuit upheld the conversion therapy ban, concluding that professional speech should receive less protection than fully protected political speech, and that the New Jersey statute survived intermediate scrutiny.[207]

Regulation of professional speech is the topic of another, even more high-profile recent litigation, regarding Florida's infamous "Docs vs. Glocks" legislation.[208] This law prohibits health care professionals from keeping records concerning their patients' gun ownership, and more broadly prevents them from even inquiring regarding gun ownership by patients or their families absent special circumstances.[209] A group of physicians sued, challenging the constitutionality of the statute on various grounds, including a free speech claim.[210] The plaintiffs succeeded in their First Amendment claim in the district court.[211] Then came utter chaos. In a series of decisions, a panel of the Eleventh Circuit originally reversed, repeatedly. In its first opinion, the court (by a two-to-one vote) held that the law was permissible because it merely regulated professional conduct.[212] Then on rehearing, the

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[206] King v. Governor of N.J., 767 F.3d 216, 224–29 (3d Cir. 2014).

[207] *Id.* at 229–39.

[208] Dahlia Lithwick & Sonja West, *The Absurd Logic Behind Florida's Docs vs. Glocks Law*, SLATE (Jan. 8, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/01/florida_s_docs_vs_glocks_bans_doctors_from_discussing_guns.html [https://perma.cc/2Q3L-9EQM].

[209] *Id.*

[210] Wollschlaeger v. Governor of Fla. (*Wollschlaeger III*), 814 F.3d 1159, 1167 (11th Cir. 2015), *vacated and reh'g en banc granted*, 649 F. App'x 647 (11th Cir. 2016) (mem.), *aff'd in part, rev'd in part*, 848 F.3d 1293 (11th Cir. 2017) (en banc).

[211] *Id.* at 1170–71.

[212] Wollschlaeger v. Governor of Fla. (*Wollschlaeger I*), 760 F.3d 1195, 1203 (11th Cir. 2014), *vacated and superseded on reh'g by* 797 F.3d 859 (11th Cir. 2015), *vacated and superseded on reh'g by* 814 F.3d 1159 (11th Cir. 2015), *vacated and reh'g en banc granted*, 649 F. App'x 647 (11th Cir. 2016) (mem), *aff'd in part, rev'd in part*, 848 F.3d 1293 (11th Cir. 2017) (en banc); Mark Joseph Stern, *The Bloodshed State*, SLATE (July 28, 2014), http://www.slate.com/articles/health_and_science/medical_examiner/2014/07/docs_vs_glocks_upheld_florida_pediatricians_forbidden_from_asking_patients.html [https://perma.cc/KRG9-LDRN].

same panel (by the same vote) applied intermediate scrutiny, concluding that this was the appropriate standard for professional speech regulations, but again upheld the law.[213] Finally, the same panel, again by the same vote, sua sponte reconsidered and revised the second opinion.[214] In the third and final panel opinion, the majority applied strict scrutiny to the Florida law.[215] Astonishingly, however, the panel concluded that the statute survived strict scrutiny because of the State's compelling interest in protecting the rights of gun owners, and so upheld the ban.[216] The Eleventh Circuit then granted en banc review and vacated the panel opinions.[217] Finally, on February 16, 2017, the en banc Eleventh Circuit held that the Florida legislation did violate the First Amendment.[218] But again, the procedural confusion did not end. First, the en banc court produced not one, but two majority opinions (the primary opinion applying substantive First Amendment analysis, the second the void-for-vagueness doctrine).[219] Further, the first (and primary) majority en banc opinion was studiously ambiguous about what level of scrutiny it was applying.[220] It described the challenged provisions as "speaker-focused and content-based restrictions," seemingly forecasting strict scrutiny analysis.[221] But then the court fudged, stating that it need not decide if strict scrutiny applies, because the Florida law's provisions "fail even under heightened scrutiny as articulated in *Sorrell* [*v. IMS Health Inc.*] . . . ."[222] This is a little peculiar because *Sorrell* was decided under the commercial speech doctrine, and if there is one thing that is clear, it is that Florida was not regulating commercial speech. But, since most people understand the commercial speech doctrine to be a species of intermediate scrutiny, presumably the majority was assuming (without deciding) that that was the appropriate standard of review for professional speech regulations. Even this assumption invoked a separate concurrence by two judges arguing that strict scrutiny should apply,[223] and a dissenting opinion defending

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[213] *See* Wollschlaeger v. Governor of Fla. (*Wollschlaeger II*), 797 F.3d 859, 885–86, 894 (11th Cir.), *vacated and superseded on reh'g by* 814 F.3d 1159 (11th Cir. 2015), *vacated and reh'g en banc granted*, 649 F. App'x 647 (11th Cir. 2016) (mem), *aff'd in part, rev'd in part*, 848 F.3d 1293 (11th Cir. 2017) (en banc); Lithwick & West, *supra* note 208.

[214] *Wollschlaeger III*, 814 F.3d at 1186.

