

**Willamette University College of Law
Law 319: Law, Money & Technology**

Information Capitalism and the First Amendment in the Second Gilded Age

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I. INTRODUCTION

American life in the 21st century is saturated with technology. From cell phones with more processing power than the computer that allowed humanity to reach the moon,¹ to wearable gadgets that can track vital signs during a workout² and augment reality,³ and to the myriad apps designed to entertain and distract,⁴ the average American has more access to technology than any human has had in the last 10,000 years.⁵ Klaus Schwab, the Founder and Chairman of the Board of Trustees of the World Economic Forum, has described this current technological moment as a Fourth Industrial Revolution⁶ “that will fundamentally alter the way we live, work, and relate to one another.”⁷ Schwab further states that “[i]n its scale, scope, and

¹ See generally Graham Kendall, *Would Your Mobile Phone be Powerful Enough to Get You to the Moon?*, THE CONVERSATION (July 1, 2019, 12:51 AM EDT), <https://theconversation.com/would-your-mobile-phone-be-powerful-enough-to-get-you-to-the-moon-115933>; Peter Dockrill, *Your Laptop Charger is More Powerful Than Apollo 11's Computer, Says Apple Developer*, SCIENCE ALERT (Feb. 12, 2020), <https://www.sciencealert.com/apollo-11-s-computer-was-less-powerful-than-a-usb-c-charger-programmer-discovers>.

² See generally Zoe Kleinman, *Why Are Doctors Wary of Wearables?*, BBC (Dec. 1, 2024), <https://www.bbc.com/news/articles/c79zpzdv4vno>; Rachael Hosie, *The Pros and Cons of Popular Fitness and Wellness Wearables, From Fitbits and Apple Watches to Glucose Monitors*, BUSINESS INSIDER (Jan. 27, 2024, 1:01 AM PST), <https://www.businessinsider.com/guides/tech/fitness-wearables-trackers-pros-cons-wellness-experts-2024-1>.

³ See e.g., Mark Gurman, *Apple Ponders Whether to Develop Smart Glasses, Fitness Ring*, BLOOMBERG (Feb. 25, 2024, 5:45 AM PST), <https://www.bloomberg.com/news/newsletters/2024-02-25/apple-ponders-making-new-wearables-ai-glasses-airpods-with-cameras-smart-ring-lt1kb7cd>.

⁴ See generally Haley Smith, *The Top 10 Entertainment Apps on iOS and Android in USA, Brazil, Japan, India, Germany, UK, and Korea*, SINGULAR BLOG (Nov. 23, 2023), <https://www.singular.net/blog/top-10-entertainment-apps/>.

⁵ See WILLIAM J. DUIKER & JACKSON J. SPIELVOGEL, *WORLD HISTORY, VOLUME ONE: TO 1800* 5 (3rd. ed. 2001) (“Systematic agriculture developed independently in different areas of the world between 8000 and 5000 B.C.E.”); Amy Kapczynski, *The Law of Information Capitalism*, 129 *YALE L. J.* 1460, 1462 (2020) (“Over the past several decades, a series of extraordinary technological developments has drastically expanded human capacities to store, exchange, and process data and information.”) (available at <https://www.yalelawjournal.org/review/the-law-of-informational-capitalism>).

⁶ Klaus Schwab, *The Fourth Industrial Revolution: What it Means, How to Respond*, WORLD ECONOMIC FORUM (Jan 14, 2016), <https://www.weforum.org/stories/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> (“The First Industrial Revolution used water and steam power to mechanize production. The Second used electric power to create mass production. The Third used electronics and information technology to automate production. Now a Fourth Industrial Revolution is building on the Third, the digital revolution that has been occurring since the middle of the last century. It is characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres.”).

⁷ *Id.*

complexity, the transformation will be unlike anything humankind has experienced before.”⁸

Others have described this new 21st century reality as a hyper-connected society, where “[s]ocial networks and online gaming aren't just changing the way we lead our lives day-by-day but [are] also fundamentally changing the way in which we see ourselves as individuals[.]”⁹ Despite what some believe to be the benefits of living in this “hyper-connected, networked economy,”¹⁰ one must consider how these new 21st century communication systems are being constructed upon the racialized, exploitative, exclusionary power structures of the past;¹¹ as well as how these same dynamics, in the form of corporate power, have shaped the law under which this new information and communication infrastructure (ICI) operates.¹²

⁸ *Id.*

⁹ Patrick Goss, *Hyper-connected Society is Changing Who We Think We Are*, TECHRADAR (Jan. 21, 2013), <https://www.techradar.com/news/internet/hyper-connected-society-is-changing-who-we-think-we-are-1126322> (“Author Professor Sir John Beddington warns that we could see a rise in social exclusion for some and problems with balancing our rights and liberties against privacy and security, leading him to urge the government to take great care with its future policies.”).

¹⁰ See e.g., Michael Arena & Sharon Benjamin, *Leading in a Hyper-connected Society*, SYSTEMS THINKER (Nov. 19, 2015), <https://thesystemsthinker.com/leading-in-a-hyper-connected-society/>

¹¹ See Meredith Whittaker, *Origin Stories: Plantations, Computers, and Industrial Control*, LOGIC(S) MAGAZINE (May 17, 2023), <https://logicmag.io/supa-dupa-skies/origin-stories-plantations-computers-and-industrial-control/> (“The blueprint for modern digital computing was codesigned by Charles Babbage, a vocal champion for the concerns of the emerging industrial capitalist class who condemned organized workers and viewed democracy and capitalism as incompatible ... His influential theories on how ‘enterprising capitalists’ could best subjugate workers are well documented in conventional labor scholarship ... ¶ [Babbage’s calculating engines] directly encoded economist Adam Smith’s theories of labor division and borrowed core functionality from technologies of labor control already in use. The engines were themselves tools for labor control, automating and disciplining not manual but mental labor. Babbage didn’t invent the theories that shaped his engines, nor did Smith. They were prefigured on the plantation, developed first as technologies to control enslaved people. Issues alive in the present—like worker surveillance, workplace automation, and the computationally mediated restructuring of traditional employment as ‘gig work’—echo the way that computational thinking historically emerges as a mode of control during the ‘age of abolition,’ in the early nineteenth century.” (internal citations omitted)).

¹² Cf. Mireille Hildebrandt, *No Such Thing As Technologically Neutral Law*, in SMART TECHNOLOGIES AND THE END(S) OF LAW: NOVEL ENTANGLEMENTS OF LAW AND TECHNOLOGY 174, 182 (2015) (“[T]hose who build the ICI of pre-emptive computing are often in charge or in the service of large commercial enterprises, entailing a private interest in their own business ... the backbone of the [21st century] world is formed by a curious amalgam of private enterprise and public bodies that combine competition and strife with invisible alignment and exchange of intelligence.”).

Properly understood, this current moment in technological development should best be framed as a Second Gilded Age,¹³ with all the attendant social stratification, economic precarity and inequality, and corporate and political corruption of the first. During the first Gilded Age, which began towards the end of the 19th century and lasted until the beginning of the Progressive Era in the early 20th,¹⁴ the global political economy¹⁵ was centered around technological innovations that streamlined and accelerated industrial capitalism.¹⁶ It was an era when “the basic factors of industrial production—labor, land, and money—were reconceptualized as commodities, while at the same time patterns of barter and exchange became detached from local communities and reembedded in the constructed mechanism of

¹³ See generally Tom Wheeler, *Who Makes the Rules in the New Gilded Age?*, BROOKINGS (Dec. 12, 2018), <https://www.brookings.edu/articles/who-makes-the-rules-in-the-new-gilded-age/>; Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFFALO L. REV. 979 (2018) (available at <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol66/iss5/1/>).

¹⁴ Balkin, *supra* note 13, at 979.

¹⁵ “Political economy is a branch of social science that studies the relationship that forms between a nation's population and its government when public policy is enacted. It is, therefore, the result of the interaction between politics and the economy and is the basis of the social science discipline. ¶ Those who research the political economy are called political economists. Their study generally involves the examination through a sociological, political, and economic lens of how public policy, the political situation, and political institutions impact a country's economic standing and future. ¶ In a wider sense, political economy was once the common term used for the field we now call economics. Adam Smith, John Stuart Mill, and Jean-Jacques Rousseau all used the term to describe their theories. The shorter term ‘economy’ was substituted in the early 20th century with the development of more rigorous statistical methods for analyzing economic factors.” Will Kenton, *Political Economy Definition, History, and Applications*, INVESTOPEDIA (Updated June 25, 2024), <https://www.investopedia.com/terms/p/political-economy.asp> (internal citations omitted). See also Dave Ellenwood, *“Information Has Value”: The Political Economy of Information Capitalism*, IN THE LIBRARY WITH THE LEAD PIPE (Aug. 19, 2020), <https://www.inthelibrarywiththeleadpipe.org/2020/information-has-value-the-political-economy-of-information-capitalism/> (“Some define political economy simply as the relationship between democracy (how decisions are made about fundamental aspects of our daily lives) and the economy (how we sustain and reproduce ourselves materially). A central question in political economy is: Who has decision-making power and control over the production and dissemination of the materials humans need to sustain daily life? ... ¶ Political economy has been around much longer than the modern discipline of economics. It is a long-standing intellectual tradition that maintains that the way in which humans provide life's necessities is not natural or inevitable, but is something that can be altered through political struggle.”).

¹⁶ Balkin, *supra* note 13, at 979. See also Wheeler, *supra* note 13 (“The Gilded Age was a time in which technological innovation drove wonderful new industrial products that improved individual lives, while at the same time creating great wealth and accompanying economic inequality.”).

‘the market.’”¹⁷ It was also an era that “produced huge fortunes, political corruption, and vast inequalities of wealth, so much so that people became concerned that they would endanger American democracy.”¹⁸

The perceived threat to democracy posed by the political economic milieu of the first Gilded Age was not unfounded. As explained by Wheeler, “[b]ack then, the rules that governed the application of the new technology were made by a handful of powerful industrial barons for their own benefit.”¹⁹ In order to facilitate the usurpation of the land, labor, and natural resources necessary to extract vast amounts of wealth for themselves, these industrial barons, in the words of Cohen, “required enabling legal institutions,” which “produced mounting costs to human wellbeing[.]”²⁰ To these industrial barons, changing the legal landscape to better suit their ends did not mean more democracy but less.²¹ What they needed, and what they purchased for themselves,²² in the words of former president Rutherford B. Hayes, was “a government by the corporations, of the corporations, and for the corporations.”²³

¹⁷ Julie E. Cohen, *Technology, Political Economy, and the Role(s) of Law*, LPE PROJECT BLOG (June 8, 2018), <https://lpeproject.org/blog/technology-political-economy-and-the-roles-of-law/>.

¹⁸ Balkin, *supra* note 13, at 979. *See also* Wheeler, *supra* note 13 (A couple of decades after the Civil War, the United States entered an era dubbed ‘The Gilded Age.’ It was Samuel Clemens—Mark Twain—who gave us the term. In an 1873 novel [*The Gilded Age: A Tale of Today*], co-written with his friend Charles Dudley Warner, the duo satirized the economic excesses, personal greed and political corruption of the time.”).

¹⁹ Wheeler, *supra* note 13.

²⁰ Cohen, *supra* note 17.

²¹ *See* Christopher Klein, *How the Gilded Age’s Top 1 Percent Thrived on Corruption*, HISTORY (Jan. 27, 2020), <https://www.history.com/news/gilded-age-corruption-corporate-wealth> (“As the United States grew into the world’s leading industrial power during the late 19th century, those atop the economic ladder in America’s Gilded Age accumulated spectacular fortunes. By 1890, the country’s 4,000 millionaires held 20 percent of the country’s wealth, and with that enormous affluence came colossal political corruption. ¶ Corporate titans could buy anything they wanted—including politicians. Richard White, professor emeritus of history at Stanford University and author of *The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865-1896*, says the Gilded Age was among the most corrupt eras in American history primarily because of ‘the rise of corporations and the growth of modern means of communication that intensified the way corruption can work.’”).

²² *Id.* (“Politicians took spectacularly handsome bribes from corporations and demanded kickbacks as the helping hand they extended often came with an open palm.”).

²³ *Id.*

Much like the first Gilded Age, the political economy of the 21st century is focused almost exclusively on the wants, wishes, and desires of concentrated capital. According to Wheeler, “[t]he rules in the early internet era—the new Gilded Age—are being made similarly; this time by information barons.”²⁴ Likewise, in the second Gilded Age, the wellbeing of the vast majority of the American people is being sublimated to the oppressive political power purchased by a tiny cabal of extremely corrupt corporate barons wielding the even greater power of institutionalized money. In keeping with the broader trend of corporate conglomerates consolidating power and concentrating wealth in other markets within the political economy,²⁵ large media conglomerates, along with technology conglomerates—such as Meta, Apple, Microsoft, Amazon, Netflix, and Google—are monopolizing the information and communication infrastructure of the 21st century in a manner that threatens the very nature of individual free expression itself; all while “experiencing blowout profits as much of the rest of the economy sinks into a depression.”²⁶ According to Harris and Varellas:

²⁴ Wheeler, *supra* note 13.

²⁵ *Monopoly by the Numbers*, OPEN MARKET INSTITUTE, <https://www.openmarketsinstitute.org/learn/monopoly-by-the-numbers> (last visited Dec. 7, 2024) (“There are many indicators that economic concentration is increasing. We see when we compare the salary of a CEO today to that of a CEO in the 1970s. Thanks to research led by the Open Markets Team, we see how economic concentration increasingly blocks entrepreneurs from starting and growing their own businesses. Similarly, we can see how wealth is increasingly concentrated geographically. As research and writing by Open Markets has detailed, wealth and power is increasingly concentrated in fewer and fewer cities, meaning that as San Francisco, New York City, and Washington thrive, a growing large number of large heartland communities like St. Louis and Memphis increasingly find themselves cut off and hollowed out. ¶ We see some of the most dramatic evidence of concentration at the level of individual economic sectors. Nearly every marketplace in America is vastly more consolidated than a generation ago.”). See also Bryce Covert, *The Visible Hand: How Monopolies Define Everyday Life*, THE NATION (Nov. 30, 2020), <https://www.thenation.com/article/culture/david-dayen-monopolized-review/> (“Our country is saturated with monopolies ... [M]onopolies make it harder for workers to wield power when there are fewer and fewer employers to choose from. They make the economy less dynamic and innovative. They make society less equal, and by amassing so many resources, they are able to amass power to protect those resources. Monopolies are even a threat to our very democracy, drowning out the voices of the people.”).

²⁶ Angela P. Harris & James J. Varellas III, *Law and Political Economy in a Time of Accelerating Crises*, 1 J. L. POL. ECON. 1, 3 (2020) (available at <https://escholarship.org/uc/item/8p8284sh>).

“[P]owerful companies located at the nexus of cutting-edge government-funded research, billionaire financiers, and the military and security state are constantly pushing their data harvesting operations and algorithms into additional areas of life. As a result, nearly every aspect of human experience, whether economic, political, social, cultural, psychological, or even spiritual, is now increasingly under pervasive surveillance, intermediated and steered into often dangerous directions by unaccountable algorithms and artificial intelligence networks so complex their architects often cannot even understand them.”²⁷

The remainder of this paper will discuss how the information and communication infrastructure of the new Gilded Age is being used to perpetuate a political economy within the United States designed specifically to benefit institutionalized money. I also discuss how the Supreme Court’s recent First Amendment jurisprudence has been shaped to entrench this social order. In part II, I examine the political economy of information capitalism and frame how this economic paradigm poses an ongoing threat to American democracy. In part III, I explore how the Supreme Court’s interpretation of the First Amendment is one facet of the “enabling legal institutions”²⁸ that sustains the political economy of information capitalism at the expense of both democracy and the idea of free expression. By accepting arguments that both money and data are protected speech under the First Amendment, the Supreme Court has enshrined mechanisms to protect monopolized corporate power’s ability to exploit the individual into constitutional law. In part IV, I discuss some potential legal arguments that, if accepted by a restructured Supreme Court, may help create an interpretation of the First Amendment that adheres more closely to the core principles of protecting political debate and free expression; as opposed to enabling the construction of a neoliberal marketplace,²⁹ free from the regulatory

²⁷ *Id.*

²⁸ Cohen, *supra* note 17.

