Substantive Rights in a Constitutional Technocracy

Abigail R. Moncrieff, Boston University School of Law
Substantive Rights in a Constitutional Technocracy

Abigail R. Moncrieff*
Substantive Rights in a Constitutional Technocracy

Abstract

There are two deep puzzles in American constitutional law, particularly related to individual substantive rights, that have persisted across generations: First, why do courts apply a double standard of judicial review, giving strict scrutiny to noneconomic liberties but mere rational basis review to economic ones? Second, why does American constitutional law take the common law baseline as the free and natural state that needs to be protected? This Article proposes a technocratic vision of substantive rights to explain and justify both of these puzzles. The central idea is that modern substantive rights—the rights to speech, religion, association, reproduction, and parenting—protect a discrete set of markets that is characterized by unusually high degrees of economic and moral uncertainty.

The Article identifies three sources of economic uncertainty (hedonic centrality, uncertain valence of value, and long/fat tailed distributions) and two sources of moral uncertainty (deep dissensus and pluralism/ambivalence) that are prevalent in all five protected markets. In the presence of those kinds of uncertainty, all theories for distributional success that are relevant in a representative democracy necessarily fail, and from a societal perspective, all distributions of goods within uncertain markets are equally good and equally bad. As a result, regulators cannot hope to improve market distributions from the common law baseline and ought not to try. That said, the modern doctrinal formulation for strict scrutiny allows regulators to intervene when they can identify discrete market failures or moral consensuses within protected markets (when they can write a “narrowly tailored” intervention to serve a “compelling state interest”). This caveat further demonstrates that the harm rights seek to avoid is fruitless regulatory tinkering in the face of uncertain costs and benefits.
Introduction

Two deep puzzles persist for individual substantive rights in American constitutional law: First, why do courts today assign “fundamental” status to some unenumerated rights, like reproductive rights, but not to others, like contractual rights? Why do courts apply a “double standard of judicial review,” giving strict scrutiny to noneconomic liberties but mere rational basis review to economic ones? Second, why do American rights protect against some kinds of regulatory intervention, like legislative enactments, but not others, like common law distributions? Why does American constitutional law take the “common law baseline” as the free and natural state that needs to be protected? The legal literature has tackled both of these puzzles vigorously since the death of the Lochner era, and scholars have proffered many solutions, some of which seek to explain the puzzles in order to justify modern doctrine and others of which seek to eliminate the puzzles by revising modern doctrine.

This article falls into the former category. My project is to explain and justify both the double standard of judicial review and the protection of common law baselines within the limited world of individual substantive rights: the First, Fifth, and Fourteenth Amendment rights to speech, religion, association, reproduction, and parenting. I tackle that project by offering a technocratic vision of substantive rights, in which the relevant question is how and why the recognition of a substantive right alters regulatory incentives.

This vision is technocratic in three senses. First, it views substantive rights as means of influencing political branch decisions rather than as ends in themselves. The article treats substantive constitutional rights as technocratic tools that politicians and judges can use to manipulate legislative and executive behavior, where strict scrutiny in the judiciary increases the cost of regulating

---

1 See Harry H. Wellington, Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication, 83 Yale L.J. 221 (1973) (noting and seeking to justify the double standard of judicial review that allows Lochner to be wrong but Griswold to be right); see also Lynn A. Baker & Ernest A. Young, Federalism and the Double Standard of Judicial Review, 51 Duke L.J. 75 (2001) (noting the double standard of judicial review in rights enforcement and arguing that federalism ought to be on the scrutinized side of the line).


6 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.
significantly more than rational basis review. This vision explicitly rejects the notion that substantive rights constitute individual or moral entitlements. Second, the article makes a technocratic assertion about costs and benefits in some regulatory regimes, arguing that costs and benefits are mathematically impossible to ascertain—are uncertain in a Knightian sense\(^8\)—in the regimes that garner the highest levels of substantive constitutional protection. Finally, the article rests on a technocratic theory of when regulators are likely to regulate and when they ought to regulate. The theory assumes tautologically that regulators will and should intervene whenever the benefits of doing so outweigh the costs.

In short, the technocratic vision is that substantive constitutional rights create conditional barriers to regulation in regimes in which the political branches are systematically unlikely to have reliable information about regulatory costs and benefits. Because those costs and benefits are deeply uncertain in speech, religion, association, reproduction, and parenting and because they are not as deeply uncertain for economic regulation, the “double standard of judicial review” and the modern set of substantive rights make sense under the technocratic vision. Furthermore, because all regulatory interventions, whether distorting or reinforcing underlying common law distributions, are likely to rest on uncertain costs and benefits in the protected regimes and are therefore likely to be arbitrary, the common law baseline also makes sense. On this view, rights protect common law distributions not because those distributions are desirable but because regulators can do no better and ought not to try.

Part I of the article sets forward, in primarily descriptive terms, the technocratic function of substantive rights. It makes the case that these rights are conditional barriers to regulation, which serve to raise the cost of regulatory intervention and thereby put a thumb on the scales in favor of private ordering and common law distributions. This description of rights is not novel; Cass Sunstein noted long ago that rights protect common law distributions,\(^9\) and Matthew Stephenson more recently elaborated a theory of rights as judicial manipulations of legislative enactment costs.\(^10\) Part I also, however, makes the new observation that rights allow regulators to intervene as market participants in the protected regimes, and it uses that observation to bolster the technocratic vision of substantive rights as laissez-faire presumptions for a discrete set of markets.

Part II fleshes out the claim that regulatory costs and benefits are uncertain in the regimes that are the subjects of modern constitutional rights. This Part presents three kinds of mathematical uncertainty that are relevant to core costs and benefits in protected regimes: a hedonic uncertainty problem, an uncertain valence problem, and a long/fat tails problem. Mathematical uncertainty, though, is relevant only to objective costs and benefits, which are not the only ones relevant to regulation. Part II therefore goes on to consider the subjective and

---


\(^8\) See generally Frank H. Knight, Risk, Uncertainty, and Profit (1971).

\(^9\) See Sunstein, Lochner’s Legacy, supra note 2.

\(^10\) See Stephenson, supra note 7.
moral benefits of regulating, and it concludes that moral uncertainty is also prevalent in the protected regimes.

Part III turns to the tautological theory of regulation that underlies this view of rights, applying basic cost-benefit analysis to consider when regulation ought to be allowed and when it ought to be discouraged. This Part makes the case that the conditions of uncertainty outlined in Part II render regulation systematically suspect in the protected realms, justifying rights’ skeptical view of regulatory interventions in those realms. The basic idea is that conditions of deep uncertainty with respect to core costs and benefits prevent regulators from formulating any theory of improvement to the preexisting (common law) distributions. Because regulating itself is not free, regulating without a theory of improvement is necessarily irrational, regardless of one’s views about the kinds of costs and benefits that ought to count in the regulatory calculus.

