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What Twenty-First-Century Free Speech Law Means for Securities Regulation

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WHAT TWENTY-FIRST-CENTURY FREE SPEECH LAW MEANS FOR SECURITIES REGULATION

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Securities law has long regulated securities-related speech—and until recently, it did so with little, if any, First Amendment controversy. Yet the antiregulatory turn in the Supreme Court's twenty-first-century Free Speech Clause doctrine has inspired corporate speakers' increasingly successful efforts to resist regulation in a variety of settings, settings that now include securities law. This doctrinal turn empowers courts, if they so choose, to dismantle the securities regulation framework in place since the Great Depression. At stake are not only recent governmental proposals to require companies to disclose accurate information about their vulnerabilities to climate change and other emerging risks, but also longstanding governmental efforts to inform and protect investors while serving broader public interests.

This Article takes seriously this threat to the securities law framework, and defends that framework's constitutionality. It describes why and how securities law regulates speech to inform and protect investors—functions that also achieve public-regarding goals by facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating the systemic economic risks of market collapse. As we'll see, key differences between securities and other goods and services leave the securities market especially vulnerable to asymmetries of information, thus intensifying the importance of accurate securities-related information to investors as listeners. The Article then maps this securities law framework onto First Amendment law, demonstrating why and how this regulatory framework aligns with Free Speech Clause theory and doctrine. Key to this alignment are securities law's listener-centered functions.

More specifically, this Article makes the case for identifying securities-related speech as a category of speech unprotected by the First Amendment. The Court has long

* University Distinguished Professor and Rothgerber Chair in Constitutional Law, University of Colorado School of Law. Special thanks to Erik Gerding and Sarah Haan for so generously sharing their insights on securities law. Thanks too for thoughtful questions and comments from RonNell Andersen Jones, Marc Blitz, Fred Bloom, Alan Chen, John Coates, James Cox, Jennifer Hendricks, Sharon Jacobs, Margot Kaminski, Mark Loewenstein, Toni Massaro, Nadav Orian Peer, Mike Pappas, Frank Partnoy, Robert Post, Andrew Schwartz, Miriam Seifter, Amanda Shanor, Scott Skinner-Thompson, Harry Surden, Jeremy Telman, and Alex Tsesis. Finally, my thanks to Simon Furney and Brittany Porter for excellent research assistance.

considered the regulation of certain categories of speech as exempt from First Amendment review, and it has more recently announced a backwards-facing methodology for determining these categories that turns on identifying a longstanding regulatory tradition of restricting speech within a category without triggering traditional First Amendment scrutiny. We can trace a lengthy regulatory tradition of responding to the informational asymmetries endemic to securities markets by prohibiting companies from making false and misleading statements and by requiring them to make certain accurate disclosures.

Securities law remains faithful to this tradition when it regulates securities-related speech to serve these listener-centered functions. For this reason, securities law stays consistent with this regulatory tradition (and thus regulates within a category of unprotected speech) when it responds to the realities that the risks to investors change over time, and that investors evaluate those risks through a variety of methodologies. Think, for instance, of disclosures that inform investors about risks and methodologies that were unknown to, or unrecognized by, past generations—think of asbestos and fentanyl, and also of climate change and cybersecurity. That new risks to investors will arise (as well as new investor approaches to evaluating those risks) is foreseeable, even if the specific content of those risks and methodologies is not. In other words, today's securities laws address problems of informational asymmetries that are far from new. So too do they deploy a set of solutions, like mandatory disclosures, to those problems that are also far from new.

This Article asserts that the securities market is sufficiently distinct from other markets in its susceptibility to information asymmetries to justify recognizing securities-related speech as its own category of unprotected speech. Nevertheless, it also considers the possibility that the Court will instead turn to an entirely separate doctrine for considering the constitutionality of securities law: the very different rules that apply to the government's regulation of commercial speech. Here too securities regulation's listener-centered functions do important First Amendment work, as much of the securities law framework satisfies review under commercial speech doctrine so long as we continue to tether commercial expression's constitutional protection to that expression's capacity to inform listeners' decisionmaking.

INTRODUCTION

As the nation reeled from the 1929 stock market crash and the ensuing misery of the Great Depression, the New Deal Congress enacted major federal securities laws. Among other things, these laws regulate securities-related speech by prohibiting securities issuers from making false and misleading statements and by requiring companies to make a variety of accurate disclosures about their firms. Through these efforts, securities law seeks to inform and protect investors in their decisions about buying, selling, and holding securities as well as their decisions about electing directors and otherwise exercising their corporate governance functions. In so doing, securities law also advances broader public-regarding goals by facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating the systemic economic risks of market collapse.

Notwithstanding its description as "essentially the regulation of speech,"[1] this federal regulatory framework has endured for the better part of a century with little (if any) First Amendment controversy. While the Supreme Court has yet squarely to consider the constitutionality of securities law, it suggested in dicta that the Free Speech Clause poses no bar to the regulation of securities-related speech. In the 1970s, for instance, the Court cited "[n]umerous examples" of "communications that are regulated without offending the First Amendment, such as the exchange of information about securities [and] corporate proxy statements."[2] In the same vein, the Court earlier noted that "neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares."[3] Many thoughtful commentators similarly described the government's regulation of securities-related speech as exempt from traditional Free Speech Clause review.[4]

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1 Roberta S. Karmel, *The Third Abraham L. Pomerantz Lecture: The First Amendment and Government Regulation of Economic Markets—Introduction*, 55 BROOK. L. REV. 1, 1 (1989).

2 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (citation omitted).

3 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 n.5 (1985) (plurality opinion) (describing the content-based regulation of securities-related speech as consistent with the First Amendment even though similar content-based speech restrictions would be impermissible in other contexts).

4 *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1770 (2004) ("[N]o First Amendment–generated level of scrutiny is used to determine whether the content-based advertising restrictions of the Securities Act of 1933 are constitutional . . . ."); *see also* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 651 (2006) (asserting that "the institutional importance of the securities regulation regime" supports the constitutionality of that regime's regulation of speech).

But in what has sometimes been characterized as the "weaponization" of the First Amendment,[5] the antiregulatory turn in twenty-first-century free speech law now inspires corporate speakers' increasingly successful efforts to resist a variety of regulatory frameworks.[6] Newly vulnerable targets of this antiregulatory turn include the Food and Drug Administration's framework for approving medical drugs and devices,[7] various consumer health and safety warnings,[8] and longstanding laws that require employers to make certain disclosures to workers about the terms and conditions of employment, including the legal protections available to workers.[9]

Several doctrinal shifts (described at length elsewhere)[10] accomplish the antiregulatory turn: the Court increasingly characterizes the target of government regulation as constitutionally protected speech rather than unprotected economic conduct;[11] scrutinizes the government's compelled informational disclosures with growing skepticism;[12]

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5 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (describing the majority as "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy"); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 167 (2015) ("It is no exaggeration to observe that the First Amendment has become a powerful engine of constitutional deregulation. The echoes of *Lochner* are palpable.").

6 *See* Nathan Cortez & William Sage, *The Disembodied First Amendment*, 100 WASH. U. L. REV. 707, 711–51 (2023) (describing these developments).

7 *See* Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 189–95 (2018).

8 *See* Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 233–36 (2021).

9 *See* Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209, 223–25; Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 43–45 (2016) [hereinafter Norton, *Truth and Lies in the Workplace*].

10 *See, e.g.*, Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 323–26 (2016); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 134.

11 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557, 564–65 (2011) (striking down a Vermont law that regulated the sale of information about doctors' prescribing practices to pharmaceutical marketers on the grounds that statute burdened "disfavored speech by disfavored speakers," *id.* at 564); *see also* Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 394 (2014) ("[*Sorrell*] gives speech status to data; it treats the effort to regulate access to the data as regulation of expression rather than conduct; and it rejects the justifications offered by Vermont for treating detailers differently than other 'speakers' as insufficient, despite their commercial interest in, and ultimate use of, the data.").

12 *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (invalidating California law that required charitable organizations to disclose information about their finances and the identity of their major donors); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371–78 (2018) (invalidating California law that required licensed

and threatens to apply its most suspicious review whenever the government regulates on the basis of expression's content, even absent indications of the government's self-interested, intolerant, or other illicit motive.[13]

Reed v. Town of Gilbert illustrates this turn.[14] When considering a First Amendment challenge to a town's sign ordinance that prohibited some signs and permitted others for less-than-obvious reasons, all nine Justices found this head-scratcher of a law to fail even rational basis scrutiny (the most deferential level of review that requires only that the government's choice be rationally related to a legitimate interest).[15] In so doing, however, a majority announced its plans to apply strict scrutiny—almost always fatal to the government's action because it requires the government to prove that its choice is necessary to a compelling interest—*whenever* the government's regulation of expression focuses on particular content or particular types of speakers.[16]

Yet *Reed*'s majority made no effort to explain or distinguish the many examples identified by concurring Justices—examples that include securities law—where the government has long regulated on the basis of content or speaker identity without triggering First Amendment attention, much less concern.[17] Indeed, the government regulates expression on the basis of content or speaker identity in many contexts with good reason: the government's thoughtful selection of regulatory targets can reflect quality policymaking. As legal scholar Toni Massaro observes: "[I]t is *commonplace* for government to distinguish among types of speakers in this manner—i.e. based upon their very different occupational roles, motivations, control over the uses of information, market power, institutional commitment to speech values, and so on."[18] Justice Breyer's concurrence in *Reed* highlighted a few of the many available illustrations: "governmental

pregnancy centers to inform women seeking pregnancy-related services that California offers free or low-cost family planning services, prenatal care, and abortion, as well as California law that required unlicensed pregnancy centers to disclose that they were in fact unlicensed because they had no health care professionals on site).

13 *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

14 *Id.*

15 *See id.* at 179–80 (Kagan, J., concurring in judgment).

16 *See id.* at 163–65 (majority opinion).

17 *See id.* at 177–78 (Breyer, J., concurring in judgment) ("Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity." *Id.* at 177.).

18 Massaro, *supra* note 11, at 396.

regulation of securities, of energy conservation labeling practices, . . . of doctor-patient confidentiality, of income tax statements," and more.[19]

Absent limiting principles that the Court has yet to identify, this turn in contemporary free speech law now empowers the dismantling of the securities regulation framework in place since the Great Depression.[20] First Amendment attacks on current governmental efforts to inform investors about companies' vulnerabilities to climate change may offer courts the opportunity to do just that,[21] as several state attorneys general have announced plans to challenge proposed securities rules that would require companies to disclose information about the impacts of climate-related risks on their businesses, their businesses' greenhouse gas emissions, and their risk management processes for governing climate-related risks.[22] Also at stake are much older regulatory measures to inform and protect investors.[23]

This Article takes this threat seriously, and defends the constitutionality of the securities law framework in the wake of this antiregulatory turn. It describes why and how securities law regulates speech to inform and protect investors as listeners. It then maps this regulatory framework onto free speech law, demonstrating why and how that framework's listener-centered functions align with First Amendment theory and doctrine. In so doing, it suggests principled limits on the contemporary antiregulatory turn.

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19 *Reed*, 576 U.S. at 177 (Breyer, J., concurring in judgment) (citations omitted).

20 *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring in judgment with respect to severability and dissenting in part) ("[T]he regulatory spheres in which the Securities and Exchange Commission or the Federal Trade Commission operate are defined by content. Put simply, treating all content-based distinctions on speech as presumptively unconstitutional is unworkable and would obstruct the ordinary workings of democratic governance.").

21 *See* Letter from Patrick Morrisey, W. Va. Att'y Gen., to Allison Herren Lee, Acting Chair, SEC 3 (Mar. 25, 2021) ("If you choose to pursue this course, we will defeat it in court."); *see also* Michael R. Siebecker, *The Incompatibility of Artificial Intelligence and* Citizens United, 83 OHIO ST. L.J. 1211, 1258 (2022) (describing recent First Amendment challenges to securities laws and related corporate regulation).

22 *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022), (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

23 For a sampling of arguments suggesting that various longstanding securities rules should be subjected to, and struck down under, heightened First Amendment scrutiny, see Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 278–323 (1990); Susan B. Heyman, *The Quiet Period in a Noisy World: Rethinking Securities Regulation and Corporate Free Speech*, 74 OHIO ST. L.J. 189, 218–24 (2013); Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 802–06 (2007); Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 299–301 (1988).

More specifically, this Article makes the case for identifying securities-related speech as a category of speech unprotected by the First Amendment. The Court has long identified the regulation of certain categories of speech as exempt from First Amendment review, and more recently, the Court has insisted upon a backwards-facing methodology for determining these categories that turns entirely on identifying a longstanding regulatory tradition of restricting speech within a category free from traditional First Amendment scrutiny.[24] The Court has yet, however, to offer any guidance on this methodology's application in the Free Speech Clause context.[25]

To be sure, historical analysis is by no means the only nor the best of tools for constitutional decisionmaking.[26] But because the Court has made clear that history—and history alone—now controls its understanding of the categories of speech unprotected by the Free Speech Clause, this Article proposes a principled application of this methodology to leverage its strengths while managing its limitations. More specifically, this Article proposes that, for Free Speech Clause purposes, we start by focusing on *why* the government has long regulated speech in a particular category: What are the functions that the government has sought to achieve? It then suggests that we delimit the relevant category of unprotected speech as that which has long been regulated to serve those functions. This functional approach attends to the core free speech value of democratic self-governance by defining the requisite regulatory tradition to permit the people's representatives to learn from time and experience when responding to stubborn problems of long standing as well as to newer manifestations of those problems. This is what Joseph Blocher and Reva Siegel have, in other settings, described as "democracy's competence."[27]

As we'll see, key differences between securities and other goods and services leave the securities market especially vulnerable to asymmetries of information, thus intensifying the importance of accurate securities-related information to investors as listeners. We can trace a lengthy regulatory tradition of responding to those asymmetries (and the harms they threaten) by prohibiting those selling securities from

24 *See infra* notes 80–96 and accompanying text.

25 *See infra* notes 114–22 and accompanying text.

26 *See infra* notes 111–24 and accompanying text.

27 Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. (forthcoming Dec. 2023) (manuscript at 106), https://ssrn.com/abstract=4355024 [https://perma.cc/PPF3-3ZZ3]; *see also* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. (forthcoming 2023) (manuscript at 71), https://ssrn.com/abstract=4408228 [https://perma.cc/BZ5A-9E7V] (observing that the Court has "instructed courts to heed historical regulatory traditions in Second Amendment cases, and legislative deference may very well be an important part of that tradition").

making false and misleading statements and by requiring companies to make certain accurate disclosures. The threads that stitch this regulatory tradition together are the functions the tradition has long sought to achieve: informing and protecting investors in their decisions to buy, sell, or hold securities and in their exercise of corporate governance responsibilities (functions that also serve broader public-regarding interests in facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating the systemic economic risks of market collapse).

