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First Amendment Cynicism and Redemption

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ABSTRACT

This article proposes a way out of the vicious cycle of "First Amendment cynicism." First Amendment cynicism is the disingenuous application or non-application of the First Amendment to further political ends unrelated to freedom of expression. The cycle is facilitated by either accurate or inaccurate perceptions of First Amendment cynicism by one's political opponents.

As one example, the perception by those on the political left that the right is applying the First Amendment cynically—turning the First Amendment into the "New Lochner"—leads the left to lose faith in First Amendment principles. Some on the left then engage in First Amendment cynicism, not applying the First Amendment to those that harm their agenda. This approach is then observed by the right, and the cycle continues. Further, improper accusations of First Amendment cynicism, or what this article terms "second-order First Amendment cynicism" render this cycle ever more vicious.

To restore both the perception and the reality of a First Amendment that serves the entire political spectrum, this article first demonstrates why the increasing accusations of First Amendment cynicism are overstated and ahistorical. Later, this article argues that the First Amendment can be both nonpartisan—treating equally speech of all political stripes—and apolitical—leading to outcomes and social arrangements that favor no political ideology. The best way to ensure that free speech doctrine remains nonpartisan and apolitical is to favor a civil libertarian approach. However, courts should ensure that the First Amendment is egalitarian in cases where the government must intervene, such as cases involving speech on government land or cases involving the heckler's veto. Finally, this article proposes ways for the Supreme Court to manage its docket and refine existing First Amendment doctrine so that the First Amendment serves those who most need its protections.

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INTRODUCTION

The First Amendment, perhaps more than any other constitutional provision, requires judges to apply its protections in a nonpartisan, apolitical way.[1] If judges make decisions about whether to protect speech based on its underlying viewpoint or political valence, the purpose of free speech doctrine is nullified as it is applied.[2] Unfortunately, as judges and

1. The meaning of nonpartisan is "somewhat nebulous and incomplete." George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 NOTRE DAME L. REV. 2287, 2320 (2013). Nonpartisan, in the sense of political impartiality, can be defined as "the absence of control by a self-interested individual or political party." Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1297 (2008). For greater exploration of whether the First Amendment can be nonpartisan and apolitical, and distinctions between the two terms, see *infra* Part II.

2. The chief First Amendment evil is indeed censorship of views based on viewpoints. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech ... because of disapproval of the ideas expressed."). Judges should no more be empowered to prioritize certain views than legislators. *See also* Erica Goldberg, *Free Speech*

partisans harshly criticize perceived misuses of free speech principles,[3] society's and even judges' faith in the First Amendment, as a principled tool that protects liberty and benefits all members of society, is eroding.[4] In order to restore that necessary faith,[5] this article seeks to demonstrate that accusations of "First Amendment cynicism"[6]—the disingenuous application or non-application of the First Amendment to further political ends unrelated to freedom of expression—are overstated, and that the First Amendment can be largely apolitical.[7] This article further suggests doctrinal solutions within our existing free speech framework, such as disentangling free speech principles from economic liberties, clarifying the speech/conduct distinction, and distinguishing compelled speech protections from protections against the suppression of speech. These alterations will help ensure that the First Amendment can benefit those who most need its protections.

Because there is no real consensus about the purpose and scope of free

Consequentialism, 116 COLUM. L. REV. 687, 720 (2016) ("[I]n the First Amendment context, allowing judges to determine which speech is protected for ideological reasons or which speech harms bother them personally would give courts the power to do something legislators cannot. Courts would then become the censors instead of the government.").

3. *See infra* Part I.

4. Just 25 years ago, one scholar wrote that "[w]ith all the cynicism in this country, however, the first amendment seems to have been untarnished." Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 97 n.264 (1994). This has changed now. In Part I, this article outlines the accusations by both the left and the right of First Amendment cynicism. In addition, some recent surveys show that society's respect for free speech has diminished over time, especially among younger adults and students. A 2016 study conducted by Gallup, the John S. and James L. Knight Foundation and the Newseum Institute found that students increasingly wish to regulate offensive speech and limit media access to campus protests. KNIGHT FOUND., *FREE EXPRESSION ON CAMPUS:* WHAT COLLEGE STUDENTS THINK ABOUT FIRST AMENDMENT ISSUES (2018), https://knightfoundation.org/wp-content/uploads/2020/01/Knight_Foundation_Free_Expression_on_Campus_2017.pdf; *but see* Matthew Yglasias, *Everything We Think About the Political Correctness Debate is Wrong*, VOX (Mar. 12, 2018 8:00 am), https://www.vox.com/policy-and-politics/2018/3/12/17100496/political-correctness-data.

5. Society's *perception* that judges are applying the First Amendment in a principled way is different than, but affected by, whether judges are actually performing their jobs in a non-cynical way. Faith in our First Amendment jurisprudence is necessary to prevent a vicious cycle where those who believe the First Amendment is being applied cynically are thus more willing to apply it cynically to benefit their own political preferences.

6. In Part I, this article will more fully develop the concept of First Amendment cynicism and also add to this typology the concept of second-order First Amendment cynicism—where accusations of First Amendment cynicism are themselves are either demonstrably false or intended disingenuously to achieve political ends unrelated to free speech. *See infra* Part I.

7. By apolitical, I mean that the political distribution of results that arise from protecting speech does not favor one ideology over another. First Amendment doctrine is *nonpartisan* because it is promulgated in a way that is facially neutral with respect to both the identity of the speaker and the viewpoint of the underlying speech. In addition, free speech doctrine can be *apolitical* if application of First Amendment law, given underlying social conditions, can distribute benefits among those of various political stripes in a way that sufficiently approximates equality of political outcomes. An apolitical First Amendment would not ultimately favor certain groups over other groups or be more likely to advance certain agendas over other agendas. *See infra* Part II.

speech rights, there is vast and growing discord about proper and improper uses of the First Amendment.[8] Although First Amendment doctrine is superficially well established,[9] there is deep disagreement over the theories animating the First Amendment, the types of activities its protections should cover, and the extent to which free speech liberties should be balanced against other societal interests.[10] Supreme Court justices are explicitly accusing each other of "weaponizing" the First Amendment to secure other political ends.[11] Charges abound of the cynical use of the First Amendment to circumvent economic regulation. Scholars, disillusioned by the outcomes of free speech cases, are questioning the most foundational, nonpartisan aspects of our critical free speech protections.[12] Many believe that free speech jurisprudence does not serve society well, or does not even achieve the internal goals of the First Amendment.[13]

The divisions underlying the First Amendment's identity crisis have manifested in a way that threatens even formerly uncontroversial aspects

8. Timothy Zick, *Restroom Use, Civil Rights, and Free Speech "Opportunism*,*"* 78 OHIO ST. L.J. 963, 998 (2017) (discussing the difficulty of criticizing "opportunistic" uses of the First Amendment when "there is no agreed-upon consensus for what constitutes a proper use, as opposed to a misuse, of the Free Speech Clause"); *see also* Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 176 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (arguing that the vaunted, "show stopper" nature of the First Amendment in American society allows it to be used as a tool to accomplish goals unrelated to free speech).

9. *See* Goldberg, *supra* note 2, at 692 (discussing how describing free speech doctrine is "superficially simple," especially with respect to content-based restrictions on speech, but applying free speech doctrine becomes more complex).

10. Zick, *supra* note 8, at 998 (remarking upon the "capacious language of the Free Speech Clause and the inability of courts and scholars to produce a coherent theory or rule to cabin it").

11. In her dissenting opinion in *Janus v. AFSCME*, Justice Elena Kagan claimed that the majority opinion, which overturned mandatory public sector union dues as unconstitutional, "prevent[ed] the American people, acting through their state and local officials, from making important choices about workplace governance. . . . by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy." 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

12. *See* Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018). Louis Michael Seidman persuasively argues that, despite scholars' efforts, free speech cannot serve progressive goals without compromising the bedrock principles of viewpoint neutrality and government nonfeasance, rendering free speech doctrine "unrecognizable as a realization of First Amendment ideals." Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2243, 2249 (2018) ("[Many progressives] just can't shake their mindless attraction to the bright flame of our free speech tradition. Progressives need to turn away before they are burned again.").

13. Scholars have classified the First Amendment as "obsolete." S*ee* Tim Wu, *Is the First Amendment Obsolete*, 117 MICH. L. REV. 547, 548 (2018) (arguing that "there is reason to fear [the First Amendment] is entering a new period of political irrelevance"). Others have questioned the central premise that an unfettered marketplace of ideas leads to truth. *See* Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407, 409 (2016) ("[M]ost non-mundane speech people engage in is largely worthless, and the world be better off were it not expressed.").

of free speech doctrine.[14] Differences between the egalitarian and libertarian approaches to free speech doctrine have surfaced in the past,[15] but now these disagreements have escalated to a point where different factions may not be able to find much common ground—in both the theory and application of free speech doctrine.

Accusations of political uses of the First Amendment may be legitimate, or may be examples of second-order First Amendment cynicism, reflecting the accuser's own desire to use the First Amendment to achieve other political ends unrelated to free speech. As an example, the American Civil Liberties Union ("ACLU"), a long time champion of robust free speech protections, is perceived by many, including former members, as abandoning its principled stance in the service of other political objectives.[16] The ACLU has responded by explaining that in choosing which cases to take, the organization must consider other valuable social goals, like equality, but that its views of the doctrine remain unchanged.[17] It is unclear how many of the current accusations of First Amendment cynicism are accurate and how many are overstated, or worse, are intended to shape the First Amendment cynically—to serve other political ends—as well.

Overstated concerns about "First Amendment Lochnerism"[18] and

14. A recent Columbia Law Review Symposium was dedicated to "Free Expression in an Age of Inequality." According to the Symposium's two contributors, those searching for a more "egalitarian First Amendment," who seek to combat "economic, racial, cultural, [and] constitutional" inequality will need to undermine foundational doctrinal ideals such as viewpoint neutrality. Kessler & Pozen, *supra* note 12, at 1954 (contending that those in favor of a more egalitarian First Amendment can achieve it best by "putting pressure on First Amendment norms ranging from content and viewpoint neutrality to the primacy of judicial enforcement to the baseline opposition to redistribution of expressive and informational resources").

15. After the Supreme Court's controversial decision in *Citizens United v. FEC,* 558 U.S. 310 (2010), Kathleen Sullivan explained the apparent shift in robust support for free speech principles from those on the political left to those on the political right as actually representing the tension between two underling, contested visions of the First Amendment—free speech as political liberty versus free speech as political equality. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010). *See also infra* Part II.

16. *See, e.g.*, Wendy Kaminer, *The ACLU Retreats from Free Expression*, WALL ST. J. June 20, 2019, at A17; Alan Dershowitz, *The Final Nail in the ACLU's Coffin*, HILL (June 11, 2018) www.thehill.com/opinion/civil-rights/391682-the-final-nail-in-the-aclus-coffin; Erica Goldberg, *An Open Letter to the ACLU*, CROWDED THEATER (Mar. 21, 2018), https://inacrowdedtheater.com/2018/03/21/an-open-letter-to-the-aclu-on-civil-liberties/.

17. After a guidelines memo that some believed contained new ACLU policies towards freedom of expression, the ACLU's Legal Director David Cole wrote a blog post to clarify the ACLU's position. *See* David Cole, *The ACLU's Longstanding Commitment to Defending Speech We Hate*, ACLU (June 20, 2018, 10:00 AM), *https://www.aclu.org/blog/free-speech/aclus-longstanding-commitment-defending-speech-we-hate*. For responses to the ACLU's response to criticism, see Eugene Volokh, *ACLU's David Cole Responds about ACLU and Freedom of Speech*, REASON: VOLKOH CONSPIRACY (June 22, 2018, 9:46 PM), https://reason.com/volokh/2018/06/22/aclus-david-cole-responds-about-aclu-and.

18. The infamous case of *Lochner v. New York*, 198 U.S. 45 (1905) (overruled by Ferguson v. Skrupa, 372 U.S. 726 (1963)), overturned a state statute limiting bakers to working 60 hours per week and

weaponization by the courts, reductive media coverage,[19] Internet culture, heavy doses of academic legal realism,[20] and compelling but overly politicized accounts by political leaders, have infused excessive pessimism into our perspective on the First Amendment.[21] This pessimism threatens all of our speech rights, because it leads to a vicious cycle of unprincipled First Amendment jurisprudence. If someone believes her political opponents are using the First Amendment cynically, as a political tool, she may be more likely to resign herself to an unprincipled First Amendment and advocate for cynical uses to serve her own political ends. Her opponent will then observe this cynicism and be more inclined to use the First Amendment cynically, continuing the cycle.[22] This cycle of cynicism is escalating between the political right and left in their approaches to free speech.[23]

Scholars have devoted significant attention to the problems of weaponization of the First Amendment, but there has not been an effort to restore faith in a nonpartisan and apolitical First Amendment, and to

10 hours per day on substantive due process grounds. *See Lochner*, 198 U.S. at 53 (finding "right to contract' trumped state maximum hours law). The case is now generally used as an example of judicial overreach, especially in trying to control the economy and make purely political policy through application of constitutional principles. For discussions of First Amendment Lochnerism, which draws an analogy between free speech doctrine and the repudiated *Lochner* see, as examples, Mila Sohoni, *The Trump Administration and the Law of Lochner*, 107 GEO. L.J. 1323, 1383–84 (2019); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917–18 & accompanying notes (2018); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 135–36 and accompanying notes (2016); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1233 (2014).

19. By this I mean both the media's predominant fixation on the results of cases over their reasoning, and also the media's focus on hot-button issues. *See infra* Section I.C. for a discussion on how the media may be exaggerating the campus free speech problem, or excluding other types of First Amendment issues on college campuses.

20. Many academics simply do not believe the First Amendment can be applied in an apolitical way. *See, e.g.*, Seidman, *supra* note 12, at 2234 (discussing "the extent to which the speech game is competitive and the extent to which doctrinal manipulation can support politically discriminatory application of legal rules.").

21. Popular portrayals of Supreme Court decisions by politicians generally infuse excessive skepticism into society's understanding of what Justices do, but this phenomenon is especially corrosive in the First Amendment context. *See, e.g.*, Erica Goldberg, *We Must Restore Legitimacy to the Supreme Court*, COLUMBUS DISPATCH (Oct. 31, 2018 5:00 a.m.), https://www.dispatch.com/opinion/20181031/column-we-must-restore-legitimacy-to-us-supreme-court (describing, as one example, President Obama's criticism of *Citizens United*, where President Obama "never mentioned the legal reasoning behind the Court's decision -- overturning federal law that limited money spent on supporting candidates prior to make documentaries, pamphlets and other media materials" -- but "noted only the outcome he found unfavorable").