In Part IV, the article briefly turns to the doctrinal formulation for strict scrutiny, which allows regulators to pass “narrowly tailored” interventions that “serve a compelling state interest.”!1 !1 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.”). Importantly, the purpose of this Part and of the Article generally is not to justify the practice of judicial review. Rights can and do increase the cost of regulatory intervention without judicial involvement by providing a strong rhetorical tool to the intervention’s opponents. Nevertheless, the strict scrutiny formulation and its application in the courts bolsters the descriptive force of the technocratic theory. Strict scrutiny doctrine is an elegant tool for dissuading regulatory intervention—without fully prohibiting it—in realms that are very likely to suffer from uncertainty, but might not always. Even within the protected regimes, substantive rights allow regulation when government can identify concrete harms, discrete market failures, or moral consensuses and can show that the intervention is narrowly tailored to fix the identified harm. Substantive constitutional rights thus strike an impressive balance between discouraging fruitless regulatory attempts in uncertain regimes while allowing discrete regulatory interventions to correct known harms or to enact moral consensuses.

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 right to trial by jury, 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 they do not require government 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 regimes, which preserve the common law distribution against regulatory tinkering.

Although none of these points is 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 focuses 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

12 Through the article, I use the term “markets” in the metaphorical sense as well as the literal sense. That is, I use “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).
14 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.”).
15 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.”).
The Constitution 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 whatever—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 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, even if the constitutional right to reproductive autonomy would prohibit government from banning in vitro fertilization.

For technocracy, this example is important in demonstrating the following central idea: Private markets are free to set the supply and 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

---

16 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.").
18 As I will discuss in the next subsection, the market sets supply and price with the help of common law property and contract rules. I do not mean to assert anywhere in this article that the private market is a natural or neutral entity that sets distributions in a regulatory vacuum; some form of positive law plays an important role in determining all market distributions.
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 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—the one that Sunstein has elaborated in his critiques of common law baselines. Substantive rights require that individuals be free to engage in protected activities without requiring that they be enabled to engage in those activities. In technocratic terms, the salient point is as follows: Just as 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, one 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 one 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 purposes, a lawsuit demanding such public assistance would name the government as the defendant and would complain of a particular


21 Jackson, 715 F.2d at 1203.


23 Posner, supra note 22, 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).

24 See Sunstein, New Deal, supra note 2, at 501–04; Sunstein, Lochner’s Legacy, supra note 2.
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 could 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.25

Substantive constitutional rights thus seem to be agnostic toward protected markets’ distributional outcomes. Private ordering—which necessarily occurs against the backdrop of general regulatory decisions and longstanding common law rules—will give rise to particular distributions of protected activities. But our constitutional freedoms do not obligle 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, practicing religion, engaging in preferred associations, reproducing, or 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.

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,26 so I will go into greater detail here than I did for the prior two characteristics, explaining why this distinction is useful for the law and theory of individual substantive rights.27

Government can use two kinds of mechanisms to intervene in markets: regulatory and participatory mechanisms.28 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.29 Although the line between the two roles is sometimes formalistic in

26 Sunstein discussed this point a bit in Free Speech Now. See Sunstein, supra note 5.
practice, 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. Payment of unemployment benefits is a participatory action (public provision of wages) while the minimum wage law is a regulatory action (an incentive for private 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 individuals to maintain roadways). Medicare and Medicaid are participatory actions (public provision of health insurance) while the Obamacare individual mandate and insurance subsidies are regulatory ones (incentives for private consumption of health insurance). In general, regulatory actions utilize police power while participatory actions exercise market power.

Although a Commerce Clause doctrine, this distinction seems useful to substantive rights 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. I will first 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 only against exercises of police power. They neither protect us from exercises of market power nor entitle us to demand such exercises. 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 people who fail to watch the address, nor may the government give tax credits, for example, to 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. 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, the 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 effectively 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 but to refuse abortion coverage has decreased women’s access to 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, 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. 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

operate courts, employ judges, provide lawyers, etc.—all exercises of market participation rather than regulation.

36 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.”).
actions in interesting ways; they limit government’s ability to lever its market power into de facto regulatory constraints. Substantive rights prohibit government from using regulatory (as opposed to 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 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.” 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.

The rule against unconstitutional conditions is less well defined 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. For example, government may refuse to employ an individual and may regulate an employee’s work-related speech, but it may not condition employment on a waiver of speech rights outside the workplace or discharge an employee in retaliation for a non-work-related exercise of those rights. Similarly, 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 (like Planned Parenthood) can participate alongside government, providing abortion coverage where government does not. In technocratic terms, the rule against unconstitutional conditions ensures 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

37 See generally Stone, supra note 13, at 1266–87.
38 See generally id. at 1598–1608.
39 See generally id. at 1266–87.
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, 41 the First Amendment has been understood to prohibit not only governmental regulation of religion but also governmental participation in religious markets. 42 The Establishment Clause, particularly given its appearance alongside the regulation-focused Free Exercise Clause, provides a textual basis for this exception, 43 but it is not entirely clear that all governmental participation—beyond public establishment of a national religion—should offend the Constitution. 44 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 to apply the state action doctrine and the freedom-enablement distinction is *DeShaney v. Winnebago County Department of Social Services*, 45 also known as the “Poor Joshua” case. 46 In that case, the

---


42 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 37.

43 U.S. Const. Amend. I (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…”).


46 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[.]”).
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 the abuse 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 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 the participant-regulator distinction becomes relevant. 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

47 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).
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 engage in protected activities. Second, substantive rights protect against governmental leveraging of market power to box out private players in protected markets—indirect assaults on market freedom within protected realms. Crucially, these 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 relevantly 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 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. 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. It raises the puzzle of the double standard of judicial review.

For those who hold that constitutional rights are fundamental, there is no need to justify the selection criteria. The Constitution protects fundamental rights because they are fundamental, and the rights that are fundamental are the ones that society protects (doctrinally, the rights that Anglo-American law has historically protected). It’s soothingly tautological. But if we acknowledge that constitutional rights are simply laissez-faire presumptions for a limited set of markets, then we need to ask why modern doctrine defines the set of markets as it does. 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 Lochner. With broad scholarly consensus that economic substantive due process was wrong and that modern substantive due process is right, 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 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

50 See Part III.C.3, infra, for further discussion of fundamental rights theories.
52 I mean here to criticize the doctrine of “implied fundamental rights” rather than robust moral theories of fundamental human rights. Broad moral rights theories are philosophically useful but not at all descriptive of American rights law. For further discussion of the robust theories, see Part III.C.3, infra.
regulation in protected markets. Reserving the normative claim for Part III of the paper, this Part elaborates 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 mathematical uncertainties in core aspects of value. Because of those uncertainties, willingness-to-pay metrics\textsuperscript{53} systematically fail as short-hands 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 regulators 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 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 can be evaluated 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”).\textsuperscript{54} 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 heads). 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.\textsuperscript{55}

In one important respect, Knightean uncertainty pervades regulatory decision-making. That respect is one that Lionel Robbins elaborated in 1935: that

