

CUSTOMIZED SPEECH AND THE FIRST AMENDMENT

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ABSTRACT

Customized Speech — speech targeted or tailored based on knowledge of one’s audience — is pervasive. It permeates our relationships, our culture, and, especially, our politics. Until recently, customization drew relatively little attention. Cambridge Analytica changed that. Since 2016, a consensus has decried Speech Customization as causing political manipulation, disunity, and destabilization. On this account, machine learning, social networks, and Big Data make political Customized Speech a threat we constitutionally can, and normatively should, curtail.

That view is mistaken. In this Article, I offer the first systematic analysis of Customized Speech and the First Amendment. I reach two provocative results: Doctrinally, the First Amendment robustly protects Speech Customization. And normatively, even amidst Big Data, this protection can help society and democracy.

Doctrinally, the use of audience information to customize speech is, itself, core protected speech. Further, audience-information collection, while less protected, may still only be regulated by carefully drawn, content-neutral, generally applicable laws. And unless and until the state affirmatively enacts such laws (as, overwhelmingly, it has not), it may not curtail speakers’ otherwise lawful use of such information in political Speech Customization.

What does this mean for democratic government? Today, Customized Speech raises fears about democratic discourse, hyper-partisan factions, and citizen autonomy. But these are less daunting than the consensus suggests, and are offset by key benefits: Modern Customized Speech activates the apathetic, empowers the marginalized, and checks government overreach. Accordingly, many current proposals to restrict such Customized Speech — from disclosure requirements to outright bans — are neither constitutionally viable nor normatively required.

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I. INTRODUCTION

A civil rights leader only shares bus boycott flyers with groups she knows support racial justice.¹ A polyglot politician gives four different speeches — in four different languages — to his Yiddish-, English-, Italian-, and Croatian-speaking constituents.² A conservative candidate uses mailing lists from ideological allies to choose where to send campaign literature.³ A gay rights coalition uses opinion polls to craft messages that resonate with swing voters.⁴ A consultancy scrapes data from fifty million Facebook profiles, then creates and sends personalized ads based on each target’s “psychographic” profile.⁵

Each of these practices is Customized Speech: speech targeted or tailored based on knowledge of one’s audience. The first four are familiar and uncontroversial — politics as usual. The fifth, practiced by Cambridge Analytica in the 2016 U.S. presidential election, shook the world. This Article explains why, doctrinally, the first four of these customizations enjoy robust First Amendment protection. And it explains why this doctrinal conclusion is normatively sound, even when applied to the *Digital* Customized Speech at the heart of the final tactic.

Customized Speech is pervasive, permeating our rhetorical traditions,⁶ our relationships,⁷ and perhaps most prominently, our politics.⁸

1. JO ANN GIBSON ROBINSON, *THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT* 45–50 (David J. Garrow ed., 1987).

2. KURT F. STONE, *Fiorello LaGuardia, in THE JEWS OF CAPITOL HILL: A COMPENDIUM OF JEWISH CONGRESSIONAL MEMBERS* 102, 103 (2010).

3. RICK PERLSTEIN, *REAGANLAND: AMERICA’S RIGHT TURN 1976–1980*, at 35, 97, 399 (2020).

4. WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* 345 (2020).

5. See BRITTANY KAISER, *TARGETED: THE CAMBRIDGE ANALYTICA WHISTLEBLOWER’S INSIDE STORY OF HOW BIG DATA, TRUMP, AND FACEBOOK BROKE DEMOCRACY AND HOW IT CAN HAPPEN AGAIN* 175 (2019); CHRISTOPHER WYLIE, *MIND*CK: CAMBRIDGE ANALYTICA AND THE PLOT TO BREAK AMERICA* 103 (2019); Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, *GUARDIAN* (Mar. 17, 2018, 6:03 PM), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> [<https://perma.cc/4VSG-PXDS>].

6. See, e.g., 2 ARISTOTLE, *Rhetoric*, in *THE COMPLETE WORKS OF ARISTOTLE* 2152, 2176 (Jonathan Barnes trans., 1984) (“We must also take into account the nature of our particular audience when making a speech of praise; for, as Socrates used to say, it is not difficult to praise the Athenians to an Athenian audience.”); HAN FEI, *On the Difficulties of Persuasion*, in *HAN FEI: BASIC WRITINGS* 73, 79 (Burton Watson trans., 2003) (“[T]he difficult thing about persuasion is to know the mind of the person one is trying to persuade and to be able to fit one’s words to it . . . [speakers] must not fail to ascertain the[ir] ruler’s loves and hates before launching into their speeches.”).

7. See, e.g., ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 1 (1959) (“When an individual enters the presence of others, they commonly seek to acquire information about him or to bring into play information about him already possessed.”).

8. See, e.g., WELLSTONE ACTION, *POLITICS THE WELLSTONE WAY* 28 (2005) (instructing, in a progressive organizing manual, that “[a] message can be effective only if it is grounded in the experiences and circumstances of its intended audience.”).

But despite (or perhaps because of) this ubiquity, courts and commentators have yet to offer any coherent theory of Customized Speech and the First Amendment. Some assert, in brief asides, that restrictions on Speech Customization do not “limit[] the manner in which [one] can speak,” and so pose little constitutional challenge.⁹ Others, with equal brevity, suggest the opposite: That the use of audience information to target or tailor speech must surely enjoy strong protection.¹⁰ Largely, though, judges and scholars have said nothing at all, leaving the doctrinal question of Customized Speech unanswered.¹¹

Since 2016, the salience of this gap has grown dramatically. That year, Cambridge Analytica, a British consultancy, undertook a massive project of political Speech Customization. It harvested Facebook data from millions of American users, then analyzed the data to create and distribute “psychographic” advertising — ads ostensibly targeted to each user’s emotional and psychological attributes.¹² And, the story goes, it succeeded, swinging just enough votes to put Donald Trump in the White House.¹³

9. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1243–44 (10th Cir. 1999) (Briscoe, J., dissenting); see also *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 289 (2d Cir. 2010) (Livingston, J., dissenting) (finding “no authority for the proposition that the First Amendment provides protection . . . for the methods of *identifying* an audience”); Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. Chi. L. Rev. 1241, 1326 & n.360 (2020); G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2238–39 (2020); see also Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1149 (2005).

10. See Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1034–35 (2014) (asserting, without further analysis, that restrictions on targeting and tailoring for online political advertising would surely face strict scrutiny); see also *U.S. West*, 182 F.3d at 1232 (majority opinion) (“Effective speech has two components: a speaker and an audience . . . [therefore] a restriction on speech tailored to a particular audience . . . cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience . . .”).

11. To date, no scholar seems to have offered a specific, rigorous account of how First Amendment doctrine should treat Customized Speech. Some mention similar concepts in passing, but without sustained analysis. See, e.g., sources collected *supra* notes 9–10; see also Patrick Day, *Cambridge Analytica and Voter Privacy*, 4 GEO. L. TECH. REV. 583, 605 (2020) (stating, when assessing proposal to limit campaigns’ use of voter data, that “salespersons are more effective when they know the background . . . of their clientele” and that “the [Supreme] Court’s concerns would be heightened in the context of political speech”); Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371, 1375, 1414 (2012) (raising, but not resolving, First Amendment questions about “associational tools for online group activity”). Others posit that anything within sweeping categories, such as “information about people,” Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1056 (2000), or any “fixed record of fact,” Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 57, 65 (2014), may enjoy some First Amendment protection (categories that, presumably, also include audience information). None, however, has explored Customized Speech as a distinct First Amendment phenomenon.

12. MARTIN MOORE, *DEMOCRACY HACKED: HOW TECHNOLOGY IS DESTABILISING GLOBAL POLITICS* 61 (2020); see also WYLIE, *supra* note 5, at 103.

13. See Nick Miller, *Cambridge Analytica CEO Suspended After Boasts of ‘Putting Trump in White House’*, SYDNEY MORNING HERALD (Mar. 21, 2018, 7:14 AM),

Factually, this tale is largely inaccurate, greatly overstating the consultancy's competence and impact.¹⁴ But narratively, it struck a chord. For despite its brazen crimes,¹⁵ Cambridge Analytica's core model was a set of Speech Customization techniques now common in American politics: pooling vast seas of voters' personal information, analyzing this data to guess which voters will embrace which message, running thousands of tests to see which guesses are correct, then sending the most persuasive ad, at the most persuasive time, to the most persuadable voter.¹⁶

Galvanized by the Cambridge Analytica scandal, a near-consensus of scholars, commentators, and legislators has concluded that machine learning, social networks, and Big Data make modern, Digital Customized Speech a threat to our democracy. Privacy and election law scholars argue such practices impoverish democratic discourse,¹⁷ stoke partisan hatred,¹⁸ and shackle personal autonomy.¹⁹ Commentators from tech titans to top regulators warn that targeted and tailored politics pose grievous societal harms.²⁰ Heeding such calls, lawmakers have proposed (and enacted) unprecedented limits on political Digital

<https://www.smh.com.au/world/europe/cambridge-analytica-ceo-suspended-after-boasts-of-putting-trump-in-white-house-20180321-p4z5dg.html> [<https://perma.cc/6LA8-RJZB>].

14. See, e.g., SIVA VAIDHYANATHAN, *ANTISOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY* 151–59 (2018).

15. Lowlights include bribery, soliciting prostitutes, and e-mail hacking. KAISER, *supra* note 5, at 326; Day, *supra* note 11, at 584–85.

16. See SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 122–23, 280 (2019); Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 11–12 (2019).

17. E.g., JARON LANIER, *TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW* 110 (2018); VAIDHYANATHAN, *supra* note 14, at 165; Christopher S. Elmendorf & Abby K. Wood, *Elite Political Ignorance: Law, Data, and the Representation of (Mis)Perceived Electorates*, 52 U.C. DAVIS L. REV. 571, 607–08 (2018).

18. See, e.g., VAIDHYANATHAN, *supra* note 14, at 139–40; Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3!)*, 95 WASH. U.L. REV. 1353, 1366–67 (2018); Julie E. Cohen, *Tailoring Election Regulation: The Platform Is the Frame*, 4 GEO. L. TECH. REV. 641, 646–47 (2020); Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMENDMENT L. REV. 200, 216 (2017).

19. See, e.g., MOORE, *supra* note 12, at 70; ZUBOFF, *supra* note 16, at 281; Cohen, *supra* note 18, at 652; Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 384 (2016); Ido Kilovaty, *Legally Cognizable Manipulation*, 34 BERKELEY TECH. L.J. 449, 464 (2019).

20. E.g., Ahiza Garcia, *Bill Gates: The Problem with Political Ads Is Targeting, Not Fact-checking*, CNN (Nov. 6, 2019, 6:15 PM), <https://cnn.it/2VaEOOL> [<https://perma.cc/KC4F-6SPL>]; Ellen L. Weintraub, *Opinion, Don't Abolish Political Ads on Social Media. Stop Microtargeting*, WASH. POST (Nov. 1, 2019, 6:51 PM), <https://wapo.st/3xjFOWV> [<https://perma.cc/7HKY-Q6ET>].

Customized Speech, from audience-targeting disclosure rules²¹ to outright curbs and bans.²²

Yet despite this flurry of activity, we still lack a coherent understanding of how Speech Customization interacts with the First Amendment. Indeed, on the few occasions proponents of Customized Speech limits acknowledge First Amendment “hurdle[s],”²³ they do so only in passing, offering little insight as to just what sort of hurdles are at stake (other than to assert that their preferred reforms will clear them).²⁴ Thus, even as courts confront the first wave of challenges to Digital Customized Speech restrictions,²⁵ they, along with legislators, litigators, and technologists, are without a doctrinal roadmap.

This Article provides that map. In doing so, it makes three novel, timely, and significant contributions. First, it provides a rigorous doctrinal analysis as to whether, and to what extent, the First Amendment protects political Customized Speech.²⁶ Here, I find a speaker’s *use* of lawfully obtained information about her audience when customizing political speech is, itself, core political speech. This conclusion flows from a speaker’s nearly plenary right to choose political speech’s content and audience; her correlative right to use the information, knowledge, and other resources she possesses to make such choices as effectively as she can (and to make them in accordance with her inherent autonomy); and the special role of audience information as just such a vital persuasive resource.

Turning from a speaker’s *use* of audience information to her initial *collection* of such information, I find that collection conduct — while not entitled to the high protections of audience-information use — still implicates First Amendment values. Here, I distill three principles: First, the state has no constitutional obligation to provide speakers with government-created audience information (like voter records or census data), even if such information would be very helpful to those speakers. Second, the state may, by generally applicable conduct laws, limit audience-information collection practices (hence, general laws against

21. *E.g.*, Honest Ads Act, S. 1989, 115th Cong. § 8(j) (2017); MD. CODE ANN., ELEC. LAW § 13-405(c)(3) (West 2018).

22. *E.g.*, Banning Microtargeted Political Ads Act, H.R. 7014, 116th Cong. (2020); Protecting Democracy from Disinformation Act, H.R. 7012, 116th Cong. (2020); Voter Privacy Act of 2019, S. 2398, 116th Cong. (2019).

23. Kilovaty, *supra* note 19, at 500.

24. *See, e.g.*, Day, *supra* note 11, at 587, 605; Elmendorf & Wood, *supra* note 17, at 614–15; Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1683–84 (2021).

25. *E.g.*, *Wash. Post v. McManus*, 944 F.3d 506 (4th Cir. 2019).

26. This Article focuses on *political* Customized Speech. Because political speech has long been entitled to heightened First Amendment protections, *cf.* *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (explaining the importance of First Amendment protections for political speech in Supreme Court jurisprudence), my conclusions may not apply to other contexts, like commercial speech.

trespass apply even to journalists). But because of the First Amendment valence of audience-information collection, even such generally applicable laws must be carefully drawn to avoid discriminating based on speaker content or viewpoint. And third, even otherwise acceptable collection limits may still fail if they unduly burden inputs truly essential to core First Amendment activity (like blanket bans on videotaping or onerous taxes on newsprint).

Combined, these principles offer a clear doctrinal structure for Speech Customization: The state may regulate audience-information *collection*, provided it does so through laws that are content-neutral, generally applicable, carefully drawn, and not unduly burdensome to essential speech inputs. But whether or not the state enacts such *collection* limits, it remains almost powerless to proscribe a speaker's *use* of otherwise lawfully collected audience information for political Customized Speech.

After establishing this doctrinal framework, I next consider *Digital Customized Speech*: the Customized Speech enabled by tools like Big Data analytics, massive social networks, and bleeding-edge machine learning. Here, I outline four trends driving this communicative revolution: vast aggregations of digital personal data (from financial transactions to personality insights); staggering tools to target, tailor, and track the effectiveness of messaging; Advertising Megaplatforms (like Google and Facebook) that “rent out” prodigious customization capabilities to speakers of all sizes and persuasions; and a legal environment with few meaningful limits on digital personal data collection.

Responding to these dynamics and the ways they have played out in recent elections, scholars, commentators, and legislators increasingly see Digital Customized Speech as a threat to democratic values, one that constitutionally can, and normatively should, be curtailed. As its second major contribution, this Article takes on, and rejects, this near-consensus view.²⁷ While Digital Customized Speech raises

27. This consensus is generational. Earlier this century, a few scholars suggested benefits that political Digital Customized Speech could offer. In 2005, for instance, Michael Kang argued that as campaigns gathered data to “narrowcast” messages, they might boost civic participation. Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO. WASH. L. REV. 1070 (2005). Likewise, Peter Swire offered a 2012 Symposium contribution, based partly on his 2008 work for President Obama’s transition, which largely lauded data-driven politics. Swire, *supra* note 11. But after 2012, the tide turned — and became a tsunami. See, e.g., JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 253 (2019); KAISER, *supra* note 5, at 174–77; LANIER, *supra* note 17; MOORE, *supra* note 12, at 59; VAIDHYANATHAN, *supra* note 14; WYLIE, *supra* note 5; ZUBOFF, *supra* note 16, at 260; Day, *supra* note 11; Hasen, *supra* note 18; Kilovaty, *supra* note 19; Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341 (2018); Parsons, *supra* note 9; Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 WIS. L. REV. 861, 873–75 (2014); Alexander Tsesis, *Marketplace of Ideas, Privacy, and the Digital Audience*, 94 NOTRE DAME L. REV. 1585 (2019); Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. CAL. L. REV. 1223 (2018); Kwame N.

concerns about democracy, partisanship, and autonomy, these are less severe than critics claim. Further, such harms must be weighed against countervailing benefits. Protection for Digital Customized Speech helps inform and engage the electorate, empowers marginalized groups, and is a valuable check on government overreach. Thus, the harms attributed to Digital Customized Speech, as of now, are not the sort of immediate, unambiguous, and overwhelming dangers that might justify abandoning longstanding doctrinal principles.

Finally, as a third significant contribution, I apply these insights to evaluate four proposed approaches for regulating Digital Customized Speech: direct limits on speakers' use of audience information; Speech Customization disclosure requirements; generally applicable information collection laws; and voluntary political action. Here, my goal is to offer concrete guidance for policymakers and judges as to which proposals can pass First Amendment muster — and which cannot.

Before beginning, two points must be addressed. First, Customized Speech is endemic, unfolding in even very basic interactions (like speakers changing volume based on where in the room their friends are standing). One may therefore wonder if this concept is too broad to be analytically useful (or, more pointedly, if workaday Speech Customizations like sending union literature to union households can teach us anything about, say, hyper-targeted Instagram ads). But many ubiquitous facets of speech are analytically and doctrinally significant. Word choice is a good example. Speakers choose their words in nearly any “speech”;²⁸ English offers many ways to say almost anything.²⁹ Yet despite this ubiquity, word choice enjoys analytically distinctive First Amendment protections, protections of real moment in resolving hard cases.³⁰

Just so here. If Speech Customization, like word choice, enjoys distinctive First Amendment protections, such a precept would be an analytically powerful background rule. One might ultimately believe some feature of modern, Digital Customized Speech leads us to depart from this baseline. But the baseline's existence — like the rule protecting word choice — would mark that journey's start and frame its destination.

Akosah, Note, *Cracking the One-Way Mirror: How Computational Politics Harms Voter Privacy, and Proposed Regulatory Solutions*, 25 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1007 (2015). This timing may be no coincidence, as many see the early 2010s as a key inflection point for Digital Customized Speech technology. See, e.g., MOORE, *supra* note 12, at 120; VAIDHYANATHAN, *supra* note 14, at 159–60. In any case, this past decade has seen little defense, let alone a systematic one, for political Digital Customized Speech.

28. Excepting outliers like instrumental music. See Alan K. Chen, *Instrumental Music and the First Amendment*, 66 *HASTINGS L.J.* 381 (2015).

29. See 1 *OXFORD ENGLISH DICTIONARY* xi (2d ed. 1989) (marking 290,500 entries).

30. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (protecting use of “Fuck” in “Fuck the Draft” slogan because “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas”).

Second, this Article’s focus is primarily, and unapologetically, doctrinal. It asks how courts, applying our current body of First Amendment precedent and principles, should treat Speech Customization. Such a focus is, of course, valuable to judges, litigants, reformers, and technologists, who must know and work through the law as it is. But I hope it is also useful to those who reject current law as mistaken, and whose work instead “imagines” where a different First Amendment doctrine might take us.³¹ By highlighting a necessary, but thus far overlooked, implication of prevailing First Amendment principles, this Article underscores where our current doctrinal commitments lead us, a finding of some value to those who would critique (or defend) their ultimate justness.

