March 11, 2011

The Role of Individual Substantive Rights in a Constitutional Technocracy

Abigail R. Moncrieff, Boston University School of Law

Available at: https://works.bepress.com/abby_moncrieff/5/
The Role of Individual Substantive Rights in a Constitutional Technocracy

Abigail R. Moncrieff

Draft: Please do not cite or circulate without author’s permission.

Abstract

This article presents a novel theory of substantive constitutional rights and of the role that they play in an increasingly technocratic legal world. The central descriptive assertion is that substantive rights serve as presumptions in favor of private ordering, which protect a limited set of regulatory regimes from technocratic tinkering, and that the characteristic that defines the set of protected regimes is a high degree of economic and moral uncertainty. Decisions to engage in speech, religion, association, reproduction, and parenting—the decisions that receive substantive constitutional protection under modern doctrine—are decisions that are of unusually uncertain individual and social value. The central normative assertion is that this defining characteristic provides a good reason to hinder regulation in these regimes because, in the presence of these deep uncertainties, technocratic regulators will have no legitimate regulatory theory to pursue. Regulation in these regimes, thus, will be more likely than average to constitute purely arbitrary infringements of liberty, even though some regulatory projects will address concrete harms or enact moral consensuses. Substantive constitutional rights provide an elegant tool for creating a conditional barrier to regulation, raising the cost of regulating without completely forbidding it.

Introduction

American law has become and is becoming increasingly technocratic. To a greater and greater extent, our laws and regulations center on data—information and analysis. Partly, this technocratization arises from the increasing...
pervasiveness of law and economics,¹ including welfare economics,² for evaluating regulatory interventions. Law becomes technocratic as we choose particularly technocratic metrics, such as market functioning and group welfare, for evaluating regulatory interventions—metrics that are (or at least are imagined to be) more precisely measurable than democratic metrics such as political preference and representational success. In another important respect, though, the trend arises from the growth in information technology, which allows for technocratization of even non-technocratic evaluative standards. When we look to preferential, representational, and even moral success as our lodestar today, we have new tools—still crude, but improving—to measure that success. Indeed, modern regulators largely depend on technocratic measurement not only to formulate rules but also to justify them.³ To an increasing extent, therefore, our constitutional democracy is also a constitutional technocracy.⁴

Our technocratic tools, however, are neither infallible nor omnipotent. There are many important regulatory questions—famously including interpersonal comparisons of utility⁵—that we cannot measure at all or at least cannot measure reliably. Technology simply has limits. What, then, should a constitutional technocracy do if, because of these limits, a whole regulatory regime seems insusceptible to technocratic analysis? That is, if standard technocratic tools fail to provide answers for a given regime, how should modern regulators approach their job? Part of this paper’s thesis is that, in such circumstances, the appropriate response is simply to abstain from regulating. If technocratic tools systematically fail in a particular regulatory regime, we should presumptively leave that regime to private ordering—we should be presumptively laissez-faire.⁶ The core of this paper’s thesis is that our constitutional technocracy

² See generally Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2002) (summarizing welfarist analysis and arguing that it is the best analytic mode for all of law).
⁵ See Part II.A, infra.
⁶ Importantly, all such private ordering occurs against a backdrop of general regulatory conditions and common law baselines. See Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 501–04 (1987) [hereinafter New Deal]; Cass R. Sunstein, Lochner’s Legacy,
already contains such laissez-faire presumptions to protect regimes in which there are peculiarly high barriers to technocratic measurement and justification. The laissez-faire presumptions are our individual substantive rights.

As enforced, substantive constitutional rights serve as strong presumptions in favor of private ordering, protecting a limited set of markets from technocratic tinkering. And the five substantive rights that sit at the core of modern doctrine—the First Amendment freedoms of speech and religion and the Fifth and Fourteenth Amendment freedoms of association, reproduction, and parenting—all protect markets in which technocratic regulation is systematically likely to fail. Importantly, however, modern rights doctrine allows infringements of liberty within those regimes when regulators can justify their interventions in precise technocratic terms—when regulators can demonstrate that the infringements are “narrowly tailored to serve a compelling state interest.” In our constitutional technocracy, thus, individual substantive rights serve as laissez-faire presumptions—but rebuttable presumptions—for those markets that are peculiarly insusceptible to technocratic improvement.

It is important to note at the outset that my focus here is only on substantive, or non-contingent, rights—rights to engage in particular private activities (like speech and religion) irrespective of prior governmental action. I do not consider those constitutional rights—usually termed procedural rights—that are contingent on such prior action. Contingent rights include rights to trials, juries, lawyers, non-incrimination, and humane punishment, which are contingent on governmental involvement in a criminal or civil dispute, and the right to vote, which is contingent on the holding of a public election. For now, I set aside all

---

87 Colum. L. Rev. 873 (1988) [hereinafter Lochner’s Legacy]. My claim here will not be that private ordering is better than intervention but rather that technocratic uncertainty prevents us from evaluating results of both private ordering and direct intervention. We should therefore default to laissez-faire because it avoids regulatory costs, including the cost of arbitrarily infringing liberty.

7 By “markets,” I am speaking metaphorically, using “market” to refer to any aggregated set of individual choices respecting a particular good, service, or activity—and particularly the set of individual choices by which limited resources are distributed among competing persons. John Stuart Mill’s marketplace of ideas, for example, is not a monetized market but a metaphorical market nevertheless, and we can define similar ones for religion, association, reproduction, and parenting. See John Stuart Mill, On Liberty ch. 2 (1859).


9 Throughout the paper, when I refer to “constitutional rights,” I mean to include only this limited set of substantive rights. I do not mean to include procedural rights, such as Fourth, Fifth, and Sixth Amendment criminal procedural protections and Seventh Amendment procedural rights for civil suits, nor do I mean to include equality constraints under the Equal Protection Clause of the Fourteenth Amendment. The theory that I propose here might have interesting implications for those rights, but those implications are beyond my current scope.

10 Lawrence v. Texas, 539 U.S. 558, 593 (2003) (“Our opinions applying the doctrine known as ‘substantive due process’ hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.”).

11 Voting is not always thought to be a procedural right, but it is importantly contingent like standard procedural rights. Just as I do not have a right to a jury trial unless government is
of these contingent rights. I also set aside constitutional property rights, which might have non-contingent dimensions but which are usually applied only contingently in modern doctrine, requiring only that government compensate property owners for its confiscatory actions. All of these non-contingent rights provide interesting foils for the analysis here, a point that I hope to flesh out in future work. For now, however, I limit myself to presenting the core thesis: that systematic and peculiar difficulties of technocratic regulation explain and justify much of substantive rights doctrine.¹²

In brief, the argument is as follows: Modern substantive constitutional rights are not individual entitlements to engage in protected activities;¹³ rather, they are merely conditional barriers to regulation of those activities, outlawing some but not all governmental intervention in protected markets. Put another way, the primary function of a substantive right in American constitutional law is not to provide individuals with a claim to access the protected activity but rather to provide us with a tool to oppose regulation of that activity. For example, the First Amendment freedom of speech does not give us an enforceable entitlement to internet access or to any given internet platform, but it does provide us with a tool to oppose regulation of the internet.¹⁴

Though perhaps narrower than ordinary Americans’ perception of rights, this understanding, as we lawyers know, does not diminish their importance. The anti-regulatory tool is strong. Individual substantive rights not only provide political opponents of intervention with a rhetorical tool to oppose regulation but also, given our system of judicial review, provide citizens and courts with a legal “veto” tool, by which they can block enforcement of any unconstitutional intervention that passes. Rights thus raise the cost to regulators of tinkering with allowing someone to sue me, I do not have a right to vote my Senator out of office unless government is hosting an election. Substantive rights are different; my right to speak exists independently of any governmental action and, as we shall see, primarily protects against governmental action rather than constraining the parameters of permitted actions.

¹² In the Dworkinian tradition of legal theory, see Ronald M. Dworkin, Hard Cases, 88 Harv. L. Rev. 1057 (1975), my goal here is to identify a rule—an organizing principle—for substantive constitutional rights that fits and justifies what we already do, not to make suggestions for changing rights doctrine. In other words, the paper does not argue that substantive constitutional rights should limit regulation in uncertain markets; it argues that they already do so. That said, my descriptive points generally are not historical; my goal here is not to describe what the Framers thought they were accomplishing when they wrote the words of the First Amendment but rather to describe what we have in fact accomplished by implementing those words over time. In that vein, the theory also explains some of the evolution of substantive rights, justifying our habit of recognizing new implied fundamental rights as norms and preferences change. Furthermore, I do not mean to claim that I have found the single best organizing principle for individual substantive rights; rather, I claim only to be proposing a new organizing principle, and I believe that this new principle has considerable explanatory power that could, at a minimum, be useful in understanding other perspectives of rights and their role.


protected markets, not only making regulatory interventions difficult to pass but also creating a risk that successfully implemented interventions will be invalidated. The mere recognition of a constitutional right is therefore likely to decrease the amount of regulation in the subject market.\textsuperscript{15}

That said, individual substantive rights seem to have very little impact on governmental participation in protected markets. Standard substantive rights neither require nor forbid government to provide relevant services at taxpayer expense. As such, individual substantive rights neither instruct government to participate in protected markets—so as, for example, to increase access to the relevant activities—nor instruct government not to do so. Rather, rights instruct government to refrain from exercising police powers—to refrain from altering individuals’ incentives in protected markets or from otherwise altering the distribution of activity within those markets. To return to the internet example, the right to speak neither requires nor prohibits public provision of internet access for underserved communities, but it might prohibit government from punishing internet service providers for failing to serve a particular area. The regulatory barrier, thus, is one that favors individual private decision-making within constitutionally protected markets, whether or not aggregated private decisions allow most people to engage in those activities.\textsuperscript{16}

In short, this understanding of individual substantive rights is that they are market-preserving rules for a particular set of markets—namely the markets for speech, religion, association, reproduction, and parenting.\textsuperscript{17} As barriers to regulatory adjustment, they are presumptions in favor of private ordering.

On this view, then, what is the justification for individual substantive rights? Why would we want a laissez-faire presumption for any markets at all, and—crucially for constitutional law scholars given the demise of \textit{Lochner}\textsuperscript{18}—why would we want such a presumption for only the particular markets that we have chosen to recognize under the First, Fifth, and Fourteenth Amendments?\textsuperscript{19} Why should we give unique constitutional protection to these markets, including

\textsuperscript{15} See Stevenson, supra note 8.

\textsuperscript{16} The point that rights are agnostic about the final distribution of activity within protected markets is an important one given that regulatory backgrounds and common law baselines affect those distributions. See note 6, infra. Rights’ goal, thus, seems to be to prevent regulation for the sake of preventing regulation, rather than to prevent regulation in order to effect a particular outcome.

\textsuperscript{17} These are the markets that the First, Fifth, and Fourteenth Amendment protect, according to modern interpretations of those rights. For a prior discussion and critique of First Amendment protections as laissez-faire presumptions, see R.H. Coase, The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. 384 (1974) (noting that the First Amendment prevents government from correcting market failures in markets for ideas).

\textsuperscript{18} \textit{Lochner v. New York}, 198 U.S. 45, 59 (1905) (“We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee.”).

\textsuperscript{19} For arguments that they should not be treated differently and that all markets should be protected from regulation, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985); Bernard H. Siegan, Economic Liberties and the Constitution (1980). For a general argument that we should hold a consistent perception of government’s ability to regulate in all markets rather than being confident of regulation of goods while skeptical of regulation of ideas, see Coase, supra note 17.
the select few that we have placed within the expansive category of Fifth and Fourteenth Amendment “liberty”?

The justification that I propose centers on a peculiar characteristic of protected markets that renders technocratic regulation uniquely difficult: economic and moral uncertainty. Notwithstanding the growing power of information technologies, we still do not know how to measure economic or moral value of constitutionally protected goods and services. Core aspects of their value are simply insusceptible to economic or moral evaluation. We therefore lack any theory for improvement in constitutionally protected markets’ distributions of goods and services, and without such a theory, a technocratic regulator cannot succeed. From a technocratic perspective, thus, regulatory intervention in uncertain markets will be an arbitrary infringement of liberty as well as a pure waste of resources. And the recognition of a constitutional right provides a useful barrier to such fruitless and wasteful attempts.

What do I mean by economic and moral uncertainty? First, economic: The value of particular behaviors within protected markets—the value to the individual and to the collective of particular religious beliefs, speech acts, associational and intimate choices, and reproductive and parenting decisions—often depends on factors that cannot be measured. The problem for the individual is that core aspects of value—the value to oneself of her own ideas, religious beliefs, friendships and relationships—are difficult or impossible to evaluate after consumption and even harder to predict before consumption. Individuals will therefore be uncertain as to the expected and actual value of their decisions within these markets. As a result of that individual uncertainty, the benefit to the individual and to the collective of providing one person rather than another with an idea or a microphone, with an altar or a pulpit, with a membership card, or with a child is impossible to predict, even probabilistically. In other words, the inevitable distributional effect that markets and regulators have under conditions of scarcity is, in all protected markets, obfuscated by high degrees of uncertainty and therefore impossible to evaluate, either ex ante or ex post.20

Second, moral uncertainty: In these markets, American society lacks a moral or ethical consensus as to the proper evaluative criteria for distributional success. Sometimes the problem is that we lack any moral sense at all about the distributional question, either because we acknowledge that multiple moral viewpoints are equally valid or because we deem the relevant questions to be non-moral questions. Speech and religion provide examples of this problem. Should communication resources be allocated to the rich, the poor, the educated, the uneducated, the young, the old, the liberal, the conservative, the religious, the secular? Should religious resources—such as land for temples, printing for religious manifests, finances for outreach, etc.—be allocated to Christians, Jews, Hindus, Muslims, Buddhists, atheists, general prayer? We cannot answer these questions—the questions themselves might even seem strange—because we do not collectively know or believe that any given distribution of resources is better than any other. In other cases, the problem is that two or more opposing (and plausible) moral views are competing for supremacy, and we are not sure which

20 See generally Frank H. Knight, Risk, Uncertainty, and Profit (1971); Part II.A.1, infra.
moral viewpoint is more deeply held or more widely held. Abortion and same-sex intimacy provide examples of this problem. Although large groups consider abortion immoral, other large groups disagree, and both sides have plausible moral arguments to support their positions. The same is true of same-sex intimacy. The problem is that we don’t know which side is right (for deontological theories of regulation) or which side is stronger (for welfarist theories of regulation). As such, the market’s distribution cannot be steered according to public morals since our polity seems deeply ambivalent, to the point of uncertainty.\(^{21}\)

Given conditions of both economic and moral uncertainty, a strong presumption against technocratic regulatory intervention makes sense. Because these conditions prevent us from evaluating centrally relevant costs and benefits, a technocratic regulator cannot formulate a theoretical definition of improvement or success for the market’s distribution. Economic uncertainty prevents the regulator from identifying any discrete harms or market failures that need correcting, and moral uncertainty prevents the regulator from identifying a preferred vector for regulation. The technocrat, thus, will not be able to point to efficiency gains, welfare enhancements, moral victories, or any other relevant group benefit to justify the costs of regulating. A substantive constitutional right thus serves a useful purpose in discouraging definitionally arbitrary and inevitably wasteful infringements of individual liberty.

All of that said, American constitutional rights explicitly recognize that some decisions within protected markets, notwithstanding the markets’ high incidences of uncertainty, might give rise to concrete harms, identifiable market failures, or moral consensuses. Even within protected markets, substantive rights allow regulation of those decisions, so long as the government can show that the law is specifically targeted to fix the defined problem or to enact the moral consensus—in doctrinal terms, that the law is “narrowly tailored to serve a compelling state interest.”\(^{22}\) Substantive constitutional rights thus strike an elegant balance between discouraging fruitless regulatory attempts in uncertain markets while allowing discrete regulatory interventions to correct known harms or to enact moral consensuses.

It is worth emphasizing at the outset that this doctrinal formulation for strict scrutiny, which is a pure judicial creation in American law, is noteworthy only insofar as it supports the assertion that uncertainty is important to constitutional rights both in theory and in practice. Unlike most structural theorists of constitutional rights,\(^{23}\) I do not seek here to justify judicial supremacy over legislative or executive judgment. From my technocratic perspective, the usefulness of constitutional rights is the increased cost of regulating that attends them, and that increased cost would attach whether or not we had a system of

\(^{21}\)See Part II.A.2, infra.

\(^{22}\)Lawrence, 539 U.S. at 593 (“Our opinions applying the doctrine known as ‘substantive due process’ hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.”).

judicial review. Without judicial review, the barrier would be purely political, providing opponents of the regulation with a rhetorical tool that might backfire on pro-regulatory representatives during election season, but it would be a real barrier nonetheless. With judicial review, of course, the barrier retains political force but also gains a more concrete dimension, creating a risk that regulatory efforts (and the political capital expended on them) will be wasted when courts refuse to enforce the resulting regulations. It is also worth noting at the outset that this doctrinal formulation requires not only Congress—in national and territorial regulations—but also the states to assert technocratic justifications when attempting to regulate protected markets. This point raises an interesting question, which I will not address here, about whose market failure or moral consensus should count. If, for example, there is a moral consensus in Texas that homosexuality is reprehensible, should that count as a compelling state interest, even if the consensus does not extend beyond the state’s borders? Again, I will not address that question here, though I note it for future discussion.

