

The Politics and Incentives of First Amendment Coverage

Frederick Schauer

Repository Citation

Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 Wm. & Mary L. Rev. 1613 (2015), <https://scholarship.law.wm.edu/wmlr/vol56/iss4/14>

THE POLITICS AND INCENTIVES OF FIRST AMENDMENT COVERAGE

FREDERICK SCHAUER*

TABLE OF CONTENTS

INTRODUCTION: LOOKING FOR SPEECH IN ALL THE WRONG (?) PLACES	1614
I. ON COVERAGE AND PROTECTION	1617
II. COVERAGE AND THE SUPREME COURT	1621
III. COVERAGE AND THE INCENTIVES OF LITIGATION	1624
IV. THE FUTURE	1631
CONCLUSION: THE RISKS OF DOCTRINAL DISTORTION	1634

* David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Article was prepared for the *William & Mary Law Review*'s February 2014 Symposium on "The Contemporary First Amendment: Freedom of Speech, Press, and Assembly."

INTRODUCTION:
LOOKING FOR SPEECH IN ALL THE WRONG (?) PLACES

In recent years, litigants have claimed that the First Amendment's Free Speech Clause limits the ability of the Securities and Exchange Commission to mandate financial disclosures,¹ restricts the power of regulatory agencies to compel disclosure of conflicts of interest in the pharmaceutical industry,² constrains the authority of a state to prevent licensed therapists from using therapeutic methods that have no scientific basis,³ and controls the prerogative of a liquor control commission to prohibit anticompetitive franchise agreements between retailers and wholesalers.⁴ Litigants have also argued that the First Amendment protects erroneous bond and credit ratings,⁵ prevents the seizure of computer equipment used in unlawful gambling,⁶ shields tattoo parlors from health regulations,⁷

1. *See Full Value Advisors, LLC v. SEC*, 633 F.3d 1104, 1104-08 (D.C. Cir. 2011) (holding that the First Amendment challenge to disclosure requirements for large investment managers was not ripe for adjudication); *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 11, 23 (D.D.C. 2013) (noting but not reaching the First Amendment challenge to the Dodd-Frank Act's requirements of disclosure of payments to foreign governments).

2. *See Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 308-10, 316 (1st Cir. 2005) (describing the First Amendment argument against compelled disclosure to a regulatory agency but rejecting it as "completely without merit").

3. *See Pickup v. Brown*, 728 F.3d 1042, 1051-57 (9th Cir. 2013), *reh'g en banc denied*, 740 F.3d 1208 (9th Cir. 2014) (holding that the use of words in medical or therapeutic treatment does not require heightened scrutiny of the regulation of treatment methods); *see also Conant v. Waters*, 309 F.3d 629, 634-35 (9th Cir. 2002); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053-56 (9th Cir. 2000).

4. *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 5-10 (1st Cir. 2007) (holding that agreements for advertising and other services do not constitute commercial speech).

5. *See Genesee Cnty. Emps.' Ret. Sys. v. Thornburg Mort. Sec. Trust*, 825 F. Supp. 2d 1082, 1234-38 (D.N.M. 2011) (holding that credit ratings are not protected by the First Amendment); *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs., LLC*, 813 F. Supp. 2d 871, 877-78 & n.1 (S.D. Ohio 2011) (noting defendants' First Amendment arguments, but deciding case on other grounds), *aff'd*, 700 F.3d 829 (6th Cir. 2012); *First Cmty. Bank v. First Tenn. Bank*, No. E2012-01422-COA-R3-CV, 2013 WL 4472514, at *16 (Tenn. Ct. App. Aug. 20, 2013) (noting but not deciding First Amendment issue).

6. *See Lucky Bob's Internet Café, LLC v. Cal. Dep't of Justice*, No. 11-CV-148, 2013 WL 1849270, at *4-5 (S.D. Cal. May 1, 2013) (rejecting claim that seizure of computer equipment constituted an unconstitutional prior restraint). First Amendment arguments in opposition to actions against unlawful gambling have also been raised and rejected in other cases. *See, e.g., There to Care, Inc. v. Ind. Dep't of Revenue*, 19 F.3d 1165, 1167-68 (7th Cir. 1994);

prohibits the government from requiring employers to inform employees of their legal rights,⁸ limits legal sanctions for erroneous maps and charts,⁹ guarantees the right of a citizen to warn potential targets of a police sting operation that they are in jeopardy of arrest,¹⁰ and, similarly, ensures that citizens are free to flash their headlights in order to warn oncoming motorists of the presence of police seeking to apprehend speeders.¹¹

Not to be outdone by actual litigants in actual courts, authors of law review articles and notes have recently argued that the First Amendment encompasses the right to engage in sports¹² and unprotected sexual activity,¹³ immunizes auctioneers from the requirements of professional licensing,¹⁴ protects people who wish to make deafeningly loud nonverbal noise in athletic arenas,¹⁵ and even allows people to practice law without a license.¹⁶ And a veritable

Telesweeps of Butler Valley, Inc. v. Kelly, No. 3:12-CV-1374, 2012 WL 4839010, at *7-9 (M.D. Pa. Oct. 10, 2012); Allied Veterans of the World, Inc.: Affiliate 67 v. Seminole Cnty., 783 F. Supp. 2d 1197, 1202 (M.D. Fla. 2011), *aff'd on other grounds*, 468 Fed. Appx. 922, 923 (11th Cir. 2012).

7. See *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-68 (9th Cir. 2010) (invalidating a total prohibition of tattoo businesses); *Coleman v. City of Mesa*, 284 P.3d 863, 866-71 (Ariz. 2012) (upholding a health-based regulation of tattoo parlors). These cases are discussed and analyzed in Clay Calvert, *Fringes of Free Expression: Testing the Meaning of "Speech" Amid Shifting Cultural Mores and Changing Technologies*, 22 S. CAL. INTERDISC. L.J. 545, 561-62 (2013).

8. *Chamber of Commerce of U.S. v. NLRB*, 856 F. Supp. 2d 778, 797 n.20 (D.S.C. 2012) (noting the First Amendment argument against required posting of employees' legal rights, but finding the First Amendment issues moot).

9. Google raised a First Amendment defense in *Rosenberg v. Harwood*, No. 100916536, 2011 WL 3153314 (D. Utah May 27, 2011), as described in Jeffrey Rosen, *Keeping Google Good: Remarks on Privacy Regulation and Free Speech*, 20 GEO. MASON L. REV. 1003, 1005-06 (2013), but the court did not address the issue.

10. *City of Dayton v. Van Hoose*, No. 18053, 2000 WL 1803867, at *1-3 (Ohio Ct. App. Dec. 8, 2000) (rejecting a First Amendment argument).