22. This is just one mechanism by which a vicious cycle of First Amendment cynicism can occur. Not every individual or organization will be equally affected by perceived First Amendment cynicism by one's opponents, but human psychology dictates that a collective loss of faith in the First Amendment could have serious consequences. In Part I, I describe mechanisms that may be currently perpetuating this cycle.

23. *See infra* Part I.

discuss modifications to the doctrine that might further de-politicize the doctrine. This article argues that a deeper understanding of the history of First Amendment jurisprudence and its necessary implications demonstrate that that the current concerns about First Amendment Lochnerism by the right and First Amendment abandonment by the left, while not frivolous, are overstated. Further, our longstanding civil libertarian First Amendment tradition—with some limiting principles—is the best way to keep free speech doctrine nonpartisan and apolitical, restore the needed faith to keep the First Amendment legitimate, and return the First Amendment to its rightful place as our most exceptional and most vaunted constitutional right.

Finally, to prevent society's faith in the First Amendment from unraveling, new accords must be reached about the extent of the First Amendment's coverage, and new arguments must convince people that the costs of free speech are worth its freedoms. This article develops strategies for de-politicizing free speech cases, including managing the docket to select for cases where egalitarian and libertarian approaches to free speech overlap. It also provides arguments for convincing both scholars and the public that strong free speech protections benefit society far better than any alternative.[24] This article applies these strategies to current, difficult free speech scenarios, engaging particular aspects of free speech doctrine.

Part I argues that claims of First Amendment cynicism are overstated, particularly the charges against the right of First Amendment Lochnerism and charges against the left of abandoning free speech. Part I also demonstrates how the responses to perceived First Amendment cynicism may become just as cynical as the problems they address. Part II then disputes the notion that the First Amendment is inherently political. It also explores why the currently dominant civil libertarian tradition is the least cynical way to understand the First Amendment, but demonstrates

24. Those who believe that the First Amendment is valuable insofar as it serves social ends, such as the production of truth or the safeguarding of democratic legitimacy, will need convincing that free speech is serving its requisite instrumental goals. *See* Goldberg, *supra* note 2, at 690 ("Scholars who espouse explicitly consequentialist theories of the First Amendment believe that free speech's value lies in advancing particular ends, such as truth or democratic self-government. These free speech consequentialists argue that speech can and should be suppressed when a given instance of speech actually works against those ends, or, more generally, when the benefits of that speech are outweighed by other harms."). Those who believe that free speech is an inherent right of autonomous moral agents, such as those who have a deontological view of the First Amendment, *id.* at 691, will not need such convincing, although "threshold deontologists" will need to be convinced that free speech rights do not cause harm above a certain threshold and thus overpowers our inherent rights. *See* Carol Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 756 (2005) (explaining that to threshold deontologists, at "some 'threshold' of catastrophic consequences, categorical moral prohibitions should give way to consequentialist concerns.").

where there is room for the "free speech as equality" approach.[25] Later, Part III offers ways of understanding the First Amendment that can de-politicize the doctrine without requiring judges to abandon vigorous judicial review, and discusses approaches to free speech jurisprudence that can be responsive to the poor and powerless without compromising viewpoint neutrality. This article applies these insights to issues surrounding the Supreme Court's docket, corporate speech and economic regulations generally, and hate speech, especially when promulgated by white supremacists.

I. FOUNDATIONS AND INACCURACIES OF FIRST AMENDMENT CYNICISM

Restoring faith in the First Amendment requires a way out of the current vicious cycle of First Amendment cynicism. This Part details and then disputes the current charges of First Amendment cynicism. For the purposes of this article, "First Amendment cynicism" is defined as the purposeful creation or application of free speech doctrine to serve political interests unrelated to freedom of expression. First Amendment cynicism can take two forms: (1) using the First Amendment to accomplish political goals unrelated to free speech that cannot be accomplished through the legislature, and (2) denying application of the First Amendment in order to promote interests unrelated to freedom of expression. Although denying application of the First Amendment in certain spheres may be perceived as simply balancing free speech rights with other interests, this article characterizes this jurisprudential approach to free speech as a cynical use in cases where those performing the balancing consistently favor certain political or ideological interests that match their political preferences.

The first section in this Part describes the nature of the accusations of First Amendment cynicism against judges, scholars, and other individuals who span the political and ideological spectra. The second section then argues that these charges, while not frivolous, are overstated and ignore the history and evolution of First Amendment jurisprudence. Indeed, some of these charges may reflect second-order First Amendment cynicism, where accusations of First Amendment cynicism are themselves intended to serve political ends unrelated to freedom of expression.[26]

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25. Kathleen Sullivan develops the often-competing "free speech as liberty" and "free speech as equality" approaches to the First Amendment in an essay that explores the polarizing response to *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010). *See* Sullivan, *supra* note 15, at 144–45.

26. There is an infinite regress problem, because accusations of second-order First Amendment cynicism may themselves be intended to shape First Amendment doctrine or culture cynically. Demonstrably false accusations of second-order First Amendment cynicism may be termed third-order First Amendment cynicism—one who vehemently disagrees with this article may label it as an example

A. First Amendment Lochnerism and Weaponization by the Right

Judges and commentators across the political spectrum are precipitously losing faith that their political opponents value a nonpartisan First Amendment. Although some critical legal scholars have lamented for decades that free speech doctrine cannot be ideologically neutral,[27] recently, more pointed charges have emerged. For example, accusations by the political left about the political right, which detail the "Lochnerization"[28]or weaponization of the First Amendment to benefit specific classes of people or political interests, are increasingly part of the mainstream discourse surrounding current free speech doctrine.

Older versions of progressive critiques of America's highly protective free speech jurisprudence targeted more high-level, philosophical approaches to the doctrine and the implications of those approaches. These critiques were more abstract and less personal than the current charges of First Amendment cynicism. In the 1990s, for example, Jack Balkin provided a compelling explanation for the First Amendment "sea change," where those on the left had begun to abandon their traditionally fervent support of a libertarian conception of free speech rights.[29] He analogized the legal realist movement of the 1920s and 1930s, which portrayed freedom of contract as not truly "free" due to background economic conditions, to a new legal realism targeting when free speech is meaningful as a right.[30] According to Balkin, those on the left have advanced significant arguments that background social and economic inequalities deprive certain underprivileged classes of people from having equal opportunities to speak, even if First Amendment doctrine is formally "free."[31]

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of third- or even fourth-order First Amendment cynicism. This article will not embark on a discussion of the infinite orders of First Amendment cynicism given how few empirical examples we have of this phenomenon, but the infinite possibilities for First Amendment cynicism demonstrates why it is imperative to develop ways of exiting the vicious cycle of First Amendment cynicism.

27. Neutrality is, of course, a difficult and contested concept, and the critical legal movement was dedicated to the view that the law can never be neutral. *See* Stephen A. Gardbaum*, Why the Liberal State Can Promote Moral Ideals After All*, 104 HARV. L. REV. 1350, 1350-52 (1991) (relating how critiques of the liberal concept of neutrality "argue that the liberal state is not neutral at all, but rather uses the rhetoric of neutrality to promote, legitimate, and defend a way of life that is built upon class, sex, and race inequality"). At a high level of abstraction, the application of legal principles must be considered political in that one has to accept our current legal structure and order. At the level of First Amendment doctrine, however, I seek to demonstrate that free speech principles can be, at least theoretically, both nonpartisan and apolitical. *See infra* Part II.

28. *See* Shanor, *supra* note 18; *infra* Section I.C.

29. *See* Jack M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 376 (1990).

30. *Id.* at 379–80.

31. *Id.* at 380–82 (detailing the feminist argument that "[j]ust as the exchange between employer and employee looks free but is actually coerced, so the speech of women and of other groups is not free but is actually the result of social forces beyond their control").

These more abstract, philosophical critiques of the meaning, scope, and application of free speech doctrine have ripened into something more sinister, as both the left and the right are, with mounting vitriol, accusing each other of purposely manipulating and misapplying First Amendment doctrine to serve political ends.

Scholars, usually on the political or ideological left, have marshaled arguments that the First Amendment, which was supposed to benefit those with minority viewpoints and the relatively politically powerless, has been co-opted to serve corporate interests. First Amendment scholar Amanda Shanor, for example, argues that corporations have successfully deployed a litigating strategy to render the First Amendment more receptive to commercial interests.[32] These developments, which Shanor finds regrettable, were in part effectuated by "well-organized business actors and conservative movement lawyers acting in a multifaceted approach over decades to influence the meaning and constitutional salience of free speech protections."[33]

According to Shanor, the commercial speech doctrine, of relatively recent advent, was originally "forged as a tool of consumer protection to secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers." However, the doctrine has expanded to encompass a speaker-based right of businesses.[34] In some courts of appeals, corporations may even be able to fight the *compulsion* of commercial speech as if it were akin to the *suppression* of commercial speech.[35] Especially during a time where "soft" regulation happens mostly through mechanisms that resemble compelled speech, such as disclosure requirements, the expansive "commercial speech doctrine" allows corporations to exploit free speech protections to serve as a powerful "deregulatory engine."[36] In essence, the doctrine has been perverted from its original purpose and scope, and corporations are partially to blame.

More broadly, many scholars believe that the First Amendment, instead of being used a metaphorical shield to defend against censorship, is being

32. *See* Shanor, *supra* note 18, at 135 ("[A] largely business-led social movement has mobilized to embed libertarian-leaning understandings of the First Amendment in constitutional jurisprudence.").

33. *Id.* at 163.

34. *Id.* at 150–51.

35. *Id.* at 145–52 ("Commercial plaintiffs have mounted cases against economic regulations ranging from the more quotidian -- such as tour guide licensing, required country-of-origin labels on meat products, and a prohibition on the sale of guns at a county fair -- to laws implicating weightier matters such as public health and foreign affairs -- including the Food and Drug Administration's graphic cigarette warnings, the Food, Drug, and Cosmetic Act's ban on the off-label promotion of drugs, and the Securities and Exchange Commission's required reporting of whether a company's products contain minerals sourced from the armed conflict in the Democratic Republic of Congo.").

36. *Id.* at 134. Shanor's article traces the development of commercial speech doctrine to explain its current clash with the administrative state. *Id.* at 137.

used as a sword to strike down all manner of progressive regulation in favor of more conservative approaches to economic and social policy.[37] Attorney and scholar Morgan Weiland chronicles how the expansion of speech rights have produced a new First Amendment theory that she calls "thin autonomy," which is contrary to the traditional liberal and republican conceptions of free speech.[38] According to Weiland, the liberal conception of free speech, which emphasizes personal autonomy for individuals,[39] and the republican conception of free speech, which focuses on how First Amendment protections can serve the democracy and public good,[40] have been subordinated to a libertarian understanding of the free speech right that is simply a "naked right against the state."[41] Giving free speech rights to corporations does not serve individual autonomy, because corporations do not have individual autonomy interests, nor does it benefit the public at large.

Even Supreme Court Justices have begun to make pointed accusations about the perversion of First Amendment doctrine. For example, in *Janus v. ACSFME*,[42] the majority overturned precedent to hold that public sector unions cannot constitutionally require non-union members to contribute agency fees to support a union's collective bargaining activities, because agency fees mandate the compelled subsidization of private speech on matters of public concern.[43] Justice Kagan, in dissent, accused the Justices in the majority of demeaning the majesty of the First Amendment in order to use it to suit their own political preferences—in this case, defunding public sector unions. Powerfully, Justice Kagan excoriated the majority's dismissal of longstanding precedent and disruption of workers' ability to organize.[44]

> There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to

37. According to Justice Kagan's dissent in *Janus v. ACFSME*, "the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy." 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

38. Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1396–97 (2007).

39. *Id.*

40. *Id.* at 1395.

41. *Id.* at 1397.

42. 138 S. Ct. 2448 *(2018).*

43. *Id.* at 2464.

44. *Id.* at 2501 (Kagain, J., dissenting).

intervene in economic and regulatory policy.[45]

Previously, in *Sorrell v. IMS Health*, Justice Breyer also compared an expansive First Amendment ruling with deregulatory implications to *Lochner v. New York*, an "anticanonical"[46] case considered to be an example of judicial overreach in inventing constitutional rights in order to judicially mandate economic policy.[47] *Sorrell* invalidated, on First Amendment grounds, a state law restricting the sale and disclosure of doctors' prescribing practices.[48]

Of course, Justices throughout history have accused each other of ignoring the Constitution in favor of their own policy preferences, including in First Amendment cases. The dissent even did so in the much-celebrated *West Virginia State Board of Education v. Barnette*,[49] which held that public school students cannot be forced to salute the flag.[50] But recent attacks, by both Supreme Court Justices, scholars, and members of society, are particularly powerful due to their pointedness and due to our current state of political polarization.[51] The judiciary generally, including the confirmations process, has become far more polarized.[52] Because free speech requires buy-in about its principled application, and because our society is currently so polarized, these accusations of First Amendment cynicism have become political in a way that could undermine First Amendment rights.

B. Left-Leaning Disrespect For and Cynical Approach to Free Speech

As the political right expands free speech in ways the left finds cynical, the right has accused the left of attempting to undo or reshape free speech

45. *Id.*

46. *See* Jamal Greene, *The Anticannon*, 125 HARV. L. REV. 379, 380–81 (2011) (including *Lochner v. New York* in the anticannon, a set of decisions that are universally agreed upon as the worst Supreme Court cases with the most indefensible central premises).

47. *Id.* at 418–19 ("It is error, on this view, for judges to invalidate democratically enacted statutes based on their subjective moral or political preferences rather than on the values authoritatively codified in the Constitution.").

48. 564 U.S. 552, 585 (2011) (Breyer, J., dissenting) (citing Central Hudson v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (Rehnquist, J., dissenting)).

49. 319 U.S. 624, 665-66 (1943) (Frankfurter, J., dissenting).

50. *Id.* at 642. *See also* Erica Goldberg, *"Good Orthodoxy" and the Legacy Of Barnette*, 13 FIU L. REV. 639, 642 (2019) (discussing how the dissent accused the majority of using the Constitution to enact its policy preferences).

51. *See* Jack Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 IND. L.J. 253, 258 (2019) (describing and citing studies to demonstrate why our current political and constitutional moment is one of "peak polarization").

52. *See* Richard L. Hansen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019) (arguing that increasing polarization of the citizenry has led to an increasingly polarized judicial selection process, increasing polarization of judicial decision-making, and an increasing partisanship to the public's assessment of judges and judicial opinions).

protections in ways that appear extreme and polarized, or, at least, self-serving. The accusation from the right is that those on the left, often academics or university students more so than judges, either wish to weaponize the First Amendment to serve progressive causes or seek to stop its obvious and fair application to serve their own causes.

