

February 2017

## Commoditized Speech, “Bargain Fairness,” and The First Amendment

Andrew Tutt

Follow this and additional works at: <http://digitalcommons.law.byu.edu/lawreview>



Part of the [Commercial Law Commons](#), and the [First Amendment Commons](#)

---

### Recommended Citation

Andrew Tutt, *Commoditized Speech, “Bargain Fairness,” and The First Amendment*, 2017 BYU L. Rev. 117 (2017).

Available at: <http://digitalcommons.law.byu.edu/lawreview/vol2017/iss1/6>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# Commoditized Speech, “Bargain Fairness,” and The First Amendment

*Andrew Tutt\**

## INTRODUCTION

Whatever else it is, speech is also frequently a commodity. Many of the products and services people purchase also happen to be speech. Books, magazines, movies, driving directions, relationship counseling, financial advice, and bulk data do not begin to scratch the surface of the examples one might give. Conversely, people also regularly pay for silence. They purchase the right to have their secrets kept, their confidences respected, and their reputations shielded. In commercial settings, the government frequently intervenes to mandate disclosure or decree silence—prohibiting materially misleading statements in securities markets, requiring warning labels in product markets, and prohibiting sexual harassment in the workplace.

What is particularly interesting about markets in products and services that happen to be speech is that they blossom in the First Amendment’s shadow. The Supreme Court once famously said “[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>1</sup> Yet, to a notable extent, numerous laws governing transactions in speech markets prohibit or require speech on precisely those bases. Courts and scholars are still grasping for a theory that safeguards important First Amendment values and makes sense of the doctrine.<sup>2</sup> Some prominent scholars appear to believe that

---

\* Attorney-Adviser, Office of Legal Counsel, Department of Justice. The views expressed in this Article are the author’s only and do not necessarily reflect the views of the Department of Justice or the Office of Legal Counsel. The author wishes to thank the participants at the 2015 Freedom of Expression Scholars Conference who provided invaluable feedback on an earlier draft, especially Ariel Bendor who provided a comprehensive critique. The author also wishes to thank Claudia Haupt for her thoughtful comments.

1. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

2. *See, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1784–85 (2004) (explaining that “however hard we try to theorize about the First Amendment’s boundaries, and however

there is no general principle and that courts should work case by case to weigh the First Amendment values at stake.<sup>3</sup>

This Article makes the provocative claim that there is a general principle governing the “commoditized speech” cases, one that credibly safeguards First Amendment values and that judges can manage. This Article terms that principle the “bargain fairness” model of First Amendment review. The test is as follows: when economic regulations equalize the relative bargaining power between parties negotiating over products and services that also happen to be or involve speech, the Court defers; when economic regulations have other purposes, the Court intervenes. The fair bargain conception, simple as it is, is highly resilient and explains a range of seemingly unrelated First Amendment holdings. It explains why the Court strikes down laws preventing people from purchasing movies, videogames, books, and prescriber-identifying information, while also explaining why the Court upholds laws permitting people to sue promise-breaking newspapers, magazines that publish unauthorized excerpts from forthcoming books, lawyers for malpractice, and employers for sexual harassment.<sup>4</sup> It also helps explain the structure of the murky law of unconstitutional conditions—why, in particular, a public school teacher cannot be fired for publishing a letter to the editor critical of the local schoolboard but a prosecutor can be fired for circulating an office-wide questionnaire critical of management.<sup>5</sup> Additionally, it helps explain why the courts permit greater speech regulation in circumstances involving financial monopolies. In all of

---

successful such theorizing might be as a normative enterprise, efforts at anything close to an explanation of the existing terrain of coverage and noncoverage are unavailing.”).

3. See, e.g., Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251–82 (1983) (arguing that the court employs an “eclectic” approach to First Amendment cases in which “a number of variables interact in complex ways” and suggesting that this approach is normatively attractive).

4. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011) (striking down ban on videogame sales); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down ban on purchase of prescriber-identifying information); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (permitting hostile workplace sexual harassment claims); *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (permitting promissory-estoppel suit against newspaper for failing to keep promise to keep source’s identity confidential); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (permitting copyright infringement action against magazine publishing unauthorized excerpts from forthcoming presidential memoir).

5. See *Connick v. Myers*, 461 U.S. 138 (1983) (permitting firing for circulating questionnaire); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (invalidating firing for publishing letter to the editor).

these circumstances, the Court applies bargain fairness review to the laws at issue.

Beyond its explanatory power, there are reasons to regard the bargain fairness model as a normatively adequate compromise between competing approaches the Court might have taken to address the relationship between the First Amendment and economic regulation. First, the bargain fairness model is judicially manageable. Judges engaged in First Amendment balancing in the commoditized speech context try to figure out whether the regulation is designed to ensure that the bargain between the parties is fair—that is, that the regulation is designed to give a leg up to the less powerful or dominant party. The fair bargain conception also opens space for speech regulation in the commercial sphere that does not pose a significant risk of spillover censorship—in other words, a risk of First Amendment under-enforcement in non-commercial circumstances. Finally, because speech regulations that enhance bargain fairness often resemble typical regulations in other product and service markets,<sup>6</sup> they do not carry the stigma of state-sponsored censorship even when, in practical effect, they censor.

To be sure, there are problems with the fair bargain conception. One might argue that permitting extensive regulation of speech anywhere demeans speech everywhere, even in transactional settings. And the fair bargain conception is circular to some degree. The value of speech is influenced by judicial determinations about its value, and thus the government can incrementally eliminate certain types of speech from the marketplace by slowly paring it back in the interests of fair bargains. But the normative problems with the fair bargain conception are not insurmountable, and its incidental impacts on First Amendment values are probably much smaller than its benefits to public welfare.<sup>7</sup>

---

6. For example, laws that protect workplace safety are similar to laws against sexual harassment in the workplace; laws that prevent companies from disclaiming personal injury liability for injuries arising from unsafe and defective products are similar to laws that prevent professionals from disclaiming malpractice liability for failure to provide adequate professional services. For more on the scope of First Amendment protections for professional speech, see Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. (forthcoming 2017).

7. Cf. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171–72 (2015) (explaining that “absent the distinction between high- and low-value speech, it would be much more difficult for the government to justify its regulation of the commercial marketplace, its ability to impose criminal sanctions on speech that facilitates or is otherwise closely connected to criminal behavior or its efforts to maintain basic standards of public conduct by prohibiting (for example) threatening and defamatory speech”).

Two additional threshold questions are worth addressing at the outset. First, a careful reader might question why this Article begins from the premise that all content- and speaker-based regulations are presumptively unconstitutional. Many First Amendment scholars approach First Amendment questions from a different premise, arguing that judicial protection for speech should only extend to types of speech that have qualities that make speech special or important. Second, careful readers might question whether the claims in this Article are descriptive or normative or both. If the Article is meant to be descriptive, they might also ask what kind of descriptive account it offers.

To address the first question, this Article begins from the premise that all content- and speaker-based regulations are presumptively unconstitutional because that is the premise of the Supreme Court's doctrine. The Court recently reiterated its view, in *Reed v. Town of Gilbert*, that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional," and that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."<sup>8</sup> The puzzle this Article seeks to solve is why a narrow class of content- and speaker-based speech restrictions—namely, a subset of laws regulating the market for commoditized speech—escapes that searching scrutiny.

To be sure, many scholars approach First Amendment questions in a different way. They begin with a grand theory that they use to distinguish speech that should be judicially protected from speech that should not be judicially protected. Robert Post, for example, has argued that speech warrants protection to the degree it promotes democratic legitimacy by permitting individuals to contribute to the formation of public discourse.<sup>9</sup> For Post, and for scholars who approach the First Amendment in a similar way, when the reasons for

---

8. 135 S. Ct. 2218, 2226, 2230 (2015).

9. See Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1323 (2009) ("Post concludes that the purpose of the First Amendment is to 'safeguard[] . . . public discourse from regulations that are inconsistent with democratic legitimacy.'" (quoting Robert C. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2368 (2000)); see also Post, *supra*, at 2368 ("[T]he participatory approach understands the First Amendment . . . as safeguarding the ability of individual citizens to participate in the formation of public opinion.")).

treating speech as special do not support protection for a certain class or category of speech, it should not be protected.<sup>10</sup> This Article takes a different approach because its claim is basically an exercise in constructive interpretation. Its purpose is to take the Court's doctrine at face value but then to identify circumstances in which the Court does not enforce that doctrine to the letter and discuss some possible reasons why.

To address the second question, this Article is interpretive, and therefore both descriptive and normative. It is descriptive in the sense that it seeks to establish that the Court upholds laws that tend to equalize bargaining power between parties to a transaction involving commoditized speech. To be clear, this Article does not claim that the Court explicitly applies a fair bargain test in its commoditized speech cases. Rather, this Article offers an explanation and a justification for the fact that the Court upholds laws that tend to equalize bargaining power in spite of its formal doctrine, which seem to call for heightened scrutiny in many such cases. This Article is normative in the sense that it argues that the Court should formally adopt the bargain fairness test. In support of that claim, the Article contends that the bargain fairness test strikes a reasonable balance between free expression and social welfare.

This Article has four parts. Part I discusses examples of the kinds of laws that the government might impose involving commoditized speech. Part II offers a more in-depth explanation of scholarly and doctrinal confusion regarding the interaction between the First Amendment and commoditized speech. Part III demonstrates how a wide range of First Amendment issues are best understood as concerned with ensuring bargain fairness. Part IV concludes with thoughts on the normative issues involved in treating bargain fairness as a preeminent value sufficient to permit extensive regulation of speech in the commercial sphere.

---

10. See, e.g., Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169 (2007) ("Speech outside of public discourse, by contrast, does not merit these [First Amendment] protections, because autonomy of speech in such contexts is not necessary to ensure the democratic legitimation safeguarded by the First Amendment."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4–5 (2000) (arguing that the subordinate status of commercial speech in First Amendment doctrine should be attributed to the fact that it "consists of communication about commercial matters that conveys information necessary for public decision making, but that does not itself form part of public discourse").

## I. EXAMPLES OF ISSUES RAISED BY COMMODITIZED SPEECH

Commoditized speech is a category with a clear core and fuzzy edges. As an initial matter, all speech that is bought and sold is subject to some general market regulations, such as contract law, even when the operation of that law results in the suppression of core protected speech.<sup>11</sup> But some flavors of speech are even more commodity-like than others. In general, archetypical commoditized speech is speech that (1) is bought and sold in a commercial setting, (2) is sought (or silenced) by a motive for private gain rather than a desire for social change, (3) is not generally regarded as useful or harmful because of its capacity to persuade individuals to alter their beliefs, (4) is exchanged in a one-to-one manner, rather than broadcast in a one-to-many manner, and (5) is useful for accomplishing a narrow or specific task.<sup>12</sup>

Typical commoditized speech exhibits all of the factors above. For example, software programs are sold in a commercial setting generally out of a motive for private gain rather than social change, because of their usefulness as tools for accomplishing specific tasks. In addition, software programs are not usually intended to convey a political message, nor generally valued because they do so. Thus, although software programs meet the formal criteria for recognition as speech—and indeed, videogames are protected speech<sup>13</sup>—they are subject to ubiquitous commercial regulation, just like other products.<sup>14</sup> Maps and navigational charts are similar archetypical examples of commoditized speech.<sup>15</sup> They are widely seen as consumer products, valued for their practical benefits, not as speech.

Much speech exhibits some but not all of the indicia of commoditization. It is with respect to this type of speech that questions most frequently arise regarding the application of the First Amendment to regulation of the speech at issue.

Consider social networking websites. Social networks are plainly places where lots of core protected First Amendment activity takes

---

11. *See* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667–71 (1991).

12. *Cf.* Schauer, *supra* note 2, at 1800–07 (proposing similar factors as indicia of First Amendment coverage generally).

13. *See* *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (“[V]ideo games qualify for First Amendment protection.”).

14. *See* Andrew Tutt, *Software Speech*, 65 STAN. L. REV. ONLINE 73 (2012).