Securities law remains faithful to this tradition when it regulates securities-related speech to serve these listener-centered functions. For this reason, securities law stays consistent with this regulatory tradition (and thus regulates within a category of unprotected speech) when it responds to the realities that the risks to investors change over time, and that investors evaluate those risks through a variety of methodologies. Think, for instance, of disclosures that inform investors about risks and methodologies that were unknown to, or unrecognized by, past generations—think of asbestos and fentanyl, and also of climate change and cybersecurity. That new risks to investors will arise (as well as new investor approaches to evaluating those risks) is foreseeable, even if the specific content of those risks and methodologies is not. In other words, today's securities laws address problems of informational asymmetries that are far from new. So too do they deploy a set of solutions to those problems, like mandatory disclosures, that are also far from new.

This Article asserts that the securities market is sufficiently distinct from other markets in its susceptibility to information asymmetries (and their attendant harms) to justify recognizing securities-related speech as its own category of unprotected speech. Nevertheless, this Article also considers the possibility that the Court will instead turn to an entirely separate doctrine for considering the constitutionality of securities law: the very different rules that apply to the government's regulation of commercial speech. Here too securities regulation's listener-centered functions do important First Amendment work, as much of the securities law framework satisfies review under commercial speech doctrine so long as we continue to tether commercial expression's constitutional protection to that expression's capacity accurately to inform listeners' autonomous decisionmaking.

To these ends, Part I explains why and how the government regulates securities-related speech. As we'll see, this regulatory framework responds to key differences between securities and other products available in the commercial marketplace, differences that intensify investors' vulnerability to information asymmetries and thus amplify the value of accurate securities-related information. Parts II and III then

explain why and how this framework aligns with free speech law notwithstanding the antiregulatory turn in First Amendment law. More specifically, Part II makes the case for understanding securities-related speech as a category of speech unprotected by the First Amendment, and Part III describes how the securities regulation framework remains consistent with the theory and doctrine of commercial speech law.

Ubiquitous in human relationships, speech is complicated because human relationships are themselves so complicated.[28] Recognizing these complexities requires that we treat speaker-listener relationships differently when in fact they are differently situated.[29] And despite the contemporary Court's protestations to the contrary, First Amendment law has long tolerated the government's content- and speaker-based distinctions that serve important functions—for example, to inform and protect listeners who experience disadvantage at the hands of speakers who enjoy greater information, power, or both.[30] The next Part describes the (necessarily) content- and speaker-specificity of securities regulation in attending to these complicated relationships.

I. WHY AND HOW SECURITIES LAW REGULATES SPEECH

This Part explains the "why" of securities law (its overarching rationales) before turning to the "how" of securities law (its operational structure). In so doing, it examines how securities law regulates speech through antifraud rules that prohibit false and misleading speech about securities-related matters; mandatory disclosure rules that require accurate and comparable disclosures about securities-related matters; and "gun-jumping" rules that tie the timing of securities offers and sales to the submission, review, and delivery of required disclosures to ensure that these disclosures are made at a time and in a way that meaningfully informs investors' decisions.

28 *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting) ("Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech.").

29 *See* Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1671 (2021) ("[T]he Court's purported insistence on formal neutrality is normatively misguided in failing to acknowledge the ways in which factual distinctions sometimes *should* make a legal difference. Indeed, identifying such distinctions is the project of much legal analysis . . . ." (footnote omitted)).

30 *See supra* notes 17–19 and accompanying text.

A. Securities Law's Rationales

Now nine decades old, federal securities statutes empower the Securities and Exchange Commission (SEC) to issue and enforce regulations consistent with the statutes' multiple functions of informing and protecting investors; maintaining fair, orderly, and efficient markets; facilitating capital formation; and advancing the public interest.[31] These functions overlap with and reinforce each other. For example, providing investors with accurate, reliable, and comparable information about available investment opportunities also promotes capital formation by safeguarding investors' confidence in capital markets' integrity.[32] And supplying shareholders with accurate, reliable, and comparable information about a firm's management not only informs those shareholders' decisions about corporate governance but also advances the public's interest by ameliorating the systemic economic threats posed by market collapse.[33]

Understanding how securities law regulates speech to achieve these interlocking functions requires that we recognize several key differences between securities and other goods and services available in the commercial marketplace—differences that intensify the importance of accurate securities-related information to investors as listeners. For these purposes, note more specifically that *protecting* investors is a securities regulation function related to, but distinct from, *informing* investors: for example, mandatory disclosures not only *protect* investors from companies' (and their managers') deception and self-

31 *E.g.*, Securities Act of 1933 § 2(b), 15 U.S.C. § 77b(b) (2018); Securities Exchange Act of 1934 §§ 14(a)(1), 23(a)(2), 15 U.S.C. §§ 78n(a)(1), § 78w(a)(2) (2018); Investment Company Act of 1940 § 2(c), 15 U.S.C. § 80a-2(c) (2018).

32 *See* Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 CONN. L. REV. 393, 419 (2006) ("If investors fear being defrauded by issuers, broker dealers, exchanges or other market intermediaries, or that the investment odds are otherwise rigged, they will no longer invest in the stock market."); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1210 (1999) (describing securities laws' functions to include promoting "market efficiency so that the prices of securities would more accurately reflect the underlying values of the securities").

33 *See* Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 296 (describing how securities laws seek to ameliorate systemic risks to fair and efficient markets, where "[s]ystemic risk is financial risk both *within* and *to* the financial system itself that investors cannot shield themselves from through diversification").

dealing but also *inform* investors' autonomous choices about which investment options best align with their values and preferences (even absent any bad behavior by companies and their management).[34]

First, securities (in other words, shares in business opportunities[35]) are what economists call "credence" goods: goods characterized by especially pronounced informational asymmetries between sellers and buyers.[36] Potential buyers of credence goods (like medical services) cannot assess those goods' value through traditional means like inspection before purchase (as is the case with "search goods" like clothing) or experience after purchase (as is the case of "experience goods" like wine).[37] Because this pudding cannot be tested by its tasting,[38] an investor may not realize a security's economic value until she receives dividends from the company or sells the security. Until then, securities law helps fill these informational gaps by requiring the sellers of securities to disclose information about their companies to buyers and potential buyers.[39]

Second, investors rarely make a simple yes-or-no decision about whether to invest in a single company; they instead more commonly select among numerous investment options. For this reason, investors need comparable information about competing opportunities—information that, again, is of particular value when assessing credence goods like securities. Akin to "governmentally defined weights and

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34 *See* Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1095–96 (2007) (explaining that informing investors to improve the functioning of financial markets is a regulatory function distinct from protecting investors from deception).

35 *See* SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946) (defining a security as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of" others).

36 *See* Arthur R. Pinto, *The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK. L. REV. 77, 84–85 (1989) ("Securities can be classified as a credence good." *Id.* at 85.); *see also* Uwe Dulleck, Rudolf Kerschbamer & Matthias Sutter, *The Economics of Credence Goods: An Experiment on the Role of Liability, Verifiability, Reputation, and Competition*, 101 AM. ECON. REV. 526, 526 (2011) (describing the characteristics of credence goods).

37 *See* Dulleck et al., *supra* note 36, at n.1 (distinguishing "[s]earch" and "[e]xperience" goods). In contrast, consumers know the value of "[o]rdinary goods" (like gasoline) without inspecting them in advance or testing their quality through use and experience. *Id.*

38 My thanks to James Cox for suggesting this metaphor.

39 *See* Pinto, *supra* note 36, at 83–84 ("Securities represent interests in a business, but the instruments themselves have no intrinsic value. They can be issued in unlimited amounts because value depends upon the business that issues them. The security itself cannot be consumed, inspected, or verified. . . . The security's value depends upon information, much of which is about the business and comes directly from the business. Thus, the value of securities is substantially dependent upon the ability of the business issuing the securities to supply the firm-specific information to the buyers.").

measures,"[40] accurate and standardized disclosures help investors distinguish well-managed companies from poorly managed ones. Enabling investors to make meaningful comparisons among firms not only informs and empowers those investors, but also supports deep and broad capital markets.[41]

Third, investors are heterogeneous: not all investors rely on the same information nor do they all use the same information in the same way. More specifically, different investors have different priorities[42] and use different methodologies for assessing the values and risks most salient to them.[43] Illustrations include investors who choose among a variety of asset pricing models consistent with contemporary finance theory, like those that apply discounted cash flow models to adjust projections of a company's future cash flows into present value, or others that emphasize ratios of a company's earnings to its share price.[44] Other investors are interested not just *that* a company generates profits but also in *how* a company generates profits.[45] Through mandatory disclosures, securities law seeks to deliver a range of information relevant to heterogeneous investors with diverse preferences and methodologies for assessing value and risk.[46]

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40 Ralph K. Winter, *A First Amendment Overview*, 55 BROOK. L. REV. 71, 74 (1989) ("[T]he function of securities legislation transcends ordinary discourse between a speaker and an audience. It mandates standard disclosure for all the firms it governs, so every firm is assured that its competitors and everyone else will generate and disclose information, too. It is analogous to governmentally defined weights and measures because it insures that everyone makes standardized disclosures."); *see also* Michael P. Dooley, *The First Amendment and the SEC: A Comment*, 20 CONN. L. REV. 335, 339 (1988) ("To 'let a thousand flowers bloom' in the realm of financial disclosure is to increase information costs by a similar magnitude. . . . [T]he market for financial information is very different from the 'free marketplace of ideas.' Whereas the latter demands diversity, the former depends upon some measure of uniformity to function at all.").

41 *See* Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 884 (2015) ("These purposes are primarily aimed at decreasing information costs and promoting the efficiency and stability of capital markets. They have helped to make American stock markets the envy of the world.").

42 *See* LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 9 (2012) (explaining that "different shareholders have different values").

43 *See* BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET: INCLUDING A LIFE-CYCLE GUIDE TO PERSONAL INVESTING 115–300 (13 ed. 2023) (discussing a wide range of investor methodologies for assessing securities' risk and value).

44 *See* ROBERT J. RHEE, ESSENTIAL CONCEPTS OF BUSINESS FOR LAWYERS 97–98, 187–247 (3d ed. 2020) (describing different methodologies for valuation).

45 *See* Williams, *supra* note 32, at 1201.

46 *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 21–22 (Del. 2017) (recognizing that a range of different methodologies are available to investors when assessing a company's value, and that these methodologies may yield different results); Dalley, *supra* note 34, at 1094 ("Pricing risk is one of the essential functions of the

Next, unlike those who purchase other goods and services, the buyers of securities acquire governance rights and responsibilities along with their share of the business. Think, for instance, of shareholders' power to elect the corporation's board of directors, to approve or disapprove mergers and acquisitions, and to bring shareholder-based suits to hold managers accountable for their performance. Mandatory disclosures inform shareholders' decisions about how to govern the firms in which they own shares in addition to their decisions about whether and when to buy, sell, or hold those shares.[47]

Finally, that public companies are owned by shareholders but controlled by managers means that managers may arrogate the firm's resources or dodge their duties to their own benefit and to shareholders' detriment.[48] The disclosures required by securities law help shield investors from the dangers that accompany such divergent incentives by obliging the firm's managers to share accurate and standardized information that enables those dissatisfied with the firm's performance to exercise exit (by selling shares) or voice (by greater engagement in corporate governance).[49] In this way, mandatory disclosures attend to asymmetries of power as well as of information: when left to fend for themselves, numerous and widely diffused shareholders face substantial collective-action barriers to their efforts to negotiate with a firm's management for full, accurate, and standardized disclosures.[50]

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securities markets, and disclosure of information improves market participants' ability to assess and price risk.").

47 We might understand these rules as compelling the disclosure of information that literally "belongs" to shareholders as the company's "owners." On the other hand, some commentators challenge the notion that public companies "belong" to their shareholders. *See, e.g.*, STOUT, *supra* note 42, at 37, 42 ("[F]rom a legal perspective, shareholders do not, and cannot, own corporations. Corporations are independent legal entities that own themselves . . . . Shareholders own shares of stock [which create] a contract that gives the shareholder very limited rights [the right to vote, the right to sue, and the right to sell their shares] under limited circumstances." (emphasis omitted)).

48 *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119–25, 277–87 (1932) (describing information as a tool for addressing the concerns raised by the separation of ownership and control); Williams, *supra* note 32, at 1216 (describing the "divergence of interests between shareholders and managers, and potential lack of accountability to the shareholders" as "preoccup[ying] corporate law scholars ever since" Berle and Means observed the tensions created by the separation of a corporation's ownership from its control).

49 *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970) (describing the strategies of exit and voice).

50 *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 206–07 (2018) (describing how shareholders "[w]idely dispersed throughout the nation" faced daunting collective action problems because of "their sheer numbers: they could not be easily organized, and any one vote against management was

The remainder of this Part turns from *why* securities law regulates securities-related speech to examine more specifically *how* it does so.

B. Restrictions on False or Misleading Speech ("Antifraud Rules")

A variety of securities laws forbid certain false or misleading statements in connection with the purchase or sale of securities. Most commonly, these rules prohibit securities issuers and marketers from making "any untrue statement of a material fact," and bar them from omitting "a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[51] Rooted in common-law tort and contract claims for fraud and misrepresentation, these rules seek to deter, and provide remedies to the victims of, fraud.[52] These rules also promote market efficiency and capital formation by preventing the "lemons" markets that can develop when the absence of accurate information about products' quality undermines, and sometimes destroys, the market for those products.[53]

Antifraud rules are necessarily both content-based and speaker-based. In other words, they regulate only certain expression (that is, securities-related speech that is false or misleading) by certain speakers (securities issuers and other market participants) precisely because those distinctions are relevant to the expression's potential for harm.

C. Mandatory Disclosure Rules

Securities laws also require companies and their agents to make a variety of accurate disclosures about securities-related matters.[54] To illustrate, securities issuers must file registration statements with the SEC that provide a range of information (information that is then made available to the public on the SEC's website) before offering securities to the public for sale—and issuers must later provide a sales

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inconsequential"); Harper Ho, *supra* note 33, at 294 ("Corporate managers are also particularly reticent to disclose negative information unless they are clearly required to do so, given the potential effect on the company's stock price.").

51 17 C.F.R. § 240.10b-5(b) (2022).

52 *See* Amanda Marie Rose, *The Shifting Raison d'Être of the Rule 10b-5 Private Right of Action*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 39, 39–44 (Sean Griffith et al. eds., 2018) (describing Rule 10b-5's common-law roots).

53 *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495–500 (1970) (describing this dynamic).