[215] *Id.*

[216] *Id.* at 1192–201.

[217] Wollschlaeger v. Governor of Fla., 649 Fed. App'x 647, 647 (11th Cir. 2016).

[218] Wollschlaeger v. Governor of Fla. (*Wollschlaeger IV*), 848 F.3d 1293, 1301 (11th Cir. 2017) (en banc).

[219] *Id.* at 1300–23.

[220] *Id.*

[221] *Id.* at 1307.

[222] *Id.* at 1308 (citing Sorrell v. IMS Health Inc., 564 U.S. 552, 569–70 (2011)).

[223] *Id.* at 1323–25 (Wilson, J., concurring).

intermediate scrutiny, but finding it satisfied (and along the way sharply criticizing the Supreme Court's *Reed* decision).[224]

If there is one thing that the Florida litigation makes crystal clear, it is the extraordinary uncertainty and confusion surrounding the constitutional status of professional speech. Three sequential opinions by the same panel, each applying a different standard of review, is unheard of but nicely illustrates the confusion evinced by the two conversion therapy cases. Equally telling is the final Eleventh Circuit panel's decision to apply strict scrutiny in a case where the law was ultimately upheld—a decision that appears to have been driven at least in part by concerns about the scope of *Reed*.[225] And this despite the fact that the Eleventh Circuit panel recognized the long and uncontroversial history of the regulation of professions.[226] Then came the final, en banc opinion, in which the majority refused or could not agree on a clear standard of review, and the dissent confessed to seeking direct strategies to "narrow *Reed*'s scope" in order to avoid strict scrutiny.[227] In few areas is the expansionary force of the Court's recent decisions more evident than with regard to professional speech.[228]

V. WHEN SPEECH IS "SPEECH"

As noted earlier, the underlying assumption of the Court's modern free expression doctrine, including the *Spence* "test" defining expressive conduct,[229] is that all uses of language constitute protected speech.[230] The examples discussed in the previous two Parts demonstrate, however, that this assumption cannot be correct. To the contrary, the inescapable conclusion they point to is that the word "speech" as used in the First Amendment does not match the colloquial meaning of that word. This Part of the Article begins the task of defining the word "speech" for First Amendment purposes in a way that can be tied to the history and text of the First Amendment.

To frame the issue, we can begin by considering the problem of noncommunicative speech, including solitary prayer, intrapersonal communication, and private diaries. Are such uses of language within the coverage of the First Amendment? Recall that in the realm of conduct, the Court has said that conduct is expressive, and so falls within the scope of the First Amendment, only if "[a]n intent to convey a particularized message was present,

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[224] *Wollschlaeger IV*, 848 F.3d at 1330–38 (Tjoflat, J., dissenting).

[225] *Wollschlaeger v. Governor of Fla.*, 814 F.3d 1159, 1192 (11th Cir. 2015), *vacated and reh'g en banc granted*, 649 F. App'x 647 (11th Cir. 2016) (mem), *aff'd in part, rev'd in part*, 848 F.3d 1293 (11th Cir. 2017) (en banc).

[226] *Id.* at 1190–92.

[227] *Wollschlaeger IV*, 848 F.3d at 1333–34 (Tjoflat, J., dissenting).

[228] *See supra* note 18 and accompanying text.

[229] Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[230] *See supra* notes 22–66 and accompanying text.

and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[231] This test necessarily limits First Amendment coverage to communicative conduct, because most people would agree that regulations of noncommunicative conduct raise no First Amendment issues.[232] But should that same restriction be carried over to regulations of language? As noted above, this question cannot be answered based on an abstract definition of the word "speech." If it can be answered, it must be through attention to the specific context in which the word appears in the First Amendment.

Attention to context must begin by noting the constitutional text, and in particular the fact that the Free Speech Clause does not appear in isolation. The First Amendment, in whole, reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[233]

The Free Speech Clause is thus combined with a number of other provisions: the Establishment Clause, the Free Exercise Clause, the Press Clause, the Assembly Clause, and the Petition Clause.[234] We will set aside the Religion Clauses (Establishment and Free Exercise) because, as I have explained in greater detail elsewhere, their drafting history demonstrates that the framing generation considered them to be quite distinct from the other, what I call democratic rights of the First Amendment.[235] Indeed, the Religion Clauses were not combined with the rest of the First Amendment until September 9, 1789, very late in the drafting process, when the Senate did so without explanation.[236] The other rights, however, have always been associated with each other.[237] Speech and press are part of the same provision, and right next to the provision protecting assembly and petition, both in George Mason's master draft of the Bill of Rights (where protections for religion notably were not juxtaposed with the democratic rights),[238] and in James Madison's original

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[231] *Spence*, 418 U.S. at 410–11.

[232] *Contra* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 992–94, 1009–12 (1978) (arguing that the First Amendment should protect conduct that advances First Amendment values).

[233] U.S. CONST. amend. I.

