ESSAY

FIRST AMENDMENT SPECULATION AND CONJECTURE

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Those to whom nothing which I am about to say will be new, may therefore
I hope, excuse me, if on a subject which for now three centuries has been so often
discussed, I venture on one discussion more.

—John Stuart Mill

Given the facial differences between commercial and noncommercial speech
analysis, conventional wisdom suggests that noncommercial speakers receive

* J.D., University of Arizona, 2015, Constitutional Law Fellow. Acknowledgment,
research assistant, WestLaw Tort Handbook, co-authored by Dan Dobbs. For assistance
with this essay, I want to thank first and foremost my partner and best friend Jessica DeMarco,
whose encouragement and support mean more to me than any words of mine could ever
accurately describe. Next to my mother, Rene Broker, my first literary and intellectual hero,
setting the finest example a son could ever wish for and for always providing the greatest of
assistance in organizing my thoughts and arguments. Finally, to my mentor, Jane Bambauer,
a First Amendment scholar of the highest order, a great professor of law, and a wonderful
friend. Thank you all very much for helping me reach my dreams.

1. JOHN STUART MILL, ON LIBERTY 15 (Charles W. Elliot ed., Barnes & Noble
2. See Scott Wellikoff, Mixed Speech: Inequities That Result From An Ambiguous
   of speech, such as political and religious expression, false and misleading commercial speech
   can be fully regulated and barred if necessary.”).
more protection than commercial speakers. This conventional wisdom is correct to some extent; federal regulators impose an extensive and complex set of rules on commercial advertising that have no analogs for noncommercial speech. However, a careful comparison shows that once the U.S. Supreme Court is asked to scrutinize speech regulations, the commercial speech doctrine’s relatively weaker rhetoric comes with stronger de facto scrutiny. Once commercial speech was afforded First Amendment protection, the Court steadily began to develop two separate, distinct analytical frameworks between commercial and noncommercial speech. While using these separate frameworks, the Court counter-intuitively (and not altogether consciously) subjects government interests asserted in commercial speech cases to a higher burden. Meanwhile, outside core political speech, the Court has continued to permit speculation to serve as a basis for the censorship of noncommercial speakers.

This essay offers a modest proposal: the “no speculation” rule established for commercial speech precluding governmental regulations based on speculation and conjecture should apply with equal force to noncommercial speech. Part I will trace the development of the “no speculation” or “conjecture limitation” in the commercial speech doctrine. Part II demonstrates that the Court has avoided using the probing “no speculation” rule in noncommercial speech cases, allowing the government to regulate noncommercial actors based on speculative and untested assumptions. Part III outlines the theory of the no speculation or conjecture test and explores the implications of equally applying the no speculation or conjecture test to all free speech claims.

I. THE DEVELOPMENT OF THE NO SPECULATION OR CONJECTURE TEST

The status of advertising in the early history of the First Amendment is a matter of significant scholarly debate today. Whatever the original intent, the Court clearly rejected First Amendment coverage of commercial speech in 1942. By the time the Court heard Virginia Bd. Of Pharmacy v. Virginia Citizens Consumer Council, however, it was ready to reexamine its position on

3.  Id. at 159-160.
5.  Id.
6.  Id. at 486-87.
commercial speech. Finding commercial information to be “indispensable to the proper allocation of resources in a free enterprise system” the Court determined that commercial speech was too valuable to remain unprotected. Equally striking, the Court described the citizenry’s interest in commercial speech “as keen, if not keener by far, than interest in the day’s most urgent political debate.”

Commercial speech has benefited from its latecomer status. When looking to other forms of speech, the Court uses history as a guide, following old rules and categorical exceptions without engaging in any serious evidential balancing of harms and benefits. Therefore, because commercial speech protections are a relatively recent construct, it benefits from analytical strength, despite its purportedly lower value.