54 These disclosures are also governed by the antifraud rules described *supra* notes 51–53 and accompanying text. In other words, securities law not only requires regulated entities to make these disclosures but also requires them to ensure the disclosures' accuracy.

document called a "prospectus" (drawn from the registration statement) to investors when selling those securities through public offerings.[55] Public companies[56] must also file quarterly and annual reports with the SEC (information that, again, is made publicly available to investors),[57] along with reports of certain key corporate events like bankruptcies or company earnings announcements.[58]

These required disclosures include information about the company's operations, financial condition, and risk factors; descriptions of the company's property; legal proceedings in which the company is involved; factors that increase the risk of investing in the company; the company's securities performance (like the dividends it has paid); the management's discussion of the factors it believes have affected past performance and will affect future performance; and board members' and officers' identities and compensation.[59] (Securities law also leaves companies free to provide additional texture and nuance through voluntary disclosures of their own, and many companies choose to make disclosures beyond those required by law.)[60]

Federal securities law also requires companies to provide various disclosures to shareholders relevant to their governance decisions. For example, in advance of an election of a public company's directors, that company must make certain disclosures that inform shareholders' votes, most commonly through proxy statements delivered electronically or through the mail.[61] More specifically, these proxy statements must include the company's annual report and audited financial statements, along with information about voting procedures, information about the compensation of directors and officers, and background information about candidates for director.[62] Similar disclosure requirements apply to shareholders who seek to nominate candidates

55 15 U.S.C. § 77e (2018); *see also id.* § 77d(a)(2) (exempting "transactions by an issuer not involving any public offering").

56 *See id.* §§ 78*l*(a), (g), 78*o*(d) (providing the thresholds for determining when a company is "public" for these purposes—thresholds that include listing its securities on a national exchange, conducting a registered offering, or possessing total assets in excess of $10 million).

57 *Id.* § 78m(a).

58 *See* SEC Form 8-K, Information to Be Included in the Report: Item 1.03(a), at 6 (Sept. 2023).

59 *See, e.g.*, 17 C.F.R. pts. 210, 229 (2022).

60 Even so, a variety of rules and doctrines seek to discourage issuers from burying bad news or otherwise frustrating investor decisionmaking by flooding investors with distracting or useless information. *See* Erik F. Gerding, *Disclosure 2.0: Can Technology Solve Overload, Complexity, and Other Information Failures?*, 90 TUL. L. REV. 1143, 1151 (2016).

61 *See* 15 U.S.C. § 78n(c) (2018); 17 C.F.R. §§ 240.14a-3, 240.14a-16 (2022).

62 *See* 17 C.F.R. §§ 240.14a-3, 240.14a-101 (2022); *see also* Williams, *supra* note 32, at 1207 (describing these processes).

of their own or to submit other matters to a shareholder vote.[63] Along the same lines, federal securities laws also require public companies involved in potential mergers or acquisitions to provide information material to shareholders' decisions about those transactions.[64]

These mandatory disclosure rules are necessarily both content-based and speaker-based, in that they regulate only certain speech (by requiring disclosures only of certain securities-related matters) by certain speakers (like securities issuers or company management) because those distinctions are relevant to the expression's potential for value to investors as listeners. In this way, these distinctions serve the regulatory framework's multiple and overlapping functions of informing investors' decisions about buying, selling, and holding securities as well as their decisions about corporate governance matters.

D. Gun-Jumping Rules

A related set of federal securities laws tie the timing of securities offers and sales to the submission, review, and delivery of required disclosures to ensure that those disclosures are made at a time and in a way that meaningfully informs investors' decisions. Collectively known as the "gun-jumping rules" (to prevent a company from "jumping the gun" to sell securities before the SEC has reviewed the company's registration statement and its required disclosures), these provisions of the Securities Act of 1933 work together to ensure that investors receive, before investing, the required disclosures that provide investors with accurate (and comparable) descriptions of businesses and their past financial performance, as well as an assessment of the risks they may face in the future.

Here's how the gun-jumping rules work: First, they prohibit an issuer from making "offers" to sell a security to the public until the issuer has filed a registration statement (and its various disclosures)

63 *See* 17 C.F.R. § 240.14a-8 (2022); *see also* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 272–77 (2016) (describing the shareholder proposal process). Under certain circumstances, securities law also requires the incumbent management to distribute those shareholders' proxy statements—together with the company's own proxy statements—to the other shareholders. 17 C.F.R. § 240.14a-8.

64 Among other things, a firm seeking to acquire a public company without the support of that target company's management (in what's called a hostile takeover) must also provide mandatory disclosure to the target's shareholders. *See* 15 U.S.C. § 78n(d)–(f). For related reasons, federal securities law also requires that shareholders who have acquired above a certain threshold of stock disclose their ownership stake to other shareholders through an SEC filing. *Id.* § 78m(d), (g).

with the SEC.[65] Next, SEC staff review the registration statement to ensure that it includes the required disclosures; this period of time after the company has filed a registration statement with the SEC but before the agency has completed its review is known as the "waiting period."[66] As law professor Paula Dalley explains, "This waiting period prevents issuers and underwriters from engaging in aggressive, abbreviated, and misleading selling efforts while the market (or, more specifically, analysts and other professionals) digests the information in the preliminary prospectus. The waiting period also gives individuals time to consider before investing."[67] Finally, when the SEC's review finds the disclosures satisfactory, its staff declares the registration statement "effective," which then permits the issuer to sell those securities once it has delivered the prospectus (with its various disclosures) to potential buyers.[68] This architecture seeks to focus investors' attention, at key decision points, on the information disclosed in the registration statement and the prospectus.[69]

In enacting the gun-jumping rules, the New Deal Congress sought to forestall the abusive marketing practices that it considered partially responsible for the 1929 stock market crash and the ensuing Great Depression.[70] History offers examples aplenty of high-pressure sales tactics that undermined investors' capacity to assess risk, with consequences that extended beyond individual investors' losses to include stock market crashes that led to prolonged economic downturns and

65 *See id.* § 77e; *see also* Securities Act Release No. 3844, 22 Fed. Reg. 8359, 8359 (Oct. 24, 1957) (interpreting an "offer" to mean any communication that "may in fact contribute to conditioning the public mind or arousing public interest in the issuer or in the securities of an issuer in a manner which raises a serious question whether the publicity is not in fact part of the selling effort").

66 *See Filing Review Process*, U.S. SEC. & EXCH. COMM'N (Sept. 27, 2019), https://www.sec.gov/divisions/corpfin/cffilingreview [https://perma.cc/XJ6J-92MF].

67 Dalley, *supra* note 34, at 1100 (footnote omitted).

68 *See* 15 U.S.C. § 77e(c) (prohibiting any person using instrumentalities of interstate commerce from selling a security unless a registration statement is in effect for that sale); *id.* § 77e(b)(2) (requiring that securities delivered to investors be accompanied or preceded by a final prospectus); *see also* Winter, *supra* note 40, at 75 ("By prohibiting sales without a written prospectus, [federal securities law] reduces the number of claims of oral misrepresentation.").

69 SEC rules also create certain "safe harbors" that permit certain communications by securities issuers prior to the SEC's completion of its review. *See* Heyman, *supra* note 23, at 193–206 (describing various safe harbors).

70 *See* MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA'S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE 135–49, 237–55, 288–94 (2010) (describing how congressional oversight hearings revealed a variety of abusive sales practices that contributed to the Great Crash and how these discoveries influenced the enactment of the Securities Act of 1933 and its gun-jumping rules); JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 1–2, 13–38 (1982) (same).

sometimes even depressions.[71] The gun-jumping rules' rationales are thus the same as those underlying the mandatory disclosure rules—and for the same reasons too, those rules are necessarily content- and speaker-specific.

* * *

As we've seen, the multiple and interrelated functions underlying securities law explain that regulatory framework's focus on specific speakers and specific content to inform and protect investors as listeners. The remainder of this Article explores why and how this securities law framework aligns with free speech theory and doctrine. Key to this alignment, as we'll see, are securities law's listener-centered functions.

II. SECURITIES-RELATED SPEECH AS A CATEGORY OF UNPROTECTED SPEECH

Not all speech is protected by the First Amendment. Nor could it be, as the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."[72] What categories of speech lie beyond the reach of the Free Speech Clause? True threats, incitement to imminent illegal action, fighting words, obscenity, fraud, child pornography, and speech integral to criminal conduct, the Court tells us.[73] (But not, according to the Court, images of animal cruelty.[74] Nor violent video games sold to children.[75] Nor many intentional falsehoods.[76])

Some sort of categorical approach is understandable—maybe even unavoidable—as a mechanism for managing the tension between protecting speech and averting the harms inflicted by certain expression. For this reason, First Amendment scholar Geof Stone describes this categorical approach as "an essential concomitant of an effective

71 *See* Gerding, *supra* note 32, at 403–13 (detailing six historical cycles where widespread manipulation and fraud by securities' marketers contributed to stock market bubbles and ensuing economic crises).

72 *See* Frohwerk v. United States, 249 U.S. 204, 206 (1919).

73 *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) ("Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain." (citations omitted)); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011) (offering examples "such as" obscenity, incitement, and fighting words); United States v. Stevens, 559 U.S. 460, 468–70 (2010) (identifying these categories to include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct).

74 *Stevens*, 559 U.S. at 468–70.

75 *Brown*, 564 U.S. at 805.

76 *Alvarez*, 567 U.S. at 718 (plurality opinion).

system of free expression, for unless we are prepared to apply the same standards to private blackmail, for example, that we apply to public political debate, some distinctions in terms of constitutional value are inevitable."[77]

At the same time, however, a categorical approach demands that we identify a methodology for determining which categories of speech should be treated as unprotected by the First Amendment. This is no easy trick.

A. The Court's History-Only Approach

The Court initially explained its approach to identifying categories of unprotected speech in terms akin to cost-benefit analysis, balancing the contested expression's First Amendment value against the harms threatened by that expression. Consider this, from the Court's 1942 decision in *Chaplinsky v. New Hampshire*:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[78]

For decades, many understood *Chaplinsky* to mean that the Court characterized a category of expression as unprotected when it found that the speech within that category threatened injury that substantially outweighed its First Amendment value.[79]

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77 Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 195 n.24 (1983).

78 315 U.S. 568, 571–72 (1942) (footnotes omitted).

79 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) ("From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (quoting *Chaplinsky*, 315 U.S. at 572)); *see also id.* at 400 (White, J., concurring in judgment) ("[T]he Court has held that the First Amendment does not apply to [certain content-based categories] because their expressive content is worthless or of *de minimis* value to society. We have not departed from this principle, emphasizing repeatedly that, 'within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no

The Court now insists, however, that its methodology for identifying categories of unprotected speech turns entirely on whether the regulation of speech within that category has been historically treated as exempt from First Amendment review. More specifically, the contemporary Court asserts that every category of such speech must be based on either "a previously recognized, long-established category of unprotected speech"[80] or a "categor[y] of speech that ha[s] been historically unprotected, but ha[s] not yet been specifically identified or discussed as such in [the] case law."[81] A "long-settled tradition of subjecting that speech to regulation" is thus key, the twenty-first-century Court tells us, to identifying historically unprotected categories of speech.[82]

The Court first articulated this exclusive emphasis on history in *United States v. Stevens*, where it insisted that longstanding regulatory tradition is—and always has been—the only way to identify a category of expression unprotected by the Free Speech Clause.[83] There the Court considered a First Amendment challenge to a federal law that criminalized the commercial creation, sale, or possession of depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed."[84] In so doing, the Court rejected as "startling and dangerous" what it characterized as the government's "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing

process of case-by-case adjudication is required.'" (third and fourth alterations in original) (citation omitted) (quoting New York v. Ferber, 458 U.S. 747, 763–64 (1982))).

80 United States v. Stevens, 559 U.S. 460, 471 (2010).

81 *Id.* at 472; *see also Alvarez*, 567 U.S. at 717 (plurality opinion) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" (second alteration in original) (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment))); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) (requiring "persuasive evidence . . . of a long (if heretofore unrecognized) tradition of proscription"). Steve Shiffrin described this as "the frozen categories approach." Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1493 (2014).

82 *Stevens*, 559 U.S. at 469.

83 *Id.* at 471. To be sure, the Court had sometimes considered historical analysis as among the available tools for solving other Free Speech Clause problems. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) (identifying the government's historical use of monuments to express itself as a factor in identifying the contested speech as the government's for Free Speech Clause purposes); Burson v. Freeman, 504 U.S. 191, 200 (1992) (drawing from "the evolution of election reform" to "demonstrate[] the necessity," and thus the constitutionality, of content-based bans on campaigning in and around polling places). But *Stevens* reflects the Court's first insistence that history is the *only* legitimate approach to deciding a specific Free Speech Clause question.

84 *Stevens*, 559 U.S. at 465 (quoting 18 U.S.C. § 48(c)(1) (2006)).

of relative social costs and benefits."[85] Absent evidence of a longstanding tradition of banning images of animal cruelty (distinct from a tradition of banning animal cruelty itself), the Court held that the contested speech did not fall within a category of unprotected speech and invalidated the law as substantially overbroad.[86] Acknowledging that "this Court has often *described* historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'"[87] the *Stevens* Court nevertheless asserted that

> such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor. When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis . . . [but we have instead] grounded [our] analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.[88]

Shortly thereafter, in *Brown v. Entertainment Merchants Ass'n*, the Court again insisted on a history-only methodology for identifying categories of unprotected speech when it struck down a state law that prohibited selling or renting—to minors—video games with depictions of "killing, maiming, dismembering, or sexually assaulting an image of a human being."[89] Absent evidence of a longstanding tradition of restricting minors' access to violent images, the majority held that the law prohibited speech protected by the First Amendment (thus triggering, and failing, strict scrutiny): "[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'"[90]

As noted above, the twenty-first-century Court's illustrative lists of the categories of unprotected speech encompassed incitement, true threats, obscenity, defamation, speech integral to criminal conduct,

85 *Id.* at 470.
86 *Id.* at 471–72, 482.
87 *Id.* at 470 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).
88 *Id.* at 471.
89 564 U.S. 786, 789 (2011) (quoting CAL. CIV. CODE § 1746(d)(1) (West 2009)).
90 *Id.* at 792 (second alteration in original) (quoting *Stevens*, 559 U.S. at 470).

child pornography, fighting words, and fraud.[91] It did not, however, specifically mention securities law, despite its earlier dicta observing that the regulation of securities-related speech triggered no First Amendment review.[92] This may not mean much, as the Court did not claim to be exhaustively cataloguing all categories of unprotected speech. Indeed, it made no mention of other areas of law where the government's longstanding restriction of speech has never prompted Free Speech Clause scrutiny—like antitrust law that restricts the use and exchange of information for anticompetitive purposes,[93] evidence and professional responsibility laws that prohibit the use and disclosure of certain information,[94] and contract law that "consists almost entirely of rules attaching liability to various uses of language."[95]

Indeed, in announcing regulatory tradition as the only appropriate means of identifying categories of unprotected speech, Chief Justice Roberts observed: "Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[96] The remainder of this Part makes the case for identifying securities-related speech as just such a category.