This paper proceeds as follows. Part I elaborates the technocratic impact of individual substantive rights, demonstrating that such rights are enforced as barriers to regulation—and therefore as presumptions in favor of private ordering—rather than as individual entitlements. Part II fleshes out the claim that uncertainty is a predominant characteristic of constitutionally protected markets for speech, religion, association, reproduction, and parenting. Part III provides justifications for disfavoring regulation under conditions of uncertainty and compares those justifications to existing theories of substantive rights. Part IV briefly notes the elegance of the doctrinal formulation permitting “narrowly tailored” laws that “serve a compelling state interest” and identifies the questions of institutional competence that arise from that formulation. Part V concludes.

I. The Technocratic Function of Rights

There is still a strong sense in American jurisprudence—and in the collective consciousness of the American people—that constitutional rights provide individual entitlements. They are natural; they are fundamental; they are inalienable. They are not instrumental or technocratic.

While this view may be rhetorically and philosophically useful, it does not describe the real-world function of individual substantive rights. Granted, substantive rights are non-contingent, meaning that my freedom of speech—to the extent that it protects me at all—protects all of the speech that I utter. This point distinguishes speech, religion, association, reproduction, and parenting from procedural rights like the jury right, for example, which protects me only in the context of a state-sponsored trial. It is therefore easy to understand why non-lawyers might think that I have an individual entitlement—perhaps even an absolute entitlement—to speak.

As enforced, however, substantive rights have four characteristics that cement their function as technocratic tools rather than individual entitlements. First, substantive rights are valid only against governmental action; they have no enforcement power against private action. Second, substantive rights require government to leave us free to engage in protected activities but not to enable us
to engage in those activities. Third, rights focus on government’s *police power* rather than its *market power*. Finally, rights are not absolute; they are all subject to a state-interest override. Together, these four points demonstrate not only that substantive constitutional rights are tools rather than entitlements but also that these rights function as *market-preserving* tools—as laissez-faire presumptions for protected markets.

Although none of these points is novel or controversial in the abstract, the conclusion that substantive rights must be limited laissez-faire presumptions is still a contentious and under-developed one in the literature. This Part will focus on the first three characteristics of substantive rights (leaving the fourth for Part IV of the paper), serving primarily to elaborate and defend the technocratic view of substantive rights as market-preserving tools.

### A. Governmental vs. Private Action

As anyone trained in American law knows, substantive constitutional rights protect against governmental action only, not private action. I am referring, of course, to the state action doctrine—the requirement that the defendant in constitutional litigation be a government entity or public actor. This requirement has a firm textual basis in the Constitution; the First Amendment specifies that it restrains “Congress” and the Fourteenth Amendment that it restrains the “State.” The Fifth and Fourteenth Amendments both refer to “due process of law.”

The Constitution, thus, intends to limit governmental action only, not private action.

For now, I mean to highlight this doctrine only in its most obtuse form. If a private party prevents me from speaking—by force or punishment or what have you, but without governmental help of any kind—I have no First Amendment claim. To any American lawyer, this point is so obvious as to be uninteresting. But if we zoom out to a systemic example, the idea is central to the technocratic perspective of rights.

Imagine that the extant market fails to provide me with affordable access to assistive reproductive technologies, either because no doctors are willing to provide those services in my community or because I cannot afford the services at the price the market offers. This state of affairs would undoubtedly hamper my

---

25 U.S. Const. Amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition Government for a redress of grievances.”).
26 U.S. Const. Amend. XIV cl. 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
27 Id. (emphasis added); U.S. Const. Amend. V (emphasis added) (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).
ability to exercise a constitutional right to procreative autonomy, just as a state ban on in vitro fertilization would. As with a private party punishing me for speaking, however, this deprivation would be privately caused, and I therefore would have no constitutional recourse against doctors for avoiding my community or against my boss for paying me too little.

For technocracy, this example is important in demonstrating the following central idea: The private market is free to set the supply and the price of constitutionally protected goods and services, even if the market-clearing supply is too low or the market-clearing price is too high to allow universal access.

B. Freedom vs. Enablement

Closely intertwined with the state action doctrine is the idea that substantive constitutional rights are “negative” rather than “positive,” a distinction that most scholars evoke in asserting that American rights are restrictions on state action rather than obligations for such action. Originally Isaiah Berlin’s, this distinction gained particular prominence in American constitutional law in the 1980s, in a series of federal appellate cases authored by Judge Richard Posner (an original technocrat). In describing the American constitution as a “charter of negative rights,” Judge Posner famously explained: “The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”

This characteristic of rights is the most controversial of the four that I discuss here, and it is also the best-rehearsed in the literature. For my purposes, however, the important distinction is not the classic and well-rehearsed one between restrictions on and obligations for government action. As many scholars have noted, that distinction is of limited use in American constitutional law given extensive affirmative obligations in our procedural rights (obligations for government to provide trials, juries, lawyers, elections, etc.) and also given our

31 Jackson, 715 F.2d at 1203.
system of judicial review. With judicial review, even our classically negative substantive rights give rise to intensive obligations for governmental intervention in the form of judicial invalidation of infringing legislative or executive action. Our negative rights, thus, oblige significant state action.

For my purposes, though, the important distinction is a narrower and less controversial one, which Cass Sunstein has famously elaborated in his critiques of common law baselines. Substantive rights require that individuals be free to engage in protected activities without requiring that we be enabled to engage in those activities. In technocratic terms, the salient point is as follows: Just as individual substantive rights allow the private market to set supply and price without concern for universal access to protected activities, so too do they allow government to set background regulatory environments, including common law baselines, without concern for such access.

Consistently with the state action doctrine, we could imagine a substantive constitutional right to life that would require the government to enforce a living wage, for example, enabling every individual to live. Or we could imagine a substantive right to speak that would require government to ensure that all citizens had access to internet services, telephone services, or even book and publishing allowances, enabling every individual to speak and to listen. For state action doctrine purpose, a lawsuit demanding such public assistance would name the government as the defendant and would complain of a particular and contrary governmental decision—either a concrete decision that is inadequate (such as enforcing an insufficient minimum wage) or a more abstract decision to let common law entitlements guide distributions (such as refusing to set any minimum wage at all, even though common law contract rules have created unequal bargaining positions that a minimum wage law would help to correct).

But American constitutional rights do not support such claims. They are not the so-called “social and economic guarantees” of international human rights, providing individual entitlements to public assistance in protected markets.

Substantive constitutional rights thus seem to be agnostic towards protected markets’ distributional outcomes. Private ordering—which necessarily occurs against the backdrop of general regulatory decisions—will give rise to particular distributions of protected activities. But our constitutional freedoms do not oblige government to alter those distributions—and might forbid government from trying to alter those distributions—even if the privately ordered distributions prevent many people from speaking, from practicing religion, from engaging in preferred associations, from reproducing, or from being good parents.

From the Constitution’s perspective and from the government’s perspective, we must all be free to speak, but we needn’t all be able to speak.

33 Posner, supra note 32, at 3 (noting that every negative liberty entails “a corresponding positive liberty” by requiring “a public machinery of rights protection and enforcement, a machinery that includes police, prosecutors, judges, and even publicly employed or subsidized lawyers”); Stephen Holmes & Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes (1999).
34 See Sunstein, New Deal, supra note 6, at 501–04; Sunstein, Lochner’s Legacy, supra note 6.
C. Police Power vs. Market Power

The third relevant characteristic of individual substantive rights is that they restrict government’s police power rather than its market power. This distinction is one that neither the academic literature nor the doctrine has elaborated much in the context of substantive constitutional rights, so I will go into greater detail here than I did for the prior two characteristics, explaining my sense that this distinction is useful for the law and theory of individual substantive rights.\(^{36}\)

Government can use two kinds of mechanisms to intervene in markets: regulatory mechanisms and participatory mechanisms.\(^{37}\) The distinction between the two bears doctrinal importance in dormant commerce clause jurisprudence, with the Supreme Court holding that states may discriminate against out-of-state citizens if they are acting as market participants but not if they are acting as market regulators.\(^{38}\) Although the line between the two roles is sometimes formalistic in practice,\(^{39}\) the conceptual difference between proprietary and regulatory actions is fairly clear: When a government chooses to provide or to consume a good or service at public expense, it is acting as a market participant; when it creates incentives for private provision of goods or services or for private consumption of goods or services, it is acting as a market regulator.\(^{40}\) Payment of unemployment benefits, thus, is a participatory action (public provision of wages) while the minimum wage law is a regulatory action (an incentive for private

---


\(^{38}\) Reeves, Inc. v. Stake, 447 U.S. 429, 436–37 (1980) (“The basic distinction . . . between States as market participants and States as market regulators makes good sense and sound law . . . [because] the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.”); see also Norman R. Williams & Brannon P. Denning, The “New Protectionism” and the American Common Market, 85 Notre Dame L. Rev. 247, 294–303 (2009) (discussing the role of the market participant doctrine in two recent cases, United Haulers Ass’n v. Oneida-Hermiker Solid Waste Management Authority, 550 U.S. 330 (2007), and Dept. of Revenue v. Davis, 553 U.S. 328 (2007)).


\(^{40}\) There is some debate as to where exactly tax exemption falls within this framework. In Kentucky v. Davis, for example, there was disagreement as to whether tax exempt status for state municipal bonds (and not similar out of state bonds) should be seen as solely participatory, or part regulatory, part participatory. See Kentucky v. Davis, 553 U.S. 328, 345 (2008) (Souter, J., concurring) (arguing that issuing market regulation is acceptable when it goes “hand in hand” with participation); cf. Dan T. Coenen, The Supreme Court’s Municipal Bond Decision and the Market-Participant Exception to the Dormant Commerce Clause, 70 Ohio St. L.J. 1179 (2009) (arguing that Souter mistakes this dual approach for an either-or designation of participant or regulator in traditional Dormant Commerce Clause jurisprudence).
employers to use particular wage rates). Road construction and maintenance are participatory actions (public consumption of construction services) while speed limit laws are regulatory ones (incentives for private behavior). In general, regulatory actions utilize police power while participatory actions exercise market power.

Although a Commerce Clause doctrine,\(^{41}\) this distinction seems useful to rights law as well. The descriptive point that substantive rights focus on police power rather than market power helps to clarify the scopes of the state action doctrine and the freedom-enablement distinction. First, let me demonstrate the descriptive power of the participant-regulator distinction for individual substantive rights, and then I will say more about the usefulness of the distinction for understanding the other two characteristics.

1. Police Power and Market Power in Rights Doctrine

For the most part, the First, Fifth, and Fourteenth Amendments’ substantive rights protect us only against exercises of police power. They neither protect us from exercises of market power nor entitle us to demand such exercises.\(^{42}\) For a simple example: The President may say whatever he chooses in the State of the Union address, and the government may air the speech live on public broadcast networks. These are participatory activities. The government may not, however, arrest or fine me for failing to watch the address, nor may the government give tax credits, for example, to the people who do watch the address. Those would be regulatory activities.

This distinction explains the Court’s controversial opinions in the abortion funding cases, which hold that public health insurance programs (particularly Medicaid) needn’t cover the abortion procedure.\(^{43}\) The provision of public health insurance is a participatory rather than a regulatory activity, and the government is free to decide whether to provide any such insurance at all. As a result, government is also free to decide whether or not to include abortion coverage in any public insurance programs it chooses to provide—even if the refusal to provide coverage will effectually prevent some women from exercising their reproductive rights.

This point may seem indistinguishable from the claim above that government needn’t enable indigent women to exercise their reproductive freedoms, but an important nuance arises when government decides to enter a market. It may be the case that private charitable organizations would provide healthcare coverage for indigent women, including coverage for abortion procedures, but for the government’s decision to provide Medicaid. If so, then the government’s decision to enter the market has decreased women’s access to

---

\(^{41}\) Note Garcia v. San Antonio Metropolitan Transit Authority and its repeal of a similar distinction for state immunity

\(^{42}\) Remember here that I am talking about only substantive rights. Procedural rights to trials, juries, and the like require significant exercises of market power; for those rights, government must operate courts, employ judges, provide lawyers, etc.—all exercises of market participation rather than regulation.

abortion procedures in a real way. In other words, government’s exercise of market power—like its exercise of regulatory power—might change the market landscape in ways that hamper access to constitutionally protected goods and services. Nevertheless, constitutional rights do not correct those deprivations. Although the Court has consistently invalidated regulatory decisions that make it hard for women to obtain abortions,\(^\text{44}\) it has upheld participatory decisions that could have similar effects.

That said, constitutional rights are not entirely silent as to the makeup or management of government’s participatory activities. Most obviously, the Constitution includes a textually specified equality constraint.\(^\text{45}\) Government may not manage its participatory programs discriminatorily, providing Medicaid only to white Americans, for example, or only to women. Beyond the Equal Protection Clause, though, the five core substantive rights seem also to restrain participatory actions in interesting ways. Specifically, they seem to limit government’s ability to lever its market power into de facto regulatory constraints. Substantive rights prohibit government from using regulatory (rather than competitive) strategies within its participatory programs to monopolize a market or otherwise to thwart constitutional freedoms. Through two doctrinal mechanisms, constitutional rights limit regulation even when government regulates only itself-as-market-participant, but the limits are less stringent when government is not a monopolist and is not seeking to become one. The two doctrinal mechanisms are the “public forum” rule, which is specific to speech rights, and the rule against “unconstitutional conditions,” which is general to individual rights.

Pursuant to the “public forum”\(^\text{46}\) rule, the First Amendment prohibits government from regulating speech activities in the property forums that it monopolizes—streets and parks. It places far fewer restrictions, though, on government’s ability to regulate the same activities in non-monopolized property categories, or “nonpublic forums.”\(^\text{47}\) Government, thus, may not use regulatory strategies within its monopolistic market power to render speech inordinately difficult, though it remains free to decide whether or not to provide public forums in the first place.\(^\text{48}\)


\(^{45}\) See U.S. Const. Amend. XIV cl. 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

\(^{46}\) See generally Stone, supra note 24, at 1266–87.

\(^{47}\) See generally id.

\(^{48}\) This rule is somewhat more muddled in government employment than in regulation of physical forums. As the civil service employer, government is constrained in its ability to regulate employee speech, perhaps because it is a monopolist with respect to the individual employee or perhaps because civil service is itself unique enough that government should be considered a
The rule against “unconstitutional conditions” is less developed than the public forum rule, but in general, it restricts government’s ability to condition receipt of public goods or services on waivers of constitutional rights. To return to the abortion funding example: Although government may refuse to pay for abortions under Medicaid, it probably may not require a woman, as a condition of Medicaid eligibility, to promise that she will not have an abortion. This point returns us to the concern above that government participation in health insurance markets might supplant private participation and thereby diminish access to constitutionally protected services. The restriction on unconstitutional conditions diminishes that possibility by protecting a supplemental market. Because government may not condition Medicaid eligibility on a waiver of constitutional rights, there remains a possibility that private organizations can participate in the market alongside government, providing abortion coverage where government does not. In technocratic terms, this possibility demonstrates that government may not use its participatory programs to decrease market demand for protected activities.

In short, individual substantive rights allow government to act as a market participant—even when its doing so might diminish private access to constitutionally protected activities—but the rules protecting public forums and invalidating unconstitutional conditions prevent government from leveraging participatory programs to supplant a protected market. Private parties must remain free to participate alongside government.

There is one glaring exception to this general rule—religious freedom—and I cannot end this discussion without acknowledging it: Though not without controversy, the First Amendment has been understood to prohibit not only governmental regulation of religion but also governmental participation in religious markets. The Establishment Clause, particularly given its appearance monopolist in any event. But the general case that government is a monopolist in the employment context is admittedly hard to make. See generally Randy J. Kozel, Reconceptualizing Public Employee Speech, 99 Nw. U. L. Rev. 1007, 1015-1017 (2005); Randall P. Bezanson & William G. Buss, 86 Iowa L. Rev. 1377, 1488-1491 (2001); Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 Tex. L. Rev. 1, 54-60 (1990); Alberto B. Lopez, Equal Access and the Public Forum: Pinette’s Imbalance of Free Speech and Establishment, 55 Baylor L. Rev. 167, 197-199 (2003).

49 See generally Stone, supra note 46, at 1598–1608.
51 See generally, Mark Tushnet, The Constitution of Religion, 18 Conn. L. Rev. 701 (1986); Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195 (1992); see also Jesse H. Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 330 (arguing that the Establishment Clause is only violated by solely religious activity that is likely to compromise or influence a student’s freedom of religious choice or belief). Note that school vouchers—subsidies for religious consumption—would be regulatory, not participatory. Public school prayer is participatory rather than regulatory because the prayers are provided directly by public institutions and employees. See Stone, supra note 46.
alongside the regulation-focused Free Exercise Clause, provides a textual basis for this exception, but it is not entirely clear that all governmental participation—beyond public establishment of a national religion—should offend the Constitution. The Supreme Court has simply chosen over time to apply the Clause more broadly to prohibit participation in religious markets. But, to misuse an expression, this is the exception that proves the rule. Most substantive rights address regulation only.