15. *See* Schauer, *supra* note 2, at 1802.

place. Yet such networks frequently write contracts authorizing themselves to collect, use, and share individuals' personal information in vague, ambiguous, and sweeping terms.<sup>16</sup> The social networks may be using individuals' personal information to improve their service, or to sell it to advertisers, or both. Their contracts thus implicate a speech commodity—an individual's personal information—in circumstances that intertwine its collection and use with protected First Amendment speech. An open question is whether the government may regulate that transaction—for example, by creating a default rule that, in circumstances in which certain consumer personal data is collected, such collection is presumptively unauthorized unless the terms and conditions are set forth with precision.<sup>17</sup>

Or consider internet mapping products and GPS devices. Such devices provide people with useful information and therefore fall within the First Amendment's domain.<sup>18</sup> But individuals also frequently rely on directions from mapping services and GPS devices in real time (usually while driving). An open question is whether the government may make it unlawful for services that provide driving directions to disclaim personal injury liability when faulty directions cause an accident.

Also consider search engines. As gatekeepers to the Internet, search engines undoubtedly play one of the most significant and likely protectable First Amendment roles in society. Many individuals are unaware, however, that search engines do not promise that their results are accurate, unbiased, or truthful.<sup>19</sup> Indeed, search engines occasionally slant search results for commercial gain. An open question is whether the government may mandate that search engines periodically obtain acknowledgment from users that users are aware that the results may be biased or inaccurate.

The purpose of this Article is to show that each of those regulations would implicitly (and should explicitly) be analyzed under

---

16. See Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 252–53 nn.46–50 (2014) (cataloging Terms of Use policies offered by Google, Facebook, Wikipedia, and others that permit those platforms to freely take and use user-data and user-generated content).

17. For a discussion of the state of academic legal scholarship addressing this question, see Part II, *infra*.

18. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570–71 (2011).

19. Kristen Purcell, Joanna Brenner & Lee Rainie, *Search Engine Use 2012: Main Findings*, PEW RES. CTR. (Mar. 9, 2012), <http://www.pewinternet.org/2012/03/09/main-findings-11/>.



the bargain fairness test. That is, the question the Court should ask is whether the purpose and effect of the regulation is to regulate the fairness of the bargain between the consumer and the service or product provider, and not for some other reason.

## II. THE LITERATURE ON COMMODITIZED SPEECH<sup>20</sup>

Debates about commercial speech are as fierce and fraught as ever. But commercial speech, which the Court has emphasized is defined narrowly to include only advertisements and proposals for commercial transactions,<sup>21</sup> is a thin slice of the speech that people buy and sell every day. To the degree law regulates speech in our society, contracts play the largest role. In the workplace, employers use contracts to impose limits on employee speech.<sup>22</sup> In planned communities, residents use contracts to impose restrictions on how their neighbors engage in speech on their property.<sup>23</sup> In the marketplace, customers use contracts to control the speech of those with whom they do business in countless scenarios. Everything from owning a credit card to using an Internet service involves promises about how information will be collected, shared, and used. Increasingly, individuals make important choices on the basis of information furnished by third-parties involving promises, implied or explicit, that the information is accurate, unbiased, and truthful.

Scholars have long paid less attention to that other side of the commercial speech equation,<sup>24</sup> what this Article has been calling “commoditized speech.” For a long period, such speech was not thought to warrant First Amendment attention at all. As Burt Neuborne once explained, there was “a structural divide in first amendment theory” that “provided effective protection to speech

---

20. For an extensive discussion of Supreme Court cases involving commoditized speech and how the Court has decided them, see Part III, *infra*.

21. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 791–92 (1985) (explaining that the Court has “been extremely chary about extending the ‘commercial speech’ doctrine beyond this narrowly circumscribed category of advertising”).

22. For a discussion of examples involving speech-restrictions in employment contracts see Section III.A, *infra*.

23. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1652 (2009).

24. See, e.g., Shiffrin, *supra* note 3, at 1212–16 (lamenting the lack of attention to “the commercial speech that has been beneath the protection of the first amendment for all these years [that] has not been confined to commercial advertising”).

about religion, politics, science, and art, but no protection at all to speech about consumer affairs, labor relations, or capital formation.”<sup>25</sup> That divide—what Frederick Schauer calls “boundary disputes” about whether the First Amendment applies to a particular restriction on speech—have been largely “invisible.”<sup>26</sup> As Schauer has explained, there has been “[l]ittle case law and not much more commentary” pertaining to “why the content-based restrictions of speech in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, [and] the law of fraud” (among others) do not raise First Amendment questions.<sup>27</sup>

Literature devoted to the question of how the First Amendment interacts with commoditized speech remains scattered and underdeveloped. Many scholars have grappled with the question in one fashion or another, but their efforts have only scratched the surface. Their explanations have been incomplete, or their normative prescriptions have called for radical shifts in existing doctrine, or required the application of vague standards that offer little concrete guidance. The following brief survey of the literature shows that the area remains understudied and undertheorized.

In an important Article on this topic in the early 1980s, Steven Shiffrin argued that the speech that gets itself involved in commerce cannot be readily classified as protected or unprotected by easy recourse to its status as commoditized speech because the category designation is too broad.<sup>28</sup> Some people buy and sell speech precisely because of its cultural and political importance, which might render even neutral, generally applicable economic regulations suspect in some cases.<sup>29</sup> Shiffrin suggests that hard cases might involve commercial advertising that is critical of the government or that advocates for the interests of corporations as social institutions; union speech that addresses the fair distribution of power between workers

---

25. Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 5 (1989).

26. Schauer, *supra* note 2, at 1768.

27. *Id.* at 1768.

28. See Shiffrin, *supra* note 3, at 1254–55.

29. See *id.* at 1283 (“Speech interacts with the rest of our reality in too many complicated ways to allow the hope or the expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation. In trying to move toward general theory, scholars have too often built abstractions without sufficient regard for the diverse contexts in which speech regulation exists.”).

and their employers; or a corporate proxy that recommends divestment from unjust regimes or suggests that the company cannot be run by a Republican board of directors.<sup>30</sup> Shiffrin contends that many would regard it unacceptable for the government to regulate those sorts of messages, even pursuant to neutral, generally applicable laws against misleading, false, or fraudulent speech.<sup>31</sup> Shiffrin's broader point is that speech in any abstract category can warrant First Amendment protection because its content can make censorship indistinguishable from the kinds of censorship that are clearly unacceptable.<sup>32</sup>

Shiffrin's argument is provocative, but it reflects a particular conception of the role and purpose of the First Amendment. Namely, he reasons that because particular applications of otherwise acceptable prohibitions can lead to unsavory censorship, a better way of applying the First Amendment is to pierce those rules when they have objectionable consequences.<sup>33</sup> For example, in Shiffrin's view, "the SEC's regulation of statements by corporate executives about a corporation's future" might warrant First Amendment protection—even if placing restrictions on such statements is helpful for preventing harm to investors—because such statements can be "of political importance."<sup>34</sup> That is a valid way to view how the First Amendment should apply, but it is not the only way and it is inconsistent with how the Court has conceptualized the Amendment.

Shiffrin's understanding makes any law subject to searching First Amendment scrutiny if the law, in one of its incidental applications, imposes particularly unappealing censorship.<sup>35</sup> This position is not without warrant and, after *United States v. O'Brien*, it is—at least formally—the law.<sup>36</sup> But the Court has more often said that it can

---

30. *See id.* at 1231–32, 1242.

31. *See id.* at 1231–32 ("Even if one assumes that corporate elections are generally non-political, the spectacle of the SEC editing proxy materials on the basis of what is true or false on matters of domestic and foreign policy should at least cause first amendment eyebrows to lift.").

32. *See id.* at 1256–82 ("[L]urking throughout first amendment doctrine are renunciations of the equal value principle, and difficult compromises. What is important is that the courts should be forced to face up to the significance of the compromises that they make. At the same time, it is important to recognize that the compromises, while theoretically significant, have been small compromises.").

33. *See id.*

34. *See id.* at 1265–68.

35. *See id.* at 1251–54.

36. *See United States v. O'Brien*, 391 U.S. 367, 376–77 (1968); Richard H. Fallon, Jr.,

almost automatically reject First Amendment claims, even claims involving issues of paramount First Amendment moment, when, for example, a law (1) is facially not concerned with speech,<sup>37</sup> or (2) is content-neutral, even if the consequences are content-based.<sup>38</sup>

The counterargument to Shiffrin's contentions against category-wide exemptions is thus simply this: all rules are occasionally over- and under-inclusive, because that is the nature of rules. But permitting exceptions that transform rules into standards can so undermine their purposes as to render them worthless. Treating certain regulations of commoditized speech as categorically exempt from First Amendment scrutiny may be necessary to make welfare-enhancing regulation of the category possible at all.

Frederick Schauer, eschewing efforts to build a grand theory, has analyzed the regulation of commoditized speech from what one might call a sociological perspective.<sup>39</sup> That is, Schauer's concern is not *whether* commoditized speech should be subject to First Amendment protection, but *why* it is not.<sup>40</sup> Schauer contends that commoditized speech cases, like other cases at the "boundar[y]" of First Amendment protection, cannot be explained by recourse to general principles.<sup>41</sup> Building on the work of Kent Greenawalt, Schauer instead offers an array of non-doctrinal "factors" that seem to function as "indicia of coverage."<sup>42</sup> Such factors include whether the speech (1) is "public rather than face-to-face," (2) is motivated by "desire for social change rather than for private gain," (3) "relates to something general rather than to a specific transaction," and (4) is "normative rather than

*Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 15–16 (noting the conflict between *O'Brien* and *RAV v. City of St. Paul*); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 770–72 (2001) (criticizing *O'Brien* for permitting such claims).

37. That is the dictum of, among other cases, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (explaining that "since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.").

38. That is the holding of, among other cases, *McCullen v. Coakley*, 134 S. Ct. 2518, 2520 (2014) ("[A] facially neutral law does not become content based . . . simply because it may disproportionately affect speech on certain topics.").

39. Schauer, *supra* note 2, at 1787–88.

40. *Id.*

41. *Id.* at 1786–87.

42. *Id.* at 1800–07.

informational in content.”<sup>43</sup> Schauer further suggests that coverage is influenced by (5) “the existence of a sympathetic litigant or class of litigants,” (6) the “existence of a link with currently covered First Amendment items or domains,” and (7) “the presence or absence of an existing and well-entrenched regulatory scheme.”<sup>44</sup>

Schauer’s indicia are useful, especially because they show that the Court’s doctrinal statements are not as strong a predictor of outcomes as the Court’s internal motivations. However, Schauer’s indicia also suggest a pattern in the outcomes of the Court’s cases that can be knitted together by a broader principle. Namely, many of Schauer’s non-doctrinal indicia of First Amendment coverage neatly align with the bargain fairness model this Article proposes. His indicia of what kinds of speech generally fall outside First Amendment protection are precisely the kinds of speech that are most often regulated because of their commoditized nature rather than other purposes. In this sense, Schauer has usefully identified a correlation between highly commodity-like speech and lax First Amendment scrutiny; this Article explains why that correlation exists.

Eugene Volokh has more recently suggested that the permissible boundaries of commoditized speech regulation are in fact exceptionally narrow.<sup>45</sup> In a larger article about why the government may not broadly legislate informational privacy rules, Volokh asserts that there is only “one sort of limited information privacy law—contract law applied to promises not to reveal information—[that] is eminently defensible under existing free speech doctrine.”<sup>46</sup> Volokh takes the position that the government can create privacy-protective contract default rules, but may not make those privacy-protections unwaivable.<sup>47</sup>

Volokh’s effort is grounded in doctrine, namely, the textbook case of *Cohen v. Cowles Media*, which held that a promissory estoppel action may be brought against a newspaper to enforce a promise not to reveal a source’s identity.<sup>48</sup> But Volokh does not root his defense of

---

43. *Id.*

44. *Id.*

45. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1061–62 (2000).

46. *Id.* at 1057.

47. *Id.* at 1061–62.

48. *See id.* at 1057–62.

contractual privacy defaults in a deeper normative theory of the First Amendment, nor square it with the considerable body of doctrine that permits the government to create basically unwaivable contractual provisions not to speak. As Schauer explained, “[l]iability for misleading instructions, maps, and formulas, for example, is generally (and silently) understood not to raise First Amendment issues.”<sup>49</sup> Similarly, prohibitions on workplace sexual harassment are not treated as raising First Amendment concerns.<sup>50</sup> Thus, even as Volokh admits there is a broad sphere of permissible regulation without First Amendment review—regulation by contract default-rule—he does not engage in a comprehensive review of the doctrine or the theory supporting even stronger regulation.