[234] *Id.*

[235] *See* Ashutosh Bhagwat, *Religious Associations:* Hosanna-Tabor *and the Instrumental Value of Religious Groups*, 92 WASH. U. L. REV. 73, 92–93 (2014).

[236] THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 5–6 (Neil H. Cogan ed., 2d ed. 2015).

[237] *See id.* at 148.

[238] *George Mason's Master Draft of the Bill of Rights*, CONST. SOC'Y, ¶¶ 15, 16, 20 (Sept. 17, 1999) [hereinafter *Mason's Master Draft*], http://www.constitution.org/gmason/

proposed Bill of Rights to Congress.[239] The democratic rights were combined into one provision quite early in the drafting process, in late July at the latest,[240] and were therefore considered together throughout most of the debates. More recently, the Supreme Court has described these rights as "cognate" rights, with common origins and common purposes.[241] Given this history, any interpretation of the word "speech" in the First Amendment must take into account this connection to other democratic rights of the First Amendment.

When one looks at these other rights—freedom of the press, assembly, and petition—what leaps out is their similarities. All are joint activities requiring multiple actors, all have some expressive element to them, and most importantly, all are fundamentally political in the sense that they are closely tied to democratic citizenship. Even the least "expressive" of the democratic rights, assembly, is clearly a political one, as demonstrated by the fact that the original wording of this right in both Mason's and Madison's proposals was a right of the people "peaceably to assemble together to consult for their common good."[242] That the Press, Assembly, and Petition Clauses serve fundamentally democratic and political functions is a proposition I have defended extensively elsewhere,[243] and I will not reiterate the arguments here except to note that the background, text, and drafting history leave no serious doubts on this score. That these rights are collective in nature is equally obvious. The printing press is a tool to communicate views to others. Assembly is necessarily collective since one person standing alone is obviously not an assembly. Petitions are written requests directed to others (government officials), and historically often written and presented in collaboration with others (fellow citizens).[244]

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amd_gmas.htm [https://perma.cc/6LNA-RZ3M]. *Mason's Master Draft* provided the template for many of the state ratifying conventions' recommendations for amendments, and also clearly was Madison's starting point when he proposed amendments to Congress that eventually became the Bill of Rights.

[239] *Amendments Offered in Congress by James Madison June 8, 1789*, CONST. SOC'Y, ¶¶ 7–8 [hereinafter *Amendments Offered by Madison*], http://www.constitution.org/bor/amd_jmad.htm [https://perma.cc/ZU7B-J9L7].

[240] *See* THE COMPLETE BILL OF RIGHTS, *supra* note 236, at 148.

[241] *See* Thomas v. Collins, 323 U.S. 516, 530 (1945); De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

[242] *Mason's Master Draft*, *supra* note 238, at ¶ 15; *Amendments Offered by Madison*, *supra* note 239, at ¶ 8. Madison's precise language reads the "people shall not be restrained from peaceably assembling and consulting for their common good," *id.*, but the semantic difference from Mason obviously has no substantive significance.

[243] Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1099–100 (2016).

[244] RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE 86, 88 (2012).

The inference from all of this seems inescapable: like its "cognates," speech *as protected by the First Amendment* is at heart a right to engage in joint political or democratic activity. Whatever the abstract meaning of the word speech, "speech" in the First Amendment is a right to communicate to others in one's capacity as a democratic citizen. The speaker may have formulated the ideas she wishes to convey alone—though in truth, that is rarely going to be the case since most effective political participation is group based—but the core function of speech is to spread political ideas, and to organize political movements. It should be noted, however, that the word "political" should not be defined narrowly, as Robert Bork sought to,[245] to encompass only speech directly related to elections or public policy issues. Scientific knowledge, cultural sharing and development, and more broadly the shaping of values are surely highly relevant to citizenship, especially if citizenship is defined more broadly than merely voting as the full text of the First Amendment suggests it must be.[246] More to the point, permitting the state to control the knowledge, culture, and values of its citizens is entirely inconsistent with the principle of popular sovereignty that underlies the American vision of democratic citizenship, and indeed the entire American political system. A further implication of this insight is that speech need not be "public" in the sense of directed at large audiences to fall within the class of speech relevant to citizenship. After all, citizens develop and share their political and cultural values at least as much through private conversations as through public discourse.[247] This is not the place to fully explore these questions, and elucidate the complete range of speech protected under this approach to free speech,[248] aside from recognizing that the coverage of the Free Speech Clause is capacious.

But it is not unlimited. Even under this broad view, some forms of speech and some uses of language clearly are not "speech" under the definition set forth above. Most obviously, noncommunicative uses of language are not "speech." It is not that these uses of language do not have value, either to individuals or to society—of course they do. Activities like solitary prayer, keeping a diary, and even speaking to oneself have obvious significance to human beings. They can also help shape the values of those engaging in such activities. But they are not the sorts of joint, democratic activities that constitute constitutional "speech."[249]

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

[246] For a fuller exposition of this proposition, see Bhagwat, *supra* note 243, at 1119–23.