2. The State Action Doctrine and Freedom-Enablement Distinction in Light of the Participant-Regulator Distinction

Perhaps the most infamous case applying the state action doctrine and the freedom-enablement distinction is *DeShaney v. Winnebago County Department of Social Services*, also known as the “Poor Joshua” case. In that case, the Supreme Court rejected a Fourteenth Amendment claim premised on the county’s failure to protect a child from his abusive father. The Winnebago County social services department had been aware of and monitoring Joshua DeShaney’s case for about two years, but the county had left the child in his father’s custody. When Joshua was four years old, Randy DeShaney beat his son so severely that Joshua needed to be permanently institutionalized. Joshua and his mother sued the county for damages on a substantive due process theory, claiming that the county, once it had learned of the abuse, had an affirmative obligation to protect Joshua’s life and liberty. The Court rejected the claim.

Not surprisingly, the holding evoked immediate controversy, including commentary questioning the applicability of the state action doctrine and the freedom-enablement distinction to the particular facts of Joshua’s case. And it is easy to see why. The state did act in *DeShaney*, receiving repeated reports from the hospital that Joshua bore injuries implicating abuse, entering into a voluntary agreement with Randy DeShaney that he would enroll his son in school and that his girlfriend would move out of the house, monitoring Joshua’s family situation and health regularly for two years, and, most importantly, deciding to leave

52 U.S. Const. Amend. I (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…”).
55 Id. at 213 (Blackmun, J., dissenting) (“Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . ‘dutifully recorded these incidents in [their] files.’ It is a sad commentary upon American life[.]”).
56 Id. at 192–93 (reporting that the social services department started monitoring Joshua’s case in January 1982 and that he was beaten severely in March 1984).
Joshua in his father’s custody despite Randy’s noncompliance with his voluntary agreement and despite continuing reports of abuse.

Furthermore, Joshua and his mother were not asking the state to enable Joshua’s access to life and liberty in the standard sense. They were not seeking public assistance to overcome poverty or other private market deprivations. Rather, they were asserting that the state’s decision to leave Joshua in his father’s custody had exposed him to a concrete deprivation of liberty.

The majority opinion’s insistence that the injury was privately caused is not particularly helpful here, either. Many governmental decisions might be unconstitutional because they expose someone to injury that is proximally private. Imagine, for example, that a state refused to license any doctor who performed abortions but did not criminalize women’s consumption of abortion procedures. Many doctors, of course, would refuse to provide the procedure, and their refusal would be the proximate cause of many women’s constitutional injury. But such a licensing regulation would undoubtedly be unconstitutional. Here’s the thing: The decision whether or not to license doctors is not importantly different from the decision whether or not to grant custody—essentially licensing Randy DeShaney to serve as a father.

That, however, is where we arrive at the participant-regulator distinction. Joshua and his mother didn’t sue the custody-determining state, Wyoming, and base their claim on the state’s poor custody determination or the state’s poor custody rules—impeachable regulatory actions. Instead, they sued a Wisconsin social services department, basing their claim on the county’s incompetent child protective services—a poor participatory program. Their claim was that the state should have initiated regulatory intervention—and didn’t. Quite consistently with the corpus of doctrine, the Court held that substantive constitutional rights cannot support such a claim. The government is under no obligation to provide child protective services at all, as the Court pointed out, and even if it were, it would be under no (judicially reviewable) obligation to provide them well. The quality of our public services is up to us as voters and taxpayers to determine.

David Strauss, in criticizing the DeShaney opinion, analogized the social services’ actions to a judge reaching a biased opinion in a case, thereby allowing a private injury to stand. But that’s not what happened. The judge’s analog here—the social services department—never reached a decision at all. The better analogy, then, is to a judge dragging her feet in granting an injunction, thereby allowing damages to accumulate for longer—or, for a different analogy, to a police force taking a long time to build a case against a suspected serial killer, thereby allowing the killer to reach another victim before arrest. Substantive constitutional claims against the judge or the police for these kinds of participatory incompetence would undoubtedly fail.

What, then, does any of this have to do with the technocratic view of individual substantive rights? The important point is that substantive constitutional rights are particularly strong against only two categories of governmental intervention. First, rights protect against direct restraints of liberty—exercises of police power that forcibly alter individuals’ incentives to

58 Id.
engage in protected activities. Second, substantive rights also protect against governmental leveraging of market power to box out private players in protected markets—indirect assaults on market freedom within protected realms. Crucially, though, individual substantive rights do not protect against or provide for ordinary public participation in protected markets.

This combination of protections reinforces the idea that substantive rights are market-preserving tools, and it reinforces the view that the rights are agnostic towards the final distribution of protected activities within the preserved market. Individual substantive rights are satisfied as long as individuals remain free to participate in relevant markets without governmental restraint, even if alongside ordinary public participation. As long as government is not behaving differently than a normal private business, it is not attempting to skew the market’s distributions in any uniquely freedom-restricting way.

In the DeShaney case, the point is that the existence and efforts of a woefully incompetent Winnebago County Department of Social Services did not prevent Joshua’s mother from following him to Wisconsin and suing again for custody in light of the evidence of abuse. She (and others) remained free to exercise private power and to engage in private ordering—alongside Winnebago County’s public participation—to protect Joshua’s life and liberty.

D. Conclusion

Many of the claims in this part of the paper, including the central claim that rights are market-preserving tools, are not novel. There is one idea, though, that is novel in its technocratic formulation, and that idea bears repeating: Individual substantive rights are agnostic towards markets’ distributional outcomes. Rights block governmental attempts to restrict access to constitutionally protected goods and services, but they might also block regulatory attempts to expand such access—such as by requiring internet service providers to be neutral in bandwidth allocation or by giving tax credits to citizens who watch the State of the Union address. Quite troublingly, I think, for those who hold to a fundamental rights view of substantive constitutional freedoms, rights do not seek to maximize access to protected activities—or even to optimize access within resource constraints. Rather, substantive rights put a hefty thumb on the scale in favor of private ordering, completely irrespective of how well private ordering will steer constitutionally protected goods and services.

II. Economic and Moral Uncertainty in Protected Markets

There is a problem, though, with embracing the technocratic view of rights: It leaves us without a good sense of why we have some rights but not others.

For those who hold that constitutional rights are fundamental, there is no need to justify our selection criteria. We protect fundamental rights because they are fundamental, and the rights that are fundamental are the ones that we protect

59 See Part III.C.3, infra, for further discussion of fundamental rights theories.
(doctrinally, the rights we have historically protected\textsuperscript{60}). It’s soothingly tautological.\textsuperscript{61} But if we acknowledge that constitutional rights are simply laissez-faire presumptions for a limited set of markets—\textit{not} genuine entitlements to engage in fundamental human activities—then we need to ask why we define the set of markets as we do. What do the protected markets have in common that distinguishes them from all the others? And how do we decide whether a given market should be shielded from regulation or not, particularly given the breadth of the textual commands to protect “speech,” “religion,” “life,” and “liberty”? These questions are especially important—and especially so for a technocrat—given the demise of \textit{Lochner}. With broad scholarly consensus that economic substantive due process was wrong and that modern substantive due process is right, we scholars must distinguish the markets for reproduction and parenting on the one hand from the markets for labor and widgets on the other. Why leave the former to private ordering while allowing government to tinker with the latter?

My answer to these questions has two parts. The first is a purely descriptive and empirical claim that constitutionally protected markets are distinguished from others by high degrees of economic and moral uncertainty. The second is a normative claim that this distinguishing characteristic provides a good reason for hindering regulation in protected markets. Reserving the normative claim for Part III of the paper, this Part will elaborate the descriptive claim, demonstrating that constitutionally protected markets are characterized by high degrees of uncertainty.

What does that mean? With respect to economic uncertainty, the problem is that individual expected values for constitutionally protected goods and services are difficult or impossible to determine due to inherent uncertainties as to core aspects of value. Because of those uncertainties, willingness-to-pay metrics\textsuperscript{62} systematically fail as a short-hand for comparative utility and distributional success. With respect to moral uncertainty, the problem is either that society is deeply divided on central moral questions, to an extent that we cannot confidently determine which moral viewpoint is held more widely or more deeply, or that society simply has no defined moral or ethical criteria for decision-making in the face of economic uncertainty. Either of these problems leaves us without a collective moral preference for distributing scarce resources.

Importantly, these problems exist to some extent in every market. The claim here is that constitutionally protected markets are different in degree from

\textsuperscript{60}See Wash. v. Glucksberg, 521 U.S. 702, 727-728 (1997) (history and tradition rule for implied fundamental rights).

\textsuperscript{61}I mean here to criticize the doctrine of “implied fundamental rights” rather than the robust moral theories of fundamental human rights. For further discussion of the robust theories, see Part III.C.3, infra.

\textsuperscript{62}By “willingness-to-pay metrics,” I mean estimations of individual value that we derive from an individual’s willingness to pay to obtain a good or service. In other words, we usually assume that a person who pays $15 for a hammer must get more than $15 worth of value from the hammer. Furthermore, if I am willing to pay $15 for the hammer while you are willing to pay only $10 for the same hammer, then we assume that I will get more value from the hammer than you would, which is how we use willingness-to-pay to approximate comparative utility.
unprotected markets, not that they are different in kind. The uncertainty problems are more profound in—more central to—protected markets than unprotected ones. Additionally, the claim is only that uncertainties abound in protected markets, not that they are universally and absolutely present in protected markets. There may be individual instances of speech, religion, association, reproduction, and parenting that we can evaluate in either economic or moral terms (or both).

A. Economic Uncertainty

There is a distinction, first drawn by economist Frank Knight, between an outcome with a known probability (a “risk”) and one with an unknown probability (an “uncertainty”). When we don’t know what the precise outcome of our action will be but can predict the likelihoods of all possible outcomes, then taking the action involves risk. Simple examples include rolling a die (an unknown outcome with a known 1 in 6 probability of rolling a two) and flipping a coin (an unknown outcome with a known 1 in 2 probability of landing tails). When we don’t know the outcome and cannot predict the likelihoods of possible outcomes, then taking the action involves uncertainty. Uncertainty is prevalent in complex systems, such as ecological systems; the consequences of species extinction, for example, are uncertain.

In one important respect, Knightean uncertainty pervades regulatory decision-making. That respect is one that Lionel Robbins famously elaborated in 1935: that we cannot (at least yet, perhaps at all) draw interpersonal comparisons of utility. As such, we cannot predict the probable social value of a regulatory intervention because the magnitude and even the valence of redistributional effects will be unknown. That is, we will not know whether the shift in resources that results from regulation will increase or decrease collective utility because in most cases of quotidian regulation we will not be able to compare the losing parties’ (average or total) utility loss to the winning parties’

---

63 See generally Knight, supra note 20.
65 See Gary Lawson, Efficiency and Individualism, 42 Duke L.J. 53, 62–63 (1992) (noting that scholars who discuss the impossibility of interpersonal comparisons of utility might mean either that we currently lack a means of measuring individual utility or that individual utilities are inherently incommensurable and arguing that interpersonal comparisons represent “category mistake[s]” like talking “about a happy rock or a greenish shade of cold”).
Individuals’ subjective utilities are uncertain, and comparative utility is therefore likewise. For every market, thus, it is possible that regulatory interventions will fail to improve the market’s distribution, at least from a technocratic perspective.

Although this problem is undoubtedly present in every regulatory regime, we have opted in most to rely on the short-hand corrective of willingness-to-pay—usually in a standardized currency such as dollars, but occasionally in units of time or effort—as a metric for both individual and comparative utility. In other words, we have assumed that an individual who pays $15 for a hammer has gained at least $15 worth of value or satisfaction from that hammer, and we have assumed that, between two parties, the one that is willing to pay more for the hammer values it more. Willingness-to-pay, thus, allows concrete comparisons across humans, if not accurate ones due to differing marginal utilities of dollars, time, and effort and perhaps due to the inherent fallacy of comparing individuals’ subjective utilities. But, at a minimum, willingness-to-pay is a definable and usable metric for distributional success for most regulatory efforts.

In the markets for speech, religion, association, reproduction, and parenting, however, there are systematic barriers to determining both individual and comparative utility, and those barriers cause willingness-to-pay systematically to fail. Importantly, the barriers in constitutionally protected markets affect central determinants of individual and collective value and are therefore more severe than marginal uncertainties about hedonic or psychic utility, such as those that Professor Robbins emphasized. That is, in these markets, individuals’ expected utility is exceedingly difficult to define because central rather than marginal components of value are impossible to measure. Specifically, the individual expected value of many ideas, religious beliefs, associational choices, reproductive decisions, and parenting decisions is impossible to calculate—even for the individual consumer—both before and after consumption. When expected value is undefined or uncertain in a Knightean sense, the rational willingness-to-pay is impossible to determine, and individual and comparative decisions become arbitrary.

Importantly, my point here does not depend on difficulties in managing a commoditized market for these goods and services, such as difficulties in assigning and enforcing property rights for ideas. My point is not the oft-made one that economic markets for constitutional goods might systematically fail.

---

67 Quotidian regulatory decisions do not involve obvious tradeoffs of large and diffuse harms against small and consolidated benefits or vice versa, cf. Amartya Sen, Collective Choice and Social Welfare 99 (1970) (noting Emperor Nero’s burning of Rome as an example of a consolidated benefit that did not outweigh the collective loss to the Romans).
70 See Lawson, supra note 65, at 92–96 (noting that willingness-to-pay must fail as a stand-in for individual comparisons of utility because the individual comparisons themselves are category mistakes).
Instead, the point is that individual and collective decision-making in these regimes—through any kind of market, whether commoditized or rarified or otherwise—will be importantly arbitrary.

1. Individual Expected Utility

When and why would a potential consumer be unable to determine her own expected value? There are three related factors that contribute to the problem, all of which exist to some degree in each constitutionally protected market: the hedonic centrality problem, the uncertain valence problem, and the long/fat tails problem.\(^71\)

a. Hedonic Centrality

For many of the markets that the Constitution protects, an obvious cause of uncertainty about individual utility is the one that Professor Robbins focused on when discussing problems of comparative utility: the difficulties of predicting and measuring psychic or hedonic consequences—difficulties of measuring individuals’ satisfaction. In most economic markets, however, those components of utility are marginal rather than central and are incorporated into willingness-to-pay metrics. For example, although I might get satisfaction out of buying and owning a car, that is probably not the primary reason that I would decide to buy a car rather than take the subway. And if it is, then the difference in price between taking the subway and driving the car will provide a rough approximation, in monetary terms, of my hedonic gain.

In constitutionally protected markets, though, hedonic consequences are of greater-than-usual importance. In speech, for example, my decision about whether or not to follow the news or to read a novel, particularly where news and novels are unrelated to my profession, might have much more to do with the satisfaction I get from those activities than with any concrete aspects of utility, such as wealth or profit. (We can, in fact, definitionally assume that I will not gain any economic profit from recreational reading.) Similarly, my decisions about whether to have a child, whether to engage in intimate or other interpersonal relationships, and whether to practice a religion might center primarily on the hedonic gains that I expect from those activities. In short, for most people, choices among ideas, relationships, and religions are hedonically motivated—or at least are motivated by something other than monetary profit.\(^72\)

Because, as noted, these hedonic measurement problems are present to some degree in all economic markets, this characteristic of constitutionally protected markets is truly a distinction of degree rather than kind. But even if the difference of degree were extremely large, there are a few reasons that this aspect of protected markets, taken alone, would fail to explain our choices about which

\(^71\) For statistical and mathematical discussions of fat tails and feedback, see Farber, supra note 64, at 17–30.

markets to protect. First, hedonic centrality is probably a characteristic of all markets for recreation, including regulable markets for games and sports, for example. Second, there are available willingness-to-pay guides that might, if they worked and represented true choices, capture much of the hedonic value in all constitutionally protected markets. For example, there are both direct and ancillary commercial markets that allow willingness-to-pay approximations for internet access, magazines and newspapers, cable news, novels, artistic works, religious services, religious books, contraception, abortion surgeries, fertility treatments, intimate associations (albeit an illicit market in most states), private schools (and public ones if we think that taxes and bond issues demonstrate willingness to pay), etc. Finally, there are also non-hedonic aspects of most constitutionally protected activities, including wealth-maximizing motivations to engage in some kinds of speech (obviously commercial speech but also arguably political speech), to engage in some religious exercises (such as praying for greater prosperity), and to mate, reproduce and parent (such as a hope that our spouses and children will support us).

If the hedonic centrality problem were the only distinguishing feature of constitutionally protected markets, therefore, it would not be enough to justify the Constitution’s dramatically different treatment of regulation in those markets. The other two problems that I will discuss, however—the problems of uncertain valence and long/fat tails—make even the measurable aspects of individual value difficult to predict and evaluate. The following two subsections will therefore focus as much as possible on non-hedonic aspects of value.

b. Uncertain Valence

The problem of uncertain valence arises when (1) a good or service, even if it could be consumed at zero cost and even if consumed without mistake, might provide either positive or negative value and (2) the probable valence (the probability of either positive or negative value) is difficult or impossible to predict for any given instance of consumption.