²⁹ “[Neoliberalism is] the view that ‘human wellbeing can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty,

power of government and thus safe for the continued accumulation of vast amounts of wealth. The way the Supreme Court interprets the First Amendment moving forward will have profound effects on our ability as a society to maintain our democratic ideals and institutions.

II. INFORMATION CAPITALISM: THE POLITICAL ECONOMY OF THE NEW GILDED AGE

A. An Introduction to Neoliberal-Style Predatory Capitalism

To fully grasp the political economy of the new Gilded Age, it would be helpful to take a step back and examine the mechanisms of neoliberal capitalism more broadly. As an ideology, neoliberal capitalism came into full flower during the 1970s.³⁰ At that time, anti-colonial sentiment was spreading like wildfire through the global South, making the expropriation of resources and the exploitation of labor in these regions more costly.³¹ This emancipatory dynamic, coupled with relatively higher rates of corporate tax, resulted in fewer profits for the capitalist class—defined as “those with ownership stakes in large businesses and corporations.”³² Developed largely in response to the New Deal policies and regulations based upon the economic theories of John Maynard Keynes,³³ two objectives guided neoliberal

unencumbered markets, and free trade.’ Associated with the work of market-fundamentalist economists like F.A. Hayek and Milton Friedman, neoliberal thought demands not only that markets be given free rein to govern the economic sphere but also that other domains, including government, be increasingly ordered like a market, ‘incorporating and responding to marketized feedback about efficacy and value.’” Kapczynski, *supra* note 5, at 1490 (quoting JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 7 (2019)).

³⁰ Ellenwood, *supra* note 15. See also Katya Assaf, *Capitalism vs. Freedom*, 38 N.Y.U. REV. L. & SOC. CHANGE 201, 205-06 (2014) (available at <https://socialchangenyu.com/review/capitalism-vs-freedom/>) (“the 1970s marked a high point in [neoliberalism], with ideas of deregulation and privatization becoming accepted worldwide.”).

³¹ Ellenwood, *supra* note 15.

³² *Id.*

³³ See *How Keynes Influenced FDR's New Deal*, FUTURE HINDSIGHT, <https://www.futurehindsight.com/blog/how-keynes-influenced-fdrs-new-deal> (last visited Dec. 7, 2024) (“In the interwar years between WWI and WWII, right-wing strongmen rose across Europe as a response to faltering economies and the Bolshevik revolution in Russia. Keynes understood that factors like economic deprivation, deflation, and inequality lead to dictators—the evidence played out in Germany and Italy. Fearing England could fall prey to fascism or revolution because of these factors, Keynes set out to create a theory that allowed people to live well and without fear of impending economic doom. ¶

ideology: one, redirect as many of the activities associated with human life as possible into market-based exchange; and two, redistribute as much wealth as possible to the capitalist class, which would then “trickle down” to the rest of the society.³⁴ According to Ellenwood, these neoliberal economists “attempted to naturalize the laws of capitalism as though they are universal truths and the only way to conduct economic activity, as if capitalist economics were a natural science.”³⁵

Distilled to its core, capitalism as an economic system has three primary pillars: one, strong legal protections for private property; two, private ownership of the means of producing goods and services; and three, the use of market-based mechanisms for the sale and distribution of these goods and services, as well as for the selling of one’s labor to the capitalist class.³⁶ Central to the operation of capitalism is the commoditization of goods and services for

He argued for governments to stimulate faltering economies with public investiture. Even a small increase in government spending could net sizeable results, creating economic and social stability. ¶ Government-led investment infused the economy with cash and provided work for those previously unable to participate in the economy because of joblessness. For instance, if a government hires a construction firm to build a bridge, the firm needs to hire workers and pay them. Those newly employed workers use their salaries to purchase food from a farmer. That farmer now sees increased demand and needs to hire more laborers, and so on. More workers meant more happy citizens, more money in the economy, and more equality among members of society. ¶ When FDR assumed power in the midst of the Great Depression, Keynesian economic philosophy figured heavily into the new administration’s financial relief plan: The New Deal.”).

³⁴ Ellenwood, *supra* note 15. See also Will Kenton, *Trickle-Down Economics: Theory, Policies, and Critique*, INVESTOPEDIA (updated Nov. 9, 2024), <https://www.investopedia.com/terms/t/trickledowntheory.asp> (“Trickle-down economics and its policies employ the theory that tax breaks and benefits for corporations and the wealthy will trickle down and eventually benefit everyone. ¶ Tools like reduced income tax and capital gains tax breaks are offered to large businesses, investors, and entrepreneurs to stimulate economic growth.”); Mehrun Etebari, *Trickle-down Economics: Four Reasons Why it Just Doesn’t Work*, UNITED FOR A FAIR ECON. (July 17, 2003), https://www.faireconomy.org/trickle_down_economics_four_reasons (“The past 40 years have seen a gradual decrease in the top bracket’s income tax rate, from 91% in 1963 to 35% in 2003. It went as low as 28% in 1988 and 1989 due to legislation passed under Reagan, the trickle-down theory’s most famous adherent. The Clinton years saw the top bracket hold steady at a higher rate of 39.6%, but under the younger Bush’s tax-cut policies, the rich are once again paying less.”).

³⁵ Ellenwood, *supra* note 15.

³⁶ *Id.*

easier distribution within the marketplace.³⁷ Additionally, central to the operation of predatory neoliberal capitalism is the creation of profit through the oppression and exploitation of the individual. According to Ellenwood, neoliberals “exploit labor by paying workers less than what they produce in value[,]” and [s]ince profits are created on the backs of productive workers, they are alienated from the products of their labor.”³⁸ Meaning, under a neoliberal economic paradigm, the sellers of labor always get paid less than the goods or services they produce.³⁹ Coincident with these exploitative practices, the capitalist class also engages in outright wage theft⁴⁰ and systematic suppression of workers’ rights.⁴¹ At the same time, with the support of sympathetic government officials, and the intellectual backing of Chicago School economists like

³⁷ *Id.* (“Commodities are goods that are produced for sale on markets ... ¶ all commodities are exchangeable through money. If something is not exchangeable for money it ceases to be a commodity on the market.”) *See also* James Chen, *Commoditization: What it is, How it Works*, INVESTOPEDIA (updated Apr. 18, 2022), <https://www.investopedia.com/terms/c/commoditization.asp> (“Commoditization refers to the process of making something into a commodity. More broadly, commodification is taking something that previously was not available in the market and making it so ... ¶ Commoditization moreover often removes the individual, unique characteristics, and brand identity of the product so that it becomes interchangeable with other products of the same type. Making commodities interchangeable allows competition with a basis of price only and not on different characteristics.”).

³⁸ Ellenwood, *supra* note 15.

³⁹ *Id.*

⁴⁰ *See e.g.*, Rebecca Rainey & Diego Areas Munhoz, *Stagnant Minimum Pay Eroding DOL's Ability to Fight Wage Theft*, BLOOMBERG LAW (May 30, 2024, 2:10 AM PDT), <https://news.bloomberglaw.com/daily-labor-report/stagnant-minimum-pay-eroding-dols-ability-to-fight-wage-theft> (“Wage violations—sometimes dubbed ‘wage theft’ by worker advocates—can occur in multiple ways. Employers may intentionally or unintentionally forget to pay for the full number of hours an employee worked, or impermissibly deduct fees for things like uniforms from a worker’s paycheck.”).

⁴¹ *See e.g.*, JOSH BEVINS ET AL, ECON. POL’Y INST., *HOW TODAY’S UNIONS HELP WORKING PEOPLE* 21 (Aug. 24, 2017) (available at <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/>) (“Misclassification occurs when employers classify workers who are in fact employees as independent contractors, which employers do to avoid a host of employment-related obligations, such as paying for unemployment insurance and workers’ compensation and even paying a minimum wage. Workers wrongly classified as independent contractors are also deprived of the right to unionize under U.S. laws. These workers are thus unable to join together in a union to negotiate better terms and conditions with their employer. Misclassification is rampant in many industries such as food services and construction.”).

Milton Friedman,⁴² neoliberals have had tremendous success in privatizing or eliminating government-sponsored social supports for exploited sellers of labor.⁴³ Also central to the operation of neoliberal capitalism is the creation and perpetuation of myths about how money operates and flows through the political economy to shroud how neoliberals funnel the distribution of society's resources to the capitalist class.⁴⁴

⁴² "Milton Friedman was the twentieth century's most prominent advocate of free markets ... ¶ In *Capitalism and Freedom*, Friedman wrote arguably the most important economics book of the 1960s, making a case for relatively free markets to a general audience." David R Henderson, *Milton Friedman*, ECONLIB, <https://www.econlib.org/library/Enc/bios/Friedman.html> (last visited Dec. 7, 2024). See also Akhilesh Ganti, *What is the Chicago School of Economics? Definition and Aspects*, INVESTOPEDIA (Updated Sept. 18, 2023), https://www.investopedia.com/terms/c/chicago_school.asp ("Chicago School is a neoclassical economic school of thought that originated at the University of Chicago in the 1930s. The main tenets of the Chicago School are that free markets best allocate resources in an economy and that minimal, or even no, government intervention is best for economic prosperity ... ¶ The Chicago School's most prominent alumnus was Nobel Laureate Milton Friedman, whose theories were drastically different from Keynesian economics, the prevailing school of economic thought at the time ... ¶ Chicago School is libertarian and laissez-faire at its core, rejecting Keynesian notions of governments managing aggregate economic demand to promote growth."); Kapczynski, *supra* note 5, at 1484 ("[E]fficiency as a value has persisted, alongside a broader set of arguments emanating from Chicago School economics that suggested that we would all be better off (read: the world would be more efficient) if markets were maximally left alone and freed from intrusive regulation.").

⁴³ Ellenwood, *supra* note 15.

⁴⁴ See PAVLINA R. TCHERNEVA, MONEY, POWER, AND MONETARY REGIMES 2-3 (LEVY ECON. INST. OF BARD COLLEGE, Working Paper No. 861, March 2016) (available at <https://www.levyinstitute.org/publications/money-power-and-monetary-regimes>) ("Our knowledge and understanding of what money is, where it comes from, and what it does is littered with pervasive myths. Among these myths are: 1) that money is a creature of the market born out of the necessity to facilitate barter; 2) that money is an object, usually of some intrinsic value (derived from precious metals) that is easily transportable and divisible; and 3) that in and of itself, money has little economic significance (it is 'neutral'), serving only to simplify transactions but leaving employment, consumption, and investment decisions unaffected ... ¶ Not only is it not a 'creature of the market,' but a strong case can be made that money is instead a 'creature of the state,' however broadly defined. This proposition stands at the heart of the Chartalist (or Modern Money) approach to money [defined] as a *power* relationship of a specific kind, namely a social credit-debt relationship, that is codified by some authority or institution of power—be it an ancient religious authority, tribal chief, or an early administrative body, such as a Mesopotamian palace or a Greek polis, and later a monarchy, colonial power, or modern nation state ... ¶ Far from being a simple medium of benign exchange, the history of money as a creature of the state indicates that it is instead a *means of distribution*, a tool of transferring real resources from one party to another, subject to the power relationship of the specific historical context." (emphasis in original) (internal citations omitted)). See also Christine Desan, *Money as a Legal Institution*, in MONEY IN THE WESTERN LEGAL TRADITION 21, 30 (David Fox & Wolfgang Ernst eds., 2015) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321313) ("Money, it turns out, depends on a set of concepts—credit, debt, commodity, payment, sale, contract, and even (or especially) property—that are legal categories. Only by recapturing money's legal architecture can we understand how it operates to transfer goods, effectuate a deal, or generate stable exchange ... ¶ Law, after all, sets up all the relationships in the story of money's invention. Perhaps most obviously, it defines

Neoliberals also rely on perpetuating a number of harmful social dynamics to maintain neoliberal capitalism's viability as an economic paradigm. According to Ellenwood, "capitalist exploitation is deeply intertwined with racism and patriarchy."⁴⁵ Drawing on the work of Cedric Robinson⁴⁶ and Silvia Federici,⁴⁷ Ellenwood states:

"The primary manifestations of racial and gender differentiation in capitalism are the production of racist and sexist ideologies, differentiated work arrangements across racial and gender identities, and disparities in the flow of material resources, i.e. varying degrees of exploitation. Capitalists exploit these socially produced hierarchies in order to drive wages down and control workers."⁴⁸

In other words, neoliberals manipulate artificially created social inequities and hierarchies to shroud the oppressive and exploitative divide-and-conquer tactics associated with unrestrained

the contributions that individuals make to maintain their stake in a community ... [T]he governing agent holds a pivotal position because he is the only creditor common to everyone. They owe him 'tribute', 'tithes', 'rents', 'dues', 'fees' for service, 'penalties', or 'taxes'. The extent of those obligations—and thus reach of the centre into the community—depends on the way those duties are interpreted and enforced. Furthermore, law shapes not only the extent but the nature of the obligations. It determines how they are distributed and by what criteria. Taxes or other fees may be widely shared and apportioned in ways the population accepts. Or, they may be harshly levied on weaker members. 'Money' can be a matter democratically engineered or coercively imposed, depending on the infrastructure that supports it."); Christine Desan, *From Blood to Profit: Making Money in the Practice and Imagery of Early America*, 20 J. POL. HIST. 26, 26-30 (2008) (available at <https://www.cambridge.org/core/journals/journal-of-policy-history/article/abs/from-blood-to-profit-making-money-in-the-practice-and-imagery-of-early-america/62BED0C764031FF485FB6502BBAC3B7B>) ("[Colonial] Americans in fact used provincial tax credit notes for money, along with other specie substitutes: 'bills of credit' were issued to public creditors and could be employed by the holder or others to pay obligations like taxes ... ¶ [T]he bills were virtual IOUs, each for a limited denominated amount. Each note asserted that it was 'in value equal to money' and would be accepted by the provincial treasurer for money due the government, including taxes, payments, or fines. Paper money could thus be used instead of silver or gold to pay off public obligations; the value of the bills depended on the fact that they would be good for the continuing and predictable demands of government ... ¶ Colonial legislatures decided when to issue money and how to retire it. Local constituencies approved and disapproved the results ... authorities working with an involved public appropriately created the medium ... [T]he strategy that Americans used to give value to paper notes emphasized the communal purposes of their money: as each holder accepted a credit and every taxpayer cooperated in the practice that retired bills, all could appropriately claim benefits from that common fund. (internal citations omitted)).

⁴⁵ Ellenwood, *supra* note 15.

⁴⁶ See generally CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (2020) (arguing that Marxist critiques of the political economy typically focus on Eurocentric models of history and downplay the significance of Black liberation movements as agents of change and resistance).

⁴⁷ See generally SILVIA FEDERICI, *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE* (2012) (a collection of essays covering four decades of research examining how the gendered division between housework and carework, and other forms of labor are the economic roots of violence against women).

