CONTEXTUAL FREE SPEECH

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Cambridge University Press (forthcoming)

Preface

The protection of free speech is valued by all democracies. Its popularity in the United States extends far outside the circle of legal theorists, political scientists, and philosophers to the general population. The civic consciousness and sense of dignity free expression elicits is not solely attributable to the conspicuous place of the Free Speech Clause in the First Amendment to the United States Constitution. Its merit is in the importance of communications for individuals and representative democracy.

So great a constitutional guarantee cannot be captured by any generation of interpreters. Neither the framers nor contemporaries can claim the sagacity to articulate a universally accepted statement of speech rights. The general statement found in the Constitution has long been the subject of evolving constitutional meaning. Since the early twentieth century, the Supreme Court has been at the forefront of efforts to articulate the range of words, symbols, art, and other objects or activities that the First Amendment protects. Doctrines are typically contextual. While they all draw from the same source, there are unique tests, elements, and factors dealing throughout the range of relevant subjects such as public employee speech, government speech, and political speech. Context determines what is applicable, what needs to be balanced, and what considerations are beyond the points of pertinent legal disputes.

Discussions about the Free Speech Clause often focus on the personal or public value of expression without adequately weighing surrounding circumstances and other pertinent values. The dominant approaches to free speech often neglect and sometimes outright disdain the notion that it is a value to be balanced against other constitutional structures, rights, and procedures. A more nuanced approach, which I will defend in this book, requires policymakers to evaluate a full range of legally relevant considerations when dealing with challenges to government restrictions on expression–be they intellectual property laws, restrictions on terrorist posts on the Internet, obscenity regulations, commercial advertisements, judicial solicitations of donors, professional advice, student publications, violent video games, computer generated data, depictions of animal torture, or similarly complex issues. Put more simply, speech should not trump all other constitutionally protected interests.

So many aspects of our lives involve speech. The interest is not confined to academics and politicians. Various topics involving the constitutionality of free speech regularly appear in the news media, including discussions about campus codes and campaign financing. With so many segments of society chiming in differing views about the values of various types of communications is inevitable. Some individuals most favor entertainment, others politics or the arts. Pluralistic society countenances differing priorities of interest without enforcing orthodoxy. The legal realm, however, requires definitive definitions: It is one thing for constituents to disagree and quite another for the judiciary to provide inconsistent

guidelines for the resolution of cases and the drafting of legislation. Constitutional doctrine is necessary to prevent arbitrary government intrusion into the procedural and substantive rights of people to express themselves freely.

The judiciary is entrusted to provide clear guidance about constitutional principles. In the First Amendment realm, however, the Supreme Court has betimes relied on contradictory approaches, leaving scholars, journalists, politicians, and other citizens befuddled. A single theoretical construct would facilitate consistent doctrinal development. But identifying a unifying theme in the vast sea of topics associated with free speech carries all manner of pitfalls, from overlooking valuable guidance to oversimplifying analysis. The challenge is to expostulate an approach that is flexible enough to be contextual yet rigorous enough to provide objective guidance to judges.

I will argue that courts should evaluate whether speech plays a central or peripheral function in a dispute. Moreover, identifying the value of expression is relevant for adjudication. Communications enjoy the greatest protections when they further well-ordered representative democracy, whose function is to equally protected individual rights for the common good. This runs counter to judicial and scholarly interpretations that focus exclusively on relevant First Amendment doctrines. Whether a particular judicial decision is consistent with constitutional ideals should be judged by synthetic considerations of authoritative text, abstract reasoning, civic and pluralistic principles, doctrinal reflections, informational values, and rational applications of existing laws.

The right to self-expression is not solely based on the First Amendment. Take for example, the identification of freedom to communicate in public forums. The case law in that area is always discussed in the context of free speech.[1] The legitimacy of using streets to expostulates all manner of ideas is undeniable, but the doctrine is incomplete. In addition to the First Amendment, people's rights to speak in public forums can also involve the Privileges or Immunities Clause, which prohibits states from treating out of state speakers differently than domiciliaries. What is more, the First Amendment does not create the right of speech. It is rather an inalienable right of humanity that the Declaration of Independence identified as equally held by us all. Furthermore, the Ninth Amendment's preservation of unenumerated rights can be said to include self-expressions not directly spoken but exposed by art, theater, and so forth. A leading free speech scholar, Alexander Meiklejohn, conceived the First Amendment to be part of a broader constitutional guarantee of liberty:

> In our discussions of the Constitution, we commonly think that the clearest and most compelling expression of the "idea" of political freedom is given by the First Amendment. But in theory, and perhaps in practice, more penetrating insights are given by the Preamble's declaration that "We, the people of the United States … do ordain and establish this Constitution…," or by the Tenth Amendment's assertion that, while we have delegated some limited governing powers to our agents, we have reserved other powers to ourselves, or, finally, by the

provision of Article I, Section 2, that we have authority to exercise direct governing power in electing our representatives.[2]

Jurisprudence would do well to look beyond the Free Speech Clause to autonomous dignity, representative government, and equal rights to identify underlying principles relevant to the resolution of free speech cases.

The aim of this book is to is to articulate, assess, and critique contextual policies, arguments, and considerations of the First Amendment and to apply them to specific communicative challenges of the twenty-first century. Contextual interpretation involves a conversation about constitutional principles behind law, tradition, individuality, and the general welfare.

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Chapter 1

The First Amendment of the United States Constitution empowers individuals to participate in pluralistic society. It prevents government from inhibiting the exchange of ideas by restrictions on their messages and perspectives. Free speech is essential to self-governance, the development of personality, and the dissemination of information. Communications operationalize representative democracy and enable individuals to express organized thoughts, wondering musings, normative ideals, and novel notions.

The value of speech is not ad hoc but part of a unified principle of liberal equality for the common good. The Supreme Court has often been too piecemeal in assessing pertinent interests, leading to conflicting lines of precedents. Without a systematic methodology, pertinent personal, constitutional, statutory, and regulatory considerations, justices often brush aside concerns that gave rise to laws safeguarding or restricting speech. For instance in a recent case, the Court in *United States v. Stevens* found unconstitutional a federal statute prohibiting the distribution of videos depicting brutal violence committed against animals.[3] The majority downplayed nationwide policies against animal cruelty, which exist in all fifty sates, and articulated a grandiloquent notion of free speech without giving serious consideration to federal norms. The purveyors of animal violence and their audiences prevailed, while the majority discounted the victims, hardly giving any notice to the suffering of animals subjects. The decision limited legislative authority to protect vulnerable animals against brutal mutilation and violence. The First Amendment became a cudgel against congressional efforts to development a humane law reflecting the nationwide sensibility that video representation of actual animal cruelty could be curtailed without infringing on First Amendment interests. Moreover, the majority dismissively rejected the government's contention that crush videos are obscene, so prurient in content that a reasonable person would have found them patently offensive and bereft of cultural or literary value.[4] The case provides negligible consideration of First Amendment values, instead adopting categorical libertarian notions of free speech. The rights of persons wishing to sell and purchase depictions of cruelties were determinative with little evaluation of how the depictions effect public, constitutional values.

Free speech cases often involve a mix of values, all of which courts should consider in the context of specific facts giving rise to the case. In many circumstances, the adjudicator is presented with an aggregate number of irreconcilable differences, as when one party claims the right to post personal and embarrassing details about another on social media while the exposed party, to the contrary, claims the right to privacy or reputation. Only one party can prevail, under those circumstances, even though both assert legally cognizable harms. There may also be some amicable reconciliation to be reached between them, but then neither can be fully vindicated. In other cases, the harm may be singular, as for instance employment termination, but injuries may be compounded with only one among

them raising First Amendment issues. A government employer may have violated federal anti-discrimination laws, censored employee speech, and engaged in an unreasonable search. These scenarios give rise to various claims. In some cases, there will be contrary state interests–including security, preservation of government property, or educational goals–that judges will need to balance against free speech.

In cases where the state and private parties have conflicting, legally recognizable interests, judges must go through a full blown analysis of each party's arguments, the standards of review appropriate for evaluating them, and facts in the record supporting the several contentions. Resolution of these matters is not a categorical matter but one that should be balanced contextually. The key to contextual resolution is not becoming bogged down by judicially created categories but investigating the full panoply of individual rights, government interests, circumstances giving rise the complaint, and the material facts unique to each case. This is not a matter of ad hoc balancing, but sophisticated contextualization that neither underplays the First Amendment nor any other relevant legal criteria. Nor is the contextual mode of analysis a matter of eliding different constitutional provisions–as the Supreme Court joined the First Amendment and Equal Protection claims in *R.A.V. v. City of St. Paul*.[5] Each legal basis for relief or in defense should be parsed on its merits.

A. A Matter of Theory

Rather than developing a comprehensive theoretical framework for evaluating First Amendment cases, the Supreme Court has relied on libertarian perspectives and rigid definitions. In a 2015 decision, *Reed v. Town of Gilbert*, the Court relied on recent precedents to find a town violated the First Amendment by enforcing an ordinance that distinguished between political, ideological, and directional signs. The Court homogenized speech, holding that strict scrutiny applies to any law that on its face distinguishes the content of information.[6] Thereby, the Court denied the town's ability to differentiate between the communications of ideas and politics and the showing of geographic directions. Lost in the Court's black-and-white approach to content regulation were numerous other judicial precedents, in areas as diverse as obscenity and public employees, that recognize the legitimacy of regulations based on content and context.

The Court has not always been so acontextual: At various times, the justices have been mindful of conflicting concerns of private parties and governments. In a carefully parsed mid-twentieth century opinion, the Court found it unconstitutional for public schools to force Jehovah's Witness students to pledge allegiance to the flag of the United States. In that case, the majority demonstrated jurisprudential sensitivity to students' abilities desire to speak freely and to exercise religion without conforming to state loyalty demands.[7] Recent cases, on the other hand, have shunned the balancing of interests.

The Court's aversion to balancing in *Reed* and other cases in that camp seems at first glance to be unequivocal. The justices regard a "categorical balancing of the value of speech against its societal costs" to be "startling and dangerous."[8] Upon

closer examination, though, this statement may not be absolute. It does not discount all balancing, but only "ad hoc balancing," as the *Stevens* Court asserted.[9] That leaves open the types of balancing methods that are well accepted when the justices determine whether the government's restrictions on speech is based on substantial public interest; what's more, as Richard Fallon has demonstrated, balancing even appears in some version of the strict scrutiny review.[10] The Court's claim that its list of unprotected categories of speech is predicated by objective historical test[11] is belied by the Court's periodic abandonment of previously identified low value categories (such commercial speech) and addition of new ones (such as child pornography). The shift in what the majority characterizes to be protected and unprotected by the First Amendment, indicates that more is going on than a simple adoption of historical categories.