\textsuperscript{53} See Part II.A, infra.
\textsuperscript{54} See generally Knight, supra note 8.
\textsuperscript{55} For a comprehensive discussion of uncertainty in regulation, particularly focusing on cases of high magnitude harms in financial and environmental regulation, see Daniel A. Farber, Uncertainty (Feb. 18, 2010), UC Berkeley Public Law Research Paper No. 1555343, available at SSRN: http://ssrn.com/abstract=1555343.
we cannot (at least yet, perhaps ever56) draw interpersonal comparisons of utility.57 Because so many aspects of utility are immeasurable (like happiness or satisfaction), we do not know whether one person or the other will get more utility out of access to a scarce resource. As a result, we cannot predict the probable social value of regulatory interventions because the magnitude and even the valence of redistributational effects will be unknown. That is, regulators do not know whether the shift in resources that results from regulation has increased or decreased collective utility because in most cases of quotidian regulation it is impossible to compare the losing parties’ (average or total) utility loss to the winning parties’ (average or total) utility gain.58

Although this problem is undoubtedly present in every regulatory regime, law and regulation 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.59 Law has generally assumed that an individual who pays $15 for a hammer has gained at least $15 worth of value or satisfaction from that hammer, and it has assumed that, between two parties, the one that is willing to pay more for the hammer values it more.60 Willingness-to-pay allows concrete comparisons across humans, though not necessarily accurate ones due to differing marginal utilities of dollars, time, and effort61 and perhaps due to the inherent fallacy of comparing individuals’ subjective utilities.62 But, at a minimum,

56 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”).
58 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).
60 See Part II.A.2, infra, for a discussion of common law rules’ reliance on willingness-to-pay to identify the highest-value user when distributing scarce resources.
62 See Lawson, supra note 56, 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).
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 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. 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. The point here is not the oft-made one that economic markets for constitutional goods might systematically fail. 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.63

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 difficulty of predicting and measuring psychic or hedonic consequences—the difficulty 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 taking the subway. And if it is, then the difference in price between

63 For statistical and mathematical discussions of fat tails and feedback, see Farber, supra note 55, at 17–30.
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 direct 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.64

Because 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 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, news media, novels, artworks, religious services and books, contraception, abortions, 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 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, 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, economists assume that costless consumption can provide only positive value. If I receive a free widget that functions perfectly, I can either use it or sell it, and either way I gain value from the receipt. If I choose to use it rather than sell it, I’ve presumably gained value equal to or greater than the opportunity cost of selling. If I simply throw it away, the widget was presumably of no value to anyone, or 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 economists 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, consumers 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 consumers to build on experience to make smarter decisions next time. 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 good, 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 because 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

---

65 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…”).
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 and practices 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 and contested. For most speech theories, however, an idea’s value depends on its persuasiveness, its provocativeness, and/or its truth. The uncertainty problem, then, is that all of those factors are difficult to predict and evaluate.

To make this point more concrete, I’ll start with a central and uncontroversial goal of speech, the pursuit of truth.\(^{66}\) (Assume for now that truth is definite.) 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 truth or fiction.\(^{67}\) 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, and it might even provoke me actively to rebut the falsehood, which could provide others with positive value (if I were more persuasive than the liar). Alternatively, I might ignore the falsehood, in which case it would have no impact at all—zero value. Importantly, no one can 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, etc.—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,\(^{68}\) for example—might not predict my reaction to a different and unrelated false idea—that President Barack Obama was born in Kenya, say.\(^{69}\) Experience does not help to predict a given individual’s likely utility valence from a particular idea. If, therefore, law prohibited expression of known falsehoods, we might reduce either the harm of entrenching falsehood through persuasion or the

---

\(^{66}\) See John Stuart Mill, On Liberty ch. 2 (1859).


benefit of entrenching truth through provocation and rebuttal. We cannot predict which effect, if either, 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 government should do to realize that vision. The value of a political idea therefore depends on whether it will improve or harm a complex reality. Holding to the assumption that truth is definite, the value of political speech depends on whether it will persuade people to move in the right or wrong direction. The central point above, which holds in identical form here, is that speech advocating the wrong direction might steer many people in the right direction, depending on uncertain factors of persuasion and provocation.

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 net positive or negative. Indeed, the process of rebutting an argument and of winning the pursuit for truth might give the truth a stronger hold than it would have had without the challenge. Or it might not. The point is that, for any given idea, we don’t know how the debate will play out over the short or long term.

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. In other words, if truth is indefinite or “truth” is merely a majority or supermajority viewpoint, 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 a single artist will sometimes succeed and sometimes 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 a sick or unhappy child that provides its parents with negative value.\(^70\) (Or a happy, healthy child

---

\(^70\) 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
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 forgo creation of a particular child through contraception or abortion (or abstinence, for that matter): that decision might be one to forgo a happy, healthy child (negative value) or to forgo a sick, unhappy child (positive value). Because of the complexities of the human genome, the valence of a particular reproductive combination is impossible to predict from external factors or experience.

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, the valence of particular parenting decisions for particular children remains somewhat uncertain. For mere association, as for artistic expression, spiritual satisfaction, and opinions, the central problem is that the relevant components of utility are 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 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 malpractice, incest, and child 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 utility. 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 pretty good guesses 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/Fat Tails

In most markets, the utility that individuals gain from consuming goods or services follows a normal (Gaussian) distribution, which makes individual expected value from those goods or services relatively easy to estimate. For example, the vast majority of people gain positive value from owning an IKEA lamp, though it is extremely unlikely that anyone will experience an extreme gain or an extreme loss from lamp ownership. That is, most people gain about the same amount of utility from IKEA lamps—most people sit in the middle of a bell curve of expected and experienced utility—and the market-clearing supply and price can therefore reflect that normally-distributed utility. Furthermore, IKEA lamps have a normal degradation schedule that makes long-term benefits relatively easy 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.
to model, with a curve that reaches zero utility on a predictable timescale. Although it is possible (extremely unlikely, but possible) that a given IKEA design will become collectible such that long-term benefits will reach zero more slowly than normal and might even increase for some time, this possibility is a risk rather than an uncertainty. With sufficient information about the number of lamps manufactured, the usual likelihood that most individuals will use their lamps rather than preserving them for future sale, and the market’s prior experience with creating collectibles, one can estimate the likelihood that a given lamp will become collectible as well as the probable value at various time intervals of a collectible lamp. This normal distribution model makes it relatively easy for an individual to predict the value that she will gain from purchasing an IKEA lamp today.