When it extended First Amendment protection to commercial speech, the Court acknowledged inherent limitations based on the nature of the speech. For instance, unlike other categories of speech, false and misleading commercial speech can be fully regulated and even barred altogether. The *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n* (“Central Hudson”) decision, which organized and formalized the working definition and rule for commercial speech, incorporated these recognized limitations into its test based on “the common sense” distinction between speech proposing a commercial transaction and other varieties of noncommercial speech. The *Central Hudson* test identified four factors that courts should consider when determining whether a particular regulation of commercial speech was lawful. To gain protection, commercial speech “must concern lawful activity and not be misleading” and “[i]f both inquiries yield positive answers, we [the Court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” In practice, the Court has used the third governmental interest probe of the *Central Hudson* test

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11. *Id.* at 765.
12. *Id.* at 763 (emphasis added).
15. *Id.* at 771-72.
17. *Id.* at 566.
18. *Id.*
to determine whether material evidence proves the government restriction
directly and materially advances the stated interest.\(^{19}\)

Over time, the insistence on direct and material evidence became a vital
component within commercial speech analysis, creating a formidable barrier to
government restrictions against lawful commercial speakers.\(^{20}\) When applying
the commercial speech doctrine, we have also seen some of the strongest anti-
paternalistic holdings by the Court under the First Amendment.\(^{21}\) The anti-
paternalistic language suggests that the Court would likely find government
efforts to modify commercial behavior by restricting lawful commercial speech
to advance government interests, however indirectly, to be constitutionally
improper.\(^{22}\) In any event, after employment of the no speculation and conjecture
burden to commercial speakers, the Court has not upheld a restriction of
commercial speech in two decades.\(^{23}\)

*Rubin v. Coors Brewing Co.* exemplifies the benefit of this elevated standard
for commercial speakers.\(^{24}\) In *Rubin*, a beer manufacturer challenged the Federal
Alcohol Administration Act’s (FAAAA) prohibition against disclosing alcohol
content on beer labels.\(^{25}\) The *Rubin* Court acknowledged government’s
significant interest “in protecting the health, safety, and welfare of its citizens by

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\(^{20}\) Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) (requiring evidence beyond mere speculation and conjecture); Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 148-49 (1994) (When striking down the regulation the Court held the harm must be “potentially real, not purely hypothetical.”); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) (Restriction struck down because the state failed to show “the price advertising ban will significantly reduce alcohol consumption.”).

\(^{21}\) See City of Renton v. Playtime Theaters Inc., 475 U.S. 41, 54 (1986). If so, this
would signal a significant break of commercial speech analysis from noncommercial. For as
we have seen, the Court has permitted restrictions on lawful noncommercial expression when
the government claims its interest is conduct or behavior. City of Erie v. Pap’s A.M., 529 U.S.


\(^{23}\) *Rubin*, 514 U.S. at 487.

\(^{24}\) Id. at 478.
preventing brewers from competing on the basis of alcohol strength. Moreover, the Court recognized as “a valid goal” the government’s attempt to limit competitive strength wars that lead to increases in alcoholism and other social costs attributed to alcohol consumption. Yet while the Court found it was “common sense” to assume “that a restriction on the advertising of a product characteristic would decrease consumer selection of a product based on that trait,” the Court rejected the alcohol content restriction as unconstitutional.

The Rubin Court decided the label restriction was an irrational government regulatory scheme that failed to advance the government interest in a tailored way. The decision made clear that a challenged commercial speech regulation must promote the governmental interest “in a direct and material way,” not through “mere speculation or conjecture.” Government regulation based on even common sense speculation will not prove that the harms the government “recites are real and that its restriction will in fact alleviate them to a material degree.”

Although the Rubin Court insisted that speculation and conjecture will not satisfy the Central Hudson burden, it did not clarify how much or what type of evidence will sustain a commercial speech regulation. However, the insistence upon some form of material evidence has effectively elevated commercial speech protection over some forms of noncommercial speech, since some portions of the noncommercial speech framework continue to rely on traditional assumptions about the relationship between a challenged regulation and the government’s asserted interest. In other words, as will be demonstrated next, speculation and conjecture are routine parts of noncommercial speech regulation.