Rather than a necessary or objective reading of the First Amendment, the Court engages in a variety of arguments–historical, doctrinal, ethical, structural, pragmatic, or textual.[12] While the Roberts Court seeks to present itself as the expositor of the popular constitutional will, asserting that "[t]he First Amendment itself reflects a judgment by the American people,"[13] its holdings often strike popular and bipartisan statutes in favor of commercial interests.[14] With this statement, Roberts equated judge made doctrine on free speech with the will of eighteenth century framers.[15] A more authentic account of the evolution of legal interpretation is stated by Robert Post and Reva Siegel: "Throughout American history, in contexts both liberal and conservative, the Court has consistently interpreted the Constitution to reflect fundamental contemporary values. The Court has rarely regarded the Constitution as a petrified contract, fixed by terms ratified in the distant past."[16] The text of the Constitution is the starting point; the aspirations of the framing generation are important for identifying core, nation values and interpretation should not be nihilistic, but neither is it convincing for the Court to claim its development of free speech doctrine is predicated on some long established tradition that only the justices are empowered to divine.

A rigid method of interpretation is problematic because it requires judges to demarcate inflexible criteria that sometimes do not fit the case at bar. A categorical approach requires judges to review cases based on predetermined criteria rather than weighing the totality of the circumstances, conceiving litigants as individuals, and focusing on specific conflicts rather than rubrics from past decisions. Categoriality fails to adequately address counter arguments, often disregards conflicting legal reasons, and downplays facts in the record. The First Amendment is part of a broader scheme, one that protects opinions, institutions, and heterodoxy.

It does not stand alone but is part of a deeper constitutional design meant to advance the common good by establishing legal safeguards for inalienable rights, including speech. That maxim of public conduct harkens to the nation's founding. It is mandated by the Declaration of Independence and Preamble to the Constitution. Free speech is an essential principle of a society committed to "the equality of rights" for the benefit of the "common good."[17] In American, the right of speech and assembly were thought since at least the 1780s to be the people's privilege to

ascertain the common good.[18] Speech was regarded as a residual natural right, and that constitutions and other social compacts should be enforced to safeguard these and other residual rights for the common good.[19] The relation between free speech and the common good was generally accepted.[20] For instance, the Massachusetts Constitution provided:

> The people hae a right, in an orderly and peaceable manner, to assemble to cnsult upon the common good; give instructions to their representatives; and to request of the legislative body, y way of addresses, petitions, or remonstrances redress of the wrongs done them, and of the grievanes they suffer.[21]

In the anti-bellum period the constitutions of Vermont, New York, and Alabama specifically provided, "That the people have a right to freedom of speech, and the right to assemble together and consult for their common good."[22]

The First Amendment's normative value is integral to more central and fundamental function of constitutionalism, the preservation of representative democracy where individuals are treated fairly. That is a pragmatic feature, in the sense that Randy Kozel enunciated, establishing a central aspect of representative constitutionalism driven by practical and functional considerations.[23] A comprehensive constitutional approach sees the functional outcomes to only be justified when they contribute to the protection of the people's interests, as opposed to only benefitting particular interest groups. That is, institutions must hold fast to the values of civic governance in order to advance the hopes and aspirations of the individuals who compose the polity. And those aims go well beyond speech to encompass the dignity of each person and the collective will of the nation. Put more concretely, government cannot interfere in the communicative rights of individuals, except under circumstances when narrow restrictions are needed to advance other public goods such as security, intellectual property, or reputational dignity.

The Supreme Court's categorical approach to free speech is linked with libertarianism, which in the United States is the most influential philosophical perspective on the Free Speech Clause. It claims the mantle of many academics, supreme court justices, and civil liberties groups. More speech is regarded to be inevitably better–irrespective if its Nazi Party or Democratic Party speech–and government interference is met with suspicion as an affront to personal liberty. The view that speech stands out as the most important bastion of autonomy, rather than a key but not always most important element of representative democracy, has produced a formalistic approach to expressive freedoms.[24] The presumption in favor of expression has often led the Court to overlook or give short shrift to dignity interests at stake in disputes.

The First Amendment's guarantees should be understood in the context of a broader ideal of liberal equality, derived from the nation's core ethos, which is set out in the Declaration of Independence and Preamble to the Constitution. Those dictates of governance establish the purpose of representative democracy, binding on the entire federal structure. The polity is established to meet the needs of people against institutional injustices, including arbitrary censorship. The fundamental right

to express ideas, opinions, artistic views and so forth is linked to constitutional normativity that respects individuals, acknowledges their privacy, and understands the function of government to be for the betterment of people's social and civil standing.

Grounding the First Amendment in constitutional ethos has profound implications.[25] For one, it indicates that natural humans enjoy greater free speech rights than corporations. This conclusion, which I later explore in depth, has significant implications for free speech jurisprudence. The contextual approach distinguishes expressions of ordinary citizens and those of artificial entities. That distinction is informed by the circumstances under which a natural or corporate persons seeks to articulate a political, commercial, ideological, or individual views. On this subject, the Supreme Court's failure to weigh the gravity to representative democracy against commercial interest led it to hold campaign financing laws must treat corporate speech the same as natural people's speech.[26] Had the Court engaged in a hybrid assessment of all relevant factors it might have uncovered the extent to which campaign financing is tied to the elective franchise, which is a privilege unique to natural people but not commercial enterprises. Government, therefore, retains greater authority to regulate manipulative advertising than individual politicking.

The First Amendment advances the innate right human rights to articulate personal, civic, or descriptive thoughts. The right to express ideas freely, therefore, is not a grant from government, created by the Constitution, a cultural vestige, nor a matter of American legal tradition. The Amendment is, to the contrary, a public mandate to safeguard a liberty both citizens and denizens can demand to exercise, free of arbitrary government interference. Free speech is valued not merely because it is protected by the Bill of Rights but also because it is critical to the polity's commitment to dialogue for personal fulfillment and public benefit. Moreover, the U.S. commitment to free speech extends beyond existing law to the unenumerated commitment to protection of fundamental rights that are essential to the welfare of a representative democracy. That is not to say that positive law is not an important indicator of the evolution of social morality. Timothy Zick has rightly observed the dynamic relation between various parts of the Constitution can be identified intratextual comparison of the Constitution's language, precedents, historical meanings, and the contributions of social associations.[27] However, he fails to identify the core constitutional commitment to individual rights and social betterment that best identifies relationships between the First Amendment and other portions of the Constitution, such as the Due Process and Equal Protection Clauses, derive.

Understanding any law requires identifying its conceptual foundations. Application of law to any given case is a judgement based on specific facts that should stay true to the underlying ideals. Case-by-case judgments that fail to live up to principle create an incoherent body of law. Legal decisions unmoored from principles provide judges too much power to adjudicate disputes based on their subjective preferences. Once the core ideal of free speech is established, a test is

needed for examining factors and elements relevant to the resolution of cases and controversies. In a nation with a written constitution, such as the United States, text plays no small role in matters of interpretation, but it is not the end point. Other judicial factors are the interests of parties, the social effect of regulation, and alternative means of meeting the legitimate government goal.

While the foundation of the system remains stable, the law's elasticity allows for correction of previous legal errors by legislative policies, judicial corrections, or executive refinements. These changes also cannot happen in a vacuum. Legitimate modification or abandonment of past practices should be undertaken to achieve underlying functions of law, such as equal protection of political, artistic, or personal opportunities.

The core aim of the First Amendment is to protect open assertion, discourse, and debate. The constitutional significance of free speech is bound up with representative democracy. Unpackaged further, representative democracy is a system providing channels for individual articulation and establishing a bureaucracy whose aim is the pursuit political actions conducive to people's happiness. Communication is both an individual interest for self-fulfillment and a social one for articulating and persuading others how to achieve civic and legal fairness, justice, and electoral parity.

Judges presiding over First Amendment cases, therefore, cannot deviate from principles that are articulated in the nation's founding documents. However, the contours of free speech theory do not definitively provide unequivocally correct answers for the resolution of legal disputes. Decision makers must therefore advance the rule of law through interpretive methodologies that are sensitive to history, doctrine, social impact, and case-by-case evaluation. Free speech remains a bedrock of American law; this will not change so long as the United States Constitution remains the law of the land. But the mediums for spreading communications have greatly expanded from relatively rudimentary printing instruments existing in 1791, which informed the framers' understandings when they ratified the Bill of Rights. Application of an ancient constitution to issues about new information technologies and copyrighted digital materials requires contextual flexibility sufficient to apply existing precedents, to modify them when necessary, and, in more unusual circumstances, to overturn them. Theory should inform all decisions, both as to the validity of existing precedents and as to novel questions about free speech. Issues inevitably arise in courts that require the schematic advancement of our understanding about everything from incitement to press freedoms. Even as it guides courts faced with complex modern questions, the evolution of Free Speech doctrine must retain integrity to abiding, first principles.

The contextual approach to free speech diverges sharply from the rigid perspective of jurists like Justice Hugo Black, who asserted that the Free Speech Clause should be read as an absolute bar against government limitations on people's expressions of opinions and ideas.[28] His claim was textualist, purporting to rely exclusively on the actual wording of the Constitution. He focused on the First Amendment's wording: "Congress shall make no law . . . abridging the freedom of

speech. . .” Justice Black understood this provision to mean that any law limiting speech was unconstitutional. As he uncompromisingly put it, “I read ‘no law abridging’ to mean no law abridging.”[29] At first glance this claim seems plausible: after all, it requires judges to follow the letter of the Constitution. But closer examination makes it abundantly evident that the First Amendment should not be read literally; indeed, following it verbatim would result in the suppression of speech. By its explicit wording, the Amendment only restricts congressional abuses of authority against speakers, but the prohibition against abridging speech would be rendered virtually meaningless if it were not to also apply to the other two branches of government. Extension of the First Amendment’s restraints to the executive and judicial branches is the only reasonable extrapolation from a broader constitutional principle, prohibiting abuses of power and respecting the people’s fundamental rights, not directly required by the text.

There are a variety of problems, however, with rigid interpretive methodology. For one, it stifles the development of stare decisis and thereby harms the evolution of legal norms. The First Amendment is ancient and therefore in need of contemporary interpretations. For another, the formalistic view of speech overlooks a number of problems, not least of which is the First Amendment’s exclusive reference to Congress as the entity who cannot abridge speech, rendering it necessary to look outside the strict wording to prevent presidential or judicial censorship. Furthermore, it is unrealistic to believe a few words of the Constitution can categorically determine the outcome of an infinite number of case scenarios. The evolution of the First Amendment makes clear that it is an instrument that can evolve through time.