11. *Elli v. City of Ellisville*, 997 F. Supp. 2d 980, 983-84 (E.D. Mo. 2014) (granting a preliminary injunction because plaintiff's warning to other drivers constituted communication protected by the First Amendment).

12. Genevieve Lakier, *Sport as Speech*, 16 U. PA. J. CONST. L. 1109, 1111 (2014).

13. Alexander S. Birkhold, *Poking Holes in L.A.'s New Condom Requirement: Pornography, Barebacking, and Speech*, 90 WASH. U. L. REV. 1819, 1820 (2013).

14. See Enrique Armijo, "Going Once, Going Twice ...": *The Dubious Legality and Necessity of North Carolina's Auctioneer License Statute*, 91 N.C. L. REV. 1887, 1927-34 (2013).

15. See Shane Kotlarsky, *What's All the Noise About: Did the New York Yankees Violate Fans' First Amendment Rights by Banning Vuvuzelas in Yankee Stadium?*, 20 JEFFREY S. MOORAD SPORTS L.J. 35, 36 (2013).

16. See Catherine J. Lanctot, *Does Legalzoom Have First Amendment Rights?: Some*

industry has grown up around a diverse collection of claims that the First Amendment's protection extends to computer language, source code, and raw data in all of its infinite varieties.¹⁷

What is most interesting about these various claims and arguments is not merely that some of them have been taken seriously.¹⁸ Rather, it is that they have been advanced at all, in contrast to what would have been expected a generation ago, when the suggestion that the First Amendment was even applicable to some of these activities would far more likely have produced judicial laughter or incredulity, if not Rule 11 sanctions. Accordingly, if we seek to examine the changing nature of the First Amendment landscape, both now and into the future, we might well train our attention not only on the degree of protection (or not) for activities that have long been taken to be at least relevant to the First Amendment, but also, and perhaps even more, on those activities that only recently have been thought to have anything to do with the First Amendment at all. In the past, many of the most important issues surrounding the First Amendment were issues about the nature and degree of its protection within its widely acknowledged coverage.¹⁹ But now the

Thoughts About Freedom of Speech and the Unauthorized Practice of Law, 20 TEMPLE POL. & CIV. RTS. L. REV. 255, 257 (2011).

17. See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 60 (2014); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1447 (2013); Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1630 (2014); Gerard J. Clark, *The Constitutional Protection of Information in a Digital Age*, 47 SUFFOLK U. L. REV. 267, 269 (2014); James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 933 (2014). But see Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1497 (2013). Also relevant is *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011), invalidating a content-based restriction on data mining.

18. See, e.g., *In re Enron Corp. Securities, Derivative, & "ERISA" Litig.*, 511 F. Supp. 2d 742, 826-27 (S.D. Tex. 2005) (holding that credit ratings are covered by the First Amendment). Compare *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005) (evaluating the pharmaceutical conflict of interest mandatory disclosure requirement according to First Amendment commercial speech standards), with *id.* at 316 (Boudin, J., concurring) (writing, for a 2-1 majority on this point that the First Amendment claim was "completely without merit"). See also cases cited *supra* note 7.

19. For example, although courts and scholars debated whether speech urging revolution or other large-scale governmental change should be evaluated according to whether it presented a clear and present danger, *Schenck v. United States*, 249 U.S. 47, 48 (1919), a bad tendency, *Gitlow v. New York*, 268 U.S. 652, 671 (1925), an expected disvalue of danger in excess of its free speech value, *Dennis v. United States*, 341 U.S. 494, 510 (1951), a call to action as opposed to belief, *Yates v. United States*, 354 U.S. 298, 330 (1957), or an imminent likelihood of lawlessness, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the claim that such

pressure appears to be on coverage itself, with what seems to be an accelerating attempt to widen the scope of First Amendment coverage to include actions and events traditionally thought to be far removed from any plausible conception of the purposes of a principle of free speech. The goal of this Article is in part to document this outward pressure on the First Amendment's boundaries of applicability, but even more to offer some hypotheses about why this phenomenon appears to be occurring.

I. ON COVERAGE AND PROTECTION

In order to understand the question of coverage and to appreciate its importance, it is necessary to distinguish the idea of coverage from that of protection. But because I have been writing about (harping on?) this distinction for more than thirty years,²⁰ I will keep the recapitulation mercifully brief.

Like any other rule,²¹ the First Amendment²² does not regulate the full range of human behavior. Rather, the Free Speech Clause of the First Amendment²³ has a scope of application, and it is that

speech had nothing to do with the First Amendment was rare. For a valuable summary of the foregoing line of cases, see Frank Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 42-45.

20. See generally FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225, 227 (1981); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 281 (1981) [hereinafter Schauer, *Categories and the First Amendment*]; Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 285, 287 [hereinafter Schauer, *Codifying the First Amendment*]; Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004) [hereinafter Schauer, *The Boundaries of the First Amendment*]. I will take credit for the labels "coverage" and "protection," but the basic idea was noted earlier in, for example, Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1443 (1962) (distinguishing the "scope" of the First Amendment from its "strength"); and Harry Kalven, Jr., *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 278 (distinguishing the "ambit" of the First Amendment from its "level" of protection).

21. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 23-24 (1991) (distinguishing the factual predicate of a rule from its consequent).

22. On the rule-like character of the First Amendment, see generally Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

23. In this article I will use "First Amendment" as shorthand for "Free Speech Clause of the First Amendment," although some themes here may well be applicable to other parts of the First Amendment and, even more broadly, to other parts of the Constitution.

scope of application that we can designate as its “coverage.” When an act (whether a regulatory act of government or a communicative or expressive act of a speaker) is held to implicate the First Amendment—when a First Amendment-inspired test or standard of review applies—the act can be considered to be covered by the First Amendment. Conversely, when the First Amendment does not even apply—when a restriction is ordinarily evaluated only in accordance with a rational basis standard²⁴—we can say that the activity is uncovered.