In a few unusual markets, however, the distribution of expected utility does not follow the normal bell curve. Instead, the distribution has long and fat tails. Fat tails occur when a probability distribution includes a higher-than-normal percentage of outlier events, and long tails occur when some of those outlier events are of extreme or even infinite value. In a paper about uncertainty and regulation, Dan Farber uses the example of height.71 Human height follows a normal (Gaussian) distribution, such that adult humans over seven feet tall or under four feet tall are extremely rare and adult humans over ten feet tall are nonexistent. In a species that followed a long and 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.”72

Long and fat tails can occur under two circumstances that are relevant to constitutionally protected markets. First, they arise in markets that experience a feedback effect, which occurs when an event causes its own escalation, driving up the magnitude of its value.73 A simple physical example is feedback in loudspeakers: A microphone re-amplifies the noise emerging from the speakers in a positive feedback loop that results in extremely loud noise.74 In speech markets, feedback might occur when an idea gains traction with listeners and thereby causes its perpetrator to assert his idea more forcefully and more frequently, escalating the impact of his idea in the same kind of positive feedback loop. Second, long and fat tails can arise when higher-order (i.e., later-in-time) effects of an original action might grow rather than shrinking in magnitude. A physical example is ripple effects; ripples usually fade as they spread beyond the initial perturbation. If there is a chance that ripples will instead get bigger as they spread, then the distribution of the perturbation’s probable effects will have long and fat tails; the final aggregated impact of the perturbation would have higher-than-normal chance of having an extremely high magnitude. In constitutionally protected markets, this growing-ripples problem arises from persuasion and repetition together with the length of the relevant timescales for calculating value. For example, the costs and benefits of Aristotle’s speech have been accruing for

71 Farber, supra note 55, at 21 (internal quotations and citations omitted).
72 Id.
73 Id. at 17–18.
74 Id.
more than two millennia as others have repeated his ideas, and the utility of his recorded speeches for any given generation might be either greater or lesser than the utility his contemporaries experienced. The ripples might either grow or shrink for any given generation. The total values of Aristotle’s speech have thus reached extreme magnitudes, and the final net utility of that speech is impossible to predict.

A consumer in a market with long and fat tails—unlike the IKEA lamp consumer considered above—cannot reliably predict her expected utility from engaging in the market. In a market with long and fat tails, each consumer has a higher-than-normal probability of being an outlier. Indeed, mathematically, a distribution with long and fat tails sometimes has no defined average value, which for utility calculation means that a market participant would have no defined expected utility. That is, if many instances of market participation have infinite value (like Aristotle’s, perhaps), then individual expected utility might not mathematically exist.

Though the possibility is an empirical one that may be impossible to verify, 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 and feedback: The first time Rush Limbaugh commented on politics, he probably spoke with less fervor and certainly spoke to a smaller audience than he does today. As listeners, including employers at talk radio stations, provided Limbaugh with positive feedback about his ideas, his fervor and audience steadily increased. The total impact of Limbaugh’s ideas thus grew over time in part because positive feedback from listeners has increased the amplitude and reach of his voice. Furthermore, an individual idea that Limbaugh expresses might gain traction among his listeners and cause the listeners to repeat the idea back to Limbaugh when calling the show or writing fan mail, much as noise from a speaker repeats back to the microphone. This feedback loop might then cause Limbaugh to spend more time discussing that particular idea and/or to discuss that idea with greater confidence, spreading the idea farther and driving the idea deeper. All told, the feedback that Limbaugh has gotten since the first time he spoke has increased both Limbaugh and his ideas to become outliers; his speech has had a much larger impact than the average person’s political commentary. In short, ideas gain impact and therefore gain value, whether positive or negative, when speakers get positive feedback from listeners. And in the rare but more-common-than-normal case like Limbaugh’s, an individual speaker’s or an individual idea’s total value can reach extreme magnitudes because of that positive feedback loop. Notably, this problem is easy to see for speakers with radio or television shows, but it is not unique to those speakers. I will be more inclined to follow this paper with further elaborations of this idea if I receive positive feedback from readers, and the same might be true of any ordinary speaker talking to friends. Repetition to new audiences is more likely for any idea that is positively received.

For speech and ripples, there are two related patterns that might regularly occur: the repetition problem and the timescale problem. First, consider a case of
simple repetition across a relatively short timescale, for example the expression of genocidal ideologies. Of course, such expression usually has consequences of small magnitudes. In fact, the vast majority of such expression probably falls on deaf ears, while some such expression might persuade a small number of listeners and give rise to fringe elements that never have a major impact. But sometimes the idea escalates to a holocaust. Sometimes, the initial advocacy of genocide persuades one listener, who then persuades others, and so on, such that the number of genocide advocates grows exponentially instead of shrinking like ripples. This rare extreme bad outcome from genocidal expression gives the probability distribution a long, fat tail even across a relatively short timescale: Genocidal ideas might catch more frequently than a bell curve would estimate (fat tail), and the bad outcome when the idea catches is catastrophic (long tail). Although most outcomes that we can expect from genocidal expression are bunched around the point of zero value, the tail of negative outcomes may fade to nonexistence more slowly than normal, and it certainly extends farther than normal.

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 point above, the expression of genocidal ideas might have good effects as exponentially growing numbers of listeners consider and reject the bad idea of genocide. Those people, then, might rebut the bad idea with increasing vigor as the bad idea 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. That said, the difficulty in estimating expected value that arises from long and fat tails does not depend on symmetry between the good and bad tails.

For other ideas, this persuasion and repetition can continue across extremely long timescales. In the Aristotle example mentioned above, the written recordings of Aristotle’s ideas continue to circulate—repeat to new listeners persistently over time—as they persuade new generations. But that repetition, unlike the short-term repetition of genocidal advocacy, will likely continue indefinitely through time. His speech thus has repetition characteristics as well as a timescale problem. We can imagine many other examples as well, including some with definite origins and without original recordings that can be redistributed. The basic concept of human morality, for example, is an idea of indefinite origin that has had complex consequences over an extremely long timescale. Of course, most new ideas will influence thought for only a short time (if at all), but a persuasive idea like the existence of human morality or a useful idea like the efficiency of an alphabet 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 fat and infinitely long tails to account for the nonzero probability of infinite persistence and utility. (Compare this pattern to the lamp example, where the utility of a given lamp (as with most physical goods) fades predictably over time as the good degrades and eventually breaks.) Under the technocratic theory, artistic
expression deserves constitutional protection primarily for this reason. Although the value of most artistic works will fade over time, an abnormally large percentage of individual works will gain value with time, and a rare few will become invaluable. Furthermore, a given generation’s assessment of a painting’s value might not match future generations’ assessments, so the “ripples” in the painting’s value might either fade or grow. This pattern makes the expected utility from purchasing an individual painting extremely difficult to estimate.

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). Or, even without 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 even 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 undefined. Distributions with long and fat tails sometimes have infinite and/or undefined means. 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—forgone 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 assuming costless and flawless provision and consumption. That is, the likelihood 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. The uncertain valence of individual utility and the statistical uncertainty that accompanies long and fat tails make expected value difficult to measure, even when limiting value to non-
hedonic variables. Crucially, these problems make it difficult not only for outsiders to estimate a consumer’s expected or captured value but also for the consumer to estimate her own expected value. These problems make it hard for anyone to know ahead of time—and often 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 distributional success. Conceptually, the problem is that individuals’ own approximations of their willingness-to-pay will be arbitrary, and their demonstrated willingness-to-pay will 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 a result, willingness-to-pay does not demonstrate 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. The woman with the higher willingness-to-pay was the lower-value user.)