⁴⁸ Ellenwood, *supra* note 15.

market exchange in both goods and labor. Additionally, neoliberals twist the notions of rugged individualism, materialism, and rampant consumerism into prerequisite moral virtues necessary for human freedom; and seek to enshrine these supposed values into law.⁴⁹ This narrow concept of freedom is predicated upon the neoliberal view of individuals acting solely as “rational wealth-maximizers”⁵⁰ within the bounds of an artificially constructed marketplace, and ignores how “other dimensions of human personality,”⁵¹ as well as the human desire “to discover and advance the public good,”⁵² fundamentally shapes human freedom.

Conversely, according to Assaf, “[a] legal system wishing to provide its citizens with meaningful freedom must take into account the diverse aspects of human nature.”⁵³ This means that, instead of viewing individuals as “fictional legal character[s] motivated solely by selfish pecuniary interest[,]” the people’s representatives must view individuals as whole persons, who have their own ideas about what leads to “harmonious and flourishing personalities”⁵⁴ when shaping the law. Modern psychology demonstrates that the materialistic consumer culture that neoliberals espouse to keep alive their economic ideology is “associated with anxiety, depression and broken relationships,” and is thus, by its very nature, “socially destructive.”⁵⁵

⁴⁹ See Assaf, *supra* note 30, at 202-03 (“The essence of capitalist ideology lies in the idea that the state should provide individuals with the best possible means to pursue their own financial gain. Capitalism is thus based on two major values: individualism and materialism ... ¶ [C]apitalist ideology reduces freedom to one aspect: the freedom to act [as] a private market player. Inspired by this vision, the U.S. legal system puts great emphasis on securing one’s freedom to pursue one’s own pecuniary gain. The freedom to pursue one’s non-pecuniary and collective interests—such as a clean environment, the humane treatment of animals, or social equality—often has deficient legal recognition.”).

⁵⁰ *Id.* at 207

⁵¹ *Id.*

⁵² *Id.* at 208.

⁵³ *Id.* at 203.

⁵⁴ *Id.*

⁵⁵ George Monbiot, *Materialism: A System That Eats Us From the Inside Out*, THE GUARDIAN (Dec. 9, 2013, 3:30 PM EST), <https://www.theguardian.com/commentisfree/2013/dec/09/materialism-system-eats-us-from-inside-out>.

B. The Shape of Neoliberal Capitalism in the New Gilded Age

The information barons of the new Gilded Age, much like the industrial barons of the first, engage in these same destructive patterns and predatory behaviors when practicing the information capitalism of the 21st century. And much like previous iterations of capitalist hegemony,⁵⁶ they depend on embedding protections for their profit-seeking machinations deep within the law.⁵⁷ Central to the operation of information capitalism is the aggregation and commoditization of large amounts of personal and behavioral data. According to Freedman:

“As technologies that capture and analyze data proliferate, so do businesses’ abilities to contextualize data and draw new insights from it. Through consumer behavior and predictive analytics, companies regularly capture, store and analyze large amounts of quantitative and qualitative data on their consumer base every day.”⁵⁸

The extensive quantum of data captured by the information barons of the new Gilded Age includes shopping patterns, personal viewing habits, internet search histories, personal

⁵⁶ See Assaf, *supra* note 30, at 204-05 (“Antonio Gramsci argued that capitalist ideological values have acquired the status of ‘cultural hegemony’ and have come to be perceived as rules of common sense. This hegemony is constantly being reproduced in cultural life through the media, universities, and religious institutions.” (internal citations omitted)).

⁵⁷ *Id.* at 211 (“Numerous scholars have described and critiqued capitalist ideology’s influence on the legal system. The general argument posited by Marx—that a legal system inevitably reflects the economic structure of society—was developed and nuanced by the Critical Legal Studies movement. For instance, Morton Horowitz claims that since the early nineteenth-century American judges have consciously promoted rules that favor the interests of capital owners. Describing the transformation of the U.S. legal system since that time, he observes that shifting concepts of private law played a crucial role in enabling rapid economic growth in this country. Similarly, many other scholars have pointed out the contribution of specific legal rules and doctrines to the development and persistence of capitalism.” (internal citations omitted)).

⁵⁸ Max Freedman, *How Businesses Are Collecting Data (And What They’re Doing With It)*, BUSINESS NEWS DAILY (updated Oct. 20, 2023), <https://www.businessnewsdaily.com/10625-businesses-collecting-data.html>. See also Wheeler, *supra* note 13 (“Today’s economic activity is built on digital code. Digital information is the most important capital asset of the 21st century. Typically, Gilded Age assets were hard assets: industrial products that ended up being sold. Today’s economy runs on the soft assets of computer algorithms that crunch vast amounts of data to produce as their product a new piece of information. The business of networks like Comcast, AT&T, and Verizon, and of platform service providers like Google, Facebook, and Amazon is not just connections or services, but the digital information about each of us that is collected by those activities and subsequently reused to target us with specific messages.”).

preferences, information on how users interact with websites, IP addresses and device IDs, and numerous items of personally identifiable information (PII)—birth dates, gender, addresses, phone numbers, email addresses, and Social Security numbers for example.⁵⁹ Moreover, with 83 percent of the American public having engaged with some form of social media,⁶⁰ information

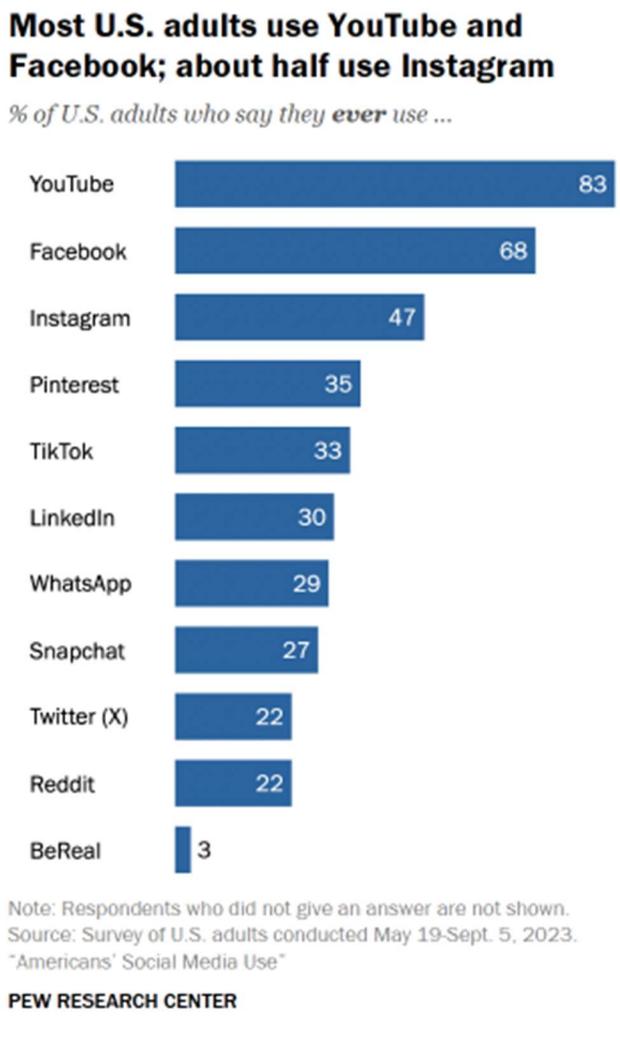


Figure 1: Americans' Social Media Usage by Platform.⁶¹

⁵⁹ See Freedman, *supra* note 58; See also Thorin Klosowski, *Big Companies Harvest Our Data. This Is Who They Think I Am.*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/wirecutter/blog/data-harvesting-by-companies/>

⁶⁰ Jeffrey Gottfried, *Americans' Social Media Use*, PEW RSCH. CTR. (Jan. 31, 2024), <https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/>.

⁶¹ *Id.*

barons also have access to, and are collecting data on, millions of Americans' social and familial connections, personal and political beliefs, and even potentially compromising information—for example, past and present physical locations, intimate photographs, and private or confidential communications.⁶²

Unsurprisingly, the commoditization of the most sensitive and private personal information has become a “multibillion dollar industry that operates in the shadows with virtually no oversight.”⁶³ So-called data brokers⁶⁴ are packaging and selling commodified data to whomever has the money to purchase it, typically unbeknownst to the average American citizen.⁶⁵ The largest of these firms, Acxiom, boasted in 2014 that it had “on average, 1,500 pieces of information on more than 200 million Americans.”⁶⁶ Notwithstanding recent attempts to curb the predatory practices of these data brokers,⁶⁷ companies in this largely unregulated industry are prone to massive security breaches,⁶⁸ which leave Americans personally vulnerable

⁶² See Klosowski, *supra* note 59

⁶³ Steve Kroft, *The Data Brokers: Selling your personal information*, CBS NEWS (Mar. 9, 2014 7:09 PM EDT), <https://www.cbsnews.com/news/the-data-brokers-selling-your-personal-information/>.

⁶⁴ See Klosowski, *supra* note 59 (“Data brokers are companies that collect and sell information about consumers to other data brokers or to individual companies. Data brokers collect information from everywhere they can, including public records, commercial sources, and Web browsing. They then collate that data into a profile.”); Yael Grauer, *What Are ‘Data Brokers,’ and Why Are They Scooping Up Information About You?*, VICE (Mar. 27, 2018, 10:00 AM), <https://www.vice.com/en/article/what-are-data-brokers-and-how-to-stop-my-private-data-collection/> (“Data brokers are entities that collect information about consumers, and then sell that data (or analytic scores, or classifications made based on that data) to other data brokers, companies, and/or individuals. These data brokers do not have a direct relationship with the people they’re collecting data on, so most people aren’t even aware that the data is even being collected.”).

⁶⁵ Kroft, *supra* note 62.

⁶⁶ *Id.*

⁶⁷ See e.g., *CFPB Proposes Rule to Stop Data Brokers from Selling Sensitive Personal Data to Scammers, Stalkers, and Spies*, CONSUMER FIN. PROT. BUREAU (Dec. 03, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-stop-data-brokers-from-selling-sensitive-personal-data-to-scammers-stalkers-and-spies/>.

⁶⁸ Grauer, *supra* note 62 (“[C]ompanies scooping up tons of data on individuals are vulnerable to security breaches, so the information they’re collecting has ended up in the wrong hands. In addition to the Equifax breach, which affected more than 145 million people, Acxiom was hacked in 2003, and over 1.6 billion records (including names, addresses, and email addresses) were stolen, and some were sold to spammers. Epsilon was hacked in 2011, exposing names and email addresses of millions of people on email marketing lists who were then subject to spam

to identity theft and other nefarious criminal activities such as hacking, stalking, and illegal foreign surveillance.⁶⁹

Likewise, the markets that form the backbone of information capitalism, much like those that formed the backbone of industrial capitalism of the first Gilded Age, are keenly prone to the market failure of monopoly.⁷⁰ However, as markets are shaped by law, this is largely due to the lax anti-trust enforcement policies pushed by Chicago School economists since the 1970s,⁷¹ rather than any perceived natural tendency of these markets toward this outcome.

The proponents of the Chicago School's dogma have gone far further than promoting just a weak anti-trust regime; they have expounded an entire anti-regulatory economic ideology that

as well as spear phishing attempts. LexisNexis' parent company RELX has been breached multiple times, exposing social security numbers, mailing addresses, and driver's license data. In 2015, 15 million records belonging to T-Mobile but stored on Experian's servers were accessed.").

⁶⁹ See generally Joseph Menn, *AI, Huge Hacks Leave Consumers Facing a Perfect Storm of Privacy Perils*, THE WASH. POST (updated Dec. 3, 2024), <https://www.washingtonpost.com/technology/2024/12/03/privacy-hackers-cfpb-data-brokers/>.

⁷⁰ See Kapczynski, *supra* note 5, at 1489 ("Networks generate network effects: the value of networks increases as more users are added. This creates tendencies toward monopoly that can be exploited because both buyers and sellers become increasingly dependent upon the marketplace of the platform."). See also Ellenwood, *supra* note 15 ("When information is commodified and sold on markets, this produces powerful ownership concentrations. Political economists of information have documented the tendency for information markets to produce monopolies and oligopolies. This type of concentration is endemic to information markets. Currently, it is observable in textbook, scholarly communication, and news media markets.").

⁷¹ Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> ("Antitrust policy and enforcement declined during the [late-1970s–mid-2010s] with the rise of the Chicago School of Economics in the late 1970s, which the Reagan administration endorsed with its enforcement priorities, judicial appointments, and amicus briefs to the Supreme Court. By the Obama administration, we had neither a popular antitrust movement nor many significant antitrust prosecutions."); MARSHALL STEINBAUM, ERIC HARRIS BERNSTEIN, & JOHN STURM, ROOSEVELT INST., *POWERLESS: HOW LAX ANTITRUST AND CONCENTRATED MARKET POWER RIG THE ECONOMY AGAINST AMERICAN WORKERS, CONSUMERS, AND COMMUNITIES* 6-7 (Feb. 2018) ("Beginning in the 1970s, a concerted movement referred to as the 'Chicago School' of antitrust beat back anti-monopoly policy through like-minded executive and judicial appointments, court rulings, and agency actions. The Chicago School argued that large corporations were large because they were efficient and because the free market incentivized them to operate in the best interest of consumers ... Government action to break up or regulate corporations, the Chicago School argued, would only impede their efficiency or protect incumbents at the expense of entrants. Under this regime, corporations and corporate conduct were presumed pro-competitive, or economically efficient. Even for potentially anti-competitive behavior, the burden of proof was raised high enough to forestall regulatory relief. ¶ This created a dramatic departure from vigorous antitrust protections that helped make the United States the world's most robust economy, and among the most equitable, during the postwar era.").

enables the imposition of a particular legal and social order that favors their continued dominance within society. According to Stucke and Ezechai:

“Adopting the Chicago School’s assumptions of self-correcting markets, composed of rational, self-interested market participants, some courts and enforcers sacrificed important political, social, and moral values to promote certain economic beliefs.”⁷²

C. Information Capitalism and Monopoly

The fallacy of the Chicago School’s argument about the beneficial nature of their economic ideology is easily demonstrated by examining the threat to democracy posed by the monopolistic dynamics within the political economy of information capitalism. Take Google for example; that conglomerate’s profits are generated almost exclusively by collecting nearly unimaginable amounts of data about its users to create individual behavioral profiles, which it then uses to allow its customers to target advertisements at its users with “increasing granularity.”⁷³ As the information barons at Google realized that more user data led to more accurate behavioral predictions, and thus more profit, they shifted Google’s operations to capture “ever-more comprehensive data on Google users.”⁷⁴ Today, nearly 90 percent of all internet searches conducted globally, and nearly 94 percent of internet searches conducted using mobile devices, are performed using Google’s search engine.⁷⁵ Alarming however, according to Kapczynski, “[t]he truth is, we do not know exactly what [data] inputs Google uses these days, any more than we can accurately describe its data holdings.”⁷⁶ The threat posed to

⁷² Stucke & Ezechai, *supra* note 71.

⁷³ Kapczynski, *supra* note 5, at 1469.

⁷⁴ *Id.*

⁷⁵ *Search Engine Market Share Worldwide, Nov. 2023-24*, STATCOUNTER, <https://gs.statcounter.com/search-engine-market-share> (last visited Dec. 9, 2024); *Mobile Search Engine Market Share Worldwide, Nov. 2023-24*, STATCOUNTER, <https://gs.statcounter.com/search-engine-market-share/mobile/worldwide> (last visited Dec. 9, 2024).

