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The Zombie First Amendment

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THE ZOMBIE FIRST AMENDMENT

JULIE E. COHEN*

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INTRODUCTION

Scholarly and popular critiques of contemporary free speech jurisprudence have noted an attitude of unquestioning deference to the political power of money. Rather than sheltering the ability to speak truth to power, they have lamented, the contemporary First Amendment shelters power's ability to make and propagate its own truth. This Article relates developments in recent First Amendment jurisprudence to a larger struggle now underway to shape the distribution of information power in the era of informational capitalism. In particular, it argues that cases about political speech—cases that lie at the First Amendment's traditional core—tell only a small part of the story. The contemporary First Amendment must be situated within a larger story about the realignment of information flows within circuits of power that serve emerging global interests, and to tell that story, one must look to disputes about the speech implications of private economic regulation. As a result of that struggle, free speech jurisprudence about information rights and harms is becoming what is best described as a zombie free speech jurisprudence: a body of doctrine robbed of its animating spirit of expressive equality and enslaved in the service of economic power.¹ Within the emerging zombie free speech jurisprudence, speech, money, and information processing are equivalent, and speech advancing economic interests receives the strongest protection of all.

Part I discusses a group of seemingly disparate cases about the contours of the contemporary First Amendment, identifying two common themes. First, the cases construct a broad equivalence between speech and money that is heavily influenced by notions of information as property or otherwise proprietary. Second, the idea of information as property or otherwise proprietary supports actions defining flows of unauthorized speech as contraband. Part II argues that First Amendment decisions do not create distributional inequities in information power; they are symptoms of it. It explores the genealogy of the contemporary crop of free speech zombies, tracing

1. See generally KYLE WILLIAM BISHOP, AMERICAN ZOMBIE GOTHIC: THE RISE AND FALL (AND RISE) OF THE WALKING DEAD IN POPULAR CULTURE 47-59 (2010); COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 21-22 (2011).

their origins to deeper realignments in the legal regimes that more directly constitute and reinforce private economic power. First Amendment jurisprudence has yet to acknowledge these realignments, and that failure of recognition is both intellectual and moral. Even so, the First Amendment cannot serve as law's primary tool for rebalancing freedom of expression in the information age.

I. ATTACK OF THE FREE SPEECH ZOMBIES

For the last decade or so, scholars of information and technology law have been puzzling over an unusual set of First Amendment decisions. Those decisions include *Eldred v. Ashcroft* and *Golan v. Holder*, both of which rejected challenges to legislative expansions of copyright protection, and *Sorrell v. IMS Health Inc.*, which struck down a Vermont law restricting use of information about physicians' prescribing behavior for marketing purposes.² Critics of *Eldred* and *Golan* have characterized those decisions as examples of a pernicious "copyright exceptionalism" within free speech jurisprudence that operates to insulate copyright legislation almost entirely from constitutional challenge.³ Meanwhile, information privacy scholars identify a different kind of exceptionalism at work in *Sorrell's* analysis of the threshold conditions for strict scrutiny, and worry that *Sorrell* signals trouble ahead both for efforts to strengthen privacy protection and more generally for the regulatory state's ability to address information harms.⁴

2. *Golan v. Holder*, 132 S. Ct. 873 (2012); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

3. Christina Bohannon, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1115 (2010); see Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831 (2010); see also Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1177 (2007) (reacting similarly to *Eldred* from a First Amendment scholar's perspective). *But see* Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1086-87 (2013) (arguing that the two cases "bring the First Amendment to bear on copyright law much as courts have done in applying definitional balancing to the laws of defamation, intentional infliction of emotional distress, privacy, trademark, and other statutory and common law causes of action").

4. See NEIL M. RICHARDS, *INTELLECTUAL PRIVACY* (2015); Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501 (2015); see also Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 868 (2012) (reacting similarly to *Sorrell* from a First Amendment scholar's perspective).

I think that the diagnosis of the likely consequences of *Eldred*, *Golan*, and *Sorrell* is right but that the charge of exceptionalism is probably wrong. Copyright's free speech jurisprudence and the emerging free speech jurisprudence of targeted marketing are part of a broader realignment in free speech jurisprudence, in which the First Amendment's traditional concern with political self-determination plays very little role. Instead, the decisions are infused with the neoliberal tropes of economic liberty and consumerist participation, and the label "speech" has become a fig leaf strategically deployed to denote and legitimize proprietary claims over the patterns of information flow. That process is producing a zombie free speech jurisprudence, in which the identification of protected speech interests conforms mindlessly to patterns of underlying entitlement, and through which the object of protection is altered almost beyond recognition.

A. Speech Interests Follow Ownership of the Means of Communication

It is useful to begin in traditional First Amendment territory, by briefly considering the Court's cases on political speech and media ownership as harbingers of realignment in free speech jurisprudence. The most prominent of the recent cases is *Citizens United v. FEC*, in which a majority of the Court struck down a provision of the Bipartisan Campaign Reform Act of 2002 that prohibited corporations and unions from using their general treasury funds for independent expenditures supporting or opposing political candidates for federal government office.⁵ The *Citizens United* decision has been analyzed at length by others far more expert in the intricacies of First Amendment doctrine. For my purposes, two aspects of the decision are worth remarking: the majority's invocation of media companies as stand-ins for the rights of corporations generally, and its refusal to countenance the possibility of a constitutionally supportable distinction between electioneering statements and other types of expression.

5. 558 U.S. 310 (2010) (invalidating 2 U.S.C. § 441(b) (2002)).

The aspect of the *Citizens United* decision that has sparked the most popular controversy is the majority's characterization of corporations and other fictional persons as speakers entitled to constitutional protection. For many scholarly commentators, however, that result was clearly presaged by earlier cases.⁶ In particular, the Court's decisions about media ownership and access reveal a consistent tradition of treating owners of capital as the bearers of First Amendment interests.⁷

Even so, the discussion of the rights of corporate speakers is noteworthy for its focus on the rights of media companies, which were exempted from the independent expenditure ban. For the majority that exemption, intended to save the independent expenditure restrictions from the risk of unconstitutionality, proved too much: media companies are in the business of using their money to fund speech, but other companies also had a constitutional right to do so.⁸ At the same time, however, the majority opinion observed that media companies are the paradigmatic corporate bearers of free speech rights:

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. The Framers may not have anticipated modern business and media corporations. Yet television networks and major newspapers owned by media corporations have become the most important means of mass communications in modern times.⁹

That way of thinking about the special status of media companies, though, conflates two different First Amendment freedoms. If media companies have a special place in the constitutional firmament, it

6. See, e.g., Heather K. Gerken, *An Initial Take on Citizens United*, BALKINIZATION (Jan. 21, 2010, 12:08 PM), <http://balkin.blogspot.com/2010/01/initial-take-on-citizens-united.html> [<http://perma.cc/87HT-SSU9>]; Nate Persily, *Citizens United: A Preview to a Post-Mortem*, BALKINIZATION (Jan. 21, 2010, 8:04 AM), http://balkin.blogspot.com/2010/01/citizens-united-preview-to-post-mortem_21.html [<http://perma.cc/5F9K-VGPA>].

7. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 747 (1996) (plurality opinion); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969).

8. See *Citizens United*, 558 U.S. at 352-53.

9. *Id.* at 353 (citation omitted).

is because as a group they operate platforms for expression that enable a diverse variety of speakers to fulfill the First Amendment's promise of a robust marketplace of ideas. By performing what Neil Netanel in a related context has called a structural function, they operationalize the guarantee of freedom of the press.¹⁰ The Court's misperception of this point has deep roots. In the line of cases upholding the FCC's imposition of rules intended to create room within the mid-twentieth-century broadcasting ecology for opposing viewpoints, the FCC argued that control of the means of communication would enable owners of mass media organs to determine what sorts of speech to allow.¹¹ According to the FCC, in other words, the problem was precisely that control of the means of communication and capacity for constitutionally protected speech are distinct, necessitating various corrective measures to minimize the influence of the former on the latter.¹² The Court, however, treated the media companies as speakers in their own right, subject to limitations justified for reasons of scarcity, not for reasons of control.¹³ In doing so, it lumped speech and press freedoms together, with potentially deleterious consequences for the exercise of both. That result is old news now; what is interesting is the way that *Citizens United* reaffirms it. The invocation of media companies as the paradigmatic example of corporate freedom of speech signals that the ultimate touchstone of expressive freedom is ownership of the means of communication. One who owns resources has the means to speak; one who owns the means of communication may speak most fully and completely.

10. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347-63 (1996). See generally Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012). By this I intend no comment on the debate about whether the press as an institution actually should receive special First Amendment consideration. See, e.g., C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007); Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014). At minimum, it seems important to ask whether, in this age of hyperpartisanship, media companies as a group actually do function to operationalize press freedoms or whether they function solely and more simply as speakers in their own right.

11. See *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 799 (1978); *Red Lion*, 395 U.S. at 375-77; see also *In re Editorializing by Broad. Licensees*, 13 F.C.C. 1246 (1949).

12. See *In re Editorializing by Broad. Licensees*, 13 F.C.C. at 1251-55.

13. See *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 795-800; *Red Lion*, 395 U.S. at 375-77.

The Court had the opportunity to avoid ruling on the constitutionality of the independent expenditure ban on the ground that the speech at issue, a full length documentary film available only via video on demand, was meaningfully different than the sort of speech with which the federal election laws are concerned.¹⁴ It declined to do so, reasoning that it would be too dangerous to involve the courts in determining what is favored speech.¹⁵ As others have noted, that conclusion in turn rests on the more general and highly dubious proposition that spending and speaking are so closely entwined that regulation of one is equivalent to regulation of the other, whatever the context.¹⁶ Facially, the *Citizens United* majority's adoption of both positions exemplifies the traditional preference for avoiding slippery slopes in free speech cases. But both the lumping of information flows and the underlying lumping of spending with speaking are symptoms of a deeper methodological problem in First Amendment jurisprudence that demands more careful consideration. In the information era, refusal to distinguish among kinds of information flow and among the roles that different entities play in facilitating it spells trouble. Digital conduct—whether by individuals or by for-profit corporations—can cause extraordinary harm and entrench extraordinary privilege. Such conduct is informational in character, originating as bits and moving via information networks. If every regulation of information flows must survive First Amendment scrutiny, meaningful governance becomes increasingly difficult—and, paradoxically, so does meaningful protection of expressive liberty.¹⁷

At a moment in history when information power has become paramount, *Citizens United* conflated speech rights with ownership of the means of communication and demonstrated an ordinary but pernicious analytical reductionism about speech and speaking. As we will see in the balance of this Section, refusal to examine the

14. See also Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412 (2013) (arguing that in producing and disseminating the film, *Citizens United* was exercising its constitutionally protected right to freedom of the press and that the Court should have decided the case on that ground).