[247] The Supreme Court has, in the context of speech by government employees, recognized that private conversations can constitute speech relevant to democratic self-governance. Rankin v. McPherson, 483 U.S. 378, 386 n.11 (1987); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414–16 (1979).

[248] I plan to explore these questions in book-length form soon.

[249] One caveat is necessary here. Sometimes, diaries or other kinds of memoranda are not intended for any audience, but might still be part of an author's preparations in creating a communication such as an article or paper which *is* intended as a contribution to public

These activities are by definition not communicative at all, and so they do not contribute to democratic or cultural discussion or debate in even the broadest sense. In particular, the fact that noncommunicative language expresses and shapes values does not meaningfully distinguish it from many forms of clearly nonexpressive conduct, from running a marathon to participating in a quilting bee. These activities are important, and therefore sometimes protected by *other* constitutional provisions such as the Free Exercise Clause[250] or the Fourth Amendment,[251] but they are not protected by the Free Speech Clause.

I recognize that this conclusion stands in sharp contrast to the position taken by others. Seana Shiffrin, for example, has explicitly argued that the First Amendment protects "diaries and other forms of discourse meant primarily for self-consumption," and indeed describes this position as "highly intuitive."[252] She uses this starting assumption as part of the basis for her rejection of democratic theories of free speech,[253] and her adoption of a "thinker-based" approach instead under which the primary purpose of the Speech Clause is to advance an "individual agent's interest in the protection of the free development and operation of her mind."[254] Shiffrin's approach may well be a strong philosophical defense and basis for protecting free speech in the abstract, which is what I take her argument to be. But for the reasons stated above, I do not think it is an adequate basis to define constitutional "speech."

Neil Richards's concept of "intellectual privacy" is similar to Shiffrin's speaker-based approach.[255] He defines intellectual privacy as "the ability, whether protected by law or social circumstances, to develop ideas and beliefs away from the unwanted gaze or interference of others,"[256] and while he does not address noncommunicative language specifically, he does conclude that "[t]he First Amendment should protect cognitive activities even if they are wholly private and unshared because of the importance of individual conscience and autonomy."[257] Noncommunicative uses of language seem to fit comfortably

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discourse. In that situation, while the diaries or notes are not themselves "speech" for First Amendment purposes, they may nonetheless be entitled to some level of penumbral protection as activities necessary for the production of speech. Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1055–57 (2015); *see also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 46 (1989).

[250] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

[251] U.S. CONST. amend. IV ("The right of the people to be secure in their . . . papers . . . against unreasonable searches and seizures, shall not be violated . . . .").

[252] Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 285 & n.4 (2011).

[253] *Id.* at 285–86, 285 n.6.

[254] *Id.* at 287.

[255] *See generally* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008).

[256] *Id.* at 389.

[257] *Id.* at 404.

within that protection. Furthermore, Richards argues that his approach is consistent with democracy-based approaches to free speech because such theories assume the existence of "autonomous individuals."[258] Again, however, I disagree.

Richards is of course correct that cognition is a necessary precursor to speech.[259] And he is also correct that a democracy built on popular sovereignty requires citizens who are autonomous individuals.[260] But the First Amendment has never been understood to protect either all precursors to speech,[261] or all forms of autonomy that matter to citizens.[262] Thus information acquisition is often an essential precursor to speech, but the First Amendment has not generally been thought to protect such activity.[263] What the First Amendment protects are specific, collective activities that are tied to, and indeed form the essence of, democratic citizenship, and the Free Speech Clause focuses on the communicative aspects of such activities. This is not to say that a theory could not be constructed under which thinking and cognition receive protection as "penumbral" First Amendment rights because of their relationship to core First Amendment activities;[264] but they are no more "speech" than buying a computer or shooting a gun,[265] because they are themselves neither collective, nor communicative.

VI. IMPLICATIONS: NONCOMMUNICATIVE SPEECH

In the previous Part, I made arguments regarding what the Free Speech Clause does protect—collective, communicative activities relevant to

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[258] *Id.* at 405.

[259] *Id.*; *see also* GREENAWALT, *supra* note 249, at 46 (making a similar argument regarding cognition and speech).

[260] Richards, *supra* note 255, at 405.

[261] *E.g.*, Bambauer, *supra* note 161, at 70–71, 77–79 (arguing that data collection is a precursor to speech, but is not protected by the First Amendment).

[262] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[263] *E.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (holding that the First Amendment protects the communication of information, not access to that information); Pell v. Procunier, 417 U.S. 817, 833–34 (1974) (holding that the press does not have a right to special access to information unavailable to the public); *cf. supra* note 249 and accompanying text (arguing that noncommunicative private speech lacks democratic qualities that characterize constitutional "speech").