Indeed, the Columbia Law Review recently hosted a symposium on how free speech can better combat inequality. The symposium's scholars tackled the inequalities created by the current "'Lochnerian' turn in First Amendment doctrine."[53] However, this type of symposium also contributes to a view, among many on the right, that those on the political or ideological left advocate for cynical uses of the First Amendment. Instead of caring about a principled application of free speech doctrine, these scholars wish to use free speech doctrine as a means to facilitate progress on their pet issue—inequality, defined with a particularly left-leaning valence. Indeed, the Introduction offers, as an alternative to First Amendment Locherism, "a First Amendment that would advance, rather than obstruct or remain indifferent to, the pursuit of social and economic equality."

The symposium explored ideas regarding both about how to craft more robust First Amendment doctrine to serve particular causes,[54] and how to ensure the First Amendment doesn't reach sectors these scholars desire to regulate.[55] This project does not necessarily reflect First Amendment cynicism if the scholars genuinely believe that the First Amendment's proper scope should be limited or expanded in this way based on doctrinal coherence, text, history, or free speech policy. Perhaps the project also does not reflect First Amendment cynicism if the authors simply wish to negate what they perceive as free speech overreach in a way that tends to increase economic and social inequality.

However, the scholars' primary interests often appear to be affirmatively advancing political and social justice aims, and free speech doctrine often seems a mere means to those aims. That approach does fit into the category of First Amendment cynicism. Of course, equality as the goal of a legal system is a broader, more justifiable, and less political aim than, for example, defunding unions or economic de-regulation. But

53. Symposium, *A First Amendment for All: Free Expression in an Age of Inequality*, 118 COLUM. L. REV. i (2018) (defining "'Lochnerian' turn" as "the use of the First Amendment to entrench social and economic hierarchy.").

54. *See, e.g.*, Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2076 (2018) (arguing in favor of expanding First Amendment doctrine substantially to cover labor picketing and boycotts).

55. *See, e.g.*, Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2032-33 (2018) (arguing that the First Amendment should not prevent regulation of social media platforms in order to increase consumers "practical freedom" at the expense of concentrated media companies' potential free speech rights).

the types of equality discussed, and discussed as a broad grouping, reflect a progressive ideology of equality of outcome instead of equality of opportunity, and favor certain types of equality over liberty, reflecting views at the left of center on the political spectrum.

Other accusations from the right are that, in less sophisticated ways than their professor counterparts, some vocal university students chant their disrespect for free speech or aim to shut down speech when speakers with objectionable views come to their campuses.[56] Shouting down or disrupting speakers is not a problem unique to the political left, but some on the left with progressive views have come to perceive the First Amendment as so antithetical to progressive causes such as equality (which they may care more about than free speech) that they are willing to abandon the idea of a principled First Amendment, which serves even objectionable speech, altogether. Even at law schools, where free, open, and civil debate is a necessity for a well-rounded academic education in the legal profession, students have shut down mainstream conservative speakers for espousing views, even views about free speech, which they find objectionable.[57] Many on the political right believe that the left has abandoned free speech, cynically, in favor of their own pet political causes, but then wish to benefit from free speech when it suits their own political interests.

Perhaps the left has polarized against the right's actual or perceived misuses of the First Amendment. Free speech may be used as a pretext for white supremacy. Indeed, the organizer of the white supremacist Unite the Right rally in Charlottesville, who claimed to be a champion of free speech values, sued a woman for swearing at him.[58] In the minds of many on the left, unfortunately, free speech as a pretext for upholding racist values has been solidified.

As a result of this dynamic, many believe that the left is also now contributing to First Amendment cynicism in a way that produces greater polarity between both sides of the political spectrum. The ACLU, famous

56. *See* Stanley Kurtz, *Year of the Shout Down: It Was Worse Than You Think*, NAT'L REV.(May 31, 2017 1:48 PM), https://www.nationalreview.com/corner/year-shout-down-worse-you-think-campus-free-speech/. For a description of the destructive protests at the University of California, Berkeley, see Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2165–66 (2018) ("One of the justifications for the violent protest in response to the University of California, Berkeley's hosting of alt-right speaker Milo Yiannopoulos was that his speech is so threatening and silencing to minority groups that their only recourse is to respond with violence.").

57. *See* Scott Jaschik, *Shutting Down Talk on Campus Free Speech*, INSIDE HIGHER ED (April 16, 2018), https://www.insidehighered.com/news/2018/04/16/guest-lecture-free-speech-cuny-law-school-heckled (reporting and linking to video where students at CUNY Law School chanted over Professor Josh Blackman's guest lecture on free speech).

58. Matt Novak, *Judge Awards $5 to Free Speech Rally Organizer Because a Woman Cursed at Him*, GIZMODO (July 2, 2018), https://gizmodo.com/judge-awards-5-to-free-speech-rally-organizer-because-1827280858.

for representing clients like neo-Nazis who wished to march in Skokie, Illinois, a town populated by many Holocaust survivors, is rethinking its approach to so-called "hate speech" cases.[59] The Skokie case "has come to symbolize the ACLU's nonpartisan, evenhanded defense of constitutional rights,"[60] but the ACLU has changed its stance with respect to armed protesters who represent hate groups.[61] A leaked internal memo by ACLU staff members outlines the factors the ACLU will use when deciding whether to take a case, including

> the (present and historical) context of the proposed speech; the potential effect on marginalized communities; the extent to which the speech may assist in advancing the goals of white supremacists or others whose views are contrary to our values; and the structural and power inequalities in the community in which the speech will occur.[62]

These changed approaches may simply reflect the more dangerous nature of certain types of protesters, but the ACLU, which now champions causes that seem more politically left-leaning and are unrelated to the classic understanding of "liberty," must balance other interests against a principled defense of free speech.[63]

These accusations of left-leaning First Amendment cynicism are serious, but, as described in the next section, they are also overstated, which may have even more serious consequences.

C. Allegations of First Amendment Cynicism Are Overstated and Ahistorical

An important first step in combating actual First Amendment cynicism is demonstrating that perceptions of First Amendment cynicism are overstated. The left's and the right's visions of free speech diverge, but not as sharply or as crassly as critics contend. Many of the loci of disagreement involve issues where reasonable minds can differ. Further, although the form of the accusations has become more pointed, charges

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59. *See* Dara Lind, *Why the ACLU Is Adjusting Its Approach to Free Speech After Charlottesville*, VOX (Aug. 21, 2017, 10:06 AM), https://www.vox.com/2017/8/20/16167870/aclu-hate-speech-nazis-charlottesville (describing how "[t]he ACLU seemed like it was in the midst of a partial reinvention as an explicitly progressive organization for the Donald Trump era").

60. David Cole, *Are You Now or Have you Ever Been a Member of the ACLU*, 90 MICH. L. REV. 1404, 1417 (1992).

61. After the deadly rally in Charlottesville, where a white supremacist attending to rally killed protester Heather Heyer, the ACLU's President Anthony Romero issued a statement that the ACLU would no longer defend the free speech rights of those who wish to march carrying firearms. Lind, *supra* note 59.

62. *See* Robby Soave, *Leaked Internal Memo Reveals ACLU is Wavering on Free Speech*, REASON (June 23, 2018 8:25 AM), https://reason.com/blog/2018/06/21/aclu-leaked-memo-free-speech.

63. *See* Goldberg, *supra* note 16 (arguing that the ACLU is abandoning its traditional protection of civil liberties in favor of supporting various civil rights causes).

of First Amendment Lochnerism are not new. The connection between free speech rights and economic deregulation has a long pedigree and may be inseverable. In addition, many of the doctrines the left now criticizes originated from liberal jurists, demonstrating the political malleability—a feature, not a bug—of the First Amendment. Many on both the left and the right continue to advance arguments in favor of a principled free speech jurisprudence without regard to the content of speech or the political result of protecting particular speech. Finally, some of the accusations against both the right and the left for First Amendment cynicism may reflect second-order First Amendment cynicism, to the extent they are either demonstrably false or are intended pretextually to achieve political ends unrelated to freedom of expression.

1. The Left's and Right's Principled Divergences

Much of the difference between the right's and the left's approach to free speech reflects two different visions of the First Amendment, one where free speech serves political equality and one where free speech serves political liberty.[64] As constitutional law expert Kathleen Sullivan articulates, in the "free speech as equality" conception, marginalized groups deserve extra solicitude from the government, which cannot discriminate when subsidizing speech or allowing speech on public land.[65] However, wealthy corporations deserve no special treatment.[66] In the "free speech as liberty" conception, the First Amendment serves to prevent governmental tyranny, or the suppression of speech based on the state's sense of what is good instead of the "private ordering of ideas."[67] In many cases, these two conceptions overlap,[68] leading to wide victories for litigants claiming First Amendment protections.[69]

By contrast, *Citizens United v FEC*,[70] a case that sharply divided conservatives and liberals both on and off the Court,[71] reflects the

64. Sullivan, *supra* note 15, at 144–45.

65. *Id.*

66. *Id.* at 145.

67. *Id.*

68. *Id.* at 144 n.9 (discussing classes of cases where the "free speech as equality" and "free speech as liberty" concepts align).

69. *See, e.g.,* Matal v. Tam, 137 S. Ct. 1744 (2017) (invalidating provisions of the Lanham Act forbidding the trademarking of disparaging terms); Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (overturning conviction based on law that banned sex offenders from access to particular types of social media); Snyder v. Phelps, 562 U.S. 443 (2011) (overturning damages award for intentional infliction of emotional distress based on protest of military funeral by controversial religious group); United States v. Stevens, 559 U.S. 460 (2010) (invalidating ban on depictions of animal cruelty).

70. 558 U.S. 310 (2010) (invalidating federal law restricting expenditures on political campaign-related speech by corporations, including non-profit corporation that produced the documentary at issue).

71. The Court's 5-4 decision did not fall entirely on partisan lines, as dissenter Justice Stevens was

differences in these two approaches, despite the fact that Justices in both the majority and the dissent embraced both of these visions, in some form.[72] Ultimately, the majority in *Citizens United* believed antithetical to the First Amendment the "affirmative action for marginal speech"[73] notions underlying the alternative approach. The necessary result of the antidistortion rationale espoused by Justice Stevens' partial concurrence and dissent is that powerful speakers such as corporations, can be silenced to make room for other voices.[74] Justice Kennedy's majority found this at intractable odds with First Amendment jurisprudence.[75] Further, Justice Kennedy's majority and Justice Stevens's partial concurrence and dissent disagreed on whether there was a compelling need to restrict campaign expenditures.[76] Reasonable minds can disagree on which approach is more consistent with First Amendment theory and jurisprudence, and whether prohibiting campaign expenditures is necessary to mitigate political corruption. The next Part discusses why free speech as liberty is more consistent with a nonpartisan First Amendment, but it suffices here to note that both the majority and the dissent articulated coherent views of freedom of speech, despite the later politicization of the case.[77]

Of course, any given Justice, scholar, or member of society may select his or her abstract approach to free speech doctrine—either free speech as liberty or free speech as equality—based on how that approach will affect preferred outcomes. That may be what happened in *Janus v. AFSCME*,[78] where Court split entirely on partisan lines, and the majority invalidated

appointed by Gerald Ford. However, Justice Stevens is considered to be a judicial liberal. *See* Matthew Sag et al., *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CAL. L. REV. 801, 831 (2009) ("Justice Stevens was appointed by President Ford, but is now the most liberal member of the Supreme Court."). The author agrees with Kathleen Sullivan that "[w]hile the labels 'liberal' and 'conservative' are reductive and sometimes incoherent as descriptions of the Justices' approaches to constitutional decisionmaking, they have become pervasive in popular accounts of the Court and in attempts to quantify its outcomes"). Sullivan, *supra* note 15, at 144 n.7.

72. Sullivan, *supra* note 15, at 145 ("Neither vision, however, entirely eclipses the other in *Citizens United*; each of the principal opinions pays lip service to the other by invoking the other's theory in its own cause.").

73. *Id.*

74. According to the majority, "[i]f the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form." *Citizens United*, 558 U.S. 310, 349 (2010).

75. *Id.*

76. *Compare id.* at 357 ("Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question.") *with id.* at 442 (Stevens, J., dissenting) (discussing "the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars").

77. *See* Sullivan, *supra* note 15.

78. 138 S. Ct. 2448 (2018).

mandatory public sector union dues as impermissible compelled speech.[79] Results-driven reasoning is a risk in all aspects of constitutional law, and all law in general. We should be vigilant to ensure Justices do not proffer pretextual opinions, and we should establish a constitutional culture where judges feel obligated to explain their theories of jurisprudence in broader terms to demonstrate their internal coherence and fidelity to the rule of law. However, currently, we can test Justices and commentators only on the coherence of their approaches and the consistency in application of those approaches. Justice Kagan's claim that the First Amendment was "weaponiz[ed]" in *Janus*,[80] for example, should require a much greater indication that the Justices have departed from either their views of *stare decisis* (as *Janus* overruled a portion of *Abood v. Detroit Board of Education*)[81] or a greater indication that *Janus* is inconsistent with the majority's approach to First Amendment law more generally.

Although Justice Kagan, in the *Janus* dissent, claimed that "[t]he First Amendment was meant for better things,"[82] the majority, explicitly, at least, believed it was vindicating an important principle, encapsulated in a quote by Thomas Jefferson, that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical."[83] Justice Kagan has a notion of democracy, much like free speech as equality, in which the state can intervene to allow citizens to more effectively access democratic institutions.[84] Justice Alito's view aligns with the free speech as liberty approach. Plus, like in *Citizens United, Janus* itself may boil down to a fight over compelling interest analysis. The majority thought free rider problems, where individuals can be represented by unions without paying dues were not a sufficient compelling interest,[85] whereas Justice Kagan's dissent believed the government was justified in believing that "agency fees are necessary for exclusive representation to work."[86] Although it is convenient that perhaps all of the *Janus* Justices' compelling-interest analysis aligns with their political views, those views may have colored what was already a reasonable approach instead of directing the Justices to a disingenuous or unreasonable interpretation of the Constitution.

Other disagreements that appear to manifest First Amendment

79. *Id.* at 2486–87.

80. *Id.* at 2501 (Kagan, J., dissenting).

81. 431 U.S. 209 (1977).

82. *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

83. *Id.* at 2464 (majority opinion) (quoting A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) (emphasis omitted and footnote omitted)).

84. *Id.* at 2502 (Kagan, J., dissenting) (arguing that the First Amendment "was meant not to undermine but to protect democratic governance—including over the role of public-sector unions").

85. *Id.* at 2466 (majority opinion).