For most goods, we assume that costless consumption can provide only positive value. If someone gives me a free widget that functions perfectly as intended, I can either use it or sell it, and either way I will gain value from the receipt. If I choose to use it rather than sell it, we assume that I’ve gained value equal to or greater than the opportunity cost of selling. If I simply throw it away, we can assume that the widget was of no value to anyone or that the time cost of selling the widget was greater than the expected income from the sale. Services are slightly trickier than goods because many of them cannot be resold, but we

---

73 See Warren J. Bilkey, A Psychological Approach to Consumer Behavior Analysis, 18 J. Marketing 18, 19 (1953) (“According to Lewinian vector psychology, the underlying basis for an actively made consumer choice is an internal psychic conflict between the person's attraction toward (positive valences) certain attributes of the item or service in question, and his repulsion against (negative valences) other attributes regarding that good or service, including its cost. If his positive valences for it are greater than his negative valences against it the purchase will be made, and vice versa.”); Peter E. Earl, Economics and Psychology: A Survey, 100 Econ. J. 718, 739 (1990) (“[A] a valence is the anticipated satisfaction from an outcome…”)

usually assume (usually quite safely) that a commercially provided service will improve rather than harm the recipient as long as the provider does not make a mistake. Furthermore, we can usually determine after consumption whether the service helped or not and can usually predict with confidence that the same service from the same provider will have the same valence in the future, thereby allowing us to build on experience to make smarter decisions. For example, if I get a massage that hurts my back (even though provided without identifiable error), then I can safely assume that another massage from the same therapist will have the same outcome. If I get a haircut that looks awful, I can safely assume that another haircut from the same stylist will have the same outcome. If many people have similar experiences, we can collectively assume that the individual therapist or the individual stylist is not a very good one, and we can drive him out of business, either through market mechanisms such as boycotts or through regulatory power such as license revocation.

Speech, religion, association, reproduction, and parenting are all importantly different from the usual goods and services just described. For the subjects of individual substantive rights, the valence of utility is difficult to predict before consumption, and it is difficult to assess after consumption. The problem is that central elements of value are uncertain in the Knightean sense.

Let’s start with religion, which provides the clearest example of this problem. Costless consumption of a given religious tenet or set thereof could result in either damnation or redemption—or might have zero utility—depending on unknown truths about deities and afterlives. Even entirely costless and flawless consumption of religious beliefs might either help or hurt us in the end, and we have no means of predicting which will happen. Furthermore, because we can neither measure spiritual payoffs while here nor interview the dead hereafter, we cannot use experience—our own or others’—to determine ex post which religious ideas provided positive value and which provided negative. Costless consumption of religion, thus, provides individual value that is uncertain both before and after consumption. And for most consumers of religious beliefs, these uncertain elements of value are central rather than marginal; the goodness or badness of a religion depends on its truth. Of course, religious ideas might have utility that is neither spiritual nor eternal, but for those purposes, religious ideas are no different from secular ones. To the extent that we like religion as a moral code, for example, the ideas can be protected as ordinary speech.

Speech’s problem of unknown valence is harder to disentangle given that the value of expression is multifaceted. In general, however, the problem is that an idea’s value depends on its persuasiveness, its provocativeness, and/or its truth, all of which are factors that are frequently difficult to predict and evaluate. To make the point more concrete, I’ll start with a central and uncontroversial goal of speech, the pursuit of truth. We’ll assume for now that truth is definite but unknown. For this goal, the value of a given instance of speech depends on whether it steers us towards or away from the truth—whether it persuades us of

---

74 See John Stuart Mill, On Liberty ch. 2 (1859).
Imagine that I (costlessly) hear a false statement of fact expressed on the radio. Most obviously, exposure to such a falsehood might persuade me to believe it, providing negative value. But it might instead provoke me to investigate the truth, which would provide positive value. Alternatively, I might ignore it, in which case it would have no impact at all—zero value. Importantly, we can’t predict ahead of time what my reaction will be because the causal elements of persuasion and provocation—the central determinants of value here—are difficult or impossible to measure. Modern science cannot yet use external factors—my brain structure or chemistry, my test scores, my educational experience, or what have you—to predict reliably whether I will believe, rebut, or ignore the average false idea. Furthermore, my rejection of one false idea—that the Holocaust is a fiction, for example—might not tell us much if anything about whether I will believe a different and unrelated false idea—that President Barack Obama was born in Kenya, say. Experience over time does not help to predict a given individual’s likely utility valence from a particular idea. If, therefore, we prohibit expression of known falsehoods, we might block not only the harm of entrenching falsehood through persuasion but also the benefit of entrenching truth through provocation and rebuttal. And we cannot predict which effect will be greater.

This same pattern holds when the statements at issue are incorrect theories of truth rather than false statements of fact. Political speech falls into this category. In general, political speech centers on open questions of fact, law, and opinion; campaigns are attempts to persuade the electorate of how the world should be, not of how it is, and to persuade the electorate of what we should do to realize that vision. As such, the value of a political idea depends on whether it will improve or harm a complex reality. If we hold to the assumption that truth is definite, then the value of political speech depends on whether it will persuade people to move in the right or wrong direction. And the central point here is that speech advocating the wrong direction might steer many people in the right direction, depending on uncertain factors of persuasion.

This general point, of course, is not at all new. It is Mill’s marketplace of ideas; it is the Hegelian dialectic. We rely on the expression of both thesis and antithesis in our pursuit of truth, and we should not presume to know whether Communist expression in the United States, for example, will help or harm that pursuit, even if we know or agree that Communism is wrong. Indeed, even if we see immediate negative effects from such expression, we do not know whether long-term effects will be positive or negative on net. Indeed, it may be that the process of rebutting an argument and of winning the pursuit for truth will give the truth a stronger hold than it would have had without the challenge. Or it might not. The point is that we don’t know.

---

For other kinds of speech, the problem of uncertain valence centers entirely on hedonism. First, take speech that does not address a definite truth. If there is no best political system, for example, then political speech will guide us towards one or another equally “right” and equally “wrong” vision of government and society. In that case, the political ideas are merely opinions, the value of which depends on their ability to satisfy preferences. That same pattern holds if truth is indefinite or if we define “truth” as a majority or supermajority viewpoint, in which case preferences are the sole determinants of value. For another example, artistic expression probably centers entirely on hedonism. It is hard to predict ahead of time whether an artwork will please its consumer or not because the hedonistic features that give rise to aesthetic value are hard to measure. Also, experience is of limited usefulness given that we expect a single artist sometimes to succeed and sometimes to fail at producing aesthetically pleasing works.

Beyond speech and religion, other constitutionally protected markets follow the same general pattern of uncertain valence, showing difficulties in predicting value both before and after consumption. For reproduction, a costless decision to fertilize a given egg with a given spermatozoon might create a healthy and happy child that provides its parents with positive value or might create a sick or unhappy child that provides its parents with negative value. (Or a happy, healthy child that provides its parents with negative value or a sick, unhealthy child that provides its parents with positive value, though those possibilities would seem explainable only by hedonic factors.) Similarly for the decision to forego creation of a particular child through contraception or abortion (or abstinence, for that matter): that decision might be one to forego a happy, healthy child (negative value) or to forego a sick, unhappy child (positive value). Because of the complexities of the human genome, we cannot use external factors or experience to predict the valence of a particular reproductive combination. For parenting, a costless choice in child-rearing might help or harm the parent-child relationship, depending on the child’s reaction to the intervention. Because of unresolved aspects of the “nature versus nurture” debate, we will remain at least somewhat uncertain of the valence of particular parenting decisions for particular children. For mere association, as for artistic expression, spiritual satisfaction, and opinions, the central problem is that the relevant components of utility seem to be solely hedonic; costless consumption of an interpersonal or group relationship might provide happiness or sadness, and prior relationships do not provide a reliable predictor of future ones.

As I mentioned briefly above, the usefulness of these points does not depend on their universality in given markets. There may be many instances of known valence within these markets (such as the generally negative value of legal

---

78 This point sets aside the creation of additional utility that comes with the creation of another human life for two reasons. First, my goal here is to describe the difficulties in measuring the consumer’s expected utility as she decides whether and how to engage in a market. The creation of additional total utility through the creation of life will be relevant only if the consumer is altruistic. Second, I suspect that many individuals’ reproductive choices are tradeoff choices; the individual will either create this reproductive combination today or a different reproductive combination at some future time, but not both. The point is that we cannot know whether today’s combination is better or worse than tomorrow’s.
malpractice, of incest, or of child abuse or neglect), but as long as some or many decisions will have uncertain valence, the market’s general distributions will be of uncertain total and average value. That said, the point does depend on the centrality of the uncertain factors to the determination of value. If the things about which we’re uncertain are marginal rather than central, then we can make a pretty good guess about overall value. In speech, religion, association, reproduction, and parenting, however, we’re uncertain about core determinants of value, and our best guesses are therefore very likely to be wrong.

c. Long and/or Fat Tails

The long/fat tail effect arises when a probability distribution includes a higher-than-normal percentage of events with high values (fat tails), and the distribution includes some events of extreme or even infinite values (long tails). In a paper about uncertainty and regulation, Dan Farber uses the example of height. Human height follows a normal Gaussian distribution, such that adult humans over seven feet tall or under four feet tall are extremely rare. In a species that followed a fat-tailed distribution, “most creatures would be really short, but nobody would be surprised to see occasionally a hundred-foot-tall monster walking down the street.”

One cause of long and fat tails is the feedback effect, which occurs when an event causes its own escalation, driving up the magnitude of its own value. A simple physical example is feedback in loudspeakers, which causes the magnitude of the noise to escalate. A similar physical rule holds that the expected net effect of an action will be impossible to estimate if higher-order effects might grow rather than shrinking in magnitude. We usually expect ripple effects to fade—to converge to zero—as they spread beyond the initial perturbation, but if the ripples might instead get bigger as they spread, then the distribution of the perturbation’s probable effects will have long tails, making expected value incalculable. In constitutionally protected markets, a similar problem arises due to the length of the relevant timescales for calculating value. For example, the costs and benefits from Aristotle’s speech have been accruing for more than two millennia, and his effect for any given generation might be either greater or lesser than the effect he had on his contemporaries. The total values have thus reached extreme magnitudes, and the net value is impossible to predict.

Though the possibility is an empirical one for which I do not have data, it seems likely that the outcome distributions for speech, religion, association, reproduction, and parenting have these long, fat tails, some of which are caused by feedback effects and others of which are caused by growing ripples and long timescales. Let’s start with speech: We usually expect expression of genocidal ideologies, for example, to have consequences of small magnitudes. In fact, the vast majority of such expression probably falls on deaf ears, while some such expression might give rise to fringe elements, like hate groups, that never have a

79 Farber, supra note 64, at 21 (internal quotations and citations omitted).
80 Id. at 17–18.
81 Id.
major impact. But sometimes the idea escalates to a holocaust. The rare bad outcome from genocidal expression, thus, gives the probability distribution a long, fat tail—long because catastrophic (high magnitude) and fat because approaching zero probability more slowly than usual (higher-than-normal probability, though still rare). That is, most outcomes that we can expect from genocidal expression are bunched around the point of zero value, but the tail of negative outcomes fades to nonexistence more slowly than normal and extends farther than normal to extremely bad outcomes. This particular example is likely one of feedback effects; as one person becomes convinced of genocidal ideas, that person attempts to persuade others and sometimes succeeds, which then causes those converts to persuade others—and so on.

For this example, there might also be a long and fat tail on the positive side of the probability distribution. Related to the unknown valence points above, the expression of genocidal ideas might have good effects as some listeners consider and reject the bad idea of genocide. Those people, then, might rebut the bad idea with increasing vigor if it gains believers, and the powerful rebuttal might swing popular belief to the opposite extreme, making even lesser discriminatory ideologies less attractive and pervasive. In other words, the expression and rejection of genocidal beliefs could have positive effects of low probability and high magnitude.

Of course, the difficulty in estimating expected value that arises from long and fat tails does not depend on symmetry between the good and bad tails. In fact, skewed (i.e. asymmetrical) distributions present their own modeling problems, sometimes making expected value even harder to estimate. An example of speech with a skewed long-tailed distribution might be a non-immediate and non-discriminatory incitement to violence, such as general advocacy of murder or cannibalism. Such advocacy would rarely result in action, but when it did, the action could be catastrophic. On the side of positive utility, however, any rebuttals that such advocacy might induce probably would not give rise to any particular improvement in society. The good tail, thus, would not be fat or long.

For an example of the timescale problem, we have the point about Aristotle above, but we can imagine many others, including ideas with less definite sources. The basic concept of human morality, for example, is an idea of indefinite origin that has had complex consequences over an extremely long timescale. Although we can expect most new ideas to influence human thought for only a short time (if at all), a persuasive idea like the existence of human morality or a useful idea like Isaac Newton’s theory of gravity will persist across generations. The idea’s value will thus continue to accrue, not necessarily monotonically but persistently. As a result, the distribution curve for an idea’s possible value will have infinitely long tails to account for the small but nonzero probability of infinite persistence.

This same long/fat tails pattern holds for other protected markets as well. For religion, the tails are infinitely long (and symmetric here) for timescale reasons only; there may be an eternal afterlife. If there is not an eternal afterlife, then the individual’s utility curve might be a straight line at zero (again assuming
costless consumption and ignoring hedonic utility such as spiritual satisfaction). Even if there is not an afterlife, consumption of some religious ideologies such as violent extremism on the negative side and tolerance on the positive side might have feedback characteristics as well as opportunities for persistence—and might have long, fat tails for those reasons.

For association, reproduction, and parenting, these interpersonal relationships usually have limited consequences but occasionally escalate into psychosocial problems for the individuals involved (including parents and children), sometimes leading to homicide or suicide and frequently leading to criminality of various other kinds. Furthermore, for parenting in particular, outcomes (whether good or bad) perpetuate in future generations, and a parenting model that catches on might have complex consequences over long timescales. On the opposite tail, interpersonal relationships can be helpful and can even be healing for individuals who had psychological or psychosocial problems at the outset.

If it is true that these distributions have long and/or fat tails—and, again, the claim is an empirical one—then, as a mathematical and statistical matter, individual expected value would be at least ill-defined and maybe theoretically indefinable. Distributions with long and fat tails sometimes have infinite variance and undefined mean, which leaves the distributions with undefined expected values. The problem is that we do not know whether or how to discount the extreme but unlikely outcomes or how to weigh those against the possible outcomes (some certain and some not) of the opposite action—foregone ideas, religions, associations, reproductive choices, or parenting decisions.

d. Conclusion

In constitutionally protected markets, individual decisions are of uncertain expected utility. Importantly, the relevant goods and services are of uncertain value even if we assume costless consumption and flawless provision and consumption. That is, the risk of negative utility does not arise in the cost-benefit trade or in a risk of error; it is inherent in the nature of the good. Part of the problem is that hedonic and psychological consequences—the uncertain aspects of individual value that provide a barrier to interpersonal comparisons—are central aspects of the decision-making calculus in relevant markets. But constitutionally protected markets have more concrete uncertainties, too, even with respect to more concrete aspects of individual value. The uncertain valence of individual utility and the statistical uncertainty that accompanies long and fat tails in probability distributions make expected value difficult to measure, even when limiting value to non-hedonic variables. Crucially, these problems make it difficult not only for outside observers to estimate a consumer’s expected or captured value but also for the consumer herself to estimate her own expected value, both subjective and objective. They make it hard for anyone to know ahead of time—and sometimes even after consumption—whether engaging in these markets will make her better off and, if so, by how much.
2. Social Utility

Because individual expected value is uncertain—or at least difficult to define—willingness-to-pay becomes an unreliable metric of comparative utility and thus an unreliable measure of the market’s distributional success. Conceptually, the problem is that individuals’ own approximations of their willingness-to-pay will be arbitrary, and their demonstrated willingness-to-pay may be likewise. Individuals might either underestimate or overestimate outcome probabilities, and given the underlying uncertainty as to the individual’s actual expected utility (including subjective or hedonic value), the distortion will not push systematically in any predictable direction. As such, we cannot use willingness-to-pay to determine whether a given idea, religion, relationship, or child has flowed to the highest-value user. For children, we have a convenient proverb in King Solomon.

For other constitutionally protected goods, consider a stylized hypothetical to demonstrate the difference between those goods and widgets. If we have one widget that must be given to only one of two people, how do we decide which person should get it? There are three possible starting points, and the common law has developed rules to ensure that, regardless of which starting point applies, the widget ends up in the hands of the higher-value user. The first possibility is that one of the two parties already holds a property right in the widget. In that case, bargaining and contract ensure that the widget ends up in the hands of the higher-value user, assuming that the parties have similar marginal utilities of dollars and that the widget owner is not suffering from endowment effects or other similar cognitive limitations. The second is that a third party holds the property right in the widget, in which case (under similar assumptions of marginal utility and cognitive capacity) an auction with contract protections ensures that the widget flows to the higher-value user. The third is that no one holds a property interest in the widget—it is a wild widget—in which case the property right will vest in the first party to “take” the widget, and we assume that the party that invested more time and effort in capturing the widget or reducing it to practice is the higher-value user.

There are two prerequisites for these common law structures to work. One is that property rights be assignable and enforceable—a prerequisite that is tenuous for some constitutionally protected goods and services (as well as for some non-protected goods and services). But another is that the two parties be able to determine their own willingness to pay in terms of money, time, and opportunity. Otherwise, neither party will know when to stop bargaining, auctioning, or racing. For constitutional goods, then, the problem is not only that property rights fail (again, true of some but not all protected goods and services) but also that individual expected value is uncertain.