⁷⁶ Kapczynski, *supra* note 5, at 1469.

American democracy when it is impossible for the people to know how this one corporate conglomerate filters and manipulates information is apparent.

The textbook market is yet another example of these dynamics. In 2016, over 80 percent of all higher-education textbooks sold in the United States were purchased from only four publishers—Pearson, McGraw-Hill, Cengage, and Wiley.⁷⁷ In 2018, just three publishers sold 68 percent of all higher education textbooks—Pearson (36%), McGraw-Hill (21%), and Cengage (11%).⁷⁸ These large corporate publishers also informally collude with each other by refraining from publishing books in subject areas where their so-called competitors have found success, thus limiting a professor's options about which textbooks to utilize.⁷⁹ This unchecked market manipulation, along with the increased proliferation of digital textbooks,⁸⁰ explains why textbook prices rose 1,041 percent—over three times the rate of other price increases—between 1977 and 2015,⁸¹ and 88 percent between 2006 and 2016.⁸² An educated electorate is essential to a thriving democracy; but when four companies control the information students learn, and their business practices make education too costly for the average American voter to achieve, the very survival of democracy is put at risk.

⁷⁷ Gaby Del Valle, *The High Cost of College Textbooks, Explained*, Vox (Mar. 6, 2019, 5:00 AM PST), <https://www.vox.com/the-goods/2019/3/6/18252322/college-textbooks-cost-expensive-pearson-cengage-mcgraw-hill>.

⁷⁸ Wheeler, *supra* note 13.

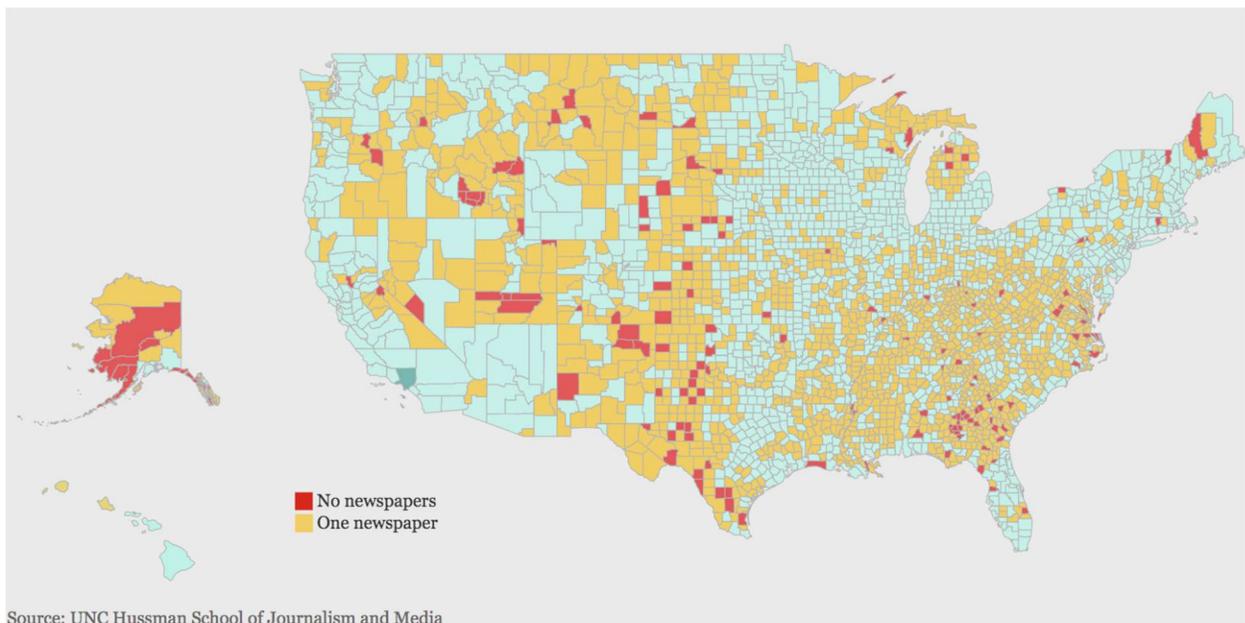
⁷⁹ Del Valle, *supra* note 77.

⁸⁰ Del Valle, *supra* note 77 (“Digital textbooks, especially those that come with access codes, have also contributed to rising costs. When students buy a textbook, they aren’t just paying for the binding and the pages; they’re paying for the research, editing, production, and distribution of the book. And when that book comes with an access code, they’re also paying for the development of—and, as the name suggests, for access to—all kinds of supplementary materials, from lessons to videos to homework assignments. ¶ Access codes, the PIRG report notes, also undercut the resale market. Since the codes can only be used once, the books are essentially worthless without them. They can also prevent students from turning to other cost-saving measures like sharing a book with a classmate.”).

⁸¹ Ben Popken, *College Textbook Prices Have Risen 1,041 Percent Since 1977*, NBC NEWS (updated Aug. 6, 2015, 8:40 AM PDT), <https://www.nbcnews.com/feature/freshman-year/college-textbook-prices-have-risen-812-percent-1978-n399926>.

⁸² Del Valle, *supra* note 77.

The same monopolistic dynamics are evident in American media markets.⁸³ For example, “[p]rivate equity funds, hedge funds and other large investment groups have been aggressively buying and managing local newspapers in recent years.”⁸⁴ As a result of this consolidation, nearly 25 percent of local newspapers have been shuttered since 2004.⁸⁵ Consequently, half of American counties now have only one local newspaper, while 225 counties have none.⁸⁶ Large



*Figure 2: Number of Local Newspapers in the United States by County.*⁸⁷

swaths of the country have become news deserts—defined as communities with “limited access to the sort of credible news and information that feeds democracy at the grassroots level.”⁸⁸

⁸³ See Covert, *supra* note 25 (“Meanwhile, the media industry itself is dotted with monopolies, such as News Corp, which owns *The Wall Street Journal* and the *New York Post* and dozens of other properties; TV conglomerates that control local news; and dominant talk radio brands.”).

⁸⁴ *The Rise of a New Media Baron and the Emerging Threat of News Deserts*, UNC HUSSMAN SCH. OF JOURNALISM AND MEDIA (Oct. 16, 2016), <https://hussman.unc.edu/news/the-rise-of-a-new-media-baron-and-the-emerging-threat-of-news-deserts>.

⁸⁵ *U.S. News Deserts*, UNC HUSSMAN SCH. OF JOURNALISM AND MEDIA, <https://www.cislm.org/research/u-s-news-deserts/> (last visited Dec. 9, 2024).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

Moreover, the aggressive cost-cutting maneuvers utilized by consolidated capital at their local newspapers still in operation have eroded both the quantity and quality of local news.⁸⁹ This is particularly troubling as around one-third of Americans recently cited a local news organization as one of their preferred news sources, and the people that do are less likely to prefer getting news from partisan media.⁹⁰

Likewise, these same dynamics also exist in local broadcast media. Sinclair Broadcast Group is currently the largest owner of local television stations in the United States.⁹¹ As of 2021, Sinclair owned 186 broadcast stations in 82 American markets.⁹² Not only does Sinclair own stations that reach nearly 40 percent of all U.S. households,⁹³ Sinclair often owns several stations in the same broadcast area.⁹⁴ Knowledge of this corporate conglomerate's ownership of these stations, however, is occluded from the American people by branding them as local ABC, CBS, NBC, or Fox affiliates.⁹⁵ Although a CU Boulder study conducted in 2021 did not find a "clear conservative shift in coverage" at Sinclair acquired stations,⁹⁶ there is significant evidence to the contrary. During the 2004 election, Sinclair required its local stations to air "mandatory commentary segments" produced at Sinclair's corporate production center featuring

⁸⁹ *Id.*

⁹⁰ Andrea Lorenz, Jessica Mahone, & Elizabeth Thompson, *Who Consumes Local News? Analysis From a Large National Survey*, UNC HUSSMAN SCH. OF JOURNALISM AND MEDIA (Sept. 11, 2023), <https://www.cislm.org/research/who-consumes-local-news-analysis-from-a-large-national-survey/>.

⁹¹ Sheelah Kolhatkar, *The Growth of Sinclair's Conservative Media Empire*, THE NEW YORKER (Oct. 15, 2018), <https://www.newyorker.com/magazine/2018/10/22/the-growth-of-sinclairs-conservative-media-empire>

⁹² Lisa Marshall, *Media Consolidation Takes Toll on Local News But Doesn't Necessarily Bias Coverage*, CU BOULDER TODAY (Oct. 20, 2021), <https://www.colorado.edu/today/2021/10/20/media-consolidation-takes-toll-local-news-doesnt-necessarily-bias-coverage>.

⁹³ *Id.*

⁹⁴ Kolhatkar, *supra* note 91.

⁹⁵ *Id.*

⁹⁶ Marshall, *supra* note 92.

conservative Mark Hyman, also Sinclair's vice-president for corporate relations.⁹⁷ These segments were deceptively designed to look like news pieces, and were broadcast directly after local newscasts.⁹⁸ In these segments, Hyman decried so-called liberal media bias; lamented that "Christianity was under attack"; and effusively praised Republican incumbent president George W. Bush, while sharply criticizing his Democratic opponent, Senator John Kerry.⁹⁹ Hyman also stated unabashedly that "terrorist leaders would dearly love to see President Bush replaced with Senator Kerry."¹⁰⁰ In April 2004, Sinclair prevented its ABC branded stations from airing a *Nightline* special in which Ted Koppel read the name of every member of the U.S. military killed since the beginning of the illegal war¹⁰¹ in Iraq in 2003.¹⁰² Shortly thereafter, Sinclair announced plans to preempt prime-time programming on all of its stations to air a widely discredited film produced by Swift Boat Veterans for Truth, "an attack group that had been buying ads in battleground states alleging that John Kerry, who had served in Vietnam, had contributed to the torture of American prisoners of war by testifying about atrocities committed during the conflict."¹⁰³ After Congressional Democrats threatened to block renewal of Sinclair's broadcasting licenses for airing what its own Washington-bureau chief called "biased political

⁹⁷ Kolhatkar, *supra* note 91.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See Ewan MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN charter, Says Annan*, THE GUARDIAN (Sept. 15, 2004, 9:28 PM EDT), <https://www.theguardian.com/world/2004/sep/16/iraq.iraq> ("The United Nations secretary general, Kofi Annan, declared explicitly for the first time last night that the US-led war on Iraq was illegal. ¶ Mr Annan said that the invasion was not sanctioned by the UN security council or in accordance with the UN's founding charter. ... [H]e was asked outright if the war was illegal. He replied: 'Yes, if you wish.' ¶ He then added unequivocally: 'I have indicated it was not in conformity with the UN charter. From our point of view and from the charter point of view it was illegal.').

¹⁰² Kolhatkar, *supra* note 91.

¹⁰³ *Id.*

propaganda, with clear intentions to sway this election[,]” Sinclair shortened the length of the film and reduced the number of its stations on which it aired.¹⁰⁴

During the 2016 election, Sinclair aired similar segments that were highly critical of the Democratic nominee, Hillary Clinton; most of which focused on her private e-mail server and supposed health issues.¹⁰⁵ Sinclair concentrated its station ownership in crucial swing states, such as Florida, Pennsylvania, Iowa, and Ohio, then significantly tilted these stations’ election coverage toward the Republican nominee, Donald Trump.¹⁰⁶ Specifically, Sinclair’s stations aired fifteen exclusive interviews with Trump, and ten with his vice-presidential nominee Mike Pence.¹⁰⁷ Sinclair-owned stations in Michigan made scant mention of the biggest scandal of the 2016 campaign—that of the Access Hollywood tape, in which Trump boasted about grabbing women by the genitals.¹⁰⁸ In the broadcast areas with the highest concentrations of Sinclair-owned stations, Clinton lost by an average of nineteen points;¹⁰⁹ while in Michigan, Clinton lost by a meager 10,000 votes.¹¹⁰ One may be left to wonder if the outcome of that election would have been different without the sway Sinclair wielded over swing state voters through its local media holdings.

And with Sinclair’s support for Trump during the campaign came a very specific payoff that benefited Sinclair’s particular business model. Once in office, Trump’s pick to run the Federal Communications Commission (FCC), Ajit Pai, voted to eliminate the cap that prevented

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

corporate conglomerates, such as Sinclair, from reaching over 39 percent of American households.¹¹¹ Pai's FCC also eliminated: a nearly eight decade-old rule that required station owners keep a local studio in the towns in which they operate¹¹²; rules that prohibited one corporate entity from owning more than two TV stations and a radio station in the same broadcast area¹¹³; and a rule that proscribed one corporate entity from owning both a newspaper and a broadcast station in the same media market.¹¹⁴

Corporate consolidation of media at the national level largely follows the same patterns observed in local print and broadcast media. Due in large part to the neoliberal anti-regulatory policies advocated by Chicago School economists and their political allies enacted into law by the Telecommunications Act of 1996,¹¹⁵ only six corporate conglomerates currently own an estimated 90 percent of all U.S. media.¹¹⁶ Several of these conglomerates own mainstream

¹¹¹ Karl Bode, *The Sinclair Horrorshow Is the Result of Decades of Failing to Take Media Consolidation Worries Seriously*, VICE (Apr. 5, 2018, 9:00 AM), <https://www.vice.com/en/article/sinclair-broadcasting-media-consolidation-regulations/>.

¹¹² *Id.*

¹¹³ Ted Johnson, *FCC Relaxes Media Ownership Rules in Contentious Vote*, VARIETY (Nov. 16, 2017, 10:50 AM PT), <https://variety.com/2017/politics/news/fcc-media-ownership-rules-sinclair-broadcasting-1202616424/>.

¹¹⁴ *Id.*

¹¹⁵ Cf. John Light, *How Media Consolidation Threatens Democracy: 857 Channels (and Nothing On)*, BILLMOYERS.COM (May 12, 2017), <https://billmoyers.com/story/media-consolidation-should-anyone-care/> (“[I]n the 1980s, Ronald Reagan’s FCC Chairman Mark Fowler brought a new, deregulatory view into vogue, and the federal government’s efforts to prevent media consolidation began to unravel. A watershed moment came a decade later, when Bill Clinton’s decision to sign the Telecommunications Act of 1996 handed lobbyists a major victory. The law was a massive dose of deregulation that dramatically raised caps on the number of local newspapers and television stations a single corporation could own, and the percentage of the national audience a single corporation could reach.”).