Daniel Solove and Neil Richards have provided the most recent thorough analysis of the First Amendment’s place in the regulation of commoditized speech.<sup>51</sup> Solove and Richards are concerned not only with transactional relationships, but also with the category of remedies that the legal system makes available to individuals for privately-inflicted speech harms (a category into which transactional relationships happen to fall).<sup>52</sup> They offer a grand theory of the appropriate role of the Court in policing such “civil” remedies: “that the First Amendment should apply to civil liability when government power shapes the content of public discourse, but not when government power merely serves as a backstop to private ordering.”<sup>53</sup>

Solove and Richards come closest to proposing a theory that reflects the bargain fairness model. If by “backstop to private ordering” they mean those regulations concerned with enhancing bargain fairness (a common form of market regulation), Solove and Richards’ test would perfectly match the model suggested here. But what Solove and Richards mean by “backstop to private ordering” is both broader and narrower than the bargain fairness test. Solove and

49. Schauer, *supra* note 2, at 1802.

50. See Fallon, *supra* note 36, at 1–2; see also Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1793–98 (1992) (arguing that workplace sexual harassment should be subject to First Amendment scrutiny).

51. Solove & Richards, *supra* note 23, at 1651–54.

52. Solove and Richards are concerned with “civil” remedies—which involve all suits between private individuals, whether the individuals involved in the suits are strangers or associates or are suing in tort or contract. Because suits between private parties involved in consensual relationships are civil suits that give rise to civil remedies, they are a “subset” of the types of relationships to which Solove and Richards are interested.

53. *Id.* at 1655.

Richards explain that a law “shapes the content of public discourse” (and therefore is not merely a “backstop to private ordering”) when “(1) the government defines the content of the civil duty; and (2) the speaker cannot avoid accepting the duty, or the government exercises undue power in procuring the speaker’s acceptance.”<sup>54</sup> This test is thus broader than the bargain fairness test because it would permit the government to regulate with *any* interest in mind, and not merely to protect the interests of one of the parties to a bargain. Solove and Richards’ test is also narrower than the bargain fairness test because it would prevent the government from creating unwaivable rules that favor less powerful parties even though such rules are often found to be, and should be, permissible when they promote bargain fairness.

Putting aside other ambiguities and complexities in Solove and Richards’ test, their suggestion, in line with Volokh,<sup>55</sup> that the question should be whether the government imposes a duty that individuals can avoid,<sup>56</sup> is inconsistent with much existing First Amendment doctrine (e.g., mandatory information privacy laws, limits on harassing workplace speech, and limits on speech by public employees). Moreover, it mistakenly focuses on an undertheorized conception of individual autonomy at the expense of other values that seem to animate decisions in this area (e.g., social welfare, fairness, and concern for preserving robust and wide-open public debate).

This earlier scholarship thus charts a path forward, but remains incomplete. Some scholars fail to fully appreciate that the Supreme Court’s cases permit more extensive regulation of consensual relationships than mere regulation by default rules.<sup>57</sup> Others believe that no general principle can adequately account for the diversity of outcomes that appear in the cases.<sup>58</sup> But there is a general principle at play in the cases, and its gravitational pull is stronger than scholars have recognized.<sup>59</sup> The regulation of commoditized speech can have serious implications for public discourse, but this Article contends that judges have accepted those costs as the price of transactional fairness when speech is bought and sold. This Article aims to shake up the scholarly debate by showing how the cases reflect a coherent and

---

54. *Id.* at 1655, 1692.

55. Solove and Richards offer little guidance as to when government duties are sufficiently avoidable as to pose no First Amendment problem.

56. *Id.* at 1692–94.

57. *See, e.g., id.* at 1655; Volokh, *supra* note 45, at 1057.

58. *See, e.g.,* Schauer, *supra* note 2, at 1786–87; Shiffrin, *supra* note 3, at 1251–82.

59. For an in-depth discussion of the cases, see Part III, *infra*.

normatively acceptable approach to the regulation of commoditized speech.

### III. BARGAIN FAIRNESS AND SUPREME COURT PRECEDENT

This Part will establish that the holdings of many cases from across First Amendment law can be best understood and justified through the principle of bargain fairness. In other words, across multiple doctrinal areas, the cases converge on a simple idea: that individuals should be freely able to enter into speech-regulating relationships and to purchase speech commodities, but that government regulations that make those bargains fairer are entitled to deference—even if the duties are unwaivable, are content-based, or result in significant censorship.

This Part analyzes several areas of First Amendment law beginning with private and government contracts to show how concern for social welfare and bargain fairness guides the Court’s decisions. It then addresses cases involving restrictions on the making and purchasing of speech commodities and explains why the Court emphatically strikes down such restrictions when enhancing bargain-fairness is not their purpose or effect. Next, it moves quickly through transactional relationships, monopoly relationships, and workplace relationships to further establish bargain fairness’s trans-substantive application. Finally, it considers cases where there is considerable judicial and scholarly disagreement about what the right outcomes should be, and explains that the disputes center on how to measure fairness.

#### *A. The Private Contract Baseline*

Contract law provides a useful baseline for the bargain fairness framework, both because of its outsized role in regulating speech in society, and because contract is the one area of speech regulation where there is general scholarly and judicial agreement about the First Amendment’s scope.<sup>60</sup> Everyone agrees you can sell your right to speak.<sup>61</sup> Both scholars with the most expansive libertarian conceptions

---

60. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 437–38 nn.305–06 (1999); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 230 (1998); Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1879, 1881–82 (2013).

61. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83



of the First Amendment and those who understand the Amendment's contours to be much narrower treat contract as a presumptively valid means of selectively restricting and restraining speech.<sup>62</sup>

The broad-based agreement that contracts impose permissible limitations on speech derives in part from doctrine. A half-century ago, the Supreme Court saw no First Amendment problem with enforcing a union contract that would have otherwise been a textbook First Amendment violation. In *Black v. Cutter Laboratories*, the Supreme Court dismissed a wrongful termination case brought by an employee fired for her membership in the Communist Party as presenting “no substantial federal question.”<sup>63</sup> The Court determined that the California courts had interpreted the employment contract's “just cause” termination provision to permit the firing.<sup>64</sup> The Supreme Court thus dismissed the case because the decision rested on an independent and adequate state law ground—California contract law.<sup>65</sup> Justices Douglas, Warren, and Black thought failing to invalidate such a contract “sanction[ed] a flagrant violation of the First Amendment.”<sup>66</sup> The Court did not.<sup>67</sup> Almost a half century later, the Supreme Court reaffirmed that doctrine in *Cohen v. Cowles Media Co.*, the modern case that is now most frequently cited for the proposition that private contracts do not trigger First Amendment scrutiny.<sup>68</sup>

---

CORNELL L. REV. 261, 268 (1998) (“[P]arties are generally free . . . to commit to being silent about almost anything.”).

62. Volokh, *supra* note 45, at 1051 (“While privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.”); Solove, *supra* note 60, at 1880–82, 1894–1900. In fairness, there are a few scholars who have argued for the import of First Amendment norms into, for example, the private workplace, but courts have resolutely refrained from acting. See Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1539 (1998).

63. 351 U.S. 292, 299–300 (1956).

64. *Id.* at 298–99. In passing on the plausibility of the California Supreme Court's interpretation of the provision, which permitted termination for “just cause,” the *Cutter* Court noted that the contract had been expressly amended to permit firings on the basis of an individual's political beliefs. *Id.*

65. *Id.* at 299.

66. *Id.* at 304 (Douglas, J., dissenting) (“We sanction a flagrant violation of the First Amendment when we allow California, acting through her highest court, to sustain Mrs. Walker's discharge because of her belief.”).

67. *Id.* at 298–99.

68. See, e.g., Volokh, *supra* note 45, at 1057 (“The Supreme Court explicitly held in *Cohen v. Cowles Media* that contracts not to speak are enforceable with no First Amendment problems.”).

The doctrine on this question is watertight. In the employment context, there does not appear to be a single speech-related termination decision that has been held unenforceable on First Amendment grounds, even where the decision was clearly unrelated to the job and was motivated by ideological animus. As Charles Glick explained in a Note in the *Yale Law Journal*, decrying that apparent insensitivity to First Amendment norms:

Expressive activities leading to . . . reprisals [by employers] have included advocating Communism, advocating homosexuality, filing grievances charging wrongdoing by superiors, writing letters critical of management to newspapers or government agencies, publishing an “underground” company newsletter, voicing misgivings about product safety, announcing intentions of attending law school at night, writing a novel, counseling a fellow employee of her legal rights against the employer, criticizing a superior, implying a racial bias on the part of the employer, and advocating women’s rights.<sup>69</sup>

None of those reprisals were found to transgress the First Amendment because they were authorized by the employees’ employment contracts.<sup>70</sup> Without implicating the First Amendment, employers have similarly maintained policies barring employees from speaking about “objectionable or inflammatory” topics off the job, engaging in adultery, smoking, and purchasing and using competitors’ products.<sup>71</sup> Contracts requiring that secrets be kept are also among the most common and most important agreements individuals enter.<sup>72</sup> They are as enforceable as other contracts,<sup>73</sup> and few have ever been subjected to First Amendment scrutiny.<sup>74</sup>

69. Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 526–27 (1982) (footnotes omitted).

70. *Id.*

71. See James A. Sonne, *Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior*, 43 GA. L. REV. 133, 140–42 (2008).

72. Garfield, *supra* note 61, at 269–74.

73. See, e.g., *United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 942–43 (11th Cir. 1995) (holding that a settlement restricting disparaging advertising about the other party’s product did not implicate the First Amendment); *Wilco Elec. Sys., Inc. v. Davis*, 543 A.2d 1202, 1204–05 (Pa. Super. Ct. 1988) (holding that a restrictive covenant giving one party the exclusive right to provide television services to residents of a particular development did not implicate the First Amendment); see also RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. d (AM. LAW INST. 1995) (discussing general enforceable of contracts protecting trade secrets).

74. For one counterexample in which a court did apply First Amendment scrutiny, see *Ruzicka v. Conde Nast Publ’ns, Inc.*, 733 F. Supp. 1289, 1295–96 (D. Minn. 1990) *aff’d and remanded*, 939 F.2d 578 (8th Cir. 1991). The case was affirmed on alternate grounds, limiting

The widespread consensus that contract falls outside of the ambit of the First Amendment is not simply a product of unquestioning adherence to outdated doctrine. Mere convention could not sustain such widespread consensus—particularly in an area of doctrine as fragmented and complex as the First Amendment. Rather, the agreement that contract is outside the First Amendment reflects essential, albeit unspoken, assumptions about the importance of autonomy and the role of contract in society.<sup>75</sup>

Many scholars and courts reason that because the right to speak is an incident of individual autonomy, people can sell it.<sup>76</sup> As attractive as respect for individual autonomy may seem as a justification for permitting individuals to sell their right to speak, social welfare—not autonomy—is probably the primary reason that courts permit the practice.<sup>77</sup> If contracts involving speech were unenforceable, many

---

the state action holding to the opinion of the district court. Even in situations involving contracts with the government, which, as the next section details, are ordinarily subject to First Amendment scrutiny, many courts have held that First Amendment rights may be waived, as long as the waiver is in a freely negotiated contract. *See, e.g.,* *Erie Telecomms., Inc. v. Erie*, 853 F.2d 1084, 1099 (3d Cir. 1988) (explaining that “we know of no doctrine, and [the plaintiff] has directed us to no case law, providing a per se rule that constitutional claims, even first amendment claims, may not be waived” by agreement); *see also* *Lake James Cmty. Volunteer Fire Dept., Inc. v. Burke Cty.*, 149 F.3d 277, 278 (4th Cir. 1998) (finding valid contractual waiver of first amendment rights), *cert. denied*, 525 U.S. 1106 (1999); *Leonard v. Clark*, 12 F.3d 885, 889–90 (9th Cir. 1993) (same); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1315 (8th Cir. 1991) (same), *cert. denied*, 502 U.S. 963 (1991).