[264] *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

[265] Though as an essential tool for creating mass communications, using a computer might find protection in the Press Clause. *See* Bhagwat, *supra* note 249, at 1056–57. And, of course, shooting a gun will sometimes be protected by the Second Amendment. District of Columbia v. Heller, 554 U.S. 570, 601–02 (2008) (interpreting the Second Amendment to protect an individual right to possess firearms for the purpose of self-defense).

democratic citizenship—and at least one example of what it does not, which is noncommunicative language. Of course, many difficult questions of coverage remain, including questions raised by the *Bronx Household of Faith* cases and by net neutrality policies. It is to these questions that we now turn.

A. *Worship Services*

Let us begin with the *Bronx Household of Faith* problem. Recall that in that case, the Second Circuit upheld a public school district's rule prohibiting the use of school property after hours for "religious worship services"[266] because the court concluded that the exclusion of a worship *service* merely prohibited a type of activity, and did not exclude worship itself or religious viewpoints.[267] Is this result supported by the above analysis? I think not. As a starting point, the Second Circuit's explicit suggestion—that while the school district can exclude worship services, it cannot exclude "[p]rayer . . . done by a person" acting alone—has things exactly upside down.[268] A worship service is a collective activity, and so at least potentially "speech" if it is also expressive and relevant to democratic citizenship. Private prayer is not, and so presumably is not "speech." But do worship services involve communication, and are they relevant to citizenship?

Taking the second question first, the answer must be that of course worship services are relevant to citizenship. As discussed above, at a minimum democratic citizenship encompasses the collective expression and development of values and beliefs. Religious worship is a central aspect of such expression and development for many citizens, and so surely is tied closely enough to democratic self-governance to fall within the coverage of the Speech Clause. The first question, however, is closer. Not all worship services are centered on communication—Quaker services, for example, are mainly silent.[269] Similarly, prior to Vatican II, Catholic services were conducted primarily in Latin,[270] a language that almost no parishioners would have understood for centuries. On the other hand, most modern worship services are centrally about communication among attendees, including presiding ministers, and sometimes with the wider world—though they of course involve some noncommunicative elements as well. Ultimately, given the close relationship between worship and communication in most circumstances, it seems inescapable that excluding

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[266] *Bronx Household IV*, 650 F.3d 30, 36 (2d Cir. 2011).

[267] *Id.* at 36–37.

[268] *Id.* at 36.

[269] MICHAEL L. BIRKEL, SILENCE AND WITNESS: THE QUAKER TRADITION 40 (2004); *see also* Marsha D. Holliday, *Silent Worship and Quaker Values*, FGC (June 11, 2012), https://www.fgcquaker.org/resources/silent-worship-and-quaker-values [https://perma.cc/ZLB5-PWLX].

[270] John Pope, *Vatican II Changed the Catholic Church—And the World*, HUFFPOST (Oct. 12, 2012), http://www.huffingtonpost.com/2012/10/11/vatican-ii-catholic-church-changes_n_1956641.html [https://perma.cc/SW84-SHP2].

worship services from schools does burden "speech," not just an "activity." At a minimum, excluding all worship services seems extraordinarily overbroad if the aim was to exclude only the noncommunicative aspects of worship services. Of course, this conclusion does not resolve the question of whether the exclusion is nonetheless constitutional because it advances the government's interest in avoiding a violation of the Establishment Clause; but that is an issue beyond the scope of this Article.

B. *Net Neutrality*

Now consider the net neutrality dispute. The question in that litigation was not whether the Open Internet Order burdened "speech" protected by the First Amendment, but whether it burdened editorial rights protected by the First Amendment.[271] But the issues are similar in that they cannot be answered in the abstract. Instead, in resolving disputes over editorial rights, one must ask whether protecting editorial control under the specific circumstances at issue advances the democratic goals of the First Amendment. With the print media, the answer is clearly that protecting the editorial discretion of publishers is essential to democracy given the key institutional role of the print media as "one of the great bulwarks of liberty" (to quote the language of the Press Clause in James Madison's original proposed constitutional amendments to Congress).[272] Moreover, given the important role that an ideological and partisan press has played in democratic debate through most of our history, editorial discretion is as important a contributor to democracy as is the right to print in the first place. Finally, today the same protections should surely extend to the editors of websites, including newspaper websites, that post materials relevant to democratic self-governance, since in the modern world such websites play a role analogous to that historically played by the print media (partisanship and all).[273]

Net neutrality, however, is different. Unlike with religious worship and the Second Circuit, close analysis strongly supports the conclusion that the D.C. Circuit was correct to conclude that the First Amendment does not protect the editorial discretion of broadband providers.[274] The fact that there is no history of broadband providers discriminating against specific content on ideological grounds strongly undermines the notion that granting such providers editorial discretion is needed to safeguard democracy. To the contrary, given that most individuals now rely primarily on the Internet to access information relevant to citizenship, and given the market power that broadband providers enjoy, granting such providers editorial control would *undermine* democracy by potentially interfering with citizens' ability to speak, educate themselves, and

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[271] *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016).

[272] *Amendments Offered by Madison*, *supra* note 239, at ¶ 7.