¹¹⁶ Natalia Galicza, *Who Owns the News?*, DESERTNEWS MAGAZINE (Oct. 19, 2024, 9:00 PM MDT), <https://www.deseret.com/magazine/2024/10/19/who-owns-newspapers-tv-news/>. (“6 mega owners: That’s the number of conglomerates estimated to control 90% of the media—empowered by deregulation of ownership in the Telecommunications Act of 1996—although measures vary and properties change hands.”); *The 6 Companies That Own (Almost) All Media [INFOGRAPHIC]*, WEBFX, <https://www.webfx.com/blog/internet/the-6-companies-that-own-almost-all-media-infographic/> (last visited Dec. 9, 2019) (“While independent media outlets still exist (and there are a lot of them), the major outlets are almost all owned by these six conglomerates. To be clear, ‘media’ in this context does not refer just to news outlets—it refers to any medium that controls the distribution of information. So here, ‘media’ includes 24-hour news stations, newspapers, publishing houses, Internet utilities, and even video game developers.”).

national broadcast news outlets as well as part of their media holdings—ABC News and ESPN are owned by Disney; NBC News, CNBC, MSNBC, and Telemundo are owned by Comcast; and CNN is owned by Warner Bros./Discovery.¹¹⁷ Combined, these three companies earned \$121.57 billion in 2023 alone; more than either Tesla, IBM or Bank of America.¹¹⁸ News Corp.—controlled by the Murdoch family, and which owns Fox News, the *Wall Street Journal*, and the *New York Post*—is another example.¹¹⁹

The Telecommunications Act of 1996 also contributed to corporate consolidation within the radio industry, and is demonstrably the most significant factor that contributed to the political right's decades of dominance on talk radio.¹²⁰ The Act eliminated the national ownership limits on how many radio stations a single company could legally own; for example, ClearChannel—later rebranded as iHeartMedia—increased the number of stations it owned from 43 in 1996,¹²¹ to 860 stations across 160 broadcast markets today.¹²² Consequently, in the decade following the passage of the Act, talk stations changed their formats from showcasing a variety of opinions to ones that aired just a single political perspective all day, with conservative talk formats outnumbering liberal or progressive formats ten to one.¹²³ Likewise, fifty-seven percent of newspapers nationally are owned by just seven corporate conglomerates.¹²⁴ For example, Gannett not only owns *USA Today*, but also over 375 daily and weekly newspapers

¹¹⁷ Galicza, *supra* note 116.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *How did Talk Radio Get So Politically Lop-Sided?*, ON THE MEDIA, NY PUB. RADIO (March 17, 2023), <https://www.wnycstudios.org/podcasts/otm/episodes/talk-radio-lopsided-on-the-media?tab=transcript>.

¹²¹ *Id.*

¹²² Galicza, *supra* note 116.

¹²³ ON THE MEDIA, *supra* note 120.

¹²⁴ Galicza, *supra* note 116.

across the United States.¹²⁵ According to Light, all this corporate consolidation “assures that some issues—issues in which corporate America is uninterested—go uncovered, while some voices—particularly female, minority and immigrant voices—rarely make it into print or onto the airwaves.”¹²⁶ Because the capitalist class wields such enormous editorial influence over the very news outlets American voters use to inform themselves about the political economy, it becomes possible for purveyors of neoliberal ideology to shape the political viewpoints that voters express at the ballot box—to the detriment of democracy and the very nature of individual free expression.

D. Information Capitalism and Democracy

In a broader sense, the unconstrained increase in corporate power throughout the political economy poses a profound threat to individual freedom, as it infringes on the personal privacy and sovereignty of the individual,¹²⁷ and raises serious questions about the future vitality of American democracy. President Franklin D. Roosevelt, in a letter to Congress in 1938, warned about the perils posed by the precise power dynamics seen in the current political economy:

“Unhappy events abroad have retaught us two simple truths about the liberty of a democratic people.

The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is Fascism—ownership of Government by an individual, by a group, or by any other controlling private power.

¹²⁵ *Id.*

¹²⁶ Light, *supra* note 115.

¹²⁷ See discussion of the Donald Trump 2016 presidential campaign’s involvement in the Cambridge Analytica scandal, by which the privacy of 87 million Americans was invaded to shape their political views and influence their votes through targeted psychological manipulation in Section II.D.2 *infra*.

The second truth is that the liberty of a democracy is not safe if its business system does not provide employment and produce and distribute goods in such a way as to sustain an acceptable standard of living.”¹²⁸

How the current political economy demonstrates Roosevelt’s second truth can be seen through an examination of the rampant economic and social inequality present in American society, which has only been exacerbated by increasingly pervasive technology. And the threat that the business model of information capitalism poses to individual sovereignty and liberty, as well as to the legitimacy of American democratic institutions—Roosevelt’s first truth—can be demonstrated by examining the Cambridge Analytica scandal, which took place during the 2016 presidential election; a scandal that is emblematic of the practices of neoliberal information barons in the new Gilded Age.

1. Economic and Social Inequality in the Current Political Economy

Not only has the political economy of information capitalism placed the social and psychological wellbeing necessary for individual human flourishing and freedom profoundly at risk,¹²⁹ but as Kapczynski points out:

¹²⁸ Letter from Franklin D. Roosevelt, President of the United States, to Congress, *Message to Congress on Curbing Monopolies*, THE AM. PRESIDENCY PROJECT (Apr. 29, 1938), <https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies>.

¹²⁹ Cf Marianna Spring, *'It stains your brain': How Social Media Algorithms Show Violence to Boys*, BBC PANORAMA (Sept. 1, 2024), <https://www.bbc.com/news/articles/c4gdqzxydpzo> (“It was 2022 and Cai, then 16, was scrolling on his phone. He says one of the first videos he saw on his social media feeds was of a cute dog. But then, it all took a turn. ¶ He says ‘out of nowhere’ he was recommended videos of someone being hit by a car, a monologue from an influencer sharing misogynistic views, and clips of violent fights. He found himself asking—why me? ... ¶ Cai, now 18, says he is still being pushed violent and misogynistic content on both Instagram and TikTok. ¶ When we scroll through his Instagram Reels, they include an image making light of domestic violence. It shows two characters side by side, one of whom has bruises, with the caption: ‘My Love Language’. Another shows a person being run over by a lorry.”); Andrew Gregory, *Gambling Poses Huge Global Threat to Public Health, Experts Warn*, THE GUARDIAN (Oct. 24, 2024, 6:30 PM EDT), <https://www.theguardian.com/society/2024/oct/24/gambling-poses-huge-global-threat-to-public-health-experts-warn-lancet-commission> (“Gambling poses a growing worldwide threat to public health, with its rapid expansion via mobile phones and the internet harming far more people than previously thought, a report warns ... ¶ Incredibly sophisticated marketing, ever-widening easy access to the internet and mobile phones are enabling the gambling industry to reach more people than ever before. These included adolescents and

“Our legal order, intertwined with the architecture of digital networks, has enabled the creation of vast new firms that wield new forms of surveillance and algorithmic power, but it also has delivered us a form of neoliberal capitalism that is inclined toward monopoly, concentrated power, and inequality.”¹³⁰

Particularly poignant is Kapczynski observation that we are not all equally vulnerable to these new forms of consolidated power,¹³¹ nor will we be equally impacted by the predatory practices of Big Data surveillance and manipulation in the same way.¹³² An analysis of rising income inequality within the political economy over the last five decades exemplifies Kapczynski’s point, and belies the neoliberal assertion that unregulated private markets best reduce economic and social inequality.¹³³

As was the case during the first Gilded Age, when the top ten percent of earners were the beneficiaries of more than 45 percent of the nation’s gross income, the top decile of earners in the new Gilded Age receive more than 50 percent of gross income currently.¹³⁴ The anti-unionization efforts of entrenched corporate power¹³⁵ have led to a steady rise in income

younger children who were routinely exposed to advertising of gambling products in ways that were unprecedented before the digital revolution, the report found ... ¶ Commercial gambling is clearly associated with financial losses and the risk of financial ruin, but it is also associated with physical and mental health problems, relationship and family breakdown, heightened risk of suicide and domestic violence, increased crime against property and people, and loss of employment, the experts concluded. ¶ The commission report noted that this impact was not spread evenly through populations, and specific groups faced an ‘elevated risk’ of harms including adolescents and younger children who were routinely exposed to advertising of gambling products. In addition, gambling is often embedded into the architecture of video games.”).

¹³⁰ Kapczynski, *supra* note 5, at 1515.

¹³¹ *Id.* at 1465.

¹³² *Id.* at 1478.

¹³³ See Assaf, *supra* note 30, at 239 ([Currently,] the task of remedying the evils of racial and gender inequality is largely left to the private market. This situation is consistent with the neoliberal philosophy that regards the market, rather than state regulation, as the best solution to all social problems.”).

¹³⁴ Wheeler, *supra* note 13.

¹³⁵ See BEVINS, *supra* note 41, at 18 (“Because unions and collective bargaining are effective at giving workers power, they are opposed by corporate interests and policymakers representing the highest-earning 1 percent. For decades, fierce corporate opposition has suppressed the freedom to form unions and bargain collectively in the private sector by promoting antiunion campaigns in workplaces seeking to unionize and by lobbying lawmakers to pass laws depriving private-sector unions of funds needed to operate. This activity has tracked the dramatic, rapid

inequality in the United States since the 1970s,¹³⁶ and to stagnation in the median wages of American workers over the last four decades.¹³⁷ For the average American worker, hourly wages rose by only 0.3 percent per year (9.9 percent overall) between 1979 and 2015.¹³⁸ A study of worker pay conducted by the Economic Policy Institute found that if it had risen in line with productivity during that same period, as it did in the decades before 1979, worker pay would have increased by 63.8 percent.¹³⁹ Meanwhile, during that same timeframe, the top one percent of earners saw their incomes rise by almost 190 percent.¹⁴⁰ Likewise, between 1978 and 2016, when compared to that of the average American worker, CEO compensation has increased nearly tenfold; from 30-to-1 to 271-to-1.¹⁴¹ Additionally, to lower labor costs, large corporations consistently seek new ways to outsource labor by pushing workers out of direct employment altogether.¹⁴² The increasing pervasiveness of technology within the political

increase of corporate political activity that began in the mid-1970s, with a specific ‘call-to-arms’ for U.S. corporations that quadrupled the number of corporate PACs from 1976 to 1980. More recently, anti-union lobbyists have passed legislation weakening unions in states such as Indiana, Michigan, and Wisconsin that were once union strongholds. Outdated labor laws have failed to provide workers with protection from this employer onslaught against collective bargaining. And corporate lobbyists have blocked reforms to labor laws that would protect worker’s collective bargaining rights with meaningful penalties for violations and better processes for organizing. Employers are exploiting loopholes, including by misclassifying workers as independent contractors to get around labor laws that protect employees.” (internal citations omitted)).

¹³⁶ BEVINS, *supra* note 41, at 7 (“The spread of collective bargaining that followed the passage of the National Labor Relations Act in 1935 led to decades of faster and fairer economic growth that persisted until the late 1970s. But since the 1970s, declining unionization has fueled rising inequality and stalled economic progress for the broad American middle class.”).

¹³⁷ Kapczynski, *supra* note 5, at 1477.

¹³⁸ BEVINS, *supra* note 41, at 8.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ STEINBAUM ET AL, *supra* note 71, at 24.

¹⁴² *Id.* See also Dominique Kost, Christian Fieseler, & Sut I. Wong, *Boundaryless Careers in the Gig Economy: An Oxymoron?*, 30 HUM. RES. MGMT. J. 100, 102 (2020) (available at <https://onlinelibrary.wiley.com/doi/full/10.1111/1748-8583.12265>) (“In recent years, digital platforms and ecosystems have disrupted industries by enlisting the work of thousands of dispersed and unorganised workers. Unlike regular workers, who are covered by relevant employment laws (minimum wage, sick leave, etc.) and taxation codes, platform gig workers are effectively self-employed and thus are responsible for their own economic upkeep and career planning ... ¶ [M]any workers now rely on such platforms for a majority of their incomes.” (internal citations omitted)).

economy has made this strategy of disempowering and exploiting workers more effective, specifically by enabling the increased use of so-called “gig workers” utilizing mobile apps designed to let information barons classify these workers as independent contractors¹⁴³—exacerbating the problem of income inequality.¹⁴⁴

Echoing Kapczynski, this exacerbation of economic inequality brought about by the rise of gig work also highlights patterns of both racial and gender inequality. According to Pew Research, “among adults under the age of 50, Hispanic (34%) or Black Americans (27%) are more likely than those who are White (16%) to have earned money via an online gig platform.”¹⁴⁵ Another study found that gender-based pay gaps have persisted in gig work.¹⁴⁶

¹⁴³ William J. Tronsor, *Unions for Workers in the Gig Economy: Time for a New Labor Movement*, 69 LAB. L. J. 181, 183 (2018) (available at <https://www.proquest.com/docview/2155626573?fromopenview=true&pq-origsite=gscholar&sourcetype=Scholarly%20Journals>) (“Employers, seeking to avoid dealing with a unionized workforce, along with the need to give employees’ health coverage, pensions, overtime pay, and the other benefits required under federal and state labor laws, started to classify their workers as independent contractors. Whether these companies are accurately classifying their workforce as independent contractors requires an extremely fact-based legal assessment ... ¶ Employers are also increasingly using subcontractors, temporary agencies, labor brokers, franchising, licensing, and third-party management of workers to make it difficult for workers to collectively organize.” (internal citation omitted)); Press Release, ECON. POL’Y INST., *National Survey of Gig Workers Shows Poor Working Conditions And Low Pay* (June 1, 2022), <https://www.epi.org/press/national-survey-of-gig-workers-shows-poor-working-conditions-and-low-pay/> (“Digital platform companies have constructed a business model on the premise that they do not employ their workforce. These companies treat workers who perform the services they offer not as employees but as independent contractors. By classifying their workforce in this way, they deprive workers of fundamental rights under federal and state labor and employment laws, including wage and hour protections, anti-discrimination protection, workers’ compensation, unemployment benefits, and the right to organize and collectively bargain. This leaves independent contractors in a far more vulnerable status, as compared with employees, when it comes to basic rights and protections on the job.”).

¹⁴⁴ Chang Wook Min, *Rising Income Inequality and the Future of Work in Digital Platforms: Uber and California Assembly Bill 5*, BERKELEY PUB. POL’Y INST. J. (July 2, 2020), <https://bppj.studentorg.berkeley.edu/2020/07/02/rising-income-inequality-and-the-future-of-work-in-digital-platforms-uber-and-california-assembly-bill-5/> (“California legislators meant to address the income inequality in labor platforms by treating gig workers as employees. Section 1(b) of AB 5 stipulates that ‘The misclassification of workers as independent contractors has been a significant factor in the erosion of the middle class and the rise in income inequality.’).

¹⁴⁵ Risa Gelles-Watnick & Monica Anderson, *Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce*, PEW RSCH. CTR. (Dec. 15, 2021), <https://www.pewresearch.org/short-reads/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/>.

¹⁴⁶ Jacki Silbermann, *Gender-based Pay Gaps in the Gig Economy*, HARV. J. L. & GENDER, <https://journals.law.harvard.edu/jlg/2020/02/gender-based-pay-gaps-in-the-gig-economy/> (last visited Dec. 10, 2024).

“Women earn on average 37% less than men across a wide range of occupations when controlling for a slew of other possible factors (education level, experience, occupation, hours of work and customer feedback).”¹⁴⁷ From a global perspective, even the exploitation of workers by information barons is distributed unevenly between different regions, evidenced by comparing worker exploitation in the global South and the global North.¹⁴⁸

2. The Cambridge Analytica Scandal: Information Capitalism and Politics

Most troubling, however, is that fact that the consolidation of corporate power, along with the consequent rise in economic and social inequality, coupled with a lack of access to unbiased flows of information poses an ongoing threat to American democratic political institutions.¹⁴⁹ “Following the 2016 U.S. presidential election, Donald Trump’s digital director, Brad Parscale, stated that Facebook helped Donald Trump win the White House.”¹⁵⁰ Beginning in July 2016, the Trump campaign paid Cambridge Analytica over \$5.9 million to aid the campaign’s social media operation.¹⁵¹ Cambridge Analytica was a UK-based data harvester controlled at the time by the Trump campaign’s chief strategist and campaign manager, Steve

¹⁴⁷ *Id.*

¹⁴⁸ See Ellenwood, *supra* note 15 (“For example, there are miners in regions of Africa who extract minerals that are essential for modern computing (coltan, cobalt, etc). Without them, many of our mainstream information technologies like cellphones and computers would not function. There is extensive documentation showing that these workers are super-exploited. There are also programmers that work for companies like Amazon and Facebook who make well over \$100K per year and have a relatively privileged lifestyle. Despite their relative privilege, these workers are paid less than the amount of value that they produce and are by definition exploited. Tech companies appropriate the surplus profit these workers produce through software development.”).