1. Justifications for, and Critiques of, the Court's History-Only Approach

The twenty-first-century Court justifies its history-only[97] approach (also known as "traditionalism"[98]) as an objective and principled curb

91 *See supra* notes 72–76 and accompanying text.

92 *See supra* notes 2–4 and accompanying text.

93 *See* United States v. Container Corp. of Am., 393 U.S. 333, 335–38 (1969) (holding that competitors' exchange of pricing information violated antitrust law).

94 *See* Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 689 (1997) (describing how evidence law routinely regulates speech on the basis of content without triggering First Amendment review); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998) (describing how professional responsibility law routinely regulates speech on the basis of content without triggering First Amendment review).

95 Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 386 (1979).

96 United States v. Stevens, 559 U.S. 460, 472 (2010).

97 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2164 (2022) (Breyer, J., dissenting) (using the term "history-only" to describe this approach to constitutional problem-solving); *see also* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 1, 1 (2023) (using the term "history and tradition").

98 *See* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1653 (2020) (using the term "traditionalism" to describe this approach).

on politically unaccountable judges.[99] (Even more recently, the Court has also announced that historical analysis now controls its approach to constitutional questions involving the Second Amendment,[100] unenumerated fundamental rights,[101] and the Establishment Clause[102]—although these developments' influence, if any, on the Court's approach to Free Speech Clause problems remains to be seen.)[103] More generally, advocates of backwards-looking methodologies like traditionalism and originalism often defend their interpretive preferences as relying on what they characterize as more determinate[104] and more

99 *See Stevens*, 559 U.S. at 472 ("[Those decisions] cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. . . . We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them."); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022) (justifying a history-only approach to identifying the scope of fundamental rights to curb what the Court described as "freewheeling judicial policymaking"); *Bruen*, 142 S. Ct. at 2130 ("[R]eliance on history to inform the meaning of [the Second Amendment's] constitutional text . . . is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field." (third alteration in original) (quoting McDonald v. City of Chicago, 561 U.S. 742, 790–91 (2010) (plurality opinion))).

100 *Bruen*, 142 S. Ct. at 2126 (requiring the government to demonstrate that a challenged regulation is "consistent with this Nation's historical tradition of firearm regulation" to satisfy Second Amendment review).

101 *Dobbs*, 142 S. Ct. at 2248 (asserting that historical analysis is the only means of identifying unenumerated fundamental rights for Due Process Clause purposes to prevent courts from falling "into the freewheeling judicial policymaking that characterized discredited decisions").

102 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (asserting that "historical practices and understandings" now control the Court's interpretation of the Establishment Clause (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

103 *See* Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59 (2023) (discussing uncertainties of applying these analyses to Free Speech Clause questions); Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism* 10–12 (Harv. Pub. L. Working Paper No. 22-14, 2022) (identifying questions about whether these history-only holdings will or should apply in other constitutional contexts); *see also* Blocher & Ruben, *supra* note 27 (describing how the contemporary Court's approach to historical analysis in the Second Amendment context departs from its approach to historical analysis in other constitutional settings).

104 *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 5 (2021) ("[Originalism is the search for] the meaning that the constitutional text conveyed to *most* people when it was ratified. And that meaning is *objective*, in the sense that whether X is the original public meaning of a given provision turns on facts about *prevailing* linguistic practice that are independent of the contents of the minds of *individual* speakers or interpreters."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (explaining that reliance on original

democratically legitimate[105] baselines to constrain judicial decisionmaking.[106] While originalist and traditionalist approaches share the same rationales, they often focus on different baselines. Originalism's gaze remains fixed on a specific snapshot in time: the public's understanding of textual meaning at the time the relevant constitutional provision was ratified—be it 1788, 1791, 1868, or some other date.[107] History-only approaches instead scan a longer period—generations and often longer—for evidence of what our longstanding practice reveals about our constitutional values.[108]

The Court's history-only approach to identifying categories of unprotected speech has plenty of critics, and deservedly so. On the descriptive front, a careful canvassing of the caselaw shows "how little the [pre-*Stevens*] Court actually relied upon history to distinguish low- from high-value speech."[109] Instead, as Genevieve Lakier explains, the Court "employed what we might describe as a 'purpose-based' approach: one that identified low-value speech by looking at whether its content-based regulation threatened to undermine the goals the First Amendment was intended to advance."[110]

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understanding "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself").

105 *See* Edwin Meese III, *Our Constitution's Design: The Implications for Its Interpretation*, 70 MARQ. L. REV. 381, 387 (1987) (describing judicial reliance on original meaning as "properly" enforcing "the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue").

106 To be sure, the premise that history-only methodologies are more determinate and more legitimate than other interpretive methodologies is vigorously contested, and appropriately so. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("But, of course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.").

107 Some originalists look to historical practice at the time of ratification—that is, how the original readers behaved at that time—as evidence of what they understood it to mean. *See* Barnett & Solum, *supra* note 97, at 13.

108 *See* DeGirolami, *supra* note 98, at 1655–56 (describing the justifications for the Court's reliance on history and tradition to include an interpretive justification that "enduring practices presumptively inform the meaning of the words that they instantiate" and a democratic-populist justification "that in a democracy, people who engage in practices consistently and over many years in the belief that they are constitutional have endowed those practices with political legitimacy"); *see also* Barnett & Solum, *supra* note 97, at 13–14 (distinguishing traditionalism from originalism).

109 Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2210 (2015).

110 *Id.*; *see also* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 85–86 (2012) (criticizing as "fundamentally illusory" the *Stevens* Court's claim that the Court had always engaged in historical analysis to identify low-value categories of speech, *id.* at 85); Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2300 (2021) (describing the Court's

And on the normative front, courts and commentators have repeatedly underscored the limitations of history-only approaches to assessing the constitutionality of present-day policy solutions to problems largely unknown to, or unappreciated by, past generations.[111] Among other things, a community's traditions do not always reveal that community's wisest judgments: at times those traditions simply represent what's easiest and most convenient.[112] And the all-too-familiar dynamics of inertia and groupthink mean that at times a community's longstanding customs instead reflect the interests of the powerful at the expense of the vulnerable. For precisely these reasons, some constitutional provisions—like the Equal Protection Clause—expressly reject longstanding historical practices.[113]

Just as the Court's threshold choice of a history-only methodology remains contested, so too does its application of this methodology when deciding specific cases.[114] For instance, the Court offered no

"impoverished" historical accounts as leading to "a deeply inconsistent body of First Amendment law that relies on a false view of both our regulatory present and our regulatory past—and is therefore able to proclaim a commitment to laissez-faire principles that, in reality, it has never been able to sustain").

111 *See* Am. Meat Inst. v. USDA, 760 F.3d 18, 48–50 (D.C. Cir. 2014) (Brown, J., dissenting) ("[I]n the First Amendment context, which has been steadily evolving since the late 1800s, history is not 'telling'; rather, it is an especially poor substitute for reasoned judgment." *Id.* at 48 (citation omitted).); Lakier, *supra* note 109, at 2220 ("But why should it matter whether eighteenth- and nineteenth-century legislatures passed rules to restrict the disclosure of speech of this kind? Given how recently the technology to store personal information on a mass scale emerged, the absence of a tradition of regulating speech of this kind tells us very little about whether courts and legislatures would have believed it constitutionally permissible to do so. All it tells us is that the problem of information disclosure had not yet emerged as something legislatures and courts had to concern themselves with." (footnote omitted)).

112 *See* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 212 (2009) ("[The limitations of tradition include the possibility that such traditions] may suffer from a systematic bias. If so, their views are entitled to less respect, not more, as their numbers increase. [They also] may reflect far less in the way of independent judgment than first appears. Many people may be following the crowd, depriving the collective wisdom of its epistemic credentials.").

113 *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 24), https://ssrn.com/abstract=4366019 [https://perma.cc/8KMQ-EZGS] (describing the Equal Protection Clause's function as to "*interrogate* our traditions," so we can't use those very traditions to guide its application).

114 *See* DeGirolami, *supra* note 98, at 1666 ("[M]any questions remain: How narrowly or broadly can a court draw any given practice to construct a tradition? What criteria does it use to exclude new practices as not conforming to the tradition, or to include new practices as more broadly within 'the tradition' long followed?"); John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 21–22 (2014) ("There is a decided lack of guidance as to the appropriate 'jurisprudential methodology' that courts should apply when determining whether a speech category is historically unprotected. Phrased differently, if history is to be decisive, how is history to be decided? Perhaps more

guidance about how specific or how lengthy the relevant regulatory tradition must be to be considered "long,"[115] "long-established,"[116] or "long familiar to the bar" [117] for Free Speech Clause purposes.

Moreover, the Court undertook no effort to document the nature or length of any regulatory tradition for the categories of speech it has identified as unprotected.[118] As just one illustration, when in 1982 the Court held child pornography to be a category of unprotected speech, it made no search for a longstanding history of restricting sexual images of children.[119] It instead emphasized the harms such images posed to children's physical and emotional well-being, especially in contrast to those depictions' "exceedingly modest" First Amendment value.[120]

And when the Court more recently emphasized, in *National Institute of Family and Life Advocates v. Becerra*, the value of tradition when assessing Free Speech Clause challenges to the government's compelled disclosures, it again offered no guidance on the requisite specificity or length of the relevant regulatory tradition.[121] There the majority stated, without elaboration, that the Free Speech Clause poses no bar to the government's compelled "health and safety warnings

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on point, which historical period should be determinative? The founding? The ratification of the Fourteenth Amendment? The precedents that exist in the modern age?" *Id.* at 22 (footnote omitted).).

115 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011).

116 United States v. Stevens, 559 U.S. 460, 471 (2010).

117 United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'" (second alteration in original) (quoting *Stevens*, 559 U.S. at 468)).

118 *See supra* note 73 and accompanying text.

119 *See* New York v. Ferber, 458 U.S. 747, 756–64 (1982); *cf.* GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 273-74 (2017) (explaining that obscenity is also treated as a category of unprotected speech despite the absence of government efforts to regulate obscenity at the time of the First Amendment's ratification). The *Ferber* Court instead relied on social-science literature along with the fact of extensive contemporary (rather than historic) regulation as evidence of the harm threatened by the regulated speech:

> Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

458 U.S. at 758.

120 *Ferber*, 458 U.S. at 762, 756–63.

121 138 S. Ct. 2361, 2376 (2018).

long considered permissible."[122] Does a tradition of requiring the disclosure of health and safety hazards more generally suffice to support contemporary warnings of newly discovered dangers to health and safety (and, if so, a regulatory tradition of what duration)? Or must the government instead identify a tradition (of some as-yet-undetermined length) of requiring warnings about the specific risk identified in a contemporary disclosure requirement? (The Court's own (often inconsistent) practice suggests that we need not go back to the ratification of the First Amendment in 1791 or the Fourteenth Amendment's Due Process Clause in 1868 to identify traditions that can valuably inform constitutional decisionmaking.[123] Recall, as just one illustration, the Court's reliance on a regulatory tradition dating to the 1890s when upholding state laws restricting the distribution of campaign literature in the immediate vicinity of polling places, laws that themselves had evolved in responses to changes in the ways in which voters experienced coercion.[124])

Long story short, history-only is neither the only nor the best of approaches to constitutional decisionmaking.[125] Yet the twenty-first-

122 *Id.*

123 *See* Lakier, *supra* note 109, at 2222 ("The fact that the Court has not specified how long a history of regulation must be to qualify as 'long-settled' means that *Stevens* could be interpreted so as to avoid conflicting with these or any other by-now familiar regulatory schemes.").

124 *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion). As another example (outside of the free speech context), the Court has credited "three-quarters of a century of settled practice" as "long enough to entitle a practice" to "great" weight for purposes of interpreting the President's authority to fill vacancies in certain offices while the Senate is in "recess." NLRB v. Noel Canning, 573 U.S. 513, 533 (2014) (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929)). Relatedly, some notable originalists remain open, in certain constitutional settings, to the value of traditions measured in a generation rather than in centuries. *See* BARNETT & BERNICK, *supra* note 104, at 29–30 ("[T]he Court has not specified rules for determining deep-rootedness. We suggest that if individual citizens have for at least a generation—that is, thirty years or more—been entitled to enjoy a right as a consequence of the positive constitutional, statutory, or common law of a supermajority of the states, it ought to be presumptively a privilege of US citizenship.").

125 *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (identifying multiple modalities of constitutional interpretation and argument that include historical, textual, structural, doctrinal, prudential, and ethical approaches); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (describing the available approaches to constitutional argument to include "arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy").

century Court has made clear that history, and history alone, will control its understanding of the categories of speech unprotected by the Free Speech Clause.[126]

Here, as in so many other areas of the law, courts (along with the rest of us) have learning curves. Legal scholars, policymakers, lawyers, historians, and judges all have a role to play in sculpting the shape and slope of these curves. There's reason to think that lower courts now charged with implementing the Court's history-only pronouncements may be receptive to efforts to identify principled guardrails on this turn. For instance, a number of scholars have documented lower courts' reluctance, in the Free Speech Clause context, to deploy the Court's sweeping antiregulatory rhetoric to dismantle sensible regulatory frameworks.[127] And such guardrails may be of interest to some of the Justices who have contributed to the antiregulatory turn but have to yet to engage with its implications for longstanding economic regulation.[128]

In other words, here I work within the twenty-first-century Court's history-only directive even as I remain critical of it. Others have undertaken related projects in other constitutional settings. For instance, Joseph Blocher and Eric Ruben note that they find the contemporary Court's Second Amendment traditionalist methodology to be problematic even as they "write from the internal perspective, attempting

126 And more recently, of course, the Court has insisted on a history-only approach to a growing number of other constitutional questions. *See supra* notes 100–02 and accompanying text.

127 *See* David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 69 (2017) (noting that "over forty years of experience with the strict scrutiny default rule has revealed courts' consistent willingness to surreptitiously evade the formal doctrinal framework" to preserve what they considered sensible regulation of harmful speech); Dan V. Kozlowski & Derigan Silver, *Measuring* Reed*'s Reach: Content Discrimination in the U.S. Circuit Courts of Appeals After* Reed v. Town of Gilbert, 24 COMMC'N L. & POL'Y 191, 261–69 (2019) (concluding that lower courts have been reluctant to apply *Reed* to unsettle longstanding law).