75. *See, e.g.,* Benkler, *supra* note 60, at 437–38 & nn.305–06 (explaining that respect for autonomy grounds the *Cohen* rule); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1281 (1998) (explaining that voluntariness is the foundation of the *Cohen* rule); Solove & Richards, *supra* note 23, at 1690 (acknowledging that “consent is a key component” of contract enforceability even if not “the governing concept”); Volokh, *supra* note 45, at 1057, 1061 (explaining the *Cohen* rule is about permitting individuals to alienate the right to speak).

76. There is no *a priori* reason, however, that application of the First Amendment should turn on whether an individual has volunteered to permit the state to censor him via a contract. Many rights cannot be sold because we do not believe it is proper to elevate respect for a person’s autonomy over his power to exercise the right at a later time. *See, e.g.,* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1865–67 (1987). One cannot sell his vote, for example. *Id.* at 1868. He cannot “sell himself into slavery . . . take undue risks of becoming penniless, or . . . sell a kidney.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–12 (1972). Speech is in many ways precisely the kind of right that would be justifiably inalienable. *See id.*; *see also* Radin, *supra*, at 1863–70. The external costs of permitting its alienation “do not lend themselves to collective measurement which is acceptably objective and nonarbitrary.” Calabresi & Melamed, *supra*, at 1111–12.

77. The term “social welfare” as it is used here means the overall collective well-being of individuals in society. “Specifically, social welfare is postulated to be an increasing function of

socially beneficial transactions would not take place because individuals would have no means of enforcement. Once the Court decided that speech could be bought and sold in the interests of social welfare, it sowed the seeds of bargain fairness. Like all other bargains, bargains involving speech raise content-based concerns that individuals will harm themselves “through their own ill-considered or disadvantageous promises.”<sup>78</sup> In other words, the very rationale for permitting contracts involving speech—social welfare—invites regulation in the interests of social welfare.<sup>79</sup>

One need look no further than *Cohen v. Cowles Media Co.* to see that fairness and welfare are primary reasons that the Court exempts contracts involving speech from First Amendment scrutiny.<sup>80</sup> In *Cohen*, a newspaper broke a promise to a source that it would preserve his anonymity because the newspaper believed that the source’s identity was itself newsworthy.<sup>81</sup> The source sued the newspaper for, among other things, breach of a contract created by promissory estoppel, a doctrine that permits the State to imply a contract when a party relies on the promise of another to his detriment.<sup>82</sup> The Supreme Court held that the First Amendment did not shield the newspaper from liability for breaking its promise.<sup>83</sup>

*Cohen* is the textbook example of the Court upholding a speech-restrictive law on the basis of bargain fairness. The newspaper in *Cohen* was penalized for speaking truthfully on a matter of public concern—that is, engaging in an activity at the heart of the First Amendment—because it broke a promise when it did so. And the case is not about individual autonomy and freedom to contract. The case, after all, did

individuals’ well-being and to depend on no other factors. It is also generally supposed that each individual’s well-being affects social welfare in a symmetric manner, which is to say that the idea of social welfare incorporates a basic notion of equal concern for all individuals.” Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 985–86 (2001); see also A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 n.6 (1998) (“Social welfare is determined by the well-being of individuals. Thus, social welfare generally rises if individuals’ well-being rises, and falls if individuals’ well-being falls.”).

78. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 797 (1983).

79. See *id.* at 763–64 (explaining that many “paternalistic” limitations on the ability of parties to bind themselves by contract are founded on concern for an “actor’s own welfare”).

80. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667–71 (1991).

81. *Id.* at 665–67.

82. *Id.* at 666–67.

83. *Id.* at 671.

not even involve a bilateral contract, but a promissory estoppel claim.<sup>84</sup> The rationale of the case was that Minnesota's promissory estoppel law was general in application and merely required "those making promises to keep them."<sup>85</sup> But notice that obligating a party to follow through on its promises is not about the autonomy of the promisor to freely enter into a contract alienating his rights. Rather, it is about safeguarding the welfare of the promisee who relies on the promise to his detriment. The rationale for crafting the contract exception to the First Amendment in *Coben* was explicitly driven by a concern for bargain fairness.

The Court's treatment of private contracts lays the groundwork for its approach to other market regulations involving commoditized speech. Because the primary reason for permitting contracts involving commoditized speech is social welfare, concern for welfare guides the Court's approach in other areas as well.

### *B. The Government Contract Ceiling*

If private contracts form the baseline of commoditized speech regulations, contracts with the government form the ceiling. All such contracts are subject to First Amendment scrutiny.<sup>86</sup> Government contracts provide a view on bargain fairness from another vantage point. Suits to invalidate conditions in government contracts place the value of bargains and First Amendment rights in direct competition. Such suits thus reveal how the Court conceptualizes the interrelationship of bargaining and speech rights in a particularly direct way. The Court's cases upholding and invalidating contractual conditions in government contracts on First Amendment grounds demonstrate the same overarching concern for bargain fairness that appears in other areas.

---

84. *Id.* at 665.

85. *Id.* at 671.

86. Before the Supreme Court's decision in *Pickering v. Board of Education* in 1968, even government contracts were thought to be outside the First Amendment's scope. Before *Pickering*, the law was thought to be reflected Justice Holmes' famous admonition in *McAuliffe v. Mayor of New Bedford*: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," ergo government contracts do not come within the First Amendment's scope. 29 N.E. 517, 517 (1892). *Pickering* established, however, that in determining the enforceability of a government contract, the courts have an obligation to weigh the government's interest as an employer against the employee's interest as a citizen. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

The traditional scholarly and judicial explanation for the distinction between government contracts and other contracts is that scrutiny for such contracts is a special case of the unconstitutional conditions doctrine.<sup>87</sup> Failing to subject government contracts to First Amendment scrutiny poses a risk that the government might “strip the citizen of rights guaranteed by the Federal Constitution . . . under the guise of a surrender of a right in exchange for a valuable privilege the state threatens to withhold.”<sup>88</sup> In other words, government contracts are a convenient opportunity for the government to engage in impermissible censorship, and so the Court watches carefully to ensure that the government does not do so.

The theory that speech restrictions in government employment contracts are struck down because they impose unconstitutional conditions does not neatly match up with the doctrine the Supreme Court has developed in practice.<sup>89</sup> The Court has fashioned two proxies for determining whether the First Amendment protects a government employee’s speech from punishment. First, the Court asks whether the speech relates to a matter of public concern.<sup>90</sup> Second, the Court asks whether the speech restriction is related to the duties of the job.<sup>91</sup> If the speech is about a matter of public concern

87. See, e.g., Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 920–22 (2006).

88. *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 593–94 (1926).

89. For a general critique, see Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1476 (1989).

90. See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (explaining that “the boundaries of the public concern test are not well defined”); *Rankin v. McPherson*, 483 U.S. 378, 380–83 (1987); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979) (explaining that employees’ views expressed privately on publicly important matters are protected); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (emphasizing that statements were made in a public forum); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *Pickering*, 391 U.S. at 572.

91. See, e.g., Farber, *supra* note 87, at 941–46 (“[T]he germaneness standard requires that any given right be purchased with a limited type of ‘currency’ bearing a logical relationship to the right.”); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1350, 1374 (1984); Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 781–82 (2007); Sullivan, *supra* note 89, at 1456–76 (discussing the centrality of germaneness in the unconstitutional conditions cases, and its weaknesses as an explanation of what should make a condition unconstitutional). The court has at times treated that as a threshold inquiry, and at other times treated it as a factor to be balanced against the importance of the speech. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (treating germaneness as a threshold inquiry); *Pickering*, 391 U.S. at 568 (treating germaneness as a factor to be balanced).

and is not within the scope of the duties of the job, it is protected from punishment.<sup>92</sup> But it is hard to believe that either the “public concern” requirement or the “scope of duties” requirement meaningfully accomplishes the task of preventing the government from using its status as employer to silence its employees more than it should.<sup>93</sup>

These government contracts cases are susceptible to a different interpretation, however. Rather than thinking of judicial supervision of government contracts as intending to prevent unjustified censorship, one might think of such supervision as an effort to ensure that bargains between the government and its employees are fair. That is, if government employees are to be silenced, the Court watches carefully to ensure that they are not required to give up more than necessary.

This reconceptualization convincingly explains both the public concern test and the scope-of-employment test. The two tests make a great deal of sense if the Court is seeking to determine whether the bargain was fair: public concern sifts for the value of the speech, and scope-of-duties is used to detect defects in the bargaining process. Together, they serve to determine the likelihood that the employee willingly parted with her rights and the likelihood that the government really needed her to do so.

The public concern test invoked in the government contract cases is best understood as involving a tacit evaluation of the value of speaking to the speaker. Hence the odd cases that hold that private

---

92. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 143, 151–52 (1983).

93. The public concern requirement makes little sense from a rights perspective. If the Court’s goal in scrutinizing government contracts were to protect freedom of speech as a right to speak, its choice to only protect some speech, but not all, would make little sense. Moreover, as applied, the Court has held that even speech expressed in private can constitute speech on a matter of public concern. The Court has also held that speech with relatively little substantive content and low social value is speech on a matter of public concern in some circumstances, and that speech with more content and relatively high social value is not on a matter of public concern in other circumstances. *Compare Rankin*, 483 U.S. at 380–83, *with Garcetti*, 547 U.S. at 414–15. It is also unclear how the scope-of-duties test prevents the government from censoring speech it does not like. Surrendering a right germane to the performance of a specific task might make the government’s interest more legitimate, but it is still censorship. Moreover, as applied, the scope-of-duties test is so broad that almost any restriction can be found to be within the scope of an employee’s duties at a high enough level of generality. *See, e.g.*, *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 564–67 (1973). Finally, the scope-of-duties test has proven a poor method of smoking out pretext. *See San Diego*, 543 U.S. at 81, 84–85.

comments to a superior,<sup>94</sup> the expression of a fleeting opinion about the news in the office,<sup>95</sup> and comments on local education policy in a local newspaper<sup>96</sup> are all speech on matters of public concern sufficient to preclude adverse employment actions.<sup>97</sup> The unifying theme is that employees would not have lightly permitted their employers to demand that they give up the right to express those opinions.<sup>98</sup>

These cases also show that the scope-of-duties test is a method of sifting for defects in the bargaining process. The scope-of-duties test, as applied, is used to determine whether it is likely that the government had a genuine job-related reason for imposing the restriction in question. From a bargain fairness perspective, that analysis is important because the baseline presumption is that employers do not generally require individuals to give up more First Amendment freedom than is necessary to perform a given job (since they would have to pay their employees more if they did so). The scope-of-duties test thus helps the Court determine whether the restrictions are actually economically justified, or if, instead, the government has used its relative bargaining power to extract an unfair concession.<sup>99</sup>

The government contracts cases thus reveal more of a narrow concern for protecting individuals' private welfare than a broad concern with preventing the government from censoring speech that is structurally important to democratic governance. The Court's goal seems to be to ensure that employees who choose to give up their right to speak do so on terms that are fair to them, not to prevent the government from tampering with the broader marketplace of ideas.

---

94. *Givhan*, 439 U.S. at 414.

95. *Rankin*, 483 U.S. at 380–83.

96. *Pickering*, 391 U.S. at 568.

97. The teacher in *Pickering* who wrote her letter to the editor criticizing the school board, the teacher in *Givhan* who voiced her concerns about racial discrimination in the school privately to her principal, and the clerical employee in *Rankin* who rooted for the President's assassin in a remark to her coworker, each made statements that expressed their personal views in circumstances outside their traditional job roles. See *Rankin*, 483 U.S. at 380–83; *Givhan*, 439 U.S. at 414; *Pickering*, 391 U.S. at 568.

98. In contrast, in cases like *Connick v. Myers*, where the Court held that an assistant district attorney's questionnaire critical of management was not speech on a matter of public concern, the Court might have concluded that speech critical of management was likely to be valuable to the government to restrict. 461 U.S. 138 (1983).

99. To give an example, if the government tried to require government employees to never reveal information acquired on the job, the scope-of-duties test would help the court to show why the condition was likely invalid as applied to a custodian but valid as applied to a spy.



To be sure, the remedies employed in government contract cases do not perfectly align with a bargain fairness approach. In the government employment cases, the Court steps in to strike down contract terms rather than carefully evaluating whether the employees were adequately compensated for them.<sup>100</sup> If bargain fairness is truly the touchstone, one might reasonably ask why the Court would not instead analyze whether the bargain adequately compensated the employee for alienating the right to speak. After all, if in principle one would be willing to sell her silence to the government for an appropriate price, the Court should look to the contract price—in addition to the value of the speech and the nature of the job—to determine whether the bargain was fair.