[273] Bhagwat, *supra* note 249, at 1056–57.

[274] *U.S. Telecom Ass'n*, 825 F.3d at 689.

organize. Finally, and most tellingly, the types of editorial discretion that broadband providers are seeking, and the motivations behind those efforts, have absolutely no relationship to democracy or citizenship. Broadband providers are seeking to block some websites, and to provide enhanced access to others, for technical and financial reasons, not ideological ones.[275] When the net neutrality debate first reached the FCC, it was over Comcast's blocking of peer-to-peer services because such services used disproportionate bandwidth, not because Comcast objected to their content.[276] Similarly, in the 2015 Open Internet Order, the most controversial aspect of the FCC's rules was a ban on paid prioritization, whereby providers provide some websites enhanced access to customers in exchange for compensation.[277] Again, the broadband providers' motives were purely to maximize profits, and they do not even allege an ideological component. To the contrary, a broadband provider who claims to block or favor content for ideological reasons would probably be committing economic suicide.[278] For all these reasons, the "editorial discretion" sought by broadband providers is so far removed from, and indeed in conflict with, the democratic goals underlying the Speech and Press Clauses that it should be considered outside the coverage of the First Amendment.[279]

VII. IMPLICATIONS: COMMUNICATIVE USES OF LANGUAGE

Finally, it is time to consider the most controversial possible implication of my analysis, which is the possibility that certain types of communicative acts should be treated outside First Amendment coverage even if they do not fall within a historically defined category of unprotected speech. Once one acknowledges that not all uses of language constitute "speech" for constitutional purposes, does that insight really have to be limited to noncommunicative uses? Or might it be that some communicative activities are nonetheless so far removed from the purposes of the First Amendment that they do not constitute constitutional "speech," as the discussion in Part IV might imply?

I begin by addressing an obvious objection, that mine is a radical proposal and a historically unprecedented weakening of free speech protections. In truth, however, it is not. To begin with, it is important to note that the very idea that

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[275] Comcast Corp. v. FCC, 600 F.3d 642, 644–45 (D.C. Cir. 2010) ("Comcast defended its interference with peer-to-peer programs as necessary to manage scarce network capacity.").

[276] *Id.*

[277] *U.S. Telecom Ass'n*, 825 F.3d at 696.

[278] A fact which admittedly might suggest that net neutrality rules are unnecessary as a matter of policy; but on the constitutional question this reality strongly favors net neutrality.

[279] Many years ago, in the pre-Internet era, I made a similar argument regarding potential common-carrier regulation of cable operators. Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 203–05 (1995).

only a few, historically defined categories of speech fall outside First Amendment protection is a very recent one. Prior to the Supreme Court's *Stevens* decision in 2010, it was almost universally assumed that the Court had the power to define new categories of unprotected speech based on a balancing analysis.[280] But more fundamentally, an excellent, recent article by Genevieve Lakier demonstrates that the whole idea of a few, defined categories of low-value speech is a modern invention.[281] Prior to the Court's 1942 decision in *Chaplinsky v. New Hampshire*,[282] Lakier argues, the general presumption had been that all speech, including obscenity, was "protected" in the sense that it could not be subjected to prior restraints, but most speech could also generally be subjected to subsequent punishment if a minimal showing of public harm could be made.[283] This was the law throughout the nineteenth century, and into the twentieth century until the New Deal Era.[284] Notably, however, even during this period, courts recognized that not all speech was equal, and that certain kinds of speech—particularly speech on explicitly political issues such as the official conduct of public officials or speech touching on the public interest—required a higher showing of harm to be punished.[285] This concept, Lakier convincingly argues, provided the basis for Justice Holmes's seminal dissent in *Abrams v. United States*, in which the Justice explicitly limited his newly beefed up "clear and present danger" test to "expressions of opinion and exhortations," clearly a reference to politically oriented speech.[286] The picture that emerges, then, is of a nuanced approach to First Amendment coverage in which all speech *is* covered for the purposes of the ban on prior restraints, but otherwise nonpolitical speech received minimal protection from subsequent punishment.

Leaving aside prior restraints, the reading of the First Amendment pressed here has obvious and close parallels to Lakier's historical analysis. Political speech receives substantial protection and can be punished only if the government can make a substantial showing of harm,[287] while speech far from the First Amendment's goals receives much more limited protection, perhaps no more than that provided by the "rational basis" test applicable to all

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[280] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); *see also* New York v. Ferber, 458 U.S. 747, 754 (1982).

[281] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015).

[282] *Chaplinksy*, 315 U.S. at 574.

[283] Lakier, *supra* note 281, at 2179–81, 2186–87.

[284] *Id.* at 2168.

[285] *Id.* at 2196–97.

[286] *Id.* at 2200 (quoting Abrams v. United States, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting)).