15. *Citizens United v. FEC*, 558 U.S. 310, 322-27 (2010).

16. See Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011); McConnell, *supra* note 14, at 447-49.

17. See generally Louis Michael Seidman, *The Dale Problem: Property and Speech Under the Regulatory State*, 75 U. CHI. L. REV. 1541 (2008).

connections between information and power has allowed different kinds of distinctions to creep into the case law largely unacknowledged. For proprietarian and statist reasons, it has suited the Court to accept that money, information processing, and speech are all simply interchangeable pieces in the same game.

B. Speech Is Property

If expressive freedom accrues as a function of ownership of the means of communication, is the converse also true? Is speech property, and if so, what consequences flow from that characterization? Legal disputes about intellectual property supply answers to those questions. Such disputes increasingly involve First Amendment issues, and both First Amendment challenges to copyright legislation and First Amendment defenses to copyright and paracopyright claims fail almost all the time. *Eldred v. Ashcroft* and *Golan v. Holder* explain why, holding that laws retrospectively extending copyright terms and resurrecting lapsed foreign copyrights from the public domain required no special free speech scrutiny because there is no right to make other people's speeches.¹⁸ In other words, claims about the speech-restrictive effects of copyright-related legislation fail because the subject matter of the speech is someone else's property. That result is sensible, the Court explained, because copyright itself performs a First Amendment function, incentivizing participation in the marketplace of ideas.¹⁹

Property rights are not absolute, of course, and neither are copyrights. In particular, as the *Eldred* and *Golan* majority opinions explained, the idea-expression distinction excludes certain subject matters from the scope of copyright protection and the fair use doctrine creates a privilege to use copyright-protected material in certain circumstances.²⁰ The Court refused, however, to look beyond copyright's internal limitations to consider the broader structural

18. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

19. *Golan*, 132 S. Ct. at 890 (citing *Eldred*, 537 U.S. at 219; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546, 558 (1985)); *Eldred*, 537 U.S. at 219 (citing *Harper & Row*, 471 U.S. at 558).

20. 17 U.S.C. §§ 102, 107 (2012); see *Golan*, 132 S. Ct. at 889-90; *Eldred*, 537 U.S. at 219-20.

effects of legislation expanding the proprietary footprint of the copyright regime. Instead, it adopted a posture of deference, ruling that Congress has nearly unlimited leeway to legislate on copyrights and copyright-related matters as long as it leaves copyright's "traditional contours" undisturbed.²¹ And because copyright itself performs a First Amendment function, courts considering infringement claims brought by private litigants rarely will be justified in invoking the First Amendment to shelter conduct that fair use does not reach.²² To the contrary, because the bearer of free speech rights has the right not to speak, rightholders are doubly justified in blocking undesired uses of their works.²³

There are two problems here. First, as many have remarked, audiences have speech interests too. From the perspective of copyright policy, the fiction of a public domain of unprotected, precopyright building blocks ignores the way people interact with culture, and the fair use doctrine does not cure this problem because it does not effectively counterbalance the broad control of derivative works that copyright law gives to rightholders.²⁴ From the perspective of speech policy, copying can serve valuable expressive purposes.²⁵ Speech interests also can be affected adversely by large structural changes, such as the creation of paracopyright entitlements that impede user access to creative works or changes to copyright duration designed to slow passage into the public domain of important pieces of our common cultural heritage.²⁶

21. *Golan*, 132 S. Ct. at 889-90; *Eldred*, 537 U.S. at 221. For an approving view of this conclusion, see Tun-Jen Chiang, *Rehabilitating the Property Theory of Copyright's First Amendment Exemption*, 89 NOTRE DAME L. REV. 521 (2013).

22. *Harper & Row*, 471 U.S. at 560; *Cable/Home Comm'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 849 (11th Cir. 1990); *New Era Publ'ns Int'l, ApS v. Henry Holt & Co., Inc.*, 873 F.2d 576, 584 (2d Cir. 1989); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978). *But see* *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264-65 (11th Cir. 2001) (giving separate and independent weight to First Amendment concerns militating against grant of preliminary injunction in fair use dispute).

23. *See Harper & Row*, 471 U.S. at 559.

24. *See* JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 74-79 (2012); Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 121, 157-64 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006).

25. *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

26. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2863-76 (1998) (codified at 17 U.S.C. §§ 1201-1204 (2012)); Sonny Bono Copyright Term Extension Act,

The second problem brings us back by a different route to the lumping problem raised in the previous Section. Creative works are the subject matter of copyright, to be sure, and if for-profit corporations are First Amendment speakers then their trademarks are the subjects of certain proprietary or quasi-proprietary rights also, but the speech-equals-property syllogism utterly fails to describe the nature of an intellectual property owner's speech interest. For an individual author, a creative work may be a personal statement, in which case it is not simply property, but rather a result of situated inspiration and creative practice.²⁷ A creative work may become simply property when the copyright is assigned to a production intermediary such as a publisher or film production company, but from the perspective of the intermediary, it is no longer a personal statement to which a speech interest might attach. A trademark is more closely analogous to a personal statement, but if so—as we will see below—it is a reputational statement of the sort that the First Amendment traditionally has declined to protect against critique. If corporate intellectual property owners have speech interests, those interests are more like those of media companies: they are interests that flow from the ownership of capital and its provision to fund production, cultural or otherwise. A rule privileging copyright interests over the speech interests of nonowners, regardless of how the regime defining ownership might expand in length and breadth, ignores these differences.

C. Proprietary Information Processing Is Speech

If spending on information is speaking and speech is property, what should be the fate of attempted legal restrictions on marketplace messages? For almost two centuries, the First Amendment was considered largely irrelevant to regulation of speech advancing

Pub. L. No. 105-298, §§ 101-102, 112 Stat. 2827, 2827-28 (1998) (codified at 17 U.S.C. §§ 302-304 (2012)). On the speech-inhibiting effects of these laws, see Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); and Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002).

27. See COHEN, *supra* note 24, at 82-88; JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 26-80 (2014).

commercial and professional activities because such regulation was understood to be directed fundamentally at commerce rather than at discourse in the public sphere. That began to change in the late twentieth century with the emergence of a line of cases that has become known as the Court's commercial speech jurisprudence and that concerned attempts to regulate more complex messages by corporate and professional speakers.²⁸ In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court purported to advance a definitive test for assessing the validity of laws regulating commercial speech: regulation of speech that is neither misleading nor related to unlawful activity must advance a substantial government interest, and must be appropriately tailored to that interest.²⁹ In the ensuing years, the Court seemed concerned chiefly with fleshing out the application of *Central Hudson* and policing the boundary that defined which sorts of speech qualified as commercial speech. It resisted juxtaposing the commercial speech inquiry, which presumed some prior act of selection of the speech to be regulated, with the line of cases holding that laws discriminating among speakers based on their identity or the content of their speech must survive strict scrutiny.³⁰

That resistance came to an end in *Sorrell v. IMS Health Inc.*, in which a majority of the Court ruled that a Vermont statute prohibiting pharmaceutical companies' use of prescriber-identifying information for marketing purposes must survive strict scrutiny because the restriction was both content- and speaker-based.³¹ Because regimes of commercial speech regulation typically begin with some definition of scope that involves one or both distinctions, *Sorrell* suggests that legislatures and agencies seeking to impose regulatory burdens on information-era commerce must proceed with caution when drawing lines.³² That result, moreover, places regulators neatly on the horns of a dilemma: broad proscriptions on information

28. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-66 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

29. 447 U.S. at 561-66.

30. See, e.g., *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40-41 (1999) (declining to address the strict scrutiny question).

31. 131 S. Ct. 2653, 2663-66 (2011).

32. *Id.*

processing seem likely to fail on narrow-tailoring grounds, but narrowly targeted privacy protections risk being invalidated as impermissibly discriminatory. Almost as an afterthought, the majority opinion continued the practice of lumping kinds of information flow, agreeing that constitutional protection for speech extended to information-processing activities intended to improve the targeting of likely prospects to whom commercial speech might be directed.³³

Opponents of information privacy regulation have attempted to paint *Sorrell* as an information privacy case,³⁴ but the majority saw it as a case about market manipulation through persuasion. The drug detailing program at issue used information about the past behaviors of prescribing physicians, not of patients, and the state's asserted interests were primarily fiscal. Because pharmaceutical detailing is designed to increase demand for proprietary drugs, the state feared that giving detailers carte blanche to conduct data mining operations in the state's prescription drug database would drive up the cost of its Medicaid prescription drug program.³⁵ That fear weighed importantly in the Court's eventual conclusion that the privacy concerns adduced in the appellate record and in the state's briefs were makeweights.³⁶ Instead, the majority framed the Vermont law as an attempt to undermine the persuasiveness of pharmaceutical marketers' speech.³⁷ So framed, the law conflicted with the marketplace-of-ideas philosophy that animates free speech jurisprudence: protection for persuasion lies at the core of the zone that the First Amendment protects.

Yet to call *Sorrell* a case about persuasion is to insist (again) on both the conflation of spending and speaking and the impossibility of making meaningful distinctions among kinds of speech-related activities. Particularly in an era when both money and speech

33. *Id.* at 2666-67 (citing *Bartnicki v. Vopper*, 532 U.S. 514 (2001), a case about an intercepted telephone conversation; *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), a case about disclosures on a product label; and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion), a case about financial reports).

34. See Thomas R. Julin, *Sorrell v. IMS Health May Doom Federal Do Not Track Acts*, 10 *Privacy & Sec. L. Rep. (BNA)* No. 35 (Sept. 5, 2011), available at <http://perma.cc/8LEQ-GV6G>.

35. See 2007 Vt. Acts & Resolves 635; *Sorrell*, 131 S. Ct. at 2670-71 (discussing this aspect of the record).

36. See *Sorrell*, 131 S. Ct. at 2668-2670; *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276-77 (2d Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011); Brief for Petitioner at 45-49, *Sorrell*, 131 S. Ct. 2653 (No. 10-779).