The remainder of this Article proceeds as follows. Part II considers whether, and to what extent, the First Amendment doctrinally protects the use and collection of audience information for political Customized Speech. Part III then introduces modern, Digital Customized Speech, and key forces driving it. From this basis, Part IV undertakes a normative analysis, finding the fears most prominently voiced against Digital Customized Speech — concerns about democracy, partisanship, and autonomy — are less severe than consensus suggests and, in any case, offset by benefits: democratic engagement, empowerment for marginalized groups, and a check on government overreach. Part V applies these findings to assess the constitutionality of various current proposals to regulate Customized Speech.

II. THE LAW OF CUSTOMIZED SPEECH

Customized Speech is everywhere. To date, though, it has not been rigorously analyzed as a distinctive First Amendment phenomenon.³² Perhaps this is because Speech Customization was less prominent under earlier technological conditions.³³ Perhaps it is because until recently, lawmakers made few attempts to specifically regulate Customized Speech.³⁴ In any case, as Customized Speech moves to the foreground of our Big Data era, there is an urgent need to learn how the First Amendment applies to such practices.

31. See, e.g., Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119–20 (2018); Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1 (2021); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016).

32. See discussion *supra* notes 9–11 and accompanying text.

33. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 2 (2004).

34. See *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 44 (1st Cir. 2008), *abrogated by* *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (describing laws targeting audience-information collection as “innovative legislation” as recently as 2008); *Wash. Post v. McManus*, 944 F.3d 506, 523 (4th Cir. 2019) (describing “novel technological challenges” implicated by disclosure law for targeted online political ads).

This Part, accordingly, considers whether, and to what extent, prevailing First Amendment doctrine protects political Speech Customization.

First, some (informal) definitions. “Customized Speech,” as noted, is speech targeted or tailored based on information about one’s audience. “Targeting” means using audience information to pick *who* one’s audience will be (think, using subscribers’ lists from *Nature* to choose where to send environmentalist flyers). “Tailoring,” meanwhile, means using audience information to determine *what* one’s speech will say, whether substantively or stylistically (think, politicians choosing to mention their beloved grandmothers when speaking at senior homes).

Customized Speech consists of two analytically distinct stages: a speaker’s *use* of audience information she possesses to target or tailor her speech, and her antecedent *collection* of such information. This Part considers each in turn.

A. Speaker Use of Audience Information

First, we consider a speaker’s use of the audience information in her possession to engage in Speech Customization. The First Amendment gives political speakers almost plenary choice over content (what to say), and audience (whom, if anyone, to say it to). In considering why the First Amendment so closely guards these choices, two principles emerge, each suggesting that the use of audience-information for political Speech Customization would be very strongly protected.

The first of these principles stems from persuasion: We protect speakers’ content and audience choices in order to protect their opportunity to change listeners’ minds. To effectuate this purpose, our doctrine broadly embraces what I call “Uncapped Persuasive Efficacy” — the idea that absent extraordinary circumstances, the state may not cap or limit an individual’s use of assets she possesses (whether cognitive, tangible, social, or monetary) to make her content and audience choices as persuasive as she can. Audience information is just such an asset; it is a powerful, often essential, resource for persuasively effective political speech. Thus, under Uncapped Persuasive Efficacy, the state can seldom, if ever, curb a political speaker’s use of audience information she possesses to make the best content and audience choices she can (that is, to use such information for Speech Customization).

A second major justification for protecting political speakers’ content and audience choices stems from “Speaker Autonomy” — the idea that the state inherently wrongs speakers if it forces them to declare what their own “*reason*” tells them should not be published.”³⁵ If the

35. *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 254 (1974) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)) (emphasis added).

state compels a speaker, especially a political speaker, to make content or audience choices in disregard of her own “reason” (that is, her own information, knowledge, or beliefs), it acts wrongfully. Applying this precept, state interference with a speaker’s use of her information about her audience — a vital part of her reason for making content and audience choices — raises grave constitutional difficulties.

1. Plenary Protection for Content and Audience Choices

The First Amendment gives political speakers almost plenary choice over content and audience.

Speaker content choices are the textbook First Amendment freedom; content-based restrictions, the textbook First Amendment violation.³⁶ The First Amendment guards speakers’ editorial, stylistic, and linguistic choices,³⁷ down to the very words they pick³⁸ (or, for artists, the strokes they paint).³⁹ Speakers also are free to choose which content to foreground and which to dim, like a parade’s choice of floats⁴⁰ or a band’s choice of “sound mix” among instruments.⁴¹ This freedom also extends to the facts or opinions a speaker shares or leaves out,⁴² even if the omitted information would have been of great use to listeners,⁴³ and even if the “facts” a speaker does share are inaccurate or outright lies.⁴⁴

Speaker audience choices, likewise, receive paramount First Amendment protection. It is a “fixed star” that political speakers may not be forced to speak at all if they choose not to (that is, they can always select an audience of zero).⁴⁵ Likewise, speakers are shielded from state interference in choosing which passersby to approach, doors to knock, or addresses to mail to.⁴⁶ And speakers’ choices regarding their overall “quantity of expression” and “size of the audience

36. *United States v. Alvarez*, 567 U.S. 709, 715 (2012).

37. *Tornillo*, 418 U.S. at 258.

38. *Cohen v. California*, 403 U.S. 15, 26 (1971).

39. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (stating that the First Amendment “unquestionably shield[s]” the “painting of Jackson Pollock”).

40. *Id.* at 574–75.

41. *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989).

42. *Hurley*, 515 U.S. at 573.

43. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995).

44. *See United States v. Alvarez*, 567 U.S. 709, 722–23 (2012).

45. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

46. *See Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 154–55, 164 (2002) (rejecting requirement that non-commercial solicitors complete “registration form” indicating which premises they planned to visit); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (rejecting law that would ban mailing “communist political propaganda” except to recipients who affirmatively opted in to receiving it); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164 (1939) (striking down ban on handbill distribution); *see also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1193 (2016) (“Surely the First Amendment protects the right of people to choose who they will and will not speak to.”).

reached”⁴⁷ — like how many spokespeople will spread a speaker’s message or how much time they will spend doing so⁴⁸ — enjoy the same high protections as content choices.⁴⁹ Of course, there is no guarantee a speaker’s hoped-for audience will actually materialize; one’s choice to address the public cannot ensure the public will tune in.⁵⁰ But that is a choice for listeners, not the state, to make.

Thus far, we have retraced well-known premises: Political speakers enjoy almost plenary freedom in choosing content and audience. But these premises prompt a deeper question: Why are these areas — content and audience choice — accorded such high protection? Here, two justifications emerge, each with significant implications for Customized Speech: Uncapped Persuasive Efficacy and Speaker Autonomy.

2. Uncapped Persuasive Efficacy

One reason First Amendment doctrine so strongly guards speakers’ content and audience choices is because it centrally values persuasion — speakers’ opportunities to change listeners’ minds. The First Amendment may well protect speech absent any audience (say, diary writing or “scream[ing] into the void”).⁵¹ But when most of us speak, especially when we *politically* speak, we very much want to reach and convince other people. Speech, on this count, is an instrument, the “purpose” of which is “influenc[ing] the outcome of the vote.”⁵² Sincere professions of one’s views are well and good, but if they cannot be “direct[ed] . . . in the way that will make them most effective”⁵³ at changing minds, they are, in a doctrinally important sense, irrelevant. Accordingly, a core First Amendment purpose is preserving political speakers’ “opportunity to persuade to action” through their choices of content and audience.⁵⁴

To effectuate this purpose, First Amendment doctrine broadly and consistently embraces Uncapped Persuasive Efficacy: The idea that absent extraordinary circumstances, the state may not cap or limit an

47. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976); *see also* *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 194–95 (1999) (rejecting limits on petition-signature gatherers because rules “cut down the size of the audience proponents can reach”) (internal quotation omitted).

48. *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988).

49. *Id.*; *Buckley*, 424 U.S. at 18.

50. For an illuminating analysis of this dynamic, see James Grimmelman, *Listeners’ Choices*, 90 U. COLO. L. REV. 365 (2019).

51. *Cf.* Derek E. Bambauer, *The Macguffin and the Net: Taking Internet Listeners Seriously*, 90 U. COLO. L. REV. 475, 476 (2019).

52. *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 790–91 (1978); *see also* *Ripon Soc’y, Inc. v. Nat’l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (plurality opinion) (“Speeches and assemblies are after all not ends in themselves but means to effect change through the political process.”).

53. *Ripon Soc’y*, 525 F.2d at 585.

54. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

individual in using assets she possesses to make her content and audience choices as persuasive as she can. This principle is most readily (and controversially) associated with the treatment of money in politics.⁵⁵ But it is equally (and less controversially) at work in many domains, from cognitive, to tangible, to social, to financial resources.

First, consider the First Amendment's treatment of *cognitive* assets: a speaker's knowledge, talents, training, or lived experience. Here, a speaker's freedom to use the full "power" of her "thought[s]"⁵⁶ and the full force of her "eloquen[ce]"⁵⁷ to be as persuasive as she can enjoys unquestioned First Amendment protection. Indeed, as Robert Post rightly observes: "It would be unthinkable to enact legislation limiting each person to publishing no more than one book a year, or contributing annually no more than 200 column inches to a newspaper, even though such legislation might serve the goal of equality."⁵⁸

While this result may seem deeply intuitive, it is not normatively obvious. After all, cognitive resources are distributed radically unevenly, largely by unearned chance and circumstance.⁵⁹ Further, unequal distributions of cognitive power, absent correction, soon lead to inequalities of persuasive and political power (a reality not lost on the Founding Generation).⁶⁰ Nonetheless, First Amendment doctrine, at least for political speech, adopts a thoroughgoing "cognitive libertarianism": If a speaker has knowledge, talent, training, or experiences, the state may not cap her in using such persuasive assets to the fullest.⁶¹

55. See discussion *infra* notes 72–84 and accompanying text.

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

57. See *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (explaining that the First Amendment protects speech "which is eloquent no less than that which is unconvincing").

58. ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 51 (2016).

59. See JOHN RAWLS, *A THEORY OF JUSTICE* 73–74 (1971); David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171, 175 (1992).

60. See MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 410 (2016) ("Perhaps most important, the Federalists' greater education translated into a major oratorical advantage at ratifying conventions Thus the Antifederalist 'Centinel' complained that his adversaries had 'every advantage which education, the science of government and of law, the knowledge of history and superior talents and endowments' could confer.") (internal citation omitted).

61. Nor is this a mere concession to practical necessity. Of course, some ways of levelling the cognitive playing field (like subjecting the thoughtful to state-mandated distractions, or banning the educated from public life) evoke sci-fi nightmares or real-world catastrophes. Cf. KURT VONNEGUT, *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE* 7 (1968); ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION* 167 (1986). But in other domains, like consumer protection, we permit (and judicially validate) interventions to ensure those "trained in the art of persuasion" (say, personal injury attorneys) will not use this asset to exploit the "unsophisticated" (say, injured laypersons). *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464–65 (1978). That comparable restrictions are off the table for political speech, *id.* at 458–59, thus reflects a doctrinal imperative, not a logistical one.

Likewise, consider a speaker's use of the tangible tools she possesses — like paintbrushes, printing presses, or graphics software — to effectuate her content and audience choices. Here, as for cognitive assets, the rule is Uncapped Persuasive Efficacy. As Judge Bybee explained in *Anderson v. City of Hermosa Beach*:

The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.⁶²

The state cannot curb your use of your paintbrushes to make art as compelling as you can.⁶³ It cannot curb your use of your movie projector to show the most impactful films you can.⁶⁴ And it cannot curb your use of your piano to make music as stirring as you can.⁶⁵ Once again, all power to the possessor.⁶⁶

Third, consider speakers' First Amendment freedom to deploy their social and organizational capital for persuasive ends, as seen in the venerable freedom of association. It is "beyond dispute" that the First Amendment protects "freedom of association for the purpose of advancing ideas and airing grievances."⁶⁷ But this protection does not derive from the Amendment's text (which makes no mention of "association"). Rather, it stems directly from persuasive efficacy: Association is protected precisely because it allows for "*effective advocacy*."⁶⁸ First Amendment caselaw is clear on this point, recognizing the persuasive advantages large and well-organized groups enjoy in "pooling their

62. 621 F.3d 1051, 1062 (9th Cir. 2010) (extending First Amendment protection to tattooists).

63. *Id.*; see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

64. See *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (extending First Amendment protection to motion pictures); see also Robert C. Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 717 (2000) ("If the state were to prohibit the use of projectors without a license, First Amendment coverage would undoubtedly be triggered.").

65. Chen, *supra* note 28, at 381–82.

66. By contrast, regulation of "content-neutral" aspects of communications equipment (like a sound truck's volume) are more readily permitted. See discussion *infra* notes 113–18 and accompanying text.

67. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

68. *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)) (emphasis added).

resources” to “amplify their voices,”⁶⁹ or in collaborating to “exchange ideas and formulate strategy.”⁷⁰ And it is equally clear that speakers’ use of these potent persuasive assets may not be curbed or capped except in extraordinary circumstances; to the contrary, the fact that speakers’ persuasive advantages grow in proportion to their organizational might is celebrated, hailed as a vindication of those speakers’ “popularity in the political marketplace.”⁷¹

Finally, consider political speakers’ use of monetary assets to effectuate content and audience choices. In lightning-rod cases like *Citizens United* and *McCutcheon v. FEC*, the Roberts Court has repeatedly affirmed that when it comes to funding political speech, “Congress may not . . . restrict the political participation of some in order to enhance the relative influence of others.”⁷² But the Court’s embrace of Uncapped Persuasive Efficacy long predates these recent (controversial) cases, instead reflecting a remarkably broad and durable consensus: Absent special circumstances, caps on a speaker’s use of her money to make her speech as persuasive as she can are not permitted.

The modern wellspring of this consensus came nearly 50 years ago in *Buckley v. Valeo*.⁷³ *Buckley* considered whether overall limits on independent political speech expenditures violated the First Amendment. The Court plainly saw the link between money and persuasive power, noting even the “distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs.”⁷⁴ Caps on a speaker’s use of monetary assets thus “necessarily reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”⁷⁵ As such, this type of limit could be justified only by the same “exacting scrutiny applicable to limitations on core First Amendment rights of political expression.”⁷⁶ Finding the government’s asserted anticorruption interest did not satisfy this standard⁷⁷ — and that any asserted interest in “restrict[ing] the speech of some elements of our society in order to

69. *FEC v. Nat’l Conservative Pol. Action Comm.*, 470 U.S. 480, 495 (1985) [hereinafter *NCPAC*]; see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986) [hereinafter *MCFL*] (“[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction.”).

70. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010).

71. *MCFL*, 479 U.S. at 259.

72. *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality opinion); see also *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011); *Citizens United v. FEC*, 558 U.S. 310, 349–52 (2010).

73. 424 U.S. 1 (1976).

74. *Id.* at 19.

75. *Id.*

76. *Id.* at 44–45.

77. Though such anticorruption concerns were found sufficient to justify *contribution* limits. *Id.* at 24–29.

enhance the relative voice of others” would be “wholly foreign to the First Amendment”⁷⁸ — the Court struck down the caps.⁷⁹

Whether the cases predating *Buckley* required this result is debatable.⁸⁰ But whatever its antecedents, *Buckley* crystalized a potent, consequential, and resilient doctrine: no caps on spending one’s own money to fund one’s own political speech.⁸¹ Indeed, across the past three decades, a stretch marked by hard-fought campaign finance controversies,⁸² only one Justice suggested turning from this principle.⁸³ Instead, to a first approximation, the Court’s campaign finance cases, from majority to dissent, have colored well within *Buckley*’s lines — the lines of Uncapped Persuasive Efficacy.⁸⁴

Uncapped Persuasive Efficacy is, of course, subject to trenchant normative attack. It is, by definition, inegalitarian, ratifying and reinforcing cognitive, material, organizational, and monetary inequalities.⁸⁵ But whatever its normative shortcomings,⁸⁶ as a matter of

78. *Id.* at 48–49.

79. *Id.* at 51.

80. See generally Lakier, *supra* note 31.

81. Cf. David A. Strauss, *The Equality Taboo*, 2015 U. CHI. LEGAL F. 509, 509 (2015) (describing “remarkable . . . continued domination” of *Buckley*’s principle in subsequent campaign finance jurisprudence).

82. Compare *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality opinion), and *Citizens United v. FEC*, 558 U.S. 310, 318 (2010) (majority opinion), with *McCutcheon*, 572 U.S. at 232 (Breyer, J., dissenting), and *Citizens United*, 558 U.S. at 393 (Stevens, J., concurring in part and dissenting in part).

83. See, e.g., *Davis v. FEC*, 554 U.S. 724, 750–52 (2008) (Stevens, J., concurring in part and dissenting in part) (arguing, in one-Justice portion of dissent, that *Buckley*’s approach to uncapped speaker monetary expenditures should be overruled); *Randall v. Sorrell*, 548 U.S. 230, 273–74 (2006) (Stevens, J., dissenting) (same, one-Justice dissent); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring) (same, one-Justice concurrence); see also MICHAEL DIMINO, BRADLEY SMITH & MICHAEL SOLIMINE, *VOTING RIGHTS AND ELECTION LAW* 819 (2d ed. 2015) (“Since *Buckley*, nineteen men and women have sat on the Court, and only Justice Stevens has argued that for constitutional purposes, campaign-contribution and expenditure limitations should be treated merely as restrictions on property.”).

84. Some suggest that prior to *Citizens United* (2010), *Buckley*’s ostensibly categorical rejection of “equalizing” spending limits was not rigorously enforced, with the Court upholding de facto “equalizing” laws in the guise of “anticorruption.” E.g., Lakier, *supra* note 31, at 2129–30 (claiming decisions in this period “[i]n effect . . . defined the anticorruption interest to include an interest in promoting equality[.]” such that “notwithstanding its strict language, in practice *Buckley* was not interpreted as an insurmountable constraint on the government’s ability to limit the campaign spending of the very wealthy”). To be sure, dicta in these cases evokes egalitarian themes. See, e.g., *MCFL*, 479 U.S. 238, 257 (1986) (describing campaign finance laws as “curb[ing] the political influence of those who exercise control over large aggregations of capital”) (internal citations omitted). But even in this period, no case seriously challenged the premise that a person (at least, a natural person) enjoys uncapped use of her own money to fund her political speech. Instead, the holdings of such cases, whatever their dicta, focused squarely on which specific corporate forms risked sufficient “corruption” to allow for some regulation. See *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 669 (1990); *NCPAC*, 470 U.S. 480, 495 (1985); *MCFL*, 479 U.S. at 259.

85. See, e.g., sources collected *supra* note 31.

86. Of course, other normative arguments support Uncapped Persuasive Efficacy. A strong-form libertarian, for instance, might suggest that any state cap on the use of one’s

doctrine, Uncapped Persuasive Efficacy is firmly fixed in our First Amendment firmament.

Applying this principle, a speaker's use of audience information she possesses to create Customized Speech will, like her use of other persuasive resources, enjoy very strong constitutional protections. For when it comes to effective persuasion, information about one's audience is a powerful, if not essential, asset. As audience members, none of us is a blank slate. Listeners, as Lyrissa Barnett Lidsky observes, are profoundly influenced by "[e]ducation, cultural background, and countless other characteristics."⁸⁷ We vary, sometimes dramatically, in life experiences, cognitive styles, and personal preferences.⁸⁸ Our interests and concerns are inherently unpredictable, sometimes even to ourselves.⁸⁹ We therefore must speak, and persuade, amid endemic intersubjective uncertainty. Under such conditions, information about one's audience is of decisive expressive value; it is as impactful, and sometimes more impactful, than cognitive prowess, tangible tools, social connections, or money. It is unsurprising, then, that venerated rhetoricians (like Aristotle and Han Fei),⁹⁰ foundational sociologists (like Erving Goffman),⁹¹ and battle-tested political organizers (like Wellstone Action)⁹² each, in their ways, extol the value of audience information as an asset for persuasive efficacy.⁹³

Further, the value of audience information is especially pronounced for speakers seeking to communicate and persuade across religious, racial, factional, or cultural differences,⁹⁴ a necessity in our

property is presumptively wrongful. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Alternatively, one might adopt a prudential-libertarian stance that, as an empirical and historical matter, the government is particularly bad at "equalizing" persuasiveness among speakers, and that its attempts to do so will overwhelmingly be incomplete, self-serving, or unacceptably invasive. *See generally* Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335 (2017); *see also* *Davis*, 554 U.S. at 724.

87. Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 801 & n.4 (2010).

88. *See* Eric Goldman, *Data Mining and Attention Consumption*, in *PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION* 225, 232 (Katherine Strandburg & Daniela Stan Raicu eds., 2005).

89. *Id.*

90. ARISTOTLE, *supra* note 6, at 2176; HAN FEI, *supra* note 6, at 73, 79.

91. GOFFMAN, *supra* note 7, at 15, 106–07.

92. WELLSTONE ACTION, *supra* note 8, at 28–29.

93. *See also* *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 558 (2011) (recognizing that in designing sales pitches, "[s]alespersons can be more effective when they know the background and purchasing preferences of their clientele").

94. *See generally* MARK P. ORBE & TINA M. HARRIS, *INTERRACIAL COMMUNICATION: THEORY INTO PRACTICE* (3d ed. 2013); INGRID PILLAR, *INTERCULTURAL COMMUNICATION: A CRITICAL INTRODUCTION* (2d ed. 2017); LARRY A. SAMOVAR, RICHARD E. PORTER & EDWIN R. MCDANIEL, *INTERCULTURAL COMMUNICATION: A READER* (14th ed. 2014); STELLA TING-TOOMEY & TENZIN DORJEE, *COMMUNICATING ACROSS CULTURES* (2d ed. 2018).

increasingly diverse polity.⁹⁵ And for minority groups and adherents to non-mainstream positions — speakers the First Amendment has long shown special solicitude⁹⁶ — this capacity is especially vital, for in our majoritarian democracy, minorities must effectively persuade across coalitional lines if their views are to carry the day.⁹⁷

Thus, given our doctrinal commitment to Uncapped Persuasive Efficacy, the state may seldom, if ever, cap a political speaker's use of audience information she possesses to make the most persuasive content and audience choices she can — that is, to engage in Customized Speech.

3. Speaker Autonomy

A second justification for protecting political speakers' freedom in content and audience choices derives from Speaker Autonomy. Speaker Autonomy is the idea that the state commits an inherent wrong if it forces speakers to make political⁹⁸ content or audience choices that the speakers' own "reason" tells them they should not.⁹⁹ If the government subjects speakers to this harm, it inherently and impermissibly "invades the[ir] sphere of intellect and spirit," which the First Amendment "reserve[s] from all official control."¹⁰⁰

Speaker Autonomy has deep roots: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."¹⁰¹ And unlike Uncapped Persuasive Efficacy, which focuses on speech's external effects, Speaker Autonomy looks to the internal

95. WILLIAM H. FREY, BROOKINGS INST., *THE NATION IS DIVERSIFYING EVEN FASTER THAN PREDICTED, ACCORDING TO NEW CENSUS DATA (2020)*, <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted> [<https://perma.cc/HD9U-8CKC>].

96. *Cf. Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (highlighting the First Amendment's special solicitude for the "poorly financed causes of little people").

97. *See* *THE POLITICS OF MINORITY COALITIONS: RACE, ETHNICITY, AND SHARED UNCERTAINTIES* (Wilbur C. Rich ed., 1996); VANESSA C. TYSON, *TWISTS OF FATE: MULTIRACIAL COALITIONS AND MINORITY REPRESENTATION IN THE US HOUSE OF REPRESENTATIVES* (2016); *see also* ESKRIDGE, JR. & RIANO, *supra* note 4, at 345 (describing polling by LGBT marriage-equality coalition to develop messages to persuade "middle-of-the-road" voters); BRYANT GARTH, *NEIGHBORHOOD LAW FIRMS FOR THE POOR: A COMPARATIVE STUDY OF RECENT DEVELOPMENTS IN LEGAL AID AND IN THE LEGAL PROFESSION* 192 (1980) ("Poor persons cannot succeed in making lasting gains unless they can find common ground with middle-class groups, labor unions, and the like").

98. Once again, this analysis focuses on *political* speech; other contexts, like commercial speech, might implicate different considerations. *See* discussion *supra* note 26.

99. *See* *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)).

100. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

101. *Barnette*, 319 U.S. at 642.

and the inherent: It applies even if a speech restriction would have no impact on a speaker's persuasive power¹⁰² (or for that matter, if it might make the speaker *more* persuasive).¹⁰³

Restrictions on a speaker's use of what she knows about her audience when making her content and audience choices directly violates this precept. Such restrictions, after all, necessarily force speakers to depart from or disregard their own "reason" — their information, knowledge, and beliefs — in favor of the state's.¹⁰⁴

Indeed, of all the reasons a speaker may have for making content or audience choices, few are as salient as those derived from her knowledge or information about her audience. Consider, for instance, the organizing drive that kicked off the Montgomery Bus Boycott. Led by activists like Professor Jo Ann Robinson, a small team drafted, mimeographed, and hand-distributed 52,000 flyers, working so efficiently that, within a day, "practically every Black man, woman, and child in Montgomery" had learned the Boycott's plan.¹⁰⁵ These leaflets were not broadcast communications (i.e., crafted for and aimed at a general audience); they were Customized Speech, targeted and tailored using Robinson's knowledge of their recipients' roles in the city's Black community.¹⁰⁶ Had Alabama forced Robinson to disregard her audience information — to send leaflets to all residents, from Movement sympathizers to white supremacists — it would have unacceptably, and unconstitutionally, compromised her autonomy.

Of course, as with Uncapped Persuasive Efficacy, Speaker Autonomy is subject to normative critique. For example, it is not obvious that interference with one's autonomy as a speaker is morally worse than forms of state interference we more readily allow (like limits on one's vocation).¹⁰⁷ Likewise, Speaker Autonomy can be criticized for focusing solely on curbing state coercion (a "negative" liberty) while offering no affirmative guarantee of the resources one might need (from education to campaign funds) to put her expressive autonomy into

102. See, e.g., *Tornillo*, 418 U.S. at 258.

103. Cf. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 227–28 (1989) ("[E]ven if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1987) ("The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point 'even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party.'" (quoting *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 123–24 (1981))).

104. See *Tornillo*, 418 U.S. at 256 (quoting *Associated Press*, 326 U.S. at 20 n.18).

105. ROBINSON, *supra* note 1, at 45–47, 50.

106. See *id.* at 46–47.

107. Cf. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 10–11 (2012); ROBERT H. BORK, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 25 (1971).

practice (a “positive” liberty).¹⁰⁸ But despite these charges, Speaker Autonomy remains a core doctrinal precept, and one that offers independent reason for protecting speakers’ use of audience information in political Speech Customization.

4. Audience-Information Uses and the First Amendment

To recap, First Amendment doctrine gives political speakers almost plenary freedom to choose their content and audiences. It does so because of Uncapped Persuasive Efficacy. And it does so because of Speaker Autonomy. Together, these precepts dictate that a political speaker’s use of audience information to choose content or audience — that is, to engage in Customized Speech — is protected at the same high level as political speech itself.

At times, this protection will cash out as “strict scrutiny,” the standard applied to laws directly restricting political content or audience choices.¹⁰⁹ Alternatively, some regulations, like compelled disclosures of Speech Customization practices,¹¹⁰ would be reviewed under “exacting scrutiny,” a somewhat less demanding test.¹¹¹ As is true for all core speech, courts will need to carefully parse these gradations.¹¹² But this nuance should not distract from the central point: A political speaker’s use of audience information to effectuate her right to make content and audience choices is, itself, core First Amendment speech, and is protected accordingly.

Before proceeding, a final objection must be considered: One might agree that a speaker’s audience-information use enjoys some protection, but suggest that limits on targeting and tailoring are better seen as content-neutral “time, place, and manner” regulations (like volume limits for sound trucks).¹¹³ After all, even if a very loud truck would boost one’s persuasive effectiveness (or vindicate her autonomy), the state may still apply content-neutral noise limits to it.¹¹⁴ On this view, limits on the use of audience information to target or tailor speech would be “content-neutral,” as such rules “only prohibit [speakers]

108. See generally Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (outlining debate over “action-inaction” distinction when assessing the state’s obligations to its citizens).

109. See, e.g., *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

110. See discussion *infra* Section V.B.

111. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

112. See, e.g., *Wash. Post v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019) (declining to “decide whether strict or exacting scrutiny should apply” to digital campaign ad disclosure law).

113. See *Kovacs v. Cooper*, 336 U.S. 77, 87–89 (1949) (holding regulation permissible for high-volume sound trucks).

114. See *id.*

from using [audience information] to target [listeners] and do not . . . limit anything that [speakers] might say to them.”¹¹⁵

This comparison fails, however, because “time, place, and manner” restrictions address *non-semantic* evils — that is, harms independent of a speaker’s content or meaning.¹¹⁶ By contrast, a speaker’s choices about which listeners to address or what message to say to them are inextricably bound up with their choices of content and viewpoint.¹¹⁷ Put another way, targeting and tailoring choices are far closer to a rock band’s “sound mix” among instruments (core speech) than to the band’s generic “volume.”¹¹⁸ And nothing better shows this than the fact that the leading attacks on Customized Speech — from arguments about democratic discourse to fears about strident partisanship — directly flow from the perceived evils of such speech’s content.¹¹⁹

B. Speaker Collection of Audience Information

Having considered speakers’ use of audience information for political Speech Customization, we may turn to the process by which speakers collect such information in the first place.

If audience-information use is core protected speech, then the initial collection of such information also has a First Amendment valence. However, “collection” is a virtually limitless category of conduct, from uncontroversial (think, reading community newsletters) to abhorrent (think, trespassing to learn voter habits). Truly, “[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”¹²⁰

Fortunately, analogous fields of information collection for core First Amendment purposes, like newsgathering for journalism, offer three doctrinal principles to navigate this tension. First, the government is under no First Amendment obligation to provide speakers with government-created information, even if such information would greatly help the speaker’s (core, protected) speech. Second, the state can

115. *Cf.* *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (describing FCC’s argument that limits on use of customer information to target marketing do “not violate . . . [a marketer’s] First Amendment rights because they only prohibit [speakers] from using [audience information] to target customers and do not . . . limit anything [speakers] might say to them.”). For an analogous argument that the ability of a speaker to engage in “mass amplification” of political speech (i.e., to reach a large quantity of listeners) should not enjoy the same strong-form First Amendment protections as the content of that speech, see Miller, *supra* note 31, at 4–8.

116. *See* *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647–48 (1981).

117. *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 18 (1976) (distinguishing “direct quantity restrictions on political communication” (subject to strict scrutiny) from lesser “time, place, and manner” limits implicated by sound truck volume limits).

118. *Cf.* *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989).

119. *See* discussion *infra* Part IV.

120. *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965).

permissibly limit information collection through generally applicable conduct laws (hence, even journalists have no special privilege to trespass or wiretap). Even such laws, however, must be carefully drawn and rigorously content-neutral, both in language and effect. And third, even otherwise acceptable information-collection laws may still fail if they unduly burden an input truly essential to core First Amendment activity (think, onerous taxes on newsprint or blanket bans on audio- or video-recording).

1. No Right to Government-Created Audience Information

First, with the idiosyncratic exception of trial access,¹²¹ the First Amendment does not require the state to “subsidize” speakers by providing access to government-created information, even where such information would greatly help in producing core protected speech.¹²² “The Constitution,” in other words, is “neither a Freedom of Information Act nor an Official Secrets Act.”¹²³

However, if the government provides some speakers with government-created information, then it must do so on content-neutral, non-discriminatory terms. Thus, a state could not limit voter roll access to “those whose political views were in line with the party in power.”¹²⁴

2. Generally Applicable Collection Laws Permitted

Further, unlike speakers’ use of audience information in their possession — which can only be curbed in extraordinary circumstances — the state may readily limit information-collection conduct, provided it does so via generally applicable, content-neutral, carefully drawn laws. Thus, even speakers engaged in unimpeachable First Amendment endeavors (like investigative journalism) must follow the same contract,¹²⁵ trespass,¹²⁶ and anti-wiretapping rules as the rest of us.¹²⁷

However, because “[l]aws enacted to control or suppress speech may operate at different points in the speech process,”¹²⁸ including the stage of initial information collection, courts will carefully assess even ostensibly neutral laws to ensure they do not, whether by text or effect, discriminate based on content or viewpoint.

121. *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–76 (1980).

122. *See* *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

123. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion) (quoting Potter Stewart, *Or of the Press*, 26 *HASTINGS L.J.* 631, 636 (1975)).

124. *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring).

125. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70, 672 (1991).

126. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

127. *See* *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001).

128. *Citizens United v. FEC*, 558 U.S. 310, 336 (2010).

In *Sorrell v. IMS Health Inc.*, for example, a Vermont law barred pharmaceutical representatives from collecting “prescriber-identifying information” about doctors, a form of audience information that the representatives wanted to use to target and tailor sales pitches.¹²⁹ But while the law applied to for-profit drug-makers, it exempted other types of speakers (like non-profits and universities).¹³⁰ This, the Court held, violated the First Amendment, because speakers who presumably advocated for generic drugs (like non-profits) were allowed access to key audience information, but speakers who took the opposite view (for-profit drug representatives) were not.¹³¹

Likewise, courts may go beyond the text of facially neutral information-collection rules to see if such laws were motivated by impermissible, content-discriminatory intent. A good example here is *Animal Legal Defense Fund v. Wasden*, a First Amendment challenge to Idaho’s “Ag-Gag” law.¹³² Idaho’s law criminalized, among other things, the use of “misrepresentation” to “enter[] an agricultural facility.”¹³³ In principle, this provision was neutral as to an entrant’s viewpoint. But the law’s legislative history evinced a clear intent to “quash investigative reporting on agricultural production facilities” and thus help farmers avoid the “court of public opinion.”¹³⁴ These intentions, the Ninth Circuit found, could not “be squared with a content-neutral trespass law.”¹³⁵ Partly on this basis, the provision was struck down.¹³⁶

3. Truly Essential Speech Inputs Protected

As a third principle, even where an information-collection conduct law is content-neutral and carefully drawn, it may still fail if it unduly burdens inputs truly essential to core protected speech. For example, consider comprehensive bans on audio- or video-recording — laws that are content-neutral, but that close off an informational input of profound First Amendment value. In *ACLU v. Alvarez*,¹³⁷ the Seventh Circuit struck down such a ban, finding Illinois’s anti-eavesdropping law, which criminalized the audio-recording of any person without their consent, was unconstitutional as applied to recordings of police encounters in public.¹³⁸ Likewise, if content-neutral but onerous taxes

129. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011).

130. *See id.* at 563.

131. *See id.* at 571.

132. 878 F.3d 1184, 1189–90 (9th Cir. 2018).

133. *Id.* at 1193 (emphasis omitted) (quoting then-effective version of IDAHO CODE § 18–7042(1)(a) (2014)).

134. *Id.* at 1196–97.

135. *Id.* at 1197.

136. *Id.* at 1198–99.

137. 679 F.3d 583 (7th Cir. 2012).

138. *Id.* at 595–96, 608; *accord* Project Veritas Action Fund v. Rollins, 982 F.3d 813, 840 (1st Cir. 2020).

burden a tangible input of special First Amendment import, like newsprint, they might also be struck down.¹³⁹

To be sure, the precise scope of these “super inputs” is unclear; as Ashutosh Bhagwat observes, “[c]ourts have struggled with these cases and often resolved them in contradictory ways.”¹⁴⁰ But at a minimum, these precedents suggest that some categories of speech-antecedent conduct are simply too essential to core speech to be unduly burdened, even by content-neutral laws.¹⁴¹

Might there be such super inputs for political Speech Customization? One possibility would be information-collection techniques specifically aimed at assessing listeners’ responses to one’s own core speech (like opinion polls, focus groups, or “A/B” tests of ads). Like other super inputs, these collection practices are overwhelmingly conducted for the purpose of producing subsequent speech.¹⁴² Further, such practices are closely linked to democratic responsiveness — a core First Amendment value.¹⁴³ It is thus plausible that even generally applicable, content-neutral data collection laws would fail as applied to these types of audience-information collection.

C. *The Customized Speech Doctrine*

At this point, we can combine these insights — on use and on collection — to sketch the following structure: A speaker’s *use* of audience information she possesses when customizing political speech is, itself, core political speech.¹⁴⁴ By contrast, the state may regulate the *collection* of audience information through generally applicable conduct laws, provided such laws are content-neutral, carefully drawn, and do not unduly burden truly essential speech inputs. But again, whether or not the state enacts such collection-conduct restrictions, it remains

139. See, e.g., *Minneapolis Star & Trib. Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983).

140. Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1036 (2015).

141. Other thoughtful attempts to bring clarity to this area include: Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1 (2016); and Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119 (2001).

142. Cf. Bhagwat, *supra* note 140, at 1067 (arguing attempt to tax newsprint raised First Amendment problems as it “ended up *primarily* restricting speech relevant to democratic self-governance”) (emphasis added); Campbell, *supra* note 141, at 6 (arguing speech-antecedent conduct should be protected if “the government uses a rule that targets . . . the speech process”).

143. See *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (observing that a “central feature of democracy” is that “constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns”); see also *Nat’l Broad. Co., Inc. v. Colburg*, 699 F. Supp. 241, 242 (D. Mont. 1988) (rejecting exit poll ban because “[g]athering and dissemination of information concerning why and how people vote constitutes speech which is protected by the [F]irst [A]mendment”).

144. See discussion *supra* Section II.A.

almost powerless to bar a speaker from *using* otherwise lawfully collected audience information to engage in political Speech Customization.

Notably, this structure mirrors analogous doctrinal areas. Consider news and newsgathering. Media reporting, like political Speech Customization, is a core First Amendment activity. Like Customized Speech, news is inextricably connected to information collection; “without some protection for seeking out the news, freedom of the press could be eviscerated.”¹⁴⁵ Yet newsworthy information, like audience information, can be gathered by an extraordinary range of conduct — from uncontroversial (like public-records research)¹⁴⁶ to reprehensible (like hacking victims’ voicemails).¹⁴⁷

In resolving this tension, the Supreme Court has developed a newsgathering doctrine roughly mirroring the Customized Speech framework: The state may, through content-neutral, carefully drawn laws, limit information *collection* (once again, there is no journalists’ privilege to trespass or steal).¹⁴⁸ But the state may almost never punish a journalist’s subsequent *use* of lawfully acquired information as part of her reporting.

Thus, in the *Pentagon Papers* case, the Supreme Court refused to enforce an injunction barring the *New York Times* from publishing sensitive security information it obtained from a leaker who stole them.¹⁴⁹ Likewise, where the press has lawfully collected highly intimate information, even the names of juvenile offenders (*Smith v. Daily Mail*) or sexual assault victims (*Florida Star*), efforts to criminalize the later *use* of such information in news reports have foundered.¹⁵⁰

Indeed, even if a journalist obtains information “in a manner lawful in itself but from a source who has obtained it unlawfully,”¹⁵¹ such “defect in a chain” almost never justifies “punish[ing] the ensuing publication.”¹⁵² In *Bartnicki v. Vopper*, for instance, an unknown party illegally wiretapped calls between two teachers’ union organizers.¹⁵³ The tap recorded crude and menacing conversations about school

145. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

146. *E.g.*, Moiz Syed & Derek Willis, *New Records Show the NYPD’s Favored Punishment: Less Vacation Time*, PROPUBLICA (June 22, 2021), <https://projects.propublica.org/nypd-disciplinary-records> [<https://perma.cc/2D4M-H3ST>].