128 *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2347 (2020) (plurality opinion) (stating that its decision is "not intended" to affect "traditional or ordinary economic regulation of commercial activity"); *id.* at 2361 (Breyer, J., concurring in judgment with respect to severability and dissenting in part) ("The idea that broad language in any one case (even *Reed*) has categorically determined how content discrimination should be applied in *every single context* is both wrong and reflects an oversimplification and over-reading of our precedent. The diversity of approaches in this very case underscores the point that the law here is far from settled. Indeed, the plurality itself disclaims the idea that its rule would apply to unsettle 'traditional or ordinary economic regulation of commercial activity,' indicating that the plurality presumably thinks there are some outer bounds to its broad language.").

to make the most of what the Court has given us," thus combining "critique with a positive vision for coherent implementation."[129] And Reva Siegel counsels that it is important to document "outsiders[']" history when implementing the Court's newly announced history-only approach to identifying fundamental rights even as she challenges that approach.[130]

To this end, even under the contemporary Court's exclusive focus on regulatory tradition in identifying categories of unprotected speech, choices remain when framing the relevant regulatory tradition. The remainder of this Part proposes that we choose a functional approach to assessing the relevant regulatory history that remains attentive to democratic self-governance as a core Free Speech Clause value.

2. A Functional Approach to Assessing Regulatory History

At its best, history and tradition can reveal the time-tested reflections of "many minds" over "many years"[131] about the categories of speech that do little to advance First Amendment values while threatening significant harm—categories of speech that have thus long been regulated without triggering First Amendment scrutiny.[132] More specifically, historical analysis at its best recognizes that our traditions are often evolutionary, and appropriately so. What's historically constant is not always, and certainly not only, what's historically important.[133]

A history-only approach that credits only linear and uncomplicated regulatory traditions as valuably informing constitutional

129 Blocher & Ruben, *supra* note 27 (manuscript at 38); *see also id.* ("Judges, litigators, and scholars must all be able to make arguments within *Bruen*'s framework, even if they believe it to be fundamentally flawed.").

130 Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1198, 1197–98 (2023) (highlighting the drawbacks of the Court's history-only approach to fundamental-rights analysis, while urging that we identify "ways to democratize our claims on constitutional memory—to depict the plural sources of the nation's history and traditions," *id.* at 1197).

131 *See* SUNSTEIN, *supra* note 112, at 94–95 (describing "many minds" arguments as advocating that "the persistence of a practice across many minds and many years makes it more likely to be correct, wise, or good").

132 *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011) ("[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs.'" (second alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010))).

133 *See* ANNETTE GORDON-REED, ON JUNETEENTH 120 (2021) (describing "change over time" as "the heart of a historian's work"); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 96 (1969) ("History, in sum, tells us what to avoid and whom to accept.").

problem-solving denies the reality that a particular problem's nature and scope often change over time in ways that demand changes in our response. As Bill Eskridge reminds us, "[t]radition is rarely simple and univocal; it is multifarious, evolving, and complicated."[134] So too does a history-only approach that credits only linear and uncomplicated regulatory traditions ignore communities' efforts to learn from experience in wrestling with longstanding problems.[135] Framing the requisite regulatory tradition too narrowly thus offers no room for political bodies to newly recognize, or to grapple with new manifestations of, problems that have long troubled those bodies and the people they represent.[136]

Better to delimit the relevant regulatory tradition by crediting the evolution of policymakers' solutions to complex problems over time. More specifically, for Free Speech Clause purposes, better that we focus on *why* the government has long regulated speech in a particular category, and then define the relevant category of unprotected speech as that which has long been regulated to serve those functions. Under this approach, we look to see whether contemporary speech regulations serve the same functions as those served by longstanding regulations (say, protecting public health and safety by requiring warnings)—even if they regulate risks that were unrecognized decades or centuries ago (like the health dangers of asbestos, or fentanyl). Think too of antitrust law that has long restricted the exchange and use of certain information to facilitate market competition, evidence law that has long prohibited the use of certain information (like information about a defendant's prior bad acts or information learned through hearsay) to protect the fairness and integrity of legal decisionmaking processes, and professional responsibility law that has long barred the

134 William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 194 (2009); *see also id.* ("Lawyers and judges tend to interpret 'tradition' statically and instrumentally, to mean legal practices or norms that have persevered over a long period of time *and* that provide stable meaning that can be used to resolve a legal issue. The static understanding is related to the instrumental use, because lawyers and judges prefer simplicity to complexity. In contrast, historians approach tradition dynamically and non-instrumentally, to mean legal practices or norms that as a general principle have persevered in some ways and evolved in others.").

135 *See* Sunstein, *supra* note 103, at 12 (observing the failure of the Court's historical analysis to acknowledge "some forms of moral progress"); *see also* MILLER, *supra* note 133, at 27–28 (emphasizing the value of history as shedding light not only on "contemporaneous meaning but also as potential for growth" and on the importance of studying "the stream and the flow, not merely the source").

136 Others have recognized the dangers of too narrow a framing of the relevant regulatory tradition in other constitutional settings. In Second Amendment contexts, for example, Joseph Blocher and Eric Ruben counsel that we operate at higher levels of generality and look for broad principles of similarity rather than insist on historical models that are nearly identical. *See* Blocher & Ruben, *supra* note 27 (manuscript at 61–65).

use or disclosure of confidential communications to protect attorney-client and doctor-patient relationships.

This sort of functional approach for identifying the requisite regulatory tradition permits policymakers to learn from time and experience when responding to stubborn problems of long standing. Such an approach remains attentive to democratic self-governance as a core Free Speech Clause value when it respects evolving responses within that tradition by policymakers accountable to the people for their successes and failures in addressing enduring problems.[137] The next Section applies this functional approach specifically to securities regulation.

B. What This Means for Securities Law

This functional approach explains a category of unprotected securities-related speech that encompasses the speech that has long been regulated to serve the related but distinct functions of informing and protecting investors. (Recall again that *protecting* investors from companies' and managers' deception and self-dealing is a function distinct from *informing* investors' autonomous choices about which investment options best align with their interests even absent corporate deception.)[138] More specifically, the contemporary securities law framework continues a lengthy regulatory tradition responsive to securities markets' unusual vulnerability to information asymmetries.[139] To address those asymmetries and their attendant harms, securities laws have long regulated securities-related speech not only by prohibiting false and misleading speech but also by requiring certain disclosures. For instance, New Jersey required a variety of securities disclosures in

137 *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517–18 (1996) (Scalia, J., concurring in part and concurring in judgment) ("I will take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of 'the freedom of speech,' and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people." *Id.* at 517 (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting)).); *see also* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1475 (2022) ("Where we adhere to the teachings of history, experience, and precedent, the dissent would hold that tens of thousands of jurisdictions have presumptively violated the First Amendment, some for more than half a century, and that they have done so by use of an on-/off-premises distinction this Court has repeatedly reviewed and never previously questioned. For the reasons we have explained, the Constitution does not require that bizarre result.").

138 *See supra* note 34 and accompanying text.

139 *See* STUART BANNER, ANGLO-AMERICAN SECURITIES REGULATION: CULTURAL AND POLITICAL ROOTS, 1690–1860, at 4 (1998) (summarizing this tradition).

1846,[140] Kansas in 1911 enacted the first in a wave of state "blue sky" laws that prohibit companies' fraudulent statements and require basic disclosures to investors,[141] and Congress first enacted federal securities law in 1933.[142]

These laws continue an even more extended regulatory tradition.[143] As legal scholar Stuart Banner recounts,

> The belief that the sellers of securities were more likely to be deceitful than the sellers of other kinds of property, and that the sale of securities accordingly needed to be more closely supervised by government than the sale of other things, was widely held as early as the 1690s, and had never disappeared. The associated opinion that the securities market was unusually susceptible to domination by insiders, who could control prices by controlling the flow of information, was equally old."[144]

For this reason, "the perceived differences between securities and older kinds of property, especially the enhanced ability of sellers to manipulate prices and otherwise deceive buyers, led English and then American regulators gradually to develop special statutory schemes targeted only at the transfer of securities."[145] As Adam Winkler has also documented, these laws responded to growing public concerns that (what Berle and Means described as) the separation of companies' ownership from their control too often empowered corporate managers to appropriate the company's resources in self-interested ways to the disadvantage of shareholders.[146]

In other words, today's securities laws neither address a new problem nor deploy a new set of solutions to those problems. Instead, they regulate securities-related speech for reasons and in ways "long familiar to the bar,"[147] when they respond to the realities that the risks to

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140 *See* Act of Feb. 25, 1846, 1846 N.J. Laws 64 (prescribing manufacturing companies' duties to include disclosing the amount of their capital stock fixed and paid in, the amount of increases to their capital stock, any reductions in their capital stock, and their annual reports).

141 Act of Mar. 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210.

142 Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2018)). The 1933 Act's disclosure requirements were themselves inspired by the United Kingdom Joint Stock Companies Act 1844, 7 & 8 Vict. c. 110. *See* Simon Gleeson & Harold S. Bloomenthal, *The Public Offer of Securities in the United Kingdom*, 27 DENV. J. INT'L L. & POL'Y 359, 359 (1999); *see also* Bishop C. Hunt, *The Joint-Stock Company in England, 1830–1844*, 43 J. POL. ECON. 331 (1935) (discussing the securities-related concerns that led to the nineteenth-century enactment of the United Kingdom's Companies Act).

143 *See* BANNER, *supra* note 139, at 4.

144 *Id.* at 281–82.

145 *Id.* at 283.

146 WINKLER, *supra* note 50, at 205–07.

147 United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion) ("[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined

investors change over time, and that investors evaluate those risks through a variety of methodologies that may also change with time. "Most of today's regulatory techniques, including prohibitions of certain types of transactions, mandatory disclosure rules, minimum holding periods, and rules forbidding deception and price manipulation, were tried or at least suggested in the eighteenth and early nineteenth centuries," Professor Banner explains.[148] "The market and the government were both much smaller, but a good part of the landscape would be familiar to a twentieth-century lawyer."[149]

The threads that stitch this regulatory tradition together are the functions it has long sought to achieve: informing and protecting investors (functions that also serve broader public-regarding interests). Again, this regulatory tradition is necessarily speaker- and content-based: it regulates certain expression (by requiring accurate disclosures and prohibiting false and misleading speech) by certain speakers (securities issuers and other market participants) precisely because those distinctions are relevant to the expression's potential for harm and value.

As we've seen, we can trace this tradition of regulating securities-related speech back nearly a century for federal law, even longer for state law, and longer still within the Anglo-American tradition. Securities law stays faithful to this tradition, and thus should remain exempt from First Amendment scrutiny, when it regulates securities-related speech to serve these listener-centered functions. More specifically, contemporary securities law remains consistent with this regulatory tradition when it responds to the realities that the risks to, and preferences of, investors change over time by requiring disclosures that inform investors about new risks (like climate change and cybersecurity) even when those risks were unknown to, or unrecognized by, past generations. Think, as one of many examples, of asbestos: "For years, asbestos-related risks were invisible, and information about asbestos would likely have been called 'non-financial.' Over time, those risks went from invisible to visible to extremely clear, and clearly financial."[150] That new risks to investors will arise (as well as new investor

to the few 'historic and traditional categories [of expression] long familiar to the bar.'" (second alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 468 (2010))).

148 BANNER, *supra* note 139, at 4.

149 *Id.*

150 John Coates, *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets*, U.S. SEC. & EXCH. COMM'N (Mar. 11, 2021), https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121 [https://perma.cc/JTH3-ED82]; *see also id.* ("Not surprisingly, disclosure about these risks did not initially show up in SEC filings, but there too they went from invisible to increasingly disclosed.").

approaches to evaluating those risks) is foreseeable, even if the specific content of those risks and methodologies is not.

Consider, for instance, contemporary investor demand for information about companies' vulnerabilities and contributions to climate change.[151] Disclosures of these sorts continue securities law's regulatory tradition by informing investors' decisions in several ways. First, some investors find that such disclosures provide them with information material to their valuation of a company's potential for profit or loss.[152] More specifically, some investors worry that environmental damage caused by a company may lead to its legal liability or reputational loss, or feel that disclosures about companies' risk to climate change informs them about "a potential source of systemic risk."[153] Along these lines, as securities law scholar Virginia Harper Ho observes, "[T]he current lack of investment-grade information about the financial impacts of climate change may create pricing distortions that expose global markets to destabilizing and unpredictable volatility when these hidden risks materialize, resulting in financial shock and sudden asset loss."[154]

Second, some investors rely on climate change disclosures to help them invest in companies and elect management aligned with their social values.[155] Recall that many investors have long made investment decisions based on factors unrelated to a company's future earnings or cash flow, and that some investors care about *how* a company makes money and not just that it makes money.[156] These investors are sometimes described as having a "double" or even "triple" bottom line

151 *See* Sarah C. Haan, The First Amendment and the SEC's Proposed Climate Risk Disclosure Rule 4–6 (June 16, 2022) (unpublished manuscript), https://ssrn.com/abstract=4138712 [https://perma.cc/T7XD-82CZ] (describing such proposals).

152 *See id.* at 11–12 (discussing investor demand for ESG disclosures); Williams, *supra* note 32, at 1278–87 (same); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (making clear that a fact is "material" for securities law purposes when there is a substantial likelihood that it would affect a reasonable investor's decisionmaking).

153 Harper Ho, *supra* note 33, at 296; *see also id.* at 280 (describing "evidence of the financial materiality of many ESG factors and rising demand for better information on the financial effects of climate change" (footnote omitted)); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 9 (2020) (finding that most institutional investors interviewed "seek ESG information to enhance their understanding of risks that could affect companies' value over time").

154 Harper Ho, *supra* note 33, at 296–97.

155 *See* Jill E. Fisch et al., Comment Letter on Climate Change Disclosures 5 (June 11, 2021) (explaining how institutional and other investors "use ESG information to evaluate reporting companies with respect to their nonfinancial preferences"); *id.* at 6 (explaining how investors use ESG information in exercising their voting rights to oversee management).

156 *See supra* notes 42–46 and accompanying text.

because they make investment choices aligned with their environmental and social interests along with their financial interests.[157]

Not all investors agree, to be sure. But we can expect such disagreement when we recall investors' heterogeneity and thus their diverse preferences and priorities.[158] Disclosures that reflect the diversity of investors' informational interests about new risks remain consistent with securities law's longstanding regulatory tradition of informing and protecting investors.