In many contexts, the distinction between the coverage of a rule and its degree of protection (or its other consequences) is so straightforward as to be invisible. Typically, we look to the language of a rule to determine its coverage, and that is why the coverage of the Eighth Amendment is largely delineated by the word “punishment,”²⁵ why the coverage of the Second Amendment is close to the common definition of the word “arms,”²⁶ and why the requirement

24. The absence of heightened scrutiny under the First Amendment does not mean that heightened scrutiny might not be applicable under some other constitutional provision. The statement in the text thus presupposes the common situation in which the First Amendment is the only available basis for heightened scrutiny, and thus that the absence of First Amendment scrutiny produces only the minimal scrutiny of the rational basis standard. And I take the rational basis standard as setting the (very low) baseline criterion for the constitutionality of any governmental action. *See, e.g.,* *City of New Orleans v. Duke*, 427 U.S. 297, 303-04 (1976) (holding that the preference for established pushcart vendors over newer ones meets standard of minimal rationality); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (rejecting on rational basis grounds a due process challenge to a law barring all except lawyers from the business of debt adjusting); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 491 (1955) (rejecting on rational basis grounds due process and equal protection challenges to a law prohibiting opticians from fitting eyeglasses without a prescription from an optometrist or ophthalmologist); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (stating that states act within “extremely broad limits” in areas not infringing particular constitutional rights). On the rational basis standard as establishing the degree of scrutiny for even words and images that lie outside of the coverage of the First Amendment, see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (relying on *Ferguson* and other rational basis cases to permit regulation of obscenity on the basis of “unprovable assumptions”). But in some contexts the foregoing analysis may turn out to be an oversimplification, as in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding that even the regulation of uncovered fighting words must avoid viewpoint discrimination).

25. U.S. CONST. amend. VIII; *see generally* Anthony F. Granucci, “Nor Shall Cruel and Unusual Punishments Be Inflicted”: *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

26. U.S. CONST. amend. II; *cf. Dist. of Columbia v. Heller*, 554 U.S. 570, 589 n.11 (2008) (stressing literal meaning in interpreting the Second Amendment).

of two witnesses for conviction in Article III, Section 3 applies to trials for treason but not for other crimes.²⁷

When we turn to the First Amendment, however, things are not nearly so straightforward. If the coverage of the First Amendment were even close to the ordinary meaning of the word “speech,” then vast segments of human life would remain shielded by the First Amendment from regulation or other legal consequences. To provide just a few examples, the laws dealing with contracts, wills, trusts, gambling, warranties, and fraud all involve legal regimes that specify consequences, including negative ones, for using certain words—speech—in certain ways, but routinely present no First Amendment issues whatsoever. Moreover, a large portion of what is now taken to be uncontroversially covered by the First Amendment would become uncovered, including painting,²⁸ sculpture,²⁹ music,³⁰ the wearing of armbands,³¹ and the display³² or desecration³³ of flags, none of which involve speech in the ordinary sense of that word. And thus whether we travel by the route of distinguishing “the freedom of speech” from “speech” as the specification of coverage;³⁴ whether we understand “speech” as a term of art;³⁵ whether we look more directly at the underlying purpose or purposes of the

27. U.S. CONST. art. III, § 3; see *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986) (distinguishing treason from other crimes in rejecting a Treason Clause argument).

28. The First Amendment coverage of art is sometimes assumed without argument. *E.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998) (accepting that art is “speech” for First Amendment purposes); *Piarowski v. Illinois Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985) (observing that the First Amendment “embraces” the “purely artistic”). See generally Randall P. Bezanson, *Art and the Constitution*, 93 IOWA L. REV. 1593 (2008); Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012).

29. See *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988) (allowing removal of government-owned sculptures against a First Amendment objection, but agreeing that sculpture in general is protected by the First Amendment).

30. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. Inc.*, 515 U.S. 557, 569 (1995) (describing music as “unquestionably shielded” by the First Amendment).

31. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

32. See *Stromberg v. California*, 283 U.S. 359, 369 (1931).

33. See *United States v. Eichman*, 496 U.S. 310, 315 (1990); *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

34. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

35. See Peter Meijes Tiersma, *Nonverbal Communication and the Freedom of Speech*, 1993 WIS. L. REV. 1525, 1543.

speech, press, assembly, and petition clauses;³⁶ or whether we look at the history of the First Amendment,³⁷ we find ourselves in the position of attempting to locate the coverage of the First Amendment by means other than the ordinary language meaning of the word “speech.”

The question of coverage is thus an essential element in determining, for example, when the highest degree of First Amendment protection applies,³⁸ when the somewhat lower levels of intermediate scrutiny apply,³⁹ and when no heightened scrutiny applies at all.⁴⁰ We know that heightened scrutiny applies to the punishment

36. On the necessity of looking to purpose rather than ordinary language, see Schauer, *Categories and the First Amendment*, *supra* note 20, at 269; Frederick Schauer, *Speech and “Speech”—Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 909 (1979).

37. *See, e.g.*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2751 (2011) (Thomas, J., dissenting) (arguing that the First Amendment should be interpreted according to the “practices and beliefs of the founding generation”). Recently the Supreme Court has suggested that coverage is to be determined largely by history and tradition, and that exclusions from coverage that are not in some way historically grounded would be disfavored. *See, e.g., id.* at 2734-38 (majority opinion) (holding that interactive video games are covered by the First Amendment); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that videos of animal cruelty are covered because of lack of tradition of excluding violence from First Amendment coverage). But the Court has never suggested that the ordinary meaning of the word “speech” ought to be the touchstone for determining coverage.

38. Actually, “degrees” might be a better way of putting it, because there is some space between the extremely high degree of protection offered by the test in *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969), and the arguably even higher degree of protection against prior restraints. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *see also* John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 417 (1983) (describing the prior restraint standard as an “independent rule of constitutional disfavor”).

39. Again, there may be multiple levels of lower-but-more-than-rational-basis scrutiny. The most familiar is the so-called intermediate scrutiny test applied to the regulation of commercial advertising in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557, 556 (1980), and another is the standard from *United States v. O’Brien*, 391 U.S. 367, 376 (1968), and *Clark v. Community Creative Non-Violence*, 468 U.S. 288, 298 (1984), this being the standard applied to laws not aimed at the communicative impact of an utterance but which nevertheless have an incidental effect on speech. On the actual degree of scrutiny applied to such incidental restrictions on speech, *see generally* Larry Alexander, *Trouble on Track Two: Incidental Regulation of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993); Michael C. Dorf, *Incidental Restrictions on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996); Frederick Schauer, *Cuban Books, Cuban Cigars, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779 (1985); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1484-85 (2013).

40. As, for example, the ordinary, garden-variety case of aiding and abetting a crime, such

of speeches urging the overthrow of the government,⁴¹ that intermediate scrutiny applies to the regulation of advertisements for products,⁴² and that nothing more than rational basis scrutiny applies to the legal control of the ordinary terms of an ordinary contract, to the words used to enter into an agreement to fix prices, and to the words used to perform an act of racial discrimination. And we know all of this precisely because, sometimes explicitly and sometimes not, we have made a largely purpose-based determination regarding the scope of coverage of the First Amendment.