37. *Sorrell*, 131 S. Ct. at 2671.

increasingly have become dematerialized, existing only as bits that flow over the network, it may make good technical sense to classify anything that creates meaning as speech. That result is consistent with an understanding of information that is derived from cybernetics and based on the distinction between signal and noise, but it makes much less sense from a constitutional perspective, which is concerned—or ought to be—with the creation of meaning.³⁸ Detailing is different from persuasion along a critical dimension that has to do with transparency and manipulation. Its operative principle is the nudge rather than the reasoned comparison among alternatives, and its point is surplus extraction, pure and simple. Its goal is to minimize the need to persuade by targeting directly those potential customers most strongly predisposed to buy and appealing to everything that is known about those customers' habits and predilections. With the pronouncement that operations directed at surplus extraction are privileged as speech, the zombification of First Amendment law takes an important additional step away from protection for information as expression and toward protection for information as competitive advantage.

More generally, the backward-looking lawyerly exercise of evaluating new commercial speech cases for their consistency with *Central Hudson* and its progeny gets the commercial speech problem precisely wrong. *Central Hudson* and its ilk are better understood as forerunners of a mature jurisprudence about the First Amendment implications of regulatory oversight of commercial information processing activities in the information age. The First Amendment antiregulatory agenda that began with arguments developed in law review articles and strategy sessions at libertarian think tanks also has matured.³⁹ What began as a trickle of cases

38. See CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* 19 (1949). For two thought-provoking general critiques of the Shannon approach and its minimalist approach to the question of meaning, see N. KATHERINE HAYLES, *HOW WE BECAME POSTHUMAN: VIRTUAL BODIES IN CYBERNETICS, LITERATURE, AND INFORMATICS* 50-83 (1999); and DAN SCHILLER, *HOW TO THINK ABOUT INFORMATION* 3-16 (2007).

39. See SOLVEIG SINGLETON, *PRIVACY AS CENSORSHIP: A SKEPTICAL VIEW OF PROPOSALS TO REGULATE PRIVACY IN THE PRIVATE SECTOR* (Cato Inst. Policy Analysis No. 295, 1998), available at <http://perma.cc/KE3A-XWKU>; Adam Thierer & Berin Szoka, *What Unites Advocates of Speech Controls & Privacy Regulation?*, *PROGRESS ON POINT*, Nov. 2009, available at <http://perma.cc/P2WA-3PQW>; Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 *STAN. L.*

raising First Amendment challenges to regulations concerning information-related activities in regulated markets has become a steady stream of opinions on a wide variety of subjects—food and drug labeling requirements, disclosure requirements for securities issuers, permissible uses of consumer information, and so on.⁴⁰ From this perspective, moreover, it is no coincidence that the Court's commercial speech jurisprudence has developed alongside its cases about the free speech rights of corporations generally. Both developments reflect an economic reality in which information has increasingly become untethered from industrial production to become a source of value in its own right, and in which powerful interests that profit from information-related activities have systematically resisted regulatory oversight.

The real question posed in *Sorrell* was one that the majority did not recognize: how commercial speech jurisprudence for the era of informational capitalism ought to respond to such efforts. A signal victory for the First Amendment antiregulatory strategy, *Sorrell* portends wholesale constitutionalization of entire sectors of commercial activity and a broad and enduring marginalization of regulatory authority.

D. Proprietary Information Can Be Contraband

The fourth important underpinning of the emerging zombie First Amendment jurisprudence is *Holder v. Humanitarian Law Project*. There, a majority of the Court rejected a First Amendment challenge to a federal law forbidding material aid and support to organizations classified as terrorist.⁴¹ The entity challenging the law had provided human rights advocacy training to certain Kurdish and Tamil dissident organizations, and feared prosecution.⁴² Although *Humanitarian Law Project* does not seem to be a case about private economic power at all, it too is usefully read in light of the propertarian shift in contemporary First Amendment juris-

REV. 1049 (2000).

40. See, e.g., *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012); *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004); *King v. Gen. Info. Servs.*, 903 F. Supp. 2d 303 (E.D. Pa. 2012).

41. 561 U.S. 1 (2010).

42. *Id.* at 1-2.

prudence. So read, the case stands for the proposition that information that is property or that represents proprietary knowledge can become contraband and the target of interdiction mandates.⁴³

Within the First Amendment canon, disputes about banned speech and prohibited associations evoke the era of the civil rights marches, the House Un-American Activities Committee, and the demise of broadly drafted criminal syndicalism laws. Thus, for example, David Cole has argued that *Humanitarian Law Project* represents a radical break from cases like *Brandenburg v. Ohio*, which allowed punishment of speech only when sufficiently linked to direct threats of violence.⁴⁴ That view seems difficult to contradict, and from the perspective that Cole so ably articulates, the decision in *Humanitarian Law Project* is inexplicable. And yet the constitutional law scholar's view of the world is sometimes preoccupied with events within the stream of constitutional jurisprudence to the exclusion of those occurring outside it. The decision in *Humanitarian Law Project* reflects the influence of another, more contemporary debate about information danger and information contraband that one also must acknowledge.

A new phase in the debate about information contraband and the First Amendment began in the 1990s, amid the dawning realization that global information and communication networks and encryption technologies permitted information to spread in an uncontrolled and radically democratic fashion. Public fears coalesced around a set of threats that the technorati dubbed the "Four Horsemen of the Infocalypse": terrorism, drug dealers, pedophiles, and organized crime.⁴⁵ The Four Horsemen represented existential threats to the

43. A useful treatment of the information contraband question, focusing primarily on the question whether the general structure of First Amendment doctrine permits contraband treatment, is Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099 (2002).

44. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Scales v. United States*, 367 U.S. 203, 203 (1961) (enunciating analogous rule for efforts to criminalize association); see David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 147-48 (2012); see also Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 41-55 (2006) (arguing that efforts to regulate speech by targeting online intermediaries should consider the mid-twentieth century's First Amendment lessons).

45. See Javier Bernal, *Big Brother Is On-Line: Public and Private Security in the Internet*, CYBERSOCIOLOGY MAG. (Aug. 6, 1999), http://www.cybersociology.com/files/6_publicandprivate

fabric of society and the rule of law: threats in response to which ordinary procedures might be suspended in favor of extraordinary measures. With the articulation of these threats, the stage was set for a shift in the legal understanding of the relationship between speech and danger.

The first strand of the contemporary discourse about information contraband has explored the blurring of speech and conduct in executable computer code. In the mid-1990s, litigants in a pair of cases challenged the attempted assertion of federal export control regulations to restrict Internet-based distribution of encryption technologies, and won rulings acknowledging that human-readable source code is speech and that even machine-readable object code has an important expressive dimension.⁴⁶ The federal courts have been unwilling, however, to accept the further argument that laws regulating code merit strict scrutiny. Instead, as the Sixth Circuit explained, “[t]he functional capabilities of source code, and particularly those of encryption source code, should be considered when analyzing the governmental interest in regulating the exchange of this form of speech.”⁴⁷ To similar effect, in *Universal Studios, Inc. v. Corley*, a case about code that circumvented technical protections for copyrighted works, the court held that circumvention tools could be regulated as conduct, subject to the same general limitations that apply to other laws with secondary effects on speech.⁴⁸

The statute challenged in *Humanitarian Law Project* reflects a similar effort to define particular kinds of expertise as posing dangers in a way that transcended the formal classification of expert advice as speech. As the lawsuit wound its way through the

security.html [http://perma.cc/KW3Q-DNF5]. For what appears to have been the first use of the term, see Timothy C. May, *The Crypto Anarchist Manifesto*, in CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS 61, 67 (Peter Ludlow ed., 2001).

46. *Junger v. Daley*, 209 F.3d 481, 484-85 (6th Cir. 2000); *Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996), *aff’d sub nom. Bernstein v. U.S. Dep’t of Justice*, 176 F.3d 1132 (9th Cir. 1999), *withdrawn and reh’g granted*, 192 F.3d 1308 (1999). In *Bernstein*, the planned en banc rehearing was cancelled after the Commerce Department, to which export authority had been transferred, announced plans to amend the challenged regulations and notified the plaintiff that it no longer considered his code to be covered. *Bernstein v. U.S. Dep’t of Commerce*, No. C 95-0582 MHP, 2004 WL 838163, at *2, *5 n.2 (N.D. Cal. Apr. 19, 2004).

47. *Junger*, 209 F.3d at 485 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

48. 273 F.3d 429, 434-35, 450-52 (2d Cir. 2001) (citing *O’Brien*, 391 U.S. at 377; *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 799 (1989)).

courts, Congress amended the definition of “material support or resources” to include “expert advice or assistance,” and then amended the definition of “expert advice or assistance” to include “advice or assistance derived from scientific, technical or other specialized knowledge.”⁴⁹ Expert speech, Congress seemed to be saying, has a kind of power that ordinary speech does not, and can be restricted on that basis—which, both Congress and the courts seemed to think, is a different proposition than making invidious distinctions among kinds of speech or kinds of speakers.⁵⁰ The appellants in *Humanitarian Law Project* were not scientists or engineers, and were not providing technical training in the lay sense of that term.⁵¹ Yet in a world in which the line between speech and computer-mediated action had become vanishingly thin, the idea of the *materiality* of expert legal training could begin to seem entirely credible.

The second strand of the contemporary discourse about speech and existential threats concerns the copyright pirate, and the appearance of this “fifth horseman” is in itself a development worth remarking. Beginning in the late 1990s, members of the recording and motion picture industries and their respective trade associations waged a systematic campaign to associate online copyright infringement with organized crime and terrorism, and to frame online infringement as an existential threat to society in its own right.⁵² The notion that copyright infringement threatens the social fabric in a way analogous to organized crime or terrorism is, of course, highly debatable. As we have just seen, however, if information is property first and foremost, the speech-related reasons for

49. For discussion of the amendments, see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 10-13 (2010).

50. See *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 931-32 (9th Cir. 2007) (upholding amended statute as “not aimed at expressive conduct” and not covering “a substantial amount of protected speech”), *aff’d in part and rev’d in part sub nom.* *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

51. *Humanitarian Law Project*, 561 U.S. at 2.