86. *Id.* at 2490 (Kagan, J., dissenting).

cynicism may also reflect underlying doctrinal differences that are not entirely political in nature. The right and the left also sometimes disagree about whether *restrictions* on speech should be considered equally problematic as *compelled* speech. According to Justice Alito's majority opinion in *Janus*, compelling speech is worse than restricting speech because in addition to interfering with the private marketplace of ideas, "individuals are coerced into betraying their convictions."[87] This divergence on how to treat compelled speech has recently arisen in commercial speech cases involving mandatory disclosure provisions, because many believe disclosure requirements on corporations are benign and simply add information to the actual marketplace.[88]

There is a significant argument that doctrines affording commercial speech First Amendment protections, originally developed by liberal jurists to vindicate listeners' rights, have been perverted to benefit corporate interests.[89] But the very fact that the current protections for corporations evolved from the commercial speech doctrine, "as one facet of a progressively led rights revolution"[90] aimed at consumer protection,[91] demonstrates how apolitical the First Amendment still is, can be, and should be.[92] Although it is true that listener's rights have, to some degree, merged with the free speech rights of corporate speakers,[93] this is not necessarily an indication of First Amendment cynicism. Protecting the ability of the corporation to speak also protects against governmental ordering of what the listener may hear, consistent with the free speech as liberty vision, even if not with the free speech as equality vision.

Some scholars see cases like *Sorrell v. IMS Health Inc.*,[94] which invalidated a state law restricting the sale, disclosure, and use of pharmacy

87. *Id.* at 2464 (majority opinion).

88. Shanor, *supra* note 18, at 152–53 (contending that although the Supreme Court treats compelled commercial speech as a lesser constitutional problem than restrictions on commercial speech, "some circuit court decisions have not been so clear").

89. Weiland, *supra* note 38, at 1433 ("[B]ecause corporate speech rights are clearly vindicated by the Court's deregulatory move [in Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976)], while it is not at all clear whether listeners' rights are similarly upheld, the Court arguably began to use listeners' rights as an instrumental one-way deregulatory ratchet.").

90. Shanor, *supra* note 18, at 142.

91. *Id.* at 143 ("The commercial speech doctrine was forged as a tool of consumer protection to secure the value of commercial speech to society, not to ensure the autonomy interests of commercial speakers.").

92. *Id.* ("The doctrinal revolution in commercial speech came over the strenuous opposition of the Court's conservatives.").

93. According to Weiland, in commercial speech cases, "the Court radically transformed listeners' rights from how they are understood in the republican tradition, reconceptualizing listeners as individuals with an interest in the 'free flow of information.' It purported to vindicate those rights through deregulatory rulings, the same mechanism that benefits corporate speech rights." Weiland, *supra* note 38, at 1430.

94. 564 U.S. 552 (2011).

records on the prescribing practices of doctors without their consent,[95] as expanding protections for commercial speech too far.[96] But the case also shows that the First Amendment benefits speakers and listeners regardless of identity, and no one political approach can win under the First Amendment. The view that corporations should not be discriminated against as one type of speaker, a view that divided the left and the right in *Citizens United v. FEC*, is eminently justifiable, even if debatable.

2. The Historical Interaction of Free Speech Rights and Economic Liberties

As detailed in the previous subsection, interpretations by scholars and jurists on the right and left often reflect principled disagreements about the nature of the free speech right. In addition, there is far more political fluidity in the doctrine than can be captured in simple left/right dichotomies. As historian and legal scholar Jeremy Kessler comprehensively chronicles, free speech liberties and economic de-regulation have long been intertwined,[97] often based on the jurisprudence of liberal Supreme Court Justices.

Originally, media companies fought for free speech rights to publish objectionable content and fought against licensing taxes.[98] Many of the earliest victories for free speech were won by newspapers, often represented by "corporate lawyers tasked with fending off New Deal economic regulation," and specifically a trade group controlled by newspaper chains.[99] In *Near v. Minnesota*, for example, the Court held that despite a newspaper's operating as a business, which could be viewed as conduct instead of speech, the press has a right against prior restraint to publish information about corrupt public officials, even if it might have previously published scandalous or defamatory information.[100] In

95. *Id.* at 563–64 (holding that Vermont's law imposed impermissible content- and speaker- based restrictions on speech).

96. According to Shanor, because the commercial speech doctrine was intended to give some, but lesser, protection to commercial speech, restrictions on commercial speech are necessarily content based. Shanor, *supra* note 18, at 151. The Court missteps, then, when it strikes down regulations on commercial speech because they are content based. *Id.*

97. Kessler, *supra* note 18, at 1925 ("While certainly not the dominant trend in First Amendment jurisprudence, judicial suspicion of economic regulations that incidentally restrict the exercise of First Amendment rights-- even when that exercise takes the form of commercial activity--has a long doctrinal pedigree . . . .").

98. *Id.* at 1925–26.

99. *Id.* at 1925.

100. 283 U.S. 697, 720 (1931) ("In attempted justification of the statute, it is said that it deals not with publication per se, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose.").

Grosjean v. American Press Co., the Court held that taxes on newspapers with high circulations violated the First and Fourteenth Amendments.[101] The Supreme Court recognized that the power to tax, or interfere with the running of a business, could have dramatic First Amendment implications.

Then, furthering the connection between civil and economic liberties, the "peddling tax" cases invalidated laws requiring taxes on the distribution and sale of Jehovah's Witnesses' religious literature, despite the fact that the taxes applied to commerce generally.[102] Jurists began to notice a "basic, structural antagonism between judicial civil libertarianism and judicial deference to political regulation of the economy."[103] Part of the tension was created by the famous *Carolene Products* Footnote Four, which gave special status to enumerated constitutional rights, as above economic regulation.[104] "Successful attempts to shore up the logic of bifurcated review—to formulate a workable distinction between judicial defense of civil liberty and judicial supervision of the economy—have been few and far between in the courts and in the academy."[105] Even many liberal "Justices rather saw a free market in particular goods and services (the sale of religious magazines, the advertisement of abortion services) as inextricable from the free market in self-expression and self-determination that they sought to vindicate."[106]

Thus, according to Kessler, scholars today have an unduly narrow sense of First Amendment Lochnerism, which has a long history that is far more politically complex and broader than the narrative of conservative Justices wishing to strike down economic regulations to benefit corporate interests.[107] Kessler's presentation of this history of the First Amendment is not intended to justify the state of the doctrine. Instead, he believes that those seeking First Amendment reforms will have to challenge wider swaths of the doctrine and resort to legislative solutions to gain political control of the economy.[108] The entanglement

101. 297 U.S. 233 (1936).

102. Kessler, *supra* note 18, at 1957–59.

103. *Id.* at 1976.

104. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. "); *see also* Kessler, *supra* note 18, at 1919 (discussing the danger of Carolene Products Footnote 4 to economic regulations).

105. Kessler, *supra* note 18, at 2003–04.

106. *Id.* at 2000.

107. *Id.* at 2000 ("This definition of Lochnerism . . . adopted by many contemporary critics of First Amendment Lochnerism, has worked to obscure the long-term, economically libertarian tendencies of aggressive judicial enforcement of the First Amendment.").

108. *Id.* at 2003 ("In light of this longer history, critics of

of free speech rights and economic liberties is well entrenched in the doctrine, often perpetuated by "liberal judges as activists."[109]

3. First Amendment Lochnerism Forever

Indeed, even the term "First Amendment Lochnerism" has been around for quite some time. This analogy, which is usually, although not always,[110] meant to reproach, has been invoked in a variety of contexts, not all dealing with instances where constitutional rights trump economic restrictions. Donald Livey chided the Court's entire First Amendment scheme of protecting only certain speech as embracing "a first amendment variant of Lochnerism" in the 1980s.[111] This early accusation of First Amendment Lochnerism contended that the Court protects speech based on its own policy preferences; for example, it excludes obscenity and fighting words from free speech protections based on its own subjective conception of value.[112]

First Amendment Lochnerism was also discussed in relation to the Court's protection of hate speech in the 1990s, and the Court's blurring of the line between speech and conduct.[113] Other scholars have invoked the term when discussing specific cases, such as a case invalidating criminal sanctions for those who publish intercepted communications between union members,[114] or the case involving burning of draft cards, which established the expressive conduct paradigm,[115] where expressive conduct receives some First Amendment scrutiny but more easily passes constitutional review than pure speech.[116] The current charges of First

contemporary First Amendment Lochnerism might be wise to abandon their defense of an illusory tradition of economically neutral First Amendment enforcement. Instead, they could take up the banner of radical reform and seek to break with a legal tradition that has long been insensitive to the tension between judicial civil libertarianism and judicial deference to economic regulation.").

109. *Id.* at 2001–02.

110. For an article criticizing the use of the term as strictly a pejorative, *see* Howard Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV.421, 423 (2006) ("The pejorative nature of the term ultimately serves to obscure meaningful substantive constitutional dialogue about the meaning of the freedom of speech and how that freedom should be balanced against competing constitutional, political, and social values.").

111. Donald E. Livey, *The Sometimes Relevant First Amendment*, 60 TEMP. L.Q. 881, 883 (1987).

112. *Id.* at 884–85.

113. Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 110–15 (1993).

114. Wasserman, *supra* note 110, at 423 (comparing Bartnicki v. Vopper, 532 U.S. 519 (2001) with Lochner).

115. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 771 (2001) (comparing United States v. O'Brien, 391 U.S. 367 (1968), with Lochner).

116. According to the Court, expressive conduct, like the burning of a draft card, involves elements of speech and non-speech. Unlike restrictions on pure speech, which receive strict scrutiny, restrictions on expressive conduct receive intermediate scrutiny. *See* United States v. O'Brien, 391 U.S. at 377 ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government;

Amendment Lochnerism, which are more pointed and repeated in greater stereo, may simply be another wave of criticisms of the interpretation of an amendment that does not give great guidance to courts and will necessarily create discord in its application. Thus, the perception of First Amendment cynicism may be stronger among the current public, but that does not necessarily reflect historical reality of actual or perceived instances of First Amendment cynicism.

4. Misrepresenting the Left's Abandonment of Free Speech

The previous subparts mainly refute the accusations, made by the left against the right, of First Amendment cynicism that takes the forms of First Amendment Lochnerism and weaponization of free speech doctrine. There is also good reason to believe that the accusations by the right against the left, largely in the form that the left has abandoned a robust, principled reading of the First Amendment, are overstated, and may themselves reflect second-order First Amendment cynicism.[117]

Undermining accusations of First Amendment cynicism from the right about the left, many university students and progressives still strongly believe in free speech, but simply want to devote their energy to other causes or to acknowledge those hurt by speech.[118] Those who wish to heckle speakers appear to simply be a vocal, and virulent, minority.[119] There is some evidence that the "campus free speech crisis" is improving.[120] Plus, many who appear to have abandoned a viewpoint-neutral, robust free speech regime offer views about free speech that echo the older legal realist critiques of the 1990s, although those critiques have morphed and become less sophisticated once they entered the realm of general public discourse.

Further, there is some evidence that those on the right, who are quite dismayed by the perceived campus free speech crisis, have little regard for free speech in other important areas, especially when the speech is not conservative in orientation. The right's horror at the left's

if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

117. *See infra* Section I.C.5.

118. *See* Anthony L. Fisher, *The Free Speech Problem on Campus is Real. It Ultimately Hurts Dissidents*, VOX (Jan. 2, 2017 8:45 AM), https://www.vox.com/the-big-idea/2016/12/13/13931524/free-speech-pen-america-campus-censorship.

119. *See, e.g.*, Scott Jaschik, *Free Speech at Brown (Again)*, INSIDE HIGHER ED (Nov. 7, 2013), https://www.insidehighered.com/news/2013/11/07/brown-u-president-calls-broad-review-lecture-was-shouted-down (poll in Brown University newspaper indicated that while many disagreed with police commissioner speaker, they did not support those who shouted him down).

120. *See* Jeffrey Adam Sachs, *The "Campus Free Speech Crisis" Ended Last Year*, NIKANSEN CTR. (Jan. 25, 2019), https://niskanencenter.org/blog/the-campus-free-speech-crisis-ended-last-year/.

abandonment of free speech may thus be self-serving. As one example, some politicians suggesting legislation to combat disruptive protests on college campuses also wish to penalize those who engage in protest boycotts of products made by Israeli companies, by limiting the ability of those who participate in the Boycott, Divestment, and Sanctions movement to contract with state governments.[121] As another example, many state legislatures, generally representing conservative interests, have enacted laws penalizing animal welfare activists or investigative journalists from accessing farm facilities based on false premises.[122] Several courts have deemed aspects of these so-called "ag-gag" laws unconstitutional.[123]

Of course, the constitutional status of boycotts is uncertain,[124] and is far more complex than the right to speak at a university if invited by a recognized student group.[125] Further, the conservatives decrying liberals' disregard for free speech may not be the same ones trying to implement ag-gag laws, which may be motivated by a principled, viewpoint-neutral desire to protect property rights. However, these examples offer at least some evidence that some who appear most vocal about campus free speech concerns may be engaging in second-order First Amendment cynicism—accusations of First Amendment cynicism intended to accomplish a political agenda unrelated to sincerely held, principled views about freedom of speech.

5. Second-Order First Amendment Cynicism

Any given accusation of First Amendment cynicism may itself be a cynical reflection of the political motives of the accuser and not a

121. Lee Fang & Zaid Jilani, *Politicians Campaign on Free Speech While Voting to Punish Those Who Boycott Israel*, INTERCEPT (Mar. 14, 2018), https://theintercept.com/2018/03/14/campus-free-speech-bds-israel-boycott/.

122. Brandon Keim, *Ag-Gag Laws Could Make America Sick*, WIRED, (May 2, 2013), https://www.wired.com/2013/05/ag-gag-public-health/; Esha Bhandari, *Court Rules 'Ag-Gag' Law Criminalizing Undercover Reporting Violates the First Amendment*, ACLU.org (Jan. 22, 2019), https://www.aclu.org/blog/free-speech/freedom-press/court-rules-ag-gag-law-criminalizing-undercover-reporting-violates.

123. *See, e.g.*, Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) (holding unconstitutional laws criminalizing entry into an agricultural facility by misrepresentation, but upholding laws criminalizing gaining access to records or employment through misrepresentation); Animal Legal Defense Fund v. Herbert, 263 F.Supp.3d 1193 (D. Utah 2017).

124. *See* Erica Goldberg, *Federal Courts Examining BDS Movement Boycott Restrictions*, CROWDED THEATER (Apr. 23, 2019), https://inacrowdedtheater.com/2019/04/23/federal-courts-examining-bds-movement-boycott-restrictions/.