Identifying original intent for which the framers ratified the First Amendment is also insufficient for applying it to all contemporary cases. Over the years, the U.S. understanding of the First Amendment has become far more libertarian than it had been at the nation’s founding. The early republic held to a fairly narrow view of free speech, primarily as a prohibition against prior restraints. Even statements critical of the government were suspect and subject to prosecution. The fifth Congress, in 1798, adopted a notorious law prohibiting anyone from engaging in seditious speech, but the Supreme Court never formally overturned the Sedition Act.[30] A leading judge in 1799 defended the policy, “Without suppressing slander and sedition against the government, the support of public opinion cannot be preserved to it.”[31] This opinion was consistent with the view of the revolutionary times. An anonymous author in 1793 wrote, “Whosoever disturbs the peace, foments disturbance, excites sedition, or scatters discord, ought to be considered and treated as a public enemy.”[32]

While federalists supported the Sedition Act, democrats considered a gag law that suppressed “liberty of saying and doing what we please, and also that the liberty of the press is hereby infringed.” Federalists responded to the claim that the law violated the First Amendment by arguing that the Bill of Rights did not upend common law judgments against libel, which like the Sedition Act prohibited false claims harming objects’ reputations.[33] Framers of the Constitution were in so great a

disagreement about whether the Act was in keeping with common law or in violation of the Constitution that rather than repeal it the law simply lapsed on the eve of the Republican Thomas Jefferson taking the reins of presidential powers from John Adam's Federalist Administration.[34]

Despite its historic pedigry, contemporary scholars, across all theoretical leanings, and the Supreme Court, in *New York Times v. Sullivan*, regard that statute to have been a grave misuse of power, violative of a foremost First Amendment principle against government suppression of statements critical of its policies.[35] Yet the historical record, which contains both defenses and attacks about the public value of sedition law, cannot resolve the meaning of the First Amendment.[36] That task is left to each generation that should look to text, history, principle, and aspiration to better achieve the ideals of the First Amendment.

Contemporary free speech doctrine is quite fidifferent than its late eighteenth and early nineteenth century counterparts. As one author synthesized that period, "Individuals who joined together in a social contract . . . after all, had no reason to immunize efforts to lie or mislead. Nor did they need to prevent the government from preserving norms of civility and morality, like rules against blasphemy and profane swearing. Indeed, the Founders constantly mentioned that the inalienable right to speak was limited to those who spoke with decency and truth, and state governments routinely and uncontroversially restricted plenty of speech that did not directly violate the rights of others."[37] While history is not unequivocally determinitive of contemporary disputes, its insights, moral teachings, and objective facts are important to current understanding of the fundamental principles for safeguarding free speech.

By identifying and applying first principles to specific decisions, the adjudicator can avoid making ad hoc judgements. Doctrine is nevertheless always the product of case-by-case decisions, which necessarily implies case-by-case reasoning. Stare decisis is essential for advancing legal culture within the traditional parameters of U.S. law. The protection of free expression should proceed on a firm normative basis, not just case-by-case reasoning that relies exclusively on past judicial tests. A normative approach creates aspirational values that are crucial for resolving existing cases and for critiquing previous ones. Without normative interpretation, judges are thrown on a sea of facts that often do not fit neatly with past decisions and allow for subjective readings.

The ideal of constitutional governance, requiring government to protect individual rights for the common good, remains constant irrespective of the mode of speech, method of regulations, or category at issue. In practice that means that ideals of constitutional equality and justice must inform our understandings and evolutions of free speech categories such as secondary effects, campaign financing, and educational expressions. These are disparate areas of free speech law, relying on unique concepts for explanation and explication, yet each must resonate with the ideal of human equality and general welfare found in the Declaration of Independence and Preamble to the United States Constitution. Most scholarship on

the First Amendment has a philosophical proclivity for libertarianism, giving only short shrift to more comprehensive constitutional theories of free speech.

B. Basic Contours of Free Speech Theory

Some scholars have dismissed the notion of a comprehensive theory of free speech,[38] and we will examine their criticisms in Chapter *. For now, I wish to sketch a bit of the contours of the theory that this book will later unpack in the context of specific doctrines. For a normative framework to be applicable and useable throughout the field of free speech it must advance deliberative and just governance. The polity is composed of individual people whose interest is both public and private. Individuals value their communicative engagement at the micro level, in their homes and among friends, and at the macro level, as members of a sovereign body. The First Amendment stresses the government's obligation to protect avenues and modes of communications because of their importance to the people's safety and happiness, both of which are guaranteed by the Declaration of Independence. The general welfare of a polity can in part be measured by the extent to which people are free to openly assert serious, jocular, and informative matters without punishment. Free speech is one of the blessings of liberty that is intrinsic to a representative polity of equals.

The protection of free speech, therefore, precedes the ratification of the First Amendment. And the scope of protections far exceeds the Amendment's express terms. The right to speak freely should be regarded not as a constitutional grant but an unalienable right, inherent in the rational nature of humanity. It is an inborn entitlement of the natural person by virtue of his humanity and an essential feature of civil persons. Even when it comes to the Constitution, the protection of verbal, written, and otherwise expressive communications is not exclusively linked to the First Amendment. That instrument protects "the freedom of speech." But few would question that it also protects other forms of self-expression, such as written texts, drawings, and audio recordings. While the Constitution does not explicitly name any of these, the Ninth Amendment's protection of unenumerated rights seems an obvious sources for the people's claim to safeguard conduct that is incidental to those enumerated by the First Amendment. So too, the Preamble to the Constitution's General Welfare Clause is pertinent to the discussion because a society that muzzles its citizens gravely diminishes their well-being. Freedom of expression is a right inherent to humanity, not the formality of positive law.

Reliance on an expansive method for reviewing free speech differs from the approach of most mainstream scholarship and current doctrine on the subject, which often focus on the Free Speech Clause without adequately reflecting upon other, pertinent provisions and principles.

Put more directly, the Supreme Court has of late resisted using considerations for the public good in its free speech cases, relying instead on strict scrutiny in cases of content or viewpoint restrictions. In one case, writing for a plurality Chief Justice Roberts stated: "[T]here are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public

good."[39] This rigidity is not found in other democracies. In countries like Canada and Germany constitutions direct judges to balance free speech rights against other fundamental values, especially the value of representative democracy.[40] The Supreme Court relies on formalistic categories–like those of public forum, limited public form, and designated public forum–to decide when strict scrutiny would be appropriate. When dealing with limitations on speech, the Court will first decide whether the government had a compelling state interest before it ever gets to the question of whether the policy is narrowly tailored to some other narrowly tailored public purpose, such as judicial integrity.[41]

Contextual reasoning is better done by reflecting on all relevant constitutional values at stake in a case, rather than on the basis of judicially created categories. Those values are not derived willy nilly but by close examination of the Declaration of Independence, the Constitution, history, precedent, legislative policy, pragmatic consequence, and sovereign purpose.

Under the United States Supreme Court's formalistic approach, wherein stare decisis only allows judges to look to precedents to gain direction about rules of decision, courts rarely defer to legislative priority about such content rich matters as campaign financing reform. Typically a judge limits selection of applicable precedents to precedents dealing with free speech, or even more narrowly only that subset of expressive cases applicable to the category on which the Court has framed an issue at bar. A more comprehensive model would weigh all topics relevant to the resolution of a case. For instance, in corporate campaign financing cases, which I will discuss at length, the interests involved are not only those of speakers and audiences, but also those of commercial entities, the polity as a whole, republican governance, federalism, and civility. In evaluating the constitutionality of terrorist support law, the issues include both matters of communications and associations among individuals as well as those of domestic public safety, national security, and foreign relations. In addition to analogical analysis, legal reasoning requires a close examination of facts and a careful comparison to past decisions with similar situations. This conceptual process will sometimes extend to areas not directly involving speech, such as privacy, secondary effects of adult entertainment, or the cruelty against animals involved in crush videos.

This is not to say that there is no room for well defined categories. In certain circumstances, formalistic definitions help expose arbitrary censorship. However, the default should be a complete and thorough review of the record and applicable case law rather than a simplistic rejection of regulations because it limits a form of expression the Court has not characterized as low value. The premise that all speech is protected except for a few judicially created categories is historically and analytically unsound. In some cases, such as those dealing with commercial speakers there are strong public interests that should be weighed rather than an automatic predilection in favor of speech. In many cases limits on speech requiring strict scrutiny analysis, but that conclusion is best arrived at through reflection rather than over-simplified doctrine that dismisses out of hand legislative public policy. This balance of interests is best reflected in areas of life where explicit limits content

are permissible, such as professional regulations, copyrights, patents, and antitrust laws.

C. Principle and Precedent

The foundational principle of the Constitution, and its components including the First Amendment, is government's obligation to protect individual rights for the common good. This, in turn, should be the bedrock of free speech jurisprudence. Rather than systematically parsing cases on the basis of this or some closely related principle of governance, the Supreme Court typically renders decisions based on precedents or some modification of them. This practice is subject to manipulation, as Fred Schauer has pointed out,[42] because it allows judges to select a doctrinal framework–be it the doctrines of public forum, designated public forum, limited public forum, unconstitutional conditions, or some other–that is likely to lead to a result favored by the presiding court. The reason for doctrinal selectivity might be political, ideological, or pragmatic. But the fact remains that when a judge selects what line of precedents to fit a case under, he or she is neither engaged in a straightforward, obvious, or particularly objective endeavor.

Analysis of a court's reasoning is subject to inquiry into whether judges applied the precedents reasonably or manipulated them; whether the decision at bar significantly altered precedents, explicitly or implicitly, to achieve resolution, shift doctrinally, decide ideologically; or whether it overturned past decisions, in the words of Justice O'Connor, for some "series of prudential and pragmatic considerations."[43] But this is only part of the story. A related but distinct concern is whether the Court's reasoning was predicated on some value that was pertinent but not directly at issue in the case. Here I'm relying on Joseph Raz's distinction between first-order and second-order judgments.[44] The former help resolve disputes on the basis of considerations intrinsic to a cases, while the latter provide more general reasoning for evaluating specific analyses. The Court often relies on reasoning that seemingly applies strictly to the case at hand, but there is often second-order dispositive reasoning that lies behind its decision. For example, in recent case finding a state did not violate the First Amendment when it prohibited an organization from using a Confederate logo on vanity plates, the Court used the government speech doctrine for its first order decision, but given the viewpoint nature of the government's exclusionary decision on plates, behind the holding seemed to lurk a second order value of empowering officials to prevent an offensive symbol of racial intolerance onto its platform.[45] This second order concern was not stated, however, because it deviates from the general injunction against the regulation of offensive speech. In other cases, such as those dealing with videos of animal cruelty or violent video games, the Supreme Court has demonstrated a decidedly greater commitment to the protection of speech against government interference. The distinctions between these cases is undoubtedly partly based on the critical First Amendment function of preserving discourse, but there are second order concerns at stake in these cases, including judicial interpretive supremacy and originalist sentiments about how to identify protected speech.