52. For work collecting and analyzing these statements, see TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE 113-25 (2007); JOHN LOGIE, PEERS, PIRATES, AND PERSUASION: RHETORIC IN THE PEER-TO-PEER DEBATES (2006); John Logie, *A Copyright Cold War? The Polarized Rhetoric of the Peer-to-Peer Debates*, FIRST MONDAY (July 2003), <http://firstmonday.org/ojs/index.php/fm/article/view/1064/984> [<http://perma.cc/UYD3-LM76>]. On the framing of copyright infringement as an existential threat, see Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 18-19, 24-25 (2006).

regulating with a light hand appear less salient to both Congress and the courts. From a political perspective, moreover, the asserted problem of “piracy” presented optics more congenial to draconian state intervention.

While attempts during the 1990s and 2000s to expand legally sanctioned state surveillance of electronic communications met with determined resistance,⁵³ attempts to institute surveillance and interdiction in the interest of copyright policing produced a series of compromises among the private commercial interests involved. These included a notice and takedown system for online service providers and various private-sector initiatives for automated enforcement and filtering of online content.⁵⁴ Although Congress had not yet attempted to legislate general interdiction obligations—a move that would come two years after the decision in *Humanitarian Law Project*—by 2010 both Congress and the courts clearly recognized legal and technical interdiction of information flows offensive to proprietary interests as important resources in the legislative toolkit.

The final strand of the contemporary discourse about information contraband concerns state and corporate secrets. Congress enacted the law challenged in *Humanitarian Law Project* in 1997, but for a variety of reasons, including the curative amendments noted above, the case did not reach the Court until a decade later. The Court held oral argument in February 2010.⁵⁵ In April 2010, the news broke that WikiLeaks, a self-described open government organization, had

53. See, e.g., Sara Kehaulani Goo & Robert O'Harrow Jr., *New Airline Screening System Postponed: Controversy over Privacy Leads to CAPPS II Paring, Delay Until After Election*, WASH. POST, July 16, 2004, at A2; Steven Levy, *Battle of the Clipper Chip*, N.Y. TIMES MAG., June 12, 1994, at 44; *Senate Rebuffs Domestic Spy Plan*, WIRED (Jan. 23, 2003), <http://archive.wired.com/politics/law/news/2003/01/57386> [<http://perma.cc/VE24-E5N8>] (describing congressional hearings on the government's “Total Information Awareness” initiative).

54. See Digital Millennium Copyright Act, Pub. L. No. 105-304, § 502, 112 Stat. 2860, 2905-16 (1998) (codified as amended at 17 U.S.C. § 512 (2012)); Megan Geuss, *YouTube Has Paid \$1 Billion to Rights Holders via Content ID Since 2007*, ARS TECHNICA, (Oct. 13, 2014, 7:53 PM), <http://arstechnica.com/tech-policy/2014/10/youtube-has-paid-1-billion-to-rights-holders-via-content-id-since-2007/> [<http://perma.cc/G278-6DAR>]. On the implications of private-sector automated enforcement initiatives in copyright and other areas, see Danny Rosenthal, *Assessing Digital Preemption (and the Future of Law Enforcement?)*, 14 NEW CRIM. L. REV. 576 (2011).

55. Transcript of Oral Argument at 1, *Humanitarian Law Project*, 561 U.S. 1 (Nos. 08-1498, 09-89), 2010 WL 621318.

published a video of a 2007 attack by a U.S. military helicopter in Baghdad that killed a number of civilians, including children, and two Reuters employees. The episode received extensive coverage by U.S. newspapers of record, which noted the organization's history of leaking hidden information about government and corporate operations.⁵⁶ WikiLeaks attracted its share of defenders, but its critics saw a textbook case of advocacy run amok and threatening to disrupt the orderly flows of policing and nation-building.⁵⁷ A *New York Times* article on WikiLeaks published only a few weeks beforehand had quoted a Pentagon report as concluding that information of the sort routinely published by WikiLeaks "could be used by foreign intelligence services, terrorist groups and others to identify vulnerabilities, plan attacks and build new devices."⁵⁸

The Court decided *Humanitarian Law Project* two months after WikiLeaks published the video and two days after the *New York Times* reported as front-page news that U.S. Army Specialist Bradley Manning had been arrested on suspicion of having leaked the information to WikiLeaks.⁵⁹ At oral argument and in its briefs, the government had asserted that expert training in human rights advocacy could work to legitimize dangerous organizations.⁶⁰ Accepting that justification, the majority opinion also noted that terrorist organizations could rely on such training to "threaten, manipulate, and disrupt" the international legal system.⁶¹ Additionally, the Court cautioned about the risks of "straining the United States'

56. See Elisabeth Bumiller, *Video Shows U.S. Killing of Reuters Employees*, N.Y. TIMES, Apr. 6, 2010, at A13; Noam Cohen & Brian Stelter, *Airstrike Video Brings Attention to Whistle-Blower Site*, N.Y. TIMES, Apr. 7, 2010, at A8; Garance Franke-Ruta, *Web Site Releases Video of Baghdad Attack That Killed 2 Journalists*, WASH. POST (Apr. 5, 2010, 5:41 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/05/AR2010040503778.html> [<http://perma.cc/RUF7-CFL8>].

57. See Gabriel Schoenfeld, *Warfare Through "a Soda Straw,"* WALL ST. J., June 23, 2010, at A17.

58. Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 18, 2010, at A18.

59. Elisabeth Bumiller, *Army Leak Suspect Is Turned in, by Ex-Hacker*, N.Y. TIMES, June 8, 2010, at A1.

60. Transcript of Oral Argument, *supra* note 55, at 42-46; Brief for the Respondents at 56, *Humanitarian Law Project*, 561 U.S. 1 (Nos. 08-1498, 09-89).

61. *Humanitarian Law Project*, 561 U.S. at 37.

relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks.”⁶²

The exercise of situating the Justices within a larger cultural context is inevitably speculative. Even so, the Justices live in the same world that the rest of us do. The *Humanitarian Law Project* majority opinion is a product of its time, and not only because it expresses the deference to asserted national-security imperatives that has become the norm in the post-9/11 environment. It also dovetails neatly with the debates about material expertise, technical interdiction, and the viral spread of online conduct that have come to loom so large in the public view. So read, the case establishes the predicate for a shift away from *Brandenburg* and toward a far more flexible approach to claims of speech-related danger when certain kinds of interests are threatened.⁶³

* * *

Taken together, the decisions just described sketch the broad outlines of an emerging First Amendment jurisprudence that is surprisingly coherent, and more than a little unsettling. *Citizens United* and *Sorrell* stand for the proposition that information flows that advance the purposes of private property accumulation and consumer surplus extraction may move freely with little fear of encountering regulatory obstacles. At the same time, *Humanitarian Law Project*, *Eldred*, and *Golan* are proof that some types of content and speaker distinctions will be supported by the full force of law—will be treated, in other words, as principled and nonarbitrary. Together these opinions establish both a generally deregulatory stance toward proprietary, profit-motivated uses of information and

62. *Id.* at 32.

63. See *supra* note 44 and accompanying text. Some claims of speech-related danger still receive more critical scrutiny, but they typically do not involve threats to a proprietary interest in information. See *United States v. Alvarez*, 132 S. Ct. 2537, 2539 (2012) (invalidating a federal law criminalizing the making of false representations about one’s own receipt of military honors); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2729 (2011) (enjoining enforcement of a California law prohibiting the sale or rental of violent video games to minors); *United States v. Stevens*, 559 U.S. 460 (2010) (invalidating a federal law criminalizing the creation, possession, or sale of depictions of animal cruelty). Notably, *Brown* employed strict scrutiny to invalidate a law that threatened the proprietary interests of game developers. See 131 S. Ct. at 2738.

the predicate for installing circuit breakers within the network to intercept other kinds of uses that threaten proprietary interests. *Eldred*, *Golan*, and *Citizens United* articulate and elevate to constitutional significance a tight equivalence between speech and property, making clear that anyone invoking speech arguments to limit property claims confronts a heavy burden. *Humanitarian Law Project* and *Sorrell*, meanwhile, invert long-established rules about the evidentiary thresholds for constitutional scrutiny of speech regulation, investing censorship of activism with national security implications but encouraging First Amendment challenges to regulation of private economic activity.

II. SUBCONSTITUTIONAL SETTLEMENTS: POWER AND PRIVILEGE IN THE INFORMATION ECONOMY

So far, I have argued that First Amendment scholars should pay more systematic attention to a set of developments that only partially overlaps the territory long conceived as the First Amendment's traditional core. Many of those developments involve private economic activity and proprietary claims to information. In general, the Court has resolved First Amendment claims relating to private economic activity in a way that ratifies emerging distributions of information power. In this respect, contemporary First Amendment jurisprudence aligns with what scholars in a variety of fields have identified as a more general shift toward a neoliberal governmentality that emphasizes market liberties and a market-based approach to political participation.⁶⁴

Constitutional law does not itself produce the shift toward neoliberal governmentality. As Morton Horwitz has observed, "A constitutional revolution can take place only when the intellectual ground has first been prepared."⁶⁵ Horwitz was describing the New Deal revolution in constitutional law, and more particularly the

64. See Wendy Brown, *Neo-Liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1 (2003); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014); David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (2007); Timothy K. Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395 (2011); Thomas Lemke, "The Birth of Bio-Politics": Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality, 30 ECON. & SOC'Y 190 (2001).

65. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 3 (1992).

need to take careful note of its prehistory. As his research showed, the development of private and commercial law during both the antebellum period and the post-Civil War years established the distributive backdrop against which the constitutional disputes of the *Lochner* and New Deal eras were litigated. Economic regulation was commonplace in the nineteenth century, and initially emerged in ways that reinforced emerging patterns of industrial power, while judges came to understand the common law instrumentally, as a tool for promoting commerce and economic development.⁶⁶ The judicial philosophy that produced *Lochner* was in part a reaction to perceived special-interest legislation that threatened property interests, but the turn toward social science methodology that progressive legal thought set in motion also tended to validate existing economic arrangements.⁶⁷ Similarly, the First Amendment jurisprudence outlined in Part I takes its shape from an antecedent pattern of subconstitutional settlements and justifications that reflects perceived economic, commercial, and political imperatives.