125. *See* Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349, 373–74 (2011) (describing case law that heavily scrutinizes university decisions that deny access to student groups use of campus facilities and viewpoint-based discrimination against speech by student organizations).

principled defense of a particular interpretation of the First Amendment. An accusation of this kind would then constitute second-order First Amendment cynicism. However, accusations of second-order cynicism may themselves be cynical, intended to undermine legitimate accusations of First Amendment cynicism. As a result, there is an infinite regress issue.[126] When considering second-order First Amendment cynicism, or accusations of second-order First Amendment cynicism, the vicious cycle gets ever more vicious.

In a universe consisting solely of first-order First Amendment cynicism, perceptions by the left of first-order First Amendment cynicism by the right may lead those on the left to also interpret free speech protections cynically, and when the right perceives this, it may follow suit, perpetuating a vicious cycle. With second-order First Amendment cynicism, accusations of First Amendment cynicism—themselves perhaps disingenuous—cause the target of the accusation to lose faith in a principled free speech regime because those who seem most vocal about speaking in favor of free speech protections (or those in favor of prudent limitations on free speech that are consistent with the Constitution) are doing so cynically. This loss of faith then leads to more First Amendment cynicism by those falsely accused of first-order cynicism, continuing the cycle, or perhaps even to accusations of second-order cynicism that the target perceives as cynical.

As one example, many on the left believe that the right has manufactured a campus free speech crisis, in which the right is accusing the left of not caring about free speech when in fact many vocal proponents of free speech on the right simply wish to use "free speech martyrdom" as an effective pretext.[127] What the left sees from the right as false accusations of First Amendment cynicism (or second-order First Amendment cynicism), the right sees as genuine allegations of actual cynicism, accusations that the left can evade by claiming these accusations of First Amendment cynicism are, in actuality, second-order First Amendment cynicism.

Exiting this infinitely recursive cycle of First Amendment cynicism, which can be infinitely recursive, is difficult because there is no "true" First Amendment by which we can measure people's interpretations of free speech protections. We can, however, examine whether an

126. *See supra* note 24.

127. *See, e.g.*, Jelani Cobb, *The Mistake the Berkeley Protesters Made About Milo Yiannopoulos*, NEW YORKER (Feb. 15, 2017), https://www.newyorker.com/news/daily-comment/the-mistake-the-berkeley-protesters-made-about-milo-yiannopoulos. According to Jelani Cobb, Milo Yiannopoulos, whose anticipated speech at University of California, Berkeley caused violent and disruptive protests, "is of a blinkered tradition that sees no distinction worth examining between martyrdom and limitations on one's ability to attack others. Yiannopoulos's act is the political equivalent of an N.B.A. guard flopping in the hope of drawing a foul, a rendition of victimhood so aptly executed as to pass for the real thing."

individual's own views are internally consistent, whether individuals advance propositions that consistently align with their own political preferences, and whether their views about the First Amendment are either impossible to administer or impossible to square with necessary aspects of Constitutional interpretation or rule of law principles.

Ultimately, of course, it may be impossible to avoid importing one's own personal preferences about speech into one's views about the doctrine.[128] Given that reasonable minds can differ on the doctrine, perhaps some focus on the result is inevitable. Primary focus on the result, however, renders the doctrine unprincipled and corrodes the rule of law by making result more significant than reasoning. There may not be a baseline "true" First Amendment against which we can determine which interpretations are cynical, but we can create free speech doctrine that is as apolitical as possible.

II. RESTORING FAITH IN A NONPARTISAN FREE SPEECH REGIME

An important step in diminishing fears of, and actual instances of, First Amendment cynicism is to convince scholars, judges, and community members that the First Amendment can be, and mostly has been, nonpartisan and perhaps even apolitical. Individuals who believe there is a principled way to apply the First Amendment are more likely to choose this path over a cynical but politically advantageous interpretation of free speech doctrine.

For the purposes of this article, "nonpartisan" means that the First Amendment can be used as a tool to protect viewpoints across the political spectrum. Judges can and will invalidate speech restrictions as a violation of the First Amendment—and can and will uphold regulations as permissible under the First Amendment—regardless of whether political party affiliations and political ideology match the viewpoints expressed in the speech at issue. In this way, the First Amendment is formally nonpartisan.

For the purposes of this article, "apolitical" means that broad protections of First Amendment rights can lead to outcomes that do not necessarily benefit or serve a particular political ideology. The distribution of speaking rights created by a formally nonpartisan First Amendment doctrine need not skew our political culture, direct legislative victories in a particular way, or favor outcomes of a particular political ideology. In this way, the First Amendment is substantively apolitical. A

128. Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction,* 64 STAN. L. REV. 851, 884 (2012) (finding, in an empirical study, that people's political commitments influenced whether they perceived a protest as consisting of protected speech or unprotected threatening conduct).

nonpartisan First Amendment protects speech that argues in favor of Democratic and Republican causes alike. An *apolitical* First Amendment yields results beyond the speech itself that do not necessarily skew conservative—maintaining the current power structures or favoring certain types of conservative policies—over progressive.

this Part contends that free speech doctrine can be, and has been, both nonpartisan and apolitical. Section A details why the First Amendment cannot be progressive, but argues that this fact does not make strong free speech protections regressive or conservative. Section B defends the "free speech as liberty" approach as the best way to retain the nonpartisan and apolitical nature of the First Amendment, so long as the "free speech as equality" aspects are retained.

A. A Nonpartisan, Apolitical First Amendment

If we, as a society, want to move beyond simply reducing the perception of First Amendment cynicism and begin restoring broad support and respect for free speech principles, community members, judges, and scholars will have to be convinced that the principle of free speech is worth protecting. Judges, scholars, and members of society may also have to be shown, if they do not believe in the inherent virtue of the principle of free speech, that the First Amendment does not serve their political opponents more than it serves their own causes. For some, perhaps it is enough to demonstrate that free speech principles prevent the largest downside risk, or the worst, most tyrannical damage, to their causes,[129] even if free speech serves their political opponents more than it serves them. This method of convincing resembles John Rawls's conceit that that individuals behind the "veil of ignorance" would choose to distribute social entitlements in a way that prevents the worst consequences to the least well off, even if this distribution does not maximize welfare for everyone.[130]

Although the dominant strategy,[131] in a game theoretical sense, may be to use the First Amendment cynically, widespread acceptance of a particular understanding of free speech principles may defeat this inclination. The best way to convince the broadest swath of society in the continuing inherent and instrumental good of the First Amendment is to

129. According to Louis Michael Seidman, "free speech protects the political left from the most extreme threats." Seidman, *supra* note 12, at 2223. However, this protection against extreme downside risks "does not make the speech right progressive." *Id.*

130. JOHN RAWLS, A THEORY OF JUSTICE 31, 92 (1971).

131. A "dominant strategy" is the best strategy for an actor to pursue no matter what strategies other actors in a given scenario choose. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 11 (1994).

demonstrate that free speech principles do not serve any given ideology. Despite the current peak of First Amendment criticism, free speech doctrine has been, and can continue to be, both nonpartisan and apolitical.

Several progressive scholars have concluded that the First Amendment, as currently structured, cannot be politically progressive, defined by one scholar as "the modern political stance favoring an activist government that strives to achieve the public good, including the correction of unjust distributions produced by the market and the dismantling of power hierarchies based on traits like race, nationality, gender, class, and sexual orientation."[132] To create a First Amendment that would serve a progressive political ideology, according to two scholars, would require a "radical rethinking of existing doctrine," and of the grammar of the First Amendment.[133] The reasons for this are manifold.

First, progressive ideology often requires government intervention. An active government exists in tension with the protection of free speech liberties, which generally require governmental nonfeasance into the private ordering of speech.[134] In addition, this governmental nonintervention into the figurative "marketplace of ideas"[135] means that those who have earned more money in the literal marketplace of commerce will be able to afford greater platforms for speech and will have more property on which to speak. Because the First Amendment is not triggered by private suppression of speech, and because the government enforces state background laws unrelated to freedom of expression, those with the most property will have the greatest ability to create speech platforms and exclude others form this property.[136] In this way, economic power translates to speaking power which translates to economic power, and the status quo is perpetuated.

Further, not only does the First Amendment require nonfeasance into the marketplace of ideas, but it may prohibit governmental action in other

132. Seidman, *supra* note 12, at 2020.

133. Kessler & Pozen, *supra* note 12, at 2006.

134. Seidman, *supra* note 12, at 2240 ("Like the rest of the Constitution, First Amendment doctrine links freedom to government nonfeasance and oppression to government action. ").

135. A primary rationale underlying strong free speech protections is that an unregulated "marketplace of ideas" ultimately serves truth. *See* Goldberg, *supra* note 56, at 2164 n.1. Many scholars, however, have called into question the veracity of this notion. *See, e.g.*, Leiter, *supra* note 13, at 409 ("My claim is that most [nonmundane] speech . . . has little or no net positive epistemic value (that is, value for helping us discover the truth) . . . .").

136. Goldberg, *supra* note 56, at 2185 ("Private citizens can thus refuse entry into their homes to anyone whose views, on any topic, from the best city for pizza to the most suitable presidential candidate, they disagree with. If the uninvited guest refuses to leave, the state can enforce property laws, even if they incidentally affect that speaker's message. Private employers can often fire individuals for speech they dislike, and social media platforms can remove users for speech they find hateful or otherwise objectionable.").

spheres as well. As noted earlier, from its early days of enforcement, the Supreme Court intertwined free speech rights and economic liberties.[137] The more robustly or aggressively courts enforce free speech rights, the more they may have to invalidate economic and social regulation. The First Amendment cannot be fully "economically neutral," and the view that it ever was is "illusory."[138]

Finally, and most basically, viewpoint neutrality means that courts cannot favor progressive viewpoints over conservative viewpoints. Combining this viewpoint neutrality with the current power structures means that some will be more affected, or more silenced, by particular types of speech than others.[139]

For all of these reasons, those who seek governmental intervention to level the playing field caused by centuries of suppression on the basis of particular identity characteristics (such as race, gender, and sexual orientation) may be thwarted in their efforts by the First Amendment.

In many ways, the fact that the First Amendment cannot be progressive is a good thing and it is evidence of a nonpartisan and perhaps apolitical First Amendment. Just because the First Amendment cannot primarily serve progressive ideology does not necessarily mean the First Amendment has to be regressive or conservative. Certainly, there are ways in which free speech doctrine perpetuates the status quo, and gives those with economic or social advantages more free speech protections, with which they can further entrench their privileges and power. But protecting those disfavored by the political branches against governmental censorship means that minority rights and the rights of those at the vanguard, or outside, of any given social hierarchy will be protected, whether they are advocating for progressive causes or not.[140] Although the state action doctrine does benefit those with greater resources and power, and although corporations receive greater speech rights now than in the past, the current conceptualization and application of free speech rights both protects progressive speech and leads to progressive political outcomes. In addition, much economic regulation

137. *See supra* Section I.C.

138. Kessler, *supra* note 18, at 2001.

139. Many feminists argue, for example, that pornography subordinates and objectifies women, leading to their silencing—either because they choose not to speak or because others do not take the content of their messages as seriously. For a summary of these arguments, see Goldberg, *supra* note 56, at 2180 & accompanying notes.

140. These rights will be protected as against governmental suppression but will not be protected as against private citizens deterring or disincentivizing others from speaking. Many progressive scholars do not believe the greatest threat to free speech comes from the government. *See* Wu, *supra* note 13, at 548–49 (arguing that the greatest threat to our free speech environment is no longer government suppression, but the attention of listeners and private parties' disruption of the channels of communication). However, the problem of vying for the attention of listeners is a feature, not a bug, of the ideal marketplace of ideas, and the Internet has democratized free speech far beyond traditional media.

can still be upheld, even under a robust interpretation of what constitutes protected speech. There are ways to cabin the expanding commercial speech doctrine to balance interests; these doctrinal possibilities are explored in Part III.

Most fundamentally, sacrificing progressivism to a free speech doctrine that protects viewpoints antithetical to progressive ideology means that courts will also protect viewpoints that promote progressive ideology. In this way, free speech doctrine is nonpartisan. Formally, no side wins.[141] The deregulation of the marketplace of ideas often benefits progressive speech, such as labor picketing and civil rights marches.[142] Our First Amendment jurisprudence on academic freedom, as another example, primarily benefits academics with left-leaning views and historically protected professors with suspected associations with the Communist Party.[143]

Courts have protected speech of radical and subversive or counterculture thinkers and actors throughout the First Amendment's history,[144] and that trend continues today.[145] Although imperfect, courts can and do have a grand history of protecting speech regardless of viewpoint.

By requiring governmental acceptance of the speech of the disempowered, the First Amendment can be not only nonpartisan, but apolitical, leading to substantive outcomes that favor progressives as much as conservatives. Despite many progressive scholars' calls for increased regulation of the Internet,[146] to the extent that progressivism favors marginalized communities over elites, the increased democratization of free speech, through media like the Internet, has

141. Of course, formal equality, while nonpartisan, may not lead to ideologically neutral results, or even the optimal access to the marketplace of ideas. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2156 (2018) ("But to say that courts could, and should, interpret the First Amendment's command in a manner that is less constrained by the requirement of formal equality . . . is to say that courts could, and should, engage in a far more realistic analysis than they currently do of the political, economic, and social realities that impede, or enable, the "uninhibited, robust, and wide-open" public debate that the First Amendment is supposed to make possible--and develop rules in response."). However, the First Amendment can also be substantively apolitical. *See infra* pp. 35–37.

142. Seidman, *supra* note 12, at 2222.

143. *See* Neil H. Hutchins et al., *Faculty, the Courts, and the First Amendment*, 120 PENN ST. L. REV. 1027, 1032 (2016) ("Academic freedom became viewed as possessing a constitutional dimension during the Cold War era, when McCarthyism inspired government officials to inject themselves in public education for the purpose of identifying and expelling communist sympathizers.").

144. *See, e.g.*, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (protecting the academic freedom rights of university professor suspected of having ties to Communism).