[287] Today, the doctrinal formulation of that is the "strict scrutiny" test for content-based speech regulations and the *Brandenburg* test permitting punishment of incitement only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

regulations that impinge on liberty.[288] The primary difference is that in an earlier era the concept of "political" was narrowly defined,[289] but my approach takes a much broader view. This is consistent with modern law's realization that the distinction between "politics" and "entertainment," or perhaps more accurately between "politics" and "culture," is simply untenable, a point that the Court has recognized in cases such as *Winters v. New York*[290] and *Brown v. Entertainment Merchants Ass'n*.[291] Cultural values, religious values, and political values are inextricably intertwined, and therefore in a democratic system based on popular sovereignty, all must be beyond the government's reach. But, contrary to the modern Court's view, none of this requires a conclusion that *all* acts of communication receive such heightened scrutiny, and so fall within the coverage of modern doctrine.

Let us begin with an easy example: commercial sales or sharing of personal data. There is no doubt that such transactions are communicative in the sense that they share information. As such, they seem to be speech by any commonly used definition. But the sale of personal data usually has no connection at all to political or cultural values, to democratic citizenship, or to political activities, no matter how broadly defined. Therefore, there seems no reason to prevent the state from regulating such sales as long as some minimal showing of public harm can be made—a requirement surely satisfied by identifying privacy interests to be protected. It should be emphasized that this does not mean all information, or even all data, falls outside the First Amendment's coverage. Much data, including scientific data, aggregated data about individual habits, and even personal information about public officials and figures,[292] is surely relevant to public policy and culture, and so must be fully protected. Similarly, data such as voter and donor lists, which have obvious ties to the political process, also certainly fall within First Amendment coverage. But even under the broadest view of the word political, it is hard to see how personal information about, for example, private individuals' shopping habits, used to sell targeted advertising, has any connection to citizenship or democracy.

Revenge porn, at least as used to victimize private figures, seems almost as strong a case for nonprotection. Revenge porn is undoubtedly communicative. But the motives behind it, and the impact it has on individual victims, have essentially nothing to do with political or cultural

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[288] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938).

[289] Lakier, *supra* note 281, at 2194–95.

[290] Winters v. New York, 333 U.S. 507, 510 (1948).

[291] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011).

[292] A good example of such protected data would be the personal information regarding the appearances of police officers who participated in a lineup, at issue in Dahlstrom v. Sun-Times Media, LLC, 777 F.3d 937, 939 (7th Cir. 2015). The court upheld the restriction on disclosure in *Dahlstrom* on the very dubious theory that the law at issue was content-neutral. *Id.* at 949–50. But that is a different story. *See* Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1445–46 (2017).

values. It is important to note that while revenge porn is undoubtedly often motivated by misogyny, and may well reflect specific political/cultural values regarding the social role of women on the part of both posters and viewers, that is not why it should be treated as falling outside core First Amendment coverage. Rather, it is the specific mode of communication, its highly personal and highly intrusive aspect, that makes it, like the fighting words prosecuted in *Chaplinsky*, "no essential part of any exposition of ideas."[293] The precise same content, without the element of personal intrusion (for example, consensual pornography), would certainly receive constitutional protection given its cultural valence. It is the invasive aspect of revenge porn that adds nothing to political or cultural discourse, and so makes it not "speech" for First Amendment purposes. Put differently, what can be punished is not the misogyny, but the betrayal associated with revenge porn. In this sense, prosecution of revenge porn is similar to imposing liability for breach of contract via speech, which the Supreme Court has permitted.[294] As such, given the obvious and important public interest in protecting the victims of revenge porn, there is no barrier to state regulation in this area.

Products liability, including liability based on defective speech "products" such as maps and charts, and liability based on failure to warn or defective instructions, again seems a simple coverage issue. The communications at issue here are entirely functional in nature, and their functions do not relate in the vaguest way to democracy, citizenship, culture, or politics. Moreover, the social interest in compensating individuals harmed by defective products or defective instructions is so obvious it needs no explanation. Again, therefore, a seemingly intractable doctrinal problem can be resolved easily if one abandons the modern Court's unwillingness to take coverage issues seriously. Put differently, no one seriously thinks that products liability law is in real tension with the First Amendment. Here, I am simply offering an explanation for why this mass wisdom is obviously correct.

Finally, we turn to professional speech. The coverage problem here is much more complex and debatable than in the other examples discussed in this Part. Insofar as regulations of professional speech involve application of uncontroversial norms regarding professional competence, they seem to pose no serious First Amendment problems because the speech at issue, again, seems in most cases to be very distant from political or cultural concerns. Put differently, the First Amendment's coverage surely does not extend to most malpractice law. However, the modern disputes over professional speech pose much harder questions. Conversion therapy is not simply a professional service; it also has a strongly ideological component to it. As such, bans on conversion therapy also have an ideological edge, albeit they can be defended as prohibiting an

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[293] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[294] Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991).

empirically harmful practice. The underlying issue in the Florida "Docs vs. Glocks" litigation—whether medical professionals may treat gun ownership as a medical or health issue[295]—is an even more obviously ideological question, to which no empirically "correct" answer can possibly exist. Given the strong cultural and political values at stake in these disputes, the Ninth Circuit's conclusion that professional speech regulation raises *no* First Amendment concerns seems clearly incorrect. This is not to say that its ultimate decision to uphold California's conversion therapy ban was incorrect, but at a minimum, courts must insist that such regulations are supported by substantial empirical evidence of social harm. And similarly with Florida's gun-inquiry law. Otherwise, professional speech regulation can become a mask for the very thing the First Amendment prohibits, which is state manipulation of the values and beliefs of citizens through suppression of speech.