To be sure, some assert that the relevant regulatory tradition should be defined narrowly to include only disclosures about certain traditional "financial" measures of securities' value or risk—asserting that not all investors value other sorts of disclosures or that investors that *do* value those disclosures are wrong to do so.[159] To the extent that such arguments suggest that requiring disclosures about nonfinancial matters reflects regulators' ideological preferences rather than listeners' informational interests, they are rooted in a "negative theory" of the Free Speech Clause that "understands the First Amendment to be more about our fears of the government than about our affirmative

157 *See* Timothy F. Slaper & Tanya J. Hall, *The Triple Bottom Line: What Is It and How Does It Work?*, IND. BUS. REV., Spring 2011, at 4, 4 ("The ['triple bottom line'] TBL is an accounting framework that incorporates three dimensions of performance: social, environmental and financial."); Williams, *supra* note 32, at 1277 ("The discussion has been separated into types of investors primarily for simplicity. It is unlikely that people are pure economic investors or pure social investors, however. Rather, different mixtures of economic and noneconomic preferences inform investors' views. Most 'economic' investors would recoil from even extraordinarily profitable investments in slave-labor camps, for instance, were such things legal in another country, just as most 'social' investors would recoil from investments that promised no return." (footnotes omitted)). Note that some investment managers offer funds geared to right-leaning investors. *See* Joshua Green, *The Anti-Woke Investors*, BLOOMBERG BUSINESSWEEK, Nov. 15, 2021, at 38.

158 *See* Williams, *supra* note 32, at 1207 (advocating for SEC disclosures "both from the perspective of the 'economic' investor, who is primarily interested in financial returns, and from the perspective of the 'social' investor, who is concerned with the social and environmental effects of corporate conduct").

159 *See* Lawrence A. Cunningham et al., Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors 2–8, 10–12 (Apr. 25, 2022) (expressing doubt that individual investors, as opposed to institutional investors, care about ESG disclosures along with doubt that ESG metrics help predict companies' performance). For discussion of institutional and individual investors and the various ways in which they engage with management (or not), see Alon Brav, Matthew Cain & Jonathon Zytnick, *Retail Shareholder Participation in the Proxy Process: Monitoring, Engagement, and Voting*, 144 J. FIN. ECON. 492 (2022); Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019); Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 UC DAVIS L. REV. 1913 (2021). Others offer evidence that many investors do seek this information and that they have good reason for doing so, see *supra* notes 151–57 and accompanying text.

aspirations of the good."[160] As I have written elsewhere, however, "negative theory should pack less power in settings where the government's discretion is limited, where we don't see evidence of its self-interest or incompetence, or where listeners can't protect themselves from powerful private speakers such that we distrust nongovernmental parties even more than the government."[161] As we've seen, securities law reflects a regulatory tradition responsive to the harms threatened by nongovernmental speakers who hold advantages of information (and sometimes power) over their listeners.

In short, the categorical boundaries anticipated by this functional approach are justifiable on normative as well as historical grounds. This functional approach returns democratic self-governance to the core of free speech law by defining the requisite regulatory tradition to permit the people's representatives to learn from time and experience when responding to stubborn problems of long standing as well as to newer manifestations of those problems.[162] Securities regulation's emphasis on information-forcing disclosures additionally advances listeners' First Amendment interests not only in autonomy but also in democratic self-governance "because citizens must have accurate information not only to knowledgeably participate at the ballot box but also to have meaningful freedom in economic life itself."[163]

At the core of the tradition identified here is the regulation of speech by securities issuers and company management to inform and protect investors as listeners. The decisions of politically accountable governmental bodies serve these functions (and thus regulate within a category of unprotected speech) so long as they regulate securities-related speech to inform heterogeneous investors' assessments of risk and value. As a constitutional matter, this means that these actors' assessments of what's valuable to listeners should generally face rational

160 HELEN NORTON, DISTRUST, NEGATIVE FIRST AMENDMENT THEORY, AND THE REGULATION OF LIES 3 (2022).

161 *Id.* at 6; *see also id.* at 5 ("[A]lthough our experience frequently leads us to distrust the government . . . , sometimes our experience leads us to distrust powerful private speakers even more.").

162 This is what Joseph Blocher and Reva Siegel describe as "democracy's competence." Blocher & Siegel, *supra* note 27.

163 Amanda Shanor & Sarah E. Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2033, 2033 (2022); *see also id.* ("When listeners are epistemically dependent for information on commercial speakers, regulation of such speech for truthfulness is consistent with the First Amendment . . . ."); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1371–74 (2019) (explaining how securities disclosures advance investors' First Amendment autonomy and self-governance interests).

basis review (with the exception of disclosures that threaten third parties' equality, privacy, or other constitutionally protected rights).[164] At the same time, important nonconstitutional mechanisms, like Administrative Procedure Act requirements and political accountability, remain available to check those bodies' choices.

Even as we frame this category of unprotected securities-related speech, however, work remains to be done in sanding and shaping its contours. For example, we can expect disagreement about whether the regulation of speech by those who play an intermediary role between securities issuers and investors lies closer to this tradition's periphery or to its core: examples include the regulation of certain speech by credit rating agencies (services that rate companies' ability to pay back debt)[165] and proxy advisers (services that review corporate disclosures and provide research and advice to inform shareholders' voting decisions).[166] In my view, these remain plausibly within the functional tradition that I've suggested because they seek to inform and protect investors by regulating the securities-related speech of speakers who enjoy advantages of information (and sometimes power) over those investors.[167]

* * *

As we've seen, securities differ from other goods and services available in the commercial marketplace in ways that intensify the importance of accurate securities-related information to investors as listeners. These differences, in turn, support the treatment of securities-related speech as a category of speech unprotected by the First Amendment.[168] Note that I do not assert that the securities setting is the only environment in which the strength of listeners' interests is key

164 *See* Post, *supra* note 41, at 893 (noting "that courts ought to be cautious about approving compelled commercial speech in the presence" of a "conflict with other constitutional values" like equal protection or privacy). Contrast, for example, investors' interest in a CEO's compensation package to any such interest in the CEO's pregnancy status or pregnancy history. Disclosures of the latter, but not the former, sort implicate individuals' privacy and equality interests.

165 *See* Frank Partnoy, *What's (Still) Wrong with Credit Ratings?*, 92 WASH. L. REV. 1407, 1408–19 (2017) (discussing and critiquing the regulation of credit rating agencies as insufficient to address their potential for contributing to systemic economic harm).

166 *See* Concept Release on the U.S. Proxy System, Exchange Act Release No. 62495, Investment Advisers Act Release No. 3052, Investment Company Act Release No. 29340, 75 Fed. Reg. 42982 (July 22, 2010).

167 These sorts of definitional challenges are not uncommon. Think, for instance, of the Court's fifty-year learning curve before it settled on a definition of unprotected "incitement" to capture a close and direct connection between speech and violence (or other illegal activity). *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (defining unprotected incitement as speech "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action").

168 *See supra* notes 31–50 and accompanying text.

to First Amendment law.[169] Instead, I observe that securities are different from other commercially available goods and services in meaningful ways—and that the history of securities regulation recognizes and reflects these differences in ways that matter for First Amendment law.[170]

If the Court chooses not to treat securities-related speech as a category of speech unprotected by the First Amendment, however, it may well turn to the very different rules that apply to the government's regulation of commercial speech.[171] Such a choice would require case-by-case adjudication of each of the myriad securities rules under commercial speech review. Given the interrelated structure of the securities regulation framework, such rule-by-rule adjudication would threaten to bring down the entire ship—to the detriment of investors, shareholders, and the public.[172] This reality adds a pragmatic justification to the normative and historical justifications for treating securities-related speech as a category of unprotected speech.

The next Part nevertheless considers the possibility that the Court will treat securities-related speech as a type of commercial speech.

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169 *See* Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 460–68 (2019) (discussing other listener-centered relationships like those between employers and workers, and those between professionals and their clients and patients).

170 *See* Lillian R. BeVier, *A Comment on Professor Wolfson's 'The First Amendment and the SEC*,' 20 CONN. L. REV. 325, 326 (1988) ("The securities market and its associated market for information are in a different institutional setting than are the market for consumer goods and services and its associated market for information; and both markets in turn differ significantly from the institutional setting that characterizes the political market and the market for political information. Therefore, it should not be surprising, and it can hardly be deemed alarming, that the rules that have evolved to govern speech within these different contexts are categorically different from one another."); Dalley, *supra* note 34, at 1090–91 ("[Securities regulation] operates in a singular environment: a highly developed, relatively efficient market with an enormous support structure of both market and informational intermediaries, in a context in which decision-makers often seek professional advice and make great efforts to be as rational as possible. This environment provides a mechanism by which disclosed information can reach its audience, affect behavior, and cause a desired result through its operation on a single variable, the price of a security.").

171 Yet another possibility is that the Court will abandon commercial speech doctrine altogether, and simply apply strict scrutiny to all content-based regulation of speech, regardless of its commercial character. *See infra* notes 192–94 and accompanying text. That possibility's destabilizing consequences, however, lead some to predict that lower courts instructed to apply strict scrutiny to longstanding regulatory frameworks will balk at dismantling those frameworks, and will instead water down strict scrutiny in ways ultimately detrimental to the robust protection of core political speech. *See* Reed v. Town of Gilbert, 576 U.S. 155, 178 (2015) (Breyer, J., concurring in judgment) ("[T]he Court could escape the problem by watering down the force of the presumption against constitutionality that 'strict scrutiny' normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where 'strict scrutiny' should apply in full force.").

172 *See* Haan, *supra* note 151, at 10 ("That choice . . . would make nearly every securities regulation a target for First Amendment challenge.").

Here too, securities regulation's listener-centered functions do important work.

III. SECURITIES-RELATED SPEECH AS COMMERCIAL SPEECH

"Listeners first," the Court's commercial speech doctrine has long emphasized. To be sure, First Amendment law often privileges *speakers'* interests. This is the case of political expression and other speech in public discourse, where the Court presumes an environment of equality between speakers and listeners that permits listeners to protect themselves from harmful or unwelcome speech through the traditional remedies of exit or voice.[173] But First Amendment law at times privileges listeners over speakers in some speaker-listener relationships involving asymmetries of information or power: "[W]hen we require *more* of speakers when their listeners lack information or power[,]we improve the quality of the communicative discourse. More specifically, we promote listeners' First Amendment interests when we enable them to receive accurate information that informs, but does not coerce, their decision-making."[174]

The Court's longstanding commercial speech doctrine exemplifies this approach by protecting commercial expression from regulation when that expression serves listeners' interests—but not when that expression frustrates those interests.[175]

A. Commercial Expression's First Amendment Protection Through a Listener-Centered Lens

The Court in 1976 held for the first time that the Free Speech Clause provides *some* protection for commercial speech, where it considered consumers' (that is, listeners') First Amendment challenge to Virginia's law that forbade pharmacists from advertising their prescription drug prices.[176] Ostensibly motivated by fears that such advertising

173 *See* HIRSCHMAN, *supra* note 49, and text accompanying note 49 (discussing exit and voice); *see also* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 21 (2012) ("Within public discourse, the First Amendment protects the autonomy of speakers, not merely the rights of audiences.").

174 Norton, *supra* note 169, at 443.

175 *See* Post, *supra* note 41, at 874 ("Persons do not engage in commercial speech in order to influence the content of public opinion, but to facilitate transactions in the marketplace."); *see also* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1631 (2017) ("The law of consumer protection has long concerned itself with information and power asymmetries among market participants.").

176 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); *see also* Cortez & Sage, *supra* note 6, at 734 ("In the first case to explicitly extend First Amendment coverage to commercial speech, the plaintiffs were *customers* rather than

would drive pharmacists to cut back on quality professional services in a race to reduce costs and thus prices,[177] the law too often harmed consumers: "For forty tetracycline tablets, a patient could pay $1.20 in one pharmacy and $9.00 in another—a difference of almost 650 percent. Without going from pharmacy to pharmacy, patients would never know there was a cheaper alternative."[178] In striking down the law, the Court emphasized the First Amendment value of commercial speech to consumers as often-vulnerable listeners:

> Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.[179]

Soon thereafter the Court announced that its rigor in reviewing the government's regulation of commercial speech would turn on that expression's capacity to further, or instead frustrate, listeners' First Amendment interests. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, a constitutional challenge to a state's ban on utility advertising that promoted electricity use, the Court again described commercial expression's First Amendment value as contingent on its ability to inform consumers' autonomous decisionmaking.[180] Because commercial speech that is false, misleading, or related to illegal activity offers no constitutional value to listeners, the Court explained that the First Amendment does not protect such speech:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.[181]

The Court contrasted accurate speech about legal commercial activity (like accurate speech about prescription drug prices or available

businesses."). The Court had earlier held that the First Amendment provides *no* protection to commercial advertising. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

177 *Va. State Bd.*, 425 U.S. at 767–68.

178 WINKLER, *supra* note 50, at 291.

179 *Va. State Bd.*, 425 U.S. at 763–64 (footnote omitted).

180 *See* 447 U.S. 557 (1980).

181 *Id.* at 563–64 (citations omitted).

electric services) as generally valuable to its listeners, and thus applied a form of intermediate scrutiny to the government's regulation of such speech.[182] Under this test, courts ask whether the government's interest is substantial, whether the regulation directly advances that interest, and whether the regulation is "not more extensive than is necessary to serve that interest."[183] Note here the Court's choice to apply intermediate (rather than strict) scrutiny to the government's restriction of accurate commercial speech, a choice that permits the government greater latitude to regulate speech in commercial settings than in public discourse. Emphasizing "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,"[184] the Court concluded that the "Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."[185]

In sum, the Court in *Central Hudson* divided the universe of commercial speech into two types. To one side is commercial actors' speech that is false, misleading, or related to illegal activity, and thus unprotected by the First Amendment because it frustrates listeners' interests. To another side is all other commercial speech, the regulation of which triggers intermediate scrutiny because such expression usually serves listeners' interests.

Shortly thereafter, the Court added a third type: the government's compelled disclosures of accurate information about available goods and services. In *Zauderer v. Office of Disciplinary Counsel*, the Court upheld a state rule requiring lawyers advertising contingent-fee services (in which the client pays attorney's fees only if their suit is successful) to disclose that clients remain responsible for litigation costs even if their suit does not prevail.[186] In so doing, the Court distinguished the government's requirements that commercial actors *disclose* accurate information to consumers from the government's *restrictions* on those actors' speech, applying a more deferential test to the former than to

182 *Id.* at 564–566, 573.

183 *Id.* at 566. Applying this test, the Court struck down the ban on utilities' promotional advertising: although the ban directly advanced the state's substantial interest in energy conservation, the Court found that the state could achieve this interest through more narrowly tailored regulation that, for instance, permitted utilities to promote "electric devices or services that would cause no net increase in total energy use." *Id.* at 570.

184 *Id.* at 562 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

185 *Id.* at 563; *see also Ohralik*, 436 U.S. at 456 ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.").