There are two answers to that argument, and both have interesting implications beyond the government contracts setting. First, it is plausible that the Court does not analyze price because the market value of relinquished rights to speech cannot be easily priced. Speech-restrictive conditions outside the scope of one's job duties are unlikely to be salient to individuals negotiating government contracts, and oftentimes will have no private-market analogs, making it difficult to find a substitute employment contract against which to price the term. As such, the Court may strike out such terms as a second-best alternative.

Second, the Court may strike out terms because even if such terms could be priced, it would not be administrable to continually adjudicate claims that individuals were not paid enough for their silence. Striking out terms sets the conditions for all negotiations between the government and its employees, thus preventing strategic behavior by both parties when dickering over terms. Making government speech restrictions waivable, even in principle, might be so likely to be abused that the Court thinks it better to take such terms off the table.

Those two problems—difficulty pricing terms and difficulty policing negotiations—reappear in other areas involving commoditized speech. Where a government regulation simulates a contract term for which people would negotiate but is difficult to price and police, the Court has generally deferred when the government makes the term unwaivable.

---

100. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477–80 (1995) (invalidating law banning honoraria for certain executive branch employees).

### C. Unconstitutional Commoditized Speech Restrictions

The Court's cases striking down regulations involving commoditized speech also reveal the power of the fair bargain conception by negative inference. In numerous instances, commercial regulations that are not confined to the amelioration of bargain inequalities are struck down.<sup>101</sup> Thus, even as bargain fairness can make it seem as if the Court is unduly lax in its analysis of the regulation of commoditized speech, these cases stand as a reminder of the limited scope and application of the bargain fairness test.

---

101. Some examples demonstrate the breadth of this principle. In the charitable solicitation context, the Supreme Court has at least thrice struck down rules that would limit consensual donations to some types of charities by limiting the amount that charities could spend on fundraising. See *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 619–21 (2003) (explaining that in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988), *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), “the Court invalidated laws that prohibited charitable organizations or fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising—whether or not any fraudulent representations were made to potential donors” because such laws are not narrowly tailored to combat fraud). In the context of licensing schemes governing the distribution of commoditized speech, the Supreme Court has invalidated laws empowering officials to grant (or deny) permission to distribute leaflets and erect newsracks on public property where the schemes were not narrowly tailored to protect public welfare. See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769–72 (1988) (newsracks); *Lovell v. City of Griffin*, 303 U.S. 444, 450–51 (1938) (leaflets). The Supreme Court has also struck down prohibitions on the distribution of anonymous election-related leaflets—justified by the need to better inform voters about the source of campaign-related messages and prevent fraud—finding the better-inform-voters rationale insufficient because anonymity is part of the message, and finding the anti-fraud rationale insufficient because the law was overbroad and other antifraud statutes already adequately guarded against fraud. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348–49 (1995). The Supreme Court has struck down right-of-reply laws—laws that permit politicians criticized by newspapers to respond on the pages of the same newspaper. Those laws, although justified as giving consumers greater access to information they may want, have been invalidated at least in part on the grounds that permitting a right-of-reply fundamentally alters the product being sold. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974) (invalidating newspaper right-of-reply statute); cf. *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 116–21 (1973) (plurality opinion) (holding broadcasters had right to refuse to sell advertising time to political advertisers). The Supreme Court has also said, in dictum, that there can be no legitimate “state interest in suppressing [the dissemination of books] . . . out of solicitude for the sensibilities of readers.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (holding that outrageousness of the speech to some readers did not alter its protected status); *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943) (explaining in dictum that Jehovah’s Witnesses could not be barred from engaging in door-to-door soliciting merely because those views are “unpopular, annoying or distasteful” to some).

Two recent cases provide ready examples. *Sorrell v. IMS Health Inc.* and *Brown v. Entertainment Merchants Association* both involved government regulation of commercial transactions in which speech commodities were sold. In each case the Court applied strict scrutiny and struck down the regulations.<sup>102</sup> Each case involved regulation of commoditized speech that did not seek to enhance the fairness of the bargain between the parties to the transaction. The two cases thus support the general thesis by negative implication: when commoditized speech regulations do not seek to make a transaction fairer to one of the parties to that transaction, but instead have other purposes, the Court will strike them down.

In the first case, *Sorrell v. IMS Health Inc.*, the Supreme Court struck down a Vermont privacy law that prohibited the sale, disclosure for marketing purposes, or use for marketing purposes of pharmacy records that revealed the prescribing practices of individual doctors.<sup>103</sup> The Court treated the law as a content-based and speaker-based restriction on speech, applied strict scrutiny, and invalidated it.<sup>104</sup> Lacking a better vocabulary for formulating their defense of the law, Vermont tried to argue that the restrictions at issue should have been subjected to more lenient scrutiny because the speech at issue was “commercial speech.”<sup>105</sup> The Court held that even analyzed under the more forgiving standards applicable to commercial speech, Vermont’s law was unconstitutional.<sup>106</sup>

In the second case, *Brown v. Entertainment Merchants Ass’n*, the Supreme Court struck down a California law that prohibited the sale or rental of violent videogames to minors and required packaging labels for such products to state “18.”<sup>107</sup> Like Vermont in *Sorrell*, California lacked a ready vocabulary for arguing its case, but tried to argue that the restrictions were permissible because violent speech is like obscenity and unprotected by the First Amendment.<sup>108</sup> The Court held that violent speech was entitled to full constitutional protection,

---

102. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011).

103. *Sorrell*, 564 U.S. at 552, 556–57.

104. *Id.* at 565–67.

105. *Id.* at 571.

106. *Id.*

107. *Brown*, 564 U.S. at 789.

108. *Id.* at 792–93.

determined that California's law imposed a content-based restriction, applied strict scrutiny, and invalidated the law.<sup>109</sup>

The two cases look like straightforward applications of the content principle and settled First Amendment norms. Neither was, however. Both cases divided the court. *Sorrell* was 6–3,<sup>110</sup> and *Brown* was 7–2 with a two-justice concurrence.<sup>111</sup> Both cases masked deeper issues. In *Sorrell*, the deeper issue was the extent to which the government may protect a third-party's interests (such as those of patients and doctors) by interfering with otherwise consensual commercial transactions between other parties (pharmacies and marketers). In *Brown*, the deeper issue was the extent to which the government may interfere with commercial transactions between two otherwise consenting parties (children and videogame retailers).

Both cases clearly involve the regulation of commoditized speech and paternalistic rather than more nefariously censorial government motives. And in both cases, the laws at issue were found to violate the First Amendment. These cases show that there is a range of circumstances where the Court will intervene to strike down regulations governing bargains over commoditized speech when those regulations venture beyond ensuring bargain fairness. The crucial fact about each case is that no party to the bargains wanted the transaction to include the mandatory government term. In *Brown*, neither the retailers nor the children wanted the transaction restricted.<sup>112</sup> In *Sorrell*, neither the pharmacies nor the marketers wanted it.<sup>113</sup> The regulations thus did not make the bargains fairer. They did not seek to fill in a term that the less powerful party would have wanted had the circumstances of bargaining been more equal. The Court struck down the regulations in both cases because the laws at issue did not seek to make a transaction fairer to one of the parties to that transaction, but instead had other purposes.

---

109. *Id.* at 798–804.

110. *Sorrell*, 564 U.S. at 555.

111. *Brown*, 564 U.S. at 787.

112. In *Brown* the restriction completely barred willing children from purchasing violent videogames from willing retailers. There was no question that some children wished to purchase the games on their own. *See, e.g., id.* at 794–95, 802–04 (discussing the law's restrictions on purchase even by children of parents who do not disapprove of the purchase).

113. *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 273 (2d Cir. 2010) (“The statute prevents willing sellers and willing buyers from completing a sale of information to be used for purposes that the state disapproves.”), *aff'd*, 564 U.S. 552 (2011).

Take *Sorrell*: the Vermont law at issue made it unlawful for pharmacies and marketers to engage in a consensual transaction.<sup>114</sup> The law's intent was not to protect the fairness of the bargain between the pharmacies and advertisers.<sup>115</sup> Rather the statute imposed that bar to protect the interests of third parties (patients, doctors, and the general public).<sup>116</sup> The State contended that the law was "necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship" and was integral "to . . . improved public health and reduced healthcare costs."<sup>117</sup> The regulation in *Sorrell* thus prohibited an otherwise consensual speech contract between A and B, in order to protect the interests of C, D, and E. The Court rejected all of Vermont's proffered interests as insufficient to support the law even under the relatively deferential standard afforded to commercial speech.<sup>118</sup> Cryptically, near the end of the opinion, the Court noted that its cases recognize that the government has a "legitimate interest in protecting consumers from 'commercial harms,'" but that Vermont had not advanced a justification addressing harms of that type.<sup>119</sup>

Similarly, in *Brown*, the California law prohibited the sale of violent videogames to children on the grounds that children are especially vulnerable to the effects of violent speech.<sup>120</sup> California did not seek to hide this justification for the law. On the contrary, California's whole case was that the speech was unprotected (of low value because it is immoral) and that children could be legitimately prohibited from accessing it (because they are particularly vulnerable to its corrupting influence).<sup>121</sup> California's only other justification for the law was that the law would help vindicate the third-party interests of parents who wished to protect their children from video game violence.<sup>122</sup> The Court rejected all of those justifications as not presenting a compelling government interest sufficient to survive strict scrutiny.<sup>123</sup>

---

114. See *Sorrell*, 564 U.S. at 558–59 (describing the law at issue).

115. See *id.* at 571–79 (describing Vermont's asserted interests in enacting the law).

116. See *id.*

117. *Sorrell*, 564 U.S. at 572.

118. *Id.* at 572–79.

119. *Id.* at 579.

120. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 798–800 (2011).

121. *Id.* at 793–96, 800.

122. *Id.* at 801–04.

123. See *id.* at 794–96, 799–804.

Suppose the facts of the two cases were modified slightly such that the regulations were designed to enhance bargain fairness. It is probable that the cases would have come out differently. Suppose, on the one hand, that in *Brown* the software at issue were an automated stock-trading program, and the requirement was a warning on the box that the program's trading algorithm had not been proven to actually make any money. Those facts would make the case like *Commodity Futures Trading Commission v. Vartuli*, a case in which the Second Circuit held that the marketing, sale, and use of a stock trading program was subject to the registration and antifraud provisions of the securities laws and not protected by the First Amendment.<sup>124</sup> Unlike the restrictions in *Brown*, the registration and antifraud laws upheld in *Vartuli* exist to enhance bargain fairness by providing investors with information they would surely want.

Suppose, on the other hand, that in *Sorrell* the prohibition had "allow[ed] the [prescriber-identifying] information's sale or disclosure in only a few narrow and well-justified circumstances."<sup>125</sup> There is language in *Sorrell* that suggests that such a restriction would have been constitutional because it would have shown that the "State's asserted interest in physician confidentiality" was actual, rather than pre-textual.<sup>126</sup> Rather than an apparent concern with preventing the commercial marketing of prescription drugs, that justification—protecting physician confidentiality—would have reflected a concern for the fairness of the bargain between pharmacies and physicians. The Court in *Sorrell* suggested that such a law would have been constitutional.<sup>127</sup>

Thus, *Sorrell* and *Brown*, as evaluated under the lens of the fair-bargain conception of First Amendment law, tend to show that commoditized speech regulations that do something other than attempt to protect one of the parties to a transaction are subject to intensive First Amendment scrutiny, even while fairness-promoting regulations rarely receive scrutiny at all.

---

124. *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 107–13 (2d Cir. 2000).

125. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 554 (2011).