For other constitutionally protected goods, consider a stylized hypothetical to demonstrate the difference between those goods and widgets. If there is one widget that must be given to only one of two people, how does the law 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, measured by users’ relative willingness to pay. 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, have equal bargaining power, and are not suffering from cognitive limitations like the endowment effect. The second is that a third party holds the property right in the widget, in which case (under similar assumptions of marginal utility, bargaining power, 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 law assumes 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.

Now imagine (remembering that the hypothetical is stylized) that, instead of a widget, the law is trying to distribute a religious tenet that can be taught to only one of two people. How should law 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 the legal system cannot 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 assuming that the tenet provided good guidance that would result in spiritual gratification and/or eternal redemption and assuming that both parties would be persuaded of the tenet’s truth, nobody would know (not the parties, not the law) 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 at 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 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.

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 individual instances of the goods at issue cannot be compared against each other. It is in fact impossible to determine which ideas, which religions, or which humans will provide the most social utility, and that might be a good reason to avoid regulations 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 is that markets and regulators necessarily steer goods and services to one individual or another, and it is impossible to 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, law typically uses 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 to justify constitutional protection. One is that value must be uncertain even when consumption is costless. The other is that value must be uncertain even when production and consumption are error-free. These two conditions are necessary to distinguish inherent uncertainty from, respectively, tradeoff uncertainty and risk uncertainty, neither of which is sufficient to warrant a laissez-faire presumption. This subsection provides examples of these other kinds of uncertainty—examples of markets with tradeoff and risk problems—in order to clarify the scope of the theory.

a. 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 (Orbit peppermint flavor) but not know whether it’s worth the $1.29 and trip to the drugstore that it would cost to get it. Perhaps that $1.29 and ten minutes would be better allocated somewhere else. If, however, a pack of Orbit peppermint gum magically appeared in my purse, there would be no doubt that I would be better off (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). I know from reliable experience that I enjoy chewing (well-made) Orbit peppermint gum, and the value of costless gum is therefore undoubtedly positive for me. 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.75

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

75 There may be marginal uncertainties about the inherent value of gum, such as whether it has any effect on dental health and hygiene or whether its aspartame cause cancer in the long run. The central factors, however, of flavor and satisfaction are known or knowable with experience.
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 other papers will be of limited usefulness in predicting the value of this paper; even if I were regularly a persuasive or provocative writer, 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. The regulatory system, thus, has no basis on which to steer the relevant markets.

This distinction explains why, under this theory, the Constitution should not protect 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 are many unknowns about environmental consequences and even though the inherent value of environmental protectionism might be immeasurable, there is no doubt 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 government could magically freeze environmental degradations at their current level or could magically restore air and water quality to its cleaner past while still growing the economy, humans would undoubtedly be better off or the same, not worse off. On the other side, “costless” (really benefitless) restrictions on industrial production or urban development undoubtedly would be bad. If restrictions on such activities would produce no environmental or other benefit, 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 Americans are 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. (Part III will say more about the legitimacy of this kind of regulation.)

b. 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, even costless consumption will make me worse off. Those problems, however, can be deemed failures in the gum’s production. That is, negative value from one bad pack of Orbit peppermint gum, given long experience of enjoying well-made gum of the same brand and flavor, almost certainly arose from error of some kind. It is coherent to say that the bad-tasting or sickness-inducing Orbit is a faulty piece of gum without saying that Orbit is inherently 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 idea is that Orbit peppermint gum that causes a bad outcome can be deemed discretely rather than inherently faulty. Regulators should therefore 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, it is impossible in those markets to distinguish faulty instantiations from bad products. For example, if this paper fails to convince most readers of its basic claims and/or fails to provoke commentary challenging 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, unprovocative, and/or wrong. Even if the paper fails to contribute to truth or debate, 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 because it is impossible to say whether the process or the product was to blame. In short, it impossible meaningfully to disentangle an idea’s persuasiveness and provocativeness from its intrinsic value, and that obstacle makes it impossible to distinguish faulty instantiations of ideas from faulty ideas.

Importantly, the impossibility of identifying error in speech does not depend on truth being indefinite or unknown. 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. Under these circumstances, there is undoubtedly a risk of error insofar as some expressions of wrong ideas will persuade listeners to adopt falsehood. But, for two reasons, regulation would be powerless to steer the speech toward provocation and away from persuasion. First, as noted above, we simply do not know what causes an idea to persuade
some people while provoking others, so a regulatory regime could not manipulate the manufacturing of falsehoods to make them provocative instead of persuasive the way that regulation can manipulate the manufacturing of gum to make it safe (and delicious) instead of hazardous (and disgusting). Second, even if we did understand causality in persuasion, it seems likely that the features of articulation that make expression persuasive might be the same as the features that make it provocative. More-persuasive expression might create a higher incentive for counter-speech than less-persuasive expression. If that’s true, then positive and negative value effects are directly rather than inversely related, making it impossible to prohibit manufacturing processes that give rise to persuasion without also prohibiting processes that give rise to provocation.

To make this point concrete, consider the problem of white supremacist ideology. Americans know—or at least collectively believe—that the idea of white supremacy is wrong, and most Americans will therefore consider themselves harmed if more people become white supremacists. Nevertheless, it might be objectively beneficial 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, even though there is a real risk that racist speech, instead of provoking counter-speech, will convince new listeners to adopt the bad idea of racism. So why not let regulators try to allow racist speech that provokes while punishing racist speech that persuades? First, it is hard to know whether persuasive racism failed to provoke because of the speaker or the listener; perhaps the listener was overwhelmingly likely to be persuaded rather than provoked by any instance of racist expression, or perhaps the speaker was too persuasive and insufficiently provocative. Second, uninspiring advocacy of racism might be less likely than persuasive advocacy to provoke counter-speech. Prohibiting persuasion might therefore decrease both the harms and benefits of racist expression. If that’s true, then 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, forbidding the former while permitting the latter (or vice versa for right ideas). 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 that value. One does not err by adopting Christianity rather than Judaism, even if Christians seem happier

---

77 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.
than Jews, because we simply do not know whether Christianity or Judaism is better along relevant dimensions of greater truth. Reproduction and parenting provide good examples of the indivisibility problem; although there might be some genetic combinations or parenting techniques that will reliably 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,78 and many children with psychosocial problems have perfectly happy siblings. It might therefore be coherent to say that a child born without a cerebellum79 is birth-defected—is a faulty child—but it is not possible to manipulate the reproductive process to avoid such errors in the future.

The impossibility of risk regulation in protected markets explains why, under this theory, the constitution should not protect 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, the primary aspects of value are 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, for both sports (especially extreme sports like hang gliding or skydiving) and driving, the likelihood of extremely bad outcomes is higher than it would be in a Gaussian distribution. In both cases, accidents are common and sometimes catastrophic.

