Article

Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas

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INTRODUCTION

"The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas."[1] Conceived a century ago by Justice Holmes as the central "theory of our Constitution,"[2] the marketplace of ideas metaphor has become the dominant lens for judicial (and scholarly) free-speech analysis.[3]

The metaphor's popularity and durability owe to its purported ability to serve a range of different First Amendment values. For the deontologically minded, the marketplace of ideas protects the autonomy- and dignity-respecting values of free expression.[4] For the instrumentalist, it safeguards public debate, open dialogue, and the foundations of democracy itself.[5] For the

1. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

2. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. *See, e.g.*, Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1697 (1999) ("In the marketplace of ideas, the *idea* of the marketplace of ideas enjoys a dominant market share.").

4. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 203 (2014) ("[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association."); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 225, 233 (Geoffrey R. Stone et al. eds., 1992) ("Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself . . . .").

5. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 n.19 (1976) ("This Court . . . has emphasized the role of the First Amendment in guaranteeing our capacity for democratic self-government."); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was

dissenter, it offers a shield against government censorship and an opportunity for participation.[6] And for all of us, it holds out the promise that through rigorous and free competition between ideas that which is good and true will prevail.[7]

Or at least that's the idea. Operating in the background of the modern market metaphor are contradictory conceptual assumptions (about what a "marketplace of ideas" is, how it functions, and what it accomplishes), false empirical premises (about how ideas spread, are consumed, and are evaluated), and a dubious historical pedigree. Where the Court imagines individuals consuming and weighing information on the merits, reality stubbornly persists in creating more content every minute than could be consumed in a lifetime, requiring us to rely on intermediaries that sort and shape the information we receive. Where the Court assumes the "best" ideas will gain assent and spread throughout society, existing doctrine provides no account of what resource "winning" provides or how consumer judgments are expected to feed back into the market. And where the Court envisions calculating individuals dispassionately comparing and contrasting information in a vacuum, a growing scientific consensus reveals intuitive beings construing content based on relationships, associations, social identities, and innate biases.

In short, the marketplace of ideas rests upon little more than slogans and fictions, none of which find support or sanctuary in the views of Holmes, Madison, or the founding generation.

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fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

6. *See* Freedman v. Maryland, 380 U.S. 51, 57–58 (1965) (discussing the dangers of censorship under the First Amendment); TIMOTHY C. SHIELL, AFRICAN AMERICANS AND THE FIRST AMENDMENT: THE CASE FOR LIBERTY AND EQUALITY 110 (2019) (discussing the principles of participation, anti-orthodoxy, and inclusion in the First Amendment).

7. *See* THOMAS JEFFERSON, *First Inaugural Address*, *in* THOMAS JEFFERSON: WRITINGS 492, 493 (Merrill D. Peterson ed., 1984) (1801) ("[E]rror of opinion may be tolerated where reason is left free to combat it."); JOHN STUART MILL, *On Liberty*, *reprinted in* ON LIBERTY AND OTHER ESSAYS 21 (John Gray ed., 1998) (1859) ("[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation . . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."); JOHN MILTON, *Areopagitica: A Speech to the Parliament of England for the Liberty of Unlicensed Printing*, *in* AREOPAGITICA 1, 175 (T. Holt White ed., 1819) (1644) ("Let [Truth] and Falsehood grapple; who ever knew Truth put to the wors[e], in a free and open encounter?").

Rather than a graceful arrangement of timeless values and diverse virtues operating in harmony, the modern market metaphor has morphed into something else entirely: a straitjacket of wishful thinking that binds Congress—that binds all of us—to the Court's alternate reality.

This Article suggests that the current marketplace of ideas leaves out a core concept that should inform First Amendment analysis: attention. The terms of access to our attention, the choices we make about where to direct our attention, how these choices influence which ideas spread throughout society—all of these inquiries point the way towards a potentially more meaningful, coherent, and realistic account of the marketplace of ideas, where the actual behavior of content *consumers* plays a central role.

Building a theory of competition for the marketplace of ideas around this key feature of attentional choice also cabins and clarifies the judicial role while expanding and explaining the scope of the legislative role. Judges can take a more nuanced approach to evaluating various market practices, incorporating actual facts into their assessments while remaining grounded by an enduring and consistent principle. Legislators, meanwhile, can enact laws that protect and promote free attentional choice, relying similarly upon evolving empirical understandings. Just as Congress can enact laws that safeguard economic competition and disrupt private restraints of trade, so too can Congress enact laws that enhance ideational competition and prevent anticompetitive private conduct.

An attentional-choice lens also offers good reasons to revisit the Supreme Court's campaign-finance jurisprudence. If our decentralized decision-making about where to allocate our attention is how ideational value is conferred in the marketplace of ideas, then all monetary expenditures should not necessarily receive equal constitutional protection. While expenditures to facilitate political expression should remain fully protected to promote free entry into the market,[8] and expenditures to support distribution should remain fully protected to promote free competition within the market,[9] expenditures for political advertisements—for example—do not deserve the level of constitutional protection they currently receive.[10]

8. *See infra* Part III.B.1.
9. *See infra* Part III.B.2.
10. *See infra* Part III.B.3.i.

Unlike funds that make content available to satisfy our attentional choices (such as media company operating expenses or the cost of putting content online),[11] advertising contracts involve the outright purchase of attention.[12] By definition, an advertisement contains content *no one chose to consume* from a source *no one chose to trust* with their attention. Whether one buys a quarter-page of space from a newspaper, thirty seconds of airtime from a network, or promoted exposure on social media, the expense provides access to attention on primarily economic terms in a way that circumvents the mechanism by which ideational value is conferred. In other words, the Supreme Court's laissez-faire approach to the marketplace of ideas has elevated "freedom to contract" over "free competition" and has undermined the very process the Court seeks to protect.

Shifting to an attentional-choice framework might also create space to consider how other practices—such as habit-forming technology and algorithmically tailored targeting—test the limits of genuine attentional choice and true marketplace competition. By privileging speakers and intermediaries that have *earned* access to our attention, the Court can better serve the First Amendment's dignity- and democracy-enhancing purposes, ground its doctrine more firmly in reality, and honor the critical role that we each play as producers *and* consumers of content in the marketplace of ideas.

Part I examines the conceptual, empirical, and historical problems that plague the Supreme Court's modern market metaphor. Part II introduces the role that attentional choice might play as an analytical and doctrinal device for exploring the concept of competition in the marketplace of ideas. Part III revisits some core debates in campaign-finance law, comparing the Court's treatment of expenditures under its traditional laissez-faire model with how the Court might treat various categories of expenditures under an attentional-choice model. Here, I refine the scope and meaning of the Court's existing "more speech" and "free trade" principles and explain how both public *and* private devices can interfere with free competition between ideas. Part IV builds on this ground and sketches out some potential areas for legislative intervention to promote free attentional choice

11. *See infra* Part III.B.2.

12. *See infra* Part III.B.3.i.

and prevent private market interference. Finally, Part V considers some of the attentional-choice theory's practical consequences in an increasingly polarized political environment.

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Alexander Meiklejohn once wrote of the First Amendment, "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[13] This Article offers a new aphorism for understanding the First Amendment in our modern information-rich and attention-scarce era: "What is essential is that everyone may speak, and that everything worth hearing can be heard."

I. THE MODERN MARKET METAPHOR: RECKONING WITH REALITY

A. CONCEPTUAL PROBLEMS

For much of the last century, two freedom-of-speech theories have animated modern First Amendment doctrine: the autonomy theory, which emphasizes freedom of expression, and the democracy theory, which emphasizes the necessity of free expression for self-government.[14]

At first glance, the "marketplace of ideas" offers an elegant way to resolve this tension. In properly functioning economic markets, competition encourages decentralized producers to meet the needs and preferences of decentralized consumers, ideally allocating scarce resources efficiently[15] and driving resources (and market share) to those competitors with the "best" goods and services (as judged by consumers).[16] The aggregation of individual self-interested action is thought to ultimately benefit society as a whole.[17]

13. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

14. *See* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2363 (2000); *see also* Schneider v. New Jersey, 308 U.S. 147, 160–61 (1939); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . valued liberty both as an end and as a means.").

15. *See* MARTIN KOLMAR, PRINCIPLES OF MICROECONOMICS 55–82 (2017).

16. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 402 (4th ed. 2018).

17. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 349 (1991).

The conceit is that a marketplace of ideas might operate in the same way. By staying the hand of the state and striking down laws that appear to impact the free flow of ideas, the Court believes it is providing speakers the right to introduce their ideas, protecting competition between those ideas within the political community, and allowing the "best" ideas to flourish for the benefit of individuals and society alike.[18]

From the outset, however, this conceptual framework suffers a fundamental problem: no one seems to know how such a "market" would function, what it would allocate, and why. These are not facetious questions. There are well-developed theories about how *economic* competition operates, how pricing signals drive resources, how consumer demand impacts market share, and how certain socially desirable benefits result.[19] And, because we have well-developed theories about economic competition, we can also identify anticompetitive conduct, such as collusion[20] and price-fixing.[21]

Without an equivalent theory of *ideational* competition (or "competition between ideas"), we cannot know what a "well-functioning" marketplace of ideas would look like.[22] We cannot know what private practices might hinder competition or what public regulations might foster competition. And we cannot take any solace in the Court's insistence that its approach "will inevitably produce benign results for a democratic society."[23] Instead, such assurances are "a matter of theoretical faith and not of empirical or historical observation."[24]

One initial puzzle is where competition occurs and what that competition is for. Do ideas compete for acceptance in the mind of the listener?[25] Do ideas compete for exposure across society as a whole?[26] The Supreme Court does not definitively say.[27] And

18. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

19. Strauss, *supra* note 17.

20. *See* AREEDA & HOVENKAMP, *supra* note 16, ¶ 1802.

21. *See id.* ¶ 405.

22. Strauss, *supra* note 17.

23. TIMOTHY K. KUHNER, CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION 181 (2014).

24. *Id.*

25. *See infra* text accompanying notes 29–53.

26. *See infra* text accompanying notes 54–62.

27. A third option between these might be "the social aggregate of [knowledge] possession." Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 5 (1996).

while the Court seems to recognize that these two planes of competition intersect,[28] it offers no account as to how or why. What is the market mechanism? By what means do consumer judgments feed back into (and thereby shape) the allocation of "market share" among "producers"?

1. Competition for Individual Acceptance

At times, the Court and commentators portray the marketplace of ideas as a competition for acceptance, with the battle between ideas occurring within the mind of the individual: differing facts and opinions competing for one's approval.[29] Take the counterspeech rationale, for example: true and false information are both provided, and the person confronted with the "competing" information is expected to decide which is more compelling.[30]

Putting aside for the moment whether the individual is actually likely to believe the "true" information in such a situation,[31] the scenario immediately raises some fundamental conceptual problems. To start, the individual must be confronted with (at least) two conflicting pieces of information for there to be any competition at all. More importantly, as we move away from this clean, unrealistic, binary proposition and towards a more messy, realistic argument involving various gradations and permutations, the idea that an individual *can* or *should* act as the clearinghouse for resolving every argument quickly collapses. After all, scholars may devote their entire lives to examining a single issue and fail to read every work bearing on it. No

28. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 747 (2011) ("All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.").

29. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994); Thomas v. Collins, 323 U.S. 516, 537 (1945); Goldman & Cox, *supra* note 27, at 17 ("Only someone who *accepts* or *believes* a message should qualify as a consumer of it.").

30. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); Citizens United v. FEC, 558 U.S. 310, 355 (2010) ("Factions should be checked by permitting them all to speak . . . and by entrusting the people to judge what is true and what is false.").

31. *See infra* Part I.B.

person can resolve all ideational competitions,[32] and any attempt to do so would be, itself, irrational.[33]

This quandary raises three dynamics that any "marketplace of ideas" would seemingly need to recognize and reconcile. First, persuasion is in part a function of exposure. Second, each individual has limited time for this exposure. And third, every individual lives in a mediated informational ecosystem in which one's exposure depends in part on the choices of other actors. While each of these observations may seem obvious,[34] the Court has never truly grappled with their implications for the marketplace of ideas.

First. Both the conservative and liberal wings of the Court have recognized at various points that persuasion is intimately related with exposure. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, for example, Chief Justice Roberts observed that "[a]ll else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted."[35] As Roberts recognizes, the greater the societal exposure, the greater likelihood that only one perspective will be

32. In philosophy, this dilemma moves us beyond "traditional epistemology," which views "inquiry as an activity of isolated thinkers, each pursuing truth in a spirit of individualism and pure self-reliance," and towards "social epistemology," which strives to "come to grips" with "the interpersonal and institutional contexts in which most knowledge endeavors are actually undertaken." ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD, at vii (1999).

33. Epistemological individualism is

> a romantic ideal which is thoroughly unrealistic and which, in practice, results in less rational belief and judgment. . . . I could, indeed, escape epistemic dependence on *some* experts[,] . . . [b]ut if I were to pursue epistemic autonomy across the board, I would succeed only in holding relatively uninformed, unreliable, crude, untested, and therefore *irrational* beliefs.

John Hardwig, *Epistemic Dependence*, 82 J. PHIL. 335, 340 (1985).

34. *See id.* at 336, 343 ("[B]ecause the layman is the epistemic inferior of the expert . . . rationality sometimes consists in refusing to think for oneself. . . . The conclusion that it is sometimes irrational to think for oneself—that *rationality* sometimes consists in deferring to epistemic authority and, consequently, in passively and uncritically accepting what we are given to believe—will strike those wedded to epistemic individualism as odd and unacceptable, for it undermines their paradigm of rationality. To others, it may seem too obvious for such belaboring. But in either case . . . we should recast our epistemologies and our accounts of rationality to make them congruent with this important fact of modern life.").

35. 564 U.S. 721, 747 (2011).

heard by any given person, and the greater chance that idea will be "persuasive" on the individual level.

In *Citizens United*, Justice Stevens makes a similar point about exposure and persuasion in his dissent, noting that "individuals in our society [do not have] infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere."[36] Instead, "the average listener's exposure to relevant viewpoints" is correlated with a speaker's "domination of the airwaves prior to an election."[37]

Each of these passages acknowledges that competition for acceptance at the individual level depends in part on the competition for exposure at the societal level. And each—either implicitly or explicitly—recognizes the impact that limited time and mediated informational exposure has on individual persuasion.

Second. The fact that consuming content (and producing it) takes time and attention is another axiom that complicates the Court's modern market metaphor. Time[38] and attention[39] are scarce resources.[40] Each of us has only twenty-four hours in a day and finite attentional capacity. Our individual choices about how we spend "the brutally limited resource of our attention" within this period—both as a speaker and a listener—powerfully

36. Citizens United v. FEC, 558 U.S. 310, 472 (2010) (Stevens, J., concurring in part and dissenting in part).

37. *Id.*

38. ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE 1 (2018) ("Time is widely recognized as one of the most precious and finite resources required for the accomplishment of human purposes.").

39. MATTHEW B. CRAWFORD, THE WORLD BEYOND YOUR HEAD: ON BECOMING AN INDIVIDUAL IN AN AGE OF DISTRACTION 11 (2015) ("In . . . psychological research, attention is treated as a resource—a person has only so much of it.").

40. The "scarcity rationale" articulated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), was rightfully "criticized . . . since its inception" because it viewed the scarcity of broadcasting spectrum as a reason to *deviate* from default First Amendment principles. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994). As critics have noted, scarcity is a fact of life, and to ignore it is to ignore reality. *See* Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986); John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 WM. & MARY L. REV. 841, 889 (2016). That same logic, however, means that *default* First Amendment principles must account for scarcity, including the scarcity of our time and attention. To fail in recognizing that reality is to fall into the same trap as *Red Lion* (and to ignore the fundamental principle that drives markets, *see* KOLMAR, *supra* note 15, at 4).

shape our growth, self-conception, and identity.[41] For "when we reach the end of our days, our life experience will equal what we have paid attention to, whether by choice or default."[42] As Justice Kennedy once wrote, "In a fleeting existence we have but little time to find truth through discourse."[43]

The purpose of the marketplace of ideas cannot be to "tee up" every potential conflict for individual resolution. That would be neither possible nor desirable.[44] Rather, the competition for *exposure* across society must help individuals receive the information considered most pressing, most important, most useful, and most credible by their own lights.

Third. Because one's personal exposure to information constitutes only the narrowest sliver of all information available, this exposure necessarily depends upon intermediaries that are sorting, distilling, and shaping that content.[45] Whether one relies upon a radio station, a blog, or a friend, we all have epistemic dependencies.[46] This is unavoidable. One cannot—simultaneously and in real-time—be on the ground in every warzone, interview every expert in every field, review the details of every federal appropriation and enactment and regulation, and meet with every celebrity, sports star, and political figure.[47]

We each make necessary but imperfect decisions about which intermediaries, speakers, and relationships we trust to

41. TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 7 (2016).

42. *Id.*

43. Hill v. Colorado, 530 U.S. 703, 792 (2000) (Kennedy, J., dissenting).

44. *See supra* text accompanying notes 32–34. Indeed, even if one had unlimited time, content is created faster than any individual could consume it. By some estimates, over *500 hours* of content are uploaded to YouTube *every minute*. *See* J. Clement, *Hours of Video Uploaded to YouTube Every Minute as of May 2019*, STATISTA (Aug. 9, 2019), http://statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/ [https://perma.cc/44LK-MDPL].

45. *See* GOLDMAN, *supra* note 32, at 104.

46. *See* Hardwig, *supra* note 33, at 335–36 ("The list of things I believe, though I have no evidence for the truth of them, is, if not infinite, virtually endless. . . . [Yet,] one can have good reasons for believing a proposition if one has good reasons to believe that *others* have good reasons to believe it. . . . [Such epistemic relationships are] essential to the scientific and scholarly pursuit of knowledge.").

47. As of 2016, it would take 3 years, 177 days, and 10 hours to read the Code of Federal Regulations. Patrick McLaughlin, *How Regulatory Overload Can Make Americans Less Safe*, MERCATUS CTR. (Nov. 14, 2018), http://mercatus.org/publications/regulation/how-regulatory-overload-can-make-americans-less-safe [https://perma.cc/GZV6-25T8].

keep us abreast of what matters most to us.[48] And because persuasion is so closely correlated with exposure, those who receive this *access* to our attention can exert tremendous influence over the selection and prioritization of content we receive, the substance of that content, and the framing of that content.[49]

Taken together, these three dynamics have important implications for what "competition between ideas" might mean and what the Court expects "competition in society" to accomplish. As an initial matter, one's exposure to any given idea cannot be *inherently* good. We are constantly shifting our attention between various streams of information and cognitive tasks,[50] so one's exposure to any particular piece of content involves a trade-off.

This fact alone challenges a fundamental premise animating a great deal of First Amendment thinking. "More information" (or "more speech") is commonly viewed as an unqualified good,[51] but current articulations of this principle elide the difference between the *availability* of more information and one's *exposure* to that information.[52] The *availability* of a broad array of diverse opinions is a necessary predicate for competition be-

48. John Hardwig, *The Role of Trust in Knowledge*, 88 J. PHIL. 693, 693, 700 (1991) ("[M]ost epistemologists . . . see no role for trust in knowledge . . . . After all, trust, in order to be trust, must be at least partially blind. . . . [Yet,] [m]odern knowers cannot be independent and self-reliant, not even in their own fields of specialization. . . . [T]he rationality of many of our beliefs depends not only on our own character but on the character of others as well; the rationality of many of our beliefs depends on what others do and hence is not within our individual control.").

49. *See infra* Part I.B.

50. Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 781–82 (2019) ("[W]e are always processing information, or paying attention to something. . . . To allocate attention, our brain has means by which it decides to what streams of information, among the various choices, we will attend, or process.").

51. *See, e.g.*, Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 912–13 (1998).

52. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 829 (1975) ("The policy of the First Amendment favors dissemination of information and opinion . . . ."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public *to receive suitable access* to social, political, esthetic, moral, and other ideas and experiences which is crucial here." (emphasis added)); *see also infra* Part III.B.1.

tween ideas to occur, but one's *exposure* to any given idea is implicitly assumed by the Court to be the result of the competition occurring between ideas within society.[53]

In other words, the value we mean to protect on the individual level is the *ability* and *freedom* to receive and consider a variety of views. This does not mean that any individual *can* or *should* receive any given piece of information. What matters are the terms of access to that individual's attention: on what basis does this exposure to information occur?

Consider the following opinion: anyone wearing a maroon shirt on a Thursday should be summarily executed. Is there value in allowing an individual who honestly holds this view to express it? Yes. Is there value to the marketplace of ideas in making this view available for consumption and consideration? Sure. But is there inherent value in everyone on earth *hearing* this view so they can decide for themselves whether it is a good or bad idea? Absolutely not. The very fact of hearing it means that individuals had to expend their time and attention on it—time that can no longer be spent on consuming (or producing) more meaningful content. With so much information in existence competing for our attention, broad exposure to this idea would seem to reflect a *failure* in the vetting and mediating function the marketplace of ideas is presumed to fulfill. It is this "societal" competition and mediation to which we now turn.

2. Competition for Exposure Across Society

Beyond the competition between the merits of ideas that occurs on an individual level, the Supreme Court also frequently conceptualizes a competition over exposure to ideas to be occurring at a societal level. In such cases, the Court assumes that the information that gets to us—that manages to spread throughout society and gain access to our own informational ecosystem—is already a function of what people find persuasive.[54]

The counterspeech rationale, for example, suggests that the proper "remedy for speech that is false is speech that is true."[55] This depends upon the idea that "the dynamics of free speech, of counterspeech, of refutation, can *overcome* the lie"[56]—that the

53. *See infra* text accompanying notes 54–62.

54. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

55. United States v. Alvarez, 567 U.S. 709, 727 (2012) (plurality opinion).

56. *Id.* at 726 (emphasis added).

truth will prevail "out there" in society. As Justice Brandeis once wrote, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is *more speech*, not enforced silence."[57]

But, again, the mere existence of true information only creates the preconditions necessary for the truth to prevail—"more speech" is not itself the corrective unless and until others hear that speech *and* propagate it in their own right. This competition for exposure throughout society is what allows the truth to "overcome" the lie. For the person who hears only the lie, there is no truth.

Putting aside (for one more moment) whether true or false statements are actually more likely to gain exposure in society,[58] the theoretical framework itself relies upon certain unexplained assumptions. How, for example, does this vital competition for exposure via various informational intermediaries operate?

The Court assumes that "good ideas" rise and "bad ideas" fall, but given the inherent limits of time and attention (and the role that exposure itself is assumed to fulfill), this concept can only be understood in terms of relative circulation: broader exposure for some ideas over time and less (or no) exposure for other ideas over time. To the extent content is heard at all, it does not expand into an empty and unclaimed space—it consumes time and attention that would otherwise be directed elsewhere.

Of course, one might reasonably *expect* ideas deemed "good" to be amplified by their approval and earn wider circulation (displacing other content) and ideas deemed "bad" to burn out and reduce in circulation (as they are replaced by other content). But *how* this critical process occurs—and what it might mean for the Court's First Amendment jurisprudence—receives remarkably little attention given its centrality to a meaningful account of the marketplace of ideas.

After all, this process would appear to be the market mechanism itself: the means by which decentralized consumer judgments impact the spread of information within society. If individuals comprise society, and society is expected to vet and cull the world's information to help expose those same individuals to the highest-value information, then what individual decisions—

57. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (emphasis added).

58. *See infra* Part I.B.

what consumer choices—are driving this market-share allocation process?

The Supreme Court's modern market metaphor (like its "freedom of speech" jurisprudence more generally) focuses almost exclusively on the rights and roles of speakers.[59] The result is a self-defeating doctrine: content is presumed to travel through society on the merits; the merits of content cannot be evaluated until it has been consumed by the individual; and once content has been consumed, the individual's evaluation of the merits plays no meaningful constitutional role in the travel of the content.[60]

In a real market, however, authority resides with consumers—not producers.[61] Persuasion takes two, and so it is the "autonomous hearer . . . that makes free information markets possible."[62] Without any constitutional account of how an individual listener's *affirmation* of an idea feeds back into the market and aids in increased societal *exposure* to that content, the modern market metaphor offers little more than an empty slogan. A "market" that does not attribute any significance to the decisions of its consumers is no market at all.