The point I want to make here is most aptly characterized as Hohfeldian: in the emerging information economy, the balance of rights, privileges, powers, and immunities that characterized the industrial economy and the regulatory frameworks put in place to constrain it is shifting.⁶⁸ The transformation now underway in our political economy is engendering a corresponding shift in the distribution of legal power and privilege that extends across doctrinal boundaries and that is far more fundamental than the subject-matter divisions that such boundaries attempt to impose.

A. Corporate Citizens in the Marketplace

In both *Citizens United* and the earlier cases about the free speech rights of media companies on which the *Citizens United* majority relied, the Court took as given that corporations speak in the

66. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 47-54, 78-97, 116-26, 186-210, 218-26 (1977).

67. See HORWITZ, *supra* note 65, at 208-12.

68. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913). See generally Pierre Schlag, *How to Do Things with Hohfeld* (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Working Paper No. 14-4, 2014), available at <http://perma.cc/A6AV-Q8C4>.

same ways that people do and that money enhances communicative power in a linear, additive way. Those assumptions are charmingly old-fashioned. In the contemporary information economy, the expressive power of capital is not additive but rather multiplicative and synergistic. One of the principal vehicles for the expressive power of capital is the corporate brand, and corporations rely on their brands to engage in norm entrepreneurship on a wide range of social, economic, and technical issues. The communicative impact of brands is backed by both old and new forms of legal and market privilege.

Brand-driven corporate messaging is both increasingly pervasive and increasingly difficult to disentangle from the commercial and social contexts in which it is embedded.⁶⁹ Logos and other indicia of corporate sponsorship adorn bodies, billboards, theaters and arenas, and other public spaces. In addition, corporate brand owners pursue a wide range of other branding opportunities that might yield bottom-line benefits: product placements in films and television shows, displays on the uniforms and equipment of professional athletes, and so on. The modern corporation does not simply advertise its wares, however. It develops a “social media presence” on platforms like Facebook and Twitter, streaming updates to its followers about developments that might implicate its market or enhance its brand cachet. In addition, it develops gamified promotional strategies designed to recruit individual consumers as brand evangelists and reward them for their successes.⁷⁰ These developments make the cumulative power of corporate messaging far greater than the Court’s discussion presumed. Although speech in the service of branding tends not to be overtly political, it reflects

69. The legal scholarship on trademark law is just beginning to grapple with this dynamic in a more systematic way. See Mario Biagioli et al., *Brand New World: Distinguishing Oneself in the Global Flow*, 47 U.C. DAVIS L. REV. 455 (2013); Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012).

70. See generally RAJAT PAHARIA, *LOYALTY 3.0: HOW BIG DATA AND GAMIFICATION ARE REVOLUTIONIZING CUSTOMER AND EMPLOYEE ENGAGEMENT* (2013); GABE ZICHERMANN & JOSELIN LINDER, *THE GAMIFICATION REVOLUTION: HOW LEADERS LEVERAGE GAME MECHANICS TO CRUSH THE COMPETITION* (2013). For a discussion of gamification as a surveillance strategy, see Julie E. Cohen, *The Surveillance-Innovation Complex: The Irony of the Participatory Turn*, in *THE PARTICIPATORY CONDITION* (Darin Barney et al. eds., forthcoming 2016).

and reinscribes the ethos of consumerist, transactionally inflected participation that increasingly characterizes public discourse.⁷¹

The principal source of federal protection for brands and branding activities, the Lanham Act, is a creation of the industrial era.⁷² Its enactment in 1946 marked the emergence of a nationwide industrial economy within which the meaning of marks of origin as signifiers of corporate reputation was no longer only local.⁷³ Within the framework established by the Lanham Act, the basic unit of reputation nominally remains the individual mark. Federal registration is available only for specific marks, and causes of action for infringement must be pleaded on a mark-specific basis.⁷⁴

At the same time, case law interpreting the Lanham Act's "likelihood of confusion" standard has evolved steadily toward recognition that in the information era, the currency of reputation is the brand more generally. Thus, for example, infringement judgments in cases involving knock-offs seem crafted to protect marks as signifiers of luxury status; and the general cause of action for unfair competition, originally intended as a catch-all, is routinely recruited to cover a wide variety of situations that implicate brands rather than marks.⁷⁵ In disputes about the use of trademarks as search terms, corporate interests lost some battles but won the war; search has been pervasively monetized.⁷⁶ Last but hardly least, other types of entitlements in marks have proliferated in ways that acknowl-

71. See generally MARK ANDREJEVIC, INFOGLUT: HOW TOO MUCH INFORMATION IS CHANGING THE WAY WE THINK AND KNOW 44-57 (2013) (describing the burgeoning field of "sentiment analysis" and the ascendancy of the "affective fact").

72. See Lanham Trademark Act, Pub. L. No. 489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1141 (2012)).

73. See also *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (extending the personal jurisdiction of the federal courts to encompass those whose activities established minimum contacts with the forum state).

74. See 15 U.S.C. §§ 1051-1054, 1114 (2012).

75. See *Hermes Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 104, 108-09 (2d Cir. 2000); *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235, 1235, 1238-39 (6th Cir. 1991); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 867, 871 (2d Cir. 1986). For insightful discussions of this trend, see Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 845-59 (2010); Rebecca Tushnet, *Stolen Valor and Stolen Luxury*, in *THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY: CRITICAL REFLECTIONS* (Barton Beebe et al. eds., forthcoming).

76. See Steven Levy, *Secret of Googlenomics: Data-Fueled Recipe Brews Profitability*, WIRED MAG. (May 22, 2009), http://archive.wired.com/culture/culturereviews/magazine/17-06/nep_googlenomics [<http://perma.cc/8GG8-Q9H3>].

edge and reinforce the expressive power of capital. Both rights against dilution and tarnishment of well-known marks and the system of trademark-based property rights in domain names work to protect the cognitive and affective capital that brand owners have developed.⁷⁷

The widening arc of federal trademark and unfair competition law has produced ripple effects on the breathing room for cultural commentary invoking marks and brands. Unlike the Copyright Act, the Lanham Act does not contain an open-ended fair-use provision, so courts considering claims involving parodies and other cultural uses have had to improvise. Clear parodies in literary and audiovisual works predictably escape liability, but the results in other kinds of cases involving the invocation of brands as cultural signifiers can be quite different, and such cases can be very costly to litigate regardless of the ultimate outcome.⁷⁸ As Rebecca Tushnet and Deven Desai have observed, these results are especially striking because they depart so greatly from those that established First Amendment principles would seem to require: they penalize efforts to contest the persuasive force of branded speech and validate an asserted interest in controlling reputation that the law generally rejects when individual public figures are involved.⁷⁹ Although the Supreme Court has not yet spoken on the application of the Lanham Act to cultural uses of marks, its 1987 decision in the “Gay Olympics” case allowed a proprietary claim to overcome an expressive one.⁸⁰

77. Federal Trademark Dilution Act, Pub. L. No. 104-98 § 3, 109 Stat. 985, 985-86 (1996) (codified as amended at 15 U.S.C. § 1125(c) (2012)); Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, § 3002, 113 Stat. 1501 app. I, at 1501A-545 to -552 (1999) (codified as amended at 15 U.S.C. § 1125(d) (2012)).

78. See, e.g., *Hershey Co. v. Friends of Steve Hershey*, No. WDQ-14-1825, 2014 WL 3571691, at *1-5 (D. Md. July 17, 2014) (finding likelihood of confusion when politician named Hershey used chocolate brown signs and white Impact or Helvetica Neue font on election signs); *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, No. 10 Civ. 1611(PKC), 2012 WL 1022247 (S.D.N.Y. Mar. 22, 2012) (granting summary judgment on luggage manufacturer’s dilution claim against car manufacturer that invoked its mark in television commercial designed to suggest that luxury could be affordable); *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913, 913, 917 (C.D. Ill. 2003) (declining to enjoin unflattering depiction of defendant’s bulldozers in movie scene about deforestation); *Grey v. Campbell Soup Co.*, 650 F. Supp. 1166 (C.D. Cal. 1986) (enjoining use of “DOGIVA,” “CATIVA,” and silver foil trade dress to market high-end pet treats), *aff’d mem.*, 830 F.2d 197 (9th Cir. 1987).

79. Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. 455 (2013); Tushnet, *supra* note 75.

80. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539-41 (1987); see

Finally, it is worth noting that the growing expressive power of corporate reputation comes at a time when the ability of ordinary people to counter reputational injury is shrinking. The Communications Decency Act of 1996 (CDA) granted broad immunity from defamation liability to online intermediaries.⁸¹ Congress styled the CDA as a speech-promoting measure, and it certainly was; early court decisions in defamation cases against Internet access providers created a risk of significant liability for an emerging industry that promised to create unprecedented opportunities for expression.⁸² Yet the CDA went further than necessary to shelter that industry, changing the contours of existing defamation law to eliminate the risk of distributor liability for intermediaries possessing knowledge of an ongoing harm.⁸³ That change benefited both new online intermediaries and old media companies that expanded into the market for Internet services, aligning speech interests with property interests in a different but no less powerful way.

also *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (distinguishing *S.F. Arts & Athletics* on the ground that the statute at issue there prohibited false invocation of the Olympic mark for unauthorized material gain); *id.* at 2559 (Alito, J., dissenting) (“It is well recognized in trademark law that the proliferation of cheap imitations of luxury goods blurs the signal given out by the purchasers of the originals.” (quoting William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 308 (1987)) (internal quotation marks omitted)).

81. Communications Decency Act, Pub. L. No. 104-104 § 509, 110 Stat. 56, 138 (1996) (codified as amended at 47 U.S.C. 230(c)(1) (2012)).

82. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995) (holding a “family oriented” online service liable as publisher of libelous statements because it exercised some editorial control over the content it served), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104 § 509, 110 Stat. 56, 138; 141 Cong. Rec. H8468-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox); Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (1996). For representative commentary on the First Amendment implications of defamation liability for online service providers, see Floyd Abrams, *First Amendment Postcards from the Edge of Cyberspace*, 11 ST. JOHN’S J. LEGAL COMMENT. 693 (1996); and Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137 (1996).

83. See David Lukmire, Note, *Can the Courts Tame the Communications Decency Act? The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371 (2010). For discussion of the CDA’s sweeping effects on online harassment, see DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 170-77 (2014).