Professional speech then poses an interesting middle ground. Most regulations of professional speech do not pose serious First Amendment concerns because most professional speech has nothing to do with the purposes of the First Amendment. However, at times professional speech regulation certainly can stray into the realm of politics and culture. Conversion therapy[296] and treatment of gun ownership[297] are obvious examples, but one can envision others, such as assessing the professional status of treatment for hypersexual behavior disorder (sex addiction),[298] or imposing ethical restrictions on lawyers who advocate or support public interest litigation.[299] In these contexts, the professional speech being regulated does fall within the First Amendment's coverage—in other words, it is "speech" as well as speech.

VIII. CONCLUSION

My primary argument in this Article is that modern developments, including an increasingly expansive and exacting First Amendment doctrine in the Supreme Court and the escalation of harms caused by speech as a result of the ubiquity of the Internet, require us to reexamine the problem of First Amendment coverage. Despite the Supreme Court's insistence to the contrary, it is simply not plausible in this world to insist that all speech constitutes "speech" for First Amendment purposes. I argue that the history and context of the First Amendment strongly suggest that in fact not all uses

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[295] Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1302–03 (11th Cir. 2017) (en banc).

[296] *See supra* notes 199–207 and accompanying text.

[297] *See supra* notes 208–24 and accompanying text.

[298] *See* Alexandra Katehakis, *Sex Addiction Beyond the DSM-V*, PSYCHOL. TODAY (Dec. 21, 2012), https://www.psychologytoday.com/blog/sex-lies-trauma/201212/sex-addiction-beyond-the-dsm-v [https://perma.cc/2WRA-EG9A] (discussing the consequences of the American Psychiatric Association's decision to exclude this disorder from the Fifth Edition of the Diagnostic Statistical Manual for Psychiatric Disorders).

[299] *See* NAACP v. Button, 371 U.S. 415, 428–29 (1963).

of language constitute "speech," and indeed not even all acts of communication should be treated as "speech" for constitutional purposes. Instead, First Amendment protection should extend only to collective, communicative activity that has relevance to democratic citizenship and self-governance (defined broadly). This approach helps explain why some widely shared instincts about the limits of First Amendment protections are correct in a way that current doctrine cannot explain; but it also suggests that in some instances, apparently widely shared assumptions about coverage, for example regarding private prayer and diaries, are incorrect. The ultimate goal, of course, is a coherent approach that provides guidance to courts and regulators on First Amendment coverage issues.

It must be acknowledged, however, that hard questions will remain. Clear rules are always desirable, and especially so in the context of free speech, for a number of reasons.[300] Sometimes, however, careful and nuanced analysis cannot be avoided. Professional speech provides one example of a sphere where nuance is unavoidable. Another, even more complex one is commercial speech—which is why this Article does not address commercial speech in detail. The problem is that commercial speech, as originally and narrowly defined to encompass only "speech which does 'no more than propose a commercial transaction'"[301] seems fairly clearly outside First Amendment coverage under my approach. However, the Supreme Court later extended the definition of commercial speech to include some discussion of subject matters clearly relevant to the democratic process.[302] And at least one court has invoked that holding to classify what seems to be *clearly* political communications as commercial speech.[303] Given those uncertainties about the scope of the commercial speech doctrine, no simple conclusions regarding coverage are possible.

In short, once one concedes that not all uses of language constitute constitutional "speech," some sensible results follow, but other hard questions remain. It is no doubt because of a desire to avoid those hard questions that the modern Court has to date evaded the coverage issue so assiduously. Time, however, has run out. Under modern circumstances, an "all or nothing" approach to the First Amendment is no longer feasible. It is time, therefore, to

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[300] Ashutosh Bhagwat, Essay, *Free Speech and "A Law of Rules,"* 15 FIRST AMEND. L. REV. 159, 160–61 (2017) (noting Justice Scalia's "reasoning for preferring rules over standards").

[301] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

[302] *See* Bolger v. Young Drug Prods. Corp., 463 U.S. 60, 64–68 (1983) (classifying informational pamphlets concerning condoms and STDs as commercial speech).

[303] *See* Kasky v. Nike, Inc., 45 P.3d 243, 261–62 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *and cert. dismissed as improvidently granted*, 539 U.S. 654, 655 (2003) (per curiam).

build a workable theory of First Amendment coverage. I have attempted here to begin that project, but plenty of hard work remains to be done.