The Supreme Court's first order free speech doctrines are binding on lower courts, legislators, and the members of the executive branch. But previous holdings can later be qualified, through devices such as statements adopting exceptions to rules carrying second order significance about values or structure. While stare decisis is critical to maintaining consistent and predictable legal order, it is the Constitution with its Amendments that remains permanent sources of legal authority. In addition, values that are quintessential to representative democracy, such as the inalienable rights mentioned in the Declaration of Independence or fairness principles of the Fourteenth Amendment, are among the highest orders of magnitude in second-order assessments. The resolution of specific cases have a direct correlation with the structure and ideals of constitutional, representative democracy. Thus, in many cases reasoning should not be confined to the First Amendment nor even doctrines confined to the case at hand but should go further to discovering all principles relevant to the resolution of a dispute. And these should be explicitly stated rather than being barely hinted to preserve the appearance of neutrality to ideals like equality, social justice, and national reconstruction. It makes resolution of cases more complex, but the reasoning more comprehensive, and the holdings more accurate.

In recent years, the Court's decisions have increasingly sided with speakers, why content regulations on speech are typically thought to be unconstitutional. But the Court has never officially adopted libertarianism. Much as the Court relied on second order libertarian considerations in favor of corporations during the *Lochner* era but based its decisions on the first order Fourteenth Amendment liberty of contract explanations, its current arguments invoke the First Amendment but lurking in the background there is usually a presumption that autonomy principles must trump other consideration. This is not to imply that all decisions fall under the libertarian strain of thought but that it is the dominant free speech ideology of justices both on the liberal and conservative ends of the spectrum. The Court has of late reduced the scope or entirely struck a variety of First Amendment precedents, dealing with a wide range of issues from campaign financing to false statements. The Court has steadily eroded the analyses of previous cases that had recognized the interaction of constitutional values; instead, heavily focusing on removing restrictions on speech and refusing to engage in balancing considerations. The broad conception of speech has included harassment under the guise of counseling at the entrance of abortion clinics and falsification of military records. The majority's increasingly formalistic approach rarely defers to legislative findings about other concerns.

An approach narrowly focused on speech without the necessary reflection on the context and principles of communications downplays important factors. A contextual and principled approach is more likely to yield comprehensive reasoning than one decided based on a knee jerk reaction to speech regulations. The outsized concern for maintaining an uninhibited market of ideas has even led the Supreme Court to strike laws designed to protect public safety, a traditional government function.[46] *McCullen v. Coakley*,[47] for example, found unconstitutional a

Massachusetts law that created a protective buffer zone in close proximity to the abortion clinics. The state legislature had passed the law after repeated violence, undue aggression, intimidation, and harassment had taken place by the entrances of a particular facility that provided abortion procedures.[48] The Court found the restriction to be an excessive interference with speech because it prevented peaceful anti-abortion protestors from approaching and ministering to arriving patients. However, the majority gave little consideration to the legislature's reliance on witnesses who had testified prior of patients being intimidated, terrorized, and otherwise made to feel unsafe when they approached the entrance. The risks women perceived to their safety in attempting to enter the clinic might having been similarly or more compelling than the interests of protestors to speech, but the Court did not fully examine that comparative question nor did it engage in close scrutiny of the reasons behind the statute.

Without providing any empirical reason for deviating from the legislature's studied findings, the Court held that a thirty-five foot buffer zone between speakers and the clinic entrance was not narrowly tailored enough to meet legitimate state concerns for safety, health, and welfare.[49] The Court was persuaded that the state had placed too heavy a burden on the speech rights of counselors and ministers. The patients' sense of intimidation and threat was given short shrift, despite the Preamble to the Constitution's declaration that maintaining public safety is a preeminent purpose of government. The Court elevated speech above the state's public policy, which leaned to patient protection.

The Court's libertarian favoritism for anti-abortion speakers at the expense of patients' privacy concerns ran counter other cases in which a differently constituted Court had favored patients' right to be left alone. In *Ohralik v. Ohio State Bar Association*, the Court had upheld a state bar association's restriction on attorney soliciting injured clients. The majority ruled against the attorney who sought physically or by letter to contact car accident victims. The First Amendment offered no defense to his effort to drum up business from vulnerable parties.[50] On the other hand, if the anti-abortion statements were directed at the public at large that would not raise the same concerns of intimidation to be counterbalanced against the potential of silencing the speaker. A different line of attorney solicitation cases point to this distinction. In *Florida Bar v. Went for It*, the Court recognized that even though state bar associations can protect the tranquility of privacy of injured parties against direct contacts in connection with injuries, attorneys have a constitutionally protected expressive right to send untargeted solicitation letter.[51] *Ohralik* and *Went for It* recognized that governments can restrict parties from communicating with persons who suffer concrete and non-speculative medical conditions.[52]

In *McCullen*, the Court should have similarly deferred to the state's decision to protect patients seeking to exercise their private, constitutional right to terminate a pregnancy, without being harassed and distressed by a gauntlet of strangers seeking to talk them out of the procedure. The same public policy concerns were at play in all three cases. Even though *Ohralik* and *Went for It* were about commercial solicitations–[53] while *McCullen* was concerned a time, place, and manner restriction

on pure speech–[54] only in the former the Court acknowledged the extent to which listeners rights to dignity can outweigh speakers' communicative interests. But in *McCullen* the Court struck an anti-harassment statute without giving consideration of how persons engaging in unsolicited, face-to-face advice can harm the peace and tranquility of women seeing entrance to a clinic providing abortions. The different status of speakers in *Ohralik* and *Went for It*, both of which concerned attorney communication, and *McCullen*, which involved private ministers, do not gainsay the similar listener concerns in all three. The Court used narrow tailoring to engage in legislating from the bench to second guess actual legislative findings. Nothing in *McCullen* limits the holding to peaceful remonstrances with the woman seeking healthcare services, to the contrary it also protects the speech rights of persons hurling abuses, deprecating, degrading, and swearing at her. While Massachusetts relied on evidence rather than conclusory statements, the Court found that the state failed to meet the high burden of proof.[55] On the other hand, the Court reasoning only gave constitutional weight to free speech but not safety concerns. The result was a libertarian, non-contexualized opinion.

There are several other recent decisions that like *McCullen* find speech to be a dispositive factor without adequately weighing other factors. In these cases, the Court takes for granted the primacy of speech but does not give adequate weight to the policy behind the regulation. Some cases presume audiences are interested in obtaining more information, even manipulative advertising, rather than the countervailing interest in consumer protection and optimal healthcare.

In the area of commercial speech regulations, the Court has recently increased protection of advertisers while discounting legislative reasons for limiting a business's access to private patient information. In *Sorrell v. IMS Health Inc.*, the Court protected pharmaceutical manufacturers' prerogatives to gather and use pharmacy records containing prescriber information for the promotion and marketing of prescription drugs.[56] The Court held that the marketing of such data was a form of free expression protected by a heightened level of judicial review. The holding is based on the notion that given more information marketers can provide better and more accurate drug information. But to come to that conclusion, the Court downplayed concerns of medical societies' and their members', who for empirical reasons were concerned that data miners will use the information to pressure physicians to prescribe those medicines that pharmaceutical companies favor, of the more expensive, rather than those that might be better or less expensive for the patients. After all, data miners primary goal was commercial, not medical. They sought to manipulate the marketing and sales of favored drugs rather than to advance healthcare research or accessibility. The information they presented to physicians was incomplete and biased in favor of pharmaceutical profits. Moreover, the state regulations had passed to protect patient privacy: Technically speaking, information obtained by the data vendors was anonymized, but patients' identities could be readily extracted through unique identifiers linked to physicians' prescription histories.[57] Despite the manipulative nature of marketing, the interest of prescribers, which was the dissemination of heath information to patients, the Court

favored marketers right to gather information and develop strategies to ingratiate their marketing plans to physicians. The holding advanced product marketing as a form of speech while discounting government's interest in protecting consumers against misleading drug advertising. The lack of context and superficial favoring of advertisement, empowered pharmaceutical companies to increase profits by aggressively targeting physicians "to prescribe a particular pharmaceutical[s]," especially highly expensive ones that continue to be protected by patents rather than their cheaper generic equivalents. By writing an opinion without weighing of all the relevant interests, the Court ruled in favor of corporation data miners rather than public health and the privacy of physicians.

In addition to not giving due weight to privacy, the majority signaled a break with precedent. In previous cases, after a series of developmental steps, the Court had settled on using the intermediate scrutiny test for commercial speech cases.[58] But in *Sorrell* the Court used an ambiguous and undefined "heightened judicial scrutiny" to indicate that in the future it would use greater judicial oversight of advertisement restrictions. Commentators, such are Julie Cohen and co-authors Martin Redish and Kelsey Shust, assert that the outcome of the case implies that strict scrutiny will henceforth be used to adjudicate challenges to regulations on marketing.[59] While that may be reading too much into the case, the wording of the decision certainly indicates the majority's shifting thinking in favor of speech irrespective of the regulatory content. The majority's formalistic method neither served to safeguard the rights of all the parties at bar nor did it hold to precedent. The opinion was not neutral in anything but form: It favored the speech of pharmaceutical producers, wholesalers, and retailers, but it undercut the autonomy of physicians and patients. And the First Amendment, as the Court has long recognized, is not only a right to speak but also a right to remain silent.[60] Thus, *Sorrell*'s bluster of protecting speech, any speech, irrespective of content, turned out to favor the speech of behemoth corporations and undermined states abilities to protect the First Amendment rights of healthcare providers and patients.

Typically the explanation for using rigid doctrines to interpret the First Amendment are based on constitutional stability. Precedents are thought to set an analytical foundation for objective decisionmaking that is not predicated on the identity of litigants nor the preferences of adjudicators. The doctrine of stare decisis presumes that judges are more likely to be objective in their reliance of first-order and second-order preferences by building on other courts' opinions about the First Amendment or other legal subjects. In recent cases, the Court has rightly confirmed its commitment to first-order protections of free speech, but it has subtly weakened, qualified, or changed established precedents, expressing an unwillingness to review second-order values. In *McCullen* it placed significant barriers on the state's ability to maintain safety near abortion clinics. And in *Sorrell* it shifted the paradigm of truthful commercial speech review from an intermediate level of review to something more rigorous. Opinions in both those Supreme Court cases are written in terms that protect speech, but they fail to take seriously enough the opposing constitutional values at stake, namely safety and health.

Categorical preference for free speech, therefore, does not necessarily lead to a comprehensive answer to cases and controversies. Indeed, preference for one constitutional text or value without serious consideration of others pertinent to the resolution of disputes creates opportunities for political preferences to enter judicial holdings. The First Amendment label, can serve as a seeming trump rather than an important component in those cases that are complicated by contrary constitutional values. Free speech is not simply the check on government policy that scholars like Ronald Dworkin envision,[61] the Court has of late relied on the First Amendment to advance corporate interests. Rather than protecting vulnerable groups or persons, the Court has preferred the claims of those with enough money to lobby Congress.