II. COVERAGE AND THE SUPREME COURT

Historically, coverage questions explicitly addressed by the Supreme Court have been focused largely on four domains. Obscene materials were explicitly held to be uncovered in *Roth v. United States*,⁴³ a holding which was explicitly reaffirmed in *Paris Adult Theatre I v. Slaton*,⁴⁴ and which is seemingly still good law.⁴⁵ Libelous utterances were identified as uncovered in *Beauharnais v. Illinois*,⁴⁶ but it is clear that *Beauharnais* does not survive *New York Times Co. v. Sullivan*⁴⁷ and the corpus of doctrine it has spawned.⁴⁸

as the case in which Smith tells Jones that Brown keeps his diamond jewelry in a safe behind the mirror in the second floor bedroom, and that the safe has combination 36 left, 17 right, 24 left. See generally KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989) (exploring the differences between the criminal speech that is covered by the First Amendment and the criminal speech that is not).

41. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (interpreting—or, more accurately, reinterpreting—*Noto v. United States*, 367 U.S. 290 (1961)); *Scales v. United States*, 367 U.S. 203, 211 (1961); *Yates v. United States*, 354 U.S. 298, 313 (1957); and *Dennis v. United States*, 341 U.S. 494, 513 (1951).

42. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Cent. Hudson Gas & Elec. Co.*, 447 U.S. at 566.

43. 354 U.S. 476, 485 (1957).

44. 413 U.S. 49, 54 (1973).

45. See *Alexander v. United States*, 509 U.S. 544, 555 (1993) (noting and not challenging the previous rejection of arguments for the unconstitutionality of obscenity regulation). A range of technological and political developments have all but made adult obscenity (as opposed to child pornography) prosecutions obsolete, thus lessening the likelihood of constitutional challenges to the basic *Roth/Paris* approach.

46. 343 U.S. 250, 266 (1952).

47. 376 U.S. 254, 268 (1964).

48. E.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) (refining the definition of public figure); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding the First Amendment applicable to media defamation of private individuals); *Curtis Publ'g Co. v. Butts*, 388 U.S.

Commercial advertising was treated as outside the First Amendment in *Valentine v. Chrestensen*,⁴⁹ a decision rendered obsolete by *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁵⁰ And although the Court's most famous statement about noncoverage appeared in the context of the exclusion of fighting words in *Chaplinsky v. New Hampshire*,⁵¹ subsequent cases⁵² have cast doubt on the importance of that conclusion even though the nominal noncoverage of fighting words remains in place.⁵³

Although none of the developments in the previous paragraph are new, a series of recent cases has brought the question of First Amendment coverage back to the forefront of the Supreme Court's attention.⁵⁴ Most important is *United States v. Stevens*,⁵⁵ in which the Court was asked to deem photographic depictions of actual torture of actual animals as outside the coverage of the First Amendment, and thus to be treated in the same manner as nonobscene child pornography after *New York v. Ferber*.⁵⁶ Under the not-quite-clear assumption that child pornography is genuinely noncovered, and thus to be treated as no more relevant to the First Amendment than verbal pricefixing or written consumer fraud, the Court, with Chief Justice Roberts writing for the majority, described the question explicitly in terms of "coverage"⁵⁷ and refused to accept the

130, 155 (1967) (extending *Sullivan*, 376 U.S. 254, to public figures). The Supreme Court is not entirely clear on the point, but it is possible that nonmedia defamation of private individuals remains entirely uncovered by the First Amendment, and that states are free to regulate such defamation on the basis of common law rules untouched by *Sullivan* and subsequent First Amendment cases. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

49. 316 U.S. 52, 54 (1942).

50. 425 U.S. 748, 759 (1976).

51. 315 U.S. 568, 571-72 (1942) ("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." (footnote omitted)).

52. *E.g.*, *Lewis v. New Orleans*, 415 U.S. 130, 132 (1974); *Rosenfeld v. New Jersey*, 408 U.S. 901, 903-05 (1972) (Powell, J., dissenting); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972).

53. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992).

54. See Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 83.

55. 559 U.S. 460 (2010).

56. 458 U.S. 747 (1982).

57. The Supreme Court's assertion in *Ferber* that New York had a "compelling interest" in protecting participant children against the harms of child pornography, *Ferber*, 458 U.S. at 761, leaves open the possibility that child pornography is "covered" but not "protected." See

invitation to extend the First Amendment's noncoverage of certain film and similar images to depictions of animal cruelty.⁵⁸ Definitively rejecting the idea that coverage is determined by weighing the value of a category of speech against its harm, the Court nevertheless kept open the theoretical possibility of identifying new categories of uncovered speech.⁵⁹ Yet the Court also made clear that such a possibility was far more theoretical than real, and indicated that it would not look kindly on efforts to expand the categories of uncovered speech.⁶⁰

A year later, the Court again explicitly confronted the coverage question, this time in *Brown v. Entertainment Merchants Association*, a case invalidating California's efforts to restrict minors' access to violent interactive video games.⁶¹ The issue was again argued in coverage terms, with California arguing that the category of extreme violence, when offered to minors in an interactive setting, should be treated in the same manner as obscenity and thus subject only to rational basis review.⁶² In rejecting the argument for noncoverage, Justice Scalia, writing for a five-member majority,⁶³ was even more blunt than the *Stevens* Court, insisting that new and not historically recognized categories of noncoverage were highly disfavored, and that recognizing or creating new ones would require a showing of necessity resembling the Court's traditionally highly stringent "compelling interest" standard.⁶⁴

Schauer, *Codifying the First Amendment*, *supra* note 20, at 286.

58. *Stevens*, 559 U.S. at 470.

59. *See id.* at 470-72. The idea that coverage should be determined by balancing speech value against harm comes from *Chaplinsky*, in which the Court stated that fighting words "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." *Chaplinsky*, 315 U.S. 568. The theoretical development of what has since come to be called "definitional balancing" is principally attributable to Melville Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 967 (1968); and see also Melville Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 45 (1973).

60. *Stevens*, 559 U.S. at 472.

61. 131 S. Ct. 2729, 2741 (2011).

62. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2734-35.

63. Chief Justice Roberts and Justice Alito concurred only in the result, with Justices Thomas and Breyer dissenting. *Id.*

64. *Id.* at 2734-38.