B. EMPIRICAL PROBLEMS

The Supreme Court is on even more treacherous terrain when it assumes—as a matter of fact—that truth (or "good ideas") will necessarily prevail over falsity (or "bad ideas") in the competition for individual acceptance or in the competition for exposure within society. According to the intuition behind the Court's counterspeech rationale: "The remedy for speech that is false is speech that is true. . . . The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[63]

59. *See* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 99–100 (2015).

60. *See* Goldman & Cox, *supra* note 27, at 26–27 (observing that, in the Court's current conception of the marketplace, "there is no difference in payment between viewers who 'consume' [a] message and those who do not"; indeed, "there seems to be no 'exchange' or 'trade' at all").

61. *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 41 (2005).

62. Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 901 (2017).

63. United States v. Alvarez, 567 U.S. 709, 727 (2012) (plurality opinion).

The cruel irony is that this presumption is precisely the kind of "false," "unreasoned," and "uninformed" folklore that has survived repeated combat with all contrary evidence. The world does not consist of purely rational atomistic actors. Humans rely on cognitive shortcuts and social cues to triage the information around them and allocate what limited attention they have available.[64] In fact, the Court's language above employs classic rhetorical devices—repetition and antithesis—that are known to "create the illusion of rationality" by "turning something questionable into something catchy."[65] If you felt seduced by the Court's powerful rhetoric, you're not alone.

The Court's current doctrine and implicit theory of democratic behavior romanticize individual political action and rest upon wildly outdated assumptions.[66] In the Court's view, personal preferences arise spontaneously and are taken as given while social groups play no apparent role.[67] This view "is like the ether theory of electromagnetic and gravitational forces: it is based on nineteenth-century intellectual foundations, and the empirical evidence has passed it by."[68]

Neuroscience shows that emotions and intuitions are an inherent part of our reasoning process.[69] While most First Amendment theories rely on a dichotomy between reason and emotion,[70] this contrast turns out to be "as pointless as contrasting rain with weather, or cars with vehicles."[71] Cognition simply re-

64. *See infra* text accompanying notes 69–96.

65. *See* DEREK THOMPSON, HIT MAKERS: THE SCIENCE OF POPULARITY IN AN AGE OF DISTRACTION 89–94 (2017).

66. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 815 (2014).

67. *See* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 225 (2016).

68. *Id.* at 299.

69. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 33–34 (2012) (discussing the difficulties in decision-making experienced by patients who largely lack emotion due to damage to the ventromedial prefrontal cortex).

70. *See, e.g.*, Neuborne, *supra* note 62, at 904–05 (stating that a "romantically optimistic" view of the citizen as a "rational, freestanding, trustworthy, and autonomous hearer" may not be an "accurate vision" but is considered "central to the operation of robust democracies, efficient markets, and free societies").

71. HAIDT, *supra* note 69, at 45.

fers to information processing, and emotions fall within this category.[72] Emotion plays a critical role in our reception to and encoding of new information. Emotion can trigger our attention, meter how much attention we provide to new information, and assign meaning and value to that information.[73] Before we even begin conscious thought, our brain has placed incoming information in a positive or negative context.[74]

We also now know that social groups powerfully shape our preferences,[75] and that cognitive shortcuts impact our decision-making and information-processing patterns.[76] "A vast body of sociological and political scientific research demonstrates that relationships, far more than ideological commitments, drive political mobilization, organization, and information transmission."[77] Indeed, reasoning itself may have evolved "not to help us find truth but to help us engage in arguments, persuasion, and manipulation in the context of discussions with other people."[78]

This is not to deny the existence of methods for challenging our instincts or the value in making more space for higher-order reasoning to occur.[79] But information transfer is inherently emotional, social, and contextual; we cannot exchange content in a way neutral to our own identities or independent of how we situate ourselves in the world. Our "political preferences and general cultural tastes . . . have their origin in ethnic, sectional, class, and family traditions,"[80] and these influences shape our

72. *See id.* at 44–45.

73. *See, e.g.*, STEVEN PINKER, HOW THE MIND WORKS 43, 372 (1997); DANIEL J. SIEGEL, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 123, 126, 131, 135, 159 (1999); ROBERT SYLWESTER, A BIOLOGICAL BRAIN IN A CULTURAL CLASSROOM 37, 39 (2d ed. 2003).

74. *See* HAIDT, *supra* note 69, at 64–65.

75. *See generally* ACHEN & BARTELS, *supra* note 67.

76. *See* S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 140 (2017) (describing examples of cognitive shortcuts, including "positive illusions, hindsight bias, contrast bias, procrastination bias, omission bias, normality bias, and the status quo bias").

77. Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1232 (2018).

78. HAIDT, *supra* note 69, at 89.

79. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

80. ACHEN & BARTELS, *supra* note 67, at 232 (quoting BERNARD BERELSON ET AL., VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN 311 (1954)).

perceptions, not just of opinions or issues but also of "simple facts."[81]

This challenges one of the Court's core articles of faith: that when "True" and "False" information come into conflict, "Truth" will win. Emotional appeals,[82] framing devices,[83] and verbal patterning tricks (such as the one used by the Court above)[84] allow those *with access* to our attention to shape our attitudes in profound ways. For example, the "repetition of a phrase or idea, *even one labeled false*, might confuse many people in the long run, because it is so easy to conflate familiarity with truth."[85] This "mere exposure effect"—where the brain labels familiar things as good—is a basic principle of advertising.[86]

Nor does information necessarily spread throughout society or gain exposure based on whether it is "true" or "good" by any objective measure. As discussed above, epistemic dependency is a constant feature of our individual information ecosystems, and this means it can be rational for "people [to] stop paying attention to their own information and look to what others know."[87] Although this can sometimes run rampant—leading to "information cascades"[88]—the human tendency to rely on others' knowledge is natural, unavoidable, and a core feature of modern information markets. It is neither inherently good nor inherently bad. Information cascades can bring social movements to life and

81. *Id.* at 231.

82. *See* THOMPSON, *supra* note 65, at 89–94; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 35–36 (1984).

83. *See* Robert M. Entman & Nikki Usher, *Framing in a Fractured Democracy: Impacts of Digital Technology on Ideology, Power and Cascading Network Activation*, 68 J. COMM. 298, 299 (2018) ("[F]raming connects on a fundamental level to the core processes of communication."). For example, in the 1970s "almost half of Americans said they would 'not allow' a communist to give a speech, while only about one-fourth said they would 'forbid' him or her from doing so." ACHEN & BARTELS, *supra* note 67, at 31.

84. Verbal patterns—epistrophe, anaphora, tricolon, epizeuxis, diacope, antithesis, parallelism, anti-metabole—can create a "rhyme-as-reason" effect. In short, such "musical language" can "create the *illusion* of rationality," even if the underlying content is patently wrong. THOMPSON, *supra* note 65, at 89–93.

85. *Id.* at 131 (emphasis added).

86. HAIDT, *supra* note 69, at 65.

87. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1765 (2019).

88. *Id.*

abuses of power to light.[89] Information cascades can also spread lies and outrage like wildfire.[90]

The reality is that mistaken beliefs can persist (and even strengthen or re-emerge) over long periods of time.[91] The theory that the marketplace of ideas necessarily functions as an "engine of truth production" is simply false.[92] Political preferences in particular "are relatively invulnerable to direct argumentation."[93] In fact, exposure to accurate information can backfire and *strengthen* political misperceptions.[94] And learning about others' political views can reduce one's ability to assess and use their expertise in nonpolitical domains.[95] Information does not exist in a vacuum and neither do we; when forced to choose between an abstract notion of accuracy or one's own sense of self and social belonging, we often favor the latter.[96]

To be clear, none of this necessitates the Supreme Court abandon a market-based conceptual framework altogether. There are compelling reasons to jettison such an approach,[97] but that is not my purpose in confronting the Court's fictions. When

89. *See id.* ("Social movements have leveraged the power of information cascades, including Black Lives Matter activists and the Never Again movement of the Parkland High School students. Arab Spring protesters spread videos and photographs of police torture.").

90. *See infra* text accompanying notes 253–56 (observing studies that demonstrate falsity can outpace truth on social media platforms).

91. ACHEN & BARTELS, *supra* note 67, at 277.

92. TERESA M. BEJAN, MERE CIVILITY: DISAGREEMENT AND THE LIMITS OF TOLERATION 139 (2017).

93. ACHEN & BARTELS, *supra* note 67, at 232 (quoting BERELSON ET AL., *supra* note 80, at 311).

94. *See* HAIDT, *supra* note 69, at 48 ("[Y]ou can't change people's minds by utterly refuting their arguments."); Strong, *supra* note 76, at 138–39. *But see* Brendan Nyhan et al., *Taking Fact-Checks Literally but Not Seriously? The Effects of Journalistic Fact-Checking on Factual Beliefs and Candidate Favorability*, POL. BEHAV. (forthcoming) (manuscript at 26), https://ssrn.com/abstract=2995128 (finding "little evidence" of "backfire effect" in research and suggesting that motivated reasoning might coexist with belief updating).

95. *See generally* Joseph Marks et al., *Epistemic Spillovers: Learning Others' Political Views Reduces the Ability To Assess and Use Their Expertise in Nonpolitical Domains*, 188 COGNITION 74 (2019).

96. *See* HAIDT, *supra* note 69, at 83.

97. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119, 2123 (2019) (discussing how the shift towards "a highly formal conception of the First Amendment's equality guarantee"—i.e., a "right to speak on equal terms as other speakers"—entrenches existing social and political hierarchies).

the role of social institutions and the routine frictions of exchange became clearer over time, both philosophers[98] and economists[99] engaged with the implications for their fields and adjusted course. Then, as the science around biases and cognition became clearer, the study of "behavioral economics" emerged to incorporate additional insights and to deepen and complicate economic study.[100] All of society's institutions have adapted to reality but one: "free speech [remains] 'the only area where *laissez-faire* is still respectable.'"[101] In the name of truth and reason, the Supreme Court continues to ignore both.

But the Court can acknowledge the limitations of its doctrine without abandoning its entire jurisprudence. The behavioral insights above should encourage the Court to stop relying upon proven falsehoods to prop up a doctrine that fails to "comport with the reality of everyday life."[102] For "[i]f that is the law, . . . 'the law is a ass—a idiot.'"[103]

C. HISTORICAL PROBLEMS

In light of the market metaphor's faults, a supporter of the doctrine might seek refuge in its purportedly long pedigree. Yet, here too the story that the Supreme Court tells is more charitable than history suggests.

As Professor Jud Campbell reveals in his important and comprehensive accounting of the First Amendment's meaning at the time of the Founding, our modern debates emphasizing "re-

98. *See* Goldman & Cox, *supra* note 27, at 2 ("[S]ocial epistemology focuses on public and institutional practices that can foster the acquisition of knowledge or information. . . . Among the social practices of interest are practices of speech and communication, through which knowledge (and also error) can be transmitted from agent to agent.").

99. *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 825–27 (2008); R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 714 (1992) ("[The neoclassical economy] lives in the minds of economists but not on earth.").

100. *See generally* FLORIS HEUKELOM, BEHAVIORAL ECONOMICS: A HISTORY (2014).

101. R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 385 (1974) (quoting Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 5 (1964)).

102. Collins v. Virginia, 138 S. Ct. 1663, 1681 (2018) (Alito, J., dissenting).

103. *Id.* (quoting C. DICKENS, OLIVER TWIST 277 (1867)).

publican government," "the marketplace of ideas," or "the autonomy of individuals" are just that: *modern*.[104] The First Amendment did not reflect any of these particular rationales when it was adopted.[105] Instead, the First Amendment reflected the dominant paradigm of an earlier era: the distinction between natural rights and positive rights.[106] Our contemporary legal debates about the appropriate scope, structure, and application of the First Amendment—and how these align with autonomy, self-governance, or the marketplace of ideas—remain important, but whatever doctrine results must sit on its own bottom.[107]

If anything, James Madison (the principal drafter of the First Amendment)[108] and Oliver Wendell Holmes, Jr. (the intellectual father of the "marketplace of ideas")[109] might be among those most surprised by the Court's modern doctrine. Madison understood well the powerful role that groups, identities, and emotions play in driving political activity.[110] "So strong is this propensity of mankind to fall into mutual animosities," Madison wrote, that "the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts."[111] Nor did Madison believe in sterling reason or the inevitability of true and good ideas prevailing: "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed."[112]

The Constitution cannot be understood apart from the view of human nature that inspired it. Early Enlightenment thinkers "diagnosed partiality and pride as the psychological factors" be-

104. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 262 (2017).

105. *See id.*

106. *See id.* at 251–52.

107. *See id.* at 318 ("[T]he history of speech and press freedoms overwhelmingly disproves the Supreme Court's insistence that modern doctrines inhere in the Speech Clause itself . . . .").

108. Although Madison was not singularly responsible for the precise phrasing and structure of the First Amendment, he was its chief architect. *See* NEUBORNE, *supra* note 59, at 1.

109. Although Holmes did not coin the precise phrase "marketplace of ideas," the First Amendment metaphor derives from his *Abrams* dissent. *See* Blasi, *supra* note 61, at 24 n.80.

110. ACHEN & BARTELS, *supra* note 67, at 215.

111. THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 2003).

112. *Id.* at 78.

hind the religious conflicts that roiled seventeenth century Europe.[113] Drawing from their lessons, Madison likewise viewed such "latent causes of faction" as being "sown in the nature of man."[114] The goal of the Constitution was not to change or ignore these innate tendencies, but to design institutions that could anticipate and account for them.[115] As Madison pondered, "what is government itself, but the greatest of all reflections on human nature?"[116]

The Court, in construing Madison's words, must be wary of any interpretation "that presuppose[s] a radical change in human nature."[117] Humans are not "detached, cool, rational" beings with "a tremendous capacity to process and contextualize information from any source."[118] The Court's interpretation of the First Amendment should recognize that reality and account for it.[119]

The "free trade in ideas" envisioned by Justice Holmes was similarly built on a more sober view of human nature and democracy.[120] Holmes (like Madison) recognized that our beliefs are profoundly shaped by our associations and social identities, noting that "[m]ost of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them."[121]

In an article published just before his famous *Abrams* dissent, Holmes reflected, "What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest

113. BEJAN, *supra* note 92, at 165.

114. THE FEDERALIST NO. 10, *supra* note 111, at 79.

115. *Id.* at 75 ("[T]he *causes* of faction cannot be removed . . . relief is only to be sought in the means of controlling its *effects*.").

116. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 2003).

117. ACHEN & BARTELS, *supra* note 67, at 10 (quoting A. LAWRENCE LOWELL, PUBLIC OPINION AND POPULAR GOVERNMENT 233 (1913)).

118. Jacob Eisler, *The Deep Patterns of Campaign Finance Law*, 49 CONN. L. REV. 55, 91 (2016).

119. *See* Ortiz, *supra* note 51, at 896–97 ("[D]emocratic theory is, in some deep sense, utopian . . . . [W]e should stop pretending [and] design institutional structures . . . to overcome, not ignore, our weaknesses.").

120. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

121. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 468 (1897).

joys . . . ."[122] Yet Holmes knew these origins of identity could be cause for both pride and restraint: "[W]hile one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else."[123]

Holmes's analogies in *Abrams* echo this lesson: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[124] With a "prudence born of experience,"[125] however, the First Amendment intervenes. "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . ."[126]

According to Holmes, the purpose of the marketplace is not to collectively find one true faith but to allow all "to speak freely and . . . win converts to their cause."[127] The concept respects our unavoidable differences and recognizes that our mutual path forward must be cleared by those ideas that gather widespread assent across and between different communities through dialogue and conversation: "the best test of truth is the power of [a] thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [our] wishes safely can be carried out."[128] Not "Truth" in a Platonic sense, but truth about our place in the world—our notion of self, our role in the community, and our vision of the highest good.[129]

122. Blasi, *supra* note 61, at 14 (quoting Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918)).

123. *Id.*

124. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

125. Blasi, *supra* note 61, at 3.

126. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

127. BEJAN, *supra* note 92, at 173.

128. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

129. Holmes appears to have drawn some of his *Abrams* references from John Stuart Mill's *On Liberty*, which Holmes had re-read in early 1919. *See* Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35, 37–38 (2010). Nonetheless, the "marketplace" envisioned by Holmes seems to diverge from Mill's in key respects. Mill viewed "the truth-seeking enterprise as a search for objective, universal truths." *Id.* at 61. Holmes free-speech defense, on the other hand, "appears to be more pragmatic, consisting of choices made by sufficiently interested majorities or dominant groups." *Id.*

Holmes himself did not believe our destination was certain or that "Truth" with a capital T would prevail. Holmes "detested absolutism."[130] Years earlier, he observed that while the logical form of the law "flatter[s] that longing for certainty and for repose which is in every human mind," the reality is more complicated: "certainty generally is illusion, and repose is not the destiny of man."[131] In *Abrams* too, Holmes calls the "theory of our Constitution . . . an experiment, as all life is an experiment" and, with an unflinching flourish, writes that "every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."[132]

In this telling, the marketplace of ideas serves a more limited function: respecting individual difference while gauging collective agreement. Rather than promoting the "best" idea in some abstract or absolute sense, the market promotes those ideas that are "best" at gaining the interest and attention of listeners based on those consumers' own choices and preferences. For only those ideas that have gained widespread assent are the "ground upon which [our] wishes safely can be carried out."[133]

From this modest starting point, a more conceptually, empirically, and historically grounded theory of ideational competition seems possible; a theory that reckons with the reality of how ideas travel in society and how humans engage with them.

II. ATTENTIONAL CHOICE: A THEORY OF COMPETITION FOR THE MARKETPLACE OF IDEAS

Absent from the Supreme Court's theory of competition between ideas is the central role of human attention: the terms of access to our attention, the choices we make about where to direct our attention, and how our attentional choices influence which ideas spread throughout society. So long as the marketplace of ideas remains a fixture of First Amendment jurisprudence, attention would seem to provide a more meaningful, coherent, and realistic account of what a marketplace of ideas is,

Of course, one need not reject the existence of "Truth" to believe there is unacceptable danger in letting the government decide what is and is not acceptable speech. *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2303 (2019) (Alito, J., concurring).

130. Ten Cate, *supra* note 129, at 48; *see also* Blasi, *supra* note 61, at 14.

131. Holmes, *supra* note 121, at 465.

132. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

133. *Id.*

how it might function, and what it should be expected to accomplish. Attention offers a way for judicial doctrine to take account of how ideas are produced, consumed, and considered in the real world.[134] Finally, attention may offer a lens through which we can re-examine the proper scope of the judicial role—and the permissible scope of legislative intervention—in a more nuanced and principled way.[135]

As a matter of First Amendment theory, attentional choices could operate as the missing market mechanism at the heart of the marketplace of ideas: the link between our decentralized decisions as *consumers* of ideas about their value and the mediating function that we are expected to play in deciding what deserves further exposure in society.

Because our time is limited and each of us necessarily depends upon the culling and framing of intermediaries,[136] we must make educated guesses about which sources to attend to based on past experience, trust, reputation, and other indicia of reliability and relevance (such as the recommendation of a friend or the validation of a source within one's social groups). Over time, we adjust which relationships and sources we rely upon as our faith is either rewarded or betrayed.

Centering attentional decisions in this way explains how individual evaluations about ideational worth influence our own future exposure, reward speakers and intermediaries who provide consistently valuable content, and guide other consumers towards content worthy of their own attention.

Perhaps one might ask why individuals cannot judge for themselves and consider the value of each bit of content on its own merits. For the reasons described in Part I, this chestnut of modern marketplace reasoning fails to recognize the fundamental limitations of time and the vetting role that society must play both as a matter of practical reality and conceptual consistency.[137] One cannot evaluate the merits of content until it has been consumed—at which point, one's time and attention has already been spent. If the consumer's assessment of value is to flow *back into* the market, that signal depends on what the consumer does next: Listen to the speaker's next podcast episode? Forward the content to a friend? These are the signals of

134. *See infra* Part III.
135. *See infra* Part IV.
136. *See supra* Part I.A.
137. *See supra* Part I.A.

ideational value that cause speakers, intermediaries, and content to gain or maintain exposure over time.[138]

This description of mediated information environments and attentional decisions based on trust may strike some as odd or even unsettling.[139] We do not often consider how tenuous, socially contingent, and faith-based our information consumption is. And yet, it is. How do you choose a book to read before you read it? On what basis do you decide to read an article? Consumption decisions about content must, by their very nature, be made prior to that consumption. Even tuning into your favorite news program in the morning or logging on to your favorite social media site reflects an act of trust in an ongoing relationship: trust that your chosen intermediary remains a dependable source of worthwhile information. Our assessments of these experiences then inform our own future consumption patterns and provide a proxy for quality that is relied upon by others.

The significance of such relationships to our own exposure may be uncomfortable to confront, but "every day we have to wager our salvation . . . based upon imperfect knowledge."[140] Information is constantly sifted, weighed, distilled, and sorted before we receive it.

Reorganizing the theory of "competition between ideas" around the role of attention also provides a conceptual framework for incorporating behavioral and psychological insights. Rather than expecting rational beings to make "correct" choices, an attentional theory of competition takes us as we are: diverse, emotional, and social beings that rely on a range of cognitive shortcuts and relational indicators to process the information around us and share it with others.[141] Just as participants in the economic market rely upon signaling information and context to guide their decisions (and may not make perfectly rational decisions), participants in the ideational market draw upon contextual signals to allocate their time and decide what deserves their attention.

138. Or, if the individual's initial experience was more than enough, that assessment will be reflected in diminished future exposure—with the less valuable and less relevant being culled.

139. *See* Hardwig, *supra* note 33, at 349 ("[I]t is also deeply disturbing because it reveals the extent to which . . . our rationality rests on trust.").

140. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

141. *See supra* Part I.B.

Building doctrine around a conceptual touchstone like free attentional choice preserves space for the law to adapt to evolving empirical understandings about how our attention is earned and how it might be abused. In other words, incorporating insights from psychology, neuroscience, political science, and political communications to inform how our attentional choices unfold in reality is not "anti-market," it is "more accurate market."[142]

If the marketplace of ideas is going to bear the substantial doctrinal weight that the Supreme Court continues to place upon it, then reexamining the concept's scope and application through the lens of attentional choice may provide a promising approach—or at least a step in the right direction. Our individualized and decentralized assessments about what deserves attention are, arguably, the way in which value is conferred in the marketplace of ideas and the point at which consumer choices enter the picture. Yet, current doctrine fails to accord any constitutional significance to these decisions.

Incorporating the role that attentional choice plays might avoid the most glaring conceptual, empirical, and historical shortcomings of the modern market metaphor, while retaining its most salient features: "nonprescriptively honoring and implementing preferences and judgments," "reward[ing] participants who generate and master pertinent information," "respond[ing] to changing conditions and lessons learned," and "encourag[ing] prudent risk-taking [by] punish[ing] both excessive caution and reckless undertakings."[143] Most importantly, such an approach ensures sovereignty remains with the people, with citizens free to set—and reset—the public agenda.[144]

III. EARNING ACCESS TO ATTENTION: REVISITING THE ROLE(S) OF EXPENDITURES IN CAMPAIGN FINANCE DOCTRINE

Reconceptualizing the marketplace of ideas as a competition for attention could have profound implications for campaign-finance doctrine, commercial-speech doctrine,[145] and a number of other areas of First Amendment law. For campaign-finance law

142. *See supra* text accompanying notes 97–101.

143. Vincent A. Blasi, *Rights Skepticism and Majority Rule at the Birth of the Modern First Amendment*, *in* THE FREE SPEECH CENTURY 13, 22–23 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

144. OWEN M. FISS, THE IRONY OF FREE SPEECH 23 (1996).

145. *See infra* note 317.

in particular, an attentional-choice approach offers a basis for revisiting and complicating some of the fundamental pillars of the debate: the uniform treatment of "money" as "speech," the centrality of the distinction between contributions and expenditures, and the reigning paradigms of "preventing corruption" and "promoting political equality."

Whereas the Supreme Court's traditional laissez-faire approach invalidates laws based on the vague concept of protecting the "free flow of information" in society, an attentional-choice approach recognizes that exposure should turn on consumer valuation and that unequal terms of access to attention have the potential to undermine the competitive operation of the marketplace of ideas. Just as some agreements advance competition while others undermine competition in the economic marketplace, so too can some expenditures advance competition while others undermine competition in the ideational marketplace.