The judicial proclivity for corporate expressions is particularly pronounced in the realm of campaign financing. A couple of recent decisions have relied on a libertarian perspective of free speech to shift precedents in favor of huge corporate spenders. While corporations can now disseminate their message more pervasively over various electronic media, ordinary people with a fraction of financial resources have a proportionately diminished voice in politics. In *Citizens United v. FEC*,[62] the Supreme Court struck a federal statute that prohibited corporations from using general treasury funds to finance political candidates' efforts to secure political office. At play in the case were two crucial constitutional values. The first was the dissemination of speech with its concomitant audience interest to learn information. The second was integrity of the representative democracy with its emphasis on fair elections. The Court put great stock in the communication of ideas but downplayed the distorting influence that billions of corporate dollars have in manipulating the outcome of elections. For the Court, the Free Speech Clause was of ultimate importance. The Court dismissively rejected the legislative judgment for the need to systematically prevent a massive influx of money and its likelihood to distort and corrupt electoral campaigns. A more thorough balancing was needed, one that recognized Congress's responsibility for safeguarding equal elective franchise. So too, it would have been important for the Court to consider any alternative policies, empirical evidence, and fit between the legislation and the statutory aims. Instead, the Court treated the matter through the strict scrutiny doctrine it applies content restrictive free speech cases and failed to give similar strict scrutiny consideration to the issue of election integrity.

The trend in favor of corporate speakers is part of a broader pattern of judicial pronouncements that claim to favor speech but on reflection politically benefit affluent persons to a disproportionate degree. In the subsequent *McCutcheon v. Federal Election Commission*,[63] the Court reviewed law that restricted both the maximum amount of money a person could give any individual candidate and the aggregate total a person could contribute to the total number of supported candidates. For the time being, the Court left untouched the base contribution limit, but it found the aggregate limit provision to violate the First Amendment and rather perfunctorily thought it did "little, if anything" to prevent corruption. Placing all forms of restrictions on content in the same category, rather than acknowledging the subtle policy considerations concerned with different political actors, an opinion of a

plurality of justices lacked nuance in its assertion that donor contributions were on a par with newspaper endorsements of political candidates.[64] The Court viewed the right to contribute to candidates' campaigns to be "basic in our democracy" because it was a component to the election of political leaders.[65]

The assumption that more speech is always socially better[66] led the Court in *Citizens United* and *McCutcheon* to strike laws that diminished the corrupting forces of corporate campaign contributions. The Court discarded precedents, and with them previous justices' legal assessments. The holdings second-guessed legislative policies. In *Citizens United* the Court ignored its earlier distinctions between the electioneering of corporate and natural persons,[67] and in *McCutcheon* it dismissively rejected extensive legislative findings about how individual donors who contributed in the hundreds of thousands dollars range gain special access to candidates.[68]

Citizens United explicitly upended long-established precedents, *Austin v. Michigan Chamber of Commerce*[69] and *McConnell v. FEC*.[70] Those earlier cases had upheld state and federal prohibitions against the uses of general corporate treasury funds on political campaigns. Because campaign financing involves speech, the majority in *Citizens United* demanded "the most convincing of reasons" to uphold precedents.[71] This highly ambiguous standard of review simply meant that the Court would not be deferential to legislative judgment favoring natural persons engagement in politics over that of artificial persons. In *McCutcheon*, the majority was more reticent, justifying its rejection of precedent on the pithiness of the case law rather than carefully scrutinizing the reasoning of past cases that aggregation limits do not violate the First Amendment.[72] In overturning precedents in *McCutcheon* and striking the aggregation restrictions, the Court showed an affinity to categorically accepting the notion that persons with the financial wherewithal have an almost uncontestable right to use their money to influence political campaigns. This outcome downplayed other first-order constitutional consideration, the administration of fair and equal elections. But in the Court's mind, speech is of so great an importance that other fundamental rights do not even warrant rigorous consideration and weighing.

The implication of the Court's increasingly decontexualized libertarianism is that the first-order speech value reflexively supersedes other constitutional values. The primacy of speech rights comes at a cost of other constitutional principles. Rather than regarding speech to be one among many factors of the Constitution essential to the fair ordering of constitutional democracy, the Court often closely scrutinizes restrictions on speech without applying strict scrutiny to other legislative policies such as the protection of free elections, the health and safety of pregnant women, or the consumer reliance of government administrators.

D. Libertarian Strains

The Court's reliance on libertarian theory for the exposition of its reasoning is evident in a variety of doctrinal areas, including campaign financing, commercial speech, and hate speech. In this Introduction, I briefly explore existing cases in these three areas to better illustrate some of the shortcomings of focusing almost

exclusively on free speech to the exclusion of other relevant considerations. Later chapters will more fully expostulate on these subjects.

Libertarian free speech doctrine purports to keep firm to the dictates of the First Amendment, but in cases like *Citizens United* and *McCutcheon* the Court relied on that ideology to strike laws crafted to protect democratic integrity. Scholars often connect libertarianism with judicial doctrines that strike commercial regulations.[73] As the Court has increasingly based its first-order interpretations of free speech cases on nearly unbounded conception of expression, it has indeed come to favor more corporate arguments and to restrict government's power to protect public equal participation in politicking. However, the libertarian strain goes further to the reliance on doctrine to strike legislation designed to protect historically vulnerable groups.

On the economic side, the Court conflates the individual entitlement of speech with the financial wherewithal to fund political candidates and parties. As a consequence, the twenty-first century Supreme Court rejects almost all legislative efforts to differentiate between natural and corporate campaign contributors.[74] Moreover, it rejects that federal and state authorities have the power to even the political playing field by safeguarding the poor and middle class voters against affluent dominance of elections: The freedom to spend money to promulgate a message applies to both corporate and private persons. The traditional view that the judiciary's obligation is to protect the rights of disempowered citizens against plutocratic domination and disenfranchisement[75] has been turned on its head. The Court now conceptualizes the First Amendment to protect the rights of corporate and wealthy individuals against government "suppression of political speech based on the speaker's identity."[76] The majority on the bench not only sanctions but welcomes high-rollers' spending and influence on political campaigns. Restrictions that were designed to level the amount of money and other resources a person can spend in support of political candidates are said to be suppressive "of political speech based on the speaker's identity."[77] This breaks from one hundred year tradition, dating as far back as Theodore Roosevelt's presidential administration, of legislative initiatives that minimized corporate entities' efforts to dominate political lobbying by expending massive capital on political campaigns.[78] Equating corporate and natural speakers also deviates from stare decisis. In earlier cases, the Supreme Court had repeatedly upheld congressional authority to limit the use of corporate wealth to gain "an unfair advantage in the political marketplace."[79] The *Citizens United* majority rejected that principled protection of elections, overturning previous cases like *Austin*, adopting, instead, a utopian conception of an "open marketplace of ideas" that could regulate itself.[80] The Roberts Court did not bother to examine whether the law was a narrowly tailored government effort to fulfill the compelling interest of preventing the moneyed elite to dominate political discourse. No matter how many millions of dollars a contributor spends to gain access to candidates, the Court now regards reliance on corporate financial leverage to pressure candidates to be a normal and inevitable aspect of democracy. Thus, corporations cannot be

precluded from buying access to politicians through general contributions and are only prohibited from bribing officials.[81]

The dominant conceptual strain of both *Citizens United* and *McCutcheon* opinions regards the First Amendment to be a prohibition against government interference in the use of money to transact political ideas. For example, the majority of the Court in the former opinion conceive of constitutional protections of free speech to be born of a mistrust in government interference.[82] The Court presumed that corporate speakers' interests against government restrictions are aligned with listener interests. The plurality in the latter opinion emphasizes the burden of regulation on individuals' abilities to contribute less money than they would have if the matter were left to their discretion.[83] These opinions favor the affluent, as Justice Breyer pointed out in his dissent to *McCutcheon*, and adulterate government's constitutional authority "to create a democracy responsive to the people."[84] Without some limits on election contributions the voice of the electorate at large can be drowned out by the influx of money.[85]

In a very different area of law, meant to protect groups against symbols of terror, the Court in *R.A.V. v. St. Paul* favored the right of individuals to express racist messages above government's interest in protecting vulnerable groups.[86] The City of St. Paul's ordinance swept too broad a net, criminalizing even speech that made people uncomfortable, and was therefore too broad to survive close First Amendment scrutiny. But as a matter of interpretive methodology the Court's opinion inadequately analyzed the City's stated purpose to prevent the use of symbols likely to illicit an immediate fight.[87] The opinion conceived speech to be a personal right that trumps considerations of equality and policies designed to protect the public peace.

R.A.V. v. Saint Paul struck down a fighting words ordinance. As in the area of campaign financing, the Court demonstrated an inclination to strike a law that limited expression without first give due weight to counterveiling constitutional interests. The majority in that case overturned a misdemeanor conviction against teens who in keeping with the tradition of the Ku Klux Klan burned a cross on the lawn of a black family. The Court became fixated on the content and viewpoint restrictions of the ordinance rather than also forthrightly engaging with the City of Saint Paul's policy of combating immediate breaches of the peace and incitements of such actions. It gave no weight to the compelling nature of the City's policy to prevent anyone from intentionally displaying symbols of intimidation, burning crosses and swastikas, on public streets or private properties. The majority should have instead balanced the right to express hatred and animosity by displaying a symbol of slavery and oppression against the government's interest in preventing intimidation, promoting equality, and public safety. Additionally, as I will show in a later chapter, the majority left entirely untapped concerns derived from principles of constitutional reconstruction.

Libertarian reasoning about free speech emphasizes the autonomous interest in the expression of ideas, subjects, and viewpoints. Although elevating speech above all other constitutional entitlements–as a constitutional trump, recognizes the

significance of personal expression, political ingenuity, and public information–it is a limited perspective that is typically dismissive of other pertinent constitutional considerations. As a result, secondary interests that often arise in First Amendment cases–such as privacy, elective integrity, or inequality–are swept aside without adequate judicial consideration.

In recent years, the Court has become increasingly single minded, which has led it to assert that content based restrictions are all constitutionally suspect.[88] That doctrinal hyperbole does not explain why many types of content based restrictions, such as those imposed on tobacco distributors or publically traded securities disclosure remain permissible.

The Court has, however, increasingly demonstrated unwillingness to defer to legislative initiatives that limit commercial speech, and the public may wonder how many regulations on commercial speech the Justices are willing to strike to advance its vision. It has repeatedly held that truthful statements about marketing are protected against censorship because they are of so great a social importance to audiences. To some extent this makes sense. Corporations like individuals are self-interested; therefore, both seek to impact debate for their own benefits. However, thinking of the matter purely in terms of speech and its suppression misses the key constitutional distinction between those two classes of speakers. Equating for profit organization's speech with that of natural people understates the core function of republican constitutionalism: Government is made for the people. That overarching precept of constitutional democracy applies exclusively to human individuals. The very function of government, as the Declaration of Independence asserts is to operate in a manner that is likely to advance human safety and happiness. Corporations are constituted for the benefit of shareholders, but they are legal entities that aim to advance profits, not civics. Corporate and natural persons share the interest to profit from enterprises, but only natural people enjoy the constitutional right to fully participate fully in politics. Moreover, voting is a public matter, with the broader implication for the personal right to vote being the actions of political actors on the public at large. Yet in *Citizens United* and *McCutcheon*, the Court placed nearly exclusive emphasis on the expression of information rather than balancing it against government's duty to safeguard elections from corruption and the appearance of corruption.