Stevens and *Entertainment Merchants* taken together might be understood to create a strong presumption of coverage. Indeed, the tenor of both cases—especially the focus on historically recognized exclusions—might even be thought to provide doctrinal ammunition for those who would have the Court rethink the vast areas of hitherto invisible noncoverage. And if this Article were an exercise in criticism of Supreme Court opinions, it might well explore *Stevens* and *Entertainment Merchants* in just this way, wondering whether the Court truly meant to be potentially receptive to First Amendment challenges to most of the Securities Act of 1933,⁶⁵ to many of the applications of the Sherman Antitrust Act,⁶⁶ and to the garden-variety operation of the law of contracts, trusts, wills, warranties, fraud, evidence,⁶⁷ criminal solicitation,⁶⁸ and criminal conspiracy, among others. But this is not that article. Rather, it is principally a highly preliminary exploration into the politics, psychology, and sociology of coverage, an exploration that makes, as we shall see, the *Stevens* and *Entertainment Merchants* language especially important.⁶⁹

III. COVERAGE AND THE INCENTIVES OF LITIGATION

As the traditional lawyer's adage goes, if you don't have the law on your side, "argue the facts", and if you don't have the facts on your side, "argue the law."⁷⁰ Behind this adage is the basic idea that litigation is strategic, with good lawyers, who of course ordinarily do not get to choose which side they will be on, seeking to locate the forms of argument that will give them the best chance of prevailing.

65. The claims to that effect have been around for quite some time. See, e.g., Lloyd L. Drury, III, *Disclosure Is Speech: Imposing Meaningful First Amendment Constraints on SEC Regulatory Authority*, 58 S.C. L. REV. 757, 765 (2007); Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 225 (1990); Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 790 (2007).

66. Cf. *Emp't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990).

67. See Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 710 (2004).

68. See generally GREENAWALT, *supra* note 40.

69. My own more complete analysis of this and other dimensions of *Stevens* and *Entertainment Merchants* is in Schauer, *supra* note 54.

70. See, e.g., Andrew T. Savage, *For the Plaintiffs*, NAT'L L.J., Dec. 17, 2001, at A21.

Seen from this perspective, lawyering in general is opportunistic, and necessarily and properly so. Putting aside that segment of “cause lawyering” that is often and justifiably concerned primarily with establishing larger principles that will apply in future cases, rather than seeking to maximize the likelihood of success for an individual litigant in an individual case,⁷¹ most lawyers who raise constitutional claims or defenses do so not out of their own commitment to certain constitutional principles, but rather because they believe that the constitutional argument will increase their likelihood of winning. And in general, the same holds true of their clients.⁷² In most instances, clients, especially non-repeat-player clients, would prefer to win with whatever legal means are available.

From this perspective of litigation strategy, it is useful to consider the circumstances in which many claims lying on the edge of First Amendment coverage arise. For example, the plaintiffs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* were plainly interested in lower prices as well as in blocking the anticompetitive tactics of nonchain local pharmacies, but there was no indication that they had any intrinsic interest in expanding First Amendment coverage.⁷³ Had First Amendment doctrine been less

71. I put aside as beyond my concern here, and in fact beyond my competence in general, the ethical quandaries presented by potential conflicts between the interests of particular litigants in particular cases and the interests of the larger cause that a particular litigant's attorney may also represent.

72. When I was in law school, I took a course from the late Leonard Boudin, probably the premier civil liberties lawyer of the 1950s and 1960s and the attorney who defended Dr. Benjamin Spock against (pre-*Brandenburg v. Ohio*) charges of advocacy of draft evasion. After a jury conviction in federal court, the First Circuit reversed, holding in part that giving a jury special questions in a criminal case was a violation of Spock's due process right to a general verdict. *United States v. Spock*, 416 F.2d 165, 180-83 (1st Cir. 1969). Although the result produced legal freedom for Spock and the court was plainly highly sympathetic to Spock's First Amendment claims, Boudin reported that an incensed Spock believed that Boudin betrayed him by arguing a “technicality” rather than relying solely on arguments about the illegality of the Vietnam War, the draft, or the prosecution of an individual for advocating draft resistance. I suspect that Spock, believing it likely that his reputation (he was *that* Dr. Spock) would have kept him from incarceration, would have preferred to lose on his preferred grounds than to win on Boudin's sound but less grandly moral legal argument.

73. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 767-68 (1976). Indeed, as an organization primarily concerned with the well-being of retail consumers, it is ironically likely that the Virginia Citizens Consumer Council would have been sympathetic to the regulation of misleading advertising—just the kind of regulation that is more vulnerable to challenge after *Virginia Pharmacy* than it was prior to that decision.

robust in general, had cases like *Bigelow v. Virginia*⁷⁴ and perhaps even *Pittsburgh Press Co. v. Human Relations Commission*⁷⁵ not laid the foundation for protection of commercial advertisements as free speech, and had *Lochner v. New York*⁷⁶ retained more vitality,⁷⁷ *Virginia Pharmacy* would have been argued and even decided on substantive due process rather than free speech grounds.⁷⁸ Similarly, those who object on nominally First Amendment grounds to mandatory disclosure in securities transactions⁷⁹ and pharmaceutical marketing⁸⁰ are likely to be far less concerned with free speech as a principle and far more with the economic effects of such mandated disclosure on their business practices. And even those who have—more conventionally in light of traditional First Amendment issues—relied on the First Amendment to protect various aspects of the sex business have often done so precisely because the First Amendment gives them the greatest likelihood of protecting their businesses and profits from regulatory attack. Indeed, a good example of this explanation came in the 2005 case *United States v.*

74. 421 U.S. 809 (1975) (invalidating a restriction on abortion advertising on First Amendment grounds).

75. *Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n*, 413 U.S. 376 (1973) (upholding a restriction on gender-separate employment advertisements). Although *Pittsburgh Press* upheld the restriction, the Court took the First Amendment arguments to the contrary seriously, and the four dissenters individually made clear that they would have reached the opposite conclusion on freedom of the press grounds. *Id.* at 393 (Burger, C.J., dissenting); *id.* at 397 (Douglas, J., dissenting); *id.* at 400 (Stewart, J., dissenting); *id.* at 404 (Blackmun, J., dissenting).

76. 198 U.S. 45 (1905).

77. *Lochner's* reputation has been somewhat rehabilitated in recent years. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 222 (2004); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 125 (2011); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987). In 1976, however, it was widely accepted that arguing against business regulation on economic liberty grounds would have been a hopeless strategy. See *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (emphasizing that *Lochner*-style review of state legislation is an unacceptable general approach); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (describing *Lochner* as having been "discarded"); *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941) (making clear that *Lochner* was no longer good law). Famously, the nonviability of *Lochner* is also the running and endorsed theme of JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73 (1980).

78. Indeed, an influential analysis argues that that is exactly what the Court disingenuously did. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30-31 (1979).