Recognizing that different types of expenditures can have different competitive impacts also reveals that both conservatives and liberals in the campaign-finance debate have fair intuitions (in part) about the "distorting" effects of government regulation and money, respectively. Caps by the government on certain categories of expenditures may constrain free entry into and free competition within the marketplace of ideas. Unlimited spending by private actors on other categories of expenditures may undermine free competition within the marketplace of ideas by increasing societal exposure in a way divorced from consumer valuation and validation.

Rather than *assuming* that a laissez-faire approach will result in a competitive marketplace of ideas, an attentional-choice theory interrogates the terms upon which attention has been attained to determine whether it has been earned through competition. This also provides a new basis for government intervention: protecting competition and preventing anticompetitive conduct.

In Section A, I provide a brief overview of the campaign-finance debates to date under the Supreme Court's modern marketplace metaphor (known as the "laissez-faire" model) and discuss some of the challenges raised in these debates.

In Section B, I describe how one might approach campaign-finance questions under the attentional-choice model instead. To start, this involves refining and clarifying the meaning and lim-

its of the "more speech" and "free trade" principles commonly invoked by the Supreme Court. These principles reasonably extend First Amendment protection to certain categories of expenditures that facilitate the production, distribution, and availability of content. Yet, the attentional-choice lens also brings into focus the ways in which both private action and government action can restrain free competition in the marketplace of ideas. This discussion clears the way for more tailored government regulations to promote free competition by protecting attentional choice and curbing private restraints of trade.

A. CAMPAIGN FINANCE UNDER THE "LAISSEZ-FAIRE" MODEL

Growing out of the industrial expansion that followed the Civil War and its attendant concentration of wealth, many Americans developed the "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption."[146] Starting with a prohibition on corporate contributions to candidates in 1907,[147] extending to encompass expenditures on behalf of candidates in 1947,[148] and culminating in the Federal Election Campaigns Act (FECA) and its amendments in the 1970s,[149] the nation's campaign finance laws gradually expanded in their reach, covering more and more uses of money to influence the political process.

Then came *Buckley v. Valeo*.[150] In 1976, a fractured Supreme Court broke the legislative framework into pieces. In *Buckley*, the Court rejected any purported government interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections,"[151] calling "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others . . . wholly foreign to the First Amendment."[152] On the other hand, the Court validated the government's interest in preventing corruption[153] but distinguished between FECA's limits on contributions directly to candidates (which were deemed sufficiently tailored to preventing corruption) and the law's limits on "independent

146. United States v. UAW-CIO, 352 U.S. 567, 570 (1957).
147. *Id.* at 575.
148. *Id.* at 581–82 (quoting H.R. REP. NO. 79-2739, at 36–37, 40 (1946)).
149. FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982).
150. 424 U.S. 1 (1976) (per curiam).
151. *Id.* at 48–49.
152. *Id.*
153. *Id.* at 45–49.

expenditures" on behalf of candidates (which were deemed insufficiently tailored to preventing corruption).[154]

To this day, campaign finance doctrine and debates continue to play out in the shadow of the two paradigms set out in *Buckley*: whether a legislative restriction targets "expenditures" or "contributions"[155] and whether the government may target "corruption" or pursue "political equality."[156] These conceptual categories offer little room for new or meaningful developments,[157] and take as their starting point the Supreme Court's conceptually flawed marketplace of ideas.

The contemporary "corruption" interest, for example, provides a narrow exception from modern marketplace treatment, but the scope of what it can justify is highly circumscribed. In *Citizens United*, the Supreme Court held that the government could only enact laws to prevent quid pro quo corruption (or the

154. *Id.* at 23–29, 45–48.

155. Fewer lines in constitutional law have "been subjected to more withering criticism over the years than *Buckley*'s expenditure/contribution distinction." Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 747 (2007). Both liberal and conservative Justices have expressed an interest in abandoning the distinction. *See* FEC v. Beaumont, 539 U.S. 146, 164 (2003) (Kennedy, J., concurring) ("Were we presented with a case in which the distinction between contributions and expenditures under the whole scheme of campaign finance regulation were under review, I might join Justice Thomas' dissenting opinion."); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting; Scalia, J., joining) ("The analytic foundation of *Buckley* . . . was tenuous from the very beginning and has only continued to erode in the intervening years."); *id.* at 405 (Breyer, J., concurring; Ginsburg, J., joining) (suggesting that the Court might "reinterpret aspects of *Buckley*" and "mak[e] less absolute the contribution/expenditure line"). Although there may be reasons for treating contributions directly to campaigns differently than contributions to independent organizations from a *corruption* standpoint, contributions and expenditures are, generally speaking, "'two sides of the same First Amendment coin,' and [the] Court's efforts to distinguish the two have produced mere 'word games' rather than any cognizable constitutional law principle." McCutcheon v. FEC, 572 U.S. 185, 189 (2014) (Thomas, J., concurring) (quoting *Buckley*, 424 U.S. at 241, 244 (Burger, C.J., concurring in part and dissenting in part)).

156. *See* Karlan, *supra* note 155, at 747, 751.

157. *See* Daniel P. Tokaji & Renata E.B. Strause, *How Sausage Is Made: A Research Agenda for Campaign Finance and Lobbying*, 164 U. PA. L. REV. ONLINE 223, 228 (2016) ("The anticorruption-versus-equality debate has effectively reached its conclusion, at least as an academic matter."); Bob Bauer, *Undesirable Alternatives*, MORE SOFT MONEY HARD L. (May 11, 2016), http://www.moresoftmoneyhardlaw.com/2016/05/undesirable-alternatives/ [https://perma.cc/PKP6-KHX2] (referring to "the bitter, stalemated discussion of campaign finance policy").

appearance of such corruption)—it could not prohibit expenditures just because they might curry favor, access, or influence.[158]

Quite (in)famously, *Citizens United* claimed as a matter of law that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[159] Once this form of corruption has been defined out of the way and only quid pro quo corruption remains, the scope of permissible government intervention shrinks dramatically. There is little evidence of the kind of "vote buying" that forms the central concern of quid pro quo corruption.[160] Actual bribery is vanishingly rare."[161] And while "much of what politicians and benefactors now do in the regulatory system crafted by the Supreme Court actually *does* appear to be *quid pro quo* corruption" to the average citizen,[162] some election-law scholars expect doctrine to continue moving in a deregulatory direction.[163]

A corruption-centered framework also provides a poor fit for dynamics that voters find problematic on other grounds. In May 2016, for example, the eighty-three-year-old father of a California congressman pleaded guilty "to funneling more than a quarter of a million dollars to his son's campaigns in 2010 and 2012."[164] Prosecutors sought a thirty-month prison term.[165] While there are good reasons to limit such behavior, "preventing corruption" would not seem to be one of them. There is little risk that the father was attempting to buy off his own son. The same could be said of spending by self-funded candidates and spending

158. *See* Citizens United v. FEC, 558 U.S. 310, 359–60 (2010).

159. *Id.* at 360.

160. *See* Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375, 412 (2016).

161. *See id.*

162. *Id.* at 380.

163. *See, e.g.*, Richard L. Hasen, *Unlimited Donations to Candidates, Coming Soon?*, ATLANTIC (July 26, 2019), http://www.theatlantic.com/ideas/archive/2019/07/campaign-finance-supreme-court/594751/ [https://perma.cc/FCT4-UPL9].

164. John Myers, *'I Have, in Fact, Done the Crime': Rep. Ami Bera's Father Admits Illegal Campaign Contributions*, L.A. TIMES (May 10, 2016), https://www.latimes.com/politics/la-pol-sac-ami-bera-father-campaign-money-20160510-story.html [https://perma.cc/KP95-FKA4].

165. *Id.*

by interest groups intended to influence public opinion on initiatives, referenda, and ballot questions.[166]

The debate over the political equality interest, on the other hand, splits three ways—all of which take the Supreme Court's modern market metaphor as their starting point for debate. On one side are "libertarian" advocates[167] who (along with a current majority on the Supreme Court)[168] continue to subscribe to the modern market metaphor despite its conceptual incoherence, unproven assumptions, and empirical errors.

For market libertarians, the metaphor operates as a kind of laissez-faire shorthand: government regulations distort the free flow of information; the free flow of information is necessary for the market to function; therefore, government regulations violate the First Amendment. The political equality interest in particular is considered anathema to market ordering—a blatant attempt by the government to "tilt public debate in a preferred direction" by picking winners and losers.[169]

On the other side are "interventionist" advocates[170] who believe the government should be able to pursue an interest in political equality. Some observe that the modern market metaphor is significantly flawed[171] and advocate for abandoning the model in favor of a more explicit balancing between equality and liberty; others (perhaps recognizing the metaphor's staying power) work within its parameters, arguing that media consolidation

166. *See* FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 n.7 (1982) ("[I]n elections of candidates to public office, unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption."); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298 (1981) ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.").

167. *See* Eisler, *supra* note 118, at 84–86; Ann Southworth, *The Consequences of* Citizens United*: What Do the Lawyers Say?*, 93 CHI.-KENT L. REV. 525, 542–43 (2018).

168. *See generally* McCutcheon v. FEC, 572 U.S. 185 (2014); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Citizens United v. FEC, 558 U.S. 310 (2010).

169. Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011).

170. *See* Eisler, *supra* note 118, at 87–91; Southworth, *supra* note 167, at 531–42.

171. *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 255, 277, 296 (Geoffrey R. Stone et al. eds., 1992).

prevents meaningful "access" to the market;[172] that economic inequality leads to outsized ideational influence;[173] or that human irrationality leads to "market failures."[174]

Yet, despite this divide (between those who view *the market* as the problem and those who view market *failures* as the problem[175]), both types of interventionists appear to rely upon the conceptual assumptions critiqued in Part I in deciding whether to reject or double-down on the metaphor. In other words, while libertarians and interventionists alike deploy the language of markets in their debates, the first-order questions of market definition addressed in Part I remain unresolved. This has implications for all sides.

Interventionists fighting undue political influence face difficult questions about the proper baseline for measuring political equality (or, more critically framed, the "right" amount of government-sanctioned influence).[176] How do we measure when a particular group or individual has become "too powerful" in the political process or the marketplace of ideas?[177] "[W]hat does an undistorted and unskewed political process look like?"[178] And who decides?[179] As William Maurer points out, "politicians will likely continue to believe that politics is skewed whenever someone disagrees with them."[180]

Moreover, it hardly seems appropriate to speak of "market failures" when we lack any theory about what "competition" or "market power" are supposed to look like in a marketplace of ideas.[181] Arguments about media consolidation and "market access," for example, hinge on definitional assumptions: that the relevant "market" is mass media, and that "access" is the ability

172. *See, e.g.*, Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1655–56 (1967).

173. *See, e.g.*, Ingber, *supra* note 82, at 4–5.

174. *See id.* at 5, 35–36.

175. *See generally* Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745 (1999).

176. *See* Derek Muller, *The Case for More Money in Politics*, LAW & LIBERTY (June 2, 2016), https://www.lawliberty.org/liberty-forum/the-case-for-more-money-in-politics/ [https://perma.cc/TLG2-EUZA].

177. *See* Citizens United v. FEC, 558 U.S. 310, 344 (2010).

178. William R. Maurer, Book Review, FEDERALIST SOC'Y REV., June 2016, at 60, 63.

179. *See* McGinnis, *supra* note 40, at 850.

180. Maurer, *supra* note 178.

181. Strauss, *supra* note 17, at 349.

to convey broadcast messages.[182] (In this telling, the soapbox citizen is not a participant in the marketplace at all.) But the press, for all its First Amendment importance,[183] still consists of economic entities making economic decisions in an economic market, and so a purported "right of access" turns out to be a positive economic right as well: the right to an advertising contract.[184]

Libertarians protesting government intervention have their own circles to square. One cannot argue that a law interferes with the proper function of the marketplace of ideas without knowing how such an "ideational market" functions. Protecting freedom of contract does not always protect free competition. In economic markets, a fully laissez-faire approach would allow for per se anticompetitive contracts such as price-fixing agreements. The Sherman Act prohibits such agreements[185] because doing so *enhances* economic competition. Yet, we only know that the Sherman Act enhances competition (rather than "interfering" with it) because we have a theory of how economic competition operates.

Antitrust laws do not engage in economic "equalizing" or favor particular competitors or products over others; rather, they protect the competitive process itself so consumers decide who wins and loses.[186] Without any theory of ideational competition, the modern market metaphor glosses over such distinctions and ignores the category of "anticompetitive" conduct altogether. A marketplace of ideas with any coherent meaning would inherently recognize that there must exist a range of permissible government interventions tailored to preventing anticompetitive conduct and promoting ideational competition.[187]

182. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248, 251 (1974).

183. *See* U.S. CONST. amend. I.

184. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973) (considering "whether the 'public interest' standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment"); Barron, *supra* note 172, at 1667 (proposing a "common law duty to publish advertisements").

185. *See* 15 U.S.C. § 1 (2018) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

186. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

187. *See* Coase, *supra* note 101, at 386 ("It is not enough merely to say that the government should be excluded from a sphere of activity because it is vital to the functioning of our society.").

By conflating "freedom of contract" with "free competition" in its market metaphor,[188] the Court's laissez-faire approach has opened the door to conduct that one might expect to undermine the free operation of the market. Incorporating and evaluating the role that attentional choice plays in guiding exposure to ideas complicates this picture and introduces new nuances and conceptual distinctions into a debate that too often lacks both.

B. CAMPAIGN FINANCE UNDER THE ATTENTIONAL-CHOICE MODEL

An attentional-choice-focused approach to the marketplace of ideas creates new possibilities for more tailored legislative interventions and more careful and considered judicial responses. In particular, recognizing attentional choice as the value-conferring moment in market competition pries open analytical space across a number of dimensions.

First, attention can help distinguish and refine the limits of the Court's core principles of "more speech" and "free trade." The "more speech" principle recognizes that "more speech, not less, is the governing rule" of the First Amendment.[189] The "free trade" principle recognizes that "the ultimate good desired is better reached by free trade in ideas" and "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[190]

As Part I demonstrates, however, the boundaries and meanings of these principles to date have been vague and conflicting. The "more speech" principle has been used to refer to (and to justify) *exposure* to speech—an understanding at odds with ideational competition and a robust "free trade" principle.[191] And, when the Court *has* placed limits on its "more speech" rationale, it has done so in ways that recognize the practical impact of limited and mediated exposure to ideas, but not the constitutional consequences of these dynamics.[192]

Second, considering the role of attention creates space to consider anew a whole range of different activities and agreements that the Court has treated as constitutionally equivalent

188. *See infra* Part III.B.3.i.

189. *See* Citizens United v. FEC, 558 U.S. 310, 361 (2010).

190. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

191. *See supra* Part I.A.

192. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 747 (2011).

under the First Amendment. "Speech,"[193] "dissemination,"[194] "communication"[195]—all of these terms have been used in loose and interchangeable ways to describe activities that differ in how they relate to attentional choice.[196] Examining the role of (and consequences for) attention in each instance provides a way to interrogate and clarify the language we use to describe conceptually distinct activities in the marketplace of ideas.

Finally, examining activities and agreements through their relationship with attentional choice provides a new way to challenge the Court's (and the campaign-finance community's) uniform treatment of money as "speech." Both libertarians and interventionists tend to view money as a monolith. For libertarians, money plays an inherent and inseparable part in all communicative exercises and any limit upon its use distorts the marketplace of ideas. For interventionists, economic and ideational power constitute separate spheres and the unlimited use of money distorts the marketplace of ideas. An attentional-choice theory challenges the assumption that money "is" or "is not" speech and instead examines the competitive effects of particular uses of money.

By looking at how expenditures influence the terms of access to our attention, an attentional-choice theory of competition could spur a more subtle and productive debate about what types of expenditures deserve strong constitutional protection and what types of expenditures do not. Some practices, agreements, and expenditures might be pro-competitive insofar as they enhance attentional choice and align it with exposure, and others may be anti-competitive insofar as they disregard or undermine the link between attentional choice and exposure.

193. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam) (referring to expression, distribution, and attention-purchase).

194. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 819 (1975) (referring to distribution and attention-purchase).

195. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–58 (1976) (referring to expression, distribution, and attention-purchase).

196. *See infra* Parts III.B.1 (describing expression), III.B.2 (describing distribution aligned with attentional choice), III.B.3 (describing attentional purchases and propagation unrelated to attentional choice).

1. Market Entry (Refining the "More Speech" Principle)

The First Amendment prohibits the government from making laws that "abridg[e] the freedom of speech."[197] When it was adopted, the First Amendment protected—at its core—the inalienable natural right to the well-intentioned expression of one's honest opinions.[198] Because opinions "were understood to be nonvolitional," the Amendment effectively protected the freedoms of conscience and thought.[199] The Amendment also protected ordinary natural rights—such as writing and publishing—but these were widely considered regulable to promote the public good and general welfare.[200]

Today, of course, the First Amendment accords much broader protection to the creation and production of content—even unpopular content disapproved by the public at large. This serves both individualist and democratic values.

On individualist grounds, the Free Speech Clause "guarantees each individual his day in a public arena" and "allow[s] [him] to ventilate his feelings and beliefs."[201] The freedom to create and to express oneself is important in this view because the act of creation and expression itself is intrinsically important. Persons cannot be free, autonomous actors and full members of society unless they can express themselves, even if "[no] one else cares, or even listens."[202] This protects the dignitary interests of natural persons (such as the author of this Article) who feel compelled to speak even when they know an idea is unlikely to gain broad exposure.

On democratic grounds, the Free Speech Clause ensures that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information" is silenced by the government and thereby kept from the people and their consideration.[203] This protects the *speech* of natural persons and legal entities alike for the *purpose*

197. U.S. CONST. amend. I.

198. Campbell, *supra* note 104, at 281–82.

199. *See id.* at 280–82.

200. *See id.* at 268–81.

201. Ingber, *supra* note 82, at 80.

202. *Id.*

203. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111 (1993) (citing MEIKLEJOHN, *supra* note 13, at 75).

of natural persons deliberating as members of a democratic community.[204] Because judgments about the value of these ideas—including their importance, relevance, and even rationality—must be reserved to the people, the First Amendment protects the expression of the vast majority of ideas.[205]

From a marketplace perspective, this creation of content is a vital predicate to robust competition. There can be no competition in the absence of competitors. By protecting free entry into the marketplace of ideas, the Free Speech Clause ensures that a wide variety of ideas are *available* for consumption.[206] This entry occurs when (or as) content comes into existence, whether a speech, a video, a manuscript, or a post online.

To the extent the Supreme Court's "more speech" principle stands for this proposition, it serves a critical and useful function in the marketplace of ideas.[207] However, the "more speech" principle cannot—and should not—be interpreted to mean that any particular piece of content is *entitled* to anyone's attention. Increased exposure to attention through intermediaries must itself be the byproduct of success in the competitive process.[208] Every speaker—like every business—thinks their product is the best

204. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978) (protecting corporate speech based on the "inherent worth of the speech in terms of its capacity for informing the public"). This interpretation might stand irrespective of whether corporations possess constitutional rights. The premise that corporations *do* possess such rights, however, is worth revisiting. Such "unexamined assumptions have a way of becoming, by force of usage, unsound law." McCormick v. United States, 500 U.S. 257, 280 (1991) (Stevens, J., dissenting). The concept of constitutional corporate personhood is based on surprisingly little "history, logic, or reason," Wheeling Steel Corp. v. Glander, 337 U.S. 562, 577 (1949) (Douglas, J., dissenting), and was "decided at an early date, with neither argument nor discussion," *Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting).

205. *See* FISS, *supra* note 144, at 43.

206. *See supra* text accompanying notes 51–53.

207. *See, e.g.*, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) ("Our precedents have focused 'not only on the role of the First Amendment in fostering individual self-expression but also on its role in *affording the public access* to discussion, debate, and the dissemination of information and ideas.' And we have recognized that 'the State may not, consistently with the spirit of the First Amendment, contract *the spectrum of available knowledge*.'" (emphasis added) (first quoting *Bellotti*, 435 U.S. at 783; then quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965))).

208. Of course, respect for attentional choice cannot silence expression itself (thereby foreclosing market entry). *See infra* note 294. Speakers are not, however, entitled to exposure via intermediaries. *See infra* Part III.B.3.

on the market and is worthy of the greatest market share. But that is not for the producer to decide.

To protect free entry, the "more speech" principle extends First Amendment protections beyond the ideational marketplace itself to those economic expenditures necessary to formulate and produce content as well. Thus, while money is not speech, the Court recognizes that even "[t]he humblest handbill or leaflet entails printing [and] paper . . . costs."[209] If a person or association is expending money on the generation of content (by producing a video, writing a book, printing yard signs, preparing a white paper, etc.), the expenses incident to those activities should receive strong constitutional protection under the Free Speech Clause.

Such expenditures are integral to crafting the most compelling messages. Capping these expenditures at any threshold could risk degrading the content (through diminished research, preparation, or production) or eliminating the content altogether (once the threshold is reached).[210] Significant sums can be spent to produce *An Inconvenient Truth* just as they can be spent to produce *Hillary: The Movie*.[211] A newspaper can spend whatever it wants on researching and printing an article about why the Glass-Steagall Act should be restored, just as Bank of America can spend whatever it wants on white papers or news alerts about why it should not be restored. A nonprofit can produce a video about economic justice, just as a concerned citizen can buy poster board and markers to protest.

In each situation, the constitutional protection for the economic expenditure derives from the ideationally protected activity. This ensures that the "more speech" principle remains closely tied to the individualistic, democratic, and market-entry functions of the Free Speech Clause. Thus, the "more speech" principle protects the creation and expression of content. How

209. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

210. *See, e.g.*, Transcript of Oral Argument at 5, Randall v. Sorrell, 548 U.S. 230 (2006) (No. 04-1528) ("Once these low expenditure limits are exhausted, a candidate may not drive to the village green to address a rally, may not return the phone call from a reporter at the local newspaper, and may not call a neighbor to urge her to get out to vote.").

Even if one (reasonably) does not think the First Amendment must protect *unlimited* expenditures to fund the production of content, *see, e.g.*, Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 38–43 (2018), constitutional protection should arguably be at its highest for funds spent on creating content.

211. *See* Citizens United v. FEC, 558 U.S. 310, 319–20 (2010).

that content spreads throughout society and earns exposure, however, is governed by our next principle.

2. Market Competition (Refining the "Free Trade" Principle)

The centerpiece of the market metaphor is the "free trade" principle. As Justice Holmes wrote, "[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[212] Because market competition is meant to reveal the assent of the people (rather than superiority by any supposed objective standard), the "truth" found through free ideational exchange among market participants is measured by success in earning the attention of the listener.[213] The ideational market—like the economic market—does not produce a single universal good or herd all consumers towards one product; it respects and responds to the varied preferences of its participants.

The "free trade" principle protects competition within the marketplace of ideas. While all ideas—popular and unpopular—are welcome to enter the public sphere under the "more speech" principle, not all ideas can (or should) win attention under the "free trade" principle. The First Amendment was enacted "when the main threat to the nation's political speech environment was state suppressions of dissidents" and its interpretation to date has "focuse[d] exclusively on the protection of speakers from government."[214] Today, however, "it is no longer speech itself that is scarce, but the attention of listeners."[215] The nonnegotiable constraint of time means we only have so much attention to spare, and reality prevents us from consuming more than a fraction of the content accessible to us.

Given these constraints, we must make choices about what to consume and which sources are worthy of our informational dependence. In a free marketplace of ideas, the choice of the *consumer* is constitutionally protected, not the choice of the planner *or the producer*.[216] The listener—not the speaker—decides what

212. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

213. *See supra* Part I.C.

214. Tim Wu, *Is the First Amendment Obsolete?*, *in* THE FREE SPEECH CENTURY, *supra* note 143, at 272, 273.

215. *Id.*

216. *See* Blasi, *supra* note 61, at 41.

content is worthy of attention in a competitive ideational market.[217] Some may choose Fox News and some may choose MSNBC, but one cannot spend the same minute on both.