B. Industrial Copyright

The Court in *Eldred* took the expansionist trajectory of copyright as an inevitable response to “demographic, economic, and technological changes.”⁸⁴ Authors’ increased longevity, however, might equally well reinforce the argument that postmortem protection for copyrights is unnecessary. The purported economic imperative for longer copyright also was illusory; as the amicus brief of Nobel Laureate economists demonstrated, the discounted present value of a twenty-year term extension to authors of works yet to be created was essentially nil.⁸⁵ And the Court’s view of technological reality told only half the story. Property rights may require strengthening to counter new threats, but the specter of new threats also can be invoked opportunistically to expand existing entitlements into uncharted territory. Copyrights are broader and last longer than ever before, but that result reflects historical contingency and the assertion of power rather than the demands of materialist logic.

The one-way ratchet in the scope and duration of copyright entitlements that has been underway since the mid-twentieth century has served primarily corporate interests. The dramatic expansions of copyright in the mid-twentieth century to cover the byproducts of new recording and broadcast technologies responded directly to the influence of newly powerful industries. As Jessica Litman has documented, those industries actively participated in the drafting of the Copyright Act of 1976, developing a then-novel process that proceeded via negotiation and compromise among the affected industries with minimal oversight by elected legislators.⁸⁶ By the time that process was concluded, the capture of the legislative process was essentially complete. The resulting legislation contained broad, general rights and narrow, specific limitations, eliminating the latitude that formerly had existed for many nonprofit and downstream uses of copyrighted works.⁸⁷

84. *Eldred v. Ashcroft*, 537 U.S. 186, 206-07 (2003).

85. Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 5-7, *Eldred*, 537 U.S. 186 (No. 01-618).

86. See Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

87. For discussion of the latitude that formerly existed for nonexploitative personal uses, see Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

The capture of the copyright legislative process has persisted into the Internet era, producing both continued copyright expansion and the enactment of new paracopyright regimes such as the Digital Millennium Copyright Act's prohibitions against trafficking in tools for circumventing technical measures applied to copyrighted works.⁸⁸ Although not every proposal for strengthened protection has succeeded, that result often reflects the efforts of another group of powerful interests that includes computer equipment manufacturers and providers of Internet services. For example, many exceptions to the antitrafficking provisions benefit those interests, as does the structure of the DMCA's notice-and-takedown provisions.⁸⁹ So too with copyright litigation: recent years have seen courts begin to recognize and privilege a wide range of conduct by technology companies and celebrity artists as fair use, but a parallel recalibration to carve out breathing room for creative play and routine personal use by ordinary people has yet to occur.⁹⁰ Information and

88. See 17 U.S.C. § 1201(a)(2), (b) (2012).

89. See *id.* § 512, 1201(f) (reverse engineering); *id.* § 1201(g) (encryption research); *id.* § 1201(j) (security testing). The exceptions benefiting individuals and nonprofit institutions are far more limited in scope. See *id.* § 512(b), (h) (immunizing service providers from suits over mistaken takedowns and allowing suits against complainants only in cases of "knowing[] material[] misrepresent[ation]"); *id.* § 1201(d) (allowing circumvention by nonprofits, but only if they already know how); *id.* § 1201(i) (allowing circumvention of personal profiling capabilities under limited circumstances).

90. See *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg, L.P.*, 756 F.3d 73 (2d Cir. 2014) (reproduction and dissemination by news service of audio recording discussing market performance); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (appropriation by celebrity artist of documentary artist's photographs as the basis for a series of artworks); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (reproduction of student papers for use in automated tool to detect plagiarism); *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (reproduction by an Internet search engine of "thumbnail" versions of copyrighted photos); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (reproduction of Grateful Dead concert posters in a book about the band); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (reproduction by celebrity artist of a commercial photographer's work as part of a painting); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000) (copies of computer software made while reverse engineering the plaintiff's game platform to create a competing platform); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (copies of computer software made while reverse engineering the plaintiff's game platform to create compatible games); *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (reproduction and digitalization of copyrighted books to permit full-text search), *appeal docketed*, No. 13-4829 (2d Cir. Dec. 23, 2013). *But see* *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (holding that nonprofit libraries' reproduction and display of digital book scans for purposes of search, disability access, and preservation was paradigmatic fair use).

entertainment industry interests also predominate in international trade negotiations. As a result, and despite its official position to the contrary, the United States Trade Representative regularly advances proposals in trade negotiations that go beyond what U.S. copyright law would require, and uses its annual Special 301 report to name and shame countries that have resisted those proposals (or for other, political reasons).⁹¹

Meanwhile, in the legislative arena, the rhetoric has begun to shift in a way that nakedly acknowledges the real interests at stake. Industry associations that used to bring individual authors to testify before Congress now send their own officials, who make arguments about distribution incentives, trade balances, and gross national product.⁹² (The *Golan* majority cited this too as ineluctable reality.⁹³) Powerful and well-connected new organizations such as the Copyright Alliance boast membership lists consisting of entertainment,

91. For discussion on the uses and abuses of the Special 301 process, see Gabriel J. Michael, *Special 301: Is It Effective?*, TO PROMOTE THE PROGRESS? (June 5, 2014), <http://topromotetheprogress.wordpress.com/2014/06/05/special-301-is-it-effective/> [<http://perma.cc/MCX5-FHN9>]; Gabriel J. Michael, *Special 301: The Politics of Listings*, TO PROMOTE THE PROGRESS? (June 12, 2014), <http://topromotetheprogress.wordpress.com/2014/06/12/special-301-the-politics-of-listings/> [<http://perma.cc/3CBQ-PXXD>]. For discussion of industry influence in trade negotiations, see Margot Kaminski, *The Capture of International Intellectual Property Law Through the U.S. Trade Regime*, 87 S. CAL. L. REV. 977 (2014). For a graphical representation of the imbalance, see Christopher Ingraham & Howard Schneider, *Industry Voices Dominate the Trade Advisory System*, WASH. POST (Feb. 27, 2014), <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/> [<http://perma.cc/7HDQ-ESD3>].

92. *Compare The Copyright Term Extension Act of 1995: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 55-58 (1995) (statements of Bob Dylan, Don Henley, Carlos Santana, and Stephen Sondheim), and *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright Per Program Licenses: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 27-29 (1997) (statement of Julius Epstein, screenwriter of “Casablanca”), with *The Role of Voluntary Agreements in the U.S. Intellectual Property System: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 12-25 (2013) (statement of Cary Sherman, Chairman & CEO, Recording Industry Association of America), and *Music Licensing Under Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of David Israelite, President & CEO, National Music Publishers Association), available at <http://perma.cc/DCK7-V3XE>.

93. *Golan v. Holder*, 132 S. Ct. 873, 889 (2012) (“Full compliance with Berne, Congress had reason to believe, would expand the foreign markets available to U.S. authors and invigorate protection against piracy of U.S. works abroad, thereby benefitting copyright-intensive industries stateside and inducing greater investment in the creative process.” (citation omitted)).

software, and information industry associations.⁹⁴ Copyrighted works may originate as speech by authors, but in the halls of Congress and the corridors of K Street they are big business; they become speech interests again only when legal briefs must be crafted.

C. *The Biopolitical Public Domain*

The parties in *Sorrell* argued vigorously about the level of scrutiny that ought to apply to laws regulating a type of private-sector information processing that had both privacy and price implications. None questioned the background default rule that absent a special reason for protection, personally identifiable information is there for the taking. That assumption conceals a distributive decision that is antecedent and profoundly important to the First Amendment inquiry. Scholarly commentary on *Sorrell* has cited the case as evidence of a resurgent *Lochnerism* because the majority opinion reorients First Amendment standards toward the protection of economic liberty.⁹⁵ The comparison is even more apt than that reasoning suggests. The conception of economic liberty that *Lochner* constitutionalized reflected a particular, contingent relationship between the private law of contract and economic regulation that had evolved over the course of the preceding century as the industrial economy emerged.⁹⁶ In similar fashion, the conception of information freedom constitutionalized by *Sorrell* reflects a purported baseline that has itself been under construction during the decades that have witnessed the emergence of the informational era.

In the United States, the commercial data processing market has become a multibillion-dollar market that sits at the intersection of a number of information-era business models. The oldest of those models is the consumer credit reporting industry, which emerged on a nationwide scale in the mid-twentieth century, and which has been sheltered by a federal statutory framework that limits the

94. *Members*, COPYRIGHT ALLIANCE, <http://www.copyrightalliance.org/members> [<http://perma.cc/DQ7U-N64J>] (last visited Mar. 20, 2015).

95. See, e.g., Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2389-91 (2014); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014); Richards, *supra* note 4.

96. *Lochner v. New York*, 198 U.S. 45, 53 (1905); see HORWITZ, *supra* note 66, at 9-31.

liability of consumer reporting entities and imposes no independent duty to verify information or reconcile discrepancies between conflicting reports.⁹⁷ In the late twentieth century, as automated reporting and data processing emerged and became commoditized, credit reporting agencies, credit issuers, and other entities began developing business models based on mining their databases for sources of competitive advantage.⁹⁸ The emergence of the Internet prompted explosive growth in the number and variety of businesses that collect, process, and exchange personally identifiable information. Today, those businesses include: search providers that seek, as Google puts it, “to organize the world’s information and make it universally accessible and useful”;⁹⁹ web-based social networking platforms that use graphically rich, hypertext-based environments to enable customizable member profiles and multimedia exchanges; and operators of online massively multiplayer gaming platforms. As companies in these industries have moved beyond the startup stage and sought stable sources of financing, they have gravitated toward surveillance-based business models to help them monetize user activities more completely and effectively.¹⁰⁰ Other information enterprises, including data brokers and developers of so-called behavioral advertising tools, help to provide such capabilities to all types of businesses.¹⁰¹ Widespread ownership of networked mobile devices has enabled real-time tracking of people’s whereabouts and activities, enabling more precise targeting of offers and opportunities. The flows of information that support these activities move

97. See Fair Credit Reporting Act, 15 U.S.C. § 1681e(b) (2012) (requiring “reasonable procedures to assure maximum possible accuracy”); *id.* § 1681h(e) (preempting actions for defamation, invasion of privacy, and negligence except to the extent authorized by the federal law); *id.* § 1681n(a) (authorizing statutory damages only for willful noncompliance); Sarver v. Experian Info. Solutions, 390 F.3d 969, 972 (7th Cir. 2004) (holding that requirement to investigate anomalies would be unreasonable “given the enormous volume of information Experian processes daily”).