79. See *supra* note 1 and accompanying text.

80. See *supra* note 2 and accompanying text.

Extreme Associates.⁸¹ There, the defendant, a distributor of potentially legally obscene materials, seized on Justice Scalia's dissenting characterization of the holding in *Lawrence v. Texas*⁸² to argue that obscenity regulation was a restriction on sexual liberty that could not survive due process scrutiny after *Lawrence*.⁸³ The argument was an odd reversal of the more conventional use of the First Amendment when liberty/due process arguments are likely to be unavailing, as in *Virginia Pharmacy*. By contrast, in *Extreme Associates*, the claims that would historically have been couched in the language of free speech and the First Amendment were recast as seemingly more viable (at least post-*Lawrence*) substantive due process arguments because the First Amendment arguments looked precedentially tenuous.

I have discussed this phenomenon on earlier occasions under the label of "First Amendment opportunism,"⁸⁴ but several events make the topic timely and arguably more important now. First, the language in *Stevens* and *Entertainment Merchants* provides additional support for those who would want to make First Amendment arguments for the protection of activities not traditionally or historically thought of as at the center of the First Amendment. As noted above, it may not be plausible to think that the Court in these cases genuinely intended to create a presumption in favor of First Amendment coverage for the entire universe of linguistic (or pictorial or informational or communicative) activity.⁸⁵ But that is what the Court, especially in *Stevens*, with its new emphasis on what seems to be a presumption of coverage unless there is a "long-settled

81. 352 F. Supp. 2d 578 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005).

82. 539 U.S. 558, 589-90 (2003) (Scalia, J., dissenting).

83. *Extreme Assocs., Inc.*, 352 F. Supp. 2d at 586, 590. For an article expanding on the arguments made in that case by one of the attorneys for Extreme Associates, see Jennifer M. Kinsley, *Sexual Privacy in the Internet Age: How Substantive Due Process Protects Online Obscenity*, 16 VAND. J. ENT. & TECH. L. 103, 118-20 (2013).

84. See generally, Frederick Schauer, *Free Speech Opportunism*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Frederick Schauer, *The Speech-ing of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 347 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) [hereinafter Schauer, *The Speech-ing of Sexual Harassment*]; see also Schauer, *The Boundaries of the First Amendment*, *supra* note 20, at 1787-1800 (describing the consequences of the "magnetism" of the First Amendment).

85. See *supra* notes 61-68 and accompanying text.

tradition of subjecting that speech to regulation,”⁸⁶ might be understood as saying. Other interpretations of the relevant language might be possible, and it may be that most of the traditional exclusions from coverage would satisfy the Court’s approach and thus remain excluded. But some might not because certain forms of regulation—for example, securities laws and control of unintentionally inaccurate labeling information—are of relatively recent vintage, at least compared to the age of the First Amendment itself. And even if many of the traditional exclusions might ultimately remain excluded, some might not, simply because of the way in which the Court’s language in both *Stevens* and *Entertainment Merchants* seems to place the burden of proof or burden of persuasion on those who would argue for an exclusion.⁸⁷ If it is correct that what the Supreme Court *says* is far more important than what it holds, as David Klein and Neal Devins have recently documented,⁸⁸ then we can see at least some of the language in these two recent cases as empowering a wide range of new challenges to previously uncovered activity. When one advocate can quote, and not plainly out of context, from the exact words of a Supreme Court opinion, and when her opponent is left to argue that what was initially quoted by her adversary is not what the Court really meant, or that the quoted language is mere dicta, the experienced advocate will know that the former has the upper hand and the latter is on the defensive.

Stevens and *Entertainment Merchants* merely provide new opportunities for a phenomenon that is fueled from other sources as well. Now that First Amendment arguments come as much, if not more, from the political right as from the political left,⁸⁹ the likelihood that free speech arguments will find a sympathetic audience has increased—whether on the bench, in political domains, or in public

86. *United States v. Stevens*, 559 U.S. 460, 469 (2010); *see also* *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011).

87. *See Entm’t Merchants Ass’n*, 131 S. Ct. 2729; *Stevens*, 559 U.S. 460.

88. David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2049-50 (2013); *see also* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 180-81 (2009); Frederick Schauer, *Private Speech and the Private Forum: Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 217.

89. This phenomenon is documented in J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 376; and Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 957 (1993).

debate.⁹⁰ The opportunistic lawyer or client seeking a way of fighting against some form of regulation or prosecution can now have increased confidence that an argument from the First Amendment will not be received with political scorn or doctrinal incredulity.

It is important to recognize that doctrinal victories often spring from doctrinal losses. As Sandy Levinson observed in what seems like a generation ago, the real question is not so much about which arguments will prevail as it is about which arguments will be treated as “off the wall,” frivolous, or ridiculous, and which arguments will not.⁹¹ Once an argument is taken seriously and moves out of the category of being the subject of judicial or public or academic ridicule, the argument has gone some way towards ultimate acceptance. Not every argument that is taken seriously will prevail in the long run, of course. But being taken seriously even in losing often seems causal of being advanced on future occasions, causal of being taken even more seriously on future occasions, and thus causal, in a probabilistic sense, of finally being accepted. That is why it is plausible to suppose that the Supreme Court’s refusal to say *anything* about free speech in its opinion in the verbal workplace sexual harassment case of *Harris v. Forklift Systems, Inc.*, despite the First Amendment arguments made in some of the briefs and some portion of the oral argument, is a more definitive statement of

90. There are two ways to understand this claim. One is that the increased receptiveness to First Amendment claims by jurists on the political right as well as on the left means that there is no longer any reason to suspect—as there might have been a generation ago—that free speech arguments will be well received primarily on the political left. As a result, a vastly higher proportion of the judiciary seems now open to such arguments, increasing the likelihood of their success. Alternatively, it may be that the political valence of free speech arguments has shifted even more dramatically, such that the arguments are now understood as conservative rather than as liberal ones. If this alternative explanation is plausible, as the recent decisions on campaign finance reform, for example, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), and abortion clinic protests, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), suggest, then the field of receptiveness of First Amendment arguments may be changing even more dramatically and opening up new opportunities for strategic use of the First Amendment.

91. Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 388 (1982) (crediting the “off the wall/on the wall” idea in interpretation to Stanley Fish and adapting it to legal interpretation); Sanford Levinson, *What Do Lawyers Know? (And What Do They Do with Their Knowledge?)*: Comments on Schauer and Moore, 58 S. CAL. L. REV. 441, 442 (1985); see also J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 967 (1998); Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 378 (1986).

rejection of such claims than explicit discussion of them in the opinion would have been.⁹²

That constitutional arguments are strategic and opportunistic is hardly surprising. That is simply what good lawyers are paid to do. What may be slightly more surprising, especially to international observers, is that in the United States, these arguments are seemingly disproportionately focused on free speech and the First Amendment. An interesting comparative project would attempt to determine whether, for example, Canadian lawyers and clients opportunistically seize on Charter-based equality arguments⁹³ in the same way that American lawyers and their clients seize on First Amendment-based free speech arguments, at least on the assumption that equality has the kind of political, cultural, and legal resonance in Canada that free speech has in the United States. Similarly, we can ask whether we see a similar phenomenon in Germany, with the culturally important and constitutionally specified right to dignity and right of personality⁹⁴ emerging as the principle of choice rather than equality, freedom of speech, or personal liberty.