In this way, a market participant's expressive and receptive decisions play equally important roles in fulfilling the First Amendment's autonomy-respecting and democracy-enhancing purposes. "Our political system and cultural life rest upon" the principle that "each person should decide for himself or herself the ideas and beliefs deserving of expression, *consideration*, and adherence."[218]

To protect free competition within the marketplace of ideas, the "free trade" principle extends First Amendment protection to those expenditures necessary to distribute (or make available) content to satisfy attentional market demand. "[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," any limitation upon distribution expenditures might risk "restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[219] As the Court has recognized, "Liberty of circulating is as essential . . . as liberty of publishing; indeed, without the circulation, the publication would be of little value."[220]

Yet, as above, the constitutional protection for the economic expenditure derives from the ideationally protected activity. Economic expenditures for the distribution and availability of content are only protected under the First Amendment to the extent they help satisfy *attentional* demand. Funds spent to meet the aggregate demands of consumers in the ideational market are vital to ensuring that popular speakers and content gain the exposure they deserve and that ideas can travel as far as their reputation or merits will take them. When economic funds follow attentional demand, the integrity of the marketplace of ideas is preserved and the most compelling content and most

217. *See* NEUBORNE, *supra* note 59, at 98.

218. Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 641 (1994) (emphasis added); *see also* Citizens United v. FEC, 558 U.S. 310, 341 (2010) (noting that the public has "the right and privilege to determine for itself what speech and speakers *are worthy of consideration*" (emphasis added)).

219. Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

220. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (quoting *Ex parte* Jackson, 96 U.S. 727, 733 (1877)). This is in tension with the strongest readings of the First Amendment's autonomy value. *See supra* note 202 and accompanying text.

trusted speakers *earn* their wide exposure and large attentional market share.

It is no coincidence that "[s]ome of our most valued forms of fully protected speech are uttered for a profit."[221] "[T]he pamphlets of Thomas Paine were not distributed free of charge."[222] Paine "wasn't paying for people to read his words—readers were paying to buy [his] book."[223] Similarly, "media corporations make money *by* making political commentary, including endorsements."[224] Purveyors of such information can charge for its distribution because the audience has assigned their content attentional value. This is the marketplace of ideas at its finest—content traveling far and wide based on consumers' decentralized choices.

Consumers may choose established purveyors of information (such as *The Wall Street Journal* or *The New York Times*) or consumers may choose newer entrants. In today's rich media environment, one can choose Andrew Sullivan[225] or Josh Marshall,[226] *The Volokh Conspiracy*[227] or *Take Care*.[228] What matters is that people choose this content—they have decided that such speakers and intermediaries provide information that is worth their time.

221. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)); *see also* Citizens United v. FEC, 558 U.S. 310, 390 (2010) (Scalia, J., concurring).

222. Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

223. DEREK D. CRESSMAN, WHEN MONEY TALKS: THE HIGH PRICE OF "FREE" SPEECH AND THE SELLING OF DEMOCRACY 38 (2016).

224. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting).

225. *Andrew Sullivan*, WIKIPEDIA, https://en.wikipedia.org/wiki/Andrew_Sullivan [https://perma.cc/3XH7-C9CV] ("Sullivan is a conservative political commentator . . . [and] [h]e started a political blog in 2000 . . . .").

226. *Josh Marshall*, WIKIPEDIA, https://en.wikipedia.org/wiki/Josh_Marshall [https://perma.cc/3B27-UQWM] ("Marshall . . . is an American journalist and blogger . . . [who] presides over a network of progressive-oriented sites that . . . average 400,000-page views every weekday and 750,000 unique visitors every month.").

227. *The Volokh Conspiracy*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Volokh_Conspiracy [https://perma.cc/VL8K-EM57] ("The Volokh Conspiracy is a blog . . . covering legal and political issues from an ideological orientation . . . [of] 'generally libertarian, conservative, centrist, or some mixture of these.'").

228. *About Us*, TAKE CARE, https://takecareblog.com/about-us [https://perma.cc/LC3T-FGF3] ("*Take Care* [is a blog that] addresses a wide range of legal questions arising under President Trump.").

Protecting distribution expenditures deemed meaningful by the market not only accords with Supreme Court precedent,[229] it imbues the Free Press Clause with freestanding, independent constitutional significance[230] while adopting a neutral posture when it comes to actually defining "the press." Although the First Amendment spells out separate protection for the press by its plain terms,[231] the Court has lamented "the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from [nonmedia] corporations."[232] The Court usually treats the Free Press Clause "as just another colony of the imperial Free Speech Clause, which does all the legal work."[233] Determining who/what qualifies as "the media" for constitutional purposes has become especially delicate in an age when anyone can publish a blog, post a comment on Facebook, or upload a video to YouTube.[234]

If one recognizes that attentional capacity is limited and believes the Free Press Clause was "designed to ensure a free speaker the *ability* to reach a mass audience"[235] but not the *right* to reach a mass audience,[236] then "the press" can become as fluid and flexible as the ideational market desires while remaining objectively identifiable as a matter of constitutional law. The rapid expansion of new media, for example, has generally tracked public interest.[237] When an organization cultivates a following based on voluntary attentional choices,[238] the Constitution should protect the expenses that make its content available.

229. *See* Citizens United v. FEC, 558 U.S. 310, 349–51 (2010).

230. *See* Campbell, *supra* note 104, at 249 ("Conventional wisdom holds that the freedom of speech and the freedom of the press were equivalent concepts, together comprising what we would now call a freedom of expression."); *see id.* at 268 (historically, "speech and press freedoms were legally distinct, with the latter referring only to the customary legal rules that protected printing-press operators").

231. U.S. CONST. amend. I.

232. First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 796 (1978) (Burger, C.J., concurring).

233. NEUBORNE, *supra* note 59, at 103.

234. Nathaniel Persily, *The Campaign Revolution Will Not Be Televised*, AM. INT. (Oct. 10, 2015), https://www.the-american-interest.com/2015/10/10/the-campaign-revolution-will-not-be-televised/ [https://perma.cc/K6XQ-L6SM].

235. NEUBORNE, *supra* note 59, at 19 (emphasis added).

236. *See infra* Part III.B.3.

237. DANIEL W. DREZNER, THE IDEAS INDUSTRY 27 (2017).

238. As technology progresses, there may be limits to what attentional choices can truly be called "voluntary." *See infra* notes 280–92 and accompanying text.

In his *McConnell* dissent, Justice Scalia articulates how such economic transactions are necessary to create content and satisfy consumers' attentional choices:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. . . . Instead of regulating the various parties to the enterprise individually, the government can suppress their ability to coordinate by regulating their use of money. What good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen? The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.[239]

Where economic expenditures are necessary to make content available in response to attentional decisions by consumers (*i.e.*, success in the ideational market, rather than the economic market), the First Amendment extends protection. By construing the Free Press Clause in this manner, the Court can protect the press and let the market define it.

These protections need not only apply to those who produce content for a profit.[240] If a nonprofit organization wishes to spend money to make content available for free, then such expenditures should also receive strong constitutional protection. Making content freely accessible to those who *choose* to consume it reduces the economic barriers to dissemination and aids in the free flow of information that is spreading based on attentional demand. Whether one is paying website hosting fees,[241] booking a venue for a political rally,[242] or making content freely available on-demand to cable subscribers,[243] the "free trade" principle should fully protect the expenditure.

Our choices about which intermediaries continue to deserve our trust over time play a vital role not only in *how* information

239. McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J., dissenting).

240. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).

241. *See, e.g.*, Bailey v. Me. Comm'n on Gov. Ethics & Elec. Practices, 900 F. Supp. 2d 75, 79 (D. Me. 2012).

242. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

243. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 320 (2010); Persily, *supra* note 234 ("*Hillary: The Movie* was an ideologically motivated hatchet job on a presidential candidate, to be sure, but it was one that viewers needed to seek out if they wished to watch it. It was not imposed on them.").

travels throughout society, but in *what kind* of information gains widespread exposure. This might cause some readers concern: What if our attentional choices promote virality over veracity, popularity over quality?[244] What if "We the People" reward *the worst* ideas? The short answer is as unavoidable as it is unsurprising: the Constitution cannot guarantee our success or save us from ourselves. Despite the Supreme Court's sunny assurances, free choices and free speech can give rise to a variety of economic and ideational preferences both good (kale and tax policy) and bad (cigarettes and spiteful rhetoric). Framed as a market or not, ignoring that reality serves no one.

One need not (and should not expect to) rely solely on markets' self-correcting properties to address lies and falsehoods. There is no basis to believe that "free competition between ideas" will inevitably privilege true information or eliminate false information, and there is good reason to suspect the opposite.[245] Unfair, deceptive, and misleading trade practices are regulated in the economic market specifically *because* consumers find them so seductive, and various scholars have entered the fray over just how falsity might be addressed in meaningful ways.[246] That is an important discussion, but it is not one I take up in this Article. Suffice it to say, a more realistic market metaphor should also carry more realistic expectations: a market that is driven by consumer choices will cater to a *wide* variety of consumer preferences.[247]

Nonetheless, an attentional marketplace is not entirely without meaningful effect on this score. That is because our relational decisions about who to trust with access to our attention provide a critical counterbalance to our quicker, baser instincts.

244. *See* Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 72 (2017).

245. *See infra* notes 248–56 and accompanying text.

246. *See, e.g.*, Chesney & Citron, *supra* note 87; Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a Post-Truth World*, 64 ST. LOUIS UNIV. L.J. (forthcoming 2020), https://ssrn.com/abstract=3418427; Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669 (2017).

247. Goldman & Cox, *supra* note 27, at 17–18 ("[E]conomic theory does not imply that the 'best' or highest-quality products will be produced and consumed under free competition . . . . What economic theory actually says is that, under competition, the levels of outputs for each type of good will reach efficient levels, relative to . . . the preferences of consumers. This makes no categorical prediction about which types of goods will be produced . . . . If people valu[e] falsehood, then perfect competition would provide falsehood . . . .").

Over the short run, outrage and lies are undoubtedly potent drivers of human attention. Novelty and negativity "grab our attention as human beings," and "[i]t's all too easy to create both when you're not bound by the limitations of reality."[248] This remains as true today as it has been throughout much of history.[249]

The first contested presidential election in 1796 was strewn with lies.[250] During Jefferson's second run, his opponents claimed his election would lead to "a national orgy of rape, incest, and adultery."[251] And, only two years after appearing on the scene in 1833, the *New York Sun* (the first "penny paper" to derive its revenues primarily from advertising) began running a series about amazing "astronomical discoveries" on the moon, including "great seas and canyons, pillars of red rock and lunar trees" and, yes, alien life: "winged creatures" that "averaged four feet in height" and were covered in "short and glossy copper-coloured hair."[252] This is not exactly confidence-inspiring.

Modern dynamics can be equally sobering. Social media platforms, which are designed to maximize user attention, use data "to predict what will cause you to react most strongly, and then giv[e] you more of that."[253] An empirical study of falsehoods on Twitter found that "falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information."[254] While "the truth rarely diffused to more than

248. Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News*, ATLANTIC (Mar. 8, 2018), https://theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/ [https://perma.cc/ZD6Y-7URE] (quoting Professor Brendan Nyhan); *see also* Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1149 (2018).

249. The moderate news culture of the 1950s seems to be an historical anomaly attributable to a highly consolidated telecommunications industry. *See* WU, *supra* note 41, at 129. And while some now recall this common cultural knowledge base more sympathetically, it is not an unqualified good. Vulnerable and voiceless communities whose stories never made the nightly news might not look back so longingly. *See* Barron, *supra* note 172, at 1647.

250. Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 368 (2017).

251. *Id.* (quoting BRUCE L. FELKNOR, DIRTY POLITICS 21 (1966)).

252. WU, *supra* note 41, at 12–17.

253. Roger McNamee, *How To Fix Facebook—Before It Fixes Us*, WASH. MONTHLY (Jan. 7, 2018), https://washingtonmonthly.com/magazine/january-february-march-2018/how-to-fix-facebook-before-it-fixes-us/ [https://perma.cc/5BEY-MX29].

254. Vosoughi et al., *supra* 248, at 1147.

1000 people, the top 1% of false-news cascades routinely diffused to between 1000 and 100,000 people."[255] False *political* news in particular "traveled deeper and more broadly, reached more people, and was more viral than any other category of false information."[256]

Over the long run, however, the story becomes more complex. Like any relationship, there are limits to what we will tolerate from our informational intermediaries. The friend who constantly exaggerates earns skepticism, while the friend who tells it straight earns trust. Corrective mechanisms make real social circles and chosen sources of information answerable for abuses of our attention. The "disenchantment effect," for example, protects us from "a continual diet of the purely sensational."[257]

Whereas the penny papers of the 1830s eventually ran into the ground, "*The New York Times* and *The Wall Street Journal* . . . beat out their rivals in the late nineteenth century not by being more sensational, but less."[258] Editors, writers, newscasters, and other intermediaries are repeat players who must constantly balance the short-term need to maintain the audience's attention with the long-term need to maintain the audience's trust.[259] The audience, in turn, rewards intermediaries that strike this balance with repeat business. Such relationships lead to the wider circulation of information that does more than grab our attention—it aims to be worthy of our attention.[260]

Facebook's continual tweaking of its algorithms also reflects—in part—the balance that intermediaries must strike to retain voluntary and sustained attention. Several years ago, Facebook was awash in "clickbait stories" that people hated "*even*

255. *Id.* at 1148.

256. *Id.*; *see also* Persily, *supra* note 244, at 68.

257. WU, *supra* note 41, at 23, 100–01.

258. *Id.* at 100–01.

259. *See* Blocher, *supra* note 99, at 857 ("Just like market actors, repeat speech players are less likely to violate norms, lie, or break promises, because they know that repeat interactions are inevitable.").

260. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248, 258 (1974) (providing great constitutional deference to a newspaper's "exercise of editorial control and judgment"); *see also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (plurality opinion) ("The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by . . . the acceptance of a sufficient number of readers . . . [and] the journalistic integrity of its editors and publishers.").

though they often clicked on them."[261] Those posting had figured out what kind of headlines captured users' attention and gamed Facebook's algorithm. Our "behavioral self" gorged on these stories, even while our "aspirational self" did not want to.[262] To avoid losing users over the long-term, Facebook downgraded the most clickbait-y headlines *despite* their efficacy in grabbing attention.[263]

So too has Facebook reacted to the fallout from the 2016 election—and the loss of users that followed[264]—by refining its algorithms. To retain its audience,[265] Facebook began curbing the spread of hoaxes and misinformation,[266] disrupting "coordinated inauthentic behavior" on its platform,[267] and promoting the circulation of articles that users actually took the time to read before sharing.[268] Even the depressing Twitter study above found that true tweets inspired trust in the speaker.[269]

These relational dynamics matter: when people "develop trust in institutions, . . . that trust can give the institution more power."[270] This creates a virtuous feedback loop. Not only are sources less inclined to abuse the attention of their audience, but

261. THOMPSON, *supra* note 65, at 271.

262. *Id.* at 270.

263. *See id.* at 270–71.

264. *See* Alina Selyukh, *Postelection, Overwhelmed Facebook Users Unfriend, Cut Back*, NPR (Nov. 20, 2016, 6:34 PM), https://npr.org/sections/alltechconsidered/2016/11/20/502567858/post-election-overwhelmed-facebook-users-unfriend-cut-back [https://perma.cc/9N2S-D2KA].

265. And, perhaps, to head off government intervention.

266. *See* Fred Vogelstein, *Facebook Just Learned the True Cost of Fixing Its Problems*, WIRED (July 25, 2018, 11:18 PM), https://wired.com/story/facebook-just-learned-the-true-cost-of-fixing-its-problems/ [https://perma.cc/R7WB-UTVD].

267. *See* Meagan Flynn, *On Eve of Election, Facebook Says It's Investigating 'Coordinated Inauthentic Behavior' by 'Foreign Entities,' Deletes 115 Accounts*, WASH. POST (Nov. 6, 2018, 1:34 AM), https://washingtonpost.com/nation/2018/11/06/eve-election-facebook-says-its-investigating-coordinated-inauthentic-behavior-deletes-accounts/ [https://perma.cc/JPC7-T6S6].

268. *See* Jeffrey Rosen, *America Is Living James Madison's Nightmare*, ATLANTIC (Oct. 2018), https://theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/ [https://perma.cc/9P3T-J3DR].

269. Vosoughi et al., *supra* 248, at 1150.

270. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 21 (2017).

listeners "find news more credible if trusted people vouch for its veracity and relevance."[271]

Studies have also found that "the best way to combat political misperceptions is through the use of 'surprising validators,' meaning individuals and institutions that are credible to persons operating under the misperception(s) in question."[272] In other words, a theory of ideational competition that incorporates and respects the role of social groups, intermediaries, and relational information might enhance our ability to process new information that conflicts with our existing preconceptions.

Requiring speakers and content to run this gauntlet of decentralized vetting in order to earn broad exposure begins to sound more like a market. Nonetheless, some may worry that intermediaries carry an inherent threat of bias. Professor John McGinnis, for example, has argued that liberal-leaning reporters, academics, and celebrities have "powerful platforms" that "make it easy for them to directly propagate ideas."[273]

Yet, the power of intermediaries is both inevitable and inherently nonpartisan. Unless one lives alone in a cabin in the woods, informational mediation is a fact of life. This dynamic has no inherent political slant. Ideational "market signals" like trust and reputation are defined by market participants' own social circles and cues. Fox News is a trusted brand among its consumers[274] and consistently ranks as the market leader in news outlet viewership.[275] So, too, do social groups treat particular claims to authority differently. "Arguing from authority only works if the authority is recognized and legitimized by others," and "there has been a slow-motion erosion of trust in prestigious institutions and professions for the past half century."[276] Market sig-

271. El-Haj, *supra* note 77, at 1263 n.183 (quoting THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM 128–29 (2012)).

272. Strong, *supra* note 76, at 141–42.

273. McGinnis, *supra* note 40, at 868.

274. *See* Joe Concha, *BBC, Fox News, PBS Ranked as TV's Most Trusted News Brands*, HILL (July 31, 2018, 1:20 PM), https://thehill.com/homenews/media/399701-bbc-fox-news-pbs-ranked-as-tvs-most-trusted-news-brands [https://perma.cc/HLE9-YHPD].

275. *See* Joe Concha, *Fox's 'Hannity' Is Most-Watched Cable Program in July*, HILL (July 31, 2018, 4:02 PM), https://thehill.com/homenews/media/399747-foxs-hannity-is-most-watched-cable-program-in-july [https://perma.cc/VH5L-2Z2H].

276. DREZNER, *supra* note 237, at 53, 11.

nals are constantly being constructed, deconstructed, and reconstructed within and among social groups,[277] and which social groups rise in salience at any given moment is itself based on what identities are activated by speakers and participants in the market.[278]

Because mere exposure to information inherently involves selection and prioritization among competing speakers and speech, we can begin to appreciate how our decisions about who to trust with our attention impacts the marketplace of ideas. Because information necessarily travels through gatekeepers, those with access to our attention have an immense amount of power to determine which ideas gain wide exposure and how those ideas are framed.[279] Privileging those who have *earned* our attention and trust ensures that our intermediaries remain accountable and that the marketplace of ideas remains free and competitive.

Now, to be sure, a doctrinal turn towards attentional choice raises a host of complexities that emphasize both the concept's malleability and its importance, especially in our information-rich, data-driven world. The upper parts of our brain provide a voluntary mechanism for directing attention, but the lower parts of our brain also provide an involuntary mechanism for directing attention.[280] It is beyond the scope of this Article to explore the myriad ways in which the methods for sustained attention-capture in the modern, algorithm-driven social-media era might differ in type or degree from the methods for earning attention in the past with respect to one's volition. Whether and how various modern practices might undermine or enhance attentional volition present important interdisciplinary questions worth additional study if attentional choice takes a more central role in First Amendment doctrine. Nonetheless, some aspects of the

277. Trust in the "Fourth Estate" has fallen to thirty-two percent in recent years, down from seventy-two percent after Watergate. Concha, *supra* note 274. President Trump, "who has frequently criticized negative coverage as 'fake news,'" comes in just behind the press, with twenty-nine percent rating him trustworthy. *Id.* The power of the press, like the power of the President, is not fixed—it expands and contracts in a dynamic process. "Trust and power" are closely linked: "[T]rust in specific decision makers stands in a dialectical relationship with views on particular issues . . . ." *See* CHAFETZ, *supra* note 270, at 21.

278. *See infra* text accompanying notes 518–19.

279. *See supra* Parts I.A–B.

280. Wu, *supra* note 50, at 782.

modern attention economy would seem to deserve more immediate inquiry.

First, many social media platforms now employ technical and nonexpressive components that prey on known psychological tendencies to create patterns of addiction.[281] Twitter's "pull to refresh" function and "loading" wheel, for example, do not reflect *content* but are conscience design choices known to build sensations of anticipation and reward in the user experience in order to develop non-conscious habits.[282] These habit-forming devices undoubtedly garner our attention but stray far from the goal of encouraging *voluntary* sustained attention based on one's conscious appraisal of an intermediary's content quality, editorial selection, or other personal balance of interest and relevance.

Second, large online platforms increasingly exercise control over attention in ways that go well beyond the editorial power of traditional intermediaries.[283] As modern clearinghouses for access to more traditional sources of news content as well as updates from friends and family, social media companies increasingly act as "mega-intermediaries" that users may consider "too big to leave." If participants in the ideational marketplace are to retain genuine attentional choice, this may—unironically—require more rigorous *economic* antitrust enforcement and policies. Attentional choice is only effective insofar as there are genuinely diverse and competing options vying for attention.

For example, in 2012, Instagram and Facebook "were competing for much the same attention—the same hours—that consumers might devote to [social media]."[284] Professor Tim Wu points out that, by strictly focusing on cash-market analyses and allowing Facebook to acquire Instagram, antitrust agencies overlooked vital attentional competition between the two entities.[285] From the perspective of *economic* competition, this meant that Facebook could remove Instagram as an emerging competitor in the attentional market before it had converted its attentional share into advertising revenue.[286] From the perspective of

281. *See* Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 133–34 (2019).

282. *See id.*

283. *See id.* at 176; Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 394 (2018).

284. Wu, *supra* note 50, at 775.

285. *Id.* at 793–95.

286. *Id.*

ideational competition, however, the acquisition also removed a source of *content* discipline from the market. With both Facebook and Instagram under unified control, each has less incentive to strike an appropriate, responsible, and sustainable balance between powerful short-term appeal, sustainable long-term appeal, and broad content appeal. Users tired or skeptical of the content on one platform are captured by the other.

Finally, while both traditional media sources and social media platforms engage in an exposure-selection process that involves a kind of "editorial control," one might wonder if these processes can be equated without overlooking something fundamentally different about their attention-capture models. Traditional editorial decisions use human judgment and seek to earn the attention of a community by crafting an offering tempered by the values and mores of that human editorial judgment. Algorithms, on the other hand, "engage in autonomous decision-making about what should happen next, basing predictions [about each individual user] on what [that user has done] before."[287] These algorithms surgically refine their selections based on an individual user's ever-growing body of past behaviors and draw additional guidance from vast data sets and analytics tools and technologies that monitor that user's online activities outside of the platform.[288]

In the past, individualized tailoring of content was only possible through deep, sustained human relationships—with information conveyed in the context of trusted associations and communities. Informational intermediaries exercising editorial judgment to capture attention, meanwhile, could only forge trust at the level of the community. Platforms that serve individually tailored content selected by algorithm might begin to undercut the human engagement that previously formed the core of the marketplace's presumed consensus-building function. Moreover, while emotion and sensationalism have long been used to garner attention and to carry readers along (and therefore play an appropriate role in persuasion), social-media algorithms today "keep users always 'on the rails,'" using data to feed content that aims to keep users in a kind of sustained attentional stupor that might, at some point, begin to test the boundaries of what can be called genuine attentional "choice."[289]

287. Entman & Usher, *supra* note 83, at 301.

288. *Id.* at 301–02.

289. Langvardt, *supra* note 281, at 149.

These final dynamics admittedly cut close to the quick. The claim that modern platforms might be *too* effective at holding our attention raises difficult questions about the boundaries of human volition and the core purposes and practices of the market.[290] These questions deserve further consideration and study. Both habit-forming design and ideational market consolidation, however, reflect areas where immediate legislative intervention would seem appropriate under almost any attentional-choice framework.[291] A doctrine that accords constitutional significance to genuine attentional choices would also leave additional space for legislators to protect and enhance free exercise of speech as they gain a greater understanding of how attention is earned and allocated in fact.[292] The importance of protecting attentional volition becomes especially clear when one considers the "free trade" principle's autonomy- and democracy-enhancing values.