Campaign financing and fighting words are not the only areas of free speech in need of contextual dialogue. A balancing approach would reorientate existing judicial practices. The current state of free speech law is not quite the absolutist, textual, and literal perspective of Justice Black.[89] Nevertheless, recent cases–ranging from finding unconstitutional a state law that prohibited stores from renting and selling violent video games to another statute forbidding the distribution of animal cruelty videos–overwhelmingly favor communications. Those opinions, rightly recognize the significance speakers and audiences place on free expression, but they were decided without adequate recognition of parallel and conflicting government concerns, for instances of child and animal safety.

Before elaborating a contextual theory of free speech in the next chapter, it is important to clarify that mine is a study of methodology. Therefore, I agree with some of the cases that I critique and disagree with others. But it is the libertarian form of analysis that I mean to appraise and critique. Furthermore, I provide a balanced alternative to the current status quo, a method more in tune with the depth and breadth of the issues involved in the assessment of restrictions touching upon persons' rights to expression. My suggested approach runs counter to the direction of the last two decades of Supreme Court jurisprudence, which tends to treat many content restrictions as automatically suspect.[90] Scholars too, such as Justin Marceau and Alan Chen, have argued that relying on anything less than strict scrutiny to reviews content-based restrictions on expression "departs from more than a half-century of precedent."[91] This categorical line of thinking is analytically suspect because it discounts other doctrines--such as the public employee, symbolic conduct, and student speech doctrines–for which the Court explicitly recognizes the need to balance civic expression with governmental functions. Moreover, the strict scrutiny standard is itself manipulable. The worst slights of hand occur when the Court fails to acknowledge equally salient values that complicate review and should not be discounted out of hand, even when laws include content limitations. The contextual approach, I will seek to demonstrate, more closely identifies nuanced constitutional issues and adjudicative factors than does a formalistic method.

Chapter 2

The First Amendment is a normative piece of the Constitution's rampart of representative governance, setting out a structure for carrying out the national commitment to liberal equality for the common good.[92] The literal text of the Constitution provides a framework, but is only the starting point for exercising authority. The wording of the First Amendment is ambiguous. On its face, only Congress is prohibited from abridging free speech; no other branch of government is mentioned there. That could not however be the full reach of the Amendment. If it were, the executive branch and the judiciary would not be included in the constitutional prohibition against censorship. And it is illogical, indeed comical, to think the President of the United States or judges have unlimited power of censorship just because the Amendment does not refer to them. Such a proposition would be a recipe for tyranny and would be incongruous with the nation's traditions and ethos.

The very structure of U.S. government is built on a foundation that safeguards deliberation, self-expression, self-affirmation, and scientific pursuits as necessary components of liberal republicanism. These rights are not only guarded by the Amendment but also by the very structure of a government by the people and for the people, by statutes, and by judicial opinions. Indeed even prior to ratification of the Constitution, the nation's founding statement of purpose, as it is set out by the Declaration of Independence, recited a commitment to establish a nation to protect ordinary citizens' safety and happiness. Irrespective of the First Amendment's exclusive focus on the legislative branch, all sorts of voters, associations, and soap box orators would be unsafe unless all three branches were governed by the principles of an open and tolerant society free of executive and judicial harms. States too, as the Supreme Court recognizes, cannot suppress thoughts, ideas, symbolic gestures, and the like.

Given the First Amendment's dearth of textual guidance, an analytical, structural, and normative model is needed to remain vigilant against abuses of power. Judicial doctrines alone will not suffice because our understanding of free speech must be consistent with the grander principles of constitutional ethos, which mandates that officials formulate and pursue policies likely to protect individual rights for the common good.

Free Speech theory should describe existing doctrine, historic trajectory, and normative value of free speech. A synthetic approach differs from the Supreme Court's current embrace of a categorical rule. Free speech is not a separate value, standing over and above any other in the constitutional hierarchy; to the contrary, it is a vital element of a representative polity committed to advancing the general welfare by safeguarding individual liberties on an equal basis. Free speech is essential to popular government, but any analysis of its scope should look beyond the First Amendment to a more comprehensive ideal of the Constitution. A broad understanding of constitutional analysis sheds light on why courts should examine

whether regulations on the content of speech infringe individual liberty balanced against other significant social considerations. Theoretical context is necessary to explain why the Supreme Court finds a variety of content-based restrictions on speech (such as securities regulations, antitrust laws, and incitement statutes) to be legitimate uses of state power, while others (such as those limiting political debate or placing prior constraints on licenses) do not withstand judicial scrutiny. A robust theory should provide the normative basis for balancing free speech against other values, and it should mark a descriptive baseline for assessing existing doctrine, legislative initiatives, administrative regulations, state statutes, and municipal regulations. No simple hierarchy is available for accurate, in-depth interpretation. Rather, courts should engage in close scrutiny to determine and evaluate all relevant public policy concerns, past practices, social needs, laws connection to asserted public goals, and any alternative means of achieving them.

Frederick Schauer has similarly expressed the need for courts to review broad second-order factors, including ones that are "political, sociological, cultural, historical, psychological, and economic." These areas of analytical consideration are not exclusively relevant for First Amendment disputes, rather they are critical to constitutional order as a whole. The judiciary's responsibility is to parse relevant factors in the context of cases and, thereby, to create, elaborate on, modify, or overturn doctrines to which courts, legislatures, and regulators can later turn for clarity. As Schauer points out, analyses of those external factors are necessary to the development of free speech doctrine. All those facets clarify the significance of the First Amendment to a free and open constitutional democracy.

Members of a political community benefit from sharing ideas. They are not atomic being but through communicative interactions with others can impact the general welfare. The multifactoral "milieu" in which the Free Speech Clause ought to be interpreted implies the need for a contextualized approach that is true to principle, doctrine, and sensitive to material facts.[93]

The people's entitlement to freely express themselves has synthetic value that fits the broader construct of the Constitution. The best explanation for why there are constitutional guarantees on free speech come only partly from the First Amendment and more expansively from constitutional structure as a whole. Inevitably, values will point in different direction, often because individual liberties will collide with government authorities. Resolution of conflicts requires balanced reflections of topics and ideals directly related to speech but also supplementation by secondary-factors relevant to coherent normative interpretation of specific policies, regulations, and cases. Without a core theory, government officials will lack a consistent and uniform grounding for decision making.

The Free Speech Clause is not a stand-alone provision. As all other clauses of the Constitution, it is tethered to the people's enjoyment of representative democracy. This has both private and public components. As private speakers seek to express their personalities, and as civic players they seek to participate in governance. There are a slew of considerations connected to both, among them is

the right of citizens to petition, associate, explore their identities, associate with others, be informed, and participate in politics.

First Amendment doctrine has always included an evolving set of considerations, holdings, tests, factors, and goals. Contrary judicial claims of originalist stasis[94] are belied by the constantly expanding and reinterpreted doctrine. Definition of a comprehensive theory of speech has become important in recent years as the Court has expanded the right of free speech enjoyed by business interests, the purveyors of animal torture recordings, and hate groups. In recent years the Court has also increasingly characterized conduct with limited communicative function, including unsolicited advertising, as protected speech under the First Amendment. This has led to the constitutionalization of a wide variety of contemporary technological interactions, including cable television shows with sexual content,[95] video gaming,[96] and commercial sales of animal torture videos.[97] Outside the business realm, many of the Court's opinions are favor claims of expression over competing social concerns. For example, the Supreme Court has found demeaning anti-homosexual statements made at a funeral to be of constitutional value that even trumped the bereaving father's right to recover for the resulting emotional trauma.[98] And a majority of Justices have vindicated the right of a person to lie about military honors, favoring the interest of deceivers to that of service members and the Department of Defense to maintain credibility about their awarded medals.[99] The tendency to elevate the First Amendment above most any policy too often displaces the comprehensive resolution of all the relevant conflicts and leaves judicial rationale incomplete. The Court is eager to protect the rights of the vulnerable speakers and audiences by leaving open the channels of communication, but it more often than not gives short shrift to arguments for vindicating other rights asserted by litigants.

The libertarian pattern of judicial opinions is also evident in other doctrines. The convergence of conservative and liberal free speech thought has created a nearly absolute defense against economic regulation, public peace ordinances, and even sign regulations. Opposition against laws designed to protected public welfare resembles late-nineteenth and early-twentieth centuries laissez-faire ideology against public health and labor laws. During what has come to be known as the *Lochner* Era, so named after a pertinent Supreme Court decision, the Court repeatedly found unconstitutional state and federal laws that restricted the exploitation of power against ordinary individuals. In the late nineteenth and early twentieth centuries, the right to contract became the doctrine of choice to invoke against legal protection of vulnerable populations, like factory workers.

At the dawn of the early twenty-first century, the First Amendment became the constitutional defense against civility, drawn upon by litigants as disparate in their efforts as those challenging financial securities disclosure provisions, conflicts of interest regulations, scientific requirements for licensed therapists, antitrust restrictions on retailers and distributors, seizure of computer equipment needed for a criminal investigation, health regulations for tattoo parlors, and notices of employees legal rights.[100] These efforts are not new. Jack Balkin has pointed out that

in 1990 liberals along with businesses and other conservatives were relying on "absolutist forms of arguments" to invoke the First Amendment in support of interests that ran the ambit from property rights, opposition to affirmative action, and defense of racist speech.[101] Litigant affinity to favor expressive liberty to other concerns without careful contextualized adjudication has only increased since then. Litigants have found a more sympathetic court, willing to override nearly all policy concerns in favor of those invoking libertarian First Amendment claims.

The ideological pattern expands speech rights at the expense of other interests, giving only passing recognition of legislative policy and little credence to legislative findings. The Court consistently rejects countervailing concerns in favor of parties asserting a right of self-expression. For example, in *Entertainment Merchants*, where the Court found a right to sell interactive violent games to young children without their needing to first obtain parental permission. The decision heavily favored distributors and the consumers of violent representations. But the majority simply rejected, out of hand, legislative determinations arrived at following thorough hearings demonstrating the states interest, based on sociological studies found in peer-reviewed articles and on the testimony of social scientists, finding that after long-term playing of these games children were more prone to become irritable, antisocial, callous to violence, and antisocial. Research identified a correlation "between minors who play violent video games and physical and psychological harm."[102] The Court put resolution of the case in terms of its content neutral standard, finding that gaming companies have a First Amendment right to distribute their products to children without state restrictions on time or manner of the transaction.