145. In *Matal v. Tam*, for example, the Court recently held that the Patent and Trademark Office cannot deny a trademark to an Asian-American band seeking to reclaim Asian-American stereotypes and slurs by naming themselves "The Slants." 137 S. Ct. 1744 (2017)

146. *See* Wu, *supra* note 13, at 572–73.

served progressivism as well, even if companies like Facebook have First Amendment rights to create their own speech architecture.[147] When marginalized, countercultural voices are given counter-majoritarian free speech rights, they can use these rights to change the way disempowered communities are seen and heard, and how the law responds to these communities. Recent examples include the #MeToo movement, which highlights sexual assault and harassment, and the popularity of memes sharing anti-racist information.[148] The #MeToo movement is not only a social and cultural phenomenon; it may lead to changes in the ways the law protects victims of harassment, who are usually women, and how judges sentence those convicted of rape and sexual assault.[149]

Reshaping the First Amendment in order to better serve progressive goals is a fool's errand because it will so disrupt First Amendment law that it will not even be useful to progressives. Progressive scholars who recognize this believe that power should be reclaimed through the democracy, not necessarily though the courts; Professor Seidman further believes that the First Amendment should be demystified as a necessary and inevitable tool for social good.[150] However, the public would not be served by diminished respect for the First Amendment. One intriguing reason Seidman cites as supporting First Amendment "demystification"[151]—that free speech as a right is dogmatic and "dictatorial"[152]—ultimately does not make much sense. According to Seidman, the existence of the First Amendment in the Constitution means that the issue of free speech is, ironically, not truly up for debate.[153]

The error of this argument is that although a constitutional right creates difficulty for change, the First Amendment is the reason we can debate whether free speech is a virtue. Because of our First Amendment protections, we are free to debate the worthiness of the First Amendment.

147. *See* Goldberg, *supra* note 56, at 2189–90.

148. *See* Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/.

149. *See, e.g.*, Charisse Jones, *#MeToo One Year Later: Cosby, Moonves Fall, Sex Harassment Fight at Work Far From Over*, USA TODAY (Oct. 4, 2018 12:11 PM), https://www.usatoday.com/story/money/2018/10/04/metoo-workplace-sexual-harassment-laws-policies-progress/1378191002/.

150. According to Seidman, "[i]f the Constitution is not, and cannot be, a fair and neutral framework that everyone is bound to accept, that is a reason to oppose constitutional obligation. If progressives are harmed by First Amendment mystification, they should favor demystifying the Amendment rather than embracing it." Seidman, *supra* note 12, at 2245.

151. *Id.* ("If progressives are harmed by First Amendment mystification, they should favor demystifying the Amendment rather than embracing it.").

152. *Id.* at 2247.

153. *Id.* ("If the Constitution requires something, then that is the end of the argument, at least in American constitutional culture.").

Instead of feeling beholden to the current First Amendment, some have even proposed amendments to the Constitution to limit the First Amendment, in light of cases like *Citizens United*.[154] As long as viewpoint neutrality persists in free speech doctrine, we are free to consider the extent of our free speech protections and determine whether we are satisfied that they are being applied in a nonpartisan, apolitical way.

Indeed, even cases that appear to favor substantively conservative outcomes eventually aid progressive causes and vice versa. Thus, cases that seemingly favor one side of the political aisle end up benefitting the other side. For example, the decision in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston,* which held that a private parade can exclude the float of an organization comprised of gay, lesbian, and bisexual Irish Americans,[155] ultimately supports the Charlotte Pride Parade's right to exclude the conservative group Gays for Trump.[156] The courts' general antipathy towards censorship of student speech often protects conservative speech,[157] but also shields students from punishment for wearing bracelets declaring "I Heart Boobies" that promote breast cancer awareness.[158] The Supreme Court's decision in *West Virginia Board of Education v. Barnette*,[159] the anti-authoritarian decision that permitted public school students to refuse to stand and salute the flag,[160] was marshalled in *Janus* to allow a conservative child support specialist to refuse to contribute to his public sector union.[161]

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154. Press Release, Rep. Jamie Raskin, House of Representatives, Bipartisan Constitutional Amendment to Overturn *Citizens United* Introduced (Jan. 4, 2019), https://raskin.house.gov/media/press-releases/bipartisan-constitutional-amendment-overturn-citizens-united-introduced.

155. 515 U.S. 557, 559–61 (1995).

156. Eugene Volokh, *Can the Charlotte Pride Parade Exclude Gays for Trump Float?*, WASH. POST: BLOG (June 8, 2017, 6:52 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/08/can-charlotte-pride-parade-exclude-gays-for-trump-float/?noredirect=on&utm_term=.86b39f960176.

157. *See, e.g.*, Blair v. Shippensburg University, 280 F. Supp. 2d 357, 365 (2003) (finding university speech code and harassment policy overbroad after plaintiffs claimed that a reluctance "to advance certain controversial theories or ideas regarding any number of political or social issues because ... she feared that discussion of such theories might be sanctionable under applicable University [S]peech [C]ode[ ]").

158. *See* B.H. v. Easton Area School District, 725 F.3d 293 (3d Cir. 2013).

159. 319 U.S. 624 (1943).

160. *Id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

161. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2463, 2464, 2478 (2018) (citing West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)). Justice Kagan's dissent takes issue with the majority's use of *Barnette* to justify the view that compelling speech works a greater injury than suppressing speech because *Barnette* is an "exceptional" case. *Id.* at 2494 (Kagan, J., dissenting) ("The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious

Of course, courts may not always apply the First Amendment consistently, independent of viewpoint, which leads to perhaps legitimate accusations of First Amendment cynicism. In *Holder v. Humanitarian Law Project*,[162] one of the few cases to hold that a speech restriction survived strict scrutiny, the Supreme Court upheld a law prohibiting "material support" to terrorist organizations, even when this material support came in the form of speech advising the organizations on how to more peacefully accomplish their goals.[163] Perhaps the Justices allowed their antipathy towards terrorism to color their analysis.

Judges are human beings. Some threats may be considered too great to ignore, or judges' political inclinations may get the better of them. Perfect political neutrality is aspirational and asymptotic, but the constant striving betters our jurisprudence. Even just in the last decade, the Supreme Court has decided many First Amendment cases involving controversial speech in a nonpartisan way with wide margins in favor of First Amendment rights.[164] Some have charged the Roberts Court with favoring only certain types of speech, as Justice Roberts has authored opinions deferring to the government in public school and prison cases, yet expanding speech rights for corporations.[165] However, as mentioned earlier, expanding speech rights for corporations is justifiable to the extent the Court does not wish to discriminate on the basis of speaker identity or wishes to use corporations as proxies for listeners' rights—although limiting principles to the expansion of corporate rights should be incorporated into the doctrine and will be discussed later in Part III. And the fact that the government sometimes wins in free speech cases does not necessarily reflect First Amendment cynicism since there are nonpartisan, institutional reasons to be especially deferential to the government for

beliefs.") (internal citations omitted).

162. 561 U.S. 1 (2010).

163. *Id.* at 30 (holding that Congress was justified in finding that even when material support consists of imparting legitimate knowledge, this support can further the violent goals of a terrorist organization, especially if "support frees up other resources within the organization that may be put to violent ends.).

164. *See, e.g.* Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018) (invalidating state law banning political apparel at polling places as impermissibly vague); Lozman v. City of Rivera Beach, 138 S. Ct. 1935, 1954–55 (holding that probable cause to arrest someone who disrupted city council meeting does not bar First Amendment retaliation claim); Matal v. Tam, 137 S. Ct. 1744 (invalidating provision of federal law denying trademarks to marks that disparage groups of people); Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (invalidating state law denying sex offenders access to certain social media websites); Snyder v. Phelps, 562 U.S. 443, 459-60 (2011) (invalidating damages for intentional infliction of emotional distress against controversial religious group protesting at military funerals); United States v. Stevens, 559 U.S. 460, 470 (2010) (invalidating statute criminalizing depictions of animal torture).

165. *See, e.g.*, David H. Gans, *Roberts at 10: The Strongest Free Speech Court in History?*, Constitutional Accountability Center, https://www.theusconstitution.org/wp-content/uploads/2017/12/Roberts_at_10_09_First_Amendment_Snapshot_0.pdf.

speech in public lower schools and prisons.

The best way to generally preserve and continue to facilitate an apolitical First Amendment is to conceive of free speech as liberty, but also to remember that free speech as equality serves important goals. Where both of these approaches can be served, faith in the First Amendment can be at its highest.

B. The "Neutrality" of a Libertarian First Amendment

Because free speech doctrine, by and large, can be both nonpartisan and apolitical, dramatic changes in the doctrine are not necessary to preserve its nonpartisan, apolitical nature. The First Amendment cannot be reshaped to be more progressive without compromising both progressivism and the most essential, nonpartisan, and apolitical aspects of the doctrine. Restoration of belief in a bipartisan First Amendment therefore requires acceptance of civil libertarian tradition, with its strong state action doctrine and viewpoint neutrality, with some limiting principles. This section analyzes why "free speech as liberty," with its emphasis on viewpoint neutrality and governmental nonfeasance, must remain the default paradigm for First Amendment doctrine. There are contexts, however, where "free speech as equality," which guarantees resources for marginal or underrepresented speakers, best serves a nonpartisan, apolitical First Amendment.[166]

As explored in the previous section, the currently dominant free speech as liberty approach does not necessarily have to lead to libertarian political outcomes. This means that even though First Amendment jurisprudence has a libertarian valence, it can still be apolitical.[167] Further, free speech as liberty does not favor speech expressing libertarian ideas, meaning it can be nonpartisan. Although one could argue that, at a high level of abstraction, the choice of "free speech as liberty" is itself political, these arguments would render any interpretive method unavoidably political. The act of interpreting law instead of flipping a coin could also be considered political, at an even higher level of abstraction. For our purposes, what is important is that "free speech as liberty" will treat fairly speech across the political spectrum and that all ideologies can benefit from this approach.

To preserve the nonpartisan, apolitical aspects of the First Amendment, the free speech as liberty model is the best starting point. Because, in that model, all efforts to "skew the private ordering of speech" are treated with

166. These terms and their basic approaches come from Kathleen Sullivan's *Two Concepts of Freedom of Speech*. *See supra* Section I.C.1.

167. *See supra* Section II.A. (arguing that our free speech doctrine has been, and can continue to be, generally nonpartisan and apolitical).

skepticism,[168] free speech as liberty best preserves the viewpoint neutrality and governmental nonfeasance critical to a nonpartisan and apolitical First Amendment. The dominant free speech as liberty regime simply means the Supreme Court takes a generally libertarian approach to free speech doctrine. As noted in the previous section, the doctrine cannot, on a large scale, re-distribute power or cater to the most vulnerable in ways ideal for progressives. This is a feature, not a bug, of a nonpartisan First Amendment, but it means judges need to be vigilant to ensure that the First Amendment is also not predominantly conservative or regressive.

Accepting the generally civil libertarian orientation of free speech doctrine does not mean the free speech as equality model, which provides special solicitude to the speech of the minority or the "little guy,"[169] does not have an important place in the jurisprudence. There are contexts in which the free speech as equality model is consistent with a nonpartisan First Amendment and can foster progressive ideals—to balance out the ways in which a nonpartisan First Amendment yields conservative or libertarian results. However, because free speech as equality "endorses a kind of affirmative action for marginal speech,"[170] its approach should prevail only in cases where free speech as equality makes governmental discrimination on the basis of viewpoint *less likely*. Cases of this nature, where the free speech equality model serves a nonpartisan First Amendment, generally occur where the government has already intervened, such as cases involving government subsidies, or in cases where the government must intervene because nonintervention would give the government too much discretion to discriminate on the basis of viewpoint, such as heckler's veto cases.

As examples, the government must generally allow access for speech on public land classified as a public forum.[171] This access provides speakers with fewer resources advantages in the marketplace of ideas that they would not otherwise have had.[172] The designation of land as a public forum benefits speech across the political spectrum, but on the whole favors those with less money and power, thus creating substantive

168. Sullivan, *supra* note 15, at 145.

169. *Id.* at 145–46.

170. *Id.* at 145.

171. *See id.*

172. In a traditional or a designated public forum, content-based restrictions on speech must survive strict scrutiny, and even content neutral restrictions must allow sufficient access to the forum. *See Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45 (1983) ("For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.") (citations omitted).

equality in a way that aligns with progressive ideology. This restriction on government censorship on public land bolsters the apolitical aspects of the First Amendment by undercutting some of the conservative results inherent in nonpartisan free speech doctrine.

The free speech as equality model works well for traditional and designated public fora because the government is already involved in land ownership and governmental nonfeasance is impossible, so requiring equal access ensures that the government does not have the discretion to discriminate against speech on the basis of viewpoint. Of course, the government may place conditions on speech when it explicitly funds certain activities,[173] even if it may not deny government benefits on the basis of viewpoint, and has much more discretion to restrict speech in nonpublic fora, such as schools and prisons.[174] Courts must continue to distinguish public from nonpublic fora, and to distinguish government funding activities from participation in government programs/access to government benefits,[175] in a way that makes free speech doctrine less political. Student activities fees at public universities, for example, must be administered in a viewpoint neutral fashion,[176] providing resources to groups that might not be able to procure their own funding.

Another example of the free speech as equality model best serving an apolitical, nonpartisan First Amendment is the doctrine's approach to instances where controversial speakers elicit violent or destructive reactions from listeners. In those cases, the government may not pass security or cleanup costs off to speakers in the form of increased costs for speaking permits.[177] This rule, which may be described as providing benefits to controversial speech, embraces an anti-"heckler's veto" principle: the government must not punish speakers for the violent reactions of listeners, thus preventing hecklers from serving as censors.[178]

173. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that the government may prohibit recipients of public family planning funds to engage in abortion counseling because "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way").

174. Sullivan, *supra* note 15, at 159–60 (discussing how free speech rights do not extend to places like airports and schools and how the government may limit the rights of public employees).

175. *See* Matal v. Tam, 137 S.Ct. 1744, 1761 (2017) (distinguishing the trademark regime, where the government may not discriminate on the basis of viewpoint from direct, monetary government funding of certain activities).

176. Rosenberger v. Rector, 515 U.S. 819 (1995).

177. Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992); *see also* Erica Goldberg, *Must Universities Subsidize Controversial Ideas: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349 (2011) (applying *Forsyth* to public universities charging student groups for hosting outside speakers and arguing security fees must be imposed in a content neutral way).

178. Goldberg, *supra* note 177, at 358–59 (discussing heckler's veto jurisprudence and scholarship).

Here, free speech as equality protects the speech of those on the margins of society, especially those without vast resources, and ensures nondiscrimination by the government. One reason for the heckler's veto principle is that the government cannot be given too much discretion to determine what price to charge for speech (in the form of speaking permits) because variations in cost may conceal governmental decisions to discriminate on the basis of viewpoint.[179] When the government grants permits to speakers wishing to host parades or rallies, it cannot give itself such broad latitude that it can hide discrimination on the basis of viewpoint.[180]

Indeed, the government generally has an affirmative duty to protect speakers instead of arresting them[181] – and thus state actors do not have the leeway to alter how much security they provide to speakers based on whether or not state actors (e.g., the police) deem the speech acceptable or objectionable. In this way, state actors, if they already provide police assistance to prevent violence generally (which every state does), must do so to protect controversial speakers, regardless of ability to pay. This approach preserves viewpoint neutrality by prohibiting the state from determining which speech it prefers when providing security services.