Imagine (remembering that the hypothetical is stylized) that, instead of a widget, we are trying to distribute a religious tenet that can be taught to only one of two people. How do we determine which person is the higher value user? The determination should depend not only on which of the bidding parties will believe the tenet and thereby benefit from it hedonistically but also on whether the tenet itself is worth anything and whether that worth is differential between the two
parties. Before consumption, persuasion is impossible to predict, so we do not know which party will like and embrace the tenet—which (if either) party will benefit from consumption. Even after consumption, neither bidding party will know whether the tenet provides truth about spirituality, deities, or afterlives. Furthermore, even if we assumed that the tenet provided good guidance that would result in spiritual gratification and/or eternal redemption and assumed that both parties would be persuaded of the tenet’s truth, we would not know which (if either) party would be willing and able to follow the tenet’s guidance well enough to benefit from it.

How, then, would the parties know how much to pay for the tenet in contract, to bid for the tenet in auction, or to pursue the tenet in the wild? In the face of these uncertainties, each party’s willingness to pay would be arbitrary, and the distributional outcome would likely depend only on resource constraints (including cognitive ones). The winning party might simply be the one with more money, time, greed, or risk aversion. In short, even if property rights could work to channel constitutionally protected goods and services, the standard common law structures for distributing scarce resources would systematically fail due to uncertainties of individual expected value. We do not know and cannot determine which individual will benefit most from given instances of speech, religion, association, reproduction, and parenting.

The uncertainty problem for social value, then, is as follows: Even if we had available all of the data that could reasonably be farmed from the market, including all of the information about how much people are actually paying in monetized markets related to protected goods and services, we could not define an optimal distribution of ideas, religions, relationships, or lives. The amounts that people spend within these markets and within ancillary markets do not provide a genuine measure of utility, not only because willingness-to-pay is an incomplete proxy for utility but also because utility in these markets is inherently uncertain and undefined.

It is important to note that this point is not the same as the intuitive point that the goods at issue in constitutionally protected markets cannot be compared against each other. It is true that we don’t know and can’t determine which ideas, which religions, or which humans will provide the most social utility and that there might therefore be a good argument for avoiding decisions that would determine which ideas, which religions, or which humans will survive and which will not. That point, however, is more relevant to the presence of moral uncertainty, discussed in the next section. The economic uncertainty point here is that markets and regulators necessarily steer goods and services to one individual or another, and we cannot determine which individuals will be benefited and which will be harmed from the acquisition of a single constitutional good, much less which individuals will benefit or lose most from such acquisition. Again, we typically use willingness-to-pay to make these determinations, but that short-hand metric fails in protected markets.
3. Counterexamples

There are two conditions, mentioned above, that must hold for uncertainty to be of the right kind—of the kind that justifies constitutional protection. One is that value must be uncertain even when consumption is costless. The other is that value must be uncertain even when consumption is error-free. These two conditions are necessary to distinguish inherent (or Knightean) uncertainty from, respectively, tradeoff uncertainty and risk uncertainty, neither of which is sufficient to warrant a laissez-faire presumption. This subsection will provide examples of these other kinds of uncertainty—examples of markets with tradeoff and risk problems, which should not receive constitutional protection—in an effort to clarify the scope of the theory.

a. Cost and Tradeoff Uncertainty in Environmental Regulation

For all goods and services available today, there will sometimes be uncertainty in the cost-benefit tradeoff. I might know that I want a pack of my favorite gum (which happens to be Orbit peppermint flavor) but not know whether it’s worth the $1.29 and trip to the drugstore that it would cost me to get it. Perhaps that $1.29 and ten minutes would be better allocated elsewhere. If, however, a pack of Orbit peppermint gum magically appeared in my purse, there would be no doubt that I would be better off. I know from reliable experience that I enjoy chewing Orbit peppermint gum, and the value of costless gum is therefore undoubtedly positive for me (assuming, of course, that it is a well-made pack of gum without food-borne illnesses or other flaws, the subject of the next subsection). Furthermore, if I am not in the mood for gum when it magically appears, I can sell my free gum for $1 (less than it costs at the store) and earn a $1 profit. The uncertainty in this example, thus, is only tradeoff uncertainty, not uncertainty about the inherent value of gum.82

Speech, religion, association, reproduction, and parenting involve both tradeoff uncertainty and inherent uncertainty. For example, the value of this paper (an instance of speech) is uncertain in part because you, the reader, don’t know whether it’s worth your time to read it. The idea might be good, but not good enough to justify the time and effort of understanding it. But the uncertainty is deeper than that. Even if you could magically absorb the idea without reading or pondering the paper, even if you could glean the idea completely costlessly, there is still the problem that the idea itself might either persuade you or not, might either provoke your rebuttals or not, might be actually right or not, and might persist across long timescales or not. The various permutations of this idea’s persuasiveness, provocativeness, rightness, and longevity are central to its value, and they should be central to a potential reader’s decision about whether or not to consume the idea, even costlessly. But those factors are unknown and unknowable ahead of time. Furthermore, any experiences you’ve had with my

---

82 There may be marginal uncertainties about the inherent value of gum, such as whether it has any effect on dental health and hygiene. The central factors, however, of flavor and satisfaction are known or knowable with experience.
other papers will be of limited usefulness in predicting the value of this paper; even if I were regularly a persuasive or provocative writer, we can be sure that I will sometimes be right and sometimes be wrong. Because of this inherent uncertainty, regulators will not be able to distinguish ideas that should be promoted from ideas that should be discouraged. The problem is not merely a pricing problem; it is also that regulators cannot steer the market towards valuable ideas and away from worthless ideas given the impossibility of predicting which ideas will be valuable and which will be worthless. This same pattern of inherent rather than tradeoff uncertainty holds in other protected markets as well. The problem is not merely that we don’t know whether it’s worth our time or money to practice religion, to engage in relationships, to have a child, or to invest in parenting; it is also that the central determinants of value in these markets are inherently unknowable. We do not and cannot know the value of a given religion, relationship, reproductive combination, or parenting style. The regulatory system, thus, has no basis on which to steer the relevant markets.

This distinction explains why, under my theory, we should not grant constitutional protection to environmental markets. There is tremendous economic uncertainty about environmental regulation, but the central cause of that uncertainty lies in the regulatory tradeoff, not in the inherent value of the environment. As many scholars have noted, environmental degradations, including air pollution, water pollution, species extinction, and greenhouse gas emissions, have uncertain short- and long-term consequences. Furthermore, the bad tails of environmental degradation might be fat and definitely are long. In the worst case, we might destroy the planet. Nevertheless, even though there is much that we don’t know about environmental consequences and even though the inherent value of environmental protectionism might be immeasurable, we are confident that costless protection of the environment, if it were possible, would be good or neutral. Mere preservation will not be bad. In other words, if we could magically freeze environmental degradations at their current level or if we could magically restore air and water quality to its cleaner past while still growing our economies, we would undoubtedly be better off or the same; we would not be worse off. On the other side, we are confident that “costless” (really benefitless) restrictions on industrial production or urban development would be bad. That is, if we gained no environmental or other benefit from restricting such activities, then the restrictions would merely hurt us. We would lose economic productivity and growth. The uncertainty problem in environmental law, thus, is only that we don’t yet know how good protectionism is (or how bad degradation will be) and therefore have a hard time deciding how much to spend—in terms of both regulatory and opportunity costs—to decrease pollution. But even in the face of this tradeoff uncertainty, regulators can make a legitimate decision about how much we’re collectively willing to spend in lost economic productivity in order to

---

be risk averse about environmental degradation. We voters—we the coerced and liberty-constrained—can be confident that our regulators are pursuing some theory of cost-benefit balance so long as the things that are costs are clearly distinguishable from the things that are benefits. (I’ll say more about the legitimacy of this kind of regulation in Part III.)

**b. Error and Risk Regulation in (Extreme) Sports and Driving**

Another cause of uncertainty in all modern markets is the risk of error. A particular pack of Orbit peppermint gum might contain a food borne illness or might otherwise be defective, perhaps in a way that causes it to taste bad. If so, then even costless consumption of the gum will make me worse off. Those problems, however, can be deemed failures in the gum’s production. That is, we are confident that the negative value in the case of bad gum arose from error of some kind, particularly given that we know that I enjoy well-made Orbit peppermint gum. It is coherent to say that the bad-tasting or sickness-inducing Orbit is a faulty piece of gum without saying that Orbit is bad gum. This is not necessarily to say that the regulatory process (including the Wrigley Corporation’s private quality control process) is or should be capable of pinpointing every error and eliminating it; rather, the point is that Orbit peppermint gum that causes a bad outcome can be deemed discretely rather than inherently faulty. There is little or no possibility that one well-made stick of Orbit peppermint gum will provide me with positive value while another well-made stick of Orbit peppermint gum will provide me with negative value. Regulators, thus, should be allowed to pursue perfection in the production of known goods, even if they are incapable of achieving it.

Although there are risks of error in constitutionally protected markets as well, in those markets, we cannot disentangle causal factors well enough to distinguish faulty instantiations from bad products. For example, if this paper fails to convince most readers of its basic claims, that might be because I failed to communicate the idea effectively, but it might instead be because the idea is intrinsically unpersuasive or wrong. If the paper fails, therefore, the regulatory system will not be able to conclude that the paper is faulty while the underlying idea is valuable in the same way that it could conclude that an infected or stale pack of Orbit gum is faulty while the underlying product is valuable. There would therefore be no basis either for regulating my production process or for prohibiting my product, even if the paper were an identifiable failure, because it is impossible to say whether the process or the product was to blame. Of course, the opposite is also true. If the paper persuades most readers of the idea, that might be because I wrote extremely persuasively, or it might be because the idea is intrinsically right. The regulatory process, thus, cannot use success—particularly short-term success—as evidence of either process or product value. In short, we cannot meaningfully disentangle an idea’s persuasiveness (or unpersuasiveness) from its intrinsic value, and that obstacle makes it impossible to distinguish faulty instantiations of ideas from faulty ideas. It is therefore highly likely that one well-written and persuasive paper will provide me with positive value (convincing me of truth) while another well-written and persuasive paper—perhaps even from
the same author—will provide me with negative value (convincing me of falsehood). The regulatory process has no means of distinguishing the persuasive and wrong ideas from the persuasive and right ones and therefore cannot possibly seek perfection in idea manufacturing.

Importantly, the general problem of error and risk regulation does not depend on the truth being unknown. The causal uncertainty persists even when we know or believe that the idea being advocated is wrong. In that case, expression of the idea will provide a consumer with negative value if it persuades but with positive value if it provokes rebuttal. Under these circumstances, there is undoubtedly a risk of harm and therefore a risk of error insofar as some expressions of such ideas will persuade their listeners to adopt falsehood. But because we do not understand the causal factors of provocation or persuasion, we are powerless to steer the speech towards provocation and away from persuasion. To make this point concrete, consider the problem of white supremacist ideology. We know—or at least collectively believe—that the idea of white supremacy is wrong, and we will consider ourselves harmed if more people become white supremacists. Nevertheless, we want to preserve some expression of racist ideology—at least so long as the idea of white supremacy remains present in society—in order to maintain an incentive for counter-speech.84 (I’ll call it “devil’s advocate” speech even though many speakers sincerely believe in their ideas and are not “playing devil’s advocate” in the colloquial sense; they are, like devil’s advocates, engaging in a category of speech that challenges and thereby strengthens the majority view.) Nevertheless, there is a real risk that racist speech, instead of provoking counter-speech, will convince new listeners to adopt the bad idea of white supremacy. One might argue on that basis that we should be able to label expressions as faulty or erroneous when they persuade new people to adopt bad ideas. The problem, though, is that we cannot disentangle the factors that make expression persuasive from the factors that make expression provocative. Most importantly, the factors themselves are hard to identify. We simply don’t know what causes an idea to persuade some people while provoking others. Another important part of the problem, though, is that more-persuasive expressions probably create a higher incentive for counter-speech than less-persuasive expressions, such that the positive and negative value effects are directly rather than inversely related. For gum and for most goods, the relationship is inverse; the more faulty it is, the less good it will be. But positive and negative effects in devil’s advocate speech are directly related and thus indivisible. As a result, the regulatory process cannot manipulate racist expression to make it provocative instead of persuasive the way that it can manipulate gum to make it safe instead of infected.

In short, it is impossible to imagine a quality control process that would distinguish the persuasive from the provocative instantiations of wrong ideas,

84 The underlying claim here is that the idea of equality might lose strength and credibility if it becomes unchallenged dogma, particularly if we use the truth of equality to suppress a still-present counterpoint, creating an impression that the tolerant majority cannot defend its idea against the intolerant minority’s. We therefore need or at least want to preserve racist speech (at least so long as there are still racist ideas in circulation) in order to preserve our rebuttals and our credibility.
forbidding the former while permitting the latter, or that would distinguish the
persuasive from the provocative instantiations of right ideas, permitting the
former while forbidding the latter. Sometimes the problem is that the outward
manifestation of value—the persuasiveness or provocativeness—is not a reliable
indicator of intrinsic value, while other times the problem is that the risk of bad
outcomes is indivisible from the possibility of good outcomes.

Other constitutionally protected markets show similar problems. In
religion, of course, the problem is that we have no information about intrinsic
value, and any outward manifestations are irrelevant to intrinsic value. We
therefore cannot say that one errs by adopting Christianity rather than Judaism,
even if Christians seem happier than Jews, because we simply do not know
whether Christianity or Judaism is better along relevant dimensions of greater
truth. Reproduction and parenting provide particularly good examples of the
indivisibility problem; although there might be some genetic combinations or
parenting techniques that we know will produce unhappy or unhealthy children,
many children are unhappy or unhealthy for mysterious reasons. Many children
born with birth defects are born to perfectly healthy parents who passed genetic
screens, and many children with psychosocial problems have perfectly happy
siblings. We might, therefore, want to say that a child born without a
cerebellum is birth-defected—is a faulty child—but we cannot manipulate the
reproductive process to avoid such errors in the future.

This distinction explains why, under my theory, we should not grant
constitutional protection to markets for recreational sports or for driving. Like
constitutionally protected markets, sports and driving show characteristics of
economic uncertainty. First, for recreational sports and for joyriding in cars, the
primary aspects of value are probably hedonic (though, for sports, health and
fitness are more concrete benefits). Second, for both sports and driving, value
might be positive or negative even if consumed costlessly; sports might provide
either stimulation or injury, and driving might provide either transportation or
collision. Most importantly, though, both for sports (especially extreme sports
like hang gliding or skydiving) and for driving, the likelihood of extremely bad
outcomes is higher than it would be in a normal Gaussian distribution, meaning
that the distributions have long and fat tails. In both cases, accidents could be
catastrophic, causing severe injury or even death.

The difference, though, is that in both cases the bad outcomes derive only
from risks that are theoretically divisible from benefits. For driving, we can say
confidently that a bad outcome arose from bad driving; the outward manifestation
of value aligns perfectly with the intrinsic value. Necessarily, thus, the risk of bad
outcomes is theoretically divisible from the possibility of good outcomes. We can
imagine, in theory, a perfectly safe drive that would accomplish the goals of
transportation without involving any risk of harm—an alert and experienced
driver with a flawlessly functioning automobile in perfect weather conditions and

---

85 For a dramatic example of this, see Lisa Holewa, Boy Without a Cerebellum Baffles Doctors,
AOL News, available online at http://www.aolnews.com/2011/02/12/chase-britton-boy-without-a-

86 See id.
broad daylight, alone on the roads and obeying the traffic laws. Though
impossible to accomplish in reality, the picture is constructible in theory. The
regulatory process therefore pursues a definable goal by regulating traffic, even if
the ultimate goal is unachievable.

For extreme sports, the story might seem more similar to the indivisible
risks of devil’s advocate speech. There are undoubtedly many skydivers who get
a thrill—and thus an added benefit—from the risk of death. For them, the risk is
part of the fun. The outward manifestation of value, therefore—the death or
injury—is not necessarily aligned with intrinsic value since the risk of death was
part of the intrinsic value all along. That is, the intrinsic value of skydiving might
be positive even though some particular instantiations turn out to be negative.
Furthermore, as they do in devil’s advocate speech, risk and benefit have a direct
relationship in extreme sports, at least to a certain extent. To a point, the benefits
of skydiving increase as the risk increases.

There are three critical differences, though, between skydiving and devil’s
advocate speech. The first is that the risk factors in skydiving and other extreme
sports are causally identifiable and are therefore theoretically divisible from the
activity. It is theoretically possible to jump from an airplane without any risk of
injury if the conditions are good and the human and parachute do their jobs
perfectly. The second is that skydivers might want a nonzero risk of death, but
the benefits will start to decrease if the risk becomes too great. Few people would
choose to skydive if they had a fifty percent chance of death or serious injury on
each jump. Third, we can combine these points to imagine a regulatory regime
that eliminates unnecessary risks of extreme sports while allowing preferred risks.
Because the risk factors are identifiable and theoretically divisible and because
there is a limit on the direct relationship between risk and benefit, skydivers can
make a choice about how much risk to eliminate and how much risk to tolerate.

None of these characteristics holds for devil’s advocate speech. On the
first, it is not theoretically possible to engage in devil’s advocate speech without
some risk of persuading a member of the audience of a wrong idea. It is
incoherent, even in theory, to imagine a successful expression of a wrong idea
that is guaranteed to provoke rather than persuade. On the second, unlike the
benefits of skydiving, the possible benefits of devil’s advocate speech continue to
increase as the possible risks increase. If a wrong idea has a fifty percent chance
of persuading a listener rather than a twenty percent chance, then the idea’s
opponents have a more powerful rather than a less powerful incentive to rebut it.
This trend continues until the bad idea is guaranteed to persuade listeners
regardless of whether opponents rebut it or not. Combining these points, it is
impossible in constitutionally protected markets to make a coherent choice about
how much risk we should tolerate. Even if regulators wanted to limit risk, they
would not know how to go about it, and it is not at all clear that they could limit
risks of harm without also limiting possibilities for benefit.