147. *Cf. Why the Phone-hacking Story Won’t Go Away*, ECONOMIST (Nov. 12, 2020), <https://econ.st/3yiVcdV> [<https://perma.cc/N7UR-BYHW>].

148. *See* discussion *supra* Section II.B.

149. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*).

150. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 105–06 (1979); *Fla. Star v. B.J.F.*, 491 U.S. 524, 533–34, 541 (1989).

151. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (quoting *Boehner v. McDermott*, 191 F.3d 463, 484–85 (D.C. Cir. 1999) (Sentelle, J., dissenting)).

152. *Boehner v. McDermott*, 484 F.3d 573, 583 (D.C. Cir. 2007) (*en banc*) (Sentelle, J., dissenting) (internal citation omitted); *see also id.* at 581 (Griffith, J., concurring) (making Judge Sentelle’s dissent controlling on this point).

153. 532 U.S. at 518–19.

district contract negotiations.¹⁵⁴ The anonymous wiretapper then left tapes of these conversations with two media outlets.¹⁵⁵ The outlets “had reason to know” the tapes had been made unlawfully,¹⁵⁶ but published their contents anyway.¹⁵⁷ On these facts, the Supreme Court, yet again, held the First Amendment precluded punishing the press.¹⁵⁸ In sum, “[o]nce personal information is collected, it will often leak, and once it leaks there may be little if anything U.S. law can do about it.”¹⁵⁹ Just so for Customized Speech.

D. General Objections

At this point, we can consider two general objections to this doctrinal structure. First, one might argue that comparisons to areas like newsgathering are inapt because those practices involve “newsworthy” information of “public concern,” while audience information collected for political Customized Speech often involves “private” concerns (like a voter’s hobbies or recent purchases).¹⁶⁰

However, public concern and newsworthiness are relevant in areas like newsgathering because there the relevant First Amendment practice is *publication*: literally, turning private facts into public facts. Broadcasting a person’s private information to the community at large, thus exposing them to communal shame or scorn, has long been seen as a serious injury.¹⁶¹ It thus makes sense that to justify that harm, a truly public or newsworthy concern must be at stake. By contrast, in political Speech Customization, collected audience information is not meant to be published or shared at all; to the contrary, as Kwame Akosah observes, political speakers usually “guard data closely out of fear that partisan opponents will gain access,”¹⁶² and indeed, tend to tell no one, least of all audience members themselves, about the information they have collected.¹⁶³

154. *E.g., id.* (“If they’re not gonna move for three percent, we’re gonna have . . . [t]o blow off their front porches, we’ll have to do some work on some of those guys.”).

155. *See id.* at 519.

156. *Id.* at 525.

157. *Id.* at 519.

158. *Id.* at 534–35.

159. A. Michael Froomkin, *Regulating Mass Surveillance as Privacy Pollution: Learning from Environmental Impact Statements*, 2015 U. ILL. L. REV. 1713, 1781 (2015).

160. *Cf.* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 987 (2003) (proposing that “speech of private concern should be accorded less protection than speech of public concern”).

161. *See* RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) (describing “unprivileged *publication* to a third party” as key element of defamation) (emphasis added).

162. Akosah, *supra* note 27, at 1024.

163. *Cf.* Rubinstein, *supra* note 27, at 897 (“A Romney campaign official was more blunt: ‘You don’t want your analytical efforts to be obvious because voters get creeped out.’” (quoting Charles Duhigg, *Campaigns Mine Personal Lives to Get Out Vote*, N.Y. TIMES (Oct. 13, 2012), <https://www.nytimes.com/2012/10/14/us/politics/campaigns-mine-personal-lives-to>

As a second objection, one might argue that this doctrinal structure is “odd” because it means that unless and until the state affirmatively enacts appropriate information collection laws, “a candidate seeking representative office has more of a right to voters’ personal information than the voters themselves.”¹⁶⁴ And this can seem jarring, because we may intuitively believe that autonomous listeners should be free to block or refuse unwanted speech (or to have state support in blocking unwanted speech that self-help cannot block).

In fact, however, this distribution of informational rights — granting political speakers some degree of “attentional easement” at the expense of potential listeners’ privacy or peace of mind — is a recurring First Amendment feature.¹⁶⁵ The state may not categorically ban political speakers from door-to-door canvassing,¹⁶⁶ instead putting the onus on individual residents to affirmatively opt out. Likewise, the state may not forbid unsolicited political mailings,¹⁶⁷ putting the onus on recipients to either discard such mail on arrival or to specifically and affirmatively opt out of receiving it.¹⁶⁸ Indeed, even where a practice is personally invasive (like being noisomely confronted with handbills on a public street)¹⁶⁹ or involves unasked-for touching of chattels (like unsolicited flyers placed under windshield wipers),¹⁷⁰ courts consistently find the First Amendment precludes any “default rule” that puts the cost on political speakers to get affirmative permission before outreach. Rather, these doctrines privilege speakers’ prerogative to “reach the minds of willing listeners” and their “opportunity to win attention.”¹⁷¹ And indeed, the balance may tip even further: If core political speech is at stake, some courts suggest that even individual opt-out regimes might

get-out-vote.html [https://perma.cc/7WBX-484R]); *see also* Calo, *supra* note 10, at 1030–31 (“[W]here the consumer does not have any idea that her information will be used to tailor prices, pitches, or other aspects of her experience, she does not suffer subjective privacy harm.”).

164. Day, *supra* note 11, at 604.

165. *See* THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 299 (1970); *see also* Jane Bambauer, *Freedom from Thought*, 65 *EMORY L.J.* 219, 224 (2015).

166. *Martin v. City of Struthers*, 319 U.S. 141, 142–43, 149 (1943) (rejecting ordinance banning door-to-door canvassing).

167. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (rejecting requirement that “communist political propaganda” could only be mailed to recipients who affirmatively opted into receiving it).

168. *See, e.g., Rowan v. U.S. Post Off. Dep’t*, 397 U.S. 728, 738 (1970) (upholding law letting individuals opt out of sexually explicit commercial mail).

169. *See Talley v. California*, 362 U.S. 60, 63–64 (1960) (rejecting ordinance banning distribution of handbills, even where handbills were anonymous).

170. *E.g., Klein v. City of San Clemente*, 584 F.3d 1196, 1204–05 (9th Cir. 2009) (rejecting categorical ban on placing unsolicited political flyers on parked cars); *accord* *Horina v. City of Granite City*, 538 F.3d 624, 627 (7th Cir. 2008). *But see* *Jobe v. City of Catlettsburg*, 409 F.3d 261, 262 (6th Cir. 2005) (opposite result).

171. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

be unacceptable¹⁷² (a sensibility also reflected in the exemptions for non-commercial speech found in many “Do Not Call” laws).¹⁷³

Not only is this distribution of rights doctrinally common, it is also, as applied to political Customized Speech, normatively appropriate. A key premise of our democracy is that we, the People, have some duty to be open to civic persuasion, even at the expense of some privacy. “[P]ublic discussion,” per Justice Brandeis, “is a political duty.”¹⁷⁴ Unsubscribing from democracy should therefore rarely, if ever, be the default. On this point, within our democracy, “political speakers” and “politicians” are “us,” which also shifts the distributional calculus; today’s voter whose door is knocked based on information about what matters to her may be, is hoped to be, tomorrow’s door-knocker, customizing her own speech on behalf of her own causes.¹⁷⁵ Finally, such an “attentional easement” for democratic discourse seems particularly apt given current media and technology conditions, which have greatly increased the relative challenge of engaging would-be listeners in political dialogue. When today’s citizen crosses the town square, she’s more likely to be staring at her smartphone than at a soapbox speaker.¹⁷⁶ Technologies like Caller ID,¹⁷⁷ “smart” doorbells,¹⁷⁸ and text message blocking¹⁷⁹ can form similar hurdles to outreach. And these barriers are reinforced, to a non-trivial degree, by ever more enticing non-political pastimes, from the Golden Age of Streaming TV¹⁸⁰

172. *E.g.*, *Rowan*, 397 U.S. at 741 (Brennan, J., concurring) (observing that opt-out law for commercial mailings is permissible, but similar regime for political content might be problematic); *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1233 & n.2 (10th Cir. 2004) (expressing “no opinion as to whether the do-not-call registry would be constitutional if it applied to political . . . callers”).

173. *E.g.*, Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. §§ 7701–7713 (2003) (restrictions limited to “commercial electronic mail messages”) (emphasis added); Telephone Consumer Protections Act, 47 U.S.C. § 227 (1991) (restrictions limited to *commercial* unsolicited phone calls).

174. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

175. *See Swire*, *supra* note 11, at 1376 (“Modern grassroots organizing seeks to engage interested people and go viral, to galvanize one energetic individual who then gets his or her friends and contacts excited.”).

176. *Cf.* Robert D. Lang, *Don’t Text, Talk, and Walk: The Emerging Smartphone Defense in Personal Injury Litigation*, 77 ALB. L. REV. 425, 427 (2014). Though in fairness, true “soap box” speakers may never have been all that effective. *Cf.* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 67 (2010) (“Think about the universal image of an individual exercising his First Amendment rights — someone standing on a soap box. Most people simply walk on by.”).

177. *See Grimmelmann*, *supra* note 50, at 397.

178. *See* Laura Daily, *Why Installing a Smart Doorbell Might Be a Clever Move*, WASH. POST (Nov. 27, 2018), <https://wapo.st/374JoQG> [<https://perma.cc/N24Z-T3MD>].

179. Jennifer Jolly, *Political Text Messages Blowing Up Your Phone? Here’s How to Stop Them*, USA TODAY (Oct. 21, 2020, 1:03 PM), <https://www.usatoday.com/story/tech/columnist/2020/10/21/stop-political-text-messages-iphone-android-biden-trump-election/6005374002> [<https://perma.cc/6FY4-Z2SM>].

180. *See* Jonathan Ore, *How Literature, History and Streaming’s ‘On-Demand Culture’ Shaped the New Golden Age of TV*, CBC RADIO (Dec. 26, 2019,

to “cute pictures of cats.”¹⁸¹ In such conditions, it seems especially fitting that political speakers enjoy a doctrinal subsidy to craft customized content that can cut through the “infoglut.”¹⁸²

III. DIGITAL CUSTOMIZED SPEECH

In the previous Part, I outlined the First Amendment doctrine of Customized Speech. Speech Customization has ancient roots.¹⁸³ But in this Part, I consider a more modern manifestation: *Digital Customized Speech*.

Digital Customized Speech is Customized Speech created, enhanced, or transmitted through tools like Big Data processing, machine learning analytics, and massive social networks. While imprecise, this definition adequately captures the phenomena most central to stories like Cambridge Analytica, and to the debates such stories touched off.

Many factors enable Digital Customized Speech, but this Part zeroes in on four: deeper collection of personal data, enhanced targeting and tailoring, ascendant Advertising Megaplatforms, and the general absence of regulations that limit digital data collection.

A. Deeper Data Collection

Digital Customized Speech starts from speakers’ ability to collect vast, and often highly intimate, troves of digitized audience information. Some is gathered directly by political speakers, as when supporters sign up for e-mail lists, visit candidate websites, or download campaign apps.¹⁸⁴ Political speakers can then combine such data with other information they have gathered, including from phone banks or door-to-door canvasses.¹⁸⁵ Political allies can also exchange data among themselves, a common (and, to date, loosely regulated)

6:00 AM), <https://www.cbc.ca/radio/how-literature-history-and-streaming-s-on-demand-culture-shaped-the-new-golden-age-of-tv-1.5399889> [<https://perma.cc/M638-AFVB>].

181. Citron & Richards, *supra* note 18, at 1376; *see also* James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 943–44 (2011) (attributing late-nineteenth-century drop in civic participation to “vaudeville, amusement parks, theater, [and] dance halls”).

182. Cohen, *supra* note 19, at 384; *see also* Will Oremus, *Twitter’s Ban on Political Ads Will Hurt Activists, Labor Groups, and Organizers*, MEDIUM: ONEZERO (Oct. 31, 2019), <https://onezero.medium.com/twitters-ban-on-political-ads-will-hurt-activists-labor-groups-and-organizers-c339908b841d> [<https://perma.cc/6HRP-YE2D>] (“[P]rioritizing commercial speech over political speech is itself a political stance, and not necessarily one that we should want our online communication platforms to take.”).

183. *See* discussion *supra* note 6 and accompanying text.

184. *See* Rubinstein, *supra* note 27, at 873–75; Akosah, *supra* note 27, at 1019.

185. Daniel Kreiss, *Yes We Can (Profile You): A Brief Primer on Campaigns and Political Data*, 64 STAN. L. REV. ONLINE 70, 71 (2012); Rubinstein, *supra* note 27, at 871–72.

practice.¹⁸⁶ The results, at least for major political parties, are large, unified databases of detailed audience information.¹⁸⁷

Digital Customized Speech is also fueled by the digitization of government-created records, like voting rolls and census data. This information can be quite extensive, including citizens' race, gender, age, address, and other demographic information. Modern technologies did not create these resources, but they have made it much easier for political speakers to gather, analyze, and deploy them in Speech Customization.¹⁸⁸ Indeed, while esoteric data collection (like biometrics or psychological insights) makes for gripping headlines,¹⁸⁹ government-created data, due to its reliability and comprehensiveness, remains the workhorse of much political Customized Speech.¹⁹⁰

Apart from government-created data, modern Speech Customizers also draw from an ever-expanding sea of private-sector audience information. As shopping, dating, working, worship, child-rearing, and politics have all moved online, we cast off wider and wider wakes of digital (thus, readily collected) personal information.¹⁹¹ In turn, political speakers can access this information, whether directly (say, purchasing a news site's subscribers' list) or indirectly (like working with third-party "data broker[s]").¹⁹² Such information ranges from the pedestrian (like favorite ice cream flavor) to the extremely intimate (like search engine query histories or specific geolocations).¹⁹³

By now, many types of digitized private-sector personal information, from purchase histories to web viewing records, have been collected and used in Customized Speech for decades.¹⁹⁴ But a final, newer

186. See generally Samir Sheth, Note, *Super PACs, Personal Data, and Campaign Finance Loopholes*, 105 VA. L. REV. 655 (2019).

187. *Id.* at 663–64.

188. See DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 149 (2004); see also Douglas A. Kysar, *Kids & Cul-De-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853, 875–80 (2002) (reviewing U.S. CENSUS BUREAU, U.S. DEP'T OF COM., *CENSUS 2000: CENSUS OF POPULATION AND HOUSING* (2001) and describing technological evolution of census-data analysis by commercial marketers to target and tailor (commercial) speech).

189. See discussion *infra* notes 194–200 and accompanying text.

190. See Rubinstein, *supra* note 27, at 875–76.

191. MARK BARTHOLOMEW, *ADCREEP: THE CASE AGAINST MODERN MARKETING* 66 (2017).

192. *Id.* at 64.

193. Cf. Kashmir Hill, *The Obama and Romney Campaigns Know if You've Visited Porn Sites. Why 'Do Not Track' Matters*, FORBES (Oct. 16, 2012, 1:01 PM), <https://www.forbes.com/sites/kashmirhill/2012/10/16/the-obama-and-romney-campaigns-know-if-youve-visited-porn-sites-why-do-not-track-matters> [<https://perma.cc/6TMG-ER4X>].

194. See, e.g., A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1461 (2000) (analyzing private-sector digital data gathering including "routine collection of transactional data, growing automated surveillance in public places, deployment of facial recognition technology and other biometrics, cell-phone tracking, vehicle tracking, satellite monitoring, workplace surveillance, Internet tracking from cookies to 'clicktrails,' [and] hardware-based identifiers").

subset of information collection is worth flagging: Using tools like smartphone cameras, haptic touch sensors, and machine learning analysis, Speech Customizers can increasingly glean information about an audience's emotions, psychology, or physical and mental health. Examples include insight on individuals' emotional states (like frustration or joy),¹⁹⁵ cognitive impairments,¹⁹⁶ or long-run personality types.¹⁹⁷ Many see this form of audience-information collection as deeply disquieting.¹⁹⁸ And with the ascendant "Internet of Things," where objects from coffee pots to rectal thermometers increasingly beam our data to the cloud,¹⁹⁹ such biophysical information collection will only grow more salient.²⁰⁰

B. Stronger Targeting and Tailoring

As a second change, new analytical and technical capabilities give Digital Customized Speech extraordinary targeting and tailoring capabilities.

Digital Customized Speech makes targeting — sending content to a particular audience — much easier. Previously, speakers could engage in precise targeting (like sending an in-person canvasser to visit a particular home)²⁰¹ or large-scale targeting (like choosing to show a broadcast advertisement in the Pittsburgh market instead of Philadelphia),²⁰² but seldom both at the same time. Digital Customized Speech changes this. By using identifiers like web "cookies," mobile device IDs, and persistent social media accounts,²⁰³ speakers can cheaply gain access to far more accurate addresses for any given audience member than they could have under analog conditions, and can thus undertake very precise targeting of a very large audience.²⁰⁴

Likewise, the digital environment makes it cheap and easy for speakers to radically tailor content based on audience-member interest. Consider a simple website advertising banner: Digital Customized Speech tools let speakers, even those with few resources, cheaply and quickly create an almost infinite variety of messages, using an infinite

195. See Shaun B. Spencer, *The Problem of Online Manipulation*, 2020 U. ILL. L. REV. 959, 975–76 (2020).

196. Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115, 143–44 (2020).

197. Kilovaty, *supra* note 19, at 465.

198. See, e.g., MOORE, *supra* note 12; Willis, *supra* note 196.

199. Woodrow Hartzog & Evan Selinger, *The Internet of Heirlooms and Disposable Things*, 17 N.C. J.L. & TECH. 581, 582 (2016).

200. See *id.* at 583; see also Stacy-Ann Elvy, *Paying for Privacy and the Personal Data Economy*, 117 COLUM. L. REV. 1369, 1403–04 (2017).

201. CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 187 (2016); Kang, *supra* note 27, at 1076.

202. O'NEIL, *supra* note 201, at 192–93.

203. Rubinstein, *supra* note 27, at 879.

204. MOORE, *supra* note 12, at 59.

variety of fonts, and set in an infinite selection of color schemes.²⁰⁵ Indeed, with no printing, shipping, or design-staff costs, these capabilities let speakers make tens of thousands of distinct ad versions, sometimes tailored to the level of each individual recipient.²⁰⁶

Digital Customized Speech tools also let speakers minutely “track the level of response their posts and advertisements generate.”²⁰⁷ Speakers thus immediately know if viewers engaged with their message (e.g., clicked on it)²⁰⁸ or even *considered* engaging with it (e.g., if their mouse hovered on the content).²⁰⁹

The intersection of these trends — easy content tailoring and granular response data — also lets speakers conduct cheap, frequent, and massive “A/B” tests. In A/B tests, different ad versions are sent to statistically significant populations to see, in real time, which version does better.²¹⁰ The Trump 2016 campaign, for example, A/B tested up to 60,000 ad variants a day, constantly tweaking elements from color palette to substantive language.²¹¹

Finally, Digital Speech Customization increasingly employs machine learning and big data to make targeting decisions, finding audience correlations which unaided humans could not have.²¹² Further, artificial intelligence increasingly creates, distributes, and tests content of its own, writing and honing engaging messages with little human oversight.²¹³

Given the sophistication of these targeting and tailoring techniques, well-heeled speakers (like major presidential campaigns) may hire extensive (and expensive) teams of data scientists.²¹⁴ But as the next Section shows, smaller, less-resourced speakers also enjoy considerable access to these new capacities. Ironically, they do so via some of the planet’s biggest businesses.