From an individualist perspective, privileging our free attentional choices and respecting our assessments about speakers' and intermediaries' trustworthiness deepens our own personal development and provides us greater autonomy and agency in setting out our own direction. Given how contingent our informational exposure is, how reliant we are upon intermediaries, and how radically their selection shapes our growth, values, ideologies, and sense of identity and community, our choice in intermediaries is among the most significant we can make.

More fundamentally, what we pay attention to (by choice or otherwise) *is* our conscious experience—it is our very sense of existence and being.[293] For this reason, it would seem more than strange to think that "[h]earers [do not possess] dignitary rights to self-fulfillment and self-definition, too."[294]

290. In the economic marketplace, for example, the Supreme Court has generally disfavored predatory pricing claims. *See, e.g.*, Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–27 (1993). Saying that prices are *too* low raises difficult questions about the boundaries of proper market function. *See id.*

291. *See infra* Part IV.

292. *See id.*

293. Wu, *supra* note 50, at 780.

294. Neuborne, *supra* note 62, at 901. To be clear, respecting one's attentional choices does not confer absolute control or a "listener's veto" over others' speech. The Court rightfully recognizes that listener discomfort cannot silence a speaker. *See* Cohen v. California, 403 U.S. 15, 21 (1971). I may not want to see a "Fuck the Draft" jacket, but I cannot prevent that without extinguishing the expression itself. *Id.* at 16–22. The freedom of speech necessarily means that we will see and hear things that make us angry or uncomfortable. That is both

Nor are our autonomy interests limited to "listening" choices: As informational intermediaries in our own right, our choices about what to share (and what *not* to share) within our social groups aren't just part of how the marketplace functions—they're also self-defining. "People do not share content solely because it is informative. . . . They want to be heard and seen, and respected."[295] What we share is part of who we are, how we define ourselves as individuals, and how we situate ourselves within our broader communities.

From a democratic perspective, the "free trade" principle does more than acknowledge that "the people" should be entrusted with the direction of public debate as a matter of theory,[296] it protects the decentralized process by which the people shape public debate as a matter of fact. Structuring protections for economic expenditures around their role in responding to attentional choices recognizes that value in the marketplace of ideas can only be assigned by consumers—not the speakers themselves.

The "free trade" principle also recognizes that value in the marketplace of ideas is measured by the depth and breadth of the interest and attention we accord as a society, not by any absolute or objective quality intrinsic to information itself. It is "the power of [a] thought to get itself accepted in the competition of the market" that determines whether we have found "ground upon which [our] wishes safely can be carried out."[297] In an attentional-choice market, we all have a role in shaping the political dialogue and determining our course as a nation.

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the cost of living in a free society as well as one of its profound benefits—the unexpected insight, the growth through discomfort, the serendipitous encounter.

Full control over access to one's attention at all times is neither the goal nor the animating principle of the attentional-choice theory (for that is inconsistent with both reality and the First Amendment). When one makes a conscious choice in selecting particular content or a particular intermediary, however, that decision carries constitutional significance in the marketplace of ideas. Exposure via intermediaries that does not carry this imprimatur may be susceptible to greater legislative regulation in the public interest. *See infra* Part III.B.3.i.

295. *Once Considered a Boon to Democracy, Social Media Have Started To Look Like Its Nemesis*, ECONOMIST (Nov. 4, 2017), https://www.economist.com/briefing/2017/11/04/once-considered-a-boon-to-democracy-social-media-have-started-to-look-like-its-nemesis [https://perma.cc/3BJS-QMKC].

296. *See* FISS, *supra* note 144, at 23.

297. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. Anticompetitive Conduct

With a more robust theory of ideational competition, both private conduct and government action bearing on the marketplace of ideas appear in a new light. An attentional-choice approach does not relegate the judicial role to ad hoc balancing and uncritical deference, nor does it foreclose legislative power based on bald fictions.[298]

Instead, the theory looks to the actual terms of access to our attention to ascertain how exposure is being allocated. Under this approach, judges would maintain a critical role in preventing government barriers to entry or other public interferences with trade consistent with several aspects of existing doctrine under *Buckley v. Valeo* and *Citizens United*. However, this approach would also demand judicial deference when the political branches seek to promote ideational competition or intervene to disrupt private anticompetitive conduct.

i. Private Interference

Looking to the actual terms upon which access to our attention occurs provides a radical new way to examine private conduct bearing on the marketplace of ideas. If economic expenditures driven by attentional demand are pro-competitive, then economic agreements that propagate exposure and consume attention in the *absence* of any underlying consumer choice frustrate the operation of the marketplace of ideas. Such content has not "earned its keep" through competition.

I do not intend for this Article to establish an exhaustive taxonomy of competitive and anticompetitive ideational conduct. However, there is at least one kind of expenditure worth exploring more here given how differently it could be treated under an attentional-choice model: payments for advertising. Advertising agreements reflect the sale of human time and attention.[299] "[W]hat advertisers are paying for [is] access to the minds of consumers."[300] A speaker that has earned and cultivated that access

298. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (stressing the importance of a reasoned constitutional basis for legitimate exercises of the Court's power).

299. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 629 (1994) (noting that broadcasters "generate revenues by selling time to advertisers"); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969) ("[S]tation owners . . . make time available . . . to the highest bidders."); *see also* WU, *supra* note 41, at 6 ("[A]ttention has been widely recognized as a commodity . . . .").

300. Wu, *supra* note 50, at 784.

to attention through free trade (such as a newspaper) sells that access to a speaker that has *not* earned the consumer's attention (such as a shampoo manufacturer or a political candidate).[301]

By definition, advertisements contain content that *no one chose to consume* from speakers that *no one chose to trust* with their attention. Ad expenditures circumvent ideational competition by skipping the value-conferring step where consumers choose to assign their attention. As a result, ideas come to dominate the public debate based on largely content-neutral transactions: a newspaper sells a quarter-page of paper; a network sells thirty seconds of airtime; a social media provider sells a "promoted" location within one's Twitter or Facebook feed. Whatever message the purchaser may ultimately choose to fill that blank space, the advertising transaction itself involves the purchase of access to attention alone.[302]

Consider, for example, the run-up to the 2018 midterm elections. In March 2018, the Democrats' "House Majority PAC" reserved $43 million worth of television ad time across thirty-three media markets.[303] In April 2018, the Republicans' "Congressional Leadership Fund" responded by booking $48 million in ads, with $38 million going to television airtime and $10 million going to digital advertising.[304] That's $91 million spent on access to audience attention alone *before any content has been produced*. There was no "expression" to speak of yet and no one chose to entrust these organizations with their attention, but one could already be sure that their messages would reach millions of Americans. This makes a mockery of the marketplace of ideas.

301. *See id.* at 772 (describing the basic model of the "attention industry" as "attract[ing] attention by offering something to the public (entertainment, news, free services, and so on), and then reselling that attention to advertisers for cash").

302. There is, of course, a degree of vetting that occurs when intermediaries accept advertisements—an intermediary does not want advertising content that would *too* heavily degrade its earned attention. *See infra* note 320. The key inquiry, however, is whether the content would have exposure *but for* the attentional purchase. *See id.*

303. Mike DeBonis, *Democratic Super PAC Makes Plans To Spend $43 Million on House Races*, WASH. POST (Mar. 8, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/03/08/democratic-super-pac-makes-plans-to-spend-43-million-on-house-races/ [https://perma.cc/Z97A-GWJP].

304. Mike DeBonis, *Top GOP Super PAC Books $48 Million in Ads for House Races*, WASH. POST (Apr. 17, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/04/17/top-gop-super-pac-books-48-million-in-ads-for-house-races/ [https://perma.cc/BD4A-4ENC].

To be sure, the purchaser of an ad block makes the expenditure for the purpose of spreading a message far and wide—but the question here turns on the terms of access to the consumer's attention, not the reasons the producer might want that attention. In a mediated and attention-constrained marketplace of ideas, increased exposure must be understood as the *result* of competition, not its predicate.[305] Attention must be earned, not bought. The fact that spreading an idea far and wide might be extremely difficult is precisely the point.

Unlike expenditures protected under the "more speech" principle (which are incidents of speech) or expenditures protected under the "free trade" principle (which reflect value ascribed by the listener), expenditures for advertising reflect nothing more than value ascribed *by the speaker*. Judgments by speakers about the relative value of their own speech are entitled to no special protection in the marketplace of ideas. The whole purpose of a market-based approach is to leave agenda-setting and moderation of the public debate to the public itself. Everyone wants to command a large market share. In a competitive market, producers can only acquire that position by earning it. Advertising transactions circumvent the market mechanism and move attentional sovereignty (and ideational power) from consumers to producers.

Taken together, the freedom of speech (with the right to spend on creating content), and the freedom of the press (with the right to spend on meeting attentional demand) protect the *ability* of a speaker to *earn* a wide audience. Neither freedom, however, creates a *right* of a speaker *to* a wide audience. Such a "right" is incompatible with the terms of competition for attention and exposure. The perverse notion that one might be entitled to the ear of another is the instinct of the authoritarian[306] and the first step towards transforming the First Amendment from a bulwark of political liberty into a tool for political domination.[307] The size of one's audience—the exposure one receives—is for the market to decide.

Rather than deriving from the First Amendment itself, the constitutional protection that advertising receives comes from the Court's own laissez-faire doctrine. That doctrine fails to distinguish between free competition and free contract.[308] Without

305. *See supra* Parts I.A, II, III.B.2.

306. *See* WU, *supra* note 41, at 109–20.

307. *See* CRAWFORD, *supra* note 39, at 11–13.

308. *See supra* Part III.A.

a theory of ideational competition, the Court has allowed the market metaphor to morph into a constitutional right to enter into any contract relating to expressive content or activity. By elevating free contract over free trade (and creating a supposed "right to an audience"), the Court has inadvertently crafted constitutional protections for anticompetitive agreements.

If the Court applied a similar theory in the economic sphere, the result would be a constitutional right to price-fixing agreements, output restrictions, collusion, and cartels. Such an interpretation would defy common sense, distort the market, undermine competition, and justifiably provoke widespread popular outrage. That we see this result unfolding in the marketplace of ideas, then, should be no surprise.[309]

To realign the market metaphor with the First Amendment, the Supreme Court should recognize that no one has a "right to others' attention" in a market where attention is itself the resource over which competition occurs. To be sure, the concept of attentional choice cannot go so far as to foreclose market entry and silence the production of content that one finds objectionable or unpleasant.[310] But a "right to attention" cannot coexist with a "right to compete for attention."

Once one removes a purported "right to attention," any constitutional right to unlimited expenditures in support of that right fall with it. As under the "more speech" and "free trade" principles, constitutional protections for expenditures derive from the constitutionally protected activity they support.[311] When the right to the activity disappears, so does the right to the attendant expenditures.

Here, the Court must be careful to distinguish between how it treats the content found in advertisements and how it treats the vehicle of advertising. The vehicle of advertising can be used to convey all kinds of content: political content, commercial content (i.e., "speech . . . propos[ing] a commercial transaction"),[312] etc. In Supreme Court precedent to date, this distinction has gone largely overlooked, complicating campaign-finance and commercial-speech law[313] alike.

309. *See infra* Conclusion.

310. *See supra* note 294.

311. *See supra* Parts III.B.1–2.

312. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1976).

313. *See infra* note 317.

One of the only cases to address this distinction directly—*New York Times Co. v. Sullivan*—barely analyzed the issue.[314] In *Sullivan*, the Court addressed whether and how the First Amendment impacted state libel law regulating the *contents* of an advertisement in *The New York Times*, holding that a plaintiff must show "actual malice" to prevail.[315] An attentional-choice model would do nothing to alter the reasoning, holding, or outcome of that decision.

Yet, in a mere two paragraphs (out of a fifty-page decision) the Court suggested in dicta that the distinction between an article in *The New York Times* and an advertisement in *The New York Times* was of no constitutional significance whatsoever, dismissively stating, "That the Times was paid for publishing the advertisement is as immaterial . . . as is the fact that newspapers and books are sold."[316] That may be true with respect to the level of protection the *contents* of an advertisement should receive, but not the level of protection expenditures on the *vehicle* itself should receive.[317]

314. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

315. *See id.* at 279–92.

316. *Id.* at 266.

317. Because the vehicle of advertising can convey content of any variety, to say that "advertising pure and simple" falls within the bounds of "commercial speech" muddles the inquiry. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1985). Content should not lose its protections simply because "money is spent to project it," *Va. State Bd. of Pharmacy*, 425 U.S. at 761, but such a broad characterization ("to project") conflates various market practices and encompasses far more than advertising.

The early commercial-speech cases, for example, involved prohibitions on the expression and distribution of targeted content, not just its advertisement. *See Va. State Bd. of Pharmacy*, 425 U.S. at 750 (statute punishing pharmacist if he or she "publishes, advertises or promotes, directly or indirectly, in any manner whatsoever" drug prices); Bigelow v. Virginia, 421 U.S. 809, 812–13 (1975) (statute barring "any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner" from providing information about abortion services). Such direct prohibitions on free speech and free competition raise far more profound First Amendment problems than the regulation of advertising purchases alone and using the term "project" to encompass every use of money for every activity prohibited by such a statute obscures more than it explains.

Nonetheless, it also remains true that the messages found in advertisements "do not forfeit [their] protection because they were published in the form of a paid advertisement." *Sullivan*, 376 U.S. at 266; *see also* Bates v. State Bar of Ariz., 433 U.S. 350, 363 (1977). The content itself remains fully protected, and unlimited expenditures can be used to support the circulation and distribution

If the terms of exposure to ideas matter, then a *reader's* payment for a newspaper's *content* differs from an *advertiser's* payment for a newspaper's *readers*.[318] The former primarily reflects ideational power; the latter primarily reflects economic power. When a speaker pays to commandeer the attention of an audience,[319] the economic agreement short-circuits the process by which listeners grant or withhold their ideational currency. Each individual's decision to deem an idea worth their time or an intermediary worth their trust is supposed to guide the market's "invisible hand" and allocate attentional market share accordingly.[320]

of that same content. That does not mean, however, that the Constitution should protect unlimited expenditures for the purchase of attention itself.

318. This offers a response to those who argue that "there does not seem to be any justification for making a distinction between those who own a press or media outlet and those who want to rent one." McGinnis, *supra* note 40, at 867. An owner of a media outlet must cultivate and retain attention; the renter of a media outlet does not. Of course, a media company owned by a benefactor with deep pockets might be capable of running in the red longer than another, but the more the owner disregards the attentional choices of consumers the sooner that owner will lose the underlying value of the asset altogether.

319. *See generally* CRESSMAN, *supra* note 223 (discussing the concept of "paid speech"); Ari Weisbard, Comment, *Buying an Audience: Justifying the Regulation of Campaign Expenditures that Buy Access to Voters*, 118 YALE L.J. 379 (2008) (discussing the concept of payments for an audience). Once again, *Citizens United* offers an illustration. In addition to producing the movie and making it available on demand, the plaintiff sought to spend money on running two ten-second ads and one thirty-second ad on broadcast and cable television. Citizens United v. FEC, 558 U.S. 310, 320 (2010). The costs associated with *producing* those ads may be protected, but the costs associated with *running* those ads should not be.

320. One might object that consuming ad-supported content is a "package deal": in exchange for receiving content I want to consume, I agree to tolerate content I did not necessarily want to consume. As such, the consumer's attentional choice is at least *indirectly* related to the choices of the intermediary and the content of the ads because the intermediary aims to strike a balance (in both ad frequency and content) that maximizes revenue while avoiding degrading the underlying product so much that it alienates consumers. *See* Wu, *supra* note 50, at 789–90 (discussing the concept of "advertising load"). Indeed, there are "some well-known examples of advertising that have succeeded in minimizing or eliminating product degradation. The advertisements in fashion magazines like *Vogue* are considered by many readers to be part of the attraction." *Id.* at 789 n.87.

Nonetheless, even when an intermediary minimizes advertising load, the reputation it has cultivated remains key to the maintenance of audience attention. A *Vogue* ad receives our attention because it is in *Vogue*. The question is not whether intermediaries can run ads or whether viewers can strike that bargain, but whether a piece of content would have received exposure *but for*

This defining trait of success in the ideational market—consumer choice—is medium- and technology-neutral.[321] Newspapers do not pay for you to read them; movies do not pay for you to watch them; Twitter does not pay for you to browse tweets. Whatever the era or the method of communication, a meaningful difference remains between content you *choose* to consume and content that advertisers pay to put in front of you. The former has succeeded in the marketplace of ideas; the latter has not.

This interpretive touchstone does not mean that the "unique characteristics" of any given medium "should be ignored" when determining the constitutionality of regulations.[322] The Court has previously recognized that the degree of affirmative choice exhibited by a reader or viewer might play a role in the marketplace of ideas and that the context of that choice might vary. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, for example, a majority distinguished between the advertising found in newspapers and the advertising found on television, observing that "[w]ritten [advertisements] are not communicated unless they are read, and reading requires an affirmative act. Broadcast [advertisements], in contrast, are 'in the air.' . . . [They can be avoided] only by frequently leaving the room, changing the channel, or doing some other such affirmative act."[323] The majority went so far as to call broadcast viewers a "captive audience" for advertisements.[324]

The Court has since moved away from this kind of context- and choice-sensitive reasoning, but a deeper look at the marketplace of ideas justifies revisiting that doctrinal turn. In *Citizens United*, for example, Citizens United itself suggested that the Court could invalidate the challenged law "as applied to movies shown through video on-demand" without invaliding it with respect to ads because viewers of on-demand content "select[] a

the payment made to the intermediary who has cultivated the attentional demand. If not, then its increased exposure stems primarily from economic purchase, not attentional value.

321. "Advertising-based business models have always valued 'time on device,' whether the device be a television or a magazine." Langvardt, *supra* note 281, at 135. There may be important differences between how magazines, television, and social media go about earning attention, but the basis of the competition is the same. *See supra* text accompanying notes 287–89; *infra* text accompanying notes 322–29.

322. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 639 (1994).

323. 412 U.S. 94, 128 (1973) (quoting Banzhaf v. FCC, 405 F.2d 1082, 1100–01 (D.C. Cir. 1968)).

324. *Id.* at 127.

program after taking 'a series of affirmative steps.'"[325] Advertising spots, on the other hand, "reach viewers who have chosen a channel or a program for reasons unrelated to the advertising."[326] The Court waved this argument away, claiming that it had no authority to say "what means of speech should be preferred or disfavored" and stating that it must "decline to draw, and then redraw, constitutional lines based on the particular media or technology used."[327] But this explanation is both nonresponsive and makes little sense from a market perspective.

Saying that a viewer's "affirmative act" in choosing content is irrelevant to the marketplace of ideas is like saying that a consumer's "affirmative act" in buying a product is irrelevant to the economic marketplace. If consumer choice plays no role, there is no market. Nor does subjecting the *vehicle* of advertising to different scrutiny involve disfavoring certain "means of speech": a speaker can post a thirty-second video online where it must be affirmatively sought out by viewers or a speaker can place that video in an advertisement and thereby "reach viewers who have chosen a channel or a program for reasons unrelated to the advertising."[328] Both the message and the means (video) are identical—what has changed are the terms upon which that video has accessed the attention of the viewer. Consumer choice remains a durable touchstone regardless of the era's preferred media or technology.[329]

325. Citizens United v. FEC, 558 U.S. 310, 326 (2010).

326. *Id.*

327. *Id.* at 326–27.

328. *Id.* at 326.

329. To be fair, a court's analysis under an attentional-choice framework might differ depending upon "the particular media or technology" at issue in any given case. But this would *not* be because the medium or technology deserve categorically different treatment. *See, e.g.*, *supra* note 40 (critiquing the Court's unique treatment of broadcasting spectrum based on the "scarcity rationale"). Rather, the Court's approach to the medium or technology at issue would remain consistently grounded in the principle of consumer choice.

Because the law challenged in *Citizens United* was not designed around this principle, the opinion itself never meaningfully engages with this distinction. *See, e.g.*, 558 U.S. at 325–27 (finding the movie at issue to be, "in essence," a "feature-length negative advertisement" because it was "equivalent to express advocacy" under the challenged law); *id.* at 364 ("Today, 30-second television ads may be the most effective way to convey a political message. . . . Soon, however, it may be that Internet sources, such as blogs and social networking Web

Earning exposure is difficult, but the discipline of the market serves an important purpose. A charlatan who sells worthless or dangerous goods deserves to go out of business. So too does one who trades in bankrupt ideas deserve to find himself hawking his wares to an empty room. The fact that nonsense cannot spread far and wide is not a violation of rights, it's a triumph of decentralized discretion. The fact that some ideas may find their circulation diminished is not a failure of the market, it is the market's central feature.

None of this is to say advertisements are inherently "bad" or lack value.[330] A reasonable degree of access to advertising might help a good idea gain an initial exposure that would not otherwise be possible. Similarly, a reasonable degree of access to advertising might help "outsiders" get a foothold in the marketplace of ideas and help prevent consolidation of attentional control by the largest, most popular, or most well-established speakers or intermediaries. More instrumentally, many content platforms (newspaper, radio, television, social media, etc.) are built on advertising revenues,[331] and these platforms give consumers access to information that they *have* chosen in the marketplace of ideas. A wide range of expenditures protected under the "free trade" principle would dry up as a practical matter absent some protection for advertising revenues.

Unlike the high level of constitutional protection accorded to expressive expenditures or distributive expenditures, however,

sites, will provide citizens with significant information about political candidates and issues.").

Were Congress to make the attentional-choice distinction between advertisements and movies explicit in its legislation, however, the Court would need to confront it. A speaker will rarely pay to have an audience watch a feature-length film—this is a real and meaningful difference between *Hillary: The Movie* and an attack ad run on TV. Of course, if a consumer *chooses* to watch a feature-length film that effectively functions as a plug for a political candidate, a political position, or even a commercial product, then that speaker deserves the fruits of their labor and their attendant exposure in the marketplace of ideas. *See, e.g.*, Noah Kristula-Green, Opinion, *The Lego Movie Isn't a Great Film, It's a Brilliant Commercial*, GUARDIAN (Feb. 19, 2014), https://www.theguardian.com/commentisfree/2014/feb/19/lego-movie-is-great-commerical [https://perma.cc/VFM2-8FRX].

330. *See, e.g.*, Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, U. CHI. L. REV. (forthcoming) (manuscript at 31), https://ssrn.com/abstract=3374370 (noting that even "image ads" that do not convey much information "possess the capacity to shape public attitudes").

331. *See* Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2336 n.324 (2018).

advertising expenditures deserve only minimal constitutional protection. This is because allowing content to propagate through advertising inherently implicates competitive tradeoffs. The initial exposure that a limited degree of advertising provides may enhance democratic competition and be worthwhile as a policy matter,[332] but it is still unrelated to the underlying content's success in the marketplace of ideas. The more one is allowed to gain ideational exposure through economic power alone, the less we are truly promoting free competition between ideas.

Thus, allowing a speaker to purchase *unlimited* amounts of attentional exposure *despite* his content's repeated failure to earn wider circulation does nothing to honor the First Amendment. If anything, extending strong constitutional protection to practices that undermine the power of attentional choice insulates conduct by private actors that pose threats to individual autonomy and democratic self-governance rivaling that which animated the First Amendment.

On an individual level, "our life experience will equal what we have paid attention to."[333] When we do not control our attention, our life is not our own.[334] And while our social groups, associations, and informational intermediaries influence us in ways we may not anticipate through their access to our attention, we are a voluntary participant in such relationships—cultivating, shaping, and deciding who retains this access. These choices reflect the ongoing *trust* so vital to knowledge-generation and formation of the self.[335]

Attention transactions, on the other hand, enhance the power of ideational producers at the cost of consumers' own autonomy, agency, and self-development. Unlike almost any other party vying for access to our attention, advertisers can leapfrog the competition, reach *through* the intermediaries we have chosen, and strike us like a bolt from the blue based on economic

332. *See, e.g.*, *infra* text accompanying notes 431–37.

333. WU, *supra* note 41, at 7 (attributing the observation to William James).

334. *See* CRAWFORD, *supra* note 39, at 11–13 ("Attention is the thing that is most one's own: in the normal course of things, we choose what to pay attention to, and in a very real sense this determines what is real for us; what is actually present to our consciousness. Appropriations of our attention are then an especially intimate matter.").