186 471 U.S. 626, 650 (1985).

the latter.[187] Again emphasizing that commercial expression's First Amendment protection turns on that expression's value to listeners, the Court found that the government generally serves listeners' interests when it requires commercial actors to disclose *more* accurate information about their goods and services.[188] For this reason, the government's required disclosures of "factual and uncontroversial" information need only be "reasonably related" to consumers' interests so long as they are not "unjustified or unduly burdensome."[189] For years, the government's compelled commercial disclosures usually satisfied *Zauderer*'s deferential review.[190]

* * *

The Court has noted that the commercial speech doctrine itself relies on speaker- and content-based distinctions precisely because those distinctions are key to identifying the universe of commercial speech and its attendant potential for value to listeners' decisionmaking.[191] But the contemporary antiregulatory turn in First Amendment law leads many to wonder whether the twenty-first-century Court still understands the commercial speech doctrine as privileging listeners' First Amendment interests, or whether the Court instead now privileges the First Amendment interests of commercial producers and

187 *Id.* at 650–51.

188 *Id.* at 651 ("The State['s] . . . prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." (citation omitted)); *see also* Shanor & Light, *supra* note 163, at 2086 ("[T]he Constitution extends asymmetrical protection to government *restrictions* on commercial speech versus mandated *disclosures* of commercial speech . . . [b]ecause the First Amendment favors more, rather than less, factual-information flow to the public for its decisionmaking in economic and political life.").

189 *Zauderer*, 471 U.S. at 651; *see also* CTIA - The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 842 (9th Cir. 2019) (applying *Zauderer* to disclosures intended to achieve "substantial" government interests like informing consumers about health and safety risks); Am. Meat Inst. v. USDA, 760 F.3d 18, 20 (D.C. Cir. 2014) (applying *Zauderer* to disclosures intended to inform consumers about products' attributes of interest to them); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (same).

190 *See* Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972, 973 (2017).

191 *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011) ("It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (noting that its "decisions have recognized 'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'" (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978))).

sellers as speakers—including those speakers' interests in *not* disclosing certain accurate information.[192] Indeed, the majority's dictum in *Sorrell v. IMS Health Inc.* suggested the possibility of applying strict scrutiny to the government's regulation of commercial speech (even while holding that the contested regulation in that case—a state law that restricted the sale of information about doctors' prescribing practices for use in pharmaceutical marketing—failed even *Central Hudson* intermediate scrutiny).[193] And Justice Thomas has long argued that courts should apply strict scrutiny to the government's regulation of commercial speech just as they do to the government's regulation of political speech.[194] Nevertheless, lower courts have so far remained largely reluctant to retreat from the Court's longstanding doctrine that treats commercial speech that is false, misleading, or related to illegal activity as entirely unprotected; that applies intermediate scrutiny to the government's regulation of accurate speech about legal commercial activity; and that applies more deferential review to the government's compelled commercial disclosures about factual matters.[195]

B. What This Means for Securities Law

Although the Supreme Court has not precisely defined the universe of "commercial speech," at a minimum the term includes

192 *See* Cortez & Sage, *supra* note 6, at 763–64 (urging a renewed emphasis on listeners' interests when considering the First Amendment claims of corporate speakers); Amy Kapczynski, *Free Speech, Incorporated*, BOS. REV., Summer 2019, at 156, 164 ("In 2011 the commercial speech train jumped the tracks. The legal argument shifted decisively from its earlier focus on citizens' need for information and toward a newfound solicitude for the rights of corporate speakers."); Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 5 (2012) ("*Sorrell* completes what has been a decades-long process of turning the rationale for commercial speech doctrine upside down by putting the speaker, rather than the public interest, at the center of the analysis. It completes what I call has been a 'bait-and-switch' whereby the protection for commercial speech was offered under one justification, but once it was granted, has morphed into something completely different.").

193 *Sorrell*, 564 U.S. 552, 564–65 (2011).

194 *E.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 255 (2010) (Thomas, J., concurring in part and concurring in judgment) (disagreeing with the doctrinal rules that apply less rigorous scrutiny to the government's restriction of accurate commercial speech and to the government's compelled disclosures of factual commercial information); *see also* MARTIN H. REDISH, COMMERCIAL SPEECH AS FREE EXPRESSION: THE CASE FOR FIRST AMENDMENT PROTECTION 99 (2021) ("[A]lthough the Supreme Court arguably continues to adhere to the four-pronged *Central Hudson* test, that test as currently applied offers far more constitutional protection to commercial speech than it did in its early years." (footnote omitted)).

195 *See* William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 912 ("[E]ven relatively recent lower court opinions have continued to resist imposing strict scrutiny on commercial speech regulations, despite *Sorrell*'s implication that they should.").

commercial advertising and other speech that proposes, communicates, or negotiates the terms and conditions of a commercial transaction.[196] The Court itself has never considered whether securities-related speech constitutes commercial speech for First Amendment purposes. But lower courts have occasionally treated securities-related speech as a species within the genus of commercial speech.[197]

Rather than undertake the nigh-impossible task of working through each specific securities regulation, the remainder of this Part instead briefly sketches how commercial speech doctrine maps onto the three major forms of securities regulation: antifraud rules that prohibit certain false and misleading speech; rules that require the disclosure of accurate information to inform listeners' decisionmaking; and gun-jumping rules that tie the timing of certain securities-related offers and marketing to the submission, review, and delivery of those mandatory disclosures. Much of that regulatory framework can satisfy the requisite scrutiny so long as courts continue to tether their understanding of commercial expression's value (and thus its First Amendment protection) to that expression's capacity to inform listeners' autonomous decisionmaking.[198]

1. Antifraud Rules

Securities laws' antifraud rules should remain insulated from First Amendment review under the Court's commercial speech doctrine,

196 *See, e.g.*, Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (characterizing New York law as a regulation of commercial speech because it regulated retailers' communication of the price of their goods and services); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (characterizing product demonstrations in campus dormitory rooms as commercial speech); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973) (characterizing job advertisements as commercial speech). Amanda Shanor and Sarah Light propose that because the justifications for commercial speech doctrine center on settings involving asymmetries between speakers and listeners, so too should courts define "commercial speech" itself to mean a commercial actor's speech that occurs in a setting of informational dependence. Shanor & Light, *supra* note 163, at 2101.

197 *See* United States v. Wenger, 427 F.3d 840, 847, 849 (10th Cir. 2005) (holding that Section 17(b) of the Securities Act regulated commercial speech, and satisfied *Zauderer* scrutiny, by requiring that persons promoting or publicizing stock for compensation disclose that fact along with the amount of payments received).

198 For a related listener-centered discussion of how a different regulatory regime—food and drug law—could and should satisfy contemporary commercial speech review, see Amy Kapczynski, *supra* note 7, at 202 ("The FDA's substantiation requirements for both pharmaceuticals and tobacco are designed to protect the public by *informing* it . . . . The FDA's regulatory approaches to medicines and tobacco, as described earlier, can be understood as informing consumers, and so are in no real tension with modern commercial speech law." (footnote omitted)).

which treats false and misleading commercial speech as entirely unprotected by the First Amendment because it frustrates listeners' interests.[199] Note that this doctrine does not require the government to prove the commercial speaker's culpable mental state, as its listener-centered focus recognizes that false or misleading commercial expression interferes with listeners' informed decisionmaking regardless of the speaker's scienter. While a listener may find the sting of deception even more painful when accompanied by the speaker's intent to deceive, the deception itself threatens listeners' autonomy, enlightenment, and self-governance interests regardless of the speaker's state of mind.[200]

2. Mandatory Disclosures

The contemporary antiregulatory turn in First Amendment law includes greater judicial skepticism of the government's compelled commercial disclosures, skepticism that takes several doctrinal forms.[201] Whether a specific disclosure rule satisfies this increasingly skeptical review will turn, of course, on the specific disclosure at issue.

a. Deferential or Skeptical Review?

Recall that the Court applies more deferential *Zauderer* review to compelled disclosures of commercial matters deemed "factual and uncontroversial."[202] Increasingly attentive to the First Amendment interests of unwilling speakers, however, the twenty-first-century Court

199 *See* Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1430 (2020) (asserting that areas of traditional government regulation rooted in the private common law of tort and contract—like the antifraud rules—face little First Amendment risk); James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 371–72 (2018) (noting no First Amendment bar to securities laws that prohibit fraudulent statements made to investors).

200 *See* Aaron v. SEC, 446 U.S. 680, 696–702 (1980) (holding that the SEC need not prove the speaker's subjective intent under section 17(a)(3) of the Securities Act of 1933 that prohibits transactions and practices that "*operate*[] or *would operate* as a fraud or deceit" because that provision "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible," *id.* at 697 (quoting Securities Act of 1933 § 17(a)(3), 15 U.S.C. § 77q(a)(3) (1976)); Shanor & Light, *supra* note 163, at 2094 (emphasizing falsity's harm to listeners in "relationships of reliance and informational dependence").

201 For a sampling of discussion criticizing these contemporary shifts in the First Amendment law of compelled commercial disclosures, see Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881 (2022); David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841 (2022); Post, *supra* note 41; Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731 (2020); Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811 (2022).

202 *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985).

is now quick to characterize a disclosure as instead "controversial." *National Institute of Family and Life Advocates v. Becerra* illustrates the point.[203] In that case, pregnancy service centers (organizations that seek to persuade pregnant women not to have abortions) asserted First Amendment challenges to California's law that required them to disclose that California provided free or low-cost reproductive health care services including prenatal care, contraceptive care, and abortion.[204] A 5–4 Court found that *Zauderer* deference did not apply: even though the disclosure was factually accurate, the majority found it nevertheless "controversial" because it required the speaker to mention "abortion, anything but an 'uncontroversial' topic."[205] (Several thoughtful observers suggest that *NIFLA* is distinguishable from most other compelled-disclosure cases because it dealt with abortion and because it did not arise in a commercial setting since the pregnancy service centers did not charge for their services.)[206]

Along these lines, some lower court*s* are quicker to describe the government's compelled commercial disclosures as involving something other than "factual and uncontroversial" matters, applying *Central Hudson* intermediate scrutiny (which requires the government to show that its regulation of commercial speech "directly advance[s]" its "substantial interest" in a way "not more extensive than is necessary to serve that interest")[207] rather than more deferential *Zauderer* review (under which the government's compelled commercial disclosures will survive so long as they do not unduly burden the commercial actor's speech and are reasonably related to the government's informational objectives).[208] Consider, for example, *National Ass'n of Manufacturers v.*

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203 138 S. Ct. 2361, 2388 (2018). This move too has generated plenty of criticism. *See, e.g.*, REDISH, *supra* note 194, at 131 (proposing instead that "the compelled speech must not include facts or scientific statements with which the compelled speaker reasonably disagrees"); Shiffrin, *supra* note 201, at 731–32 (concluding that "[w]hether factual, informational speech is controversial in any meaningful sense should be irrelevant to a First Amendment inquiry").

204 *NIFLA*, 138 S. Ct. at 2368.

205 *Id.* at 2372. It then found that the notice failed intermediate scrutiny. *Id.* at 2375. Note that the majority distinguished as constitutionally permissible "health and safety warnings long considered permissible" or "purely factual and uncontroversial disclosures about commercial products." *Id.* at 2376.

206 *See, e.g.*, Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 66 (2019) (describing *NIFLA* as "primarily about [the] conservative Justices' hostility to abortion rights"); Haupt & Parmet, *supra* note 8, at 301 ("[T]he most plausible justification for *NIFLA* remains that it is primarily an abortion decision wrapped into a First Amendment claim.").

207 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564, 566 (1980).

208 Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985).

SEC.[209] In hopes of ameliorating the humanitarian crisis created by armed conflict in the Congo funded by the sale of certain minerals, Congress directed the SEC to develop a rule requiring publicly traded companies to disclose whether the minerals used in their products had or had not been found to be "DRC [Democratic Republic of the Congo] conflict free"; the National Association of Manufacturers brought a First Amendment challenge to the resulting "Conflict Minerals Rule."[210] There the D.C. Circuit assumed (without deciding) that the compelled disclosure involved commercial speech,[211] and chose to apply *Central Hudson* skepticism (rather than *Zauderer* deference) to the disclosure in part because it concluded that the disclosure's content was not "factual and uncontroversial"; in the panel's view, requiring a company to disclose that its product was "not conflict free" was no different from "compelling an issuer to confess blood on its hands."[212]

Returning to a listener-centered focus offers a principled understanding of *Zauderer*'s requirement that the government's mandatory disclosures must concern "factual and uncontroversial" matters to deserve deference.[213] When we put listeners first, we can and should

209 800 F.3d 518 (D.C. Cir. 2015).

210 *See id.* at 531 (Srinivasan, J., dissenting) (discussing the rule's history and objectives).

211 *Id.* at 521–22 (majority opinion). For its part, the SEC did not describe the rule's purpose as informing and protecting investors, but instead as "directed at achieving overall social benefits" and thus "quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve." *Id.* at 522 (quoting Conflict Minerals, 77 Fed. Reg. 56274, 56350 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249b)); *see also id.* at 521 n.7. Legal scholar Sarah Haan, however, is among those to contest this characterization, emphasizing that Congress had described its directive to the SEC in terms of investors' informational interests. *See* Haan, *supra* note 151, at 12–14 (criticizing the D.C. Circuit for "fail[ing] to credit Congress's plausible legislative choice that the disclosure would be useful to investors—implicitly holding that its own view about the types of information that should be important to investors mattered more than Congress's," *id.* at 13); *see also* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 147 (2018) ("[The required disclosure] is material in the marketplace, and having the information easily available allows the marketplace to work more smoothly and efficiently.").

212 *Nat'l Ass'n of Mfrs.*, 800 F.3d at 522–24, 530. Acknowledging the instability of current commercial speech doctrine, the court offered an alternative basis for its decision and held that the required disclosures also failed *Zauderer* as both unjustified and unduly burdensome to the commercial actor's speech. *Id.* at 524–28.