205. See, e.g., *id.* at 131; Willis, *supra* note 196, at 126, 131.

206. Susser et al., *supra* note 16, at 31–32.

207. VAIDHYANATHAN, *supra* note 14, at 60.

208. O’NEIL, *supra* note 201, at 190.

209. COHEN, *supra* note 27, at 84–85.

210. Elmendorf & Wood, *supra* note 17, at 606–07; see also Spencer, *supra* note 195, at 976.

211. *Once Considered a Boon to Democracy, Social Media Have Started to Look Like Its Nemesis*, ECONOMIST (Nov. 4, 2017), <https://econ.st/3zTkdNi> [<https://perma.cc/EVZ8-C8EA>].

212. See generally Woodrow Hartzog & Evan Selinger, *Big Data in Small Hands*, 66 STAN. L. REV. ONLINE 81 (2013); see also CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 4 (2018); Kilovaty, *supra* note 19, at 456–57 (2019); Willis, *supra* note 196, at 146–47.

213. See Willis, *supra* note 196, at 128–29.

214. See, e.g., KAISER, *supra* note 5, at 84; MOORE, *supra* note 12, at 58.

C. Advertising Megaplatforms

No account of Digital Customized Speech is complete without discussing the ascendant Advertising Megaplatforms: entities like Google and Facebook. The Megaplatforms' scope is stupendous. Google, for example, hosts almost 90 percent of United States search queries,²¹⁵ while Facebook includes profiles from over 2.9 billion users,²¹⁶ each a trove of personal information on "education, finances, life events, parents, relationships, and work."²¹⁷

As Shoshana Zuboff chronicles in *The Age of Surveillance Capitalism*, while Megaplatforms vary in function, they share a common revenue model: selling online ads.²¹⁸ And in a departure from past advertising practice, the Megaplatforms charge advertisers based largely on "conversion" or "engagement," that is, how many viewers demonstrably responded to the content in question.²¹⁹

Much attention has focused on the Megaplatforms' bigness: from antitrust concerns²²⁰ to fears of outsize political sway.²²¹ But for Digital Customized Speech, an opposite dynamic is more important: the Megaplatforms' role in "renting out" cutting-edge targeting and tailoring to speakers of all sizes and persuasions.

The Megaplatforms, as noted, profit based on the accuracy and efficacy of their customers' ads. Accordingly, they have bone-deep incentives to let all manners of speakers rent access to incredibly sophisticated analytical and data science tools, and to some of the most extensive audience-information collections in history.²²² As such, the Megaplatforms give an extraordinary range of speakers user-friendly

215. Press Release, Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> [<https://perma.cc/QW2C-XU37>].

216. *Facebook Fast Facts*, CNN (Jan 25, 2022, 2:21 PM), <https://cnn.it/3ihUGaO> [<https://perma.cc/W8AN-S9NA>].

217. Madeline Byrd & Katherine J. Strandburg, *CDA 230 for a Smart Internet*, 88 *FORDHAM L. REV.* 405, 413 (2019).

218. *See generally* ZUBOFF, *supra* note 16.

219. Cohen, *supra* note 18, at 646.

220. Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 *HARV. L. REV.* 497, 528 (2019).

221. Jonathan Zittrain, *Engineering an Election*, 127 *HARV. L. REV. F.* 335, 336 (2014).

222. *See* LANIER, *supra* note 17, at 33; *see also* ZUBOFF, *supra* note 16, at 93–94; Byrd & Strandburg, *supra* note 217, at 412–13 ("Facebook sells advertising through a sophisticated online platform that can be used by advertisers, large and small, to target ads to prospective customers."); Robert Yablon, *Political Advertising, Digital Platforms, and the Democratic Deficiencies of Self-Regulation*, 104 *MINN. L. REV. HEADNOTES* 13, 26–27 (2020); Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 *U.C. DAVIS L. REV.* 1793, 1815–16 (2020); Day, *supra* note 11, at 594–95. In this regard, Advertising Megaplatforms are somewhat analogous to the colonial-era "Press": non-ideological printing houses where speakers of all persuasions could "rent" access to the era's leading communication platform. *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 *U. PA. L. REV.* 459 (2012).

access to Speech Customization capacities once limited to the strongest incumbent powers.²²³ This, for good and ill, is a powerful democratizing turn.²²⁴

Notwithstanding this model, in recent years, Advertising Megaplatforms have sharply differed in their attitude toward political speakers. In 2019, Twitter announced it would no longer support any paid political advertising,²²⁵ a path also taken by several other platforms.²²⁶ Google, meanwhile, announced in 2020 that it would reduce political speakers' targeting capacities, limiting them to levels like zip code, age, and gender. But because it still permits "contextual" advertisements based on user search terms, this change's impact is unclear.²²⁷ Finally, as of the 2022 election cycle, Facebook continues to offer political speakers full access to its suite of Digital Customized Speech tools.²²⁸

D. Few Collection Limits

A final key facet of Digital Customized Speech is regulatory, not technical: As of this writing, the United States imposes few legal limits on digital audience-information collection. To the contrary, the extraordinary data gathering that fuels Digital Speech Customization, both on and off the Megaplatforms, usually unfolds with users' ostensible consent (such as clickwrap agreements to Terms of Use).²²⁹

Many lament this state of affairs. For some, the "consent" that modern data collectors secure is not meaningful, as laypersons may not fully understand the ramifications of their data privacy choices.²³⁰ Going further, some suggest that certain digital information collection

223. See VAIDHYANATHAN, *supra* note 14, at 87–88.

224. See Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2305 (2021).

225. See Jack Dorsey (@Jack), TWITTER (Oct. 30, 2019, 4:05 PM), <https://twitter.com/jack/status/1189634360472829952> [<https://perma.cc/C896-36GA>].

226. See Emily Glazer, *Twitter, Facebook Divergence on Political Ads Shows Tension in Regulating Speech*, WALL ST. J. (Oct. 31, 2019, 7:02 PM), <https://on.wsj.com/379ahTH> [<https://perma.cc/N68R-BNL5>] (reporting that Twitch, TikTok, and Pinterest also ban political advertising).

227. Presumably, speakers might infer a great deal about potential listeners based on gender, age, zip code, and the fact that they Googled "donate Socialist Party" or "Crooked Hillary."

228. Mike Isaac, *Why Everyone Is Angry at Facebook over Its Political Ads Policy*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/technology/campaigns-pressure-facebook-political-ads.html> [<https://perma.cc/96HB-TC9Y>]; Nick Corasaniti, *Political Campaigns Can Still Target You on Facebook*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/us/politics/facebook-political-ads.html> [<https://perma.cc/6C3B-M9JS>].

229. See Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95, 106 (2013).

230. Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1880–81 (2013).

should be “inconsentable,” disallowed even for ostensibly consenting persons.²³¹

Eventually, these concerns may crystalize into a new legal regime that aggressively curbs online audience-information collection. For instance, Illinois’s Biometric Information Privacy Act (“BIPA”) imposes sharp restrictions on collecting individuals’ biometric information, marking one route forward.²³² Likewise, the Children’s Online Privacy Protection Act (“COPPA”) categorically forbids a range of audience-information collection practices (like gathering any data from minor children absent parental consent).²³³ A new, more comprehensive data collection law might build on such precedents to starkly curtail digital audience-information collection (and, by extension, Digital Customized Speech).²³⁴

But the passage of such laws would not be quick or easy; indeed, such comprehensive regulation of data collection would be a marked break from America’s longstanding, “sectoral” approach to privacy law.²³⁵ And this is of tremendous doctrinal significance, for as set out above, unless and until the state affirmatively adopts (appropriately drafted) audience-information collection rules, it has almost no power to limit political speakers’ *use* of otherwise lawfully obtained audience information in political Customized Speech.²³⁶

IV. CUSTOMIZED SPEECH AND DEMOCRACY

How does the First Amendment apply to *Digital Customized Speech*? At this point, drawing on Part II’s analysis, one might be tempted to recite a syllogism: (1) The First Amendment strongly protects political Customized Speech; (2) Digital Customized Speech, for all its bells and whistles, is still Customized Speech; so (3) whatever the practical fallout, the First Amendment strongly protects Digital Customized Speech.

For at least three reasons, though, this conclusion is premature. First, even the highest First Amendment protections yield if their normative costs are too high.²³⁷ Indeed, proposals to limit Digital Customized Speech are often explicitly framed as advancing “compelling state

231. *E.g.*, Evan Selinger & Woodrow Hartzog, *The Inconsentability of Facial Surveillance*, 66 LOY. L. REV. 33, 36, 38–39 (2020); Richards, *supra* note 9, at 1203–04.

232. 740 ILL. COMP. STAT. 14/15(b) (2008).

233. 15 U.S.C. § 6502(b)(1)(A)(ii).

234. *See* discussion *infra* Section V.C.

235. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 587 (2014).

236. *See* discussion *supra* Section II.A.

237. *See* *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

interests” sufficient to survive “strict scrutiny.”²³⁸ Second, as contexts like Fourth Amendment search jurisprudence show, when game-changing technologies arise (like comprehensive GPS tracking), they may be seen as disruptive enough to justify fundamental doctrinal changes.²³⁹ And finally, the most important decisions about whether Digital Customized Speech will be permitted or protected are increasingly made not by government actors (who are directly subject to the First Amendment), but by private entities like the Advertising Megaplatforms (who overwhelmingly are not).²⁴⁰ These “New Governors,”²⁴¹ firms like Google and Facebook, are not bound by the *United States Reports*, and if the costs of orthodox First Amendment doctrine seem too high, they are likely to depart from it.

This Part, therefore, considers the normative, social, and democratic impact of extending robust First Amendment protections to Digital Speech Customization. Here, I consider claims that Digital Customized Speech harms democratic discourse, exacerbates partisanship, and enervates autonomy. I also outline countervailing benefits that protections for Digital Customized Speech provide: informing and engaging the electorate, empowering marginalized groups, and checking government overreach.

Ultimately, this Part does not (for it cannot), establish that robust First Amendment protections for political Digital Speech Customization are costless. But it does show that leading claims about the social and democratic perils of Digital Customized Speech fall far short of the immediate, unambiguous, and overwhelming dangers that might justify abandoning key doctrinal principles.

A. Democratic Discourse Harms

As a first set of objections, some argue that Digital Customized Speech harms the quality of democratic discourse, either by allowing unsavory political speech to evade detection or by denying the polity a common discourse on shared issues.

238. See, e.g., Massaro & Norton, *supra* note 24, at 1666 (interest in “further[ing] democratic self-governance”); Parsons, *supra* note 9, at 2241 (interest in competitive marketplace of ideas); Akosah, *supra* note 27, at 1050 (interest in voter privacy); Cohen, *supra* note 18, at 657–58 (“anti-factionalism interest”); *id.* at 658 (“anti-manipulation interest”); *id.* at 658–59 (“anti-authoritarianism interest”).

239. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (declining to extend “third-party doctrine,” which allowed warrantless searches of private-sector records, to phone company’s historic-location data for cellphone users).

240. Citron & Richards, *supra* note 18, at 1357. *But see* *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring in grant of certiorari) (suggesting social media platforms are “sufficiently akin to common carriers” to be subject to First Amendment).

241. See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

Digital Customized Speech is critiqued for letting politicians “make arguments to small groups that they would rather not make to the public at large,” thus avoiding mass exposure.²⁴² Consider, for instance, overtly racist content, which is deeply upsetting to most voters, but which unfortunately appeals to a subset.²⁴³ An overtly racist broadcast ad would be seen by (and presumably repulse) many non-racists, and could face scathing media scrutiny.²⁴⁴ But a targeted social media ad sent only to users with latent racist tendencies (and which automatically deletes upon viewing) might escape detection and backlash.²⁴⁵ This prospect seems especially troubling, moreover, in a campaign’s final sprint, where opponents may lack time to learn about, let alone respond to, such hyper-targeted offensive content.²⁴⁶

Of course, there is a fine line between the (presumably salutary) desire to expose a candidate’s inconsistent or offensive views to the electorate and the legitimate interest of speakers with controversial viewpoints in carefully choosing their audiences. Forcing speakers with unpopular views to “out” themselves is, in many contexts, seen as a normatively troubling (and constitutionally impermissible) “chilling effect.”²⁴⁷ Put differently, one person’s “reprehensible message that should be exposed for mainstream ridicule” may be another’s “enclave deliberation,” vital to letting marginalized groups develop their views without fear of community repression.²⁴⁸

In any case, the point is largely moot, as the same technologies that power Digital Customized Speech have also created a golden age for capturing and exposing what political speakers might wish to hide. Today, the vast majority of us have smartphone video cameras on our persons at all times.²⁴⁹ Online research makes it easier and cheaper than ever to discover a speaker’s intimate or intemperate views, stray

242. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1843 (1995); see also VAIDHYANATHAN, *supra* note 14, at 164.

243. Cf. STEPHEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS 94 (2005).

244. LANIER, *supra* note 17, at 77.

245. Cf. Spencer, *supra* note 195, at 998.

246. See, e.g., VAIDHYANATHAN, *supra* note 14, at 179.

247. See, e.g., *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87 (1982); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

248. For the “enclave deliberation” concept, see SUNSTEIN, *supra* note 212, at 85–86; see also Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1106–08 (2005) (outlining analogous concept of “second-order diversity,” under which the “democratic process may benefit from decisionmaking bodies that reflect a wide range of compositions,” such that “whatever the axis of difference (race, gender, political affiliation) . . . at least some decisionmaking bodies look nothing like” the overall electorate).

249. See *Mobile Phone Ownership over Time*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/4RE5-ZTEX>] (reporting U.S. smartphone ownership rate of eighty-five percent).

comments, or regrettable pasts.²⁵⁰ And the moment a single viewer captures offending content, she can instantly and costlessly beam it across the country.²⁵¹ Even ostensibly ephemeral digital content is readily “screenshotted,” recorded, and shared.²⁵² All of which suggests that if anything, political “multiplicity”²⁵³ is harder, not easier, to pull off in the Big Data era.

Separately, some fear that Digital Customized Speech harmfully shifts us away from a common, “deliberative” conversation on shared issues, and instead toward the bare “aggregation” of pre-existing, atomistic preferences.²⁵⁴ In this view, increasingly sophisticated Digital Speech Customization means environmentalists will only hear about candidates’ conservation policies, gun rights supporters will only hear candidate views on the Second Amendment,²⁵⁵ and infrequent voters might not even hear an election is happening at all.²⁵⁶

Of course, whether democracy is better served by shared, deliberative discourse instead of pure aggregative interest balancing is contested.²⁵⁷ And even on its own terms, this “common conversation” critique falters. It assumes, for example, that citizens who do not receive political speech customized to their “pet issues” will therefore default toward a generalized engagement with shared national questions. But it seems equally plausible such voters, absent targeted appeals relevant to their interests, would instead default toward non-participation, impoverishing our discourse.²⁵⁸

Moreover, despite the rise of Digital Customized Speech, political speakers still have considerable electoral incentives to adopt widely

250. Cf. Ruth Graham, *What Is “Dirt” in 2019?*, SLATE (Feb. 18, 2019, 7:00 PM), <https://slate.com/news-and-politics/2019/02/oppo-politics-scandal-2019-northam-kavanaugh.html> [<https://perma.cc/8SJQ-643A>].

251. See, e.g., Dashiell Bennett, *Man Who Taped Romney’s 47% Speech Will Finally Reveal Himself*, ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/politics/archive/2013/03/man-who-taped-romneys-47-speech-will-finally-reveal-himself/317448> [<https://perma.cc/9KWP-2S5P>].

252. See, e.g., Sean Burch, *Facebook Takes Down Trump Ad with Red Triangle, Symbol Once Used in Nazi Germany*, WRAP (June 18, 2020, 11:16 AM), <https://www.thewrap.com/facebook-purges-trump-ad-upside-down-triangle/> [<https://perma.cc/JW3A-CMRM>] (screenshot used to record and report on offensive social media ads).

253. O’NEIL, *supra* note 201, at 186.

254. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 18–19 (1993); Elmendorf & Wood, *supra* note 17, at 608.

255. See VAIDHYANATHAN, *supra* note 14, at 164.

256. See ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* 152–53 (2011).

257. See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 630–34 (2008) (collecting pluralist critiques of deliberationist frameworks).

258. See discussion *infra* Section IV.D.2.

recognized, ideologically consistent, multi-issue platforms,²⁵⁹ and have acted on these incentives by continuing to invest considerable resources in broadcast messages (such as network television advertisements).²⁶⁰ Thus, fears that Digital Customized Speech could leave our polity unable “to distinguish candidates through open debate of a common set of controversial issues” seem to have missed the mark.²⁶¹ Instead, the more pressing issue, to which we now turn, is what happens if “open debate” on a “common set of controversial issues”²⁶² burns too hot.

B. Partisanship Harms

One of the sharpest critiques of Digital Customized Speech is that it fuels partisan faction. At its core, Digital Speech Customization tells speakers a great deal about what listeners prefer, then offers potent tools to satisfy those preferences.²⁶³ Preference satisfaction, tautologically, has benefits.²⁶⁴ But as an empirical regularity, audiences often prefer (or, at least, digitally engage with) content that is emotionally charged, reinforces pre-existing beliefs, or demonizes partisan enemies.²⁶⁵ By letting political speakers identify and satisfy these preferences, Digital Customized Speech tools are said to super-charge these tendencies. Political speakers, made ever more aware of precisely what will generate the strongest audience engagement, thus face strong pressures to create content in a strident, hyper-partisan style.²⁶⁶ Meanwhile, Advertising Megaplatforms, whose revenue is pegged to “engagement at all costs,”²⁶⁷ have little incentive to curb such preference fulfillment (and indeed, much incentive to promote it).²⁶⁸

The result, critics argue, is a politics that is brittle, cruel, and partisan (and a public sphere that privileges extremist candidates, who naturally take such tones, over moderate rivals).²⁶⁹ Over time, these dynamics are said to spawn partisan “filter bubbles” in which listeners identified as receptive to vitriolic content receive more and more of it

259. See Austin C. Kozlowski & James P. Murphy, *Issue Alignment and Partisanship in the American Public: Revisiting the ‘Partisans Without Constraint’ Thesis*, 94 SOC. SCI. RSCH. (2021) (reporting notable increase of partisan correlation across unrelated policy areas since 2004).

260. O’NEIL, *supra* note 201, at 194.

261. HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 214 (2010).

262. *Id.*

263. See O’NEIL, *supra* note 201, at 187.

264. See discussion *infra* notes 346–48 and accompanying text.

265. COHEN, *supra* note 27, at 87; Citron & Richards, *supra* note 18, at 1366–67; James Grimmelman, *The Platform Is the Message*, 2 GEO. L. TECH. REV. 217, 226 (2018).

266. LANIER, *supra* note 17, at 116.

267. Langvardt, *supra* note 27, at 358.

268. Cohen, *supra* note 18, at 646.

269. MOORE, *supra* note 12, at 118–19.

(which, of course, could deepen their partisanship).²⁷⁰ And at the extreme, these bubbles can metastasize into “alternative truth” systems, letting wild conspiracy theories roam rampant.²⁷¹

We are undeniably in a “hyper-partisan moment,”²⁷² one where profound political disunity poses real, disconcerting dangers.²⁷³ And while the precise impact of filter bubbles is murky — “unmeasured and perhaps unmeasurable”²⁷⁴ — it seems intuitive that our current media environment allows a level of partisan segregation and extremism unthinkable in the heyday of the Big Three broadcast networks.²⁷⁵

Yet although partisanship and faction pose real threats, Digital Customized Speech is, at most, a small facet of the problem. A seemingly far greater factor, suggested above, is audience members’ consistent preferences for homophily — content that supports and reaffirms their prior views. This tendency is manifested across many situations, from the “organic reach” of hyper-partisan content shared among friends²⁷⁶ to the meteoric rise of hyper-partisan talk radio and cable stations.²⁷⁷ Homophily, of course, is the *opposite* of Customized Speech; it is Customized Listening. Rather than speakers seeking out preferred audiences, audiences are seeking out preferred speakers, “creat[ing] their own bubbles.”²⁷⁸

Of course, one might claim such homophilic “preferences” are not genuine, but rather the result of nefarious manipulation (a point considered in the next Section). But if these audience preferences are genuine, intervention to curb Digital Customized Speech on the grounds that such preferences are “incorrect” or “suboptimal” would be jaw-droppingly paternalistic, and nearly impossible to justify in a system, like ours, that “foreclose[s] public authority from assuming a guardianship of the public mind.”²⁷⁹

Moreover, while homophily is a key culprit of our discontents, it is not alone. Other contributors include, in no particular order: rising economic inequality;²⁸⁰ long-term secular trends toward political

270. PARISER, *supra* note 256, at 15; Robert L. Kerr, *From Holmes to Zuckerberg: Keeping Marketplace-of-Ideas Theory Viable in the Age of Algorithms*, 24 COMM. L. & POL’Y 477, 478 (2019).

271. See COHEN, *supra* note 27, at 253.

272. Massaro & Norton, *supra* note 24, at 1646.

273. See generally EZRA KLEIN, WHY WE’RE POLARIZED (2021); LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018).

274. VAIDHYANATHAN, *supra* note 14, at 92.

275. Though of course, such “moderation” had costs of its own, particularly to marginalized groups and voices outside the mainstream. See discussion *infra* Section IV.D.2.

276. Langvardt, *supra* note 27, at 366.

277. Kreimer, *supra* note 141, at 120–21; Volokh, *supra* note 242, at 1848–49.

278. Cynthia Dwork & Deirdre K. Mulligan, *It’s Not Privacy, and It’s Not Fair*, 66 STAN. L. REV. ONLINE 35, 37–38 (2013).

279. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

280. Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 IND. L.J. 253, 287 (2019).

polarization;²⁸¹ the unique role of Donald Trump;²⁸² the rise of “native format” advertising that renders all content, from serious journalism to “fake news,” visually indistinct;²⁸³ the erosion of longstanding constitutional norms;²⁸⁴ and increasing residential segregation by ideology.²⁸⁵ These phenomena run the gamut of human experience. And none of them is Digital Customized Speech.

Doctrinally, of course, this is a near-fatal problem: Where core protected speech is only a part of a broad social phenomenon, the First Amendment bars us from attacking the “speech part” first.²⁸⁶ And normatively, it suggests that even if political Digital Customized Speech were substantially curtailed, such measures would do far less than hoped for in healing what ails us.

C. *Autonomy Harms*

As a third line of attack, some argue that political Digital Customized Speech deprives audiences of autonomous choice in the first instance. Such arguments avoid the (doctrinally fatal) charge of political preference paternalism. Indeed, autonomy arguments have a strong First Amendment pedigree: Because “autonomy” (at least for speakers) is a core constitutional value,²⁸⁷ if Digital Customized Speech harms it, this could raise a “Rights vs. Rights” conflict²⁸⁸ with First Amendment concerns “cut[ting] both ways.”²⁸⁹

In this Section, I consider three main versions of the autonomy critique: First, that Digital Customized Speech tools undermine autonomy through appeals that are conscious (i.e., that listeners are aware of) but nonrational (like appeals to emotion or prejudice). Second, that such tools let speakers discover, then exploit, listeners’ idiosyncratic frailties and vulnerabilities, leading those listeners to make decisions against their own interests. And third, that sufficiently powerful Customized Speech technologies can “hijack” voters’ minds, using psychological and neurological techniques so potent that, like hypnosis or subliminal messaging, listeners lose all meaningful agency.

281. See generally SAM ROSENFELD, *THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA* (2017).

282. Hasen, *supra* note 18, at 212; Parsons, *supra* note 9, at 2249–50.

283. COHEN, *supra* note 27, at 87.

284. See generally Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

285. See generally Jacob R. Brown & Ryan D. Enos, *The Measurement of Partisan Sorting for 180 Million Voters*, 5 NATURE HUM. BEHAV. 998 (2021).

286. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (“If the First Amendment means anything, it means that regulating speech must be a last — not first — resort”).

287. See generally Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998); see also discussion *supra* Section II.A.3.

288. See Day, *supra* note 11, at 603.

289. Solove, *supra* note 160, at 990–91.

1. Nonrational Appeals

A first critique is that Digital Customized Speech lets speakers wrongfully bypass listeners' rational decision-making in favor of nonrational appeals, including those to negative emotions (like fear or resentment)²⁹⁰ or prejudices (like anti-immigrant bias).²⁹¹ And, says this critique, by combining impressive content creation capacities with intimate knowledge of audience sentiments (including ugly ones, like latent racism),²⁹² Digital Customized Speech gives speakers an unmatched weapon for appealing to the nonrational.

Normatively, a standard that categorically views nonrational appeals as problematic is a hard sell. Such a view is defensible,²⁹³ but it is vigorously contested.²⁹⁴ Indeed, as a matter of historical experience, nonrational and emotional appeals have powered some of our most important (and transcendent) political speech.²⁹⁵ Likewise, appeals to parochialism, while nonrational and often reprehensible, have, as a descriptive matter, long been a central feature of our political discourse.²⁹⁶ Indeed, the generation that enacted the First Amendment was shaped as much by Thomas Paine's searing anti-British polemics and Paul Revere's incendiary anti-British woodcuts²⁹⁷ as it was by Madison's "cool and deliberate" reasoning.²⁹⁸

Moreover, even on its own terms, this critique fails to account for the rationality-*enhancing* uses of Digital Customized Speech. Indeed, a central purpose of such tools is learning what matters to listeners, then providing those listeners with information relevant to such concerns. This type of "matching" is quintessentially rational — connecting deciders with facts pertinent to their decisions.²⁹⁹ Likewise, Digital Customized Speech tools can help speakers *correct* for listeners'

290. See Cohen, *supra* note 19, at 384.

291. Kerri A. Thompson, *Commercial Clicks: Advertising Algorithms as Commercial Speech*, 21 VAND. J. ENT. & TECH. L. 1019, 1027 (2019).

292. See WYLIE, *supra* note 5, at 123–24, 127–28; LANIER, *supra* note 17, at 78.

293. See, e.g., Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 MD. L. REV. 458, 484–86 (2014).

294. See, e.g., Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 395 (2020) (collecting "meaningful critiques of rational deliberation as an organizing principle for free speech").

295. Cohen v. California, 403 U.S. 15, 26 (1971); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1118 (2016) ("[W]hile Martin Luther King, Jr. was a profoundly thoughtful man, nobody believes that the effectiveness of the civil rights protests he led stemmed only or primarily from rational arguments as to the justness of their cause.").

296. See, e.g., Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

297. See DAVID MCCULLOUGH, JOHN ADAMS 66 (2001); William Ossipow & Dominik Gerber, *The Reception of Vattel's Law of Nations in the American Colonies: From James Otis and John Adams to the Declaration of Independence*, 57 AM. J. LEGAL HIST. 521, 536 (2017).

298. THE FEDERALIST NO. 63, at 382 (James Madison) (Clinton Rossiter ed., 2003).

299. See discussion *infra* notes 343–45 and accompanying text.

nonrational biases, as when better audience information lets marginalized groups craft messages to overcome a majority's prejudice.³⁰⁰

Finally, of course, almost all human preferences are shaped, frequently decisively, by less-than-rational interactions, with many of our beliefs stemming much more from chance circumstances than detached disputation.³⁰¹ Digital Customized Speech can, admittedly, involve nonrational influences that shape political views. But so too can fear of community shunning;³⁰² a childhood spent in a discrete, insular, and isolated religious community;³⁰³ powerful visual images;³⁰⁴ celebrity endorsements;³⁰⁵ or the feelings of our friends.³⁰⁶ The point is not that any of these externally imposed, nonrational influences are morally inferior (or superior) to those allegedly implicated by Digital Customized Speech. It is that such nonrational influences are endemic, and it is unclear why political Digital Customized Speech is a uniquely blameworthy example.

2. Exploiting Personal Frailties and Vulnerabilities

As a second autonomy claim, some suggest that Digital Customized Speech undermines autonomy by exploiting listeners' idiosyncratic personal frailties and vulnerabilities, like their fatigue, frustration, or mental impairments. In the commercial sector, scholars like Helen Nissenbaum warn of disturbing Speech Customization scenarios like "marketers, adducing people's vulnerabilities from past purchases . . . [and] target[ing] them with special offers for alcohol, cigarettes, and free rides to Atlantic City[.]"³⁰⁷ Applied to politics, one might imagine Customized Speech tools that use psychometric or biometric information to detect, and exploit, idiosyncratic weaknesses. For instance, a campaign might use smartphone cameras and Big Data analytics to learn the precise moment a voter feels frustrated, and then use that moment to send her negative ads bashing a rival.³⁰⁸ Or it might target ads with glaring logical errors only to those who, based on information about their grammar, spelling, or education level, appear likelier

300. See discussion *supra* notes 94–97 and accompanying text.

301. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 991, 1000 (1897) ("Most of the things we do, we do for no better reason than that our fathers have done them . . .").

302. Cf. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 903–04 (1982).

303. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 210–12 (1972).

304. Sawicki, *supra* note 293, at 462.

305. See Tal Z. Zarsky, "Mine Your Own Business!": Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion, 5 YALE J.L. & TECH. 36 (2003).

306. See generally Jane R. Bambauer, Saura Masconale & Simone M. Sepe, *Cheap Friendship*, 54 U.C. DAVIS L. REV. 2341 (2021).

307. NISSENBAUM, *supra* note 261, at 210.

308. Cf. BARTHOLOMEW, *supra* note 191, at 103.

to overlook them.³⁰⁹ Or it might direct hyper-partisan lies and misinformation to those who, based on their online browsing habits, are most likely to uncritically embrace (and go on to promote) such content.³¹⁰

The above scenarios are increasingly plausible, especially as speakers gain new sources of biometric and psychological audience information.³¹¹ Ryan Calo, for example, has documented the risks of online digital manipulation in exploiting user's existing frailties to steer them to unwanted purchases.³¹² More recently, Lauren Willis has warned that companies might try to make sales by *causing* frailties in the first place — creating, then preying on, moments of vulnerability.³¹³ Thus, as Calo and Willis persuasively suggest, in commercial transactions, consumer protection interventions may well be justified to curb such Customized Speech exploitations.

For political speech, though, this argument faces a challenge: a marked lack of agentic regret. Regret is a hallmark of exploitative manipulation of personal frailties and momentary weaknesses.³¹⁴ In imagining what makes such tactics wrongful, we picture victims who, once the bamboozling scheme has passed, rue what happened, and wish that they could undo it (think of people gulled via high-pressure marketing into unfair loans, then learning, to their horror, that they owe usurious interest).³¹⁵

If this sort of exploitation were prevalent for political Digital Customized Speech, we should expect to see voters reporting in droves that they regret their heat-of-the-moment political choices. To this point, though, political Digital Customized Speech has not had this effect. Anecdotes aside,³¹⁶ there is scant evidence that voters who received Digital Customized Speech, even speech allegedly targeted based on their emotional or psychographic information, were thereby waylaid into

309. Cf. Willis, *supra* note 196, at 125.

310. See discussion *supra* notes 270–71 (discussing phenomenon of hyper-partisan “filter bubbles,” often premised on dishonest but emotionally appealing content).

311. See discussion *supra* notes 192–98 and accompanying text.

312. See generally Calo, *supra* note 10; see also Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 743 (1999) (discussing structural incentives of merchants for exploiting cognitive frailties, even where frailties occur only in small segments of consumer population).

313. Willis, *supra* note 196, at 142.

314. Allen W. Wood, *Coercion, Manipulation, Exploitation*, in *MANIPULATION: THEORY AND PRACTICE* 17, 36 (Christian Coons & Michael Weber eds., 2014); accord Cass R. Sunstein, *Fifty Shades of Manipulation*, 1 J. MKTG. BEHAV. 213, 217 (2015) (“[A] distinguishing mark of manipulation is a justified sense of ex post betrayal.”).

315. WOODROW HARTZOG, *PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES* 147 (2018) (one “key” to “isolating acceptable persuasion from blameworthy manipulation” is “to look for regret”).

316. E.g., Sherri Underwood, *I Voted for Donald Trump, and I Already Regret It*, VOX (Jan. 18, 2017, 10:30 AM), <https://www.vox.com/first-person/2017/1/18/14300952/donald-trump-vote-regret> [<https://perma.cc/8WM4-QRWQ>].

choices they regretted.³¹⁷ Indeed, as shown above, a far more salient phenomenon has been that Digital Customized Speech may satisfy listeners' preferences *too much*.³¹⁸ And this lack of regret makes sense, because unlike commercial exploitation (which often involves tricking victims the instant they “succumb,” via immediate, non-refundable transactions),³¹⁹ voting carries its own “cooling off period.”³²⁰ However powerful Customized Speech may be, and however much it appeals to an individual's distinctive frailties, that voter still must ultimately physically travel to the voting booth or physically sign, seal, and mail a ballot³²¹ — important checks against the sort of short-run frailty exploitation seen in online commercial contexts.

Finally, this sketchy empirical record deserves especially jaundiced scrutiny because the core argument at issue — that nefarious speakers are exploiting weak-minded listeners to trick them into baleful beliefs — has a very troubled past. All too often, and especially in times of crisis, this sort of argument has been used to suppress the speech of unpopular Others: by race,³²² by national origin,³²³ by political creed.³²⁴ Its reemergence now, in an age of deep national tumult, thus merits skepticism.

317. Cf. Eric Plutzer & Michael Berkman, *New Poll: Only 3% of Trump Voters Regret Their Vote*, WASH. POST (Mar. 22, 2017), <https://wapo.st/3zLXJxx> [<https://perma.cc/6EJB-BFPD>].

318. See discussion *supra* Section IV.B.

319. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1955 (2013).

320. Cf. 16 C.F.R. § 429 (2014) (describing cooling off period for door-to-door sales).

321. *E.g.*, Colo. Rev. Stat. § 1-7.5-104.5(4)(a) (mail-in ballot requirements).

322. *E.g.*, John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 583 (2010) (describing suppression of Black associations in antebellum South on basis that “black preachers” had acquired “great ascendancy over the minds of their fellows” and “were incapable of inculcating anything but notions of the wildest superstition, thus preparing fit instruments in the hands of crafty agitators, to destroy the public tranquility” (quoting John C. Cromwell, *The Aftermath of Nat Turner's Insurrection*, 5 J. AFR. AM. HIST. 208, 218–19 (1920))).

323. *E.g.*, *Schaefer v. United States*, 251 U.S. 466, 478–79 (1920) (affirming anti-sedition convictions for German-language printers because while their pamphlet's language would be “coarse” and “vulgar” to “us,” it could be “expected to produce . . . a different effect upon its [German-speaking] readers,” who might misread the pamphlet as “truly descriptive of American feebleness”).

324. *E.g.*, *Dennis v. United States*, 341 U.S. 494, 498 (1951) (rejecting First Amendment challenge to House Un-American Activities Committee investigations because “the [Communist] Party is rigidly controlled . . . [and] the approved program is slavishly followed by the members of the Party”); see also L.A. Powe, Jr., *Scholarship and Markets*, 56 GEO. WASH. L. REV. 172, 174 (1987) (“[T]he Court seemed to agree with Justice Jackson's argument for banishing Communists from the marketplace [of ideas]: they were secretive, under the control of a hostile foreign power, and therefore not receptive to good ideas anyway.”).

3. Strong-Form Mind Control

The third, and starkest, form of autonomy argument is that Digital Customized Speech capabilities are so potent that they let speakers “hijack” listeners’ minds, negating any true agency. Julie Cohen, for example, warns that Digital Customized Speech tools let speakers “employ a radical behaviorist approach . . . to mobilize and reinforce patterns of motivation, cognition, and behavior that operate on automatic, near-instinctual levels and that may be manipulated instrumentally.”³²⁵ On this view, speakers, perhaps via sophisticated biometric or emotional data,³²⁶ are able to (or may soon be able to) “hack” listeners, negating free choice as surely as hypnosis or subliminal messages. And while sometimes such strong-form language is hyperbole to support more limited claims, this full-force, “Brain Ray” argument recurs enough to take it at face value.

To admit the obvious, this strong-form argument is a conceptual winner: If a technology existed that truly overrode human agency, then it, like subliminal messages or hypnosis, would be outside the First Amendment’s ambit.³²⁷ In practice, though, the argument falls short.

First, the past gives reason for caution: Historically, almost every new expressive medium has been accompanied by strong-form fears of mind controlling powers.³²⁸ Comic books,³²⁹ billboards,³³⁰ and motion pictures,³³¹ to name a few, were each initially feared as irresistible mental domineers (none, of course, were). This recurring pattern suggests that, just as for the notion of “Weak Minded Others,” we should exercise caution before determining that this time, really and truly, is different.

Indeed, moving from past to present, empirical evidence that Digital Customized Speech will be the first communication modality to buck this trend, and to actually impose mind control, is thus far lacking. For example, while some studies show that Digital Customized Speech based on viewers’ behavioral information is more effective, others suggest this impact is minimal and dissipates quickly.³³² Likewise,

325. COHEN, *supra* note 27, at 77; *see also* ZUBOFF, *supra* note 16, at 200–01.

326. *See* discussion *supra* notes 194–200 and accompanying text.

327. *Cf.* *Vance v. Judas Priest*, No. 86-3939, 1990 WL 130920, at *32 (Nev. Dist. Ct. Aug. 24, 1990) (subliminal messages); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 608 (hypnosis).

328. *Cf.* Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 235–36 (2014).

329. *E.g.*, *Katzev v. County of Los Angeles*, 341 P.2d 310, 312–13 (Cal. 1959).

330. *E.g.*, *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

331. *See, e.g.*, *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 242 (1915); *see also* Jeremy Geltzer, *Forbidden Films and the First Amendment*, 2016 WIS. L. REV. FORWARD 1, 2 (2016).

332. *See* Strandburg, *supra* note 229, at 104–05 (discussing data that targeted advertising which was customized based on long term collection of users’ search queries was of limited effectiveness).

proponents of strong-form autonomy claims, even in fairly recent work, lean heavily on a 2010 Facebook Election Day study.³³³ That day, Facebook changed the “Profile Page” for 61 million American users.³³⁴ Some saw generic voting reminders. But another group got Customized Speech: reminders stating which of a user’s “Friends” had said that they, too, had voted. Ultimately the latter group — the Customized Speech group — had 0.39% more turnout than the generic group.³³⁵ Such a finding is significant, because it suggests Facebook, by offering the equivalent of millions of dollars in advertising to a chosen candidate, might tilt a close election.³³⁶ But the fact that an advertisement based on Customized Speech marginally outperformed one that was not is no cause to question the very survival of free will³³⁷ (or, at least, no more cause than the fact that analog ads seen by millions of people can also, if relevant to voters’ concerns, impact elections).³³⁸

In fairness, these are not the only data points Brain Ray proponents offer³³⁹ (though given their continued prominence, the bench may be quite shallow). Yet even if more robust evidence does emerge, it would still need to be weighed against a final key dynamic: the tendency of persuasion tools to revert to persuasive mean. In a familiar arc, new communication technologies emerge, enjoy brief flowerings of extraordinary, almost mesmeric, persuasive power, but then audiences build “perceptual resistance,” and the channel fades out.³⁴⁰ This persuasion-resistance cycle has played out for colorful mass-produced posters, for

333. See, e.g., ZUBOFF, *supra* note 16, at 299; Kilovaty, *supra* note 19, at 472–73; Spencer, *supra* note 195, at 975.

334. Spencer, *supra* note 195, at 975.

335. *Id.*

336. Zittrain, *supra* note 221, at 336–37. Of course, this problem is not specific to social networks; it applies any time a leading media entity throws its heft, intentionally or not, behind a candidate. See, e.g., Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES: THE UPSHOT (Mar. 15, 2016), <https://nyti.ms/3A2xKlX> [<https://perma.cc/7HZQ-974H>]. For more on an analogous dynamic — that of Advertising Megaplatfroms using their vast scope to promote favorable coverage of their own operations, see, for example, Ryan Mac & Sheera Frenkel, *No More Apologies: Inside Facebook’s Push to Defend Its Image*, N.Y. TIMES (Sept. 21, 2021), <https://nyti.ms/3t6jc4q> [<https://perma.cc/Y9S9-68W2>].

337. *Contra* ZUBOFF, *supra* note 16, at 59 (warning that Digital Customized Speech tools threaten our very “right to a future tense”).

338. For instance, Lyndon Johnson’s 1964 “Daisy” commercial, implying that opponent Barry Goldwater might start a nuclear war if elected President, was seen by 50 million viewers on NBC alone, and is considered a seminal moment in American political history. See ROBERT MANN, *DAISY PETALS AND MUSHROOM CLOUDS: LBJ, BARRY GOLDWATER, AND THE AD THAT CHANGED AMERICAN POLITICS* 64, 102 (2011).

339. See, e.g., Spencer, *supra* note 195, at 983 (citing Adam D. I. Kramer, Jamie E. Guilory & Jeffrey T. Hancock, *Experimental Evidence of Massive-Scale Emotional Contagion Through Social Networks*, 111 PROC. NAT’L ACAD. SCI. U.S. 8788, 8788 (2014)).

340. Tal Z. Zarsky, *Privacy and Manipulation in the Digital Age*, 20 THEORETICAL INQUIRIES L. 157, 183–84 (2019). For more on the concept of perceptual resistance, see, for example, Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 721 (2010).

billboards, for radio, for television, and for early Internet ads.³⁴¹ Indeed, given the incredible tenacity of viewers in adapting to, then tuning out, messages, it is possible that far from “coloniz[ing] . . . the lifeworld,”³⁴² Digital Customized Speech is doing all it can to tread water.³⁴³

In sum, while a true Brain Ray might be good cause to rethink Digital Customized Speech (as well as many other foundational commitments),³⁴⁴ such capabilities are not, as of this writing, among us.

D. Countervailing Benefits

To this point, I have assessed claims that Digital Customized Speech harms democratic discourse, fuels faction, and saps autonomy. While meriting serious consideration, each of these claims is ultimately less persuasive than critics suggest. At the same time, there is also an affirmative case for the benefits that doctrinal protections for such Customized Speech can offer — even in our Big Data era. Here, I highlight three: informing and engaging voters, empowering the marginalized, and checking government overreach.

1. Informing and Engaging the Electorate

Digital Customized Speech increases the likelihood that a speaker’s message will be relevant or informative to listeners. In turn, this increased relevance is of great importance for civic participation and democratic engagement.

Digital Customized Speech offers unmatched tools for learning, and satisfying, listener preferences. Such improvements in fit between “sellers” (here, political speakers) and “consumers” (here, possible voters) are mutually beneficial, as fewer resources are wasted on producing (or listening to) irrelevant messages.³⁴⁵ Armed with these capacities, candidates can quickly learn what matters to voters, then speak specifically and responsively to those concerns (like specifically directing online ethanol policy ads to the farmers of Worth County, Iowa).³⁴⁶ These tools surely help political speakers. But they also help

341. See, e.g., TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 21–23 (2016) (describing audiences’ adaptation to and “revolt” against posters and billboards).

342. Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 733–34 (1987) (internal quotation omitted).

343. Cf. Zarsky, *supra* note 340, at 183–84.

344. *Id.* at 176.

345. Cf. Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1173.

346. E.g., Tal Axelrod, *Buttigieg Launches County-Specific Digital Ads in Iowa*, THE HILL (Jan. 16, 2020, 10:26 AM), <https://thehill.com/homenews/campaign/478559-buttigieg-launches-iowa-digital-campaign-in-county-specific-ads> [<https://perma.cc/4ZFR-GBGU>].

voters, who are more likely to get the information most relevant to their choice of who to support.³⁴⁷

Detractors of Digital Customized Speech often downplay this benefit, saying increased messaging relevance, while a nice fillip for commercial advertisers, should be of little account when set against the high values of democratic self-government.³⁴⁸

But this dismissive view fails to appreciate the deep connection between relevant political messaging and healthy democratic engagement. When citizens are not convinced that civic participation will directly improve their lives or make a difference to what they care about, they often opt out of participation entirely.³⁴⁹

In commercial marketing, the damage of such opt-outs is contained: If sneaker ads don't resonate with viewers, then maybe Nike sells fewer shoes. But when the "product" is democratic participation, the social costs of opt-outs are high and systemic. To see this, we need only consider our recent history.

In the late twentieth century, political speech was dominated by large, capital-intensive mediums (especially broadcast television).³⁵⁰ Because such content was very expensive to produce, and because such mediums did not lend themselves to granular Customized Speech,³⁵¹ politics skewed toward generic and inoffensive, broad messages aimed at the mushy middle of the (disproportionately old, wealthy, and white) electorate.³⁵²

This media era had its virtues.³⁵³ But among its vices was a profound lack of relevant messaging, particularly for groups outside the mainstream. It is no surprise, then, that by the turn of the millennium, broadcast-style politics were blamed for, among other problems,

347. SUNSTEIN, *supra* note 212, at 4; Volokh, *supra* note 242, at 1842–43. Indeed, as James Grimmelmann has observed in a somewhat analogous context, search engine results targeted toward each user's particular interests promote autonomy by furthering a listener's "ability to choose appropriate actions for achieving one's goals." James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 896–97 (2014); *see also* James Grimmelmann, *Don't Censor Search*, 117 YALE L.J. POCKET PART 48 (2007), <https://www.yalelawjournal.org/forum/dont-censor-search> [<https://perma.cc/282L-DH9D>].

348. *See, e.g.*, PARISER, *supra* note 256, at 18 ("As a consumer, it's hard to argue with blotting out the irrelevant and unlikable. But what is good for consumers is not necessarily good for citizens."); *accord* MOORE, *supra* note 12, at 180; Citron & Richards, *supra* note 18, at 1366.

349. *Cf.* SUNSTEIN, *supra* note 254, at 21 (describing link between feelings of political inefficacy and disengagement from democratic participation).

350. Gregory P. Magarian, *Forward into the Past: Speech Intermediaries in the Television and Internet Ages*, 71 OKLA. L. REV. 237, 249–50 (2018).

351. *See* Strandburg, *supra* note 229, at 117–18.

352. Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641, 1645–47 (1967); Magarian, *supra* note 350, at 266; *see also* ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 320 (2000) (describing electorate's demographic skew).

353. *See generally* Magarian, *supra* note 350 (comparing benefits of broadcast-era politics and contemporary, digital politics); Volokh, *supra* note 224 (same).

depressed voter turnout, weaker community institutions, and the disproportionate disengagement of voters from marginalized groups.³⁵⁴ When democratic politics were insufficiently relevant to voters' concerns, voters checked out of democratic politics — a deeply negative outcome.³⁵⁵

Against this backdrop, Digital Customized Speech's capacities for creating and distributing messages relevant to individual voters should not be overlooked. For instance, Digital Speech Customization tools, by providing better audience information, have made it once again viable for candidates to engage in large-scale door-to-door canvassing, a form of deeper engagement that had languished in the broadcast age.³⁵⁶ Likewise, Digital Customized Speech tools let speakers find and engage with voters whom less granular proxies (like race or neighborhood) would have overlooked, and whom generic campaign tactics might not have reached (like stray conservatives in deeply liberal areas, or vice versa).³⁵⁷ And by letting campaigns quickly and cheaply create content directly applicable to a group's specific concerns, Digital Speech Customization lets campaigns find and engage with communities long detached from political participation, whether they be Amish voters in rural Pennsylvania or college students in Cleveland.³⁵⁸ Thus, far from bloodless points on a net-utility curve, the heightened relevance of Digital Customized Speech can be an essential engine of engagement.

2. Empowering the Marginalized

Beyond informing and engaging the electorate, Digital Customized Speech is an unmatched "weapon of the weak," giving speakers who are socially, economically, historically, or politically marginalized an extraordinary degree of communicative power.

As even detractors admit, Digital Customized Speech is remarkably cheap.³⁵⁹ With a (free) social media account and a (relatively affordable) smartphone, speakers can access content production, data analysis, targeting, and tailoring capabilities that were once the

354. See KEYSSAR, *supra* note 352, at 320–24; ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 227–29 (2000); Kang, *supra* note 27, at 1091.

355. For other discussions of this late-twentieth century crisis of apathy, see, for example, FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE: AND WHY POLITICIANS WANT IT THAT WAY* (2000); THOMAS E. PATTERSON, *THE VANISHING VOTER* (2002); MARTIN P. WATTENBERG, *WHERE HAVE ALL THE VOTERS GONE?* (2002).

356. Kang, *supra* note 27, at 1092; Kreiss, *supra* note 185, at 70–71.

357. Kreiss, *supra* note 185, at 70–71.

358. Kang, *supra* note 27, at 1070; Akosah, *supra* note 27, at 1012.

359. VAIDHYANATHAN, *supra* note 14, at 10; Cohen, *supra* note 18, at 646; Akosah, *supra* note 27, at 1033.

province of the best-funded campaigns in the country.³⁶⁰ To be sure, these savings are available to all comers, mainstream and non-mainstream alike. But for several reasons, robust protection for Digital Customized Speech disproportionately helps the have-nots.³⁶¹

First, because of diminishing marginal returns,³⁶² an idea's most important impressions are its first ones: The impact Digital Customized Speech has in helping the Black Socialists of America identify and speak to their first 50,000 adherents is larger than its impact in helping, say, the Democratic Party reach 50,000 more viewers.³⁶³

Second, mainstream views are, by definition, widely held. For those views, even broadcast speech can reach a critical mass of adherents.³⁶⁴ Further, as Katherine Gutierrez observes, proponents of mainstream views are often already aligned with the gatekeepers of "traditional . . . capital-intensive media," giving them an advantage in such forums.³⁶⁵ Such groups, therefore, have less need of the targeting and tailoring "bypass" that Digital Customized Speech affords to out-groups.³⁶⁶

Third, Digital Customized Speech, with its ability to let speakers quickly and cheaply iterate messages to find what works, and to send different content to different audiences, is of special value to those who must persuade across racial, social, or ideological lines.³⁶⁷ While helpful to any speaker, such capacities are especially vital for minority groups and proponents of non-mainstream viewpoints, who, as discussed, must necessarily coalition-build to achieve political efficacy.³⁶⁸

Fourth, robust protections for Digital Customized Speech help marginalized groups because *analog* Customized Speech tools, like telephone opinion polls,³⁶⁹ massive door-to-door canvasses,³⁷⁰ and

360. Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 4 (2018); Grimmelmann, *supra* note 50, at 374–75.

361. See Erika Franklin Fowler, Michael M. Franz, Gregory J. Martin, Zachary Peskowitz & Travis N. Ridout, *Political Advertising Online and Offline*, 115 AM. POL. SCI. REV. 130, 137 (2021) (empirical data that "financially constrained candidates" rely more on Facebook's targeting and tailoring capabilities for political ads than do better-funded ones).

362. See Robert Yablon, *Campaigns, Inc.*, 103 MINN. L. REV. 151, 200 (2018).

363. Cf. Kathrine Gutierrez, Response, *Keeping Speech Cheap: The Progressive Case for a Free Internet in Response to Can Speech Be Progressive?* by Louis Michael Seidman, 67 UCLA L. REV. DISCOURSE 72, 82–83 (2019).

364. See *Buckley v. Valeo*, 424 U.S. 1, 56–57 (1976); cf. Daniel Kreiss & Matt Perault, *Four Ways to Fix Social Media's Political Ads Problem — Without Banning Them*, N.Y. TIMES (Nov. 16, 2019), <https://nyti.ms/2Wllt6A> [<https://perma.cc/C23D-S7ZF>].

365. Gutierrez, *supra* note 363, at 86.

366. Cf. JILLIAN C. YORK, *SILICON VALUES* 39 (2020); Sahar F. Aziz & Khaled A. Beydoun, *Fear of a Black and Brown Internet: Policing Online Activism*, 100 B.U. L. REV. 1151, 1153 (2020).

367. See discussion *supra* notes 94–97 and accompanying text.

368. See discussion *supra* notes 96–97 and accompanying text.

369. Elmendorf & Wood, *supra* note 17, at 615–16.

370. See, e.g., Ricardo Torres-Cortez, *Nevada Canvassers Knocked Half-million Doors for Democrats*, *Union Says*, LAS VEGAS SUN (Nov. 6, 2020, 2:00 AM),

relationships with established interest groups,³⁷¹ disproportionately help the moneyed and mainstream. Accordingly, if *all* speakers' access to Speech Customization via user-friendly Advertising Megaplatforms were cut off,³⁷² this would hurt marginalized speakers more, because well-funded mainstream voices could still fall back on using their own in-house data and technology experts,³⁷³ commissioning their own (costly) opinion surveys, and drawing on already-established networks of interest groups and backers.

Fifth, and finally, Digital Customized Speech is a boon for grassroots fundraising, particularly by under-funded insurgents.³⁷⁴ By giving even cash-poor speakers effective tools to carefully target fundraising appeals, Digital Speech Customization has shifted campaign finance in a markedly egalitarian direction,³⁷⁵ a result of special importance for those concerned about the political power of well-heeled corporations following *Citizens United*.³⁷⁶

To be sure, empowering the marginalized carries costs; after all, while some groups have been marginalized due to racism, classism, or homophobia, others have been marginalized due to their odious conduct or beliefs.³⁷⁷ But the main point remains: Protections for Digital Customized Speech serve a decisive role in letting marginalized voices be heard — long a core First Amendment concern.

3. Checking Government Overreach

Finally, doctrinal protections for Digital Speech Customization are salutary because without such guardrails, there is strong reason to think speakers deploying such practices will face improper government interference.

<https://lasvegassun.com/news/2020/nov/06/nevada-canvassers-knocked-half-million-doors-union> [<https://perma.cc/9N5X-QU24>].

371. See Kang, *supra* note 27, at 1076–77.

372. See, e.g., *Wash. Post v. McManus*, 944 F.3d 506, 516 (4th Cir. 2019); see also Julia Ager et al., *Statement on Google Policy Changes Issued via the UChicago Bipartisan Working Group on Digital Political Media & Democracy*, U. CHI. (Nov. 22, 2019), <https://harris.uchicago.edu/news-events/news/statement-google-policy-changes-issued-uchicago-bipartisan-working-group-digital> [<https://perma.cc/X5WP-7S8P>].

373. Kreimer, *supra* note 141, at 143; Akosah, *supra* note 27, at 1035–36; Sheth, *supra* note 186, at 665–66.

374. Hasen, *supra* note 18, at 212; see also Isaac, *supra* note 228 (reporting progressive organizers' argument that limits on targeted Facebook advertising “make it tougher for smaller organizations to collect donations online”).

375. Intuitively, fundraising may seem more like “commercial speech” than pure political discourse. But under current doctrine, fundraising that is inextricably bound to a political message, is, itself, considered core political speech. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

376. See, e.g., LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS AND A PLAN TO STOP IT* (2011).

377. YORK, *supra* note 366, at 199; see also Elmendorf & Wood, *supra* note 17, at 608.

As Jane and Derek Bambauer recount, speech modalities that challenge the informational status quo or empower marginalized groups have perennially faced state suppression and overreach.³⁷⁸ As just such a modality,³⁷⁹ we would expect that Digital Customized Speech would, absent strong First Amendment protections, fall prey to this recurring pathology. And indeed, there is already some evidence that this is the case.

Consider, for instance, the proposed Voter Privacy Act of 2019.³⁸⁰ That law would ban “unacceptable” forms of Digital Speech Customization (like targeting campaign ads based on web histories or online transactions) while allowing “acceptable” customization practices (like ads based on opinion polls, voter roll information, or response data from door-to-door canvasses).³⁸¹ This, at first, seems like a “Goldilocks” balance, preserving key benefits of Digital Customized Speech while curbing “creepy” excesses.³⁸² But on inspection, the split between “acceptable” and “unacceptable” practices uncannily tracks the split between information-collection tools that advantage large, established incumbents (like expensive opinion polls, massive phone banks, and sophisticated in-house analyses of voter files) and those that do not (like cheap, user-friendly Digital Speech Customization based on “behavioral” online data).³⁸³ As this example shows, even seemingly well-intentioned regulations of Digital Customized Speech, absent strong judicial protections, carry real risks of incumbent self-dealing.³⁸⁴

And there are bleaker possibilities. If, as some suggest, the state has the power to curb Digital Customized Speech when doing so advances values like “further[ing] democratic self-governance,”³⁸⁵ it could readily use that power to bludgeon disfavored opponents.³⁸⁶ An ill-intentioned government might, for instance, cite interests in “electoral integrity” or preventing “voter fraud” as bases to block Digital

378. See generally Bambauer & Bambauer, *supra* note 86.

379. See discussion *supra* Section IV.D.2 and accompanying text.

380. Voter Privacy Act of 2019, S. 2398, 116th Cong. (2019).

381. See Day, *supra* note 11, at 590–91.

382. See *id.* at 604–07 (praising Voter Privacy Act as letting candidates access “some of the most useful information” while also protecting “privacy interest” of voters); see also Omer Tene & Jules Polonetsky, *A Theory of Creepy: Technology, Privacy and Shifting Social Norms*, 16 *YALE J.L. & TECH.* 59, 60 (2014) (“The word ‘creepy’ has become something of a term of art in privacy policy to denote situations where [social norms and technological capabilities] . . . do not line up.”).

383. See Day, *supra* note 11, at 589–90.

384. *Cf.* *McConnell v. FEC*, 540 U.S. 93, 262–63 (Scalia, J., concurring in part and dissenting in part) (discussing “Charlie Wilson” phenomenon: tendency of incumbents, even those of good will, to become convinced that speech regulations advantaging themselves over challengers are also in the broader public interest).

385. Massaro & Norton, *supra* note 24, at 1666.

386. *Cf.* *Citizens United v. FEC*, 558 U.S. 310, 391 (2010) (Scalia, J., concurring) (“[I]f speech can be prohibited because, in the view of the Government, it leads to ‘moral decay’ or does not serve ‘public ends,’ then there is no limit to the Government’s censorship power.”).

Speech Customization based on listeners' statuses as undocumented immigrants, unregistered voters, out-of-state residents, or non-English speakers.³⁸⁷ Such efforts are, alas, all too plausible; as Toni Massaro and Helen Norton observe, we are in a "hyper-partisan moment when concern has spiked about the government's viewpoint-specific censorship of political opponents and platforms."³⁸⁸ Against this backdrop, protections for Digital Customized Speech as against state overreach, far from "obsolescence,"³⁸⁹ may be more necessary than ever.

* * * * *

First Amendment protection for Digital Customized Speech is costly. It risks, and sometimes imposes, real harms. Yet many fears about Digital Speech Customization either have not materialized or have taken forms less serious than critics suggest. Further, these harms are countervailed by key benefits: to engagement, to equity, and to civil liberty. In sum, our Big Data era does not, at least for now, offer sufficient reason to forsake strong doctrinal protections for political Customized Speech.

V. ASSESSING CUSTOMIZED SPEECH RESTRICTIONS

In the previous Parts, I advanced my main doctrinal and normative claims. In this Part, I apply these insights to offer concrete assessments of which current proposals to regulate Digital Customized Speech are constitutionally viable — and which are not. Specifically, I examine: (1) direct limits on speakers' use of audience information in Speech Customization; (2) Customized Speech disclosure requirements; (3) generally applicable audience-information collection laws; and (4) voluntary action by candidates and independent groups.

387. Cf. Philip Bump, *Yet again, Trump Blames Illegal Voting for Getting Walloped in California*, WASH. POST (July 23, 2019), <https://wapo.st/3yflWew> [<https://perma.cc/2AES-HP4E>]; Mark Niese, *Voting Groups Call Georgia Investigations Empty Partisan Attacks*, ATLANTA J.-CONST. (Feb. 8, 2021), <https://www.ajc.com/politics/voting-groups-call-georgia-investigations-empty-partisan-attacks/OTBTDDGGJJECNBPKVDMG4A5MFQ> [<https://perma.cc/W46M-TTVE>].

388. Massaro & Norton, *supra* note 24, at 1646; *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) (“[T]he overriding objective at all times should be to equip the [F]irst [A]mendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.”).

389. Cf. Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 556 (2018).

A. Direct Limits on Use of Audience Information

Some proposals call for direct limits on speakers' use of audience information in political Digital Customized Speech.³⁹⁰ As set out in Part II, a speaker's use of information in her possession for political Speech Customization is, itself, core political speech.³⁹¹ Outright use limits would therefore face "strict scrutiny," surviving only if they achieved a compelling state interest *and* were the least-restrictive means to do so.³⁹² Neither seems likely. Proponents of such information-use restrictions can surely cite "interests" that, in the abstract, are "compelling" — like autonomy, democracy, or national cohesion — but as Part IV showed, Digital Customized Speech threatens these values far less than critics suggest. Further, given the complex, multi-causal phenomena behind many of the harms blamed on Digital Customized Speech,³⁹³ showing that regulating the "speech part" of the problem is the "least restrictive" path seems equally implausible.

Alternatively, some would limit political Digital Customized Speech to listeners who affirmatively opt in to receiving it.³⁹⁴ While less burdensome than outright bans, opt-in regimes for core speech have failed in contexts from door knocking to political mailing,³⁹⁵ and would likely meet the same fate here.³⁹⁶

Conversely, some suggest that individuals who do not want to receive political Digital Customized Speech should be empowered to affirmatively opt out.³⁹⁷ Opt-out approaches are on stronger constitutional footing,³⁹⁸ and have sometimes survived even as to core protected speech (for instance, states can enforce homeowners' "no solicitation" signs even as against door-to-door political canvassers).³⁹⁹ But cases upholding opt-out regimes for unsolicited mail, phone calls, or other forms of marketing often specifically reserve the question of

390. See, e.g., Protecting Democracy from Disinformation Act, H.R. 7012, 116th Cong. (2020); see also Massaro & Norton, *supra* note 24, at 1683–84; Gilad Edelman, *Why Don't We Just Ban Targeted Advertising?*, WIRED (Mar. 22, 2020, 7:00 AM), <https://www.wired.com/story/why-dont-we-just-ban-targeted-advertising> [<https://perma.cc/7S9T-4LAP>].

391. See discussion *supra* Section II.A.

392. See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

393. See, e.g., discussion *supra* notes 280–85 and accompanying text (describing plural causation of partisanship and faction).

394. See, e.g., Banning Microtargeted Political Ads Act, H.R. 7014, 116th Cong. (2020); Elmendorf & Wood, *supra* note 17, at 613.

395. See discussion *supra* notes 164–70 and accompanying text.

396. See, e.g., *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1239–40 (10th Cir. 1999) (rejecting, as violative of First Amendment, regime requiring telecommunications' customers to affirmatively opt in before receiving *commercial* Customized Speech tailored based on commercial telephone records).

397. See, e.g., Voter Privacy Act of 2019, S. 2398, 116th Cong. (2019).

398. Cf. *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 738 (1970).

399. *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943).

whether such schemes would be acceptable if applied to political speech,⁴⁰⁰ suggesting that even opt-out models may face some constitutional difficulty. And of course, even if opt-out models could constitutionally *extend* to political speech, they almost surely cannot, as some have proposed, be *limited* to political speech.⁴⁰¹ Such content-based discrimination — especially as to a privileged content category like politics — would be flatly impermissible.⁴⁰²

Finally, it is worth flagging that even if they are found, as a doctrinal matter, to be constitutional, opt-in or opt-out regimes may have unintended pernicious impacts, and so still may be inappropriate. For instance, such approaches risk advantaging more extremist candidates, as their supporters might be more willing to jump through any needed hoops to opt in.⁴⁰³

B. Customized Speech Disclosure Requirements

As an alternative to direct limits, some propose Customized Speech disclosure requirements.⁴⁰⁴ Under these approaches, political speakers engaged in Digital Speech Customization would need to disclose the fact that their communications had been customized, the types of personal information the speakers used, and which audience (in terms of size, demographics, or other characteristics) received the content.⁴⁰⁵

Disclosure requirements are less burdensome than bans (and thus, would likely be subject to “exacting,” rather than “strict,” scrutiny).⁴⁰⁶ They can also be said to further an important listener autonomy interest by disclosing important information about speakers and their information-use practices to prospective listeners, thus empowering such listeners to make more informed choices as to what weight to assign to

400. See discussion *supra* notes 172–73 and accompanying text.

401. Cf. Elmendorf & Wood, *supra* note 17, at 613–14.

402. See Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011); see also Wash. Post v. McManus, 944 F.3d 506, 513 (4th Cir. 2019) (“While generic content-based regulations strain our commitment to free speech, content-based regulations that target *political* speech are especially suspect.”).

403. See, e.g., Jacob Gursky & Samuel Woolley, *The Trump 2020 App Is a Voter Surveillance Tool of Extraordinary Power*, MIT TECH. REV. (June 21, 2020), <https://www.technologyreview.com/2020/06/21/1004228/trumps-data-hungry-invasive-app-is-a-voter-surveillance-tool-of-extraordinary-scope> [<https://perma.cc/5UZU-CYYP>].

404. See, e.g., Honest Ads Act, S. 1989, 115th Cong. § 8 (2017); MD. CODE ANN., ELEC. LAW § 13-405(c)(3) (West 2021); Wood & Ravel, *supra* note 27, at 1278; Akosah, *supra* note 27, at 1027.

405. This discussion does not consider laws merely extending existing television and print campaign finance disclosures to analogous digital media. E.g., MD. CODE ANN., ELEC. LAW § 1-101(k)(2), 13-401(a)(1) (West 2021).

406. See *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (“exacting scrutiny” satisfied by “substantial relation between the disclosure requirement and a sufficiently important governmental interest,” provided “strength of the governmental interest . . . reflect the seriousness of the actual burden on First Amendment rights” (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010))).

any given political speech.⁴⁰⁷ Notwithstanding these possible benefits, however, under existing doctrine, disclosure rules also face difficulties.⁴⁰⁸

By definition, disclosure mandates make speakers share content that they otherwise would not have.⁴⁰⁹ Such compulsion necessarily trenches on Uncapped Persuasive Efficacy (as it makes speakers undercut their own appeal) and on Speaker Autonomy (as it forces content choices that speakers otherwise, based on their own reasons, would not have made).⁴¹⁰ And these dynamics are especially pronounced for disclosure rules that would require in-the-moment “derogatory labels”⁴¹¹ as to customization (e.g., banners stating “this ad was made using your personal data — click here to learn more”).⁴¹²

In the campaign finance context, some disclosure requirements, even for in-the-moment disclaimers, have overcome these headwinds.⁴¹³ This result, however, stems from three co-equal state interests implicated in that area: informing voters about candidates, deterring corruption, and enforcing campaign finance law.⁴¹⁴

By contrast, outside of campaign finance, where only the first, informational interest is present, mandatory disclosures have had much more limited success. *Riley v. National Federation of the Blind*, for instance, struck down requirements that charitable solicitors divulge, at the time they asked for donations, whether they were volunteers or salaried, even though such information could have been quite useful to would-be contributors.⁴¹⁵ In doing so, the Court marked the limits of

407. *Cf.* *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (describing disclosure rules’ ability to “insure that the voters are fully informed’ about the person or group who is speaking,” and to have the information needed to “evaluate the arguments to which they are being subjected” (quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976))). And of course, in addition to informing listeners’ ability to autonomously evaluate the persuasiveness of speech, such disclosure might enhance listeners’ ability to choose whether to listen to the speech in the first place, as opposed to blocking or ignoring it (a facet of particular value where listener opt-out regimes are in place). *See* discussion *supra* notes 397–99 (concluding that opt-out regimes, where listeners affirmatively choose to block or reject certain kinds of speech, are on stronger constitutional footing than some alternatives).

408. *See, e.g.*, discussion *supra* notes 42–44 (discussing protections for dishonest or otherwise misleading political speech, even where such speech may greatly compromise listener’s ability to assess speaker’s argument).

409. *See* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

410. *See* discussion *supra* Section II.A.

411. *Cf.* *Cook v. Gralike*, 531 U.S. 510, 531–32 (2001) (Rehnquist, C.J., concurring) (suggesting requirement that election ballots display which candidates had rejected self-imposed term limits would violate First Amendment as a state-imposed “derogatory label”).

412. *See, e.g.*, *Parsons*, *supra* note 9, at 2239–40 (proposing on-advertisement Speech Customization disclosures).

413. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366, 371 (2010) (upholding required campaign financial disclaimer that “___ is responsible for the content of this advertising” (quoting 2 U.S.C. § 441d(d)(2))).

414. *McConnell v. FEC*, 540 U.S. 93, 196 (2003).

415. 487 U.S. 781, 795 (1988).

the listener-informational rationale, stating it would “not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate’s recent travel budget.”⁴¹⁶ Likewise, in *McIntyre v. Ohio Elections Commission*, the Court rejected requirements that political pamphlets name their authors, finding “[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.”⁴¹⁷

At work in *Riley*, *McIntyre*, and like cases is the notion that political speakers have a right, whether from Uncapped Persuasive Efficacy or from Speaker Autonomy, to “put their best foot forward,” and that forced disclosure of potentially embarrassing facts about their internal structures, strategies, or decision-making processes are especially egregious. Indeed, as the D.C. Circuit explained in *AFL-CIO v. FEC*, forcing speakers to share internal messaging, polling, or strategic discussions risks a grave chilling effect, one “directly frustrat[ing] the [speaker’s] ability to pursue their political goals.”⁴¹⁸

Applying these doctrinal principles, Customized Speech Disclosures — which would force speakers to declare how and why they chose their audience and content — seem especially noxious. For example, a campaign for criminal justice reform might believe it is best served by directing pro-reform ads to formerly incarcerated voters. But if the campaign were forced to display this fact on the face of every ad (i.e., “This post was sent to you because you appeared in the State’s felony database — click here to learn more”), its strategy would likely be undercut, taken out of context, or demonized by opponents. Faced with such costs, the reformers might thus be deterred from Customized Speech entirely, instead resorting to less-effective “generic” outreach.⁴¹⁹

416. *Id.* at 797–98.

417. 514 U.S. 334, 348–49 (1995).

418. 333 F.3d 168, 176–77 (D.C. Cir. 2003); *see also* *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (applying “First Amendment privilege” to block civil discovery requests seeking internal campaign communications, as such disclosures chill First Amendment “right to exchange ideas and formulate strategy and messages, and to do so in private”).

419. Some suggest *McConnell v. FEC*, which upheld television-market and time-of-day disclosure requirements for broadcast advertising, would analogously permit Digital Customized Speech disclosures. *See, e.g.,* Wood & Ravel, *supra* note 27, at 1256–57 (discussing *McConnell*, 540 U.S. at 242–43). But *McConnell* can be distinguished, because: (1) the *McConnell* “political file” disclosures were limited to broadcast market (i.e. the metropolitan area where the ad ran) and approximate time of day, making them far less granular than the social-media audience disclosures envisioned for Digital Speech Customization; and (2) the *McConnell* disclosures operated in the special context of broadcast television, a highly regulated medium where extensive disclosure rules “run with the territory.” *McConnell*, 540 U.S. at 236.

Of course, for proponents of disclosure rules, that outcome would be a win: On their view, if politicians cannot loudly and proudly declare their Speech Customizations, they should not use them in the first place.⁴²⁰ But this logic embodies the precise First Amendment chilling effect that has long been viewed as deeply suspect, if not outright impermissible. And the very likelihood that disclosure mandates would have such “successes” in deterring core speech suggests the tough odds they face in surviving constitutional challenges.⁴²¹

C. Generally Applicable Information Collection Laws

In contrast to the first two approaches, which focus on speakers’ use of audience information, laws aimed at regulating the initial *collection* of such information, provided they are content-neutral, generally applicable, and carefully drawn, fare much better.⁴²²

A first area where the state enjoys considerable power would be limiting whether, and to what extent, government-created information is made available to political speakers.⁴²³ As noted, public records, like voter rolls, driver histories, or census data, are a key ingredient for much political Digital Customized Speech.⁴²⁴ Thus, limiting access to these resources or reducing the detail of information they contain (for instance, omitting race, sex, or age information) would be a constitutionally viable way to weaken political Speech Customization.⁴²⁵

On this point, though the question is closer, the government can likely condition access to government-created information on compliance with subsequent-use limitations (as when the government makes FEC fundraising data available to all, but on the condition that recipients not use it for fundraising).⁴²⁶ Similar approaches might likewise be effective in cabining Digital Customized Speech (for instance, through rules that condition access to state driver license data on an agreement that recipients may not subsequently use such data for the purpose of developing “psychographic” marketing profiles).⁴²⁷

420. *E.g.*, Wood & Ravel, *supra* note 27, at 1259.

421. *Cf. Riley*, 487 U.S. at 790 n.5 (mandatory disclosures particularly troubling where “desired and intended effect of the statute is to encourage some forms of [speech] and discourage others”).

422. *See generally* discussion *supra* Section II.B.

423. *See* discussion *supra* Section II.B.1.

424. *See* discussion *supra* notes 188–90 and accompanying text.

425. *Cf. Elmendorf & Wood*, *supra* note 17, at 576 (advocating that states “reduce the amount of information collected on voter-registration forms and released through the voter file” to limit granularity of political Speech Customization).

426. 52 U.S.C. § 30111(a)(4) (2002).

427. *Cf. Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 951–52 (7th Cir. 2015) (upholding law conditioning access to state driver records on condition that records only be used for limited subsequent purposes, which did not include journalism).

Finally, as set out in Part II, generally applicable, content-neutral, and carefully drawn limits on audience-information collection would likely meet First Amendment standards. Such laws might include bans on especially sensitive forms of collection (like biometric data).⁴²⁸ More ambitiously, they might include comprehensive, cross-sector limits on digital data collection, akin to the European Union’s GDPR.⁴²⁹ So long as such collection laws did not discriminate based on speaker content or viewpoint, then except for “truly essential” core speech inputs, like voter polling,⁴³⁰ they would likely satisfy the First Amendment. And by damming the stream of digital personal data at its source, such rules could dramatically limit the potency of Digital Customized Speech.

Of course, the fact that we can enact sweeping audience-information collection limits does not mean we necessarily should. Such limits, as shown, implicate complex policy tradeoffs: Potentially leading to more nuanced discourse or decreased partisan strife, but also potentially reducing civic engagement or disempowering the marginalized. We should thus think carefully before reflexively weakening political Speech Customization in this way.

D. Voluntary Political Action

Finally, there is one approach to Digital Customized Speech that could avoid constitutional problems entirely: voluntary political action. Just as the First Amendment protects Speech Customization, it equally protects choices *not* to customize.⁴³¹ Some speakers already engage in such “data forbearance,” eschewing various Speech Customization practices either out of personal values,⁴³² or from fear of blowback if “creepy” tactics were discovered.⁴³³ Indeed, most voters say they are less likely to support candidates who customize ads based on their personal data, suggesting data forbearance can pay political dividends.⁴³⁴

428. *Cf.* 740 ILL. COMP. STAT. 14/15(c) (2008).

429. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) (“GDPR”).

430. *See* discussion *supra* notes 141–42 and accompanying text.

431. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

432. *See* Rubinstein, *supra* note 27, at 904.

433. *Cf.* Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 216 (2017) (describing candidate forbearance in analogous field of campaign fundraising).

434. Joseph Turow & Chris Jay Hoofnagle, Opinion, *Mark Zuckerberg’s Delusion of Consumer Consent*, N.Y. TIMES (Jan. 29, 2019), <https://nyti.ms/2Sczvup> [<https://perma.cc/VV9X-TMLM>] (polling that eighty-six percent of adult Americans do not want political campaigns to tailor advertisements to their interests); JOSEPH TUROW, MICHAEL X. DELLI CARPINI, NORA A. DRAPER & ROWAN HOWARD-WILLIAMS, AMERICANS ROUNDLY REJECT TAILORED POLITICAL ADVERTISING 3 (2012) (finding that sixty-four percent of adult Americans are less likely to vote for candidate using such practices).

Further, just as political speakers can choose to forbear customization, other non-governmental actors are free to encourage them to make that choice. For example, non-governmental data privacy advocates could create a voluntary “credibility seal” for candidates who pledge not to use Speech Customization practices that the advocates deem problematic. There is good precedent for such an “Anti-Creepiness Badge”; unions, for instance, allow candidates to display “union bugs” on campaign materials made with union labor, a stamp of approval with serious electoral heft.⁴³⁵ Moreover, while private-sector privacy badges can fizzle for lack of salience,⁴³⁶ political competitors have strong, intuitive incentives to attack “creepy” rivals that lack such certifications. Imagine, for instance, a candidate debate where a politician declares that she has signed the “American Anti-Creepiness Pledge,” committing not to use any voter’s personal web history or similarly sensitive data, but that her opponent has not.⁴³⁷ Such an attack would be pungent, visceral and, if one trusts the polling, effective.⁴³⁸

Voluntary action, of course, has limits. Voters ultimately may simply not care much about candidates’ data practices.⁴³⁹ Or perhaps, as is true for campaign finance, candidates themselves will pledge to avoid unsavory practices, but acquiesce when nominally independent PACs do their dirty (data) work.⁴⁴⁰ Still, voluntary action is an intriguing avenue to meet the rise of Digital Customized Speech, and it merits greater attention.

VI. CONCLUSION

Customized Speech means changing what you say based on who you say it to. In those terms, it is as old as our democracy, if not our species. With this provenance, it is perhaps no surprise such practices enjoy strong constitutional protections; a society committed to protecting meaningful speech cannot help but protect meaningful Customized Speech. In our Big Data era, these commitments face new strain. But despite vast and sometimes jarring changes, nothing we have seen so far should pull us from our path.

435. See Ed Sills, *The Basics: ‘Union Bugs’ in Politics*, TEXAS AFL-CIO (Jan. 30, 2020, 3:20 PM), <https://www.texasaflcio.org/working-texas/basics-union-bugs-politics> [<https://perma.cc/B7JG-LBPP?type=image>].

436. Zarsky, *supra* note 340, at 181–82.

437. *Cf.* Hill, *supra* note 193.

438. See Turow & Hoofnagle, *supra* note 434.

439. Rubinstein, *supra* note 27, at 919.

440. *Cf.* Aaron Blake & Chris Cillizza, *Frontrunners Stay (Mostly) Positive as Super PACs Do Dirty Work*, WASH. POST (Dec. 28, 2011), <https://wapo.st/3y5Wzgd> [<https://perma.cc/N243-EGZ5>].