The difference, though, is that in both cases the bad outcomes derive only from risks that are theoretically divisible from benefits. For driving, a bad outcome must have arisen from (someone’s) bad driving or from bad manufacturing in the vehicle. It is coherent to say that a driving accident arose from error in the same way that it is coherent to say that infected gum arose from error. Necessarily, then, the risk of bad outcomes is theoretically divisible from the possibility of good outcomes. It is possible to imagine 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 broad daylight, totally alone on the roads and obeying all 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 and vehicle manufacturing, even if the ultimate goal is unachievable.

For extreme sports, the story might seem more similar to the indivisible risks of racist 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 intrinsic value of skydiving might thus be positive even though some instantiations turn out to be negative, and the risk of a negative instantiation might

---

79 See id.
be part of what makes skydiving beneficial in the same way that the risk of persuasion might be part of what makes racist expression provocative and therefore beneficial. That is, as they do in racist 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 racist 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 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 to tolerate.

None of these characteristics holds for racist speech. On the first, it is not theoretically possible to engage in racist 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 racist speech might continue to increase as the risk increases. 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 in the absence of rebuttal, giving opponents a maximal incentive to engage in counter-speech. Combining these points, it is impossible in constitutionally protected markets to make a coherent choice about how much risk to 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.

B. Moral Uncertainty

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.

---


81 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
Morals-based regulation raises one overarching question that I must note at the outset but 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 legal 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 does not depend on this nuance. The claim here is that substantive rights block regulation in regimes in which moral consensus is impossible to define and moral truth is impossible to pinpoint, whether the relevant frame for consensus is oligarchic or democratic. Indeed, all constitutionally protected markets show some characteristics of moral uncertainty, such that the “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 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 lack evaluative criteria (problem two). Because of this interrelationship, elements of the two problems appear alongside each other within some protected 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, Americans probably agree that the Freedom of Speech (writ large) is morally

---


82 Most famously Jeremy Waldron, cites.

83 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.
important or perhaps even morally required, and that moral sense 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 does not tell us
whether the expression of a given individual idea is morally good or bad. And
moral uncertainty surrounding individual expressions is, I think, also relevant.

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. 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 point here does not depend on its
universal scope in protected markets. There may be many behaviors within these
markets that a relevant regulatory body can deem moral or immoral, but as long
as many or most 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—particularly those that have
only recently received 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 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 that homosexual relationships are never morally
impeachable. This same basic problem appears in broader reproduction and
parenting decisions as well. Teen pregnancy, for example, is subject to a moral
conflict, with some Americans believing that teenagers are morally obligated to
terminate pregnancies, some believing that teenagers are morally obligated to put
their children up for adoption, and others believing that teenagers are morally
justified in keeping 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 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 outcomes.

As a descriptive matter, the emergence of these deep conflicts seems causally related to the 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. This pattern could certainly explain *Griswold v. Connecticut*[^84] and *Roe v. Wade*,[^85] both of which emerged as the sexual liberation and women’s rights movements began to pose serious challenges to a standing moral consensus; it could explain *Brown v. Board*,[^86] and *Loving v. Virginia*,[^87] which emerged as the civil rights movement began to pose similarly serious challenges to a similar standing consensus; and it could explain *Lawrence v. Texas*,[^88] which emerged with the gay rights movement. It could also explain the judiciary’s hesitation to extend *Loving*[^89] to homosexual marriages, a hesitation that might arise from the (gradually eroding) moral consensus in favor of traditional marriage. And it will be unsurprising if, with further erosion and growing dissensus, the Supreme Court soon creates constitutional protection for gay marriage, as a handful of lower federal court and state court judges have already.[^90]

Interestingly, this pattern can also explain the 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.

But this analogy between founding-era religious disagreements and 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[^91]—may have preceded their preference for constitutional protection whereas modern constitutional protection undoubtedly precedes a consensus for tolerance. *Roe* and *Lawrence* certainly did

[^84]: 381 U.S. 479 (1965).
[^85]: 410 U.S. 113 (1973).
[^87]: 388 U.S. 1 (1967).
[^89]: 388 U.S. 1 (1967).
[^90]: Recent cases in First and Ninth Circuits re: DOMA and gay marriage bans; state supreme court opinions.
[^91]: 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).
not emerge from an American consensus that tolerance—that freedom itself—is morally required for abortion or homosexuality. 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, as a result, the collective moral view 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 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. Americans 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 and although proselytizing Americans feel a moral imperative to spread their beliefs, there is not 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, there is 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 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. In the absence of moral judgments about individual religious beliefs, it is impossible to formulate a collective moral view as to the best distribution of religions within the United States. We can’t (at least collectively) say that we prefer ninety Christians and ten Jews over ninety Jews and ten Christians, much less that we prefer fifty-one Episcopalians and forty-nine Lutherans over forty-nine Lutherans and fifty-one Episcopalians. The deep conflict surrounding religion at the time of the founding

---

92 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.
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, for example, where there is consensus that zero malicious murders would be the morally optimal outcome, there is no agreed-upon morally optimal result 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 is not usually subject to moral judgment. For example, white supremacy may be, by consensus, a morally reprehensible idea, and abuse of nonwhite humans is certainly a morally reprehensible act. But the same moral condemnation does not attach to the mere expression of white supremacist ideology. Captured in children’s distinction between “sticks and stones” and “words,” mere expression, as a behavioral category, is not morally condemned. Of course, there are exceptions to this general point; for example, threatening someone with violence is usually deemed morally corrupt even when accomplished through mere expression, and expressions of tolerance in the face of conflict are usually deemed morally praiseworthy. And verbal bullying in schools is becoming increasingly morally disfavored. As a general matter, though, mere expression is not subject to moral judgment.

This same pattern holds for much of association, reproduction, and parenting. Individual friendships and ordinary associations are not subject to moral judgment unless they result in bad outcomes like gang violence, and individual intimate associations are not subject to moral judgment as long as they comport with established moral consensuses (like heterosexuality, discussed above, as well as other moral prohibitions discussed below: incest, bestiality, and polygamy). Today, moral condemnation of an individual reproductive combination has strong characteristics of ambivalence. Individuals do not behave immorally when they create a deaf child or a child with Down Syndrome, even if they knew they were high-risk for these genetic problems. And many unusual parenting decisions receive a similar kind of moral ambivalence, as we saw recently with the reactions to a Time Magazine cover photo depicting a woman breastfeeding her three-year-old son. Those reactions, though intense, did not include any strong moral condemnation of attachment parenting.

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 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

---

93 This particular ambivalence has not always been present. See Buck v. Bell, 274 U.S. 200 (1927) (holding that a woman in a mental institution who had given birth to two mentally handicapped children could be forcibly sterilized).
94 See Kate Pickert, Are You Mom Enough? Why Attachment Parenting Drives Some Mothers to Extremes—and How Dr. Bill Sears Became Their Guru, Time (May 23, 2012).
95 See, Associated Press, Time Magazine Cover of Breastfeeding Mom Sparks Intense Debate on “Attachment Parenting,” CBSNews (May 11, 2012) (noting that “reactions ranged from applause to cringing to shrugs”).
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 might be a self-conscious uncertainty—a restraint of our moral judgments rather than a true lack of moral judgments.