98. See OSCAR H. GANDY, JR., *THE PANOPTIC SORT: A POLITICAL ECONOMY OF PERSONAL INFORMATION* 95-102 (1993); ROBERT D. MANNING, *CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA’S ADDICTION TO CREDIT* 11-30 (2000).

99. *Company Overview*, GOOGLE, <https://www.google.com/about/company/> [<http://perma.cc/Q7H4-APSE>] (last visited Mar. 20, 2015).

100. See MARK ANDREJEVIC, *iSPY: SURVEILLANCE AND POWER IN THE INTERACTIVE ERA* 93-134 (2007).

101. For a good overview, see STAFF OF S. COMM. ON COMMERCE, SCI. & TRANSP., 112TH CONG., *A REVIEW OF THE DATA BROKER INDUSTRY: COLLECTION, USE, AND SALE OF CONSUMER DATA FOR MARKETING PURPOSES* (Comm. Print 2013).

in ways that are mostly invisible to ordinary consumers, but they are omnipresent.

These developments, like the others discussed in this Article, are manifestations of the transformation now underway in our political economy, and here it is important to consider some of the conceptual work that transformation requires. Like the prior transition from agrarianism to industrialism, the ongoing transition from industrialism to informationalism involves the commodification of important resources—land, labor, and money then; attributes, preferences, and attention now.¹⁰² The idea of resources available for commodification in turn entails a very particular idea of the common as unowned and available. The routine practices of personal information processing that have become the norm in the information economy are constituting a new type of public domain: the biopolitical public domain, a source of presumptively raw materials that are there for the taking and on which information-era innovators can build.¹⁰³

Like the public domain in intellectual property, the biopolitical public domain is a legal construct that does normative and distributive work.¹⁰⁴ It functions as a site of legal privilege (and of correlative no-rights for individual consumers) and as a starting point for the creation of new types of commercial entitlements that benefit information businesses. Personal information harvested from consumers is collected, processed, and exchanged in ways that become the basis for proprietary claims based on trade secrecy, which allegedly inheres in the databases, the algorithms and techniques used to process the data, and the resulting correlations and predictions.¹⁰⁵ The biopolitical public domain also frames an approach to knowledge production based on techniques for pattern

102. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 71-75 (1957).

103. I elaborate the concept of the biopolitical public domain more fully in Cohen, *supra* note 70; Julie E. Cohen, *The Biopolitical Public Domain* (2015) (unpublished manuscript) (on file with author).

104. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004) (discussing the public domain as a colonial construct); Cohen, *supra* note 52 (discussing the public domain as a spatial construct); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (discussing the public domain as an epistemological construct).

105. See FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS BEHIND MONEY AND INFORMATION* 19-25, 82-83, 191-93 (forthcoming 2015).

identification within very large data sets. Information businesses use those techniques to make human behaviors and preferences calculable, predictable, and profitable.¹⁰⁶

Lost in this process of expansion and reification is the ability to comprehend the harms that widespread collection and processing of personal information might produce. In the lower courts, information privacy claims challenging the commercial processing of personal information have overwhelmingly resulted in dismissal for failure to allege injury.¹⁰⁷ In policy processes and in the media, the information industries and libertarian tech policy pundits take a dismissive stance toward information privacy claims, ridiculing privacy as antiprogressive and its proponents as old-fashioned and fearful.¹⁰⁸ Because *Sorrell* was not really a case about an information privacy regulation, it is not clear what the Court would say to a case that squarely presented well-developed claims of information privacy harm. At minimum, however, a more robust theory of harm likely would support a stronger claim of government interest, which might affect the Court's judgment about the extent of tailoring required for the law to survive. The patterns of legal privilege and correlative disentanglement coalescing around the biopolitical public domain and its constituent knowledge practices work to prevent such recognition from occurring.

106. For descriptions of these practices, see generally ANDREJEVIC, *supra* note 100; PASQUALE, *supra* note 105; and Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1915-18 (2013).

107. For a partial sampling, see *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 988 F. Supp. 2d 434 (D. Del. 2013); *In re Google Android Consumer Privacy Litig.*, No. 11-MD-02264 JSW, 2013 WL 1283236 (N.D. Cal. Mar. 26, 2013); *Yunker v. Pandora Media*, No. 11-CV-03113 JSW, 2013 WL 1282980 (N.D. Cal. Mar. 26, 2013); *In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089 (N.D. Cal. 2013); *In re Google Inc. Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 WL 6738343 (N.D. Cal. Dec. 28, 2012); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942 (S.D. Cal. 2012); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040 (N.D. Cal. 2012); *Cohen v. Facebook, Inc.*, No. C 10-5282 RS, 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090 (N.D. Cal. 2011); and see also *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014) (dismissing on ground of insufficient commonality among class members).

108. For representative examples, see LARRY DOWNES, A RATIONAL RESPONSE TO THE PRIVACY "CRISIS" (Cato Inst. Policy Analysis No. 716, 2013), available at <http://perma.cc/DNX3-7X9K>; Adam Thierer, *The Problem with Obama's "Let's Be More Like Europe" Privacy Plan*, FORBES (Feb. 23, 2012, 3:37 PM), <http://www.forbes.com/sites/adamthierer/2012/02/23/the-problem-with-obamas-lets-be-more-like-europe-privacy-plan/> [<http://perma.cc/9M8Z-AAFM>].

D. Circuit Breakers in the Net

The *Holder v. Humanitarian Law Project* opinion took for granted a conception of dangerous speech inconsistent with its mid-twentieth-century precedent on sedition and communism but much more consistent with late-twentieth-century conceptions of online threats and acceptable responses. Many (though not all) recent developments in the legal and technical construction of categories of information contraband reflect private economic imperatives. Of particular importance, the past two decades have witnessed a deep and seemingly permanent shift in the nature of copyright enforcement. Twenty years ago, the principal enforcement tool was the civil infringement lawsuit. Criminal prosecution might supplement civil litigation in particularly egregious cases, but the Department of Justice generally preferred to devote its resources to other problems, and criminal enforcement was relatively rare.¹⁰⁹ Today, criminal enforcement is far more frequent, and both prosecutors and copyright owners have new and powerful tools for ex ante interdiction at their disposal.¹¹⁰

Over the course of the 1990s and 2000s, Congress amended the criminal provisions of the federal intellectual property laws nine times. The amendments expanded the categories of infringing conduct eligible for criminal penalties, increased the penalties for criminal copyright infringement and for importation and distribution of goods bearing counterfeit marks, and gave enforcement authorities the power to request court orders directing ex parte seizures of Internet domains that hosted infringing materials.¹¹¹ In

109. See generally Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305 (2002).

110. See, e.g., U.S. DEPT. OF JUSTICE, PRO IP ACT: ANNUAL REPORT FY 2012 (2012), available at <http://perma.cc/J3JH-NNUM>; FED. BUREAU OF INVESTIGATION, PRO IP ACT ANNUAL REPORT 2012 (2013), available at <http://perma.cc/RCT9-YWNG>.

111. Copyright Felony Act, Pub. L. No. 102-561, 106 Stat. 4233 (1992) (codified as amended at 18 U.S.C. § 2319 (2012)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320104, 108 Stat. 1796, 2110-2111 (1994) (codified as amended at 18 U.S.C. § 2320 (2012)); Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 5, 110 Stat. 1386, 1387 (codified as amended at 18 U.S.C. § 2320 (2012)); No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2, 111 Stat. 2678, 2678-80 (1997) (codified as amended at 18 U.S.C. §§ 2319, 2319A, 2320 (2012)); Intellectual Property Protection and Courts Amendments Act of 2004, Pub. L. No. 108-482, § 102, 118 Stat. 3912, 3912-15 (codified as amended at 18 U.S.C. § 2318 (2012)); Family Entertainment and Copyright Act of 2005, Pub. L. No.

addition, the Economic Espionage Act of 1996 established federal criminal liability for theft of trade secrets.¹¹² On the civil enforcement side, the Digital Millennium Copyright Act of 1998 established a new notice-and-takedown procedure directed at online intermediaries and another, less-well-known procedure for securing interdiction of infringing foreign traffic on a site-wide basis.¹¹³ At the same time, litigation-driven expansion in the suite of indirect infringement theories created the potential for monetary liability on a hitherto unheard-of scale.¹¹⁴

For some members of the copyright industries, these developments have not gone far enough. In particular, a litigation campaign designed to extend indirect infringement liability to reach third-party payment processors and venture capitalists failed to produce the desired results.¹¹⁵ In 2011, at the behest of the motion picture, recording, and major league sports industries, several members of Congress proposed legislation that would empower courts to cut off the support services provided by payment processors and other infrastructure providers upon *ex parte* application by an aggrieved

109-9, §§ 102-103, 119 Stat. 218, 218-21 (codified as amended at 18 U.S.C. §§ 2319, 2319B (2012)); Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181, 120 Stat. 285 (2006) (codified as amended at 18 U.S.C. § 2320 (2012)); Prioritizing Resources and Organization for Intellectual Property Act, Pub. L. No. 110-403, §§ 202-206, 122 Stat. 4256, 4260-63 (2008) (codified as amended at 18 U.S.C. §§ 2318-2320, 2323 (2012)); Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 717, 126 Stat. 993, 1076-77 (2012) (codified as amended at 18 U.S.C. § 2320 (2012)); *see also* Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 1201-1204, 112 Stat. 2860, 2863-76 (1998) (codified as amended at 17 U.S.C. § 1204 (2012)).

112. Economic Espionage Act of 1996, Pub. L. No. 104-294, § 101, 110 Stat. 3488, 3488-91 (codified as amended at 18 U.S.C. §§ 1831-1839 (2012)).

113. Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2879-80, 2885 (1998) (codified as amended at 17 U.S.C. § 512(c)(1), (j)(1)(B)(ii) (2012)).

114. *See Metro-Goldwyn-Mayer v. Grokster*, 545 U.S. 913 (2005) (recognizing theory of secondary liability based on inducing copyright infringement); *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (affirming summary judgment on contributory infringement liability for torrent site operator based on finding of sufficient causal connection to infringement by users of BitTorrent protocol); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (affirming finding of willful blindness sufficient to support contributory infringement liability based on design of defendant's file-sharing platform).