213 *See* Norton, *Truth and Lies in the Workplace*, *supra* note 9, at 75 ("An approach more consistent with the protection of listeners' First Amendment interests would thus understand 'factual and uncontroversial' in this context to refer to assertions that are provable (or disprovable) as a factual matter in the same way required of contested assertions in defamation, perjury, and antifraud law. . . . In other words, here 'uncontroversial' should mean factually or empirically uncontroversial rather than politically uncontested.").

understand this doctrinal requirement to describe "the epistemological status of the information that a speaker may be required to communicate."[214] As Robert Post points out, "Plainly a mandated disclosure cannot become controversial merely because a speaker objects to making it. . . . Nor should mandated factual disclosures become constitutionally disfavored because they occur in circumstances of acrimonious political controversy."[215] Think of federal law that requires food manufacturers to disclose caloric and other nutritional information even though certain manufacturers would rather not do so: that the disclosure may not be flattering to the product does not detract from (and in fact may increase) the disclosures' informational value to consumers as listeners. Nor does it interfere with manufacturers' ability to promote their products' positive attributes. So too of mandatory securities disclosures that require companies to disclose accurate information to investors about their performance and potential. Under an appropriately listener-centered focus, the disclosures required by securities law are best understood as "factual and uncontroversial," thus triggering *Zauderer* deference.[216]

But even if courts were instead to apply *Central Hudson*'s more skeptical review, the government's compelled disclosures can satisfy the requisite scrutiny when we attend to asymmetries of information (and sometimes power) between speakers and listeners. In assessing whether the government's regulatory means directly advances its informational ends as required by *Central Hudson*,[217] the Court has permitted the government to rely on "studies[,] anecdotes[,] history, consensus, and 'simple common sense'" to justify its choice.[218] Relatedly, the Court has also refused to insist that the government's regulation be the "least restrictive" alternative,[219] instead requiring "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'; that employs not necessarily the least

214 Post, *supra* note 41, at 910.

215 *Id.*

216 *See supra* notes 54–64 and accompanying text (describing the sorts of disclosures required by securities law).

217 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564, 566 (1980) (requiring the government to show that its regulation of commercial speech "directly advances" its "substantial interest" in a way "not more extensive than is necessary to serve that interest").

218 Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion)).

219 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001), *superseded in part by statute on other grounds*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 203, 123 Stat. 1776, 1846 (2009) (codified at 15 U.S.C. § 1334(c) (2018)).

restrictive means but . . . a means narrowly tailored to achieve the desired objective."[220] In other words, the government's appropriately crafted regulations satisfy such scrutiny so long as we remain attentive to listeners' informational interests.[221]

b. Does the Disclosure Unduly Burden the Commercial Actor's Speech?

The Court's longstanding listener-centered commercial speech doctrine nevertheless at times also considers commercial speakers' interests. Recall that the government's compelled commercial disclosures satisfy *Zauderer* review so long as they do not unduly burden the commercial actor's speech and are reasonably related to the government's informational objectives.[222] And they satisfy *Central Hudson* scrutiny when they directly advance the government's substantial interest through appropriately tailored means.[223]

Courts that have struck down compelled commercial disclosures as unduly burdensome to commercial speakers often focus on whether the required disclosure crowded out the commercial actor's own speech in settings with limited space available for the commercial actor to communicate to its customers.[224] Think of billboards, print advertising, and packaging. Along these lines, the Ninth Circuit invalidated

220 Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (citation omitted) (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)); *see also id.* at 480–81 ("By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.' Far from eroding the essential protections of the First Amendment, we think this disposition strengthens them." (citation omitted) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))).

221 *See, e.g.*, Greater Phila. Chamber of Com. v. City of Phila., 949 F.3d 116 (3d Cir. 2020) (holding that the city's law prohibiting employers' inquiries about applicants' salary history satisfied *Central Hudson* intermediate scrutiny); King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 309 (E.D. Pa. 2012) (holding that Fair Credit Reporting Act requirement that credit reports exclude outdated arrest record information regulates accurate commercial speech and thus triggers *Central Hudson* intermediate scrutiny, and then upholding the provision under that scrutiny).

222 Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985); *see also* Am. Hosp. Ass'n v. Azar, 983 F.3d 528, 541 (D.C. Cir. 2020) (stating that *Zauderer* requires the challenger to "demonstrate a burden on *speech*").

223 *See supra* note 183 and accompanying text.

224 *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (finding that California disclosure law that required unlicensed pregnancy service centers to disclose that they were in fact unlicensed because they had no health care professionals on site failed *Zauderer* scrutiny as unduly burdensome because the law required the centers to repeat the state's twenty-nine-word script on billboards and other messages, thus drowning

a city's requirement that health warnings about sugared beverages take up twenty percent of the space available for advertising those products, concluding that it unduly restricted the available space for the advertiser's own message in light of record evidence that in this context a ten percent space allotment would also successfully deliver this warning to consumers.[225]

In contrast, the Ninth Circuit found no undue burden posed by a city's requirement that cell phone retailers make the same disclosures about cell phones' health and safety risks as required of cell phone manufacturers by the Federal Communications Commission.[226] Applying *Zauderer* to what it described as "factual and uncontroversial" disclosures, the court found that the disclosure didn't crowd out the retailers' speech: a retailer could satisfy the requirement with a single posting in its facility or with a small handout accompanying the sale.[227] That the city also permitted retailers to supplement the warning with their own views about cell phones' health and safety attributes further diminished any burden on the retailers' expression.[228]

Courts worried about undue burdens on commercial speakers also increasingly reject disclosures they perceive as requiring the commercial actor to condemn itself. Recall *National Ass'n of Manufacturers v. SEC*, where the D.C. Circuit invalidated the conflict minerals rule that, in the court's view, required companies to convey their moral responsibility for the humanitarian crisis in the Congo.[229] There the court held that the required disclosure failed *Central Hudson* intermediate scrutiny (and failed even *Zauderer* as unduly burdensome) because of the availability of regulatory options less burdensome to the commercial actor's expression—for example, allowing companies to use their own language to describe their products' relationship (if any)

out the centers' own message); Dwyer v. Cappell, 762 F.3d 275, 284 (3d Cir. 2014) (holding that compelled disclosure was unduly burdensome because of its length, where the state required attorney advertisements to present the full text of—rather than excerpts or quotes from—any judicial opinion extolling the attorney's abilities).

225 Am. Beverage Ass'n v. City & Cnty. of S.F., 916 F.3d 749, 757 (9th Cir. 2019).

226 CTIA - The Wireless Ass'n v. City of Berkeley, 928 F.3d 832 (9th Cir. 2019).

227 *Id.* at 845, 849.

228 *Id.* at 849. Along the same lines, the Sixth Circuit found that the size and scale of textual health warnings to be displayed on tobacco packaging and advertising were not unduly burdensome given evidence supporting the proposed warning's effectiveness in communicating the warning to consumers, along with the challengers' failure to show that remaining space was insufficient to display their own expression. Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 530–31 (6th Cir. 2012).

229 800 F.3d 518 (D.C. Cir. 2015).

to conflict in the DRC, or requiring instead the SEC to post on its website a list of products that the agency itself had and had not confirmed to be DRC-conflict-free.[230]

Contrast *American Meat Institute v. USDA*, where meat producers brought a First Amendment challenge to the Department of Agriculture's rule requiring them to label their products' country of origin.[231] There the D.C. Circuit found that the rule required the disclosure of factual and uncontroversial information (thus triggering *Zauderer* review) when it permitted producers the choice to use the term "harvested" (rather than insisting on the more value-laden "slaughtered") when labeling their products' county of origin.[232]

Here too securities-related speech differs from speech related to other goods and services in constitutionally relevant ways. The disclosures required by securities law do not crowd out—and thus do not unduly burden—companies' speech because they do not appear on billboards, in newspapers, on packaging, or in other settings where the available space is limited. Instead, securities law requires companies to make disclosures through registration statements to the SEC (which are then made available to the public) and through prospectuses and proxy statements delivered to investors and shareholders.[233] Nor do these disclosures require stigmatizing language of the sort described above,[234] and they leave companies free to provide additional texture and nuance through voluntary disclosures of their own.[235]

c. Has the Government Justified the Disclosure's Value to Listeners?

Courts unimpressed by the evidentiary connection between a required disclosure and the government's informational objectives find those disclosures to fail *Zauderer* deference (as unjustified) or *Central Hudson* scrutiny (as insufficiently justified).[236] From a listener-centered perspective, this evidentiary requirement ensures that a disclosure actually informs listeners about matters relevant to their decisionmaking, and simultaneously screens unnecessary burden on commercial speakers.

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230 *Id.* at 530.

231 760 F.3d 18, 21 (D.C. Cir. 2014).

232 *Id.* at 27.

233 *See supra* notes 54–64 and accompanying text.

234 *See supra* notes 228–32 and accompanying text.

235 *See id.*

236 *See e.g.*, Dwyer v. Cappell, 762 F.3d 275, 282 (3d Cir. 2014) (finding that the government did not explain how requiring an attorney's advertisement to present the full text of—rather than just quotations from—a judicial opinion extolling the attorney's abilities would serve listeners' informational interests).

Some courts are increasingly skeptical of the government's justifications for compelled commercial disclosures.[237] But others credit studies, expert testimony, history, anecdotes, and common sense[238] to find it "self-evident" that the government's compelled disclosures provide information relevant to listeners' decisionmaking.[239] Consider again *American Meat Institute v. USDA*, where meat producers brought a First Amendment challenge to the Agriculture Department's requirement that their packaging disclose their products' country of origin.[240] Applying *Zauderer* scrutiny to those "factual and uncontroversial" disclosures,[241] the court found the disclosures to be justified given consumers' longstanding interest in protecting American enterprise, an interest that explained country-of-origin information's value to consumers distinct from other measures of a product's value like cost or quality.[242] In so doing, the D.C. Circuit recognized that a variety of matters apart from so-called "traditional" measures of quality, cost, and safety can and do inform consumers' decisions.

Here too securities law advances listeners' interests by requiring disclosures that inform investors' decisionmaking. And such disclosures serve those interests when they inform investors about risks both

237 Recall the conflicts mineral rule at issue in *National Ass'n of Manufacturers v. SEC*, with its objective of reducing conflict in the Congo for humanitarian purposes (a departure from securities law's traditional function of informing investors' autonomous choices). *See supra* notes 210–12 and accompanying text. There the D.C. Circuit held that the SEC's rule was unjustified (thus failing even *Zauderer* scrutiny) because the agency had not shown that the disclosure would achieve its objective of greater peace and security in the Congo. *See* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 525 (D.C. Cir. 2015) ("The idea must be that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there. But there is a major problem with this idea—it is entirely unproven and rests on pure speculation.").

238 *E.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995).

239 *E.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 652–53 (1985) (finding "self-evident" that a substantial number of laypersons would fail to understand the difference between attorney's fees and litigation costs and would thus benefit from a disclosure making clear that contingent-fee clients would still be liable for litigation costs even if not for attorney's fees); Am. Meat Inst. v. USDA, 760 F.3d 18, 26 (D.C. Cir. 2014) ("The self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have persisted for decades without anyone questioning their constitutionality. In this long-lived group have been not only country-of-origin labels but also many other routine disclosure mandates about product attributes, including, for instance, disclosures of fiber content, care instructions for clothing items, and listing of ingredients." (citations omitted)).

240 760 F.3d at 21.

241 *Id.* at 27.

242 *Id.* at 24–25; *see also id.* at 26 ("[A]s the Court recognized in *Zauderer*, such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest.").

longstanding and emerging, and when they inform the heterogeneous range of investor methodologies for considering risk and value. Given their design to inform and protect investors as listeners through accurate and comparable disclosures of securities-related information, SEC disclosure requirements can satisfy even increasingly skeptical commercial speech scrutiny when we maintain a listener-centered focus.

3. Gun-Jumping Rules

Closely tied to mandatory disclosure rules are the gun-jumping rules that tie the timing of securities-related offers and marketing statements to the SEC's review of companies' required disclosures and those disclosures' delivery to prospective buyers.[243] That these rules make mandatory disclosures meaningfully effective by ensuring that investors receive them at key decisionmaking junctures supports the application of *Zauderer* deference, which assumes that more accurate information is generally better for listeners. And the gun-jumping rules can satisfy even *Central Hudson* skepticism (in addition to *Zauderer* deference) when courts recall the ways in which they serve investors' interests as listeners in receiving accurate information.[244]

In short, securities law's interlocking regulatory framework can generally satisfy review under commercial speech doctrine so long as courts remain attentive to its listener-centered functions.

CONCLUSION

Securities law's listener-centered functions inform investors' decisions about buying, selling, and holding securities, as well as their decisions about electing directors, approving mergers or acquisitions, and otherwise exercising their corporate governance functions. These listener-centered functions, in turn, also serve public-regarding goals by facilitating stable and efficient markets, encouraging corporate accountability, and ameliorating systemic economic risks.

These functions explain the value—indeed, the necessity—of content- and speaker-specific complexity for securities law, as securities

243 *See supra* notes 65–71 and accompanying text.

244 *See id.* For a recent example of a court engaging in this sort of analysis, see SEC v. AT&T, Inc., 626 F. Supp. 3d 703 (S.D.N.Y. 2022). There the district court rejected a Free Speech Clause challenge to the SEC's Regulation FD, which prohibits public companies from selectively disclosing material nonpublic information to some listeners while withholding that information from the general public. *Id.* at 711. The court declined to apply strict scrutiny to the regulation despite its (and other securities rules') content-based nature. *Id.* at 745. It held instead that the regulation satisfied both rational basis and *Central Hudson* intermediate scrutiny (even though it found the commercial speech doctrine to be "a mismatch for the speech covered by Reg FD"). *Id.* at 748, 750–51.

regulation requires a focus on specific speakers and on specific content to achieve its multiple and interlocking objectives. These listener-centered functions also enable us to identify two pathways for understanding the constitutionality of the securities law framework despite its content-based regulation of speech.

First, these functions explain how we can recognize securities-related speech as a category of unprotected speech by tracing the longstanding regulatory tradition of addressing the information asymmetries unique to the securities market. What binds this regulatory tradition together are the listener-centered functions it has long sought to achieve: informing and protecting investors by prohibiting false and misleading securities-related speech and by requiring companies' accurate disclosures.

Second, even if the Court were instead to treat securities-related speech as a type of commercial speech, much of the securities regulation framework satisfies the requisite scrutiny under commercial speech doctrine so long as courts continue to tether their understanding of commercial expression's value (and thus its First Amendment protection) as turning on that expression's capacity to inform listeners' autonomous decisionmaking.

That courts *could* choose either of these pathways, of course, does not mean that they *will* so choose. Nevertheless, this Article seeks to inform those choices by demonstrating how securities law's longstanding listener-centered framework aligns with the theory and doctrine of free speech law.

Contemporary free speech law now poses new constitutional barriers to longstanding economic regulation. Law professor Julie Cohen describes this antiregulatory turn as reflecting "a broader realignment in free speech jurisprudence, in which the First Amendment's traditional concern with political self-determination plays very little role."[245] Along the same lines, Amy Kapczynski explains that contemporary courts increasingly treat regulatory policy questions "as constitutional questions, answering them through a First Amendment doctrine that treats many forms of regulation as the illegitimate coercion of speech, rather than as the democratic prerogative of a public seeking to protect itself from the risks of deception and harm inherent to market society."[246] Considering the crease between securities law and free speech law, as this Article does, helps illuminate the importance of principled guardrails on that antiregulatory turn.

245 Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1122 (2015).

246 Kapczynski, *supra* note 192, at 157–58.