For present purposes, though, the origin 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 well as the relative moral worth of individual associations, children, or parenting styles). As a result, modern American government, irrespective of the constitutional constraint, lacks a moral basis on which to steer the distributions of ideas, religions, associations, reproductive combinations, and parenting decisions. 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, ideas, relationships, reproductive combinations, and parenting styles.


In Washington v. Glucksberg, one of the more controversial cases on implied fundamental rights, 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 death with dignity. Importantly, this moral debate does 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 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 physician-assisted suicide argued that permissive 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. Nor was there a strong contingent arguing that involuntary euthanasia was morally acceptable or required; rather, those who favored permissive regimes argued that 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 avoid both moral harms.

Importantly, then, the plaintiffs in Glucksberg challenged the moral worth of the regulatory regime 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 determination. The proper strategy for facilitating death with dignity while avoiding abuse and coercion is not one that ought 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 economics, it is impossible to determine whether a Christian tenet will lead to salvation or not, and similarly for morality, Americans 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 regulators 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 in the next section, that uncertainty about moral precepts renders regulatory success impossible.

III. Regulation under Conditions of Uncertainty

So far, nothing in this article has justified substantive rights’ default to common law baselines. The article has demonstrated that rights contain such a default, and it has articulated distinctions between protected and unprotected markets, giving some descriptive justification for the double standard of judicial review. But why does uncertainty justify a laissez-faire presumption that leaves market distributions to private behavior, which is necessarily organized against background regulatory environments like common law entitlements? This Part addresses that question, making a general normative claim that uncertainty provides a good reason to hinder all distribution-altering regulation (including deviations from general common law rules) 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 is that a constitutional system 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.98

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.99 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 movement100). Indeed, one problem with standard structural theories of constitutional rights—which argue that rights should protect against representational failures101—is that they depend on without defining a unified theory of representational success.102

The 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 “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 preferences and because moral uncertainty defeats attempts to define moral principles, a combination of economic and moral uncertainty defeats attempts to achieve regulatory success. In markets in which economic and moral uncertainty are extremely common, regulatory success frequently will be impossible, and regulatory intervention will therefore be arbitrary. I will flesh out this claim with respect to three standard theories of regulation: efficiency, social justice, and welfare.

---

99 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 speech rights, for example, might fall under the uncertainty and ambivalence theory for constitutional protection. This possibility is beyond my current scope.
101 Ely, supra note 4.
102 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).
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. 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 optimality as the guiding metric, for example—the theories inevitably depend on the ability to define efficiency and inefficiency, as well as the capacity to identify correctible market failures.

Uncertainty makes these projects impossible. 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 sense of optimality. Frequently in these markets, there is no theoretical basis for evaluating whether a shift in resources has improved or harmed utility, however judged or defined. Because the impact on individual utility from a receipt or deprivation of resources is uncertain, the impact on collective utility from an overall shift in the distribution of resources is necessarily likewise. There is no theoretical answer for market improvement or market failure.

Importantly, it is the distinction between pinpointing an optimal allocation and pursuing theoretical optimality that distinguishes uncertain markets from others. It is always the case—in every market—that informational and technological limitations make it impossible to pinpoint optimal allocations. It is impossible to identify, for example, the precisely optimal production rate for hammers. Nevertheless, the market-clearing supply and price for hammers reveal theoretically reliable information about the product’s social utility because an individual’s willingness to pay for hammers reveals reliable information about her own expected utility from hammer ownership. It is therefore possible to make coherent assertions about the efficiency of the hammer market based on supply, demand, and price data, and the legislative process can make a rational effort (not perfect, because of informational limitations, but rational) to improve the market when apparent inefficiencies arise.

Similarly, in the counterexample markets of environmental regulation and sports and driving, efficiency is a theoretically coherent concept, and legislators act rationally when they identify and attempt to correct inefficiencies. For environmental protectionism, there is an obvious and coherent tradeoff between certain harms to industry and uncertain benefits to the environment. The harms

and benefits may be incommensurable, but the tradeoff is real and coherent. Legislators therefore can make a politically and constitutionally legitimate decision about how much we, as a society, are willing to spend to be risk averse about environmental degradation. In extreme sports and driving, there are identifiable factors that contribute to risk as well as identifiable factors that contribute to benefits, and it is theoretically possible to disentangle the two. Legislators can therefore make a politically and constitutionally legitimate decision about balancing risks and benefits even though they cannot pinpoint a precisely optimal balance.

The problem in constitutionally protected markets is that the uncertain value of individual and collective decisions fatally obfuscates the theory of optimality. Because the individual value of a constitutional good is uncertain both before and after consumption, it is impossible to 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 making a rational attempt to do so. How does one improve the social distribution of ideas in society? In a world of uncertain value, there is 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.\footnote{See Bruce A. Ackerman, Social Justice in the Liberal State (1980); F.A. Hayek, Law, Legislation, and Liberty, in 3 The Mirage of Social Justice (1973); John Rawls, A Theory of Justice (1971); see generally Carl L. Bankston III, Social Justice: Cultural Origins of a Theory and a Perspective, 15 Independent Rev. 165 (2010).}

Both moral and economic uncertainty frustrate regulatory success under these theories because they make it impossible to define the central precepts. For example, in important respects, we do not know whether the 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, the laissez-faire regime probably does not best capture equality and respect for human dignity because government is making no attempt to facilitate access to Buddhist teachings or 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 provide equal access to Buddhism; indeed, the constitutional freedom ensures that government cannot block anyone’s access. But that is not the way 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 (negative) liberty\textsuperscript{105} that such a paternalistic regime would impose. Because we are certain that reading and writing are economically valuable and collectively agree that reading and writing are morally 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,\textsuperscript{106} 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, it is impossible to 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.\textsuperscript{107} 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 forgoing, as well as distinguishing the individuals that will benefit from consuming resources from those that will benefit from forgoing 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

\textsuperscript{105} It is easy to argue that an education requirement actually improves liberty by expanding one’s ability to function in society, providing the educated with more and better options for living life. That is a positive, enablement sense of liberty rather than a negative, freedom sense of liberty. I mean to refer only to the latter here.

\textsuperscript{106} See Part I.B, infra.

\textsuperscript{107} Rawls, supra note 104, at xx.
equality. For non-consequentialist thinkers, that point alone might be enough to justify constitutional rights.

But it is important to remember that freedom gives rise to some distribution of resources within constitutionally protected markets, and in a world of constrained resources that is colored by background distributions and entitlements (both financial and biological) as well as background legal structures (both common law and regulatory), the particular distribution that arises from freedom is not equality of access or enablement. In 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 under social justice theories of regulation. 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. There are 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, then, it is impossible either to improve or to harm the relevant regimes because it is impossible to judge them at all.