126. *Id.*

127. *Id.*

*D. Commoditized Speech in Transactional Relationships*

Bargain fairness also prominently appears in cases involving the regulation of ongoing transactional relationships. Those cases fall outside the narrow ambit of commercial speech, because they do not strictly involve advertising or proposals to engage in a market transaction. Rather, they involve a relationship of relative trust between market participants. For example, in the securities realm, First Amendment cases would involve the requirement that companies make continuously available to market participants truthful, non-misleading information about their operations and performance.<sup>128</sup> In the professional services realm, regulations require that advisors, counselors, attorneys, and doctors provide information, advice, and guidance that comply with certain minimal standards of professional and ethical conduct.<sup>129</sup>

The Supreme Court has permitted substantial content-based regulation in those transactional settings to combat fraud and, more broadly, to combat a lack of adequate bargain-relevant information for consumers.<sup>130</sup> Each of those concerns is manifestly about bargain

---

128. The “core mechanism” of the Securities Exchange Act of 1934 is “sweeping disclosure requirements” that allow “shareholder choice.” *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 12 (1985); *see also* *Longman v. Food Lion, Inc.*, 197 F.3d 675, 682 (4th Cir. 1999); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1227 (9th Cir. 1987). But there have been very few First Amendment challenges to those disclosure requirements. In *Ohralik v. Ohio State Bar Association*, the Court stated in dictum that “[n]umerous examples could be cited of communications that are regulated without offending the First Amendment,” including “the exchange of information about securities [and] corporate proxy statements.” 436 U.S. 447, 456 (1978) (citations omitted). The Court noted that “[e]ach of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.” *Id.*

In the distant past, at least one federal appellate court summarily rejected a challenge to the constitutionality of the regulation of corporate proxy materials. *See SEC v. May*, 229 F.2d 123, 124 (2d Cir. 1956) (holding that petitioners’ claims that proxy regulations “are unconstitutional as unauthorized delegations of legislative power *and otherwise . . .* have no merit” (emphasis added)).

129. *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1205–09 & nn.105–07 (2016) (explaining fiduciary duties of doctors, lawyers, and accountants).

130. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous

equity. Further, regulation in these circumstances is content-based in the most classic sense: it distinguishes between speech on the basis of its content and between speakers on the basis of their identities.<sup>131</sup> The Court makes such distinctions because the risk of fraud is greater in some commercial contexts than others.<sup>132</sup>

For example, most compelled commercial disclosures are subject to reduced First Amendment scrutiny and are now subject to a standard of review bordering on rational basis.<sup>133</sup> In settings where the underlying transactions are complex or individuals stand in a relationship of vulnerability to professionals with specialized knowledge, the scope of permissible antifraud and information disclosure measures has been even more sweeping.<sup>134</sup> The government has been permitted to impose much more substantial antifraud and information-forcing regulations on individuals who work as securities professionals, accountants, and lawyers, for example, than almost anyone else.<sup>135</sup>

---

review that the First Amendment generally demands.”); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”).

131. *See, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (defining content-based laws as “those that target speech based on its communicative content” by, for example, “defining regulated speech by particular subject matter” or “its function or purpose”).

132. For example, the regulations will only apply to lawyers, accountants, or investment advisers. Or, they will relate to certain types of information or classes of transaction, such as selling a security, purchasing a house, or hiring an attorney. *See also* Schauer, *supra* note 2, at 1778 (“It might be hyperbole to describe the Securities and Exchange Commission as the Content Regulation Commission, but such a description would not be wholly inaccurate.”).

133. *See* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Zauderer*, 471 U.S. at 657–58; *Am. Meat Inst. v. USDA*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012); *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002); *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294 (1st Cir. 2005); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).

134. *See* Alfred C. Aman, Jr., *SEC v. Lowe: Professional Regulation and the First Amendment*, 1985 SUP. CT. REV. 93, 95; *see also* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1258–64 (2016) (describing doctrine).

135. Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 223 (1990); Neuborne, *supra* note 25, at 5–6; *see* Schauer, *supra* note 2, at 1766–67, 1778, 1781–84. *See generally* Henry N. Butler, *The First Amendment and Federal Securities Regulation*, 20 CONN. L. REV. 261 (1988).



What restrictions on misleading speech and disclosure requirements have in common is that they are intensely concerned with regulating the four corners of the bargain. Each dictates the information that must be made available to consumers before bargaining even begins. And in the particular settings in which such regulations are most pervasive—professional settings involving complex transactions or circumstances involving the need for secret-keeping—the products themselves are almost always commoditized speech.<sup>136</sup> They are frequently contracts with doctors, lawyers, bankers, or accountants, for example, in which an individual is either seeking access to specialized information or revealing information of a particularly personal and sensitive kind.<sup>137</sup>

Commentators have been puzzled for decades by the fact that some areas of intensely content-based speech regulation remain subject to, at best, modest First Amendment scrutiny.<sup>138</sup> But a judicial concern for ensuring bargain fairness readily explains the lack of rigor. The purpose of the measures in question is to level the bargaining positions of the parties, thereby helping individuals to obtain a better deal in circumstances of significant information asymmetry. Regulations intended to prevent fraud are particularly suitable for deference because they are often what make the transaction possible at all by reducing the transaction costs associated with the imbalance of power between the parties. If bargain fairness is the value guiding the Courts' decisions, it comes as no surprise that the Court has long held that common-law antifraud regulation is completely exempt from First Amendment scrutiny.<sup>139</sup>

The Article's thesis is also consistent with the tight nexus with bargains that the Court has treated as essential to the deference a law receives. Regulations that wander too far from immediate relevance to

---

136. *See, e.g.*, Aman, *supra* note 134, at 94 (“[A] significant component of the ultimate product or commodity produced and sold by many professions is in the form of words—spoken or written.”).

137. *See, e.g.*, Haupt, *supra* note 134, at 1248–54 (explaining that professionals “serve[] as the conduit between . . . knowledge communities” and individuals).

138. *See* sources cited *supra* note 135.

139. “Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.” *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012); *See* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (noting that fraudulent speech generally falls outside the protections of the First Amendment).

an underlying transaction raise red flags.<sup>140</sup> The Court has explicitly acknowledged that the First Amendment does not prevent antifraud regulations, for example, but that it does prevent laws against lying that have no commercial nexus.<sup>141</sup> It has also held that information furnished by a credit reporting agency to a limited audience meant to aid its subscribers in making business decisions is far less worthy of First Amendment protection than speech that concerns a “public issue” that was not made “solely in the individual interest of the speaker and its specific business audience.”<sup>142</sup>

The courts’ commercial speech, securities regulation, and professional regulation cases all converge on bargain fairness. Where the Court believes that a bargain between a consumer and a firm would be made materially fairer by the imposition of a particular speech regulation the Court generally defers. Where such regulations do not have a close nexus with the bargain or are for other purposes, however, they are likely to be subjected to heightened scrutiny.

#### *E. Speech Restrictions Imposed by Monopolists*

Cases involving monopolies comprise the area where the Court has applied something like the bargain fairness conception with the greatest consistency. This is logical because conditions of market power are the easiest to evaluate from a bargain fairness perspective.

In *Marsh v. Alabama*, the Supreme Court held that a company town could not deprive town residents of the right to receive religious literature from proselytizers.<sup>143</sup> *Marsh* could be reframed, however, as a case about the permissible scope of the government’s power to regulate the contractual relationship between the company and its residents. Returning to the baseline assumption that individuals are unlikely to concede, and companies are unlikely to make individuals forgo First Amendment interests that are not within the scope of their job duties, one could recast the case as a bargain fairness case. The fact that the company town possessed monopoly power drove the Court

---

140. See *Lowe v. SEC*, 472 U.S. 181, 203–11 (1985) (interpreting the Investment Advisers Act of 1940 as not applying to financial newsletters in order to prevent potential First Amendment problems).

141. See *Alvarez*, 132 S. Ct. at 2545–48.

142. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–62 (1985).

143. *Marsh v. Alabama*, 326 U.S. 501, 503–04 (1946). Specifically, the case involved the application of an Alabama trespassing statute to a Jehovah’s Witness, who attempted to distribute religious literature on the privately owned sidewalks of a “company town.”

to interpose a requirement in the contract between the company and its residents that would likely have already been a part of the bargain had the town not possessed monopoly power.<sup>144</sup>

The Court has also permitted states to impose compulsory terms in circumstances where the property owner has at least some market power.<sup>145</sup> Thus, in *Pruneyard Shopping Center v. Robins*, the Supreme Court concluded that a California Supreme Court decision requiring that a shopping center permit high school students to exercise their state-protected rights of expression and petition on its property did not violate the shopping center's First Amendment rights.<sup>146</sup> Because a shopping center is often more than a site of commerce but also serves as a focal point for conversation and community interaction, and because such spaces can have considerable market power in small communities, one justification for the result in *Pruneyard* is that it enhances the bargaining power of those who use the shopping center to see, hear, and partake in free expression.

The Court's other market power decisions have involved circumstances that might be described as analogous to preventing firms from placing unfairly speech-restrictive terms in their contracts. In *Associated Press v. United States*, the Supreme Court held that the Associated Press's (AP's) system of By-Laws, which prevented all AP member newspapers from selling news to non-member newspapers, violated the antitrust laws.<sup>147</sup> The Court further held that newspapers were not protected from antitrust scrutiny simply because the products they sold were speech commodities.<sup>148</sup> In *Lorrain Journal Co. v. United States*, the Court held that a requirement imposed by a newspaper with monopoly power that its advertisers not advertise with the local radio station similarly violated the antitrust laws and was

---

144. See *Marsh*, 326 U.S. at 508–09 (“[T]he managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees . . . . Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. . . . There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.”).

145. The Supreme Court has been hesitant to extend the *Marsh* doctrine, likely because of its concern with protecting the welfare-enhancing power of individuals to freely enter into contracts involving restrictions on speech.

146. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–77, 88 (1980).

147. 326 U.S. 1, 4 (1945).

148. *Id.* at 4–5, 7.

ineligible for First Amendment protection.<sup>149</sup> In *Turner Broadcasting Systems, Inc. v. FCC*, the Supreme Court upheld a federal law that required cable television systems to dedicate some of their channels to local broadcast television stations because cable providers had monopoly power and local television stations were likely to go out of business without the intercession of the law.<sup>150</sup>

Framed in fair bargain terms, each of these cases involved a situation where the court permitted the regulation of commoditized speech on the explicit grounds that one of the parties possessed too little power to obtain favorable terms.<sup>151</sup>

### *F. Speech Restrictions in Employment Contexts*

Workplace speech regulation is extensive and also puzzling. It has proven to be an endless font of debate among scholars. Beginning with labor law more than half a century ago and moving into modern workplace harassment law, the Court has permitted the government to place significant content-based restrictions on speech in the workplace untroubled by the First Amendment.<sup>152</sup> Bargain fairness explains why. In labor law and modern sexual harassment law, to give two examples, the Court permits extensive regulation as part of its broader view that regulation of the fairness of economic bargains between the parties is permissible.

#### *1. Labor law*

In labor law, courts have permitted the extensive regulation of the speech of employers and unions without applying serious First Amendment scrutiny. Labor cases have permitted content-based injunctions against picketing,<sup>153</sup> and treated even true statements about the consequences of unionization as threats constituting an

149. *Lorain Journal Co. v. United States*, 342 U.S. 143, 152–53 (1951).

150. 520 U.S. 180, 185–86, 197–200 (1997).

151. And when the cases were close, such as in *Turner*, it was not because members of the court objected to bargain fairness, but rather because they thought bargain fairness was being used as a pretext for other aims. *See id.* at 229–30, 249 (O'Connor, J., dissenting).

152. Fallon, *supra* note 36, at 1 (explaining absence of First Amendment scrutiny for workplace sexual harassment laws); Schauer, *supra* note 2, at 1782 (absence of First Amendment scrutiny for labor laws).

153. *See Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 285–87, 295 (1957) (upholding an injunction against picketing); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 491–92, 504 (1949) (same).

unfair labor practice.<sup>154</sup> As Schauer explained, “much of the balance of modern labor law involves unashamedly content-based restrictions on boycotts, strikes, and picketing.”<sup>155</sup> The result is that “[i]n some contexts unions may say and do things that employers may not, and in other contexts employers may say and do things that unions may not—the two schemes together constituting a complex but content-based system of government regulation of speech.”<sup>156</sup>

The reason for the Court’s relatively permissive First Amendment treatment of labor regulations, which seems clear from the cases themselves,<sup>157</sup> is that unionization is a method of economic empowerment for workers that the government may justifiably protect through speech regulation. At the same time, unions must be restrained to ensure that they do not abuse their position of relative market power to extract unfair concessions from employers.<sup>158</sup> One might reasonably argue from a *laissez-faire* free marketeer’s perspective that labor law, with its regulatory tinkering and counter-tinkering, represents concern for bargain fairness run amok, resulting in substantial restrictions on valuable speech. What has likely driven the Court’s refusal to interfere is a belief that the government’s purpose in regulating the labor sphere is both benign and permissible, designed to ensure that employers and unions strike fair bargains even if the consequence is significant content-based restrictions on the speech of employers and unions.