26.  Id. at 485.
27.  Id. at 489; Alcohol Fact Sheet, WORLD HEALTH ORGANIZATION, http://www.who.int/mediacentre/factsheets/fs349/en/ (last updated January 2015) (Given the adverse effects of alcohol on society this interest cannot be overstated. The World Health Organization has classified alcoholism as a global problem which compromises both individual and social development. Alcohol has been proven to harm not only the physical and psychological health of the drinker but also the well-being and health of people around the drinker. An intoxicated person can harm co-workers, relatives, friends or strangers by placing them at risk of traffic accidents or violent behavior. Because the impact of the harmful use of alcohol reaches deep into society, the Court was correct in holding that the government has a substantial interest in preventing these negative effects.).
28.  See Rubin, 514 U.S. at 487.
29.  Id. at 488.
30.  Id. at 487.
31.  Id.
II. SPECULATION AND CONJECTURE IN NONCOMMERCIAL SPEECH DOCTRINE

Although some categories of noncommercial speech, such as political speech, receive the strictest scrutiny possible, a large amount of noncommercial speech remains in an in-between status. While noncommercial speech has a stronger protection (by implication, at least) than commercial speech, the protections are less well defined. This was certainly the case in the pre-modern case law, during which “offensive” and “blasphemous” speech received little First Amendment protection. Even today, the popular concept that anything is acceptable for noncommercial speech or that “[O]ne man’s vulgarity is another’s lyric” is not as true as that precedential phrase suggests. Recent decisions by the Roberts Court have given significant lip service to the idea that the Court should probe restrictions upon noncommercial speech skeptically and thoughtfully, but systematic examination of noncommercial speech cases make it apparent that the government succeeds far more often in its attempt to control noncommercial speakers than it does in cases involving commercial actors.

The Court’s willingness to speculate effectively silenced a noncommercial actor in Morse v. Frederick, where the Court authorized a student’s suspension for displaying a sign, because a “reasonable” principal believed the sign advocated drug use. Chief Justice Roberts noted that schools have an important interest in preventing illicit drug use by their students. Absent from the analysis

37. Snyder, 131 S. Ct. at 1218 (upholding the right to protest at military funerals with anti-homosexual messages); Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2742 (2011) (striking down a California law making it illegal to sell violent video games to children under 18 years of age without parent consent).
38. See Erwin Chemerinsky, Not a Free Speech Court, 53 ARIZ. L. REV. 723, 724-25 (2011) (Here Chemerinsky points out that whenever the Government is flexing its authoritarian muscle on noncommercial speakers, for example students, prisoners, government employees, “freedom of speech always loses.” However, whenever it is corporate backed speech under analysis, i.e. limits on campaign finance, the Roberts Court uniformly rules in favor of freedom of expression. It is also important to note that in all of the noncommercial speech cases Chemerinsky cites where freedom of speech has lost, it is clear that the censoring of noncommercial speech was put to some form of scrutiny that’s easier to pass than the “no speculation” rule.).
40. Id. at 407.
by the Chief Justice, however, is any direct evidence supporting the assumption that a sign proclaiming “Bong Hits 4 Jesus” would actually increase illegal drug use or that restricting these signs would decrease drug use among students. Indeed, given its rather incoherent message, it demands some speculation to connect the sign’s removal with any assertable government interest.

The Court admitted the banner was “cryptic” and could be interpreted in many ways, such as being “offensive to some, perhaps amusing to others. To still others, it probably means nothing at all.” Despite the acknowledgment of the puzzling nature of the speech, the majority opinion determined that even a potentially meaningless or trivial reference to illegal drugs permits the Court to accept the principal’s reasonable, but speculative, interpretation, despite all the other available possibilities.

By grounding its analysis on the principal’s subjective judgment rather than on direct evidence, the Court relied on a form of common sense speculation and conjecture that it considered insufficient under commercial speech analysis because the conjecture did not prove the governmental interest “in a direct and material way.” There was, after all, no direct evidence that the sign caused a disruption and no evidence the students who viewed the sign increased or began using drugs. Given the lack of direct evidence, punishing the student for a speculative interpretation by a single administrator of an ambiguous sign is akin to the speculative relationship to a genuine governmental interest rejected by the Court in Rubin. Because the line of cases treating speech at public schools predates the commercial speech doctrine, the Court did not incorporate the tough “no speculation” rule into its core. Frederick shows that the Court continues to act in a path-dependent way rather than reworking parts of the noncommercial speech doctrine to require concrete evidence of harm.