¹⁴⁹ See STEINBAUM ET AL, *supra* note 71, at 26 (“[T]he consolidation of power affects geographic inequality, the flow of information, and the long-term health of our democratic system.”).

¹⁵⁰ Kelly Cotter, Mel Medeiros, Chanyung Pak, & Kjerstin Thorson, “*Reach the Right People*”: *The Politics of “Interests” in Facebook’s Classification System for Ad Targeting*, 8 *BIG DATA & SOC’Y* 1, 1 (2021) (available at <https://journals.sagepub.com/doi/10.1177/2053951721996046>).

¹⁵¹ Greg Price, *How Much Did Trump Pay Cambridge Analytica? Denial Of Data Firm's Involvement Doesn't Add Up*, *NEWSWEEK* (Oct. 27, 2017, 5:30 PM EDT), <https://www.newsweek.com/trump-cambridge-analytica-kushner-695315>

Bannon, and one of the Republican Party’s top donors, Robert Mercer.¹⁵² Cambridge Analytica exploited a vulnerability embedded in the design of Facebook’s application programming interface (API)¹⁵³ that allowed third-party developers to extract personal data not only on targeted Facebook users, but also on those users’ Facebook friends as well.¹⁵⁴ This allowed Cambridge Analytica access to the personal data of over 87 million Facebook users, which included at least each user’s public profile, list of friends, and email address.¹⁵⁵ It did so by deploying a personality quiz on Facebook called “thisisyourdigitallife,” which approximately 270,000 Facebook users took.¹⁵⁶ Cambridge Analytica then used all that harvested data to build individualized psychological profiles that analyzed each users’ demographic characteristics and personality traits.¹⁵⁷ Before the company was shuttered following the scandal, it claimed on its

¹⁵² See Keith Boag, *Money Man: Reclusive U.S. Billionaire Robert Mercer Helped Donald Trump Win the Presidency. But What is His Ultimate Goal?*, CBC NEWS, <https://www.cbc.ca/news2/interactives/sh/wex94ODaUs/trump-robert-mercer-billionaire/> (last visited Dec. 11, 2024) (“Mercer’s fortune and Bannon’s media instincts combined with a shared ideology to produce the anti-liberal, anti-Clinton ecosystem that includes Breitbart, the conservative non-profit Citizens United, the book Clinton Cash and much more. Together, they oversaw the data analysis company Cambridge Analytica, whose impact on the UK’s Brexit referendum and the 2016 U.S. election remain troublesomely murky.”). See also Carole Cadwalladr, *Robert Mercer: The Big Data Billionaire Waging War on Mainstream Media*, THE GUARDIAN (Feb. 26, 2017, 4:00 AM EST), <https://www.theguardian.com/politics/2017/feb/26/robert-mercer-breitbart-war-on-media-steve-bannon-donald-trump-nigel-farage> (“[Robert Mercer] is reported to have a \$10m stake in [Cambridge Analytica], which was spun out of a bigger British company called SCL Group. It specialises in ‘election management strategies’ and ‘messaging and information operations’, refined over 25 years in places like Afghanistan and Pakistan. In military circles this is known as ‘psyops’—psychological operations. (Mass propaganda that works by acting on people’s emotions.)”).

¹⁵³ “An API, or application programming interface, is a set of rules or protocols that enables software applications to communicate with each other to exchange data, features and functionality ... ¶ It’s useful to think about API communication in terms of a request and response between a client and server. The application submitting the request is the client, and the server provides the response. The API is the bridge establishing the connection between them.” Michael Goodwin, *What is an API (application programming interface)?*, IBM (Apr. 9, 2024), <https://www.ibm.com/topics/api>.

¹⁵⁴ Aja Romano, *The Facebook Data Breach Wasn’t a Hack. It Was a Wake-up Call*, Vox (Mar. 20, 2018, 1:50 PM PDT), <https://www.vox.com/2018/3/20/17138756/facebook-data-breach-cambridge-analytica-explained>.

¹⁵⁵ *Id.*

¹⁵⁶ Alexandra Ma, *Everyone is Talking About Cambridge Analytica, The Trump-linked Data Firm That Harvested 50 million Facebook profiles—Here’s What’s Going On*, BUS. INSIDER, <https://www.businessinsider.nl/cambridge-analytica-a-guide-to-the-trump-linked-data-firm-that-harvested-50-million-facebook-profiles-2018-3?international=true&r=US> (last visited Dec. 11, 2024).

¹⁵⁷ *Id.*

website that it had built psychological profiles on 220 million American voters based on 5,000 separate pieces of data for each one.¹⁵⁸ According to Christopher Wiley,¹⁵⁹ who blew the whistle on Cambridge Analytica’s operation in 2018, “[w]e exploited Facebook to harvest millions of people’s profiles. And built models to exploit what we knew about them and target their inner demons.”¹⁶⁰

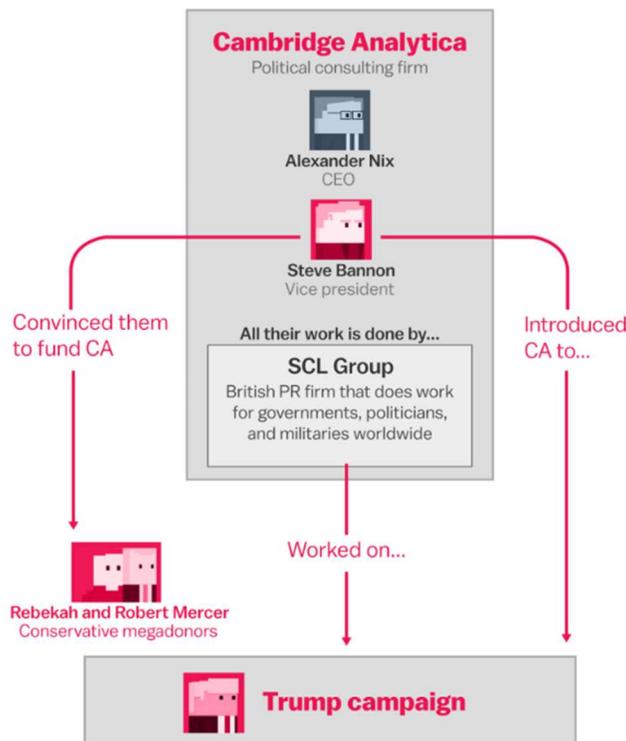


Figure 3: Cambridge Analytica’s Connections to the 2016 Trump Campaign¹⁶¹

¹⁵⁸ Cadwalladr, *supra* note 152.

¹⁵⁹ Christopher Wiley “worked at a company called Strategic Communication Laboratories, self-billed as a data analytics company to governments and military organizations worldwide.” Romano, *supra* note 154 (internal quotations omitted). Strategic Communication Laboratories used “modeling to extrapolate the personalities of people it didn’t directly survey. Then, SCL claimed, it could tailor messaging to better target and persuade voters based on their particular personalities. This, SCL said, was the future of politics.” Andrew Prokop, *Cambridge Analytica Shutting Down: The Firm’s Many Scandals, Explained*, Vox (updated May 2, 2018, 11:11 AM PDT), <https://www.vox.com/policy-and-politics/2018/3/21/17141428/cambridge-analytica-trump-russia-mueller>.

¹⁶⁰ Ma, *supra* note 156.

¹⁶¹ Alvin Chang, *The Facebook and Cambridge Analytica Scandal, Explained With a Simple Diagram*, Vox (updated May 2, 2018, 12:25 PM PST), <https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-cambridge-analytica-trump-diagram>.

The personality quiz itself was developed by Aleksandr Kogan, a University of Cambridge psychology professor with financial ties to the Russian government.¹⁶² “[W]hile he was helping turn Facebook profiles into a political tool [Kogan] was also an associate professor at St Petersburg State University, taking Russian government grants to fund other research into social media.”¹⁶³ Wiley, in his capacity as an employee of Strategic Communication Laboratories (SCL), approached Kogan during his time at Cambridge, and SCL created a U.S.-based subsidiary, Cambridge Analytica, for the sole purpose of gaining access to Kogan’s ongoing social media research.¹⁶⁴ An SCL director, Alexander Nix, was named the company’s CEO, with Robert Mercer investing heavily into the company, and Steve Bannon, also an investor, joining its board of directors.¹⁶⁵ After its founding, Cambridge Analytica received over \$2.5 million from Mercer-backed conservative super PACs, and within a year after the company’s founding, Kogan boasted of having psychological profiles on over 50 million individuals, whom he stated provided Cambridge Analytica “the capacity to predict virtually any trait.”¹⁶⁶ As with neoliberal dominance of mass media, this is particularly alarming because behavioral microtargeting provides yet another tool for neoliberal political campaigns to shape the political views of the American people; again raising profound questions about individual sovereignty and free expression in this new Gilded Age, not present during the first.

¹⁶² Ma, *supra* note 156.

¹⁶³ Carole Cadwalladr & Emma Graham-Harrison, *Cambridge Analytica: Links to Moscow Oil Firm and St Petersburg University*, THE GUARDIAN (Mar. 17, 2018, 5:59 PM EDT), <https://www.theguardian.com/news/2018/mar/17/cambridge-academic-trawling-facebook-had-links-to-russian-university>.

¹⁶⁴ Romano, *supra* note 154.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

After the news broke of Cambridge Analytica’s psychological manipulation of millions of American voters at the behest of the Trump campaign, Facebook’s Chief Security Officer at the time, Alex Stamos, issued a series of quickly deleted Tweets.¹⁶⁷ The first stated: “Kogan did not break into any systems, bypass any technical controls, or use a flaw in our software to gather more data than allowed. He did, however, misuse that data after he gathered it, but that does not retroactively make it a ‘breach.’”¹⁶⁸ Meaning that Facebook’s platform was designed to allow for this sort of data harvesting. The second stated: “It should be noted that several other prominent platforms, like Android and iOS, allow access to friend (contact) data with user permission. Like us, those platforms have policies about the use of data, but misusing contacts gathered knowingly from a phone is also not a ‘breach.’”¹⁶⁹ Meaning that these data mining practices are pervasive across the political economy. The third stated: “The ability to get friend data via API, with the permission of a user, was documented in our terms of service, platform documentation, the privacy settings, and the screen used to login to apps.”¹⁷⁰ In other words, Facebook shrouded disclosures about its data harvesting practices by couching it in technical and legal language. Notwithstanding the threat to democracy posed by its business model, Facebook’s terms of service still include provisions that allow it to “use” and “distribute” personal information about its users shared on its platform to this day.¹⁷¹ It is also worth noting

¹⁶⁷ Kurt Wagner, *Here’s How Facebook Allowed Cambridge Analytica to Get Data for 50 Million Users*, Vox (Mar. 17, 2018, 12:47 PM PDT), <https://www.vox.com/2018/3/17/17134072/facebook-cambridge-analytica-trump-explained-user-data>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Meta Terms of Service §§ 3.1-3.2 (available at <https://www.facebook.com/terms.php>) (last visited Dec. 11, 2024) (“**3. The permissions you give us:** We need certain permissions from you to provide our services:

1. Permission to use content you create and share: ... ¶ Specifically, when you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-

that Elon Musk may have purchased Twitter to aid Donald Trump’s social media strategy in his subsequent 2024 presidential campaign; fulfilling the role Cambridge Analytica played in 2016.¹⁷²

As this scandal demonstrates, extraordinarily consequential questions about data and democracy, and data and individual liberty, “must be at the core of our concern today.”¹⁷³ However, as stated by Kapczynski: “By mapping the law of data capitalism as a series of doctrines, statutes, and underlying logics, we can begin to see how law, legal thought, and technical systems have worked together to enable substantial new forms of private power. We can also explore the levers we have to tame them.”¹⁷⁴ Drawing on this insight, in the next section I explore how the Supreme Court’s interpretation of the First Amendment has enabled corporate power’s targeted manipulation of the political and social views expressed by millions of American voters.¹⁷⁵

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¹⁷² Cf. James Clayton & Peter Hoskins, *Elon Musk Takes Control of Twitter in \$44bn Deal*, BBC NEWS (Oct. 28, 2022), <https://www.bbc.com/news/technology-63402338> (“[Musk] said he would reverse bans on suspended users, which could include former US President Donald Trump, who was excluded following the Capitol riot in January 2021.”); Greg Sargent, *Elon Musk’s Stunning \$250 Million Favor to Trump Should Wake Up Dems*, THE NEW REPUBLIC (Dec. 9, 2024), <https://newrepublic.com/article/189147/musk-250-million-campaign-finance>. (“Elon Musk spent at least \$250 million to help billionaire Donald Trump win the White House. One key part of that spending came in the form of the \$20 million Musk dumped into a brazen pro-Trump propaganda campaign ... ¶ How many low-information voters this reached is unknown.”).

¹⁷³ Kapczynski, *supra* note 5, at 1467.

¹⁷⁴ *Id.*

¹⁷⁵ Balkin, *supra* note 13, at 980 (“There is a large literature criticizing the judicial doctrines of the First Amendment and how they are slanted toward the interests of corporations (and capital generally) in the Second Gilded Age. The most obvious examples are the federal courts’ recent decisions on commercial speech and campaign finance regulation.”).

III. THE FIRST AMENDMENT, DEMOCRACY, AND INFORMATION CAPITALISM

The First Amendment states in part: “Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for redress of grievances.”¹⁷⁶ While the words “free expression” are not explicitly stated anywhere in the Amendment, in *West Virginia State Board of Education v. Barnette*, a case that considered whether a state may compel students to recite the pledge of allegiance, the Supreme Court stated:

“It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish ... But here, the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind.”¹⁷⁷

Thus, according to the Court, protection of an individual’s right to freely express their ideas and opinions (or not to as the case may be) is clearly a central theme of the First Amendment. However, as the above quote from *Barnette* demonstrates, under certain circumstances, the Court has recognized that there is a societal interest in suppressing dangerous or harmful speech that outweighs the value of protecting such speech.¹⁷⁸

¹⁷⁶ U.S. CONST. amend. I.

¹⁷⁷ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943).

¹⁷⁸ See CALVIN MASSEY & BRANNON P. DENNING, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 753-54 (7th ed. 2023).

A. The Purposes of the Free Expression Guarantee

Ideally, when balancing the societal interest in question, “the Court measures the value of speech in terms of its connection to the purposes of the free expression guarantee.”¹⁷⁹ First, the liberty of individuals to freely express their ideas are indispensable for a democratic society to self-govern.¹⁸⁰ Specifically, the free expression of ideas helps to prevent entrenched political and economic power from capturing the levers of Government for too long, and aids in forestalling political violence by those defeated in political contests.¹⁸¹ Relatedly, in debating ideas, individuals within a democratic society develop “the virtues of [social] tolerance and self-restraint”; especially important in large, culturally diverse societies like the United States.¹⁸²

Second, the free expression of ideas is necessary for individuals within society to discern truth from falsehood.¹⁸³ John Stuart Mill, in his book *On Liberty* “argued that it was futile to suppress truth, for truth always triumphs over persecution, no matter how long it takes for truth to withstand [all] attempts to suppress it. Moreover, said Mill, free expression of false ideas is necessary, since conflict [with] error is essential to a clear apprehension [of] truth. Finally, said Mill, the conflicting doctrines, instead of being one true and the other false, [may] share the truth between them; and the nonconforming opinion [may be] needed to supply the remainder of the truth.”¹⁸⁴

¹⁷⁹ *Id.* at 754.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 755.