---

154. NLRB v. Gissel Packing Co., 395 U.S. 575, 616–20 (1969); Farris Fashions, Inc. v. NLRB, 32 F.3d 373, 376 (8th Cir. 1994).

155. Schauer, *supra* note 2, at 1783.

156. *Id.*

157. *See infra* note 158.

158. *See, e.g., Gissel Packing Co.*, 395 U.S. at 617 (“And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.”); *Local 695*, 354 U.S. at 285–87, 295 (“The Court therefore concluded that it was ‘clear that appellants were doing more than exercising a right of free speech or press. . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.’”); *Giboney*, 336 U.S. at 497 (“To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their antitrust laws.”).

## 2. Workplace sexual harassment

Bargain fairness also explains one of the great riddles of modern First Amendment law: the complete absence of First Amendment scrutiny for workplace sexual harassment regulations. In the area of workplace harassment law, courts have not applied First Amendment scrutiny,<sup>159</sup> even though workplace harassment is almost always a product of speech in the workplace.<sup>160</sup> The fact that workplace harassment law restricts a great deal of speech on the basis of its content has been a source of great scholarly concern,<sup>161</sup> but has not gained similar traction in the courts.<sup>162</sup>

Jack Balkin gave one of the best explanations for the courts' decision not to subject harassment in the workplace to First Amendment scrutiny: that employees at work are functionally a captive audience.<sup>163</sup> As Balkin once explained, the "employee working for low wages in a tight job market who is sexually harassed by her employer or co-worker" is in many ways analogous to the "passengers on the public buses who may see advertisements they would rather

159. Title VII of the Civil Rights Act of 1964 makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-(2)(a)(1) (2000).

160. See, e.g., Frederick Schauer, *The Speech-ing of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 347, 352 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) ("[A] survey of the kinds of events that generate hostile environment claims demonstrates that in most of them the hostile environment is created by an environment of insults, jokes, catcalls, comments, and other forms of undeniably verbal conduct."); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 691 (1997); Volokh, *supra* note 50, at 1800–01.

161. See Estlund, *supra* note 160, at 707 ("The range of [scholarly] views on this matter spans the full gamut, from those who would permit the regulation of any speech that contributes to a hostile environment, including speech on public issues, to those who would permit no regulation of speech that would be protected in the public square."); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 697–99 (2012) (summarizing disputes); see also Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995).

162. See Fallon, *supra* note 36, at 1 (summarizing Supreme Court's quiet rejection of First Amendment claims in the landmark Title VII case *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)); see also Estlund, *supra* note 160, at 707 ("The Supreme Court has left few clues to the constitutionally permissible scope of workplace harassment law, and the lower courts have largely followed the *Harris* model of silence.").

163. See J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2312–14 (1999).

avoid or the child running through stations on the radio dial.”<sup>164</sup> However, captive audience doctrine is murky, normatively controversial, and difficult to apply.<sup>165</sup> As Balkin himself has acknowledged, whether an individual is viewed as a captive audience member depends on contingent societal views about what constitutes unjust coercion.<sup>166</sup>

Despite its shortcomings, Balkin’s captive audience argument provides a compelling account of the absence of First Amendment scrutiny for workplace sexual harassment. It also neatly matches up with the theory of bargain fairness. Reconceiving harassment law in bargain terms, the prohibition on harassment in the workplace might be considered a compulsory term meant to reflect an anti-sexual-harassment term that employees would obtain in a fair bargain. Due to its disfavored status in society, harassing speech has relatively low value, and permitting harassing speech is rarely germane to the requirements of a job. Consequently, if employees and employers were to bargain on equal footing over the issue, it is not implausible that employers would be willing to accede to an employee’s demand that the employee not be subjected to harassment in the workplace.

Moreover, an important and underappreciated component of workplace sexual harassment law is that people cannot prospectively waive their rights to be free from harassment in their employment contracts.<sup>167</sup> The discrimination laws are not mere contractual default rules, but rather mandatory non-waivable guarantees made to every employee.<sup>168</sup> Two possible justifications are that (1) it is probably difficult to price such waivers, because it is difficult to know how many employees would freely and voluntarily submit to sexual harassment, and (2) it is more administrable and transaction cost-effective to apply an across-the-board presumption against waiver to all employment contracts. Because it is unlikely that any person would like to be

---

164. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 424.

165. *See, e.g.*, Estlund, *supra* note 160, at 715–18.

166. *See* Balkin, *supra* note 163, at 2314; Balkin, *supra* note 164, at 423–24.

167. *See* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (explaining that an employee cannot prospectively waive her Title VII rights); *Cange v. Stotler & Co.*, 826 F.2d 581, 594 & n.11 (7th Cir. 1987); *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (“While a release of Title VII claims will not ordinarily violate public policy, an employee may validly release only those Title VII claims arising from ‘discriminatory acts or practices which antedate the execution of the release.’”); EEOC, EEOC NOTICE NO. 915.002 (Apr. 10, 1997).

168. *See supra* note 159 and accompanying text.

sexually harassed, prohibiting sexual harassment likely safeguards the vast majority of workers from the possibility that their employer might attempt to sneak a waiver provision into their employment contract.

The fact that rights to freedom from sexual harassment may not be waived, moreover, shows that the power of the government to regulate commoditized speech is greater than ordinarily assumed. The non-waivability of rights against sexual harassment is similar to the non-waivability of rights against malpractice and fraud.<sup>169</sup> Even though fraud and malpractice liability are unwaivable, the Court has not struck down those forms of liability as violative of the First Amendment even when they result in significant censorship. Thus, contrary to the assumptions of scholars like Volokh, Solove, and Richards,<sup>170</sup> the Court has permitted legislatures to determine that some types of waivers are so likely to result in unfair bargains that they may be prohibited entirely.

### *G. The Contested Field of Tort-Like Harms from Commoditized Speech*

The final field of commoditized speech cases worth canvassing is that mysterious region where First Amendment scrutiny has been highly unpredictable: tort liability for harms arising from commoditized speech. The argument from a fair-bargain standpoint is that these cases prove difficult because it is unclear which party to the bargain is treated unfairly by the imposition of liability. On the one hand, failing to impose liability means that tortious harms fall on victims. On the other hand, in many of these circumstances, it seems

---

169. See, e.g., *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 390 (5th Cir. 2010) (noting that liability for securities fraud is unwaivable under federal and Texas law securities laws); Adam Candeub, *Contract, Warranty, and the Patient Protection and Affordable Care Act*, 46 WAKE FOREST L. REV. 45, 58 (2011) (noting that medical malpractice liability is unwaivable); Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 468 (2004) (noting that “public policy considerations and codes of professional conduct generally preclude members of [certain professions] from attempting to limit their liability for their professional negligence”); see also CAL. CIV. CODE § 1668 (2003) (“All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”); MODEL RULES OF PROF’L CONDUCT r. 1.8(h)(1) (AM. BAR ASS’N 1983) (stating that a lawyer shall not “make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making this agreement”).

170. See Solove & Richards, *supra* note 23, at 1655 (arguing that government may not constitutionally impose unwaivable speech-restrictive civil liability rules); Volokh, *supra* note 45, at 1057 (similar).



unlikely that the product would be economical to provide if tort liability were available. Moreover, in many cases, it is extremely costly to adjudicate tort claims due to concerns about the traceability of the harms to the speech commodity.

In fields where these concerns do not exist, liability for commoditized speech is routine and unproblematic. Malpractice is a familiar tort that has never been a focus of First Amendment attention. Similarly, cases involving technical products that have a defined discrete group of customers who use the product solely for its informational value also routinely escape First Amendment scrutiny. In *Brocklesby v. United States*, for example, the Ninth Circuit held that a publisher of a factually erroneous aeronautical chart could be held liable for furnishing a defective product.<sup>171</sup> There are similar cases finding liability and a lack of First Amendment protection for other speech products providing misleading instructions.<sup>172</sup>

However, courts have interposed the First Amendment to block tort liability in cases in which traceability is difficult to establish and the likely uses for commoditized speech are many and varied. In *Winter v. G.P. Putnam's Sons*, the Ninth Circuit held that mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on faulty information in *The Encyclopedia of Mushrooms* could not recover tort damages because the First Amendment protected the publisher from negligence and products liability.<sup>173</sup> Courts have also dismissed on First Amendment grounds tort cases brought on theories that speech inspired or influenced another to engage in tortious conduct.<sup>174</sup>

---

171. 767 F.2d 1288, 1295 n.9, 1296 (9th Cir. 1985).

172. See, e.g., *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 342–43 (9th Cir. 1980); *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992) (discussing liability for providing a map that incorrectly indicated the location of an electric cable); *Rozny v. Marnul*, 250 N.E.2d 656, 658–59 (Ill. 1969) (discussing liability for providing a defective survey map).

173. 938 F.2d 1033, 1033–34 (9th Cir. 1991).

174. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (holding that a magazine article on autoerotic asphyxia was entitled to First Amendment protection from liability because it did not “incite” adolescent’s death); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988) (holding that musical compositions expressing the view that suicide is an acceptable alternative to life were protected by the First Amendment from suit for wrongful death); *Olivia N. v. Nat’l Broad. Co.*, 178 Cal. Rptr. 888 (Ct. App. 1981) (dismissing on First Amendment grounds a suit based on a sexual assault patterned on a similar assault portrayed in a television show).

Volokh has opined that liability in the aeronautical charts cases might be predicated on the immediacy of the need for the information provided.<sup>175</sup> He has explained that:

People use aeronautical charts not by considering whether to follow the charts' advice, contemplating using a different chart, or deciding which of the charts' many recommendations should be accepted. Chart users just apply the information given in the charts. Charts are authoritative, especially in an environment where quick decisions are necessary and lives are at stake.<sup>176</sup>

That conclusion is somewhat plausible, though ultimately difficult to fit neatly with the outcomes of the cases. For example, some purchasers of a mushroom encyclopedia presumably purchase it with the specific intention of using it to sort safe mushrooms from deadly ones. Moreover, there have been cases in which courts have held that the First Amendment does not protect even highly speech-like (as opposed to product-like) speech. For example, the Fourth Circuit held that the First Amendment did not shield a publisher of the book *Hit Man: A Technical Manual for Independent Contractors* from tort liability for causing several individuals' deaths when a reader used the manual to carry out a murder for hire.<sup>177</sup>

Bargain fairness intersects with this area of law by positing that courts have difficulty with these cases because it is hard to determine which rule promotes bargain fairness. In the faulty technical instructions cases, the analysis is relatively easy. Individuals who purchased those products almost certainly would have demanded a warranty for the specific use to which they put the product if they had sufficient bargaining power. The cases become more difficult as the uses of a product become more variegated and the likelihood that every person in a broad class of consumers would demand the same contractual guarantee diminishes. Because not every purchaser of *The Encyclopedia of Mushrooms* purchases it for the purpose of using it as a guidebook for selecting safe wild mushrooms, it is not nearly as clear that such a warranty term is reasonable to impose.

---

175. Eugene Volokh & Donald M. Falk, *First Amendment Protection for Search Engine Search Results*, 23 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 112, 119 (2014).

176. *Id.*

177. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 241–43 (4th Cir. 1997), *rev'g* 940 F. Supp. 836 (D. Md. 1996).

It is worth noting that in the tort injury cases, courts are effectively using the background principles of tort law to override the equivalent of default warranty terms derived from the First Amendment.<sup>178</sup> Given the arc of the case law, and the uncertainty in determining what the best rules of liability in such cases are, it is likely that if the legislature were to specifically enact a law making certain tort duties applicable to particular speech commodities in order to enhance bargain fairness, courts would more readily defer to that judgment. One might imagine that as long as a law reflected a reasonable decision about which rule would enhance the fairness of the bargain between the parties, the law would be upheld.