Equally important is the effect of free speech opportunism on the development of First Amendment doctrine. It is one thing to say that lawyers are acting properly, which they are, in seizing on the First Amendment to maximize the likelihood of their clients' success. It is another thing entirely, however, to believe that such opportunism, or the clash of opportunisms, will produce the best overall doctrinal structure or the most theoretically and practically sound doctrine. If one believes, with Lord Mansfield, that the common law "works itself pure," then perhaps the consequences of free speech opportunism can be expected, in the long term, to be for the best.⁹⁵ But if, on the other hand, there are reasons to believe that

92. 510 U.S. 17 (1993). The Court's nondiscussion of the First Amendment issues in *Harris* is criticized in Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 1, and defended in Schauer, *The Speech-ing of Sexual Harassment*, *supra* note 84, at 359-60.

93. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c.11 (U.K.).

94. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl I, II (Ger.).

95. *Omychund v. Barker*, (1744) 26 Eng. Rep. 15 (Ch.) 22-23, 1 Atk. 21, 33 (emphasis omitted).

client-centered and case-based litigation may not be the optimal method of developing larger principles of general application,⁹⁶ then there is reason to question whether the First Amendment doctrine produced by opportunistic behavior is necessarily or even likely to be the First Amendment doctrine that is produced by methods less dependent on the vagaries and incentives of particular clients, particular lawyers, and particular litigation strategies.

IV. THE FUTURE

In the world of law schools and legal scholarship, it seems often to be thought that legal arguments grow out of previous legal arguments and decisions, and that legal doctrine is, at least to some extent, self-generating. And I suspect that a quick scan through most (but not all) casebooks would provide much support for this understanding of the growth of the law. But even though it is almost certainly true that existing or emerging legal doctrine plays some causal role in determining which legal arguments will be advanced and which will not, it is a mistake to assume that prior doctrine is the only or even principal causal agent in explaining which legal doctrines are used by whom and when.⁹⁷ Legal arguments are made

96. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (arguing that the nature of the case selection process may produce case-based principles which are suboptimal for the full array of events to which the principles will apply). For a similar argument with greater focus on economic theories of case selection and legal evolution, see Gillian Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 615-16 (1992). Analyses more sympathetic to Lord Mansfield's basic point, recast in modern economic terms, include John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393, 394 (1978); and Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977). For analyses advancing more mixed conclusions, see William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 279 (1979); and Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1552-53 (2003). Obviously it is not my purpose here to resolve these long-standing debates about the efficiency of common law approaches to legal change and the creation of legal rules. But it is nonetheless important to point out that any inference from the phenomenon of First Amendment opportunism to the desirability of the legal rules produced by an opportunistic process requires taking a strong position on the desirability of a litigation-centered process as a way of achieving the soundest legal regimes—a position that is, at the very least, open to debate.

97. My claim here is plainly in the neighborhood of Holmes's famous assertion that "[t]he life of the law has not been logic: it has been experience." O. W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881). If one way of understanding Holmes is that he was

because lawyers make them, and lawyers make them because it is in the interest of their individual or institutional clients to have them made. But clients are typically not interested in legal doctrine or in developing legal principles nearly as much as they are interested in winning. And thus a significant causal influence on the development of legal doctrine has always been the arguments that lawyers see as the ones that will give their doctrine-uninterested clients the best chance of prevailing.

The question then shifts, as many of the Legal Realists took pains to emphasize, to what it is that leads lawyers to believe that some arguments will be more likely to succeed than others.⁹⁸ In some areas of law, this may be largely a function of doctrine in the narrowest sense, especially when the doctrinal issues are technical, the law is detailed, and the political or ideological valence of the issues is negligible.⁹⁹ In other areas of law, the focus on the personal characteristics of the judge, a dimension stressed (and often exaggerated) by Jerome Frank, will be highly predictive.¹⁰⁰ But in American constitutional law, the role of ideological attitudes, politics, culture, and public opinion plays a larger role, whether as a nonlegal influence on legal decisions, as some would maintain,¹⁰¹

rejecting the common law belief that mere logic would enable the judge to go from a common law precedent to a new and different application, then few today would disagree. But it is nevertheless an open empirical question as to the relative roles played by the previous decisions and current policy in steering the course of legal development.

98. See generally KARL N. LLEWELLYN, *THE THEORY OF RULES* (Frederick Schauer ed., 2011) (emphasizing the way in which litigation strategies emerge from lawyers' predictions, and the way in which lawyers' predictions are often based on factors other than legal doctrine); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

99. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 249 (arguing that plain meaning seems to make more of a difference in technical cases in which the judges, and in particular Supreme Court Justices, appear to have no or few ideological priors).

100. See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1930). The role of personal and psychological characteristics in influencing judicial decisions was emphasized, even before Frank, in Theodore Schroeder, *The Psychologic Study of Judicial Opinion*, 6 CALIF. L. REV. 89, 90 (1918).

101. The prominent research by political scientists on the determinants of the Justices' votes typically distinguishes attitudinal (or ideological) factors from legal ones, but concludes that the former are more causally important than the latter. See, e.g., SAUL BRENNER & HAROLD J. SPAETH, *STARE DECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946-1992*, at 70-71 (1995); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 110-14 (2004).

or whether as simply part of constitutional law itself, as others would insist.¹⁰²

To the extent that this is so, the question then shifts once again, and it is at this point that we can see that the political, cultural, ideological, and psychological resonance of the First Amendment, when coupled with an increasingly receptive doctrinal landscape, will lead good lawyers to strain to make First Amendment arguments more than they would strain to make arguments based on other constitutional doctrines or provisions.¹⁰³ And thus *Stevens* and *Entertainment Merchants* are best understood as simply reinforcing an existing trend—and making even more plausible, from the perspective of the lawyer¹⁰⁴—arguments that would not have been taken seriously a generation ago. The same also holds true when viewed from the perspective of a judge seeking to avoid reversal or seeking public, media, or academic approval, for here too the increased resonance of First Amendment arguments will have at least some influence not only on which arguments are advanced, but also on which arguments are accepted.