¹⁸³ *Id.* at 754.

¹⁸⁴ *Id.* (quoting JOHN STUART MILL, *ON LIBERTY* (1859)) (internal quotations omitted).

Third, the protection of free expression also helps individuals in developing moral virtue.¹⁸⁵ “[H]owever our moral compass is calibrated, our ability to make moral choices—to opt for good and to reject evil—requires that we be free to choose. The process of moral deliberation often involves the expression of views, which are then open to reconsideration when others reply or react to expressed sentiments.”¹⁸⁶ Lastly, free expression is necessary for the full flourishing of human beings; that is for the development of a one’s own character, ideas, morality and viewpoints.¹⁸⁷ However, as Cohen points out, “[s]cholarly and popular critiques of contemporary free speech jurisprudence have noted an attitude of unquestioning deference to the political power of money. Rather than sheltering the ability to speak truth to power ... the contemporary First Amendment shelters power’s ability to make and propagate its own truth.”¹⁸⁸

B. How the Corporation as Speaker Imperils American Democracy

Chief among the Supreme Court’s many recent questionable First Amendment cases stands *Citizens United v. FEC*. At issue was a federal prohibition on corporations and unions using money drawn from their general treasuries to advocate for their preferred candidates “or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.”¹⁸⁹ An electioneering communication was defined as any broadcast communication that both “refers to a clearly identified candidate for Federal office” and that

¹⁸⁵ *Id.* at 755.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1120 (2015) (available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3582&context=wmlr>).

¹⁸⁹ *Citizens United v. FEC*, 558 U.S. 310, 337 (2010).

reaches over 50,000 people in a State.¹⁹⁰ Importantly, the federal statute at issue *did not* include a similar prohibition on corporations and unions establishing political action committees for that purpose using a “separate segregated fund”¹⁹¹; meaning both corporations and unions had other avenues available to express their political viewpoints. In striking down the prohibition, Justice Kennedy writing for the Court stated, the federal prohibitions were “classic examples of censorship”;¹⁹² stating further, the “prohibition on corporate independent expenditures [was] thus a ban on speech.”¹⁹³ In so doing, and in the reasoning he used to justify the majority’s opinion, Justice Kennedy accepted without question the notion that a corporation spending money to purchase political influence is, always and everywhere, identical to speech.

To reach its decision, the majority had to overturn a two-decade-old precedent set in *Austin v. Michigan Chamber of Commerce*.¹⁹⁴ In that case, the Court considered a nearly identical Michigan prohibition on corporate election expenditures.¹⁹⁵ The Michigan law, likewise, left open the possibility of corporations making “such expenditures from segregated funds used solely for political purposes.”¹⁹⁶ Justice Marshall, writing for the majority, stated that the Court had repeatedly “recognized that the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.”¹⁹⁷ In other words, society has a substantial interest in preserving the

¹⁹⁰ *Id.* at 321.

¹⁹¹ *Id.*

¹⁹² *Id.* at 337.

¹⁹³ *Id.* at 339.

¹⁹⁴ *Id.* at 365. (“*Austin* should be and now is overruled.” (internal citation omitted)).

¹⁹⁵ *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652, 654 (1990).

¹⁹⁶ *Id.* at 655.

¹⁹⁷ *Id.* at 659 (internal quotations omitted) (citing *FEC v. NCPAC*, 470 U.S. 480, 500-501 (1985); and *FEC v. Mass. Cit. for Life*, 479 U.S. 238, 257 (1986)).

integrity of its democratic systems and institutions from the corrupting influence of institutionalized money, which justifies placing limits on corporate access to the political system. In upholding the Michigan law, Justice Marshall clarified that the fear of express quid pro quo corruption (bribery) *was not* what the Michigan legislature was intending to regulate. Instead, stated Marshall:

“Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas ... We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the Michigan law]; rather, *the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures*. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions.”¹⁹⁸

Thus, when the majority in *Citizen's United* overturned *Austin*, the Court rejected the idea that the government has a substantial interest in preserving one of the main purposes of the free expression guarantee; that of protecting democratic institutions from the corrupting influence of unencumbered entrenched economic power—that democracy should instead be subjugated to it. Chillingly, as pointed out by Justice Stevens in his dissent in *Citizen's United*:

“The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races ... after today, [states] *may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.*”¹⁹⁹

¹⁹⁸ *Id.* at 659-60 (emphasis added).

¹⁹⁹ *Citizens United*, 558 U.S. at 460 (internal citations omitted) (emphasis added).

Justice Stevens states elsewhere in his dissent that “[t]here are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.”²⁰⁰ One may be left wondering if this was not the intent of the majority’s opinion. It is also worth noting that conservatives on the Court had been setting the precedents necessary for the majority to decide *Citizen’s United* in this way since *Buckley v. Valeo* in 1976.²⁰¹

Also decided in 1976 was *Va. Pharmacy Bd. v. Va. Consumer Council*. There the Court held that a Virginia law that declared it unprofessional conduct for pharmacists to advertise the price of prescription drugs for sale was violative of the First Amendment.²⁰² Justice Blackmun writing for the majority stated: “Our question is whether speech which does no more than propose a commercial transaction, is so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government that it lacks all [constitutional] protection.”²⁰³ Even though the majority assumed that the interest in advertising pharmaceuticals was “purely an economic one[,]”²⁰⁴ the Court stated that answer was that “it is not.”²⁰⁵ In so doing, the Court overturned a precedent that had been in place for decades. In 1942, the Court stated unequivocally in

²⁰⁰ *Id.* at 449.

²⁰¹ See e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding expenditure limitations in general are substantial restraints “on the quantity and diversity of political speech,” and rejecting arguments that donations of money to political campaigns are merely expressive conduct and that limits on expenditures are only time, place, and manner restrictions; both justifying a more relaxed standard of review); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down a Massachusetts statute restricting expenditures made by banks and corporations that influence the vote on referendum proposals, and a Massachusetts Supreme Judicial Court holding that First Amendment rights of corporations are “limited to issues that materially affect its business, property, or assets.”).

²⁰² *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 749-50, 762 (1976).

²⁰³ *Id.* at 762 (internal citations omitted) (internal quotations omitted).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

Valentine v. Chrestensen that “the Constitution imposes no such restraint on government as respects purely commercial advertising.”²⁰⁶

Thus, the *Va. Pharmacy* Court used constitutional law to place an gigantic hurdle in front of legislatures attempting to regulate the commercial conduct of corporations in the interest of the public good; and did so, astoundingly, by proclaiming that hindering the people’s democratically elected representatives was necessary for the preservation of individual free expression. The Virginia legislature “statutorily declared [the practice of pharmacy] to be a professional practice affecting the public health, safety and welfare ... subject to regulation and control in the public interest[,]”²⁰⁷ yet the Court substituted its own determination of what was in the best interest of the people of Virginia when it stated “society also may have a strong interest in the free flow of commercial information”²⁰⁸; casting aside any allegiance the *Va. Pharmacy* Court had to the structural democratic protections of both separation of powers and federalism enshrined in the Constitution.

The problem with the idea of a corporation as a speaker was pointed out by Justice Stevens in his dissent in *Citizen’s United*. He stated, “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.”²⁰⁹ As Justice Stevens pointed out, because corporations are entities created under the law, separate and apart from any actual citizen, when a corporation speaks it “is derivative speech, speech by proxy.”²¹⁰ Thus, regulations that impact a corporation’s ability to participate in the political system “may affect the way in which

²⁰⁶ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

²⁰⁷ *Va. Pharmacy Bd.*, 425 U.S. at 750 (internal quotation omitted).

²⁰⁸ *Id.* at 764.

²⁰⁹ *Citizens United*, 558 U.S. at 466.

²¹⁰ *Id.*

individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice.”²¹¹ Justice Stevens pointed out the inanity of the idea of a corporation as a speaker deserving of First Amendment protections elsewhere in his dissent:

“Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful ... Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.”²¹²

That gives rise to the question of who is actually participating in democratic debates when a corporation spends money to engage in the political process? And for what purposes do they do so? According to Greenwood, “[c]orporations are managed on behalf of the fictional shareholder with no interests other than its investments—not on behalf of real people.”²¹³ Thus, when a corporation enters into the political arena, it does not do so in the same way as real people, who must “balance competing values, compare their own needs and those of others important to them, and make difficult choices between various aspects of our too-finite lives.”²¹⁴ Rather, the neoliberal managers who make these decisions on behalf of the corporation are concerned solely with maximizing the share value of some nebulous fictional shareholder.²¹⁵ Greenwood is frank about the perils of allowing unfettered corporate spending in the political arena:

²¹¹ *Id.*

²¹² *Id.* at 467.

²¹³ Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1049 (August 1998) (available at https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1082&context=faculty_scholarship).

²¹⁴ *Id.*

²¹⁵ *Id.*

“If corporate managers are acting as the law and ordinary role morality expect of them, they will set aside their personal politics and cause the company to enter the political fray only in pursuit of profit. The decision to lobby, that is, should be made in just the same way as the decision to build a new factory—by evaluating the risk-adjusted present value of the expected net returns and comparing it to available alternatives. If it is more profitable to convince the legislature or the regulatory apparatus to remove a regulation than pay a fine, or comply with the law, then the firm should lobby, regardless of the managers’ private views about whether the legal change is a good one for the country as a whole.”²¹⁶

By evaluating the motivations of a corporation when spending money to influence politicians, the possibility of rampant corruption becomes evident. And as Justice Stevens points out in his dissent in *Citizen’s United*: “Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind.”²¹⁷

C. Big Data and the First Amendment

The threat to the constitutional foundations of American democratic institutions through the constitutionalization of protections that favor information barons was on full display in the Court’s decision in *Sorrell v. IMS Health, Inc.* Specifically, this case involved the predatory behavioral targeting practices of Big Data, and the majority’s opinion foreshadows the way in which Courts are poised to interpret regulatory responses to these practices moving forward. The Vermont legislature passed a law that restricted “the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors ... for marketing purposes, or used for marketing by pharmaceutical manufacturers.”²¹⁸ The Vermont law left open the possibility that the proscribed information could be disseminated for certain socially beneficial

²¹⁶ *Id.*

²¹⁷ *Citizens United*, 558 U.S. at 447.

²¹⁸ *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 557 (2011).

purposes such as health care research; legal compliance and law enforcement; and educating patients on treatment options.²¹⁹ In the commercial context, however:

“Many pharmacies sell this information to ‘data miners,’ firms that analyze prescriber-identifying information and produce reports on prescriber behavior. Data miners lease these reports to pharmaceutical manufacturers subject to nondisclosure agreements. Detailers, who represent the manufacturers, then use the reports to refine their marketing tactics and increase sales.”²²⁰

Justice Kennedy, writing for the Court, stated effusively that, corporate marketeers “can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception.”²²¹ Justice Kennedy stated further, that the data mining practices of pharmaceutical manufacturers “enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message.”²²²

In passing the legislation, the Vermont legislature specifically identified the numerous public protection justifications for adopting the restriction, all of which significantly furthered the public interest.²²³ The legislature found: 1) that the information conveyed by pharmaceutical detailers about their brand-named products’ safety and effectiveness was often one-side; 2) that due to time constraints and a quickly changing pharmaceutical market, doctors relied on the information provided by pharmaceutical detailers typically based on incomplete or biased information; 3) that the marketing practices of pharmaceutical detailers led to higher prices of both health care and health insurance by encouraging the excessive reliance on new

²¹⁹ *Id.* at 559-60.

²²⁰ *Id.* at 558.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 596 (J. Breyer, dissenting).

brand-name drugs before their effectiveness was determined as compared with older and less expensive generic alternatives; 4) that, specifically, the use of prescriber-identifying data by pharmaceutical detailers to target marketing messaging contributed to increasing healthcare prices; and 5) that repeated marketing visits by pharmaceutical detailers were “tantamount to harassment.”²²⁴

In declining to impose an injunction on the Vermont law at issue, the United States District Court for the District of Vermont found that pharmaceutical manufacturers were essentially the only paying customers of pharmaceutical data brokers; and that the Vermont Legislature's determination that behavioral targeting by pharmaceutical detailers was an effective marketing tool used to increase sales of new drugs was supported in the court record.²²⁵ Nevertheless, the Second Circuit reversed and remanded, holding that the Vermont law unduly burdened “the speech of pharmaceutical marketers and data miners without an adequate justification.”²²⁶ In affirming the Second Circuit’s decision, the majority agreed that “[t]he law on its face burdens disfavored speech by disfavored speakers.”²²⁷ Thus, the Court likened large, for-profit, multinational pharmaceutical manufacturers to political minorities that have limited ability to find purchase for their viewpoints with the majority of the American people.²²⁸

²²⁴ *Id.* at 560, 576.

²²⁵ *Id.* at 562 (internal citation omitted).

²²⁶ *Id.*

²²⁷ *Id.* at 564.

²²⁸ *But Cf.* Abbey Meller & Hauwa Ahmed, *How Big Pharma Reaps Profits While Hurting Everyday Americans*, CTR. AM. PROGRESS (Aug. 19, 2019), <https://www.americanprogress.org/article/big-pharma-reaps-profits-hurting-everyday-americans/> (“Americans spent \$535 billion on prescription drugs in 2018, an increase of 50 percent since 2010. These price increases far surpass inflation, with Big Pharma increasing prices on its most-prescribed medications by anywhere from 40 percent to 71 percent from 2011 to 2015. ¶ Moreover, pharmaceutical companies receive substantial U.S. government assistance in the form of publicly funded basic research and tax

Ignoring the Vermont legislature’s stated reasons for passing the restriction, the Court then decreed that the legislature designed the law “to impose a specific, content-based burden on protected expression [and] that heightened judicial scrutiny [was] warranted.”²²⁹ No longer was the Vermont law a reasoned regulatory response to a problem detrimentally impacting the citizens of Vermont, but now, by judicial fiat, the Vermont legislation was transfigured into an oppressive attempt to impermissibly deny the constitutional right of Big Pharma to peddle drugs. Again, disregarding notions of both separation of powers and federalism, the Court then stated that “the State contends that its law is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship [and] argues that [the legislation] is integral to the achievement of policy objectives—namely, improved public health and reduced healthcare costs.”²³⁰ The Court then stated astonishingly: “*Neither justification withstands scrutiny.*”²³¹

Justice Breyer, in his dissent, made clear the threat that the majority’s opinion poses to democratic legitimacy:

“Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways, to apply a ‘heightened’ First Amendment standard of review whenever such a program burdens speech *would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives.*”²³²

breaks, yet they continue to charge exorbitant prices for medications. But the issue goes beyond cost. In America, more than 1 million individuals suffer from Type 1 diabetes, a condition where the body cannot make insulin, which is essential for getting glucose (also known as blood sugar) into cells from the bloodstream. Without insulin, glucose accumulates in the bloodstream, causing dangerously high blood sugar levels. Among all Americans suffering from diabetes, at least 1 in 45 have said that they engaged in insulin rationing—a tactic of using less insulin than is needed in order to make the doses last longer—as a direct result of the skyrocketing price of the drug.” (internal citations omitted).

²²⁹ *Sorrell*, 564 U.S. at 565.

²³⁰ *Id.* at 572

²³¹ *Id.* (emphasis added).

²³² *Id.* at 584-85 (emphasis added).