335. *See generally* Hardwig, *supra* note 48 (discussing the role of trust in knowledge and rationality).

might alone. Any such purported right to buy access does nothing to empower the listener or enhance the dignitary interests protected by a "right to receive" information.[336]

Indeed, when one learns just how malleable our identities are and how indeterminate our preferences are in the hands of someone who has access to our attention,[337] it seems truly perverse to privilege the advertiser's power to buy this access over the citizen's power to protect it from abuse. Advertisers gain this intimate access—this critical entry point to the development of the self—without ever needing to earn the trust of the target. Given the Framers' central concern with protecting our freedom of conscience and thought,[338] the First Amendment should not be read to confer such a fundamental and formative power upon those who have not earned our trust.

On a societal level, such transactions distort the direction and tenor of our political dialogue and the order of the legislative agenda. Rather than being driven by those issues which arise through consumer attentional choices and the organic, diffuse, and diverse concerns of the public, our national conversation is distorted by those with the economic power to purchase exposure and bump their priorities to the top of our collective attention. When ten people account for over twenty percent of federal PAC donations,[339] for example, the power of the *public* to drive the direction of debate is diminished—and the bigger the ad buy, the bigger the anticompetitive effect.

336. When the government tries to insert itself directly between speaker and listener, the "free trade" principle protects the "right to receive" such information. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 408–09 (1974) (holding that censorship of outgoing mail sent by prison inmates infringes the rights of non-inmates to whom the correspondence was addressed), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989). An advertising contract, however, is not between a speaker and listener—it is between a speaker and an intermediary with access to the listener. If a "right to advertise" is, in actuality, a "right to contract for the attention of another person," then a "right to receive advertising" would be a nonsensical "right to have one's attention purchased in a third-party transaction." *But see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976).

337. *See supra* Part I.B; *infra* Part V.

338. *See* Campbell, *supra* note 104, at 280–81.

339. *See* Fredreka Schouten & Christopher Schnaars, *10 Super-Rich People Dominate Giving to Super PACs Active in Midterm Elections for Congress*, USA TODAY (Feb. 23, 2018, 1:14 PM), https://www.usatoday.com/story/news/politics/2018/02/23/10-super-rich-people-dominate-giving-super-pacs-active-midterm-elections-congress/366887002/ [https://perma.cc/6FMB-HDUD].

Consider again the $91 million in political advertising expenditures above. A reasonable limitation on this amount would silence no speaker,[340] prevent no idea from entering the market,[341] interfere with no press expenditure,[342] restrain no free ideational competition,[343] and pose no inherent risk of a creeping government censor.[344] Of course, the specific structure and design of such a limitation would raise important constitutional questions, but the limitation itself does not strike at the heart of what the First Amendment was designed to protect. Any person (natural or otherwise) would remain free to express their opinion on any political issue, spend unlimited amounts of money on political speech, and expend limitless funds to make any idea freely available to every person. How widely that idea spreads from there, however, is for the market to decide.

The Court's decision in *First National Bank of Boston v. Bellotti* is instructive. In *Bellotti*, a group of banking associations and business corporations "wanted to spend money to publicize their views opposing a referendum proposal" that would allow for a graduated income tax.[345] The Court did not base its decision on "whether corporations 'have' First Amendment rights;" rather, it gave the appellants' advertisements constitutional cover based on the "inherent worth of the speech in terms of its capacity for informing the public."[346] The Court recognized that "corporate advertising may influence the outcome of the vote" but

340. Such a regulation would not reach expenditures for the creation of any underlying content. *See supra* note 294. Nor would such regulation undermine the importance of "serendipitous" encounters with information that we might not normally encounter through our chosen intermediaries. Because deference to attentional choices does nothing to silence the wide variety of speakers we must (and should!) encounter in our everyday experience, *see supra* note 294, the theory would not allow the government to restrain genuinely serendipitous exposure to new ideas, whether from a demonstration in a park, an advocate on a street corner, or otherwise. To be sure, it would impact which messages might reach us through advertising, but there is hardly anything "serendipitous" about someone buying access to you.

341. *See supra* Part III.B.1.

342. *See supra* Part III.B.2.

343. *See supra* Part III.B.2.

344. *See* Neuborne, *supra* note 62, at 902 (noting that "fear of the government as censor" is "[b]ehind much of the Supreme Court rhetoric in First Amendment cases").

345. 435 U.S. 765, 767 (1978).

346. *Id.* at 776–77.

argued that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it."[347]

One need not question the "inherent worth" of the banks' perspective to challenge the propriety of using advertising to skew the public debate. By treating all expenditures the same, the *Bellotti* Court conflated the right to buy an audience with the right to speak at all. A bank is free to post its position on the referendum or send out a press release. The bank's employees, shareholders, or others in the community who might be impacted are free to share this position and disseminate it among family and friends. If the bank's position is *actually* persuasive, then it will spread and properly "influence the outcome of the vote."[348] But if the bank's view is *not* persuasive, it deserves no greater attention or influence than an equally persuasive counterargument would earn. As Chief Justice Roberts recognized in *Bennett*, the view that gets exposure is necessarily more effective than the view that does not.[349] Even if corporations have a right to "speak," they need not have a right to circumvent competition in the marketplace of ideas.

The problem is not, therefore, that advertising causes the views of the wealthy and powerful to "drown out" other points of view.[350] Attentional purchases do not "drown out" contrary views "in the sense that those who wish to hear them cannot"—such views are still *available*.[351] Rather, attentional purchases let those with economic power circumvent the rigorous competition usually required to earn *exposure*. This allows particular perspectives to "surge to the top" of our collective attention and become salient in a way divorced from their ideational value, their relative priority, the needs and concerns of the individual and the community, and the natural corrective dynamics at play in our network of trusted intermediaries.[352] Any idea has the latent ability "to get itself accepted in the competition of the market" by earning the attention of the community, but only some ideas are pushed unearned (and often uncontested) to the front of our

347. *Id.* at 790–91.

348. *Id.* at 790.

349. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 750 (2011).

350. *Id.* at 789.

351. Fried, *supra* note 4, at 252.

352. *See* ACHEN & BARTELS, *supra* note 67, at 75.

personal and communal consciousness on the basis of the speaker's economic resources alone.[353]

"But surely," one might say, "it is better for one side in a political debate to be heard than none at all." Not so. Given our limited attentional capacity as participants in our democracy (and our elected officials' limited attentional capacity as representatives), only those ideas that naturally drive our attention and engagement *should* translate into societal exposure and political action. That is the implicit assumption at the core of the marketplace of ideas.[354]

For when political advertisers' ideas are artificially given broader exposure, the concerns of real communities are left unattended to. If political attentional purchases were pared back, more diffuse and organic topics might drive the political debate and the legislative calendar—all without harm to anyone's ability to express themselves or make their views available for all to hear.

None of this turns upon any adverse judgments about the content of political ads, their persuasiveness, or the decisional criteria of those who might act based on such ads. This point is worth emphasizing since scholars in the past have objected to "aggressive, simple-minded television spots"[355] that appeal "to a consumer's emotion rather than to his intellect."[356] However regrettable one might find fear-mongering attack ads, however, such arguments are problematic.

To start, these objections are "profoundly inegalitarian."[357] Who is to judge the "right" metrics for evaluating candidates?[358] Each of us votes based on different criteria and saying that an appeal should be limited because it is only fluff (or bile) is to posit oneself the true arbiter of legitimate political discourse.

Casting aspersions upon the decisions of a "civic slacker" (i.e., someone who goes as far as possible to avoid political conversations but eventually votes based on the emotional appeal of

353. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

354. *See supra* Part I.C.

355. Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS (Oct. 17, 1996), https://www.nybooks.com/articles/1996/10/17/the-curse-of-american-politics/ [https://perma.cc/U2TZ-W9RB].

356. Ortiz, *supra* note 51, at 903.

357. *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

358. Ortiz, *supra* note 51, at 902–14.

a thirty-second spot)[359] isn't just self-aggrandizing—it's self-deluding to boot. The purported divide between reason and emotion is more ephemeral than one might imagine,[360] and individuals with higher levels of education and political engagement are the *worst* perpetrators of identity-motivated reasoning.[361] All of us are susceptible to emotional appeals; those "in the know" are just better at rationalizing preexisting biases.[362]

Under an attentional-choice theory of competition, the basis for the regulation is not the emotional nature of the content, but the unequal terms of access afforded to the purchaser of the viewer's attention. If the First Amendment protects the allocation of attentional market share based on success in the marketplace of ideas, then an economic transaction to purchase the viewer's attention violates the terms by which the First Amendment presupposes that viewers will be exposed to political information. After all, if a civic slacker "goes as far as possible to avoid [politics],"[363] then it should be *extra* difficult to reach and animate this voter if we respect their agency, autonomy, and decisional criteria. The fact that economic power becomes the only way to access such a voter reflects a profound market failure.

Recognizing this anticompetitive dynamic also makes the parallels between government action and private action clear. A purported "private right to unlimited attention" is offensive in the same way a purported "state power to cap distribution" is offensive: both interfere with free ideational competition to "tilt public debate in a preferred direction."[364]

In other words, the libertarian position is animated by an "equalizing" interest of its own: the power to have equal exposure and influence *despite* having uncompetitive ideas. Professor Brad Smith—a staunch defender of the laissez-faire position—argues that "[m]oney is how people who lack talent participate"

359. *See id.* at 902.

360. *See supra* Part I.B.

361. *See* ACHEN & BARTELS, *supra* note 67, at 294 (noting that "political rationalization is often most powerful among people who are well-informed and politically engaged").

362. *See id.* This is not to say there is no (or can be no) difference between routine emotional appeals and algorithm-driven tailoring when it comes to the concept of "attentional-choice." The intersection between attention, emotion, technology, and volition is an area of study that should inform any doctrinal developments in this direction.

363. Ortiz, *supra* note 51, at 902.

364. Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011).

in politics.[365] Such opponents of reform argue that "inequalities in talents in writing and speaking" could "translate into inequalities in political power."[366]

First of all, it seems odd to claim that those who lack persuasive talents should be able to "win" more exposure in a marketplace of *ideas*. Even so, libertarians have nothing to fear: a restriction on attentional purchases would not prohibit those who lack "talents in writing" from spending unlimited cash on hiring a crack team of marketing gurus to craft the perfect pitch. Whether that pitch earns the attention of the audience and generates further exposure through persuasion rather than continued purchase, however, is up to the market.

An operating theory of ideational competition also explains why it is unproblematic to leave unregulated "non-pecuniary forms of contribution . . . in the form of time spent making phone calls or knocking on doors."[367] Time spent making phone calls and knocking on doors represents the highest democratic ideal and reflects the virtues of the content conveyed and the candidate supported. That "[c]ontributions in the form of time . . . can be dramatically unequal among political candidates" is a function of market share made manifest: *consumers* deciding that certain ideas and certain candidates deserve their time and attention.[368]

Simply put, not all ideas deserve to have equal influence. "[A] right of free speech naturally leads to unequal influence."[369] Popular messages gain wide—and unequal—exposure by earning our attention and prompting us to share with others. We are all producer, gatekeeper, and consumer. Only by recognizing the importance of our diffuse decisions to speak, share, and select does a marketplace of ideas have any meaning. Anyone who has the money to buy an audience outright and says that "he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."[370]

365. KUHNER, *supra* note 23, at 175.

366. *Id.* at 262 (quoting JOHN SAMPLES, THE FALLACY OF CAMPAIGN FINANCE REFORM (2006)).

367. Muller, *supra* note 176.

368. *Id.*

369. McGinnis, *supra* note 40, at 846.

370. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting).

ii. Public Interference

An attentional-marketplace theory of the First Amendment also explains the canon of campaign finance cases in a more meaningful way. *Buckley v. Valeo* is the easiest to understand: the statute used broad language that regulated all "expenditures" as an undifferentiated class based on the specific political content expressed.[371] This had enormous consequences for the creation and distribution of political content (where protections should be at their highest) and, therefore, placed enormous weight on where the statutory line was drawn (i.e., how the covered content was defined).[372]

Under an attentional-choice approach, the problems with the law are clear. Capping *all* expenditures based on the specific content of the expression violates the "more speech" principle (by restricting the entry of content into the market) as well as the "free trade" principle (by restraining the ability of valued content to expand its audience). Such a law severely restricts the "uninhibited, robust, and wide-open" debate protected by the marketplace of ideas.[373]

Citizens United is of a piece. Although Congress attempted to narrow its regulations after *Buckley*, the resulting scheme did not align well with a supposed interest in preventing corruption (or at least an interest in quid pro quo corruption).[374] Nor could the government identify a meaningful line between the corporate expenditures reached by the law and the corporate expenditures of media and publishing companies.[375] When the government was pressed at oral argument on whether it had the power to ban a book in the lead up to an election and the attorney failed to respond with an unequivocal and resounding "no," the fate of the case was sealed.[376]

The theory above provides this line. The line does not run between types of corporate forms or the likelihood of an expenditure inducing corruption. Instead it runs between content the market demands and content it does not. This avoids the "media

371. *See* Buckley v. Valeo, 424 U.S. 1, 39–40 (1976) (per curiam).

372. *See id.* at 40–44.

373. *Id.* at 14 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

374. *See* Citizens United v. FEC, 558 U.S. 310, 359 (2010).

375. *See id.* at 351.

376. *See* Transcript of Oral Argument at 26–29, *Citizens United*, 558 U.S. 310 (No. 08-205).

exemption trap." Usually, if Congress "exempt[s] media corporations from campaign expenditures regulations[,] . . . the Court claims that Congress has engaged in unconstitutional speaker discrimination."[377] If Congress does include media corporations, however, "the Court accuses it of violating basic press freedoms."[378] Congress is "damned if it does and damned if it doesn't."[379]

By respecting the importance of attentional choice, the theory herein would allow Congress to draw a more neutral line that honors press freedoms while letting consumers decide for themselves who constitutes the press. Such an approach would also help anticipate any changes in the media environment since the fundamental attention-purchasing dynamics of advertising have remained generally stable over time.

An attentional-choice approach would also address the common complaint that media companies have "outsized influence" compared to other businesses. Of course they do—they are in the business of maintaining attention. The fact that "[m]edia companies can run procandidate editorials as easily as non-media corporations can pay for advertisements"[380] is irrelevant. Consumers in the marketplace *choose* to read editorials because they consider the opinions valuable.[381] Advertisements purchased to run alongside those editorials bear no such indicia of market-driven value. To suggest that the media's influence is "outsized" is to question *the market's* assessment of ideational merit and speaker credibility.

Refining the "more speech" and "free trade" principles in the way outlined above also threads a needle through prior precedent in a much more careful and tailored manner. Despite the

377. Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. PA. L. REV. ONLINE 253, 253 (2016).

378. *Id.*

379. *Citizens United*, 558 U.S. at 474 n.75 (Stevens, J., concurring in part and dissenting in part).

380. McConnell v. FEC, 540 U.S. 93, 283 (2003) (Thomas, J., dissenting).

381. Editorials are particularly important *because* they arise within the context of a trusting, voluntary informational relationship. As discussed above, "the best way to combat political misperceptions is through the use of 'surprising validators,' meaning individuals and institutions that are credible to persons operating under the misperception(s) in question." Strong, *supra* note 76, at 141–42. For example, when a traditionally liberal publication or organization offers a conservative endorsement (or vice versa) the unexpected nature of the endorsement and the preexisting reservoir of goodwill and trust is what makes the statement so meaningful, powerful, and persuasive.

Supreme Court's occasionally broad and inconsistent use of words like "dissemination"[382] and "communications"[383] (which sweep in all kinds of diverse and distinguishable conduct), the Court has always been most troubled by government interference with discussion and debate among individuals[384] and government interference with media that has been selected by the listener. These cherished First Amendment activities are interactive and social, with ideas disseminating based on their attentional value and citizens developing a culture of political involvement and democratic engagement in the process.[385] Under such a view, natural persons are indispensable to the tenor of the debate and the direction of the nation.[386]

For example, almost every single illustration the Court has provided regarding activities that should receive strong judicial protection would continue to receive such protection under the "more speech" and "free trade" principles above: "the National Rifle Association publish[ing] a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban"[387]; "the American Civil Liberties Union creat[ing] a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech"[388]; individuals or associations of any kind producing "[m]odern day movies, television comedies, or skits on Youtube.com [that] portray public

382. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (using the term "dissemination" to describe distribution and attention-purchase).

383. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 758 (1976) (using the term "communication" to describe expression, distribution, and attention-purchase).

384. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14–15 (1976) (per curiam).

385. *See* CIARA TORRES-SPELLISCY, CORPORATE CITIZEN?: AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE 271 (2016) ("[D]emocracy forces society to come together and deliberate. Instead of attempting to change laws and government by means of violence and threats, democracy elevates the importance of debate . . . ." (quoting Sandra Day O'Connor, *Remarks at the Inaugural Sandra Day O'Connor Distinguished Lecture Series*, 41 TEX. TECH L. REV. 1169, 1170 (2007))).

386. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) ("The right of free public discussion of the stewardship of public officials was . . . , in Madison's view, a fundamental principle of the American form of government."); *see also* Stromberg v. California, 283 U.S. 359, 369 (1931) (stating that "[t]he "maintenance of the opportunity for free political discussion *to the end* that government may be *responsive to the will of the people* is a "fundamental principle of our constitutional system." (emphasis added)).

387. Citizens United v. FEC, 558 U.S. 310, 337 (2010).

388. *Id.*

officials or public policies in unflattering ways"[389]; the publishing of "a campaign biography that [i]s the functional equivalent of express advocacy"[390]; the drawing or publishing of political cartoons[391]; or "speaking or writing in support of any candidate" by "any single powerful group" or set of associations.[392]

All of these are examples of activities involving expression or distribution, with their underlying expenditures necessary to enter the marketplace of ideas and compete for the attention of the reader, viewer, or listener. Only one of the Court's hypotheticals from *Citizens United* would be open to any kind of regulation at all: the "Sierra Club run[ning] an ad . . . that exhorts the public to disapprove of a Congressman who favors logging in national forests."[393] Depending on the regulations adopted this ad might or might not still air,[394] but either way the Sierra Club would remain free to post the video on its website, share the video on social media, and engage concerned citizens in innumerable other people-powered ways that do not involve the outright purchase of access to attention.

In other words, armed with more precise language, better-tailored regulations, and a new compelling interest, the government could potentially find ways to regulate independent political advertising expenditures (in order to prevent private restraints of trade) even if it lacked the power under *Buckley* and *Citizens United* to regulate expenditures that are protected under the "more speech" and "free trade" principles.

An attentional-market theory would also begin to explain (and cabin the scope of) one of the Court's more cryptic campaign-finance cases discussed above: *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.[395] In *Bennett*, the Court struck down an initiative passed by the voters that created a vol-

389. *Id.* at 371–72.

390. Transcript of Oral Argument at 27, *Citizens United*, 558 U.S. 310 (No. 08-205).

391. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 483 (2006) (Scalia, J., concurring).

392. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 679 (1990) (Scalia, J., dissenting).

393. *Citizens United*, 558 U.S. at 337.

394. A law might, for example, require that political attention expenditures be funded by small donations—meaning that an organization that builds broad support has greater leeway to run ads.

395. 564 U.S. 721 (2011).

untary public financing system to fund the campaigns of candidates for state office.[396] Candidates were provided an initial allotment and additional matching funds were triggered if a privately financed candidate's expenditures (combined with independent expenditures in support of that candidate) exceeded the initial allotment of state funds to the publicly financed candidate.[397] Once the triggering threshold was met, each additional private dollar spent (by the candidate or by an outside group) generated a dollar of public funding for each publicly funded candidate.[398]

The dissent[399] (along with many in the legal community[400]) argued there was simply no free-speech burden to be found. Public-finance programs—unlike caps on private spending—add "more speech" to the market.[401] They "level up" rather than "level down."[402] How could a system like Arizona's possibly pose any First Amendment problem?

The majority opinion in *Bennett*, however, reflects a Court beginning to wrestle with the reality of limited and mediated attention. "More speech," it turns out, isn't the only relevant principle in the marketplace of ideas. So is "free trade." And just as private attentional purchases that go unrebutted might distort the ideational market and hinder free competition, so too might the kind of subsidy found in *Bennett*. Unlike voucher or donation-matching subsidies (which are neutral to or aligned with public interest and support), the Arizona statute had the unique (albeit unlikely) potential to disrupt "free trade" and chill "more speech."

Consider a candidate whose ideas are popular and who wants to spend additional funds to help develop and satisfy the demand for her ideas. The speaker could be put in a bind: she can continue to speak and spread her ideas (and risk strengthening the hand of an opponent, who could use the funds on attentional purchases and artificial exposure), or she can cease

396. *Id.* at 728.

397. *Id.* at 729.

398. *Id.* at 729–30.

399. *Id.* at 763–67 (Kagan, J., dissenting).

400. *See, e.g.*, RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 84–93 (2016).

401. *Id.*

402. *Id.*

spending (which might curb the spread of her ideas despite their natural attentional value).

To be clear, the facts in *Bennett* are not so sympathetic and the Supreme Court's sudden rediscovery of the "free trade" principle in a case about public finance may reflect little more than an extension of the Court's fuzzy laissez-faire reasoning. The hypothetical above shows that a threat to free speech and free trade would only arise if a public candidate spent disproportionately on access to attention rather than expression or distribution. The Court did not focus on this dynamic at all and cited no evidence of such a risk. The more likely scenario (and apparently the one that occurred[403]) is that the private candidate would spend heavily on attentional purchases and find little reason to be deterred by matching funds given to opponents. Nonetheless, by making *total*-spend the trigger, the law at least had the potential to chill robust, merited competition.

The legal principles, competitive dynamics, and reckoning with reality found in *Bennett* point toward a recognition that government intervention *and* private behavior have the potential to distort the ideational market. These are two sides of the same coin. And just as the Court prohibits anticompetitive government action under the First Amendment, Congress has the power to curb anticompetitive private action.

IV. LEGISLATIVE INTERVENTIONS: PROMOTING COMPETITION AND PREVENTING MARKET INTERFERENCE

The First Amendment provides protections "both personal and structural."[404] Its language tracks an "inside-to-outside axis,"[405] guarding "the evolution of a democratic idea from its genesis in the interior recesses of a free citizen's conscience . . . to [the] transform[ation] [of] the idea into law."[406] Our decentralized decisions to read and to share—to invest time in an idea and deem it worthy of the time of others—is how this

403. An empirical study later confirmed that private spending was not chilled by the law. *See* Conor M. Dowling et al., *Does Public Financing Chill Political Speech? Exploiting a Court Injunction as a Natural Experiment*, 11 ELECTION L.J. 302 (2012).

404. *See, e.g.*, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1682 (2015) (Kennedy, J., dissenting).

405. NEUBORNE, *supra* note 59, at 17.

406. *Id.* at 20.

transformation occurs and how value is conferred in a free society.[407] This interest in the free flow of valued information "may be defeated by private restraints no less than by public censorship."[408] As the Supreme Court has observed:

> [A] command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . [Freedom] from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[409]

The competitive functioning of the marketplace of ideas can be threatened by authoritarians and oligarchs alike.[410] And any First Amendment doctrine that hopes to be relevant to the challenges posed by our modern information- and attention-economies will need to focus less on what government cannot do and more on what government can do.[411]

Promoting competition between ideas and safeguarding genuine attentional choice against public *and* private abuses would protect the freedom of thought and conscience that the Framers believed to be our most intimate and inalienable right.[412] In the campaign-finance and election-protection space in particular, focusing on attentional-choice might allow a mired debate to move beyond "corruption" and "political equality."[413]

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407. Associated Press v. United States, 326 U.S. 1, 28 (1944) (Frankfurter, J., concurring) ("[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

408. *Id.* at 28–29 (Roberts, J., dissenting)*; see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private [participant].").

409. *Associated Press*, 326 U.S. at 20.

410. *See* Schouten & Schnaars, *supra* note 339 (noting that donations from ten individuals accounted "for more than 20% of the money filling the bank accounts of federal super PACs").

411. *See* Wu, *supra* note 214, at 284–91.

412. *See* Campbell, *supra* note 104, at 280–81.