#### IV. THE NORMATIVE APPEAL OF THE “FAIR BARGAIN” CONCEPTION

The most fascinating aspect of the “fair bargain” conception is its apparently attenuated relationship with conventional First Amendment values—protection for democratic deliberation, the search for truth, individual autonomy, self-expression, tolerance, dissent, etc. Behind this apparent dissonance, however, lies a perfectly understandable logic. Namely, because speech is commodifiable at all, it must be subject to at least some minimal market regulation. Placing an order for a book and purchasing a ticket to a movie, for example, could not be done without at least some generally applicable commercial laws governing those transactions.

##### *A. Bargain Fairness as a Solution to the Market Norm vs. Speech Norm Dilemma*

Once neutral generally applicable principles governing market transactions are permitted—even occasionally—to restrain and restrict speech, however, the Court faces a dilemma. It must determine when to apply market norms to commoditized speech and when to apply speech norms. This question is especially difficult because many familiar neutral generally applicable principles governing market transactions specifically look to the nature of the commodity to determine the nature of the applicable rules. Determining whether a particular type of property is inalienable, for example, depends on

---

178. This would be an analogy to the idea that firms cannot waive personal injury liability in contracts of adhesion. See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791–96 (1966).

looking at the character of the property. Determining whether a product must be sold with a warning label requires an inquiry into the dangerousness of the product. Determining whether merchant rules should govern a transaction requires recourse to the identity of the parties to the transaction. Put simply, many typical market regulations are simultaneously “neutral” and “general,” and yet are “content” and “speaker-based” when applied to speech commodities because their application turns on the nature of the product and the parties to the transaction.

Bargain fairness regulation is an accurate characterization of the rationale behind the Court’s determinations of which types of commoditized speech regulations are *market* regulations rather than *speech* regulations. By permitting regulations directed at the fairness of the bargain, the Court permits legislatures to engage in the types of regulations most common to typical market regulation.

The Court was not compelled to draw the line at the fair bargain juncture. It could have treated all regulations of commoditized speech as speech regulations. Alternatively, it could have treated all regulations of commoditized speech as market regulations. Or it could have followed an eclectic path between the two. Instead, however, it appears that fair bargains are where the Court drew the line, and that decision is defensible.

Before defending the fair bargain conception, it is worth pointing out the drawbacks that would have come from drawing a different line. If the Court had treated all commoditized speech regulation as subject to significant First Amendment scrutiny, the harms to social welfare would have been significant. For example, it is unclear how the Court could justify occupational licensing, lawsuits for legal malpractice, or the enforcement of most copyright law if commoditized speech regulations were subject to conventional First Amendment scrutiny. Similarly, if the Court had chosen to treat all regulation of commoditized speech as typical market regulation, it would be trivially easy for the government to engage in censorship through the vehicle of market regulation. The Government could restrict access to speech commodities for the same fanciful reasons it sometimes imposes regulations on traditional commodities, heedlessly censoring much speech at the core of the First Amendment.

The Court might have chosen an eclectic approach—striking down some regulations and upholding others based on a balancing of interests—but familiar problems with incommensurability immediately would have arisen. An eclectic approach to analyzing the

First Amendment stakes of securities regulation, labor speech regulation, or workplace harassment would have required the Court to draw unpleasant lines. An eclectic approach would have required the Court to somehow balance society's interest in economic welfare with an individual's interest in freedom of expression case by case. Moreover, it would have required the court to justify the choice of balancing itself. Thus, an eclectic approach would have required the Court to explain how imposing categorical (or default) rules prohibiting certain kinds of speech would unduly harm freedom of expression.

Bargain fairness sidesteps the balancing problems with the eclectic approach by eliminating the question of First Amendment values from the analysis at the outset. The proper question under fair bargain analysis is not whether the economic benefits from the regulation outweigh the First Amendment harms it imposes, but whether the regulation results in an economic benefit to the less powerful of the two parties to the bargain. Bargain fairness posits that any First Amendment harms are ameliorated by the fact that the two parties would willingly enter into the contract in any event and the only question is whether a term the less powerful party prefers will control.

#### *B. Other Benefits of Bargain Fairness*

Bargain fairness has at least three other virtues. First, the type of "balancing" analysis that it calls for involves a comparison of costs and benefits, and so does not require juggling incommensurables. Second, it places reasonably clear, identifiable limits on the boundaries of permissible government regulations of commoditized speech. Third, and most importantly, it poses little risk of spillover censorship.

First, consider balancing. Balancing as a method of performing legal analysis has long been criticized because it is regarded as indeterminate and, even when honestly performed, beset by incommensurability problems.<sup>179</sup> Balancing in the fair bargain context is not indeterminate, however, and does not involve incommensurables. Instead, balancing in the fair bargain context requires courts to determine the value of the speech being negotiated from the perspective of both parties to the bargain, and from that estimate, determine whether the regulation is designed to make the bargain materially fairer. Determining the value of the right to each

---

179. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 841 (1994).

party will involve judgment; so will determining whether the discrepancy between the value to the parties is too great to sustain. However, those types of judgments, which involve judgments of degree rather than comparisons of kind, are not susceptible to the same critiques as conventional balancing analysis.

Second, consider clarity and predictability. Vindicating only those government regulations that approximate fair bargains sets clear identifiable limits on the permissible scope of government power to interfere with transactions involving commoditized speech. First, and most basically, fair bargain analysis is limited to circumstances in which there is a transactional relationship. Unless the government seeks to regulate an interaction between parties who seek to undertake a consensual commercial transaction, the government is subject to the fully panoply of First Amendment limits on its power to act. Second, transactional terms that do not reasonably approximate a fair bargain are unlawful. That limitation greatly circumscribes the kinds of substantive and procedural alterations the government may make to otherwise consensual transactions in which parties seek to alienate some aspect of their First Amendment rights.

Third, consider the risk of spillover censorship. Regulation of the parties' bilateral bargaining positions in the market is the least dangerous form of market regulation—it only imposes substantive values on the parties to the degree those values already reflect their preferences. Such regulations are designed to reflect the hypothetical interests of one of the parties, and not of the government. In the language of Solove and Richards, the government's regulations are not thought to be problematic because they merely “backstop” private ordering.<sup>180</sup>

### *C. Potential Limitations of the Bargain Fairness Model*

To be sure, bargain fairness, like all methods of deciding difficult and important legal questions, has drawbacks. Most prominently, it can be contended that “fairness” is a vague and manipulable concept. It could also be argued that the test permits the government to gradually eliminate disfavored speech from the marketplace. Finally, one might take the absolutist position that permitting speech to be extensively regulated anywhere places its protection at risk

---

180. Solove & Richards, *supra* note 23, at 1655.

everywhere. Nonetheless, each of those objections can be answered, even if not all of them can be entirely overcome.

First, consider the supposed vagueness of “fairness.” Fairness and equity are vague concepts, so one might object that bargain fairness as a concept is so imprecise and malleable as to be meaningless. One might argue that what seems like a fair trade to one man seems like theft to another. That objection has some heft, though it ultimately misses the idea that “fairness” in this context is reasonably objective and definite. Courts are not balancing incommensurables, rather, they are approximating the value of the right to the speaker who is giving up her right to speak, and its value to her counterparty, who is receiving that promise. It is not difficult in most cases to determine when a law has been enacted to benefit one of the parties to a transaction and when, instead, it has been enacted for other purposes.

Difficult cases can and do arise where legislatures pretend to enact laws that benefit one of the parties, when in fact neither party would favor the law in question. The objection in that situation, however, turns from a general objection to whether fairness can be applied in principle to a specific objection to its application in particular cases. Courts, however, engage in that sort of analysis routinely—they are often called upon to determine whether laws have a purpose or effect other than the one they purport to have. Thus, while the concept of a “fair bargain” may be vague and difficult to define, it is not an empty concept. As this Article has endeavored to show, the Court already applies it.

Second, consider the incremental censorship objection. The fair bargain concept suffers from a slight circularity problem. When the government changes the circumstances of a particular contract or set of contracts through regulation, the relative value of the speech alienated in those relationships changes to reflect that change in baseline. To give one example, the imposition of privacy regulations in one sphere may make it appear unfair that such protective regulations have not been imposed in another sphere as well. As social conditions change due to regulations on commoditized speech, it may be that the existence of one set of regulations justifies the imposition of more regulations. One might argue that this result occurred in labor law, where enhancing the power of unions by restricting employer speech ultimately required some restrictions on union

speech to restore the balance.<sup>181</sup> In that sense, the circularity problem might also be thought of as a kind of slippery-slope problem—as soon as commoditized speech is regulated, it will be difficult to draw lines against additional regulation.

The circularity or slippery-slope issue is a real one. Terms that seem fair against one baseline can come to seem unfair as the baseline moves. The result could eventually be that an area that was once entirely free from government regulation could come to be almost totally coopted by government regulation as each small regulatory change comes to justify the next incremental change. When laws are reviewed on the basis of present expectations, or present market value, they risk this form of regulatory creep. Nonetheless, the circularity issue might be overblown. Social expectations exist in a constant state of flux, and there is not necessarily any objectively appropriate level of legal regulation in any particular area at any particular time. Presentist tests, like the bargain fairness test, have the virtue of vindicating contemporary values without upsetting settled social expectations by attempting to restore outdated norms. In that sense, circularity can be as much a virtue as a vice.

Third, consider the absolutist objection: permitting the extensive regulation of speech anywhere places it at risk everywhere. One might argue that permitting speech regulation on the basis of bargain fairness poses a grave danger that courts will overlook the important substantive stakes of permitting content-based regulation. Speech is not just property. Who may speak and what they may say has a profound impact on every aspect of society—from who is elected to political office to what values society decides are worth pursuing. When courts permit the government to restrict or regulate speech on the basis of its commercial or propertarian properties, they risk losing sight of the fact that it possesses the dual aspect of informing and influencing the rest of society.

There are two replies to that critique. The first is that that argument can be leveled against any restriction or restraint on speech, not just restrictions justified on fair bargain grounds. The central problem society confronts in determining how to implement the First Amendment is recognizing that speech always has a multifarious

---

181. See Schauer, *supra* note 2, at 1783 (“In some contexts unions may say and do things that employers may not, and in other contexts employers may say and do things that unions may not—the two schemes together constituting a complex but content-based system of government regulation of speech.”).



character. Even the most valuable speech might, by virtue of its form or content, be justifiably suppressed. The second reply is that speech is not the only form of property that has a dual nature. Physical property has significant expressive importance and plays an essential role in structuring society, but the government has a free hand to regulate it. Given that property regulation has done a decent job respecting the multifaceted nature of property, it is at least possible to argue that speech regulation justified on commercial grounds can nonetheless respect the multifaceted nature of speech. Ultimately the benefit of permitting bargain fairness regulation—its tendency to advance social welfare—may far outweigh its incidental effects on speech.

#### CONCLUSION

This Article sought to develop a theory of the appropriate role of the First Amendment in governing the regulation of commoditized speech, namely, that courts should apply a “bargain fairness” model when reviewing such regulations. Speech regulations that merely enhance the bargaining power of one of the parties to a transaction should be upheld, while regulations that have other purposes and effects should be struck down. The Court’s cases involving the regulation of commoditized speech are well-explained by that implicit concern.

If the Court were to openly embrace fair bargain analysis, it might improve its application in two ways. First, the Court might take advantage of available comparators to better determine the value of the speech at stake. For example, where an industry has adopted an industry standard practice, the government could intervene to make that standard practice compulsory, thereby protecting consumers from firms that deviate from the industry norm. Courts could also look to other industries or nations to determine how consumer expectations interact with certain kinds of industry regulation. The resulting increase in judicial accuracy could help courts distinguish between genuine bargain-fairness-enhancing laws and those that seek to use bargain fairness as a pretext for substantive censorship. A second way the Court could improve its analysis might be to consider economic evidence to determine whether regulations are appropriate. For example, it could look at survey evidence, or natural experiments, to determine whether less powerful parties (like consumers and employees) truly would like to see certain regulations enacted. Again,

such analysis could help to prevent the misuse of bargain fairness as a covert means of impermissible censorship.

The government's power to regulate commoditized speech is broad, but carefully circumscribed. As a normative matter, the Court has taken a defensible position in carving out a space for laws that enhance bargain fairness, straddling the uneasy line between appropriate concern for social welfare and the preservation of important First Amendment values.