Justice Breyer also pointed out that the majority’s opinion opened a route for institutionalized money to escape the regulatory review regime enacted by Congress through the Administrative Procedure Act (APA), which includes a judicial review standard more deferential to legitimate regulatory objectives:

“Such regulatory actions ... would normally be subject to review under the Administrative Procedure Act to make certain they are not ‘arbitrary, capricious, [or] an abuse of discretion.’ In an appropriate case, such review might be informed by First Amendment considerations. But regulatory actions of the kind present here have not previously been thought to raise serious additional constitutional concerns under the First Amendment. *The ease with which one can point to actual or hypothetical examples with potentially adverse speech related effects at least roughly comparable to those at issue here indicates the danger of applying a ‘heightened’ or ‘intermediate’ standard of First Amendment review where typical regulatory actions affect commercial speech[.]*”²³³

Once again, the Court erected a barrier in front of legislatures enacting regulatory regimes to protect citizens from the predatory profit-seeking machinations of institutionalized money, but this time it did so by creating a pathway for Big Data to maneuver around the APA. Additionally, Justice Breyer also warned that the majority’s opinion risked returning the nation to long-abandoned *Lochner* Era jurisprudence:

“[T]he Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists. *By inviting courts to scrutinize whether a State's legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today's majority risks repeating the mistakes of the past in a manner not anticipated by our precedents.*”²³⁴

²³³ *Id.* at 587 (emphasis added) (internal citations omitted).

²³⁴ *Id.* at 591-92 (emphasis added).

As pointed out by Cohen, “[i]f every regulation of information flows must survive First Amendment scrutiny, meaningful governance becomes increasingly difficult and, paradoxically, so does meaningful protection of expressive liberty.”²³⁵ And once again, one may be left to wonder if this was not the *Sorrell* majority’s objective.

IV. RETHINKING FIRST AMENDMENT JURISPRUDENCE FOR A NEW PROGRESSIVE ERA

As outlined extensively above, the information capitalism of the new Gilded Age “can cause extraordinary harm and entrench extraordinary privilege.”²³⁶ However, as history teaches, no cultural hegemony lasts in perpetuity.²³⁷ Over the course of human civilization, empires have risen and empires have fallen. At the height of the Roman Republic,²³⁸ its citizen may not have been able to envision the rise of the Roman Empire hundreds of years later.²³⁹ And as the Roman Empire stretched clear across the Mediterranean world, the hubris of its rulers would not have allowed them to imagine that it would ever fall.²⁴⁰ But, eventually, it did.²⁴¹ The Dark Ages eventually led to the Enlightenment,²⁴² and Age of Imperialism eventually gave way to

²³⁵ Cohen, *supra* note 180, at 1125.

²³⁶ *Id.*

²³⁷ Cf. Assaf, *supra* note 31, at 268 (“The culmination of a social change is when it becomes part of the law. Then it starts the process of becoming fully accepted and internalized. Just as today we can no longer imagine slavery, it may well be that had the courts upheld the laws banning racist speech, that kind of speech would have been much more socially objectionable today. And, if a law banning the distribution of products of child labor or cosmetic products that were tested on animals is enacted today, perhaps in a few decades we will be unable to imagine the possibility of using such products. Therefore, the hegemony of the capitalist values in our legal discourse creates an obstacle to one of the most important social goals.”).

²³⁸ See generally *The Roman Republic*, KHANACADEMY, <https://www.khanacademy.org/humanities/world-history/ancient-medieval/roman-empire/a/roman-republic> (last visited Dec. 13, 2024).

²³⁹ See generally *The Roman Empire: A Brief History*, MILWAUKEE PUBLIC MUSEUM, <https://www.mpm.edu/research-collections/anthropology/anthropology-collections-research/mediterranean-oil-lamps/roman-empire-brief-history> (last visited Dec. 13, 2024).

²⁴⁰ “As long as the Coliseum stands, Rome shall stand; when the Coliseum falls, Rome will fall; when Rome falls, the whole world will fall.” – Venerable Bede (<https://www.goodreads.com/quotes/8284356-as-long-as-the-coliseum-stands-rome-shall-stand-when>).

²⁴¹ MILWAUKEE PUBLIC MUSEUM, *supra* note 230.

²⁴² See generally RICHARD E. RUBENSTEIN, *ARISTOTLE’S CHILDREN: HOW CHRISTIANS, MUSLIMS, AND JEWS REDISCOVERED ANCIENT WISDOM AND ILLUMINATED THE MIDDLE AGES* (2003).

post-colonialism.²⁴³ After the long night of chattel slavery and Jim Crow, eventually broke the new dawn of the Civil Rights Era.²⁴⁴ And the first Gilded Age resulted in the first Progressive Era.²⁴⁵ Likewise, the cultural hegemony of information capitalism will eventually yield to a new form of organizing economic life. As stated by Balkin: “What we did before, during the First Gilded age at the end of the nineteenth century, we can do again, in the Second Gilded Age, at the beginning of the twenty-first century.”²⁴⁶ The task now is to lay the groundwork for that forthcoming new Progressive Era. As stated by Martin Horwitz when recounting the New Deal revolution in constitutional law, “[a] constitutional revolution can take place only when the intellectual ground has been prepared.”²⁴⁷

In *Munn v. Illinois*, decided in 1876, the Court upheld an Illinois statute that placed a price cap on the what a cabal of Chicago grain elevator operators could charge against a constitutional challenge.²⁴⁸ The Court stated that “in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them.”²⁴⁹ The price charged for grain storage were “from year to year

²⁴³ See *Postcolonialism*, BRITANNICA, <https://www.britannica.com/topic/postcolonialism> (last visited Dec. 13, 2024) (“postcolonialism, the historical period or state of affairs representing the aftermath of Western colonialism; the term can also be used to describe the concurrent project to reclaim and rethink the history and agency of people subordinated under various forms of imperialism.”)

²⁴⁴ See generally THE 1619 PROJECT (Nikole Hannah-Jones et al. eds. 2021).

²⁴⁵ Balkin, *supra* note 13, at 1012 (“As the First Gilded Age drew to a close near the end of the nineteenth century, things looked pretty grim for American democracy. Government was essentially for sale. America was dominated by what Teddy Roosevelt called ‘the great malefactors of wealth.’ Americans seemed locked into a political economy of ever increasing oligarchy and corruption. And if you had asked people about American politics in 1895, they might well have despaired about the future of American democracy. ¶ But we know what happened after that. There was a renaissance of reform and an era of gradual improvement of American democracy, not perfect in all respects, but certainly better than things stood at the end of the nineteenth century.”).

²⁴⁶ *Id.*

²⁴⁷ Cohen, *supra* note 180, at 1139 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 3 (1992)).

²⁴⁸ *Munn v. Illinois*, 94 U.S. 113 (1876).

²⁴⁹ *Id.* at 131.

agreed upon and established by the different elevators or warehouses in the city of Chicago.”²⁵⁰

Chief Justice Waite, writing for the majority, stated that “it is apparent that all the elevating facilities through which [the] vast productions of seven or eight great States of the West must pass on the way to four or five of the States on the seashore may be a virtual monopoly.”²⁵¹

Chief Justice Waite stated further that these few businesses stood at “the very gateway of commerce, and take toll from all who pass.”²⁵² The Court stated that:

“[W]hen private property is affected with a public interest, it ceases to be [of private right] only. This was said by Lord Chief Justice Hale more than two hundred years ago ... and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control.”²⁵³

Quoting Lord Ellenborough, the Court stated elsewhere:

“There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it, but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.”²⁵⁴

²⁵⁰ *Id.*

²⁵¹ *Id.* (internal citations omitted).

²⁵² *Id.* at 132 (internal citations omitted).

²⁵³ *Id.* at 126.

²⁵⁴ *Id.* at 127-28.

Munn v. Illinois is the foundational case that establishes the duties at the heart of both common carrier law and the utility regulatory regime within the United States.²⁵⁵ It is in light of this historical jurisprudence that Balkin introduces the concept of information fiduciaries.²⁵⁶

Balkin defines an information fiduciary as “a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship.”²⁵⁷ The core insight behind the idea of information fiduciaries is that certain types of information gathering constitutes a matter of public concern—in other words, becomes clothed with a public interest—due to the nature of the societal relationships under which that information is gathered.²⁵⁸ Balkin elucidates this insight in relation to the information barons of the new Gilded age by way of an analogy:

“Suppose that a doctor, lawyer, or accountant sold personal information about their clients to a data broker. Suppose that they used personal information to manipulate a client's actions for the doctor, lawyer, or accountant's benefit. Or suppose that they simply disclosed it in order to gain a business advantage at the expense of their client. If they did any of these things, they would likely be liable for a violation of professional conduct, which courts might characterize either as a breach of a duty of professional obligations or as professional malpractice.”²⁵⁹

²⁵⁵ Cf. *Common Carrier*, LEGAL INFO. INST. AT CORNELL UNIV., https://www.law.cornell.edu/wex/common_carrier (last visited Dec. 20, 2024) (“A common carrier is a person or a commercial enterprise that transports passengers or goods for a fee and establishes that their service is open to the general public. Typical examples of common carriers include, a shipowner, railroad, airline, taxi service, etc. A private carrier, on the other hand, is a person or a commercial enterprise that only agrees in particular circumstances to transport passengers or goods. Private carriers differ from common carriers because they don’t establish that their service is open to the general public.”); TROY A. RULE, *RENEWABLE ENERGY: LAW, POLICY AND PRACTICE* 42 (2nd ed., 2021) (“In most states, utility laws restrict not only where an investor-owned utility may sell its power but also how much it charges, the basic terms of its agreements with customers, and even the utility’s capital expenditures and operating budget. A primary justification for such strong regulation is that universal access to reliable, reasonably-priced electricity service is so critical to a modern economy’s stability and growth that it’s simply too risky to leave providers of the service to their own devices.”)

²⁵⁶ See generally Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016) (available at <https://openyls.law.yale.edu/handle/20.500.13051/4692>).

²⁵⁷ *Id.* at 1209.

²⁵⁸ See *Id.* at 1205.

²⁵⁹ *Id.*

In the same way that the trust relationships between these professionals and their clients give rise to fiduciary duties, the trust relationship that citizens have with the information barons of the 21st century must give rise to similar fiduciary obligations.²⁶⁰

Fiduciary duties are coincident with the professional trust relationships because the law assumes “that professionals and their clients do not stand on equal footing.”²⁶¹ In other words, due to “the asymmetry of skill and understanding between professionals and their clients, ... clients must put themselves in the hands of professionals and trust them to act in the interest of the client.”²⁶² Likewise, information barons must be subjected to fiduciary obligations for similar reasons. First, as end-users of information platforms, citizens are placed in a position of significant vulnerability relative to the owners of these platforms, due to the amount of data access granted to them by the adhesion contracts they force users to agree to in exchange for utilizing the platform.²⁶³ Also, because of the claims of proprietary information that the owners of these platforms make to shield the way they operate, end-users typically do not have the expertise and knowledge to properly protect themselves from harm.²⁶⁴ Second, because the information barons “stand at the very gateway of commerce,”²⁶⁵ end-users find themselves “in a position of relative dependence with respect to these companies.”²⁶⁶ Third, typically, “online service providers hold themselves out as experts in providing certain kinds of services in

²⁶⁰ *Id.* 1223 (“By presenting themselves as trustworthy collectors and keepers of our individual data, and by emphasizing that, for reasons of security and competitiveness, they cannot be fully transparent, digital organizations induce relations of trust from us, so that we will continue to use their services.”).

²⁶¹ *Id.* At 1216.

²⁶² *Id.*

²⁶³ *Id.* at 1222.

²⁶⁴ *Id.*

²⁶⁵ *Munn v. Illinois*, 94 U.S. at 132.

²⁶⁶ Balkin, *supra* note 246, at 1222.

exchange for [end-users'] personal information."²⁶⁷ And lastly, information barons know that they hold valuable data that might be used to the detriment of end-users, and bury protections for their predatory business practices deep "in the fine print of their privacy policies and in the code of the company's information infrastructure."²⁶⁸

In traditional fiduciary relationships, information obtained about clients over the course of the relationship *is not* considered public discourse subject to standard First Amendment protections.²⁶⁹ Again Balkin elucidates this point by way of analogy:

"[S]uppose a lawyer or doctor becomes a presidential candidate and reveals embarrassing information about clients to bolster his or her electoral chances. Even though the content of the speech is political and its purpose is political, the speech is not immune from regulation, because it is an abuse of a confidential relationship in which the candidate was an information fiduciary. If this were not so, then any professional could get around malpractice law by claiming to be ... a politician."²⁷⁰

If accepted by a restructured Supreme Court in the forthcoming new Progressive Era, Balkin's idea of fiduciary duties provides an off ramp from this neo-Lochnerian highway to hell currently being enabled by the Court's recent First Amendment jurisprudence.²⁷¹

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 1219

²⁷⁰ *Id.*

²⁷¹ Another idea worth considering is viewing the data holdings of large for-profit information platforms as a bailment which also gives rise to certain duties that the bailee must undertake incident to the bailment relationship. See generally *Chapter 18: Bailments and the Storage, Shipment, and Leasing of Goods*, in INTRODUCTION TO THE LAW OF PROPERTY, ESTATE PLANNING AND INSURANCE v. 1.0 (Saylor Academy ed. 2012), https://saylordotorg.github.io/text_introduction-to-the-law-of-property-estate-planning-and-insurance/s21-bailments-and-the-storage-shipment.html (last visited Dec. 24, 2024). Similarly, a reinvigoration of the Court's drowning out doctrine in relation to corporate speech may also be worth considering. "Courts have recognized that someone who speaks so loudly and belligerently as to drown out other speech cannot invoke his own First Amendment rights to be free from state restriction." SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 771 (6th ed. 2022).

V. CONCLUSION

During the first Gilded Age industrial barons directly purchased the political power necessary to enact the legal regimes that made their rampant graft, exploitation, and corruption possible. Likewise, information barons of the 21st century are following in the footsteps of their corporate forebearers in this new Gilded Age. This time, however, a small group of neoliberal capitalists have utilized their nearly unimaginable wealth to push an economic ideology designed to entrench a very specific oppressive, socially destructive hegemonic social order to allow for the perpetual accumulation of ever more wealth for themselves. Utilizing the digital technology that has been in development since the middle of the last century, these neoliberals have chillingly developed mechanisms to behaviorally microtarget large swaths of voters to shape their individual political viewpoints in a manner largely obscured from the vast majority of the American people; bypassing the need to bribe politicians outright. Indeed, these neoliberals show no compunction in sacrificing democracy in order to enshrine protections for their Machiavellian machinations into law.

And the subscribers to this neoliberal economic ideology on the Supreme Court have been more than happy to assist their corporate benefactors in subverting American democracy. Since the 1970s, the Court has accepted disingenuous and dangerous First Amendment arguments designed to place legal road blocks in front of the people's democratically elected legislatures seeking to protect society and democracy over corporate profits; overturning decades of legal precedent in the process. This raises extraordinarily profound questions about the Court's legitimacy moving forward, and about the very nature of free expression itself. The threat posed to the survival of American democracy in this new Gilded Age is very chilling, and

very real. However, as history teaches, present circumstances never last in perpetuity. It must be remembered that “history doesn't repeat itself, but it does rhyme.”²⁷² The first Gilded Age brought about the first Progressive Era, and so too will the second Gilded Age eventually birth a new Progressive Era. The task for the time being is laying the intellectual and constitutional groundwork for that new Progressive future to emerge.

²⁷² See generally *Quote Origin: History Does Not Repeat Itself, But It Rhymes*, QUOTE INVESTIGATOR (Jan. 12. 2014), <https://quoteinvestigator.com/2014/01/12/history-rhymes/>.