413. *See supra* Part III.A. *McCutcheon* includes a passage that seems to suggest any interest other than quid pro quo corruption is foreclosed. McCutcheon v. FEC, 572 U.S. 185, 192 (2014). This should not be considered a holding of law. Article III prohibits the Court from issuing an advisory opinion about hypothetical interests that might be proffered in future disputes over as-of-yet-unwritten

Unlike a government interest in preventing corruption or promoting equal political influence (which must be weighed against the freedoms protected by the First Amendment), an interest in protecting ideational competition reinforces the purposes of the First Amendment.[414]

An "attention antitrust" could lead to more speech, more competition, and more respect for our autonomy as speakers and listeners. The nation's economic antitrust laws "were enacted for 'the protection of competition, not competitors.'"[415] A law that promotes ideational competition would no more "pick winners and losers," "equalize speech," or "discriminate against certain speakers or viewpoints" any more than the antitrust laws pick winners and losers, equalize market share, or discriminate against particular businesses or products. Such laws only ensure that dominant market positions stem from victory earned in a competitive market. In such a market, our individual and independent decisions about what to consume, recommend, and share drive demand and drive public debate.[416]

A broad accounting of permissible legislative action under an attentional-choice theory of the First Amendment is beyond the scope of this Article. Nonetheless, recognizing the nature of the issues (and identifying a framework for addressing them) could clarify the government's basis for various reforms. A government interest in encouraging the creation of diverse content

laws. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). Thus, while it may be true that "preventing corruption . . . [is] the only legitimate and compelling government interest[] *thus far identified* for restricting campaign finances," FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 496–97 (1985) (emphasis added), it need not be the only one.

414. *Associated Press*, 326 U.S. at 20 ("It would be strange indeed . . . if the grave concern for freedom of the press [and freedom of speech] which prompted adoption of the First Amendment should be read as a command that the government was without power to protect th[ose] freedom[s]."); Buckley v. Valeo, 424 U.S. 1, 92–93 (1976) (per curiam) ("[C]ongressional effort[s], not to abridge, restrict, or censor speech, but rather . . . to facilitate and enlarge public discussion and participation in the electoral process, [serve] goals vital to a self-governing people. [Such laws] further[], not abridge[], pertinent First Amendment values.").

415. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 n.14 (1984) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

416. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 505 (1946) ("[T]he preservation of a free society is so far dependent upon the right of each individual citizen to receive such literature *as he himself might desire* . . . ." (emphasis added)).

and promoting robust competition could provide additional support for public subsidies,[417] more rigorous antitrust enforcement,[418] and data portability or interoperability requirements.[419] A government interest in protecting genuine attentional volition might justify regulating habit-forming design,[420] imposing overridable time-out requirements,[421] or exploring other approaches tailored to addressing demonstrable attentional-choice constraints.[422]

Perhaps most importantly, if the Supreme Court recognized that advertising transactions afford unequal terms of access to attention, it could open the door to new legislative interventions. Current First Amendment doctrine threatens almost any law that might purport to regulate political advertising or political ad expenditures.[423] But current doctrine fails to account for how advertising allows the economic power of third parties to commandeer channels of communication that were never opened to them by the choices of consumers in the marketplace of ideas. These choices confer an enormous amount of trust and power,[424] and for advertisers that trust and power is entirely unearned. This dynamic makes advertising particularly amenable to market-structuring regulations. But what should those regulations be?

The major online platforms—Facebook, Google, and Twitter—are in the midst of showcasing a variety of different approaches to handling online advertising and political advertising

417. *See infra* note 465.

418. *See* Wu, *supra* note 50, at 793–99.

419. *See, e.g.*, Bennett Cyphers & Danny O'Brien, *Facing Facebook: Data Portability and Interoperability Are Anti-Monopoly Medicine*, ELECTRONIC FRONTIER FOUND. (July 24, 2018), https://eff.org/deeplinks/2018/07/facing-facebook-data-portability-and-interoperability-are-anti-monopoly-medicine [https://perma.cc/M3FG-2STS].

420. *See* Langvardt, *supra* note 281, at 131–33.

421. *Id.* at 159–60.

422. *See supra* text accompanying notes 287–92.

423. *See, e.g.*, Nate Persily & Alex Stamos, *Regulating Online Political Advertising by Foreign Governments and Nationals*, *in* SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND 27, 28 (Michael McFaul ed., 2019) (noting that "serious constitutional constraints rightly limit available options" for regulating issue advocacy).

424. *See supra* Parts I.A–B.

in particular.[425] Following Facebook's announcement in late 2019 that it would not fact-check advertisements purchased by politicians,[426] Twitter's CEO, Jack Dorsey, announced that Twitter would "stop all political advertising" on its platform because "political message reach should be earned, not bought."[427] For all the nuance and context that Dorsey's initial tweet lacked,[428] his central message reflected an important insight: there is a difference between "free expression" and "paying for reach."[429] More specifically, there is a difference between "earned reach" and "paid reach." Like earned media and paid advertising, both provide exposure but on very different terms.[430]

An attentional-choice theory would give this conceptual distinction constitutional significance. When an advertiser is "paying for reach," the terms of that reach are amenable to regulation consistent with the First Amendment. Yet recognizing this distinction is only half the battle—the other half is implementation. An attentional-choice theory suggests that Congress *can* legislate with respect to political advertising, not necessarily how it *should*. Policies in this area will have profound effects and any legislative intervention should receive careful interdisciplinary consideration before enactment.

425. *See Ads About Social Issues, Elections or Politics*, FACEBOOK, https://facebook.com/business/help/1838453822893854 [https://perma.cc/RYK9-HM8U]; *An Update on Our Political Ads Policy*, GOOGLE (Nov. 20, 2019), https://blog.google/technology/ads/update-our-political-ads-policy/ [https://perma.cc/E6TG-SKY3]; *Political Content*, TWITTER (Nov. 20, 2019), https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/political-content.html [https://perma.cc/ZGV8-3JML].

426. *See* Emily Stewart, *Facebook's Political Ads Policy Is Predictably Turning Out To Be a Disaster*, VOX (Oct. 30, 2019, 4:57 PM), https://vox.com/recode/2019/10/30/20939830/facebook-false-ads-california-adriel-hampton-elizabeth-warren-aoc [https://perma.cc/8BD2-RJSS].

427. Jack Dorsey (@jack), TWITTER (Oct. 30, 2019, 4:05 PM), https://twitter.com/jack/status/1189634360472829952 [https://perma.cc/569U-2Y48].

428. Twitter's revenue from political advertising is only a small part of its overall revenue, and Dorsey's tweet put off the more difficult and complex implementation issues that would soon follow—issues that ultimately (and understandably) caused Twitter to begin walking back the scope of its policy. *See* Emily Stewart, *Twitter Is Walking into a Minefield with Its Political Ads Ban*, VOX (Nov. 15, 2019, 3:00 PM), https://vox.com/recode/2019/11/15/20966908/twitter-political-ad-ban-policies-issue-ads-jack-dorsey [https://perma.cc/P92R-45EB].

429. Jack Dorsey (@jack), TWITTER (Oct. 30, 2019, 4:05 PM), https://twitter.com/jack/status/1189634377057067008 [https://perma.cc/N56X-FE6V].

430. *See, e.g.*, *Earned Media*, WIKIPEDIA, https://en.wikipedia.org/wiki/Earned_media [https://perma.cc/2GYM-CSLC].

Several scholars and commentators, for example, panned Twitter's announcement that it would "ban" political advertising.[431] Such a sweeping prohibition overlooks that advertising *can* have positive effects.[432] Political ads—especially cheaper digital ads—allow down-ballot candidates and challengers to incumbents to gain initial exposure, fostering greater political competition.[433] And, a rule that would prohibit political issue advertising but not commercial advertising could have the unintentional effect of entrenching corporate power.[434] Consider how such a rule would apply to ads warning about climate change or advocating for a carbon tax as compared to ads "selling SUVs, encouraging people to eat beef, or buy single-family homes."[435] What about ads for greater privacy regulations versus ads for new tech products?[436] "In a sense, every ad for a brand or product is an advertisement for capitalism and consumerism"[437] and focusing on political ad regulation alone might privilege existing economic structures.

Twitter eventually rolled out a more detailed policy prohibiting ads from government officials, candidates, parties, and PACs and any ads that reference a candidate, political party, elected or appointed government official, election, referendum, ballot measure, legislation, regulation, directive, or judicial outcome.[438] For issue ads, Twitter decided to permit ads that align

431. *See, e.g.*, Joan Donovan et al., *What Does Twitter's Ban on Political Ads Mean for Platform Governance?*, CTR. FOR INT'L GOVERNANCE INNOVATION (Nov. 5, 2019), https://cigionline.org/articles/what-does-twitters-ban-political-ads-mean-platform-governance [https://perma.cc/CQX4-DM54]; Shannon C. McGregor, *Why Twitter's Ban on Political Ads Isn't as Good as It Sounds*, GUARDIAN (Nov. 4, 2019, 6:00 PM), https://theguardian.com/commentisfree/2019/nov/04/twitters-political-ads-ban [https://perma.cc/2FLW-QNAP]; Will Oremus, *Twitter's Ban on Political Ads Will Hurt Activists, Labor Groups, and Organizers*, ONEZERO (Oct. 31, 2019), https://onezero.medium.com/twitters-ban-on-political-ads-will-hurt-activists-labor-groups-and-organizers-c339908b841d [https://perma.cc/D38G-NJGK]; Stewart, *supra* note 428.

432. *See supra* text accompanying notes 330–31.

433. *See* Daniel Kreiss & Matt Perault, *Four Ways To Fix Social Media's Political Ads Problem—Without Banning Them*, N.Y. TIMES (Nov. 16, 2019), https://nytimes.com/2019/11/16/opinion/twitter-facebook-political-ads.html [https://perma.cc/3XJY-YV5H].

434. *See* Oremus, *supra* note 431.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Political Content*, *supra* note 425; *Political Content FAQs*, TWITTER, https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/

with an advertiser's "publicly stated values" while limiting the micro-targeting of ads that "drive political, judicial, legislative, or regulatory outcomes."[439] For such ads, Twitter says it will disable its "tailored audiences" tool and prevent targeting by ZIP code or political affiliation.[440]

Google rolled out a revised policy soon thereafter, limiting election-ad microtargeting to the general categories of age, gender, and general location (postal code level) and eliminating the ability of campaigns to match people's online profiles with voter data in order to target tailored audiences.[441] Google will continue to allow political advertisers to do "contextual targeting, such as serving ads to people reading or watching a story about, say, the economy."[442]

These private policies raise important questions and options for legislators to consider. While there may be value in providing platforms some space to experiment—"best practices" could vary by platform or evolve in response to changing conditions—legislatures are not constitutionally compelled to stand aside and hope for the best. Two general policies appear to command widespread support: limiting micro-targeting and enhancing transparency.

Micro-targeting enables advertisers to tailor ads to the specific proclivities and predispositions of particular individuals.[443]

political-content/political-content-faqs11.html [https://perma.cc/ER4Y-V93B].

439. *Cause-Based Advertising Policy*, TWITTER, https://business.twitter.com/en/help/ads-policies/restricted-content-policies/cause-based-advertising.html [https://perma.cc/K99A-JK59].

440. *Id.*; *see* Taylor Hatmaker, *Twitter Will Ban Politicians from Buying All Ads, in Stark Contrast with Facebook*, DAILY BEAST (Nov. 15, 2019, 1:28 PM), https://thedailybeast.com/twitter-will-ban-politicians-from-buying-all-ads-in-stark-contrast-with-facebook [https://perma.cc/ES8H-QHBP].

441. *An Update on Our Political Ads Policy*, *supra* note 425; *see* Emily Stewart, *Why Everybody Is Freaking Out About Political Ads on Facebook and Google*, VOX (Nov. 27, 2019, 8:00 AM), https://vox.com/recode/2019/11/27/20977988/google-facebook-political-ads-targeting-twitter-disinformation [https://perma.cc/D5XZ-TQVF].

442. GOOGLE, *supra* note 425.

443. *See, e.g.*, Siva Vaidhyanathan, *The Real Reason Facebook Won't Fact-Check Political Ads*, N.Y. TIMES (Nov. 2, 2019), https://nytimes.com/2019/11/02/opinion/facebook-zuckerberg-political-ads.html [https://perma.cc/KQS8-ZSPN] ("Currently, two people in the same household can receive different ads from the same candidate running for state senate. That means a candidate can lie to one or both voters and they might never know about the other's ads. This data-driven obscurity limits accountability and full deliberation.").

Putting limits on the types of data advertisers can bring to platforms and the categories advertisers can target[444] would curb the greatest risks associated with advertisers' purchased exposure while enhancing its competitive benefits. Advertisers would remain free to craft *content* aimed at particular groups of listeners, but by curbing the practice of micro-targeting (i.e., regulating the *vehicle* of advertising) Congress could ensure that "people not in those groups would see those tailored messages as well."[445] This is the kind of structural market regulation that silences no speaker and reflects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[446]

Congress could also require micro-targeting to be fully transparent to the listener or viewer.

> Can I see if a political advertiser used [a] custom audience tool, and if so, if my email address was uploaded? Can I see what 'look-alike audience' advertisers . . . are seeking? Can I see a true, verified name of the advertiser in the disclaimer . . . ? Can I see if and how [a platform's] algorithms amplified the ad?[447]

Such transparency and disclosure measures appear consistent not only with an attentional-choice doctrine but with existing doctrine as well.[448]

Indeed, there are good reasons to consider extending such transparency regulations to *all* advertising—political and commercial.[449] To start, such regulations make more information

444. *See* Kreiss & Perault, *supra* note 433.

445. *See* Vaidhyanathan, *supra* note 443.

446. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

447. Yaël Eisenstat, *I Worked on Political Ads at Facebook. They Profit by Manipulating Us.*, WASH. POST (Nov. 4, 2019, 5:00 AM), https://washingtonpost.com/outlook/2019/11/04/i-worked-political-ads-facebook-they-profit-by-manipulating-us/ [https://perma.cc/8D4N-XRBL].

448. *See* Hasen, *supra* note 246, at 21–30 (describing campaign finance disclosure law serving a similar type of "information interest"). *But see* Wash. Post v. McManus, 944 F.3d 506, 523 (4th Cir. 2019) (invalidating a Maryland law imposing disclosure-and-recordkeeping requirements on online platforms rather than political actors).

449. *See* Tarleton Gillespie, *We Need To Fix Online Advertising. All of It.*, SLATE (Nov. 15, 2019, 7:11 PM), https://slate.com/technology/2019/11/twitter-political-ad-ban-online-advertising.html [https://perma.cc/77Z6-47FK] ("[A]ny restriction of political advertising will stumble on the same fundamental question: What counts as 'political'? The solution, I think, requires a much grander intervention.").

and context—"more speech"—*available* to consumers who are interested in understanding who has gained purchased access to their attention and how.[450] Congress could require online ads to include a link to information on that ad: whether a platform consulted on the ad, who purchased the ad, how the ad has traveled through the platform's network, etc.[451] This could even apply to traditional media. Television and newspaper ads might include a QR code linking viewers to more detailed information on the ad's source, terms, and scope.

A law that covered *all* advertising would also avoid excessive entanglement with a legendarily challenging issue: the line between political and non-political content. As Twitter soon discovered[452] (and as campaign-finance scholars have long recognized[453]), separating the political from the non-political is no easy task in theory, let alone in practice. This is especially so at scale.[454]

Nonetheless, if Congress enacted a statute that distinguished between political and non-political content with respect to advertising regulations, the law might be less fraught with First Amendment risk than one might expect. Unlike laws that restrict (or theories that could restrict)[455] *expression or distribution* based on the distinction between political and non-political content, a law applying solely to *advertising* would not burden the exercise of any core First Amendment right. This would significantly reduce the constitutional consequences of the particular line drawn. Congress might, for example, rely upon an attentional-choice theory to justify limiting political advertising expenditures (even as political-speech or -distribution expenditures remain unlimited).[456] Or Congress might determine that some of its advertising regulations—such as microtargeting restrictions or transparency requirements—should only apply to political content.

450. *See supra* Parts I.A, III.B.1.

451. *See* Gillespie, *supra* note 449.

452. *See id.*

453. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 126 n.16 (2003) ("What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 537 (D.D.C. 2003))).

454. *See* Gillespie, *supra* note 449.

455. *See, e.g.*, Bork, *supra* note 298, at 20–35.

456. *Compare* Part III.B.3, *with* Parts III.B.1–2.

Drawing a line between political and non-political content in these kinds of contexts is similar to the line the Supreme Court has allowed in the context of eligibility for tax deductions (where expenditures for routine "trade advertising" are treated differently than expenditures for "lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses").[457] Nothing about the distinction drawn actually restrains any actor from producing content or making that content available to the public.

To be sure, any law enacted by Congress that draws such a distinction is almost certain to receive strict scrutiny (especially given the Court's overly broad approach to identifying content-based laws).[458] But a law that is tailored to regulate the terms of access to attention for political ads should survive scrutiny given the central importance of *earning* societal exposure in a competitive marketplace of ideas.

Even arguments about potential chill lack force in the advertising-expenditures context. Someone who plays it safe to avoid an ad-buy in violation of the boundary line would not be engaging in any self-censorship since that very same content (political or otherwise) could be expressed and distributed without limitation. In fact, drawing a line between attention costs and expression/distribution costs could help "thaw" expression that may be chilled by the complexity of existing regulations.[459]

No doubt there would be advertisements that tread the boundary between political and non-political. And there may be various acceptable definitions available to the legislature—some

457. Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326 (1941); *see also* Cammarano v. United States, 358 U.S. 498, 499–500 (1959). The Court has also upheld statutes regulating "political" activities in other contexts. *See, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 550–51 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973).

458. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2237–39 (2015) (Kagan, J., concurring) (contending that strict scrutiny should apply only when there is a "realistic possibility that [the] official suppression of ideas is afoot" (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007))).

459. *See* Citizens United v. FEC, 558 U.S. 319, 324 (2010) ("Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))).

narrower,[460] some broader.[461] There are no simple answers to what qualifies as "political" in a democracy. That there are likely to be close cases, however, "is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate."[462]

Under an attentional-choice theory, the more consequential line-drawing for First Amendment purposes might actually end up being the line between advertisements and expressive conduct. At first glance, this should not seem difficult: no one who watches a YouTube video has trouble distinguishing the content they sought from the ad that precedes it; no one who watches TV mistakes a commercial break for the program.

Yet, the line can get much blurrier—and presumably would in the face of regulation. How should one treat influencers, product placements, and sponsored content? Itemization of expenditures might be appropriate in some cases—distinguishing between payments for editorial assistance and payments for placement—but such an approach may not adequately address all possible permutations for mixing paid exposure with organic consumer interest.

Depending on how demanding they are, advertising regulations could also raise an important second-order concern: the risk of diminished advertising revenues. Many intermediaries and content providers in today's society have ad-driven business models. Even a reasonable, nondiscriminatory regulation[463] that curtails attention expenditures (political or otherwise) would effectively raise the cost of access and availability to consumers to gain information they desire from platforms and providers they *have* chosen in the marketplace of ideas.

460. *See, e.g.*, Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891 (2018) (any advertisement that "display[s] a candidate's name, likeness, or logo" or "display[s] a ballot measure's [or legislative bill's] number, title, [or] subject" (quoting Cal. Elec. Code Ann. § 319.5 (West Cum. Supp. 2018))).

461. *See, e.g.*, Honest Ads Act, S. 1989, 115th Cong. § 8(a) (2017) (governing any advertisement that "is made by or on behalf of a candidate; or communicates a message relating to any political matter of national importance, including—a candidate; any election to Federal office; or a national legislative issue of public importance").

462. Bork, *supra* note 298, at 28.

463. The First Amendment forbids Congress from targeting particular publishers with discriminatory taxes or regulations. *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 239 (1936).

Given that advertisements necessarily gain exposure that is not based on consumer demand, however, Congress should receive reasonable latitude to strike an appropriate balance. Any action in this area would involve regulating an economic exchange that pulls in two opposing constitutional directions (i.e., how private subsidies improve ideational competition versus how unearned access undermines ideational competition). Whether Congress addresses this concern by tailoring the regulations to a very narrow class of political-attention expenditures[464] or whether Congress casts a broader net, regulates all advertisements, and offsets lost revenues with public subsidies,[465] the Court should recognize that a range of reasonable alternatives might be available.

464. Political ads may warrant tailored regulatory treatment in a way that shampoo ads do not, for political speech stands at "the heart of what the First Amendment is meant to protect." McConnell v. FEC, 540 U.S. 93, 248 (2003) (Scalia, J., dissenting). Ironically, the very importance of political speech under the First Amendment means that "buying reach" raises the most sensitive questions about whose ideas get exposure in society—and on what basis.

465. Any number of public subsidy models might protect the vitality of the free press and enhance free competition in the marketplace of ideas. *See* C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2178–219 (1992). Indeed, "the United States was once a pioneer in government subsidization of the media. Postal subsidies that allowed newspapers and magazines to flow virtually free to subscribers through the mail made the media in the United States the envy of European observers like Alexis de Tocqueville in the nineteenth century." Woodcock, *supra* note 331, at 2338; *see also* Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (per curiam) ("Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, and preferential postal rates and antitrust exemptions for newspapers." (citations omitted)); Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 304–05 (1913) (upholding the ability of the government to provide special "second-class mail" subsidies to publications "to secure to the public the benefits to result from 'the wide dissemination of intelligence as to current events'" and to deny the second-class rate to "publications designed primarily for advertising purposes").

In fact, public subsidies might lessen the media's subservience to economic pressures, thereby helping to align the marketplace of ideas even closer with the interests and choices of consumers. *See* Jiyoung Han & Christopher M. Federico, *The Polarizing Effect of News Framing: Comparing the Mediating Roles of Motivated Reasoning, Self-Stereotyping, and Intergroup Animus*, 68 J. COMM. 685, 687, 703 (2018) (finding that "conflict framing" in the media has polarizing effects and observing that America's greater use of conflict-frames may be, in part, a function of its largely commercialized media environment); Woodcock, *supra* note 331, at 2339 n.336 (quoting Rodney Benson et al., *Public Media Autonomy and Accountability: Best and Worst Policy Practices in 12 Leading Democracies*, 11 INT'L J. COMM. 1, 3, 15, 22 (2017)). If media was free

Finally, if all else fails and the Supreme Court strikes down all interventions without providing additional guidance on how a marketplace of ideas should be expected to function, Congress might have one option left: outlaw private anticompetitive behavior in simple, broad language modeled on the Sherman Act and leave the courts to explain how a marketplace of ideas is supposed to work.[466]

The campaign finance battle to date has been a war of attrition. Legislators (or voters) enact reforms only to see the courts invalidate them (or wound them so severely that their demise might be preferable).[467] Rather than drafting narrow and technical laws, perhaps Congress could broaden them to the level of generality provided by the Court itself. Such a statute would prohibit unreasonable restraints of trade in the marketplace of ideas and grant private parties and the FEC the power to sue in federal court to enforce the law.

Passing a "Political Sherman Act" would force the Supreme Court to grapple with its own doctrine. The "marketplace of ideas" cannot simultaneously be so amorphous that judicial elaboration is impossible *and* so robust that legislative action is impermissible. If the Court cannot explain how the marketplace of ideas functions, then it must either allow Congress its due exercise of powers or cease relying on a vague metaphor for such profound judicial decisions.

V. POWER, POLARIZATION, AND PRACTICAL CONSEQUENCES

Reorienting First Amendment debates around attentional choice (and the terms of access to our attention) would center the role that social groups, informational intermediaries, and other constituencies play in mobilizing and exercising political power.

to appeal incrementally more to our aspirational selves and incrementally less to our behavioral selves, all the better for our own personal growth and the health of our democracy. *See supra* text accompanying notes 257–71.

466. *See* 15 U.S.C. § 1 (2018) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

467. *See, e.g.*, Robert G. Boatright, *Part 1: Competing Perspectives on Campaign Finance Regulation*, *in* CAMPAIGN FINANCE: THE PROBLEMS AND CONSEQUENCES OF REFORM 15, 15 (Robert G. Boatright ed., 2011) (arguing that because judicial decisions have crafted strange rules based on unrealistic distinctions, "we have a set of laws that neither [the right nor the left] would have sought to create had they been starting from scratch").

More deeply exploring these dynamics seems overdue as a matter of constitutional study and scholarship,[468] but readers might have a more pressing question: What are the practical consequences of this theory for a fractured and polarized political community?