87 See, e.g., Anton Westman, Dangers in sport parachuting (2009), University dissertation from
Umea University, available online at http://www.dissertations.se/dissertation/fa4d6986b1/
(accessed Feb. 18, 2011); Raimund Margreiter & Lois-Jörg Lugger, Hang-gliding Accidents, 1 Br.
B. Moral Uncertainty

Of course, deep economic uncertainty does not, in itself, preclude regulatory success. Democratic governments frequently regulate for the primary or even sole purpose of enacting a moral view—a morally preferred rather than an economically efficient distribution. Murder prohibitions, public nudity bans, and tax incentives for charitable giving are examples of such regulations.

Morals-based regulation raises one overarching question that I must note at the outset but that I will largely set aside for the rest of the discussion. That question is whether any oligarchic body (such as the Supreme Court or the Senate) should be allowed to steer regulation according to elite definitions of the moral good or whether, instead, morals-based regulations should be limited to enacting popular moral views. At first blush, this question may seem to set up a dichotomy between moral truth and moral consensus for regulatory decisionmaking; certainly that is the lens through which some moral philosophers consider the question. As a purely descriptive matter, however, that dichotomy necessarily breaks down in the regulatory context. In the American legal system, no moral truth can influence regulation unless it commands a relevant consensus. That is, in order for a moral view to be enactable, some governing body must believe—meaning that the members of the body must hold a majoritarian consensus—that the moral view is right and is relevant to the regulatory question. As applied to regulation, then, moral consensus and moral truth are not conceptually distinct; the only relevant question is whether oligarchic consensuses within the American system should be allowed to trump contrary democratic consensuses. That question is one of institutional design that I will set aside for now, though I will highlight various aspects of it in Part IV.

My claim here, then, is that substantive constitutional rights arise to block regulation in regimes in which moral consensus is impossible to define and moral truth is therefore impossible to pinpoint. Indeed, all constitutionally protected markets show some characteristics of moral uncertainty, such that the vector for morally preferred regulation is undefined. The problem has two forms. First, in some constitutionally protected markets, Americans are deeply conflicted as to the moral value of individual behaviors within the market and about the moral criteria that should be relevant for judging such behavior. Second, in some such markets, Americans are pluralistic in their moral views and therefore lack collectively agreed-upon criteria for judging moral value. These two problems are not distinct; indeed, they are closely interrelated. When deep conflict (problem one) turns to tolerance for multiple moral views, then we simply lack

---

88 Moral and ethical criteria can be incorporated into consequentialist calculi for social choice, though they are not elements of a classical utilitarian approach. See, e.g., Louis Kaplow & Steven Shavell, Fairness Versus Welfare 4–5 (2002) (distinguishing “welfare economics,” which incorporates intangible aspects of human welfare, from traditional “normative economic” theories, which focus only on tangible utility). I treat them separately for clarity.
89 Most famously Jeremy Waldron, cites.
90 This point does not depend on any epistemological assertions about the nature of moral truth generally. It is simply a claim about the ability of the American regulatory system to incorporate moral truth into legal decisionmaking.
evaluative criteria (problem two). As such, elements of these two problems appear alongside each other within some constitutional markets, perhaps especially in religious markets. This subsection addresses and gives examples of each of the problems in turn, treating them separately for clarity despite their overlap.

Importantly, the point here is not that we are unsure about the moral validity of the constitutional freedoms themselves but rather that we are unsure about the moral value of each instance of a freedom’s exercise. In other words, we all agree that the Freedom of Speech (writ large) is morally important, and that fact is frequently given as the premise for the freedom’s inclusion in the Constitution. I don’t at all mean to question that premise here. For the moment, my point is only that our moral agreement on the importance of the Freedom of Speech writ large does not tell us whether the expression of a given individual idea is morally good or bad. And for present purposes, my interest is only in the difficulty of determining the moral value of individual instances of constitutionally protected behaviors. In Part III, I will further elaborate the distinction and explain why I believe that the moral justification for substantive rights—the use of the premise to justify our decisions about which markets to protect—is somewhat less compelling than but not entirely incompatible with the technocratic justification that I develop here.

Two final introductory notes, both of which are repetitions of important caveats: First, as with economic uncertainty, the claim here is not that moral uncertainty is uniquely present in constitutionally protected markets but rather that it is uniquely central to such markets. That is, there may be moral uncertainty at the margins of most markets, but that uncertainty sits at the core of protected ones. Second, as with economic uncertainty, the moral uncertainty point does not depend on its universality in protected markets. There may be many behaviors within these markets that a relevant regulatory body can confidently deem moral or immoral, but as long as some or many marginal decisions will have uncertain moral worth, the market’s possible distributions will be difficult to judge.

1. Deep Conflict

In some constitutionally protected markets—and particularly in the markets that have only recently received such protection—the cause of moral uncertainty is a deep and sincere divide among the American people as to the moral validity of protected activities. Today, this problem is easiest to see in the context of abortion and gay rights, though it might also explain the evolution of religious freedoms.

It shouldn’t take much to convince the modern reader that abortion and gay rights are both subjects of deep moral conflict in the United States. Large groups of Americans believe—quite sincerely and with sound moral arguments to support their view—that abortion is morally wrong, while other large groups of Americans believe—equally sincerely and with equally sound moral arguments in support—that there are circumstances in which abortion is morally required or at least that abortion is never morally reprehensible. Similarly, large groups of Americans sincerely believe that homosexual relationships are morally
reprehensible while other large groups equally sincerely believe that a heterosexual relationship would be morally corrupt for someone who is in fact homosexual—or at least believe that homosexual relationships are never morally impeachable. This same basic problem appears in some broader reproduction and parenting decisions as well. Teen pregnancy, for example, is subject to a moral conflict, with some Americans believing that teenagers bear a moral obligation to terminate pregnancies, some believing that teenagers bear a moral obligation to put their children up for adoption, and others believing that teenagers are morally justified in keeping and raising their children.

When this kind of deep and broad conflict arises, the regulatory system cannot tell which moral viewpoint is more widely held or more deeply held and therefore cannot define an emerging moral truth. In other words, in the face of such broad dissensus, regulators become uncertain as to the collective moral views of the American people and uncertain as to the correct moral outcome for the regulatory regime. They become incapable of distinguishing moral from immoral acts within the relevant markets. I will elaborate on this point and its relevance to the laissez-faire presumption in Part III, but for now, it suffices to say that these kinds of deep conflict create uncertainty as to moral criteria.

As a descriptive matter, the emergence of these deep conflicts seems causally related to our recognition of some constitutional freedoms. When the Supreme Court notices a deep moral divide, it creates constitutional protection and thereby relegates the moral decision to private ordering. We have certainly seen this pattern in *Griswold v. Connecticut* and *Roe v. Wade*, both of which emerged as the sexual liberation and women’s rights movements began to pose serious challenges to a standing moral consensus; we saw it in *Brown v. Board* and *Loving v. Virginia*, which emerged as the civil rights movement began to pose similarly serious challenges to a similar standing consensus; and we saw it in *Lawrence v. Texas*, which emerged as the gay rights movement began to pose a challenge to such a consensus. We have seen it, too, in the judiciary’s hesitation to extend *Loving* to protect homosexual marriages, a hesitation that might arise from the (at least perceived if not actual) strength of a moral consensus in favor of limiting marriage to heterosexual couples.

Interestingly, we also saw this pattern in our original enshrinement of First Amendment religious freedoms, which emerged as various protestant movements posed new challenges to the standing British consensus in favor of the Church of England. It was the same kind of deep and irresolvable moral conflict—this time among competing religious views—that motivated so many British citizens to move to the Americas and to enshrine freedom in the face of irresolvable conflict and uncertainty.

---

91 381 U.S. 479 (1965).  
92 410 U.S. 113 (1973).  
94 388 U.S. 1 (1967).  
96 388 U.S. 1 (1967).
But this analogy between the founding-era religious disagreements and the modern moral disagreements also highlights a distinction. The founding protestants’ belief in the moral imperative of religious tolerance—to the extent that such a belief existed at the time of the founding—may have preceded their preference for constitutional protection whereas modern constitutional protection undoubtedly precedes a consensus for tolerance. In other words, we certainly cannot say that Roe or Lawrence emerged from an American consensus that tolerance—that freedom itself—is morally required for homosexuality or for abortion. Instead, these freedoms emerged out of a sea of discord. They emerged at the moment that the moral consensus condemning the protected behavior was losing its hold and when, as a result, the collective moral view of the American electorate became questionable—became exceedingly difficult to identify. The status of Americans’ moral views was uncertainty, then, rather than consensus in favor of freedom and tolerance, when reproductive and sexual freedoms (and when genuine equality rights for black Americans) got their starts.

2. Moral Pluralism

In some constitutionally protected markets, the cause of moral uncertainty is not continuing conflict but rather pluralism or ambivalence—a lack of agreed-upon criteria for determining whether individual exercises of the freedom are morally good or bad, which in turn prevents regulators from judging the moral worth of given distributions within the markets. To one degree or another, ambivalence is present in all of the relevant markets, but the point is perhaps easiest to see in religion and is interesting to note in speech.

First, religion. In the United States, we do not share a collective sense that a belief in polytheism, for example, is morally reprehensible or that faith in transubstantiation is morally required. Indeed, although individual Americans certainly hold moral views of their own religious beliefs, we do not share a collective sense that any given religious tenet is morally obligatory or that the lack of any given religious tenet is morally reprehensible. Excepting, of course, the extreme views like violent Islamic fundamentalism, we simply have no agreed-upon sense of how to judge the morality or immorality of most ordinary religious tenets and exercises. Indeed, a claim that belief in a particular religious tenet is either moral or immoral might seem like a non sequitur at best or a category

---

97 There were several states in the Union that had established state religions at the time of the founding. See McConnell, supra. We cannot therefore say that all founding-era protestant groups believed in the moral imperative of religious freedom, though some certainly did. See, e.g., Maryland Toleration Act (1649), in Constitutional Debates on Freedom of Religion: A Documentary History 15 (John J. Patrick & Gerald P. Long eds., 1999) (requiring toleration for all trinitarian Christian faiths, i.e. those that believed in the Holy Trinity of Father, Son, and Holy Ghost); see also John Locke, A Letter Concerning Toleration (1689), in 35 Great Books of the Western World 1, 9 (Robert Maynard Hutchins ed., 1952).

98 There are of course many exceptions, including all immoral behaviors attempted under cover of religious justification. For example, our belief in the immorality of murder and suicide bombing does not shake when someone engages in those behaviors in the name of Islam. We also, of course, agree that many religious tenets and practices are morally acceptable if not morally required, such as nonviolence, tolerance, and forgiveness.
mistake at worst. For many, religious beliefs are the source of one’s moral code such that external moral condemnation of those beliefs is simply irrelevant. For others, religious beliefs are questions of faith rather than morality, such that moral judgments are category mistakes. Faith in God, for example, can be neither moral nor immoral; it is simply a question of individual belief.

This inability or unwillingness to judge individual religious beliefs necessitates ambivalence as to social outcomes in religion. That is, because we do not exercise moral judgments about individual religious beliefs, Americans lack a collective moral view as to the best distribution of religions within the United States. We simply don’t know whether we collectively prefer to have ninety Christians and ten Jews or ninety Jews and ten Christians, much less whether we prefer ninety Episcopalians and ten Lutherans or ninety Lutherans and ten Episcopalians. The deep conflict surrounding religion at the time of the founding has resolved itself into pluralism and ambivalence. As a result, the regulatory system has no moral basis on which to steer the markets for religious exercise. Unlike in murder markets, where we collectively agree that zero malicious murders would be the morally optimal outcome, there is no agreed-upon moral truth or morally optimal result that regulators can pursue in religious markets.

In speech, the problem seems to be purely a sense of category mistake. Although Americans might collectively believe that some ideas are immoral—and certainly believe that the acting out of many ideas would be immoral—the mere expression of an idea usually is not subject to moral judgment. For example, we might think that white supremacy is a morally reprehensible idea, and we certainly believe that abuse of nonwhite humans is a morally reprehensible act. But we do not level the same moral condemnation against the mere expression of white supremacist ideology. Captured in children’s distinction between “sticks and stones” and “words,” our sense is that mere expression, as a behavioral category, usually cannot be morally condemned. Of course, there are exceptions to this general point; for example, we agree that threatening someone with violence is morally corrupt even when accomplished through mere expression, and we agree that expressions of tolerance in the face of conflict are morally praiseworthy. But as a general matter, mere expression is not subject to moral judgment.

Unlike the problem of deep conflict, this problem of ambivalence is a necessary corollary of—and might therefore seem hard to distinguish from—the standard argument in American constitutional law that freedoms of speech and religion are morally required. Indeed, as noted briefly above, it may have been aversion to religious and ideological persecution that gave rise to a collective preference for religious and ideological tolerance, which I am merely translating into collective ambivalence as to moral worth of individual expressions and religions. Americans’ uncertainty about the morality of individual religions and expressions, thus, might be a self-conscious uncertainty—a restraint of our moral judgments rather than a true of lack of moral judgments. For my purposes, though, the nature of the uncertainty is irrelevant. The central point is that the modern American electorate, including modern American regulators, deems itself
either unable or unwilling—and it doesn’t matter which—to evaluate the relative moral worth of most religious exercises and ideological expressions. As such, modern American government, irrespective of the constitutional constraint, lacks a moral basis on which to steer the distributions of ideas and religions. In other words, I want to distinguish the oft-made point that American government has a moral obligation to refrain from regulating (which it very well might) from the also relevant point that the American people hold no collective moral preference as to regulatory outcomes. Again, for whatever historical or modern reason, we lack evaluative criteria for the moral worth of individual religious beliefs and individual ideas.


In *Washington v. Glucksberg*,\(^99\) one of the more controversial recent cases in the implied fundamental rights line, the Supreme Court refused to recognize an individual right to die, even for terminally ill patients seeking physician assistance in hastening inevitable death. Underlying the Court’s opinion, the moral debate centered on the asserted immorality, on one hand, of involuntary euthanasia and the asserted moral imperative, on the other, of allowing terminally ill patients to die with dignity. The moral debate in *Glucksberg*, thus, did not involve a clash of two or more contradictory moral principles, the way that the moral debate over abortion does. There was not a strong political contingent arguing that mentally competent adult patients with terminal illnesses act immorally when they choose—fully voluntarily—to hasten their deaths; rather, those who opposed permissive regimes for physician-assisted suicide argued that such regimes would open the door to abuse and coercion of the terminally ill, allowing families and doctors to foist early death on incompetent or malleable patients.\(^100\) Nor was there a strong contingent arguing that involuntary euthanasia was morally required or even morally acceptable; rather, those who favored permissive regimes argued that individual physicians would be a diligent and secure shield against abuse and coercion. The problem, then, was that a permissive regime might lead to one agreed-upon moral harm—abuse and coercion—while a restrictive regime might lead to a different but still agreed-upon moral harm—an affront to dignity. And the question was whether a constitutionally protected and thus permissive regulatory regime would be more or less likely than the restrictive regime to balance or avoid both moral harms.

Importantly, then, the plaintiffs in *Glucksberg* challenged the moral worth of the precise regulatory regime chosen rather than challenging a political conclusion about the moral worth of an individual behavior. Quite rightly, I think, the Court held that this question—the morality of various regulatory designs for protecting agreed-upon moral values—was an appropriate one for legislative consideration. The proper strategy for facilitating death with dignity

---


while avoiding abuse and coercion is not a question that needs to be left to private ordering.

4. Conclusion

As with economic uncertainty, the problem with moral uncertainty is that it prevents us from assigning value to individual goods and behaviors within protected markets. For technocracy, we do not know whether a Christian tenet will lead to salvation or not, and similarly for morality, we do not know (or at least are unwilling to decide) whether that Christian tenet is morally good or bad. In the abortion context, we do not know for technocracy whether the aborted reproductive combination was a good or bad one, and we cannot figure out for morality whether abortion is morally corrupt or not; the central moral question is too hotly debated, such that we cannot define an emergent moral truth.

Furthermore, the constitutionally protected markets do not merely present questions of regulatory design; they present uncertainties as to underlying moral precepts. As I will discuss at great length in the next section, that uncertainty about moral precepts renders regulatory success impossible.