The large gulf between the treatment of political and nonpolitical noncommercial speech adds to the doctrinal incoherence. In Frederick, the Court refused to treat the banner as a political sign in large part because the student did not characterize his speech as political. Given, however, that Alaska voters

41. Id. at 397.
42. See id. at 440-41 (Stevens, J., dissenting).
43. Id. at 401 (emphasis added).
44. Id. at 402 (“Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.”).
45. Id. at 440-41.
47. Morse v. Frederick, 551 U.S. 393, 402-03 (2007) (“Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster ‘national debate about a serious issue,’ . . . as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message.”).
have debated and substantially supported marijuana legislation for two decades, a reasonable Alaskan viewer would likely characterize the banner as political, despite the bearer’s intent.\textsuperscript{48} Having refused to characterize the sign as political without proof of the bearer’s political intent, the Court nevertheless accepted the principal’s characterization that the banner advocated drug use, even though “Frederick’s credible and uncontradicted explanation for the message” rejected such an intent.\textsuperscript{49} Thus, the Court accepted the principal’s speculation not only about the consequences of the message, but also about the student’s intent and mental state.\textsuperscript{50}

Contrast the approach taken in \textit{Frederick} to the great skepticism applied in \textit{Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett}.\textsuperscript{51} In \textit{Arizona FEC}, the Court invalidated the state’s public funding scheme, which would have matched all political contributions to candidates’ campaigns so that the candidates’ opponent had an equal opportunity to persuade voters.\textsuperscript{52} The opinion anticipated that political candidates would raise fewer funds and spend less on their campaigns if they knew that spending more triggered matching government funds.\textsuperscript{53} In her dissent, Justice Kagan accused the majority of finding a First Amendment problem based on pure conjecture, contending that public funding could just as likely lead to additional spending by the candidate not receiving public funds, resulting in more speech, not less.\textsuperscript{54} Given the absence of any supporting direct evidence for either view, the dissent’s alternative opinion remains plausible.

Thus, in both \textit{Arizona FEC} and \textit{Frederick}, the Court engages in “common sense” speculation and conjecture but for distinctly different purposes and contradictory results, and the difference relies on tentative categorization as “student” or “political” speech.\textsuperscript{55} To be sure, context will always play an

\textsuperscript{48}. Suzanna Caldwell & Laurel Andrews, \textit{Alaskans Vote To Legalize Marijuana}, \textit{Alaska Dispatch News} (Nov. 4, 2014), http://www.adn.com/article/20141104/alaskans-vote-legalize-marijuana (“The initiative was years in the making. Alaska voters considered similar measures in 2000 and 2004. Both failed, though each indicated a measure of support for legalization. Measure 5 in 2000 took 40.9 percent of the vote; Ballot Measure 2 in 2004 gained a few more points, with 44 percent of the electorate voting in favor of it.”).

\textsuperscript{49}. \textit{Morse}, 551 U.S. at 402 (“Frederick’s ‘credible and uncontradicted explanation for the message—he just wanted to get on television.’”).

\textsuperscript{50}. \textit{See id.} at 409-10.


\textsuperscript{52}. \textit{Id.} at 2812.

\textsuperscript{53}. \textit{Id.} at 2823.

\textsuperscript{54}. \textit{Id.} at 2833-34 (Kagan, J., dissenting).

\textsuperscript{55}. \textit{See id.} at 2813 (majority opinion); \textit{see also} \textit{Morse v. Frederick}, 551 U.S. 393, 396 (2007).
important role in free speech analysis. The speaker in the Frederick case, for example, was a minor speaking during school hours, and the Court is bound to afford some amount of deference to school officials, and in other contexts, to special government interests. But as First Amendment judicial review evolves to demand proof of harm, nothing about the school setting could justify the abdication of judicial skepticism and the deference to state decision-makers that guided the outcome in Frederick.

III. EMBRACING THE “NO SPECULATION” RULE

The urge of the government and the people to silence unwanted or unpopular expression is strong. It reinvents itself with every new generation of speech-related problems. Therefore, Oliver Wendell Holmes’ concept of a free marketplace of ideas must also be reaffirmed in every generation. The Court developed the “no speculation” rule during the evolution of the commercial speech doctrine, but the rule’s utility goes well beyond commercial speech. The “no speculation” rule serves all free speech cases. When courts refuse to allow governmental speculation and conjecture to establish the need for censorship, the

59. See id. at 902.
government is usefully pressed to provide material evidence proving that its speech restrictions truly serve its stated objectives.63