115. *See UMG Recordings v. Shelter Capital Partners, LLC*, 713 F.3d 1006, 1032 (9th Cir. 2013) (rejecting speculative theory of joint control over web hosting platform by venture capital investors); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788 (9th Cir. 2007) (holding that third-party payment processor lacked required causal connection to infringement and that right to terminate relationships with hosting sites did not equal right and ability to control the infringing conduct).

rightholder.¹¹⁶ The Stop Online Piracy Act (SOPA) and its companion bill, the Protect Intellectual Property Act (PIPA), sparked vehement protests that culminated in a worldwide Internet blackout in January 2012.¹¹⁷ Partly in response to the protests and partly in response to the objections of powerful Internet companies, Congress tabled the legislation.¹¹⁸

Notably, although the Obama Administration ultimately declined to support passage of the SOPA/PIPA legislation, its official position was that strong intervention in the online environment on behalf of intellectual property owners was entirely consistent with U.S. solicitude for freedom of speech.¹¹⁹ Well before the SOPA and PIPA legislation was introduced, however, the federal government had begun exporting the lessons learned from copyright interdiction to other domains far removed from intellectual property. In late 2010, after the news broke that WikiLeaks had leaked a cache of U.S. diplomatic cables that revealed contempt and disrespect for countries

116. See Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong., 1st Sess. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (PIPA), S. 968, 112th Cong. (as amended May 26, 2011); *SOPA/PIPA: Internet Blacklist Legislation*, ELECTRONIC FRONTIER FOUND., <https://www EFF.org/issues/coica-internet-censorship-and-copyright-bill> [<http://perma.cc/79HK-45UD>] (last visited Mar. 20, 2015).

117. Jonathan Weisman, *Web Rises Up to Deflect Bills Seen as Threat*, N.Y. TIMES, Jan. 19, 2012, at A1; David A. Fahrenthold, *SOPA Protests Shut Down Web Sites*, WASH. POST (Jan. 18, 2012), http://www.washingtonpost.com/politics/sopa-protests-to-shut-down-web-sites/2012/01/17/gIQA4WY16P_story.html [<http://perma.cc/S4Z7-QLTE>]; Timothy B. Lee, *SOPA Protest by the Numbers: 162M Pageviews, 7 Million Signatures*, ARS TECHNICA (Jan. 19, 2012, 1:45 PM), <http://arstechnica.com/tech-policy/2012/01/sopa-protest-by-the-numbers-162m-pageviews-7-million-signatures/> [<http://perma.cc/V3E9-HFHB>].

118. See Jennifer Martinez et al., *SOPA's Surprise Hollywood Ending*, POLITICO (Jan. 20, 2012, 9:28 PM), <http://www.politico.com/news/stories/0112/71746.html> [<http://perma.cc/A4N7-7Q5L>].

119. See Letter from Hillary Rodham Clinton, Sec'y of State, to Rep. Howard L. Berman, (Oct. 25, 2011), available at <http://perma.cc/K9LP-SYRA> (stating that goals of advancing Internet freedom and enforcing intellectual property rights online are consistent); Macon Phillips, *Obama Administration Responds to We the People Petition on SOPA and Online Piracy*, WHITE HOUSE BLOG (Jan. 14, 2012, 8:09 AM), <http://www.whitehouse.gov/blog/2012/01/14/obama-administration-responds-we-people-petitions-sopa-and-online-piracy> [<http://perma.cc/TRS-8Y4A>] (“[T]he Administration calls on all sides to work together to pass sound legislation this year that provides prosecutors and rights holders new legal tools to combat online piracy originating beyond U.S. borders while staying true to the principles outlined ... in this response.”); see also Hillary Rodham Clinton, Sec'y of State, Remarks on Internet Freedom (Jan. 21, 2010), <http://www.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm> [<http://perma.cc/TR2J-P8BS>] (“Those who use the internet to ... distribute stolen intellectual property cannot divorce their online actions from their real world identities.”).

considered to be U.S. allies, WikiLeaks suddenly found itself without Domain Name System (DNS) and web hosting providers and without a way to process donations.¹²⁰ Although government officials denied that official pressure on EveryDNS.net, Amazon.com, and PayPal, which formerly had provided those services to WikiLeaks, caused those sites to terminate their relationships, industry observers who had watched the developments closely concluded otherwise.¹²¹

As to the SOPA/PIPA proposal itself, subsequent developments suggest that the story of the evolution of interdiction capabilities remains only partly written. The American Bar Association's Intellectual Property Section recently issued a detailed report outlining recommendations for implementing strengthened interdiction obligations.¹²² Meanwhile, observers of the push to draft new, comprehensive regional trade agreements strengthening intellectual property enforcement have worried that the "wall of secrecy" surrounding the negotiations will enable the SOPA/PIPA prohibitions to resurface in the language of those agreements.¹²³ Whether or not interdiction obligations are extended, however, the changed enforcement climate has catalyzed other market reactions. Every major Internet company that hosts user-provided content uses automated filtering technology to prevent the posting of infringing content, and the major Internet access providers have adopted a "six strikes" menu of graduated sanctions to be levied on customers who

120. Charles Arther & Josh Halliday, *WikiLeaks Fights to Stay Online After US Company Withdraws Domain Name*, *GUARDIAN* (Dec. 3, 2010, 2:54 PM), <http://www.theguardian.com/media/blog/2010/dec/03/wikileaks-knocked-off-net-dns-everydns> [<http://perma.cc/UM7A-UBLD>] (citing several sources suggesting that EveryDNS.net dropped WikiLeaks under governmental pressure).

121. *Id.*; Ashlee Vance, *WikiLeaks Struggles to Stay Online after Attacks*, *N.Y. TIMES*, Dec. 3, 2010, at A8 (noting that Amazon.com kicked WikiLeaks off its systems after inquiries from an aide to Sen. Joseph I. Lieberman); Bianca Bosker, *PayPal Admits State Department Pressure Caused It to Block WikiLeaks*, *HUFFINGTON POST* (Dec. 8, 2010, 10:17 AM), http://www.huffingtonpost.com/2010/12/08/paypal-admits-us-state-de_n_793708.html [<http://perma.cc/T6QV-W2QQ>].

122. SECTION OF INTELLECTUAL PROP. LAW, AM. BAR ASS'N, A SECTION WHITE PAPER: A CALL FOR ACTION FOR ONLINE PIRACY AND COUNTERFEITING LEGISLATION (2014), *available at* <http://perma.cc/9GCY-3D3D>.

123. Lori Wallach & Ben Beachy, *Obama's Covert Trade Deal*, *N.Y. TIMES*, June 3, 2013, at A21. For a careful analysis of the draft intellectual property provisions of the Trans-Pacific Partnership agreement—leaked by WikiLeaks—concluding that the draft does not yet go that far, see Jonathan Band, *The SOPA-TPP Nexus*, 28 *AM. U. INT'L L. REV.* 31 (2012).

they believe are trafficking in infringing materials.¹²⁴ These and other measures create an online environment in which proprietary circuit breakers are expected and ordinary.

* * *

This Part of the Article has attempted to bring into sharper relief the background against which contemporary free speech litigation is conducted. That background reflects a pattern of ongoing realignment in the distribution of legal power and privilege in response to the asserted needs of powerful actors in the emerging information economy. Expanding protection for signifiers of corporate reputation has bolstered the expressive power of capital, and immunity from legal accountability for speech harms suffered by individuals and correlative disability on the part of those subjected to such harms have fortified that power still further. The expressive power of capital is fortified, as well, by a robust and open-ended privilege to harvest information from the biopolitical public domain, and by the corresponding disentanglement of individual information subjects to decline participation. Intellectual property rights in creative and expressive works have continued to expand, as have correlative duties to accommodate them. Last, though hardly least, as rights in intellectual property and other types of assertedly proprietary information have expanded, so has the power to demand reconfiguration of the network to protect those entitlements, with corresponding increases in the correlative liability of those who might stand in the way. Each of these shifts informs the First Amendment jurisprudence described in Part I. The great intellectual and moral failing of the contemporary First Amendment, and the impetus for its ongoing zombification in the service of information power, is that it has simply accepted them.

124. For information about the graduated response initiative, see CENTER FOR COPYRIGHT INFORMATION, <http://www.copyrightinformation.org/> [<http://perma.cc/YX4K-NQ4Q>] (last visited Mar. 20, 2015); and see also Annemarie Bridy, *Graduated Response American Style: "Six Strikes" Measured Against Five Norms*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2012) (evaluating the initiative in light of norms of fairness and due process).

CONCLUSION

Constitutional law's purposes are hotly debated and I have no grand claims to make on that score; my aim in this Article has been to draw attention to an emerging pattern. History suggests that constitutional law has been invoked to reinforce the accumulation of private economic power at least as often as to restrain it.¹²⁵ The account presented here suggests that a transformation of the former, reactionary sort is underway. For now, at least, First Amendment law at the dawn of global informational capitalism is ratifying distributive arrangements that celebrate and consolidate private economic power, including especially new forms of information power that undergird the emerging information economy.

Shifting the course of constitutional transformation entails recognition and reframing, and the two processes are linked. Frederick Schauer has argued that reinvigorating free speech jurisprudence requires more careful attention to naming and substantiating speech-related harms.¹²⁶ That advice is well worth heeding, but in conceptualizing harms it is also important to focus on who benefits. It is difficult to assert a speech harm when the counterparty has an entitlement that seems solidly rooted in the preexisting economic and social fabric. Reinvigorating free speech jurisprudence for the information age will entail recognition and reframing of harms, but it also requires more careful attention to naming and demystifying emerging patterns of legal power and privilege.

This suggests, however, that legal scholars looking to constitutional law for tools to halt the seemingly inexorable march of private power probably have been looking in the wrong place. As many have noted, the Constitution was not designed as a vehicle for correcting the maldistribution of resources, but rather tends to take inequality of property as a given. If the hope of a reinvigorated First Amendment is all that stands between us and the advancing horde of First Amendment zombies, we are in deep trouble. Questions about private law and private harms, in contrast, are centrally

125. For some examples, see HORWITZ, *supra* note 66, at 9-31.

126. Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 96-97.

about access to and distribution of resources. A jurisprudence of harms and benefits for the information economy must begin with those questions.