In cases where the government must necessarily intervene, free speech as equality ensures that the government does not discriminate on the basis of viewpoint when it provides services, grants subsidies, or otherwise has the ability to exercise potentially pretextual discretion. Limited to these contexts, where the government already is intervening in some way—either on its own land, in providing subsidies or issuing permits, or in providing background security generally, free speech as equality serves a nonpartisan First Amendment well. Outside of these contexts, however, free speech as equality has the potential to undermine the nonpartisan viewpoint neutrality of free speech doctrine.

When free speech as liberty and free speech as equality are in conflict with each other, the most apolitical solution is to favor the free speech as liberty model. Deferring too much to the free speech as equality model requires governmental determinations as to who is worthy of special

179. *Id.* at 354–56 (discussing Forsyth's disapproval of licensing schemes that provide too much discretion to discriminate on the basis of viewpoint or that facially discriminate based on listener reaction).

180. *Forsyth*, 505 U.S. 123 at 130 (holding that a permit licensing scheme in a public forum "may not delegate overly broad licensing discretion to a government official" and that "any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message). Charging extra fees for speech where the government expects listeners to have violent reactions impermissibly discriminated against speech on the basis of its message. *Id.* at 135–36.

181. In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Supreme Court overturned a conviction for speech that disturbed the peace because police should have handled the hostile crowd instead of silencing the speaker. *Id.* at 544-45, 550. However, if the police cannot stave off an angry crowd, they may interfere with the speech of a lawful speaker. *See* Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public Schools*, 12 HASTINGS CONST. L.Q. 1, 12 n.64 (1984).

governmental solicitude, thus compromising viewpoint neutrality. Courts should be careful not to extend jurisprudence on the heckler's veto into spheres where the government has not acted—and need not act—in order to reduce governmental discretion and solicitude that may foster viewpoint discrimination. In those spaces, requiring governmental action to serve the free speech as equality model would give the government too much discretion to judge speech based on its underlying viewpoint.

For this reason, we should be wary of extending principles relating to the heckler's veto, as Professor Tim Wu proposes, to combating everything from fraud to harassment on the Internet.[182] According to Professor Wu, "[t]he police officer whose duty it is to protect speakers from harassment and attack needs to turn his or her efforts to protecting online speech."[183] Extending heckler's veto principles beyond protecting speakers from violent or disruptive conduct into protecting speakers from objectionable and potentially unprotected speech by others on the Internet cannot be accomplished, however, without making judgments about the content of the heckler's *speech*, whereas the government's duty to protect controversial speakers from imminent *violence* does not require judgment calls about the nature of the speech at issue. Instead of extending free speech as equality principles into domains where they may facilitate viewpoint discrimination, courts should simply apply the current doctrines balancing tort principles and free speech rights to the Internet, with the usual high standards for determining when speech becomes unprotected harassment, threats, libel, or fraud.[184] The free speech as liberty model generally works best for online speech because it is not a governmental forum, and the government's intervention is not a pre-requisite to the speech or necessary to prevent imminent violence.

The Court can massage the doctrine, however, to facilitate the reality and the perception that everyone benefits from free speech doctrine, not just the rich or the corporations.

III. DE-POLITICIZING THE DOCTRINE AND ENSURING FAIR PROTECTION

There are ways that the Supreme Court can reduce the perception that the First Amendment is currently a tool of conservative policies, or that liberals have abandoned free speech in an unprincipled way. One way is to more closely control the docket of free speech cases. Another way is to place limiting principles into the current doctrine to ensure that those

182. *See* Wu, *supra* note 13, at 572.

183. *Id.*

184. *See* Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 824, 865–66 (2015) (exploring why certain categories of speech, such as libel, harassment, and obscenity, are unprotected and discussing the doctrines that create the exceptions from protection).

who most need the First Amendment can receive its benefits.

This Part first discusses how the Court should arrange its First Amendment docket to best guard against accusations of First Amendment cynicism. Next, this Part discusses ways to approach the doctrine to move it closer to its aspirational goals of being apolitical and nonpartisan, especially in the areas of corporate speech, the intersection of free speech and economic restrictions, and hate speech.

A. Managing the Docket

The Court should be mindful of the cases it selects for its docket. Chief Justice Roberts cares greatly about the Supreme Court's legitimacy,[185] especially about the public's perception of the Court as legitimate.[186] In the current climate of First Amendment skepticism, the Court would be better served taking cases where the free speech as liberty and free speech and equality models overlap. Cases where free speech as liberty and free speech as equality overlap will generally involve a politically unpopular, marginalized, or somehow vulnerable actor, especially one who does not belong to a group that traditionally wields power or privilege, being denied—by the government—certain speech rights or access to particular speech media.

An excellent recent example of where the interests underlying free speech as liberty and free speech as equality intersect is *Packingham v. North Carolina*.[187] In that case, convicted sex offenders who completed their sentences, like Lester Packingham, were prohibited from accessing social media sites that had particular functions, such as the ability to directly message people.[188] Convicted sex offers in North Carolina, therefore, could not use websites such as Washingtonpost.com or Facebook.[189] Indeed, Mr. Packingham was convicted under this law for creating a Facebook post about a good experience getting a traffic ticket dismissed.[190] The Court unanimously overturned this conviction, with

185. *See, e.g.*, Tonja Jacobi, *ObamaCare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 767 & n.22 (2013) ("Roberts has stressed throughout his chief justiceship that building large coalitions is key to the Court's legitimacy and his own measure of success.").

186. Some see Chief Justice Roberts as desiring to preserve the Court's power, which is distinct but related to the public's perception of the Court's legitimacy. *See* Benjamin Softness, *Preserving Judicial Supremacy Come Heller High Water*, 161 U. PA. L. REV. 623 627 n. 24 (2013) (citing sources for the proposition that the Chief Justice's opinion in NFIB v. Sebelius, 567 U.S. 519 (2012), the cases involving a constitutional challenge to the Affordable Care Act, "was a masterclass in power preservation").

187. 137 S. Ct. 1730 (2017).

188. North Carolina made it a criminal offense for registered sex offenders "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." *Id.* at 1733.

189. *Id.* at 1736-37.

190. *Id.* at 1734.

five Justices signing onto the majority opinion, three Justices concurring in the result, and one Justice taking no part in the opinion. Central to the Court's ruling was the view that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[191]

Packingham fits nicely into the free speech as liberty model because the government had deprived Mr. Packingham of the ability to engage in speech online, blocking access to the marketplace of ideas for those it deemed too dangerous. The case also fits nicely into the free speech as equality model because convicted sex offenders are a maligned and stigmatized population, and often the government isolates and punishes this group in ways that become oppressive. Convicted felons are also a generally vulnerable and less powerful population. Because the state cannot police and prevent sex offenses by simply prohibiting access to certain speech private forums, like Facebook, the government will have to spend more money policing sex crimes in other ways. In this way, Mr. Packingham's speech, or access to social media, can be viewed as both impermissibly penalized (free speech as liberty) but also requiring subsidization (free speech as equality) by the government. The government, not he, will incur the increased costs, in the wake of *Packingham v. North Carolina*, of prosecuting recidivist sex offenders. This subsidization is not diluting the ability of others from speaking in order to give Mr. Packingham greater speech rights, but simply works as a way to prevent the government from using its power to affect the private marketplace of ideas. A case like *Packingham* is exactly the kind of case, unlike, say, *Citizens United*,[192] where using the free speech as equality approach would lead to less viewpoint discrimination, not more.

Granting certiorari in cases like *Packingham*, which will garner large victories for free speech and will allow the public to see that First Amendment doctrine need not be political, or politically polarizing. Then, when cases like *Janus* are decided, there is more of a buffer preventing the public from losing faith precipitously in First Amendment jurisprudence.

Of course, this type of docket-managing will succeed only if the Justices wish to de-politicize both *actual* First Amendment doctrine and the public's *perception* of free speech jurisprudence. Some have accused Justices of purposely selecting cases to lay the groundwork for results

191. *Id.* at 1737.

192. In *Citizens United*, 558 U.S. 310 (2010), the majority rejected prior cases' application of the antidistortion principle, where the speech of the more powerful can be silenced in order to allow other speech to have increased influence. *See id.* at 349 ("If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.").

they like politically. For example, Justice Kagan noted, in *Janus*, that some Justices "were working overtime,"[193] trying to cast doubt upon *Abood* without overruling it, in a "6–year crusade to ban agency fees."[194] Her view seems to be that some Justices were inserting language into cases, or perhaps selecting cases strategically, to, over time, erode the underpinnings of *Abood* before it could be explicitly overruled. Many have also criticized Justice Alito for purposely attempting to find cases like *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, where a Christian baker asserted a First Amendment right to refuse to create a custom-made wedding cake for a same-sex wedding, so that he can advance a particular partisan agenda.[195]

If Justice Alito has a particular view of free speech, and that informs how he selects cases, critics who simply disagree with the outcomes he reaches do not have a true, principled objection to either his selection of cases or his jurisprudence. However, if Justice Alito is choosing free speech cases that allow him to reach results he prefers—in a way that is unrelated to his views about the First Amendment—he is contributing to First Amendment cynicism and justifying allegations of First Amendment cynicism.

If so, scrutinizing his docket-managing is justified. Justices seeking to politicize the First Amendment should be called to account for their First Amendment cynicism, and we should develop a constitutional culture where Justices are encouraged to fully articulate their broader theories of jurisprudence and how their opinions do not consistently accord with their political views. However, the best way to do this may not be through easily and glibly quoted (and misquoted) language in a Supreme Court opinion. Rather, rigorous, academic, open-minded scholarship should be devoted to gauging whether *Janus* is justified, and whether Justice Alito is consistent in his view of free speech. And even if Justice Alito is unprincipled, which he may be, *Janus* was signed onto by four other Justices, including former Justice Kennedy, who has an expansive view of free speech rights that easily accords with the outcome the majority reached in *Janus*. Allegations of free speech cynicism should not be made lightly, as they create a vicious cycle, perhaps one we are currently experiencing.

193. *Janus*, 138 S. Ct. 2448 at 2501 (Kagan, J., dissenting).

194. *Id.* at 2500.

195. 138 S. Ct. 1719 (2018). The Court ultimately decided the case based on the baker's religious liberty, postponing the question of whether custom-designed cakes are speech that cannot be compelled by anti-discrimination laws for another day. *See id.* at 1732.

B. Corporate Speech and Economic Regulations

Although unpopular among progressives, our current approach to the speech rights of corporations, especially as exemplified by cases like *Citizens United*, does fit well within the free speech as liberty vision of the First Amendment.[196] However, there are ways the Court can mitigate the politically skewing effects of broad free speech rights for corporate actors. For example, the Court can partially disentangle free speech rights from economic liberties by limiting the exceptions created from generally applicable economic restrictions for speakers such as the media and religious individuals. The Court should further clarify that in the commercial speech context, compelled speech is not as constitutionally problematic as suppression of speech.

First, many of the seminal cases that bound up economic liberties with free speech rights involved exceptions to generally applicable laws for the media or religious pamphleteers.[197] The Supreme Court can hold, without overruling many of these cases, that exceptions from generally applicable economic regulations that make speech more expensive, but do not compel speech or necessarily prohibit speech, will be granted only if the economic regulation (such as a tax) will severely restrict the speaker's ability to speak. The Jehovah's witness peddling-tax cases would have to be overruled, to the extent that the witnesses had not alleged that the peddling taxes "were so excessive as to be prohibitory," although these cases perhaps could be sustained statutorily by the principle that selling religious literature may not be a commercial enterprise, and thus may not fall within the legislature's licensing or tax provisions.[198]

Of course, the government cannot specifically target religious pamphleteers or newspapers,[199] but it can include them in generally applicable economic restrictions—including restrictions that affect the profits received from advertising[200]—unless those restrictions would severely curtail an individual or corporation's speech activities. By making a few doctrinal changes, which cohere with the rest of First Amendment jurisprudence,[201] the Court can begin to disentangle speech

196. *See infra* Section II.A.

197. *See supra* Section I.C.2.

198. *See* Murdock v. PA, 319 U.S. 105, 111 (1943) ("But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise.").

199. Thus, a tax on newspapers of a certain circulation, as in *Grosjean v. American Press Co*., 297 U.S. 233 (1936), will still be unconstitutional, as a targeting on certain types of newspapers.

200. Thus, the Court could repudiate the dicta in *Grosjean* that anything that has a tendency to affect advertising revenue is a prior restraint on speech. *See* Kessler, *supra* note 12, at 1966–67.

201. Religious speech is generally not treated with special solicitude under the First Amendment. According to a compelling view, the First Amendment deprives the government of the power to restrict all speech, and thus does not grant special deference to any particular brand of speech. *See* Jay S. Bybee,

rights from economic regulations.

In addition, the Court can and should more explicitly note that in the commercial speech context, compelled speech does not work as great a First Amendment harm as the suppression of speech. As Amanda Shanor noted, "while the Supreme Court recently affirmed the asymmetry of constitutional protection that applies to regulations that compel rather than restrict commercial speech in *Milavetz, Gallop & Milavetz, P.A. v. United States*,[202] some circuit court decisions have not been so clear."[203] In *Milavetz*, the Court cited prior decisions for the proposition that "[u]njustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, but 'an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.'"[204]

By reaffirming with no ambiguity that disclosure requirements related to preventing deception in the commercial context are generally not constitutionally problematic, the Court could mitigate the worry that, in an era of soft paternalism where regulations take the form of mandatory disclosure instead of outright prohibition, free speech will not undo the administrative state.[205] Compelled speech is not as problematic as suppression of speech with respect to corporations engaging in purely commercial speech because the primary reasons the First Amendment prohibits compelled speech are inapplicable. In *Janus*, for example, the Court held that compelled speech *is equally corrosive* as suppression of speech, but the Court's rationale was applicable only in cases where an individual, such as Mark Janus is speaking, not a corporation. In *Janus,* the reason compelled speech was considered even more harmful than the suppression of speech is because compelled speech forces individuals to disobey and explicitly disavow their consciences. Corporate disclosures involving purely commercial (not political) speech do not suffer from this problem because a corporation is not an individual, and thus does not have the same autonomy rights. Courts should therefore hold that requiring certain types of disclosures for corporations are permissible.

This distinction between suppression of speech and compulsion of speech in the commercial speech context would not compromise the

Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment, 75 TUL. L. REV. 251, 313–16 (2000) ("[T]he First Amendment is an immunity of general applicability, which means that when the government has violated anyone's First Amendment rights, the law (as applied to everyone) is unconstitutional.").