III. Regulation under Conditions of Uncertainty

The second step in justifying the Constitution’s laissez-faire presumption is the normative claim that uncertainty provides a good reason to hinder regulation in protected markets. This claim includes both a positive assertion about existing theories of regulation and a purely normative assertion about government’s proper role. The positive assertion is that uncertainty precludes regulatory success according to all standard normative definitions of such success—or at least according to all such definitions that are relevant in a representative democracy. The normative assertion (which is not at all novel in its foundations) is that we should, because of the impossibility of achieving regulatory success, discourage regulatory attempts in markets with high degrees of uncertainty. This second assertion rests not only on the classical liberal presumption against governmental interference (the core of the fundamental rights view and of some structural theories) but also on the costliness of regulation and the difficulties of political monitoring. These arguments are structural arguments that are similar to but importantly different from those in “representation reinforcing” theories of constitutional rights, which hold that courts should overturn regulations that arise from systematic underrepresentation or overrepresentation of minority interests.101

A. Impossibility of Regulatory Success

Just as Americans disagree on evaluative theories of religion, speech, and reproduction, so too do they disagree on evaluative theories of regulation.102

101 See supra note 23.
102 This point might provide support for providing constitutional protection to political markets, beyond the protection that they get from the First Amendment. Voting rights as distinct from
Government’s proper role in both economic and social regulation is much disputed, not only among academic theorists but also among the voting public (take, for example, the Tea Party movement103). Indeed, one problem with standard structural theories of constitutional rights—which argue that rights should protect against representational failures104—is that they depend on without defining a unified theory of representational success.105

My claim here is importantly different from those theories. The claim is not that there is a right regulatory result that the system is failing to effect but rather that these markets present no defined “right” result according to any normative theory of “right.” All normative theories of regulation that are relevant in a representative democracy either depend on preference optimization of some kind (be it utilitarian preference, moral preference, or both) or depend on compliance with and realization of agreed-upon moral principles. Because moral and economic uncertainty defeat attempts to define individual and collective preference and because moral uncertainty defeats attempts to define guiding moral principles, these kinds of uncertainty also defeat attempts to define and therefore to achieve regulatory success. In markets in which economic and moral uncertainty are extremely common, therefore, regulatory success will frequently be impossible. I will flesh out this claim with respect to three standard theories of regulation: efficiency, social justice, and welfare.

1. Efficiency

One category of regulatory theories focuses exclusively on market efficiency, holding that government should intervene only to correct discrete market failures. Further, efficiency theories hold that government should so intervene only if the recaptured market efficiency has greater utility than the inevitable inefficiency of redistributive interventions.106 Although the on-the-ground operation of such theories should vary depending on one’s preferred definitions of efficiency and optimality—whether using Pareto or Kaldor-Hicks efficiency as the guiding metric, for example—the theories inevitably depend on

speech rights, for example, might fall under the uncertainty and ambivalence theory for constitutional protection. This possibility is, however, beyond my current scope.


104 Ely, supra note 23.

105 See David A. Strauss, Afterword: The Role of a Bill of Rights, 59 U. Chi. L. Rev. 539, 553 (1992) [hereinafter Afterword] (noting that representation reinforcing theories of constitutional rights fail to define a theory of representational success); see also Hanna Fenichel Pitkin, The Concept of Representation (1967) (positing multiple different theories of representation, all of which have some purchase in describing representational success but none of which is singularly correct).

our ability to define efficiency and inefficiency, as well as our capacity to identify correctible market failures.

Uncertainty, of course, makes these projects impossible, regardless of one’s chosen metrics for efficiency and optimality. If individual expected value is inherently uncertain, particularly if it is difficult to measure before and after consumption, then both Pareto and Kaldor-Hicks improvements will be impossible to identify. In constitutionally protected markets, we frequently lack not only a pinpoint of optimal allocation (something that is lacking for all markets given informational limitations) but, more profoundly, any theoretical definition of optimality. Frequently in these markets, we have no theoretical basis for evaluating whether a shift in resources has improved or harmed utility, however judged or defined. (As previously noted, this problem exists to some extent for all markets given the impossibility of drawing interpersonal comparisons of utility, but the problem is more concrete and more severe in protected markets given the failure of willingness-to-pay as an approximation of utility.)

Importantly, it is the distinction between pinpointing an optimal allocation and defining a theoretical optimality that distinguishes uncertain markets from all others, including the markets offered as counterexamples above: environmental regulation, extreme sports, and driving. It is always the case—in absolutely every market—that informational and technological limitations prevent us from pinpointing optimal allocations. We do not know, for example, what the precisely optimal production rate is for hammers, but hammers can be regulated because we know in theory what factors will lead to suboptimal or superoptimal hammer production. Economists understand what information is relevant to the efficient operation of the hammer market, and the legislative process can therefore make a best effort to improve that market based on economists’ analyses and recommendations. At least for constitutional purposes, then, the efficiency theory is satisfied as long as regulation is attempting to correct market failures—attempting to target theoretically relevant factors—even though we usually cannot pinpoint optimal results.

Similarly, we know what factors are theoretically relevant in the counterexample markets and can therefore allow the legislative process to make a best effort at regulating. For environmental protectionism, we understand the nature of the tradeoff between certain harms to industry and uncertain benefits to the environment and can make a politically and constitutionally legitimate decision about how much we’re willing to spend in order to be risk averse about environmental degradation. In extreme sports and driving, we can identify the factors that theoretically contribute to risk as well as the factors that theoretically contribute to benefits and can disentangle the two, such that we can make a politically and constitutionally legitimate decision about balancing risks and benefits.

The problem in constitutionally protected markets is that the uncertain value of individual and collective decisions terminally obfuscates the theory of optimality. Because the value of constitutional goods is uncertain both before and after consumption, we cannot disentangle costs and benefits well enough to regulate technocratically. Systematic barriers, inherent in the nature of these
goods and services, prevent us from predicting whether a given instance of production or consumption will be good or bad, and we therefore cannot know—in fact or in theory—what the optimal overall level of production or consumption might be. Without such a theory, the legislative process cannot claim to be improving efficiency or even to be attempting to do so. In a world of uncertain value, we have no theory of efficiency.

2. Social Justice

Another category of normative theories of regulation focuses on social or corrective justice, which comprises a bundle of criteria for proper interventions or for best distributional outcomes. Some such theories are consequentialist, holding that regulatory structures ought to be judged by their results, while others are non-consequentialist, holding that such structures ought to be judged on their merits, regardless of their results. A governmental system will be held to succeed according to theories of social justice if its operation or effects comply with general principles of equality, fairness, and human dignity.107

Both moral and economic uncertainty frustrate regulatory success under these theories because they prevent us from defining the central precepts. For example, in important respects, we do not know whether our laissez-faire approach to religion best complies with principles of fairness and dignity because we don’t know what the right religion is. Imagine that Buddhism, say, presents the only true set of religious beliefs and that worshipping the Judeo-Christian God frustrates attempts to achieve nirvana, leaving Jews and Christians in an endless cycle of suffering and rebirth. In that case, our laissez-faire regime probably does not best capture equality and respect for human dignity because we are making no attempts to facilitate access to Buddhist teachings or Buddhist temples. Americans today do not have equal opportunities to achieve nirvana, the only dignified end if Buddhism is right.

One might object to this view by arguing that a laissez-faire regime does give us equal access to Buddhism; indeed, the constitutional freedom ensures that no one blocks that access. But that is not the way that social justice theorists—or at least consequentialist ones—think about equal access in other regimes. For example, such theorists would be profoundly dissatisfied with an education system that left all Americans free to learn to read and write but did not proactively provide access to reading and writing instruction for those who could not afford it. They might, in fact, insist on paternalistic grounds that Americans be required to learn reading and writing, despite the infringement on liberty that such a paternalistic regime would impose. Because we are certain that reading and writing are valuable, the regulatory regime will respect fairness and dignity only by proactively ensuring that all Americans can and do access those valuable tools. In other words, the social justice theorist would demand enablement, not

---

mere freedom, \(^{108}\) if we knew that Buddhism were eternally valuable. The same would be true of ideas, associations, reproduction, and parenting if we were certain about the values of those goods and activities. But without knowing where truth and value lie, we cannot determine where fairness and dignity lie.

We can recast this point in slightly more technocratic terms by borrowing the famous thought experiment of one social justice theorist: John Rawls’s veil of ignorance. \(^{109}\) If one is asked to design a just regulatory regime for constitutionally protected markets without knowing whether he will be starting from a point of advantage or disadvantage, the scientifically and statistically right answer might be, “Shrug.” For all but the most access-equality-insistent social justice theorists, the answer—at a minimum—should depend on distinguishing the resources that we will benefit from consuming from the resources that we will benefit from foregoing, as well as distinguishing the individuals that will benefit from consuming resources from those that will benefit from foregoing resources. Even those basic valence determinations might be impossible, or at least inordinately difficult, in protected markets.

Of course, social justice theorists have much to say about the morality of the constitutional freedoms themselves, and the presumption in favor of private ordering seems to provide a least common denominator for social justice theory in the face of uncertainty. In the abstract, one cannot say that freedom of thought or freedom of association is offensive to human dignity or equality; indeed, as an abstract notion, such freedom may be the regime that best respects dignity and equality. For non-consequentialist thinkers, that point alone might be enough to justify constitutional rights.

But we must note that freedom gives rise to some distribution of resources within constitutionally protected markets, and we most note that, in a world of constrained resources and a world colored by background distributions and entitlements (both financial and biological), the particular distribution that arises from freedom is not equality of access or equality of enablement. In our constitutionally protected regimes, some people will have free and easy access to speech, religion, association, reproduction, and parenting, but many will not. If the constitutionally protected goods and services were guaranteed to provide positive rather than negative value, then the unequal distribution of access would seem problematic and would seem like a legitimate concern for representative government. But under conditions of uncertainty, government cannot improve on the justice of freedom’s distributions because regulators cannot tell whether freedom’s distributions are just or unjust. We cannot identify the religion that promotes dignity, the rate of expression that signifies equality, or the reproductive outcomes that arise from justice. In short, we have neither technical nor moral criteria by which to judge the fairness or justice of resulting distributions in constitutionally protected markets. At least for consequentialist social justice theories of regulation, thus, we can neither improve nor harm the relevant regimes because we cannot judge them at all.

\(^{108}\) See Part I.B, infra.

\(^{109}\) Rawls, supra note 107, at xx.
3. Welfare

The third set of prevailing theories of regulation is the welfarist set. Welfarism is, like efficiency, a normative economic theory of regulation, but unlike efficiency, welfarism incorporates traditionally “noneconomic” factors—like morality and taste—into the definition of individual utility and into the social utility curve (re-termed individual “well-being” and the social “welfare” curve). This incorporation of morality and taste is the primary or maybe the sole difference between welfarism and efficiency. As such, the failure lies in the same place for welfarism as for efficiency; moral and economic uncertainty together preclude theoretical definition of optimal group welfare. In short, we cannot draw the social welfare curve without knowing individuals’ expected value and individuals’ taste preferences, and neither of those components of welfare is capable of definition under conditions of moral and economic uncertainty.

Importantly, welfarism’s incorporation of morality into the relevant curve saves many markets from an impossibility of regulatory success that would otherwise hold under classical economic theories of regulation. Even purely animus-based murder, for example, might be impossible to regulate under classical economic theories given that we can’t measure the negative value to the victim of lost life or the positive value to the murderer of actualized enmity. On pure economic grounds, therefore, we might lack not only a pinpoint for the optimal murder rate but also a theory of optimality for murder. But the strong and widely-held (if not universal) moral belief that life is of immeasurably higher value than enmity provides a criterion by which to judge optimality and therefore provides a technocratic justification for murder regulation. Because the vast majority of the electorate holds the same moral view of murder, we can be confident that less murder is better than more, and we can, on that basis, develop a legitimate regulatory strategy for addressing the problem.

This same logic holds when the moral views are more nuanced than the straightforward condemnation of animus-based murder, as in the case of the counterexample provided above: physician-assisted suicide. As noted, the challenge in regulating physician-assisted suicide is to craft a regime that allows the moral good of dignified death while avoiding the moral bad of abuse and coercion. Although that challenge is a profound one, it is one that the legislative process can tackle with legitimate criteria to guide it. That is, with the incorporation of moral criteria, there is a theory of optimality that government can pursue when confronting the question of physician-assisted suicide.

The incorporation of morality, however, does not save constitutionally protected markets, where both technocratic and moral criteria are uncertain. In “problem two” cases, where we simply lack evaluative criteria, the problem is clear; there are no useable factors for crafting a theory of optimality. We are

---

110 Kaplow & Shavell, supra note 88, at 18–24 (describing the “expansive” approach to utility that is common to welfare economics and to welfarist theories of regulation).

unwilling to say that Trinitarian Christianity is morally superior to non-Trinitarian Christianity and are therefore unwilling to say that the world would better approach optimality if Trinitarianism were encouraged or required. In “problem one” cases, however, where we have deep conflict on central moral questions, the problem is more complicated. For a welfarist, deep conflict does not present a genuine theoretical barrier to regulatory legitimacy; the welfarist would say that the optimal result favors the moral view that is more deeply held, measured by both the breadth and the weight of the view. For example, assume that we have a population of 100 people in which fifty-five believe that homosexuality is morally corrupt, assigning ten utils to the regulatory realization of their belief, while forty-five believe that denial of homosexuality is morally corrupt, assigning thirteen utils to the regulatory realization of their belief. In that case, a sodomy ban would provide the first set of people with a welfare gain of 550 while providing the second set of people with a welfare loss of 585; and the absence of a sodomy ban would provide the first set of people with a welfare loss of 550 while providing the second set a welfare gain of 585. The net, thus, would be negative (-35) for banning homosexuality and positive (+35) for allowing it. A welfarist would conclude in this case that we should allow homosexual relationships, even though a majority of voters favors the ban.

The problem, of course, is that this example provides a much more nuanced view of preferences than we can possibly obtain in the real world. In actual moral conflicts of this kind, we can’t determine which moral view is more deeply held because we have no reliable means of judging the strengths of individuals’ convictions. Of course, a representative process can respond appropriately to moral conflicts with clear winners—allowing a ban on animus-based murder, for example, even if some small portion of the population feels strongly that such murder should be allowed. But when conflicting moral views are essentially tied, as they seem to be for abortion and homosexuality, then we should admit the theoretical impossibility of finding the right answer. (Of course, we have to declare a winner because we cannot craft a regime that is both restrictive and permissive. But liberty wins by default, not because it is the correct result.) In short, for preference-satisfying regulations, the best outcome depends centrally on the kinds of individual satisfaction and comparative utility that Robbins discussed, and in cases of near ties, there is no representational system that can figure out which moral answer better promotes welfare. The conflict is too deep.

4. Conclusion

It is worth reemphasizing here that this claim does not depend on governmental or representational failures—or even on governmental or representational limitations. The problem is not that there is a right result that

112 Trinitarian Christians, including American Catholics, Episcopalians, and Lutherans among others, believe that God consists of the Father, Son, and Holy Ghost residing in one Godhead.
113 Cf. Maryland Toleration Act, supra note 97 (requiring toleration of any Trinitarian faith but not of non-Trinitarian faiths).
government is unwilling or unable to implement. *The problem is that there is no theoretically right result.* From a technocratic perspective, it is theoretically impossible to improve the market’s distribution. As such, the problem is not that regulators might sometimes improve and sometimes harm distributional outcomes, in which case we would want to know regulators’ likelihood of success before asserting that regulatory attempts should be discouraged. For example, even if regulators had a mere 50/50 shot at improving efficiency, justice, or welfare, we might want them to try. But where we lack a theory for improvement, we must embrace that all results are equally efficient, equally just, and equally good. Regulators, thus, cannot improve or harm the distribution, no matter how good they are at regulating.

As noted, this point distinguishes my claim from the standard representation-reinforcing theories of constitutional rights, which assert that such rights should be used to correct representational failures. But it also distinguishes my claim from generalized governmental limitations identified in social choice theory, such as Kenneth Arrow’s impossibility theorem. The impossibility of regulatory success here is one that exists in particular markets, not one that is universal to regulation.

It is also worth reemphasizing that the thesis here does not depend on the universality of these problems in protected markets. There may be many aspects of speech, religion, association, reproduction, and parenting that present known expected utility, mere tradeoff uncertainty, risk rather than uncertainty, or moral consensus. As such, some regulations in these markets might be capable of success because they might target identifiable problems or failures. But many will not. My claim here, thus, is only that these markets will frequently—much more frequently than the average market—present situations for which we lack a theory of regulatory success.

**B. Three Reasons to Hinder Regulation**

Even if this impossibility theory is right—even if regulation cannot possibly improve or harm distributional outcomes in situations characterized by moral and economic uncertainty—that point alone does not establish that we should hinder regulation in relevant markets. Indeed, if distribution can be neither harmed nor helped, then why not let regulators do whatever they want?

There are three reasons. First, our government is built on a classical liberal presumption of freedom and autonomy that ought to be preserved, at a minimum, in cases in which regulatory intervention will be arbitrary. Second, the regulatory project itself is costly; if regulation is expected to provide no benefit, we should systematically disfavor regulatory attempts. Finally, under conditions of moral and economic uncertainty, voters will be less able than usual to monitor for abuse or corruption.

---

1. Arbitrariness

In a famous dissent that has been important to modern substantive due process analysis, Justice Harlan wrote that Fourteenth Amendment liberty provides “a rational continuum” of protected interests, “which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints[.]” Whether or not this statement ought to be the lodestar for Fourteenth Amendment liberty, Justice Harlan articulated a touchstone of classical liberal government that provides the first reason to disfavor regulation in markets with high degrees of moral and economic uncertainty.

When regulators lack criteria by which to pursue regulatory success, any regulatory attempt will be definitionally arbitrary. If no distributional result can be identified as better or worse than any other, then all restrictions on liberty, all of which tinker with the distribution and many of which assert redistribution as their primary justification, are purely arbitrary. The market simply cannot be improved or harmed by a mere redistribution of constitutional goods, so there is no justification for the exercise of police power.