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 a result, 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, one 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 the impossibility of measuring either the negative value to the victim of lost life or the positive value to the murderer of

108 Kaplow & Shavell, supra note 81, at 18–24 (describing the “expansive” approach to utility that is common to welfare economics and to welfarist theories of regulation).
actualized enmity. On pure economic grounds, there might not be either a pinpoint for the optimal murder rate or any 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 animus-based murder is better than more, and we can, on that basis, develop a rational 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 of 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 and rational 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: allowing the practice up to the point that the moral costs of abuse and coercion outweigh the moral benefits of death with dignity.

The incorporation of morality, however, does not save constitutionally protected markets, where both technocratic and moral criteria are uncertain. In “problem two” cases, where there is simply a lack of evaluative criteria, the problem is clear; there are no useable factors for crafting a theory of optimality. Americans are collectively unable or unwilling to say that Trinitarian Christianity is morally superior to non-Trinitarian Christianity and are therefore unable or unwilling to say that the world would better approach optimality if Trinitarianism were encouraged or required.

In “problem one” cases, however, where there is 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 in a population of 100 people, fifty-five believe that homosexuality is morally corrupt, assigning a per capita average of ten utils to the regulatory realization of their belief, while forty-five believe that denial of homosexuality is morally corrupt, assigning a per capita average of 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, on the flip side, the absence

---


[110] Trinitarian Christians, including American Catholics, Episcopalians, and Lutherans among others, believe that God consists of the Father, Son, and Holy Ghost (together, the Holy Trinity) residing in one Godhead.

[111] Cf. Maryland Toleration Act, supra note 91 (requiring toleration of any Trinitarian faith but not of non-Trinitarian faiths).
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 government 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 regulators can possibly obtain in the real world.
In actual moral conflicts of this kind, regulators can’t determine which moral
view is more deeply held because there is no reliable means of judging and
comparing the strengths of individuals’ convictions. Of course, a representative
process can respond rationally 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 regulators should admit the impossibility of finding the
theoretically right answer. (Of course, it is necessary to declare a winner because
it is impossible to craft a regime that is both restrictive and permissive. But liberty
wins by default, not because it is the correct result, as I will discuss in greater
detail in Part III.B.1.) 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.

Importantly, all of this analysis begs a question of institutional capacity—
of whether the judiciary is in the best position to assess a near-tie and to enforce a
liberty default or whether legislatures should be allowed to make best guesses as
to welfare-enhancing outcomes, particularly given that such outcomes are not
theoretically non-existent in cases of “problem one” moral uncertainty. As noted
in the Article’s introduction, though, my goal here is not to defend judicial
review, and I do not take a stance on whether judicial enforcement is necessary or
desirable in these cases (or any others). I will simply note here that this
institutional capacity problem—along with the theoretical existence of optimality
in problem one cases—may be why rights that emerge from problem one
uncertainty are among the most controversial in constitutional debates.

4. Conclusion

It is worth reemphasizing here that, with the exception of problem one
moral uncertainty, the claim of regulatory impossibility does not depend on
governmental or representational failures—or even on governmental or
representational limitations. Except in cases of deep moral divides, the problem is
not that there is a right result that 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. The problem therefore is not that regulators might sometimes

112 Robbins, supra note 57.
improve and sometimes harm distributional outcomes, in which case one 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 in the absence of any theory for improvement, we must embrace that all results are equally efficient, equally just, and equally good. Regulators cannot improve or harm the distribution, no matter how good they are at regulating.

As noted, this point distinguishes the claim here from standard representation-reinforcing theories of constitutional rights, which assert that such rights should be used to correct representational failures. But it also distinguishes this article’s 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. The claim here is only that these markets will frequently—much more frequently than the average market—present situations for which there is no 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 markets characterized by moral and economic uncertainty—that point alone does not establish that the Constitution 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 and most importantly, 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 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 in 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 here 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 the Constitution 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 for judges’ exercising “rational basis” review.

---

114 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).


117 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).

(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, my argument is that modern doctrine has, 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 unusual uncertainty characteristics, doctrine should (and does) assume that regulation within them will be arbitrary and should (and does) 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. 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 governmental participation suffers equally from the other two problems that I discuss below: it 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 forgone regulations. If regulatory intervention in a market is unlikely to produce any 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{120} 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{121}

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{122} 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. It is impossible to say whether the persecution of communists is in fact helping or hurting 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{123} 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{120} 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{121} See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942).

\textsuperscript{122} See Micklejohn, supra note 119; Strauss, Afterword, supra note 102, at 548–49.

\textsuperscript{123} See generally Elhauge, supra note 98, 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 (the presumption of regulatory irrationality) 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 article, 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 right is absolute. Even in enforcing the broad textual command that “Congress shall make no law” restricting the 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 present 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

---

125 Lawrence
compelling state interest or because courts have simply carved exceptions to the 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 has usually received only intermediate rather than strict scrutiny.\(^{126}\) 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.\(^{128}\) Defamation of public figures is also much more likely to circulate in tabloids and news media and is therefore much more likely to cause feedback and growing ripples as the defamatory idea or its rebuttal gets repeated. 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 regulation of that speech is constitutionally permissible 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, molestation, incest, and bestiality produce concrete psychological harms to the non-consenting participant, and they also

\(^{126}\) But see Sorrell v. IMS Health (apparently applying strict scrutiny to a commercial speech case).


\(^{128}\) 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).
produce moral disapproval. They are all subject to constitutionally valid regulatory regimes. Consensual sex between an adult and a minor is subject to a prohibitive moral consensus, and regulation is constitutionally permissible. 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.\footnote{130} And for parenting, physical abuse and neglect are acknowledged to be immoral acts 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. It therefore would not make sense to prohibit all possible interventions in the relevant markets, and constitutional law has crafted doctrines that allow regulators to intervene in cases of certainty.

The hardest question that arises for doctrinal formulation is how the Court should determine when a moral consensus has broken down to a point that justifies constitutional protection (if, indeed, the Court should have this power). 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,\footnote{131} 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\footnote{132} but that today has failed to block gay marriage statutes in several states.\footnote{133} But at what point, given economic uncertainty (which undoubtedly exists for these intimate associations) and growing moral uncertainty, should the courts grant constitutional protection? The California state constitutional amendment banning gay marriage—the Proposition 8 initiative that has become the center of the federal constitutional debate—passed with 52.24% of the popular vote.\footnote{134} Is that enough to show a moral certainty that gay unions are reprehensible? I would say no—and the federal judges that have heard the federal
constitutio

nal challenge thought not—a—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 the moral consensus against obscenity, we must be satisfied to know it when we see it.

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. 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, 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. 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 because it will give anti-regulatory constituencies a rhetorical tool to oppose intervention. And given that all distributional results are equally good and equally bad under the technocratic 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. On this one, 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

---

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 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.”).
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.

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 that is, again, beyond my current scope.

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. Uncertainty frustrates rational 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.