The foregoing may well support the possibility that the future may see increased receptivity to First Amendment-inspired attacks on securities laws, antitrust laws, consumer protection laws, pharmaceutical and other product labeling laws, and the speech-

102. See RONALD DWORKIN, *LAW'S EMPIRE* (1986) (understanding law in general and constitutional law in particular as including a range of considerations that includes political morality as well as constitutional text and Supreme Court precedents); see also Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 165 (2001) (arguing that constitutional law should be substantially determined in the public and political arenas); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4, 111-12 (2003) (understanding constitutional law as partly determined and defined by popular culture in the broadest sense). Thus if law is understood to include political factors rather than being distinct from them, it is a mistake to describe the factors external to legal doctrine as outside the law. See Richard Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1408-14 (2012) (describing as “false” the distinction between law and politics).

103. There are few right-based legal arguments that could not be argued as Ninth Amendment constitutional claims, but Ninth Amendment arguments are widely dismissed, see, e.g., John Hart Ely, *The Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 179, 179 (Randy E. Barnett ed., 1989), which would lead the good lawyer to avoid such arguments and rely instead on other possible routes to the same outcome.

104. Or the perspective of a judge seeking to avoid reversal or seeking public, media, or academic approval.

restricting dimensions of the law of procedure and evidence.¹⁰⁵ Such attacks, even in the recent past, and to a great extent still now, have been perceived as laughable. But laughability, especially in constitutional law, has its cultural, political, ideological, and public opinion dimensions, as the recent litigation about the Affordable Care Act has made clear.¹⁰⁶ Thus it would be hardly surprising to see increased judicial receptivity to, and consequent lawyers' increased use of, arguments premised on the First Amendment against regulatory regimes only recently thought not to implicate the First Amendment at all.

CONCLUSION: THE RISKS OF DOCTRINAL DISTORTION

The goal of this Article is principally descriptive, predictive, and speculative. But although it has few if any normative or prescriptive

105. See Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1234-35 (2003). Compare Peters, *supra* note 67, at 711, with Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 690-91 (1997). There are serious debates about the wisdom and even the constitutionality of no-citation- and no-precedential-effect rules. See Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 401 (2002); see also SCHAUER, *supra* note 88, at 77-78. However, the claim that such rules present a free speech problem is a good example of exactly the phenomenon I discuss here.

106. The phenomenon has been particularly salient recently because throughout both the initial academic discussions regarding the constitutionality of the Affordable Care Act and the litigation that eventually produced *National Federation of Independent Business (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012), the Commerce Clause arguments against the Act were largely rejected as frivolous and the Taxing and Spending Clause arguments were almost completely ignored. See, e.g., Orin Kerr, *What Are the Chances that the Courts Will Strike Down the Individual Mandate?*, VOLOKH CONSPIRACY (Mar. 22, 2013, 9:49 PM), <http://www.volokh.com/2010/03/22/what-are-the-chances-that-the-courts-will-strike-down-the-individual-mandate> [<http://perma.cc/SLG4-VWLW>]. There are various hypotheses about why arguments that were initially so quickly dismissed were eventually not only taken seriously, but ultimately prevailed (in part), including the influence of prominent lawyers and academics and the influence of the political debate. And a different hypothesis suggests that there was less of a change than liberal academics perceived, largely because liberal academics saw the pre-*NFIB v. Sebelius* law as expanding federal power more than was actually the case. For more discussion about how the arguments regarding the constitutionality of the Affordable Care Act moved from being dismissed as frivolous, to being taken seriously to, (sometimes) ultimately prevailing, compare David Hyman, *Why Did Law Professors Misunderstand the Lawsuits Against the PPACA?*, 2014 U. ILL. L. REV. 805 (2014), with Andrew Koppelman, *Did the Law Professors Blow It in the Health Care Case?*, 2014 U. ILL. L. REV. 1273 (2014).

pretensions,¹⁰⁷ it is worth concluding by recalling Justice Powell's warning in his opinion in *Ohralik v. Ohio State Bar Association*.¹⁰⁸ When the coverage of the First Amendment expands, he worried, there is an increased possibility that, out of necessity, some of the existing doctrinal tools developed for a smaller area of coverage will have to be modified, possibly with unfortunate consequences.¹⁰⁹ Justice Powell was not completely clear about what he had in mind, but, for example, we might imagine that existing First Amendment traditions of nondeference to governmental decision making might be weakened if that governmental decision making were to include the content-based decisions of the Securities and Exchange Commission and the Federal Trade Commission about whether prospectuses and advertisements, respectively, are potentially misleading. Assuming as a matter of simple logistical reality that the courts are not going to review the particular decisions of those agencies about which prospectuses and advertisements are potentially misleading with the same degree of scrutiny that appellate courts review commentary found by trial courts to be libelous, or even films found to be obscene, is there a possibility that the existing requirement of independent appellate review¹¹⁰ will be weakened?¹¹¹ Similarly, assuming that some agencies are, and will continue to be, permitted to regulate some words on the basis of causal consequences less clear than those necessary for regulating political speech under *Brandenburg v. Ohio*, will *Brandenburg's* stringent requirements of causation, imminence, and explicitness become weaker?¹¹²

107. I admit to having expressed misgivings about a First Amendment doctrinal structure with broad coverage, as opposed to a narrow but strong one in earlier work. See Schauer, *Categories and the First Amendment*, *supra* note 20, at 307; Schauer, *Codifying the First Amendment*, *supra* note 20, at 317; Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1194-1201 (1988).

108. 436 U.S. 447 (1978).

109. *Id.* at 456 (expressing concern about the process of "dilution" or "devitalization" of the First Amendment if commercial speech were to be evaluated according to the same standard used for political or other traditionally-protected speech); see also Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1222-23 (2012).

110. See *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 658 (1989); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 486 (1984); *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964); see also Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 346-47 (2000).

111. See Schauer, *supra* note 107, at 1195.

112. 395 U.S. 444 (1969) (per curiam). Thus we can assume that the requirement of *Central*

I will leave to others or to other occasions the normative arguments about whether the possible consequences just noted would be for the better or for the worse. It may be, after all, that new doctrinal tools—increased complexity in the doctrine, for example, including but not limited to new levels of scrutiny or new domain-specific tests—might be developed to deal with some of these issues. But if the confluence of a number of recent developments are likely to put increased outward pressure on the coverage of the First Amendment, then it is important to consider the doctrinal implications such that increased coverage might produce.

Hudson Gas & Electric Co. v. Public Service Commission of New York, 447 U.S. 557, 564 (1980), that a regulation of commercial advertising “directly advance” the state interest requires a weaker showing of causation than that found in *Brandenburg*.