202. 559 U.S. 229 (2010).

203. Shanor, *supra* note 18, at 152.

204. Milavetz, 559 U.S. 229, 250 (2010) (quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985).

205. *See supra* Section I.A.

rationales behind *Citizens United*. The federal law overturned in *Citizens United*, the Bipartisan Campaign Reform Act, involved *suppression* of core, political speech: a documentary about Hillary Clinton made by a nonprofit corporation. By prohibiting corporations to spend money on documentaries like the one at issue in *Citizens United*, the Court was suppressing speech and discriminating on speech based on speaker identity, skewing the marketplace of ideas for all listeners. However, in cases of mandatory disclosures for corporations, especially those that are related to preventing deception, there should be less protection for compelled speech because the corporation is not being asked to betray individual convictions, so the rationale behind compelled speech—not wanting to force individuals to declare something antithetical to their private consciences—is not relevant.

This logic also explains why controversial corporate disclosures that are an attempt to affect the marketplace of ideas, especially if the content compelled undermines the views of the corporation, should be unconstitutional. Preserving the distinction between compelled speech and suppression of speech for commercial, nonpolitical, corporate speech does not mean that all compelled corporate disclosures will be constitutionally permissible. Forcing a private utility company to include in its billing statements opinions of third parties that contradict content expressed in the utility's newsletter was deemed unconstitutional.[206] The state's interest must still be in informing consumers about attributes of the specific product in a way that either prevents deception or provides facts about something consumers have expressed an interest in knowing.[207] In general, greater scrutiny should be given to disclosure requirements that go beyond preventing deception, as these may be intended to *affect* consumer preferences as opposed to simply *inform* consumers about the attributes of a product. Further, when the speech becomes controversial or not "purely factual,"[208] or is designed to influence the marketplace of ideas instead of the actual marketplace, then the compelled disclosure should not pass the *Central Hudson* test for commercial speech.[209]

Recently, the Supreme Court invalidated disclosure requirements on

206. Pacific Gas & Elec. v. Public Utilities Comm'n of California, 475 U.S. 1, 4, 11 (1986).

207. The District of Columbia Circuit Court of Appeals has held that a permissible government interest need not be solely in preventing deception to consumers, but did not articulate exactly what type of interests are sufficient. *See* Am. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d 18, 23 (D.C. Cir. 2014) (allowing "substantial" interests to justify compelled corporate disclosure, although noting that the term substantial "seems elusive").

208. *Id.* at 27. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the Supreme Court held that purely factual and uncontroversial disclosure requirements that relate to commercial transactions will be upheld unless they are "unjustified and unduly burdensome." 471 U.S. 626, 651 (1985).

209. *Am. Meat Inst.*, 760 F.3d at 26 (applying *Central Hudson* to "country of origin" labeling for meat and finding the mandatory disclosure requirement constitutional).

so-called "crisis pregnancy centers," which provide services for women in order to serve as an alternative to their procuring of an abortion, because abortion is "anything but an 'uncontroversial' topic,'"[210] and the disclosure requirements were either unduly burdensome,[211] or unrelated to the specific services being provided by the pregnancy centers.[212] This decision accords with the notion that corporate disclosure requirements should generally pass constitutional muster, unless they are designed to influence the marketplace of ideas, or unless they touch upon the actual conscience of the individual actors comprising the corporation.

Beyond allowing for greater regulation of corporate disclosures and more disaggregating of free speech liberties from economic restrictions, the Supreme Court should draw clearer lines between speech and conduct, especially for speech that implicates historically disadvantaged groups. The speech about these groups should be protected, but conduct causing further oppression can be more greatly scrutinized.

C. Hate Speech and the Speech/Conduct Distinction

Many progressives champion creating an exception from First Amendment protection for "hate speech."[213] America is exceptional among Western democracies for protecting this type of speech.[214] Despite what appears to be vast misinformation among the public to the contrary, hate speech is not an unprotected category of speech.[215] This country's commitment to viewpoint neutrality, fundamental to our free speech regime, mandates this bit of American exceptionalism. That said, the Court should be vigilant to guard against transforming the necessary First Amendment protections for hateful and bigoted speech, which disproportionately harm historically disadvantaged groups, into a way for free speech doctrine to produce an overabundance of outcomes that undermine progressive causes.

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210. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018).

211. *Id.* at 2377.

212. *See id.* at 2373 ("The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion. . . .").

213. *See, e.g.*, Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010); MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); Richard Delgado, *Words That Wound; A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143-45 (1982).

214. *See* Waldron, s*upra* note 213, at 1597-98; *see also* Guy E. Carmi, *Dignity--The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 988-89 (2007) (describing America's approach, unique among Western democracies, of favoring freedom of expression over the elusive concept of "human dignity").

215. Ken White, *Actually, Hate Speech is Protected Speech*, L.A. TIMES (June 8, 2017).

One way the Court can guard against hate speech protections rendering the First Amendment too politically polarizing is to clarify, at an abstract level, the distinctions between protected speech, which receives the highest constitutional scrutiny, expressive conduct, which received intermediate scrutiny, and unprotected conduct.[216] In cases involving free speech challenges to public accommodations laws,[217] the Supreme Court should clarify what constitutes pure speech and what constitutes expressive conduct, thereby allowing public accommodations laws that prevent discrimination in the provision of goods and services to trump free speech rights when expressive conduct, and not pure speech, is at issue.[218] In a future case similar to *Masterpiece Cakeshop*,[219] where the Colorado Civil Rights Commission sued a Christian baker who refused to make custom-design cakes for same-sex weddings, the Court must clarify where First Amendment rights insulate people from public accommodations laws. Perhaps a cake is expressive conduct, while the words on a cake are pure speech.[220] Or perhaps even stock phrases on a cake are not pure speech, if they are commissioned by another,[221] but photographs—a traditional medium of artistic expression—are always pure speech.[222] Where the Court draws the line, in terms of restoring faith in the First Amendment generally, may actually be less important than creating a line that is clear, defensible, and consistently applied.[223] Drawing the line between speech and expressive conduct in this arena will not be obvious or easy, but creating clear jurisprudence and then applying it consistently will be paramount to reducing concerns about First Amendment cynicism.

The other increasingly relevant domain involving hate speech, where courts will have to draw clear, meaningful lines, involves rallies by groups

216. *See supra* note 113.

217. This issue was presented in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), but the Court decided the case on religious liberty grounds instead.

218. For deeper analysis on this issue, *see* Goldberg, *supra* note 50, 657–62.

219. *See supra* notes 197 & 219.

220. *See* Goldberg, *supra* note 50, at 660 ("The writing on a cake, if conveying a unique message, likely should be considered pure speech . . . .").

221. *Id.* ("Plus, the application of the expressive conduct test demonstrates that very little speech appreciable by a reasonable observer would be compelled by requiring bakers to offer cakes on the same terms to all customers. This application of the expressive conduct test further illustrates why a blank cake should not be considered speech, but expressive conduct, in the first place.").

222. This is the argument made in a brief by Dale Carpenter and Eugene Volokh. *See* Brief for American Unity Fund & Profs. Dale Carpenter & Eugene Volokh as Amici Curiae in Support of Respondents, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4918194, at *14 (arguing that courts should treat as pure speech items, even those sold in commerce, that use media traditionally associated with expression).

223. Surely, where the Supreme Court draws the line is highly significant for those affected by the outcome of the case, but in terms of First Amendment and rule of law principles, clear line drawing that maintains the doctrine's nonpartisan and apolitical is paramount.

associated with hateful speech or conduct. Currently, cities may attempt to block rallies held by groups associated with white supremacist views, especially after the deadly Unite the Right rally in Charlottesville, Virginia.[224] Unfortunately, many groups are going to have some number of violent adherents, and the organizers of a rally should not be punished in the form of censorship for the actions of members, and the government cannot dent permits only to groups with certain viewpoints based on the violent actions of outlier members, if groups with differing viewpoints and potentially violent outlier members are granted rally permits. However, if a hateful group is encouraging or inciting violence, the city should not have to permit rallies for speech that has lost its protection due to the necessarily high incitement standard.[225]

As an example, the City of Dayton initiated a lawsuit against the Honorable Sacred Knights, an organization affiliated with the Ku Klux Klan, and its leader Robert Morgan.[226] The Honorable Sacred Knights received a permit from Montgomery County to hold a rally at Courthouse Square in Dayton,[227] and the City alleged that this rally, which will include 10 to more than 20 members, would constitute both an illegal paramilitary operation and a public nuisance.[228] Rally attendees had made inflammatory, hateful posts to social media, have pointed guns at the camera and held nooses, which, if the organizers or key members reasonably expected to produce imminent lawless action and would reasonably incite imminent lawless action, would rise to the level of unprotected incitement.[229] In addition, although the heckler's veto requires the police to protect speakers from violent reactions instead of arresting speakers, if a city cannot protect its citizens, it is permitted to disrupt speech to declare a state of emergency.[230]

That said, courts need to be extra cautious about finding that rally organizers encourage violent conduct, because weakening the incitement

224. *See* Associated Press, *James Alex Fields' Trial in Deadly Charlottesville White Nationalist Rally Set to Begin*, NBCNEWS.COM (Nov. 26, 2018, 8:25 AM), https://www.nbcnews.com/news/us-news/james-alex-fields-trial-deadly-charlottesville-white-nationalist-rally-set-n939991.

225. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

226. *See* Complaint, City of Dayton v. Honorable Sacred Knights and Robert Morgan, Case No. 2019 CV 01109 (Ohio. Civ. Div. Mar. 13, 2019.).

227. Chris Stewart, *Klan Rally Permit Approved by Montgomery County: We Are Legally Obligated,* DAYTON DAILY NEWS (Feb. 22,2019), https://www.daytondailynews.com/news/local/klan-rally-permit-approved-montgomery-county-are-legally-obligated/rusoUfEPag21x3WOlaw8WJ/.

228. *See* Complaint, *supra* note 226.

229. *See supra* note 120.

230. *See supra* note 177.

standard is an easy way to pretextually discriminate on the basis of viewpoint. Groups across the political spectrum have adherents who advocate some forms of violence in some situations. Courts should be reluctant to simply make the problem of white supremacist rallies go away by declaring certain groups paramilitary organizations simply because some members carry weapons – but may find that groups are unlawful paramilitary entities if they train their members to use firearms for violence, during rallies or otherwise.[231] Ultimately, the City of Dayton settled with the Honorable Sacred Knights, who were permitted to bring some guns to the rally but not carry assault rifles.[232] Only nine members demonstrated, and no violence occurred, but protecting the city from potential clashes between the Honorable Sacred Knights and the counter protesters cost the city $650,000.[233] This is a hefty price to pay, but much of the security concern comes from the number of counter protesters, who, far outnumbered the Honorable Sacred Knights members.[234]

One way out of our current vicious cycle of First Amendment cynicism is to strengthen our commitment to protect even the most noxious, hateful ideas, so long as they do not materialize into conduct. Progressives are needed to commit themselves to this approach. Of course, hateful speech disparages the historically marginalized based on identity characteristics, and thus is speech especially antithetical to the progressive mission. To convince progressives that this speech must be protected anyway, progressives must first be given examples, like Black Lives Matter, or even rock and roll music (and its relationship to suicide or homicide),[235] where certain groups were blamed for the violent actions of their adherents, or even perceived adherents.[236] Thus, members of

231. *See, e.g.*, City of Charlottesville v. Pa. Light Foot Militia, No. CL 17-560, 2018 WL 4698657, at *7 (Va. Cir. Ct. July 7, 2018) ("Plaintiffs assert that Redneck Revolt along with the various other militia-type groups, assembled with the purpose of training, practicing with, and/or being instructed in the use of firearms and other techniques… capable of causing injury or death. Plaintiffs also allege that Redneck Revolt's intent was that its actions would be used in the context of and in furtherance of a civil disorder, and such is planned in the future.").

232. Chris Stewart, *Dayton, Klan Group Reach Agreement over Guns, Masks*, DAYTON DAILY NEWS (May 14, 2019), https://www.daytondailynews.com/news/crime--law/dayton-klan-group-reach-agreement-over-guns-masks/FXfl36HwAXFfGDAf7CBF8N/.

233. Donica Phifer, *Ohio City Spends $650,000 for Security During Ku Klux Klan Rally*, NEWSWEEK (May 27, 2019), https://www.newsweek.com/ohio-city-spends-650000-security-during-ku-klux-klan-rally-1436881.

234. Ari Berman, *Nine Klan Members Showed Up to Their Ohio Rally. Six Hundred Anti-Racists Came, Too*, MOTHER JONES (May 26, 2019), https://www.motherjones.com/politics/2019/05/9-klan-members-showed-up-to-their-ohio-rally-600-anti-racists-came-too/.

235. Peter Alan Block, *Modern Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 777–79 (1990) (discussing lawsuits filed against musicians and producers based on perceived hidden messages or the content of the songs).

236. *See, e.g.*, German Lopez, *There's Nothing Linking Black Lives Matter to a Texas Cop's Death. Fox News Did It Anyway*, VOX (Sept. 3, 2015), https://www.vox.com/2015/9/1/9239643/black-lives-

organizations of various political stripes should remain concerned about denying access to groups looking to organize or host marches or rallies.

Finally, allowing open access to speech in a public forum serves progressive ideology, because it increases access to audiences for those with less money and power. In this way, allowing even a Ku Klux Klan-affiliated group to march is consistent with the free speech as equality approach to the First Amendment.

CONCLUSION

Loss of faith in the judiciary and rule of law ideals are a special concern in the context of the First Amendment. Unless courts apply free speech protections in nonpartisan ways that lead, on net, to apolitical outcomes, the primary purpose of free speech rights is nullified even as the doctrine is applied. Instead of the government's engaging in viewpoint discrimination, the courts will then have favored certain speech based on its viewpoint. Both the political left and the right have been accused of improper and politically motivated interpretations of the First Amendment, but these accusations are overstated and can be jurisprudentially dangerous.

To mitigate the current vicious cycle of First Amendment cynicism, where perceptions of political applications of the doctrine lead to a loss of faith in a politically neutral First Amendment regime, courts should generally consider a libertarian approach to the First Amendment, but must temper this with an egalitarian approach to the First Amendment in cases of necessary government intervention, such as heckler's veto cases. Further, the Supreme Court can better manage its docket to select more cases where the free speech as liberty and free speech as equality conceptions overlap; should take specific measures to disentangle economic rights from free speech rights; and should ensure that the necessarily robust for hate speech do not insulate hateful conduct from constitutional scrutiny. A restoration of faith in our First Amendment is possible and may precipitate a reaffirmation of rule of law principles in general.

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