If the Court were to be more contextual in its analysis and more comprehensive in its reasoning, its opinions would be less prone to charges of politicization.[103] In some cases, even the outcomes might have been the same, but reasoning more robust, transparent, and analytically convincing. As things stand, the Court's judicial aggrandizement indicates political motives rather than constitutional interpretation.

The aim of this book, then, is to explain a more contextual and less one-sided method of First Amendment interpretation. A theory of free speech is necessary to diminish judicial reliance on ad hoc reasoning. Indeed, the First Amendment's economic wording, speaking only in terms of restrictions on the legislature, cannot be consistently interpreted without a theory consistent with constitutional structures and normative commitments. The method I suggest requires evaluations of the values of speech in various circumstances and its grounding in overarching constitutional theory. The Court, to the contrary, in cases such as *Entertainment Merchants* has both instructed judges to avoid valuations of other interests relative to speech and virtually foreclosed content efforts to craft legislation favoring values other than speech.

1) Communications

While the wording of the First Amendment is sparse, its meaning has deep ramifications to individuals' abilities to live freely, society's ability to function, multiculturalism to thrive, and audiences access to useful information. Speech encompasses a wide variety of utterances, symbols, and references. Meaning is derived from grammatical rules, contextual uses, idiomatic nuances, local customs, and other semantic features of articulation, referencing, and gesticulations. This of course is a non-exhaustive explanation of speech, but it suffices to demonstrate the many ways that communications between people are possible, relevant, and influential. The multiple frames of catharsis and interactivity involved make speech so important to those who express themselves and those who hear its message.

The ability to discuss our internal states of mind, our beliefs, and our aspirations is a facet of rational faculty. But some communications, which many people likewise regard to be valuable, are emotive. These might take the form of raunchy statements, passionate noises, or dissatisfied grunts. These crude forms of expression are protected for the value they have to individuals, even though they have no direct effect on political culture or on the marketplace of ideas.

The First Amendment covers an infinite set of communications about perceptions, ideas, sensations, emotions, philosophies, scientific findings, empirical studies, and other datum containing internal and external stimuli. Grammatical structure and vocabulary set some limitations the ability to fully and accurately articulate our feelings and ideas. Nevertheless, whether the uneducated or savant, each of us has varying degrees of knowledge, understanding, and wisdom with which we can affect culture, comfort each other, and advance political agendas by adopting standards of language, rhetoric, cadence, and infection to convince others. The implication here is far-reaching. It means that the value of speech to individuals and polities extends from the teaching and learning of creative writing, to the construction of philosophical theories and the articulation of empirical findings. This elaborate process–this human dance, if you will–is done by borrowing from other languages, abandoning past words and phrases as archaic, and creating something new to better depict modern technological and political realities.

Language colors how individuals and groups perceive themselves, their culture, their roles, and their values. Free expression is vital to our constitutional community. It animates legal, public, and personal actions. The ability to communicate with others allows individuals to integrate with or differentiate themselves from social, cultural, religious, or community norms and institutions. By itself language is a neutral medium available for conservative, moderate, and liberal causes, for personal development and public causes. Speech can spark change or promote stasis.

For constitutional purposes, the First Amendment creates a legal right to express a plethora of ideas. The views can be mundane, orthodox, or heterodox. The right to speech extends to a multiplicity of human interactions necessary for the pursuit of happiness. However, not all speech is protected. It is the function of free speech theory to better understand what forms of communication the Constitution protects and what forms can be regulated.

2) A Contextual Theory of Free Speech

A comprehensive theory of free speech must explain the role of dialogue and self-expression in a constitutional democracy. A systematic framework can provide lawmakers and judges with a consistent structure for setting policies and deciding cases.

The First Amendment is grounded in principles articulated by various substantive and structural clauses of the Constitution and the Declaration of Independence. Speech plays an essential role in protecting the rights of individuals who live in a community of equals. Government policies should take into account a variety of relevant public concerns that are both personal and outward looking. In many instances, including national security and commercial regulations, statutes have an incidental or direct effect on speech. Challenges to these cases must be adjudicated contextually, examining the reasoning behind a statute, its application, and what effect it has on speakers. Litigants seeking review of such statutes can raise conflicting claims about what facts should be determinative, what laws should be controlling, and the interpretative doctrines on which a court should rely.

Judicial review should include analysis of whether restrictions on expression advance individual liberties and social goods. But these considerations are not to be evaluated in a vacuum. The written Constitution determines both the extent of government powers and the rights enjoyed by people. Conflicts between individuals and state regulators raise a litany of questions about autonomy, dignity, and government authority. The ideals of equality and liberty are not simply philosophical constructs but entitlements under the Bill of Rights and other portions of the Constitution. Like all other liberties, free speech is not an absolute. When government articulates reasons to enforce certain restraints, its rationale should be weighed relative to the autonomy interests at stake. A court evaluating a restriction on speech should identify how it impacts an individual's sense of identity and personal aims as well as the relevant community's collective life.

This assessment regards free speech to be one constitutional value among others. It embraces the importance of speech to representative democracy and self-expression but it also recognizes that the First Amendment is not an automatic trump against all other policy concerns. In this chapter, I lay out a contextual understanding of speech before turning later in the book to the theories of other scholars who tend to be more narrow in their focus.

Before setting out on this journey, it is important to note that the Supreme Court has not annunciated a comprehensive theory of free speech. Debates about the purpose and function of the First Amendment remain as in flux as over half a century ago, when Thomas Emerson declared that "no really adequate or comprehensive theory of the first amendment" had been proclaimed despite "the mounting number of decisions and an even greater volume of comment."[104] Since then, precedents and studies of the First Amendment have continued to increase, shift, and yield new insights, but lower court judges have not received Supreme Court determination about the scope of the First Amendment's protections of speech. The rationales courts use in precedents are piecemeal and often seem to be

chosen post hoc as the rationalization for politically charged decision making. A more stable explanation of constitutional free speech concerns would provide free speech doctrine greater consistency and systematicity. Such an advance in the area of free speech, as in any other area of law, would provide courts and scholars with coherent principle, regularity in adjudication, and uniformity of precedents.

One of the most in-depth and influential statements about the First Amendment appears in Justice Brandeis's concurrence to *Whitney v. California*.[105] His approach, as Vincent Blasi has pointed out, is of a political philosopher delineating how private individuals exercise their communicative autonomy to engage in statecraft.[106]

The case itself is not particularly memorable; in fact, it's better know for having been overruled by a subsequent decision.[107] Its memory survives in the public mind not for the majority's depth of reasoning but for the lasting imprint Brandeis's expostulation left on subsequent thought about free speech. The Supreme Court decided it at a time when members of the Communist Party were subject to prosecution under criminal syndicalism statutes, charged not only with advocating violent and armed revolution by the proletariat,[108] but also with membership in the party. This approach intruded into people's ability to engage and participate in activities with like-minded individuals. The overbroad judicial acceptance of syndicalism empowered states not only to prosecute those engaged in armed struggle or preparing minions for it but also persons who simply believed in Marxist ideology without advocating violent tactics.

In his concurrence to *Whitney*, Justice Brandeis distanced himself with this suppression of fundamental liberty, and his concurrence outlined the functions of constitutionally protected free speech. They included the ability to think, speak, and disseminate ideas without fear of government persecution. Brandeis nevertheless realized that "the rights of free speech and assembly . . . are not absolute."[109] In times of true national emergency, had the communists been calling for the immediate overthrew of the United States, surely there would be reason to safeguard public safety against calls to substantial public disorder. But persons' political affiliations are not within the ambit of government regulatory powers, even when their beliefs are outrageous to the general public. The choice of political membership is personal, requiring individuals to have access to information necessary to perform their civic duties.

Brandeis drew from a tradition of free speech that had gained momentum in the early twentieth century. At the time, most cases favored strong-handed government action in the area of national security. Judges rarely probed government evidence tendered by prosecutors bringing charges of sedition or incitement against political dissidents.[110] The test judges used assessed whether a suspect expression created a clear and present danger of a substantial evil. Even in that early period of First Amendment development, the Court acknowledged that speech was a fundamental right worthy of special judicial scrutiny.[111]

He drew attention to the ambiguity of the clear and present danger standard. He recommended a modified version that would have required government to prove

that the danger of substantive evil was clear and imminent. Brandeis further opined that courts should not simply render judgments based on judge's personal preferences or their conjectures but the fundamental principles of American government. As he understood, speech and democracy are interconnected; speech is not a right independent of any other but of critical importance for self-government. As one author observed, Brandeis "laid out a rationale for free speech in a democracy, and placed it firmly in the context of American history and ideology."[112] Brandeis observed that the aversion to censorship can be traced to the nation's founding.

Debate has always been central to citizens' identity and their understanding of representative government. Citizens' expectation that government respond or at least give serious consideration to their petitions has strengthened the nation's ability to grapple with complex political issues. The framers enshrined the values of free speech and assembly in the Constitution because their preservation is "indispensable to the discovery and spread of political truth." Deliberation, as he explained it, rather than repression were the best answers to "evil counsels." Free discussion, Brandeis continued, facilitates social stability by allowing persons to publically vent charged disagreements rather than allowing them to fester into unresolved hatreds. The foremost function of the Free Speech Clause according to his description is the advancement of effective democratic values, safeguarding against "tyrannies of governing majorities." With this explication, Justice Brandeis became a foremost expositor of the First Amendment for generations of scholars and judges.

While Brandeis established a contextual starting point, for understanding the value of free speech, his account requires further elaboration about the personal value of speech. Political expression is only part of the human experience with sharing ideas. Artistic endeavors, theatric performances, and personal discussions of all types are all critical to individuals' communal humanity. Dignity interests are of even greater day-to-day importance to the average person than the periodic forays into politics.

In addition to humans civic consciousness, they are private individuals whose ability to communicate, listen, and participate is deeply planted both in the First Amendment and the Constitution as a whole. While Justice Brandeis was undeniably correct that in 1791 the framers amended the Constitution to guard against suppression of unorthodox thought, he might have reached even further back into the nation's founding to identify the value of free speech. The Declaration of Independence contained a statement on the importance of free speech and that predated the Bill of Rights by fifteen years. One aspect of free expression that the First Amendment explicitly protects is the right to "petition the Government for a redress of grievances." This safeguard is meant to prevent the types of abuses against which the Declaration states: "[i]n every stage of these Oppressions we have Petitioned for Redress in the most humble Terms: Our repeated Petitions have been answered only by repeated Injury." Both documents established the right of the people to participate in debates and discussion.