On one hand, privileging attentional choice seems like a positive step. Respecting the role that associations and relationships play in our lives could enhance democratic accountability while dismantling the Court's cripplingly dysfunctional campaign-finance jurisprudence. Today campaigns spend a majority of their budget on advertising;[469] representatives engage in round-the-clock fundraising;[470] and a whole new industry of election professionals overemphasize capital-intensive activities, underemphasize grassroots outreach, and distort the complexion of those who seek office.[471]

None of this leads to meaningful representation. Overwhelming empirical evidence confirms that elections are not tying officeholders to the preferences of voters.[472] Large democracies simply "do not work through individualistic citizen engagement."[473]

468. *See* Heather K. Gerken, *The Discursive Benefits of Structure: Federalism and the First Amendment*, *in* THE FREE SPEECH CENTURY, *supra* note 143, at 68, 76 ("Power relations tend to be understudied in the literature on the First Amendment. The role of groups is underplayed."); Daryl J. Levinson, Foreword, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 38 (2016) ("[T]he ultimate holders of power in American democracy are not government institutions like Congress and the President but democratic-level interests.").

469. *See* El-Haj, *supra* note 77, at 1294 (noting that 2008 presidential campaigns spent nearly 60% of their budgets on advertising).

470. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 138–39 (2011). The ramifications of this are severe. *See* Anthony J. Gaughan, *The Forty-Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 820 (2016) ("Members no longer have the time to master public policy issues in depth or regularly attend committee meetings. Not surprisingly, therefore, the typical member of Congress has become dependent on lobbyists and congressional leaders for information on the legislation pending before Congress."); *id.* at 823 ("The demeaning and exhausting demands of fundraising have driven experienced officeholders to resign and have deterred talented candidates from running for office in the first place.").

471. *See* Robert Yablon, *Campaigns, Inc.*, 103 MINN. L. REV. 151, 154–56 (2018).

472. *See* El-Haj, *supra* note 77, at 1243–44 (citing LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 287 (2008)).

473. Michael J. Malbin, *Three Policy Paths After* Citizens United*: A Critical*

Strengthening ties between constituents, associations (political and civic), and representatives could significantly improve democratic responsiveness and accountability.[474] Such relationships and social groupings help create "a two-way street of communication between elites and ordinary citizens,"[475] giving individuals a more meaningful voice.[476]

In other words, if we want elections to actually convey policy content, that content must come from the relationships between parties and social groups.[477] Like buyer cooperatives in the market, social groups offer a stronger anchor for transmitting demands: "When coalitions shift, politicians scramble to adjust their policy positions accordingly."[478] Politicians that find it harder to market themselves via advertising "would continue to court votes on some kind of wholesale level[] seek[ing] the support of intermediaries who could 'deliver' bundles of votes directly."[479] This is a feature, not a flaw.

From a democracy-realist perspective, such dynamics ground politics in "the mediating influence" of groups that are "engaged in the give and take of party and coalitional politics."[480] And, if "political money, like water, has to go somewhere . . . [and] is part of a broader ecosystem,"[481] then the redirection of political spending from ads to organizations might help rebuild the capacity of these vital democratic institutions. Rather than suppressing the influence of organic, grassroots organizing efforts and local political parties, money might reduce the economic barriers faced by people-powered movements and help amplify their efforts. The more money plowed back into building out intermediary organizations, the better our politics might function.

From an information-realist perspective, group dynamics contextualize content[482] and require that its attentional priority

Review Essay, 52 TULSA L. REV. 537, 542 (2017).

474. *See* El-Haj, *supra* note 77, at 1256.

475. *Id.* at 1254.

476. *See* Malbin, *supra* note 473, at 542 ("Intermediary organizations are necessary to give individuals an effective voice.").

477. *See* ACHEN & BARTELS, *supra* note 67, at 266.

478. *Id.* (citation omitted).

479. Issacharoff & Karlan, *supra* note 357, at 1729.

480. *Id.* at 1714.

481. *Id.* at 1708.

482. *See* Strong, *supra* note 76, at 141–42.

be earned rather than bought. Social groups have "a set of ongoing concerns and challenges, and a vocabulary for discussing them."[483] Being fluent in these concerns and this vocabulary is part of how politicians convey connection and win support.[484]

This is not about pandering. Trust matters. Civic ties[485] and reputation[486] have provided a foundation for meaningful political alignment since our nation's earliest elections. Elected officials tend to be more reliable representatives of their communities' interests when they actually *come* from those communities.[487] Members of Congress with blue-collar backgrounds more dependably defend blue-collar interests.[488] Black legislators are more likely than comparable white legislators to vote for policies that support people of color.[489] A whole range of characteristics can "cause [legislators] to deviate from party orthodoxy" in ways pertinent to those characteristics.[490]

Thus, shifting to a doctrine that recognizes the relational nature of information and ascribes social groups (and choices about social groups) constitutional significance could be seen as a positive development. Laissez-faire doctrine incorrectly assumes that the marketplace of ideas allows a rational atomistic

483. ACHEN & BARTELS, *supra* note 67, at 309.

484. *See id.*; *see also* Magda Hinojosa et al., *Speaking as a Woman: Descriptive Presentation and Representation in Costa Rica's Legislative Assembly*, 39 J. WOMEN POL. & POL'Y 407, 411, 423 (2018) (studying "descriptive presentation" and the ways in which legislators invoke their identity and draw on their personal experiences in speechmaking as a way to establish authority).

485. *See* El-Haj, *supra* note 77, at 1264 ("[P]rior to the advent of mass media, candidates needed 'to build extensive interpersonal networks not confined to particular occupational or social circles' to garner reputation and votes. As such, the path to political power ran through membership in socioeconomically integrated civic associations . . . . Political elites were thereby prevented from becoming socially insulated from the rest of American society.").

486. *See* KUHNER, *supra* note 23, at 145 ("Electioneering during the founding era did not involve large sums of money. Candidates stood for election *based on their reputation* among voters and thus spent little on advertising and campaigning." (emphasis added)).

487. *See* ACHEN & BARTELS, *supra* note 67, at 309.

488. NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 109–36, 143 (2013).

489. ACHEN & BARTELS, *supra* note 67, at 309.

490. *Id.*

voter to align her *ex nihilo* policy preferences with the corresponding party's issue platform.[491] An attentional-choice approach might do something more concrete and realistic: send someone the community trusts—someone who understands what the community needs—to represent it in Congress.[492]

On the other hand, privileging attentional choice could seem dangerous—a doubling-down on our worst impulses. One particularly effective manipulator of attention comes to mind: Donald Trump. Throughout the 2016 elections, Trump benefited from outrageous statements, lies, and racist and xenophobic appeals that drove a massive amount of organic attention and free media coverage.[493] Historically, both presidential candidates in a general election receive roughly the same amounts of news coverage.[494] In 2016, however, Trump "received more coverage than Clinton almost every day between June 1 and Election Day, including 63 percent of cable news mentions and 69 percent of the solo-headlined stories."[495]

There is little that an attentional-choice approach to the First Amendment would do to rein in this kind of influence. Candidates would remain free to say what they want,[496] and the press would remain free to cover them. Our recourse as a viewing

491. *See supra* Part I. Information shortcuts and heuristics alone "won't save populist theories of democracy." ACHEN & BARTELS, *supra* note 67, at 300. Nonetheless, informational signals may operate more reliably in the aggregate when they are not "swayed by the same vivid campaign ad." *Id.* at 41; *see also id.* at 300 (noting that aggregating large individual errors through elections tends to dilute the resulting error on the whole).

492. *See id.* at 250.

493. *See* Persily, *supra* note 244, at 67, 72; Nicholas Confessore & Karen Yourish, *$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), https://nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html [https://perma.cc/SY8K-A6FH].

494. JOHN SIDES ET AL., IDENTITY CRISIS: THE 2016 PRESIDENTIAL CAMPAIGN AND THE BATTLE FOR THE MEANING OF AMERICA 135 (2018).

495. *Id.*

496. The extent to which the First Amendment allows false or misleading speech to be regulated is a question not addressed in this Article. Many of the same line drawing and enforcement issues that currently arise, however, would remain the same under an attentional marketplace conception of the First Amendment. *See* Ross, *supra* note 250. Nonetheless, a realistic reckoning with human nature *does* belie the Supreme Court's empty assurances that the marketplace of ideas will act as an "engine[] of truth production." *See* BEJAN, *supra* note 92, at 173. There may be good reasons for the Court to tread lightly in this domain, but its doctrine should rest upon those reasons—not an empty promise.

audience and a voting public would remain limited to the TV remote and the ballot box.

Of course, the ability to regulate advertising (and ad expenditures) could have impacted a number of ways in which Trump's genuinely viral messaging was artificially amplified through attentional purchases. For one thing, Trump did not *start out* as a widely popular figure with a broad base of small-donor support. His campaign's initial advertising efforts relied heavily upon big donors and self-funding.[497]

On the domestic side, this money was plowed overwhelmingly into surgically targeted digital advertising.[498] "By Cambridge Analytica's account, the campaign targeted 13.5 million persuadable voters in sixteen battleground states," including potential Trump voters (to boost turnout) and "white liberals, young women, and African Americans" (to reduce turnout).[499] On an average day, the campaign would "fe[e]d Facebook between 50,000 and 60,000 different versions of its advertisements . . . [s]ome were aimed at just a few dozen voters in a particular district."[500] The campaign would "experiment[] with different versions and drop[] ineffective ones."[501]

On the foreign side, Russian propagandists relied heavily upon organic social media circulation, but paid ads often provided a springboard, connecting new audiences to unpaid content.[502] On Twitter, "promoted tweets" appeared in approximately 53.5 million users' feeds.[503] On Facebook, approximately 11.4 million users saw Russia-linked paid ads.[504] If a user "liked" or "shared" the paid content, the advertiser's unpaid posts would appear in the user's feed from that point forward, often without

497. *See* Bill Allison et al., *Tracking the 2016 Presidential Money Race*, BLOOMBERG (Dec. 9, 2016), https://bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising/ [https://perma.cc/YVM2-FFC6].

498. *See id.*

499. Persily, *supra* note 244, at 65–66.

500. *Once Considered a Boon to Democracy, Social Media Have Started To Look Like Its Nemesis*, *supra* note 295.

501. *Id.*

502. IAN VANDEWALKER & LAWRENCE NORDEN, BRENNAN CTR. FOR JUSTICE, GETTING FOREIGN FUNDS OUT OF AMERICA'S ELECTIONS 3 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Foreign_Funds.pdf [https://perma.cc/3E3G-TFRW].

503. *Id.* at 7.

504. *Id.*

the subscriber realizing it.[505] Over 126 million users were exposed to posts on Facebook in this manner.[506] That is about 40% of the U.S. population.[507]

Meaningful regulations might have put a damper on these practices. Nonetheless, no interpretation of the First Amendment allowing attentional choices to drive exposure would contain a force like Trump. In explaining Trump's rise, the role of advertising and paid access to attention pales in comparison to the role that his messaging and social mobilization played.[508] "By emphasizing certain issues or speaking directly to certain groups, candidates can make those issues and group identities more salient to voters and more predictive of their choices."[509] For Trump, this meant raising the salience of race as a driving (and dividing) social identity—an approach with profound consequences for the election and for our society.[510]

No one should expect any kind of market-based doctrine to cure these ills. A borderline-religious faith that a free-speech "market" can or necessarily would promote "good" speech is ironic. Markets reward demand—and a sober look at our demons suggests there is great demand for villains and scapegoats, for clear enemies and simple fixes. The First Amendment need not condemn us to our worst instincts, but we should not expect it to save us from them.

Nonetheless, an attentional-choice approach might still be a step in the right direction. First, by identifying the nature of the market and opening up space for legislation to help structure the market, a degree of self-governance can re-enter the picture. Limiting advertising expenditures or reining in micro-targeting might encourage more open, inclusive, and broader debates, with candidates building consensus and community rather than fragmenting society down to the smallest, manipulable denominator. Such political dialogue does the democracy-enhancing work of finding areas of commonality "upon which [our] wishes safely can be carried out."[511]

505. *Id.*

506. *Id.*

507. *Once Considered a Boon to Democracy, Social Media Have Started To Look Like Its Nemesis*, *supra* note 295.

508. *See* SIDES ET AL., *supra* note 494, at 189–97.

509. *See id.* at 71.

510. *See id.* at 3–11.

511. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Second, by connecting the doctrinal framework with an inquiry into how ideas actually generate attention and earn exposure in society, the legislative interventions above (as well as the courts' understanding of its own role) can be informed by evolving empirical understandings. Rather than casting these insights aside, courts and legislatures might be able to develop an ever more nuanced understanding of what genuine attentional choice really means and how it might be protected—all while staying grounded to an enduring constitutional principle.

Finally, building a system in which relationships, trust, and community reputation matter more than proximity to wealth or fundraising prowess could expand the pool of candidates who choose to run in the first place. "Democratic governance can function properly only when competent types who reflect the desires of their constituents stand up and seek political office."[512] The dynamics of this "candidate supply" question have received surprisingly little study,[513] but Professor Andrew Hall suggests that the fundraising and campaigning burdens placed upon modern candidates are depriving voters of the opportunity to vote on more moderate candidates.[514]

Legislation that incentivizes more candidates to run for office could ease one source of the polarization gripping our political system. Currently, "[l]egislators might polarize even if voters do not want them to, because voters can only elect representatives from among the set of people who run for office."[515] Hall found that roughly "80 percent of polarization exists no matter which candidates voters choose from . . . [because] it is already baked into the set of people who [have chosen to] run for office."[516] Meaningful reform might improve these numbers.[517]

Who chooses to run, how they choose to appeal to us, and what stories they decide to tell matter. Each of us belongs to

512. ANDREW B. HALL, WHO WANTS TO RUN? HOW THE DEVALUING OF POLITICAL OFFICE DRIVES POLARIZATION 8 (2019).

513. *See id.* at 2.

514. *See id.* at 3 ("[W]hen [the] costs of running are high and [the] benefits of holding office are low, more-moderate candidates are disproportionately less likely to run.").

515. *Id.* at 13.

516. *Id.* at 15.

517. *See id.* at 7 (suggesting that "changing our system of campaign finance so that candidates spend less time fundraising" could improve candidate recruitment).

many groups—place of birth, place of residence, ethnicity, religion, gender, occupation—"but simply being a member *of* a group is not the same thing as identifying or sympathizing *with* that group."[518] Political actors activate which communities we identify with through their rhetoric. They give certain identities more prominence, more meaning, and more importance as a decision-making criterion.[519] They help us define ourselves. Madison and Holmes recognized this—that we are social beings and that our understanding of the world will always be shaped by our experiences and associations.[520] Our judicial doctrines and institutions must recognize that reality, not run from it.

As listeners and as members of the political community—as partners in this exchange[521]—we have the power and responsibility to use our judgment wisely, to decide what (and who) is worthy of our time and attention, and to reward that which makes our country and ourselves better. Our choices matter—and the First Amendment should reflect that.

CONCLUSION

Justice Holmes once said, "[t]he life of the law has not been logic: it has been experience."[522] Our nation's experience in the shadow of the Supreme Court's modern market metaphor should give the Justices pause. Our autonomy and democracy face growing threats from more powerful private forces than the Founders could have ever imagined. The First Amendment does not condemn us to helplessly submit to their control.

With respect to autonomy, the increasingly sophisticated and voracious operations of attention brokers are beginning to test the boundaries of free attentional choice and to endanger that most fundamental First Amendment right: the freedom of thought. Since "attention is always being spent on *something*," competitors for attentional-choice "necessarily must displace something that already has some hold on the attention desired."[523] When consumers make free attentional choices—say, deciding to switch from *The New York Times* to *The Economist*—

518. SIDES ET AL., *supra* note 494, at 3.

519. *See id.*

520. *See supra* Part I.C.

521. *See* NEUBORNE, *supra* note 59, at 118–19.

522. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

523. Wu, *supra* note 50, at 792.

the marketplace of ideas protects autonomy and enhances the power to form one's own beliefs.

When consumers become trapped in patterns that resemble addiction, however, attentional "choice" becomes an illusion and the fair exchange between consumer and producer evaporates. The growing power of machine learning, data analytics, and habit-forming design to exploit known psychological weaknesses and keep consumers dependent threatens to rob us of truly free thought and to render our conscious experience no more than a resource to be mined for profit.

If these practices only disrupted a genuine choice between competing information providers, that would be bad enough. Today, however, the capacity sought by attention merchants is just as likely to come from "the conquest of attentional 'greenfields'"—time that used to be spent on friends, families, civic associations, and community groups; on exploring and enjoying new hobbies, taking walks, and the simple but profound act of reflecting.[524] This conquest could be expected to have a much more drastic effect on our lives, our relationships, our communities, our civic society—our very humanity.

Ensuring that we, the people, retain the power to promote free competition in the marketplace of ideas and to ensure fair terms of access to our attention will be vital to protecting true autonomy and genuine freedom of thought in the coming era.[525] The First Amendment rightfully protects us from a government bent on subjugation, suppression, and thought-control; it does not demand that we unilaterally disarm and wholly cede control to private entities that seek the same.

With respect to democracy, the picture is no less bleak. Officeholders now spend up to seventy percent of their time raising money[526] and are too busy to hold committee meetings,[527] read bills,[528] or do the actual job of policymaking.[529] Floor "debates"

524. *Id.*

525. *See id.* at 801 ("It is . . . the deprivation of a liberty, more precisely liberty of thought, which is itself a constitutional value.").

526. LESSIG, *supra* note 470, at 138.

527. *See id.* at 139.

528. *See* CONGRESSMAN X, THE CONFESSIONS OF CONGRESSMAN X: A DISTURBING AND SHOCKINGLY FRANK TELL-ALL OF VANITY, GREED AND DECEIT 12 (2016).

529. Nick Penniman & Wendell Potter, *Citizens United Is Only 15% of the Political Cash Problem*, L.A. TIMES (Mar. 8, 2016), https://latimes.com/opinion/op-ed/la-oe-penniman-potter-political-campaign-finance-reform-20160308

involve few members,[530] and majority gatherings are now "almost exclusively ceremonial."[531] Members of both parties have skipped classified intelligence briefings on terrorist activities to attend out-of-state fundraisers,[532] and committee positions are increasingly awarded based on fundraising ability rather than experience, expertise, or interest.[533]

Not only do well-funded interests have the power to skew public debate by purchasing unlimited societal exposure, sometimes the threat alone is enough to snap politicians into line.[534] In this world, where money matters more than ideas, party leaders ask candidates, "How is this quarter looking?" "What did your opponent raise?" and "How many hours of call time do you have scheduled this month?" rather than, "What are you hearing on the campaign trail?" "What issues are resonating with voters?" and "How many community events did you attend this week?"[535] These are not corrupt actors (such that "throwing the bums out" might provide remedy). These are "ordinary people responding logically to powerful incentives"[536] created by the Supreme Court's laissez-faire doctrine.

-story.html [https://perma.cc/27PV-NGRN] (quoting Rep. Dan Glickman (D-Kan.)).

530. *See* Marian Currinder, *Paying To Play: Fundraising in the U.S. House of Representatives*, *in* CAMPAIGN FINANCE: THE PROBLEMS AND CONSEQUENCES OF REFORM, *supra* note 467, at 145.

531. LESSIG, *supra* note 470, at 141.

532. *See* Ted Barrett, *Hagan Admits Skipping Armed Services Hearing for Campaign Fundraiser*, CNN (Oct. 10, 2014), https://cnn.com/2014/10/08/politics/hagan-armed-services-hearing/index.html [https://perma.cc/5HRA-WBGL] (reporting on Sen. Kay Hagan (D-NC)); Alex Leary, *Rubio Misses Paris Hearing for Fundraising; Did Attend Classified Briefing Tuesday*, TAMPA BAY TIMES (Nov. 18, 2015), https://www.tampabay.com/rubio-misses-briefing-on-paris-attacks-for-fundraising/2254468/ [https://perma.cc/B4FH-KL9D] (reporting on Sen. Marco Rubio (R-FL)).

533. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 80 (2012); Currinder, *supra* note 530, at 143.

534. *See* TORRES-SPELLISCY, *supra* note 385, at 62.

535. Sean Eldridge, *How Dialing for Dollars Is Undermining Our Democracy—and How To Stop It*, MEDIUM (Feb. 28, 2016), https://medium.com/@SeanEldridge/how-dialing-for-dollars-is-undermining-our-democracy-and-how-to-stop-it-e9aff589785a#.ti3ih4ltm [https://perma.cc/74KK-WZRZ].

536. LESSIG, *supra* note 470, at 238.

Our legislative processes have become virtually unresponsive to the average American[537]—a shift that has not gone unnoticed by voters. An astounding 96% of Americans blame money in politics for our political dysfunction.[538] When asked "who has the most influence on how members of Congress vote," 54% of Democrats and 50% of Republicans said "special interests and lobbyists," with "campaign contributors" coming in a close second.[539] Second to last were "constituents," with just 11% of Democrats and 15% of Republicans.[540] (Last place? "[Legislators'] own conscience.")[541]

Americans' confidence in Congress reflects this displeasure, dropping as low as 7% in recent years.[542] This was "not only the lowest on record, but also the lowest Gallup ha[d] recorded for any institution in [its] 41-year[s]" of gauging Americans' confidence in seventeen major U.S. institutions.[543] As Lawrence Lessig has noted, "when we waged a Revolutionary War against the British Crown, more than [seven] percent of the American people had confidence in King George III."[544] That popular outrage did not end well for King George, and it does not bode well for the institutional stability and durability of our government.

The Supreme Court's own reputation is also at stake. *Citizens United* is widely recognized by name and is despised, with over 80% of Americans saying it should be overturned,[545] and almost 90% saying there should be restrictions in place to limit the

537. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014).

538. BRENNAN CTR. FOR JUSTICE, DEMOCRACY: AN ELECTION AGENDA FOR CANDIDATES, ACTIVISTS, AND LEGISLATORS 20 (Wendy Weiser & Alicia Bannon eds., 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Democracy%20Agenda%202018.pdf [https://perma.cc/4C4U-ZFA2].

539. WENDELL POTTER & NICK PENNIMAN, NATION ON THE TAKE: HOW BIG MONEY CORRUPTS OUR DEMOCRACY AND WHAT WE CAN DO ABOUT IT 40–41 (2016).

540. *Id.*

541. *Id.*

542. Rebecca Riffkin, *Public Faith in Congress Falls Again, Hits Historic Low*, GALLUP (June 19, 2014), https://gallup.com/poll/171710/public-faith-congress-falls-again-hits-historic-low.aspx [https://perma.cc/A4C7-C57A].

543. *Id.*

544. LESSIG, *supra* note 470, at 247.

545. ROBERT E. MUTCH, CAMPAIGN FINANCE: WHAT EVERYONE NEEDS TO KNOW 137 (2016).

influence of the rich on political campaigns.[546] Even the *donors* hate the system, with 80% regularly pressured by officeholders to contribute and 74% supporting expenditure caps.[547] This "overwhelming popular opposition to *Citizens United* suggests that . . . the [C]ourt ha[s] acted against widely and deeply held opinions about what it means to be a democracy and how our democracy should work."[548]

The First Amendment does not consign us to this fate. The marketplace of ideas—and electoral campaigns—functioned quite well before the massive influx of political advertising money. Before the 1950s, "ordinary voters still had an important role in elections . . . . Footwork on the ground—getting voters to the polls and persuading them to vote for a candidate—was probably the most important part of campaigning."[549] Such methods were not just a product of the times; they are integral to how we create genuine political communities, transmit meaningful political information, and hold our representatives accountable.[550]

Holmes once quipped that "[a] good catchword can obscure analysis for fifty years."[551] At 100 years, his "marketplace" has done one better. Developing a more principled and coherent approach to First Amendment analysis will not happen overnight. But the time and attention will be worth it.

546. Gaughan, *supra* note 470, at 832.

547. *Id.*

548. MUTCH, *supra* note 545, at 122.

549. RICHARD W. PAINTER, TAXATION ONLY WITH REPRESENTATION 30 (2016).

550. *See supra* text accompanying notes 474–92.

551. Wendell L. Willkie attributed this quote to Oliver Wendell Holmes, Jr. in a 1938 radio broadcast. *America's Town Meeting of the Air* (The Town Hall, Inc. radio broadcast Jan. 6, 1938), *transcribed in How Can Government and Business Work Together?*, *in* BULLETIN OF AMERICA'S TOWN MEETING OF THE AIR, Jan. 6, 1938, at 5, 21.