Importantly, this point assumes that freedom from regulatory intervention is a value unto itself. The argument—emphatically—assumes that the distributional outcome that results from liberty will be just as good and just as bad as every other distributional outcome. The argument therefore bears little resemblance to liberal economic theory, which asserts that private ordering in competitive markets will provide a better distributional outcome than any produced by a central planner. Rather, the argument is most similar to fundamental rights theories, which hold that human autonomy against government is an independently important value, regardless of whether private ordering will provide more or less actual freedom or better or worse final results than central planning. In short, the argument is that limited government is a good in itself if government cannot improve things and that we should therefore discourage any governmental intervention that will produce arbitrary results.

Importantly, this basic point underlies another swath of due process doctrine; it is the justification that courts give for exercising “rational basis”

---

115 See Glucksberg, 521 U.S. at 762–73 (Souter, J., concurring) (discussing the Poe dissent at length); cf. id. at 721–22 & n.17 (challenging Justice Souter's extensive reliance on Poe and asserting that implied fundamental rights analysis ought to depend only on history and tradition).
118 Importantly, unregulated markets might provide some people will less freedom than regulated markets, depending on the nature of the regulation. Just as regulation will alter the distribution of goods, so too might it alter the distribution of power and choice. The important dimension of freedom, thus, is only freedom from police powers, sometimes deemed “coercive restraints,” not freedom from choice-limiting economic conditions (some of which may be just as coercive as governmentally imposed incentives).
review (rather than no review at all) of ordinary legislation. The Constitution doesn’t require much of ordinary legislation, but under modern doctrine, it does require that such legislation have a point. Quotidian restrictions on liberty must have some raison d’être in order to pass constitutional muster. How, then, does the basic point about arbitrariness translate to individual substantive rights, which get significantly greater judicial scrutiny than ordinary legislation? Under the uncertainty theory, the justification for giving such heightened constitutional protection in relevant markets is that uncertainty within those markets makes it systematically unlikely that the legislature will have a rational reason for intervening. In an important respect, then, my argument is that we have, with good cause, simply reversed the presumption of rationality in the five markets that are the core subjects of individual substantive rights. Because these markets have uncertainty characteristics, we should (and do) assume that regulation within them will be arbitrary, and we should (and do) require government to rebut that presumption if it wants to regulate.

A final note: The basic point that liberty is intrinsically valuable and should be invaded only for cause is probably the only one that justifies rights’ failure to restrict governmental participation in protected markets. As noted above, participation does not infringe liberty in the same way that regulation does; there is no coercive restraint when government merely provides a good or service, particularly if government pays for the good or service from specific rather than general revenue. But like regulation, governmental participation is costly and hard to monitor.

2. Costliness

The second reason for hindering regulation is the simplest: regulation is not free. Both in the actual passage and in the later enforcement, regulation requires expenditure of considerable resources, including the opportunity cost of foregone regulations. If we expect regulatory intervention in a market to produce no defined benefit, then we should systematically disfavor it. Indeed, a regulatory project will necessarily be welfare-reducing and unjust if it consumes resources without effecting improvement. (Note that this argument might be a reason to disfavor judicial review, which is also costly. I will return briefly to this point in Part IV.)

3. Monitoring

The final reason to disfavor regulation in these markets is similar to representation-reinforcing theories, particularly those that focus on risks of tyranny. In protected markets, voters will have a hard time monitoring regulatory decisions for abuse and corruption. The same qualities that leave these markets without a theory of distributional success—moral and economic uncertainty—also make it difficult for voters to evaluate governmental behavior in these markets, leaving the markets more susceptible than average to abuse. A

---

simple appeal to McCarthyism\textsuperscript{121} might suffice to illustrate the point; part of the problem was that voters could not tell whether the individuals being punished really were communists or not, much less whether they were communists that posed a genuine security threat. There are similar historical examples for other protected markets as well; religious persecution and persecution through forced sterilization are historically familiar problems.\textsuperscript{122}

As noted, this point is similar to those structural theories that emphasize risks of tyranny, particularly those that justify protection of speech on the ground that ruling factions will be tempted to suppress critical viewpoints.\textsuperscript{123} But the emphasis on uncertainty provides a firmer basis for extra-political (i.e. constitutional) restriction of regulation, and it provides a basis for extending that restriction beyond political speech. Ruling factions might choose any number of strategies for suppressing opposition—well beyond obtuse punishment of seditious ideology—but the tools that will be hardest to ferret out and eliminate electorally will be those that are difficult to evaluate. In addition to speech, the other constitutionally protected behaviors—religion, association, reproduction, and parenting—all qualify. Because we do not know whether the behaviors themselves are beneficial or harmful, we cannot determine whether individuals engaging in these behaviors are dangerous or not. We cannot determine whether the persecution of Communists is in fact helping or hurting our safety and enlightenment.

Furthermore, this uncertainty-based justification for restricting regulation is not limited to suppressive or punitive regulatory attempts. Another faction-restricting theory of constitutional rights holds that rights should invalidate any minority-protectionist regulation that does not further welfare, particularly interest group regulation.\textsuperscript{124} The likelihood of such interest group regulation might be systematically higher in markets characterized by moral and economic uncertainty because voters will have a hard time determining whether or not a given distributional decision is excessively protective of a moneyed interest. It therefore makes sense to raise the cost to government of regulating such markets in order to dampen the temptation for cronyism.

Importantly, the monitoring justification for hindering regulatory attempts depends on one or both of the first two reasons provided. If the problem were merely that a ruling faction might use police powers to steer distribution in its favor and if it’s true that all possible distributions are equally good and equally bad in relevant markets (or at least that we collectively lack a distributional preference), then we ought not to be troubled by our inability to distinguish public-interest-oriented regulations from mere faction-favoring distributions. The ruling faction’s temptation to favor itself and its friends is troubling only insofar

\textsuperscript{121} See Oxford English Dictionary (3d ed. 2010) (“McCarthyism” is “the policy of identifying (suspected) Communists and removing them from government departments or other positions, spec. as pursued by McCarthy in the United States in the 1950s. In extended use: any form of persecutory investigation likened to that conducted by McCarthy.”).

\textsuperscript{122} See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942).

\textsuperscript{123} See Mieklejohn, supra note 120; Strauss, Afterword, supra note 105, at 548–49.

\textsuperscript{124} See generally Elhauge, supra note 101, at 44–48 (summarizing arguments).
as we dislike the infringements on liberty and the substantial costs that accompany them.

IV. Doctrinal Formulation and Institutional Design

The final step in the technocratic theory of rights is to demonstrate that individual substantive rights are a useful tool for discouraging regulation in markets characterized by moral and economic uncertainty. There are two issues implicit in this step, both of which involve complex questions. The first is a purely doctrinal issue. The question is whether the laissez-faire presumption that arises from individual substantive rights should be rebuttable and, if so, what the standard should be for permissible regulations. As noted in the introduction and at various points throughout the paper, the current doctrine of substantive rights maps fairly well onto the problems identified in this paper, allowing regulators to overcome the laissez-faire presumption by showing that their regulatory approach targets a known market failure or enacts a moral consensus. The second important issue is one of institutional design. The question is whether the judiciary—particularly the federal Supreme Court—is a good arbiter of a rebuttable presumption under the appropriate doctrinal formulations.

In this Part, my goal is simply to highlight the relevant questions without providing comprehensive answers. I will note a few examples of where substantive rights have allowed regulators to target market failures or to enact consensuses, but the review will be far from complete. And I will raise several concrete questions about institutional design without attempting to analyze any of the questions fully. I hope to flesh out both of these areas of analysis in future work.

A. Doctrinal Formulation

In American law, no substantive rights are absolute. Even in enforcing the broad textual command that “Congress shall make no law” restricting individual freedoms of speech and religion, the Supreme Court has allowed several restrictive regulations to stand. Under the strictest doctrinal formulation, these regulations are constitutionally valid if they are “narrowly tailored to serve a compelling state interest.” The laissez-faire presumption, thus, is undoubtedly a rebuttable one. And the only question is what should count as a sufficient rebuttal—or, in the narrowest doctrinal terms, what should count as a compelling state interest.

For my purposes, the interesting feature of modern doctrine is that it has permitted regulations that target certainty. Even within these markets that are much more likely than average to contain no right answers, there are instances of certainty and consensus. And regulators have been allowed to address those instances, either because courts have accepted the regulators’ assertions of compelling state interest or because courts have simply carved exceptions to the

---

125 U.S. Const. Amend. I (emphasis added).
126 Lawrence
scope of constitutional protection. Just a few examples should suffice to illustrate the basic point, though of course modern doctrine contains countless examples and many complexities.

In speech doctrine, many of the speech acts that are not constitutionally protected are acts that impose concrete harms, that operate in quantifiable economic markets, or that generally lack the characteristics of uncertainty described above. Commercial speech is the easiest example; advertising is an ordinary economic activity, lacks hedonic centrality, is unlikely to cause negative utility (has a likely positive or zero valence), and does not follow a long- or fat-tailed distribution. Doctrinally, commercial speech receives only intermediate rather than strict scrutiny. Defamation of private figures is another interesting example, particularly given the Court’s different treatment of defamation of public figures.127 For private figures, a defamatory (definitionally false) statement is overwhelmingly likely to provide negative total utility and to be concretely harmful to the subject of the defamation (in terms of reputational damage). For public figures, however, defamatory statements are more likely to provoke rebuttal and debate, which might end up providing positive utility both for the subject of the defamation and for society as a whole.128 It therefore makes sense for the Court to allow regulation of defamation for private figures but not for public ones. (The Court’s allowance of punishment for malicious defamation of public figures might have to do with a moral consensus that malice should be punished rather than a sense that malice produces a certain harm.) Legal malpractice is another category of speech that produces a known harm that can be deemed a failure or inefficiency, and we allow free regulation of that speech as well. Obscenity is an example of speech against which we have a moral consensus, and we allow regulation of obscenity even though its economic value is probably uncertain.

In religion, polygamy is subject to a prohibitive moral consensus, and the Supreme Court has rejected constitutional challenges to polygamy bans.129 Among intimate associations, rape, incest, and bestiality produce concrete psychological harms to the non-consenting participant, and they also produce moral disapproval. They are all subject to constitutionally valid regulatory regimes. For reproduction, “partial birth abortion” may be subject to a prohibitive moral consensus, and the Supreme Court upheld a congressional ban in 2007 notwithstanding the general constitutional right to procreative autonomy.130 And for parenting, physical abuse and neglect are acknowledged to be immoral acts

128 The idea that the Court might have been seeking to preserve public debate with its decision in New York Times is a well-rehearsed idea. Richard A. Epstein, Was New York Times v. Sullivan Wrong?, 53 U. Chi. L. Rev. 782, 797-801 (1986); Lee Levine, Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart, 35 Am. U.L. Rev. 3, 24 (1985). Tying that idea to uncertainty as to the value of the defamatory statements is a new twist.
129 Reynolds v. United States, 98 U.S. 145 (1878) (holding that a Mormon’s assertion of religious duty should not be accepted as a defense to criminal prosecution for bigamy); Utah v. Holm, 137 P.3d 726 (2006) (refusing to extend the Supreme Court’s decision in Lawrence v. Texas to protect against criminal convictions for bigamy), cert denied 549 U.S. 1252 (2007).
that impose concrete harms arising from a known market failure of unequal 
bargaining power, and they, too, are subject to constitutionally permissible 
regulatory restrictions.

In short, although protected markets show higher-than-average incidences 
of moral and economic uncertainty, the umbrellas of “speech,” “religion,” 
“association,” “reproduction,” and “parenting” also cover many human choices 
that are not so characterized. We therefore would not want to prohibit all possible 
interventions in the relevant markets, and we have crafted doctrines that allow 
regulators to intervene in cases of certainty.

The hardest question that arises for doctrinal formulation is how we 
should determine when a moral consensus has broken down to a point that 
justifies constitutional protection. That is, if a moral consensus has provided the 
rebuttal to the laissez-faire presumption but that moral consensus starts to decay, 
at what point should constitutional protection kick in? The clearest current 
example of this problem is the ongoing gay marriage debate. For decades, 
notwithstanding the constitutional protection for marriage generally and for 
interracial marriage in particular, American legislatures and many American 
courts have refused constitutional protection to same-sex marriage. Part of this 
paper’s thesis is that such refusal made sense in light of a strong moral consensus 
that marriage must involve a man and a woman. We have, however, seen the 
accelerated deterioration of that consensus over the last decade—a consensus that, 
in 1996, was sufficiently strong to generate federal legislation but that today 
has failed to block gay marriage statutes in several states. But at what point, 
given economic uncertainty (which undoubtedly exists for these intimate 
associations) and growing moral uncertainty, should we grant constitutional 
protection? The California state constitutional amendment banning gay 
mariage—the Proposition 8 initiative that has become the center of the federal 
constitutional debate—passed with 52.24% of the popular vote. Is that enough 
to show a moral certainty that gay unions are reprehensible? I would say no—and 
the District Court judge that heard the federal constitutional challenge thought 
not—but the question is a scalar one with an undefined threshold. It seems 
relevant that the aggrieved minority comprises only 10% of the population but 
mustered nearly 48% of the vote, but it is hard to know how to define the 
threshold for moral certainty. Perhaps, as with our moral consensus against 
obscenity, we must be satisfied to know it when we see it.

131 Loving, 388 U.S. 1.
133 An Act Relating to Civil Unions, 2000 Vt. ALS 91 (2000); An Act Implementing the 
Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Ct. 
ALS 13 (2009).
134 Debra Bowen, California Secretary of State, Statement of Vote: November 4, 2008, General 
Election 15 (2008), available at 
136 Bowen, supra note 134, at 15.
137 See Jacobellis v. Ohio, 378 U.S. 184, 197 (Steward, J., concurring) (“I shall not today attempt 
further to define the kinds of material I understand to be embraced within that shorthand
Importantly, this tie between constitutional protection and dissensus-based moral uncertainty provides a justification for the phenomenon that David Strauss has deemed “modernizing” and that other scholars have discussed in the context of gay rights.\footnote{Strauss, Modernizing Mission of Judicial Review: Andrew Koppelman, DOMA, Romer, and Rationality, Drake L. Rev. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650687##.} Moral senses shift over time, and when a consensus dies, so too does one metric for judging regulatory interventions. At that point, if the market also shows characteristics of economic uncertainty and therefore lacks other metrics for defining regulatory success, then the market ought to get new constitutional protection.

B. Institutional Design

There are many important questions of institutional design that arise under this theory of substantive rights. The most obvious is whether courts should play any role at all in enforcing the laissez-faire presumption, invalidating infringing legislative decisions. As I mentioned above, I do not seek in this paper to justify judicial review. Even without it, the recognition of a constitutional right will raise the cost of legislating and will decrease the amount of arbitrary regulation in subject markets. And given that all distributional results are equally good and equally bad under my theory, judicial guardianship of constitutional rights is significantly less important than it would be if freedom were guaranteed to produce better outcomes. Nevertheless, both the arbitrariness and the monitoring justifications for substantive rights’ laissez-faire presumptions suggest that the judiciary can play an important role under this theory. It can safeguard the important value of liberty, and it can prevent political actors from using uncertain markets to abuse their police powers. Of course, judicial review is costly, and a good technocrat should want to know whether the judiciary creates enough value in terms of protected liberty and prevented abuse to justify its cost. That question is well beyond my current scope.

A more mundane question is whether judges are capable of evaluating regulators’ assertions of certainty and consensus in order to apply the doctrinal formulations mentioned above. In the end, I think the answer is yes. Measuring uncertainty with precision is no easier than defining the threshold required for moral consensus, but as with presence or absence of moral consensus, the presence or absence of certainty might be easy to intuit. If government can articulate a state interest with reference either to standard economic theory or to generally accepted moral precepts, the regulation should be allowed. Although it will be possible for regulators to be disingenuous in their state-interest offerings, it should also be possible for judges to sniff out such insincerity. Furthermore, litigants raising constitutional challenges will be able to make a better-articulated case against the stated government interest if they can appeal to well-defined notions of moral and economic uncertainty.

description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).
Another important question of institutional design relates to federalism. Here, the question is whether a moral consensus that exists within a limited state or region should suffice to rebut the laissez-faire presumption and to defeat the constitutional protection. Because the First Amendment has been incorporated into the Fourteenth, federal substantive rights restrict state legislatures as well as Congress, but the Supreme Court cannot deem a regulation constitutionally valid in one state but constitutionally invalid in another. If there is a moral consensus against homosexual marriage in the southern states but moral uncertainty in northern states, what should the Supreme Court do? My tentative answer is that federal constitutional protection should kick in only when uncertainty exists nation-wide, but the problem is a difficult one.

Conclusion

Substantive constitutional rights in modern American doctrine serve as strong but rebuttable presumptions in favor of private ordering. Although this function seems inconsistent with traditional notions of constitutional rights, laissez-faire presumptions make sense for markets that involve high degrees of economic and moral uncertainty, particularly in a constitutional technocracy. Uncertainty frustrates technocratic regulation, leaving regulators without a valid theory to pursue. Uncertainty therefore justifies the presumption that regulatory infringements of liberty will be arbitrary. In modern doctrine, substantive constitutional rights provide that presumption in five markets that involve high degrees of uncertainty—speech, religion, association, reproduction, and parenting—but they allow regulators to rebut the presumption through a showing of certainty or consensus. Substantive rights thus provide an elegant technocratic tool, discouraging arbitrary infringements of liberty without frustrating legitimate regulatory projects.

---

139 Incorporation cites.