Indeed there is a more indirect but no less important value involved in the ability to communicate to fellow citizens. It lies in the penumbra of Brandeisian civil ideal of partaking in and sharing in the marketplace of idea. The Preamble to the Constitution speaks of general welfare and instructs government to protect communal happiness. The First Amendment's protection of speech draws from that grander and more constitutionally global mandate to advance the good of society. The right of the people to petition is a key component to the articulation of political and person beliefs. The channels of communication have grow –and in the age of digital, telephonic, and other electromagnetic communications, the channels for reflection, contemplation, and learning have grown by leaps and bounds.

What leaps out from the broader understanding of free speech is the extent to which it requires judges to interpret cases based on aspirational principles. This perspective runs counter to the claim or originalists, who argue constitutional interpretation in general and First Amendment interpretation in particular must be backward looking. There is undeniable value in learning from the wisdom of the past. What's more, the written, legal obligation requires judges, legislators, and citizens alike to reflect on the trajectory of the law from its earliest days in the revolutionary era until today. But the text contains a mandate of general welfare that can only be understood from a presentist context deeply informed by the achievements and failures of courts, Congress, and presidents throughout nation's two and a half century of accumulated wisdom.

As Americans have become more pluralistic in their understanding of republican democracy, their views on the First Amendment have changed. Legal culture's altered perception of the Constitution is clearest in the area of seditious libel. In the early republic, intentionally speaking in favor of regime change would have warranted criminal conviction. Criminal punishment had attached in the late eighteenth century to a person who excited "any unlawful combinations . . . for opposing or resisting any law of the United States, or any act of the President of the United States."[113] That form of political censorship, which stifled public criticism, is now a vestige of the past. Viewing the country's evolving notion of free speech, means an abandonment of the relics of a nation that at its founding was less tolerant of dissent. The nation has long since adopted an understanding more in keeping with Justice Brandeis's statement in *Whitney*. People now freely speak against the government and laws without worrying about arrest unless their words pose an imminent threat of harm. Many write on blogs, take to the airways, speak in coffee shops, converse on telephones, and many other forms of communication in opposition to government programs, regulations, or any other official conducts.

Greater commitment to debate and discussion has loosened the fears that informed earlier times. But debate is not of independent value. It is one tied to speakers and audiences. They as individuals in a polity of equals enjoy the ability to vent, discuss, and otherwise communicate their ideas. Speech is of vital importance to a country established on constitutional mandate for government to advance the good of the people. That is, a country not solely benefitting the few, which would be an oligarchy, nor advancement of an even narrower group of people, such as a

plutocracy committed to will of rich or an aristocracy committed to the good of a privileged class of citizens.

That speech is part of a broad constitutional scheme implies that there can be certain limits, restricting policies catering to lobbyists for who lavished a politicians with gifts. Speech should be regarded as a right protected for the good it contributes to individuals and the good it conduces to society at large. The polity is a social construct with mandatory rules, whose terms of human engagement must follow the script of the nation's independence with its aim to build a government for the safety and happiness of its members. In addition to Brandeis's concerns for civic-minded conversations, the common good of the community of equals includes the ability to simply jabber, joke, and otherwise express one's selfhood. That personal aspect of free speech is implicit in the Declaration of Independence's assertion that people have formed a government to better preserve their inalienable right to pursue happiness.

In general terms, public policy must further the general welfare of the community of equals, each striving to achieve his or her sense of self-identity. In the context of free speech, that means judges can rely on the strict scrutiny standard to review restrictions on expression purportedly meant to benefit the public good but whose formulation lacks compelling reason or is overly broad.

3) Speech and Other Values

Americans high regard for the value of free speech predates the U.S. Constitution. The American Revolution would have been impossible without the formation of associations, especially the colony-wide Sons of Liberty, that facilitated the spread of petitions, the distribution of letters, and the gathering of conventions. Citizens expressed their desire to Congress directly. Revolutionaries also used many other methods to make their opinions heard, including debates around liberty poles; speeches, books, and pamphlets heralding the vision of a participatory government; and the many newspapers, journal, person-to-person contacts to spread word of charges against the Crown and ideas for constitutional change. Free speech was an essential feature of social and cultural advance at the birth of the nation. Outside the political realm, the ability to speak freely was critical to enjoyment of creativity, which made its way into the Constitution in the Copyright Clause, protecting professional and amateur artists.

Speech drives change, whether in politics or the arts, and disseminates the ideas, styles, and habits of the past. Principle is critical to the restoration, strengthening, renewal and exercise or representative democracy. The nation's advancement from a land politically dominated by propertied white men to a polity of equal citizens was furthered by discourse, conviction, and persuasion. Without the enjoying the First Amendment protection to express views against the mainstream, abolitionist, feminist, gay rights, and labor movements would have been entirely ineffective. At times, officials suppressed movements. In the mid-nineteenth century, both houses of Congress gagged anti-slavery speeches on their floors, and courts stifled labor unions during the nineteenth and early twentieth centuries. Most

activists, with the exception of libertarian groups like the American Civil Liberties Union, did not, however, conceive of speech as the be-all and end-all of their struggles. These movements sought to instantiate ideals of justice, fairness, equality, and happiness. These overarching purposes of governance fall within the Constitution's mandates for government to benefit the people. The First Amendment is vitally important to both stability and development of a republic responsible for the welfare of citizens. Irrespective of the speakers' identities, speech is essential to the achievement of persons' goals and agendas. Written and oral communications provide doors to the external world, an opening for stimulating national or local introspections as well as an opportunity to influence, entertain, commiserate, and reflect on history.

The right to free speech stems from an overall constitutional commitment to a polity of equal and dignified individuals. This perspective, to paraphrase one of Justice Powell's dissents, empowers each of us to voice views or be silent in a polity of dignified individuals enjoying the privileges of citizenship.[114] The American tradition of free speech is, thus, linked to activism, personality, sociability, and cultural development. Exclude any one of these values (the personal, public, or informative) and we are left with an incomplete explanation of why speech is so relevant to constitutional culture.

Speech advances the enumerated and unenumerated provisions of the Constitution. The essence of republican government is the prohibition against tyranny. Speech enables citizens to engage in the many features of democracy, including voting for state and federal officials. Elections are not directly derived to the First Amendment, but from the time of the founding the power to articulate ideas has been an entitlement. But the aspiration of political engagement has remained constant. Without the ability to freely articulate ones thoughts, government of the people and by the people cannot function. But the right to self-expression is also a necessary entitlement in a nation whose statement of independence asserts the right of each person to enjoy the innate liberties of humanity.

Speech, then, provides individuals with the means of swaying others politically, aesthetically, and socially. It benefits speakers and audiences. The Constitution's mandate for the general welfare allows each actor in the whole community to be at liberty even when expressing controversial views without fearing that powerful groups will stifle ideas. The range of matters involving speech are all connected to a grand principle of representative democracy with the essential features of general welfare. Although persons operate as civic players, the welfare of the community is not purely public. Persons also join in a society and lobby politicians to benefit privately. Protections of communications are as important for improving governance as it is for improving private lives. The First Amendment is, therefore, a rampart for the maintenance of self-government, self-fulfillment, the quest for knowledge, and creative entertainment. The political self is inexorably linked to the private individuals and their interests. In the many cases that these interests conflict, courts must rely on predictable methods of resolution adopting appropriate standards of review, balancing, stare decisis, or deference.

The judiciary plays the role of neutral arbiter deciding conflicts among citizens with legal cognizable claims and defenses. But judges are not alone in their responsibility to constitutional justice. To the contrary citizens responsibilities to others requires legislative actions. Many of the thorniest conflicts in First Amendment law question the extent to which the judiciary is required to defer or check the power of federal, state, and local legislatures. The fairly inchoate obligation to protect social welfare gets narrowed to questions of whether lawmakers have abused their discretion in passing laws restricting speech.

None of us live in a vacuum; therefore benefits to a community may sometimes trump personal desires. Courts have routinely upheld laws that prohibit incitement, copyright violation, trademark misappropriation, conspiracy, and other types of restraints that do not implicate core constitutional commitments. Controversies arise over what is the nature of those commitments, how to balance contradictory dictates, how to interpret ambiguities. In some cases speech outside the First Amendment is easy to identify, hence the famous uncontroversial prohibition against shouting fire in a crowded theater; at other times legal disputes are about more grey areas, such as commercial speech, captive audience disputes, and forced speech; finally, are those forms of speech that are presumed protected, foremost those that advance political agendas.

In the broadest sense, the First Amendment safeguards the voices of individuals living in a constitutional community. Each of us seeks to make sense of their external surroundings and internal perceptions, to note his or her impressions, and then to communicate those ideas to others, or some of us memorialize them in written, audible, or video formats. Speakers express their sense of meaning and audiences engage with it through cultural and personal filters. For constitutional purposes, separating the personal from the public facets of speech disentangles a synthetic function of communications and cognition. Such a separation may makes sense when addressing specific hypotheticals or cases, but that is a matter of analytical convenience or judicial efficiency. Lurking behind every form of political speech is a desire to affect individuals, and behind matters of personal expression are question about the rights of the community.

The United States is a liberal democracy, committed to individual rights and the informed exercise of power. The Constitution, courts, and activists alike place so much emphasis on speech because it is connected to the enjoyment of so many enumerated and unenumerated rights. The Free Speech Clause is unambiguously related to a variety of other clauses securing voting rights.[115] In the context of intellectual property, the Supreme Court has found that even copyright protections are not absolute. The ability of audiences to at least limited use written and oral material is secured because the public can gain access to such materials through fair uses. Moreover, while a party can claim ownership to how ideas are expressed, the ideas themselves remain in the public domain.[116] So too, the Equal Protection Clause is linked with the First Amendment's purpose of keeping government from imposing its favored view upon classes of people with whom its policy statements diverge.[117]

In addition to its links to other clauses of the written Constitution, the Free Speech Clause is also interconnected with unenumerated rights. For instance, access to criminal trials, which the Court has identified as a right that is nowhere explicitly mentioned in the Constitution but is implicit in the Due Process Clause[118] is also linked to the right of speech. As the Court put it, "The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[119] Likewise the implied freedom of association is a fundamental liberty that is tied to free speech.[120] Likewise symbolic conduct–drawing attention to a message by using some physical object such as a flag–is clearly within the ambit of the Free Speech Clause, although not explicitly mentioned there.[121] The legally cognizable right to free speech provides persons with the necessary space to engage in social activity and to participate in community discussion, debate, and creativity.

Speech is a diffuse right that is best understood in connection with relevant constitutional norms rather than in isolation. Courts hearing cases involving free speech should consider whether there are countervailing constitutional concerns to weigh against those directly dealing with expression. Values that are compelling enough to warrant balancing include privacy, travel, suffrage, the guarantee against self-incrimination, and so forth. Rather than confining their reasoning to communicative values or pre-determined categories. The value of free speech to individuals, culture, and civil society goes far beyond any doctrines or judicial traditions. The often unstated assumption is that in the analytical background is the value of equal dignity. This recognizes both the personal importance and the correlative entitlement that government is prohibited from abridging. The common good of the people cannot be realized without honoring the differing