Recently, the Court’s completion of corporate speech rights in *Citizens United v. FEC*64 generated a large public and political outcry to limit corporate speakers’ First Amendment protections. The resulting debate has largely centered on *Citizens United*’s treatment of money, in the form of political contributions, as a form of protected speech.65 Many now view this designation as a dangerous extension of power to the already powerful corporate influence within the political process. As the dissenting justices put it, “while American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”66

Outrage over *Citizens United* has led many scholars to argue that commercial speech protections should be leveled down67—back towards the weak position in a pre-*Virginia Board* era. These scholars fundamentally doubt the wisdom of the marketplace of ideas—that no matter how big or small, every side has and deserves the opportunity to fight for the acceptance of its ideas. But assuming that the marketplace of ideas continues to be a compelling justification for free speech liberties, and there is good reason to assume it is,68 the marketplace of ideas is better served not by increasing restrictions on commercial speech, but by “leveling up” the noncommercial speech scrutiny. A leveling up of free speech protection would allow noncommercial speech to benefit from the no speculation or conjecture rule.69 Requiring the government to offer direct evidence supporting restriction on all speakers ensures American society progresses with the fullest possible input of all speakers.70

63.  *Id.*
70.  *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (“If in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted . . . the only meaning of free speech is that they should be given their chance and have their way.”). Some scholars have advocated for the material evidence test to be applied more evenly across the commercial speech spectrum. *See* Shannon M. Hinegardner, *Abrogating The Supreme Court’s De Facto Rational Basis Standard For Commercial Speech: A Survey And Proposed
Extending the “no speculation” rule to all speakers will not disrupt any key distinctions between commercial and noncommercial speech jurisprudence. The Court has been clear: “To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.” The extension of the no speculation or conjecture test across the First Amendment speech board would not invite dilution because it does not alter the analysis of the nature of the expression nor the government interests asserted within either commercial or noncommercial speech cases. Instead, the test would only provide assurance that each accepted restriction demonstratively furthers the identified and recognized government interest. Far from diluting noncommercial speech rights, it would reinforce the rights while correcting the mismatch between rhetoric and treatment that currently plagues First Amendment law.

Incorporation of the “no speculation” rule to noncommercial speakers also improves institutional legitimacy. The public largely distrusts the Court, fearing that it has become a partisan panel. Equal implementation of the “no speculation” rule to noncommercial speakers may reestablish some trust by generating opinions based on empirical evidence, and by reducing the appearance of commercial speech favoritism.

IV. CONCLUSION

All free speech scrutiny should incorporate some form of a “no speculation” rule, requiring material evidence to justify the regulation of speech. The reasoning of the commercial speech cases is sound enough to inform all other areas of free speech scrutiny. To protect speakers from overreaching restrictions

Revision Of The Third Central Hudson Prong, 43 NEW ENG. L. REV. 523, 532 (2009) (This essay goes one step further and advocates for the material evidence test to be applied to all forms of speech restrictions, commercial or not).


72. Confidence in Institutions, GALLUP, http://www.gallup.com/poll/1597/confidence-institutions.aspx (last visited Mar. 25, 2016); Editorial, Supreme Court Sows Distrust with Justices’ Political Activity, THE BOSTON GLOBE (June 11, 2012), http://www.bostonglobe.com/opinion/editorials/2012/06/10/supreme-court-sows-distrust-with-justices-political-activity/4-kqOFydnswx5cscVr5rfJP/story.html (“[W]hen Supreme Court justices become the leading figures—the keynoters, the rallying points—of national groups dedicated to very specific agendas, it’s an affront to the court. The two legal societies have clear views on health care, voting rights, campaign finance, and many other issues. How can litigants believe they’re getting a fair shake before justices who, by their very presence, support those groups?”).

73. See John C. Coates IV, Corporate Speech and the First Amendment: History, Data, and Implications, (forthcoming) (manuscript at 2) (on file with author).
based on untested common sense, the government must supply some evidence that the harms of speech are real. Circuit courts have already begun to take the “no speculation” rule seriously, outlining the invariable problems resulting from restrictions upheld based on one’s subjective view of common sense. Having an evidence-based standard that mirrors the scientific, rather than the philosophical, will prevent the appearance of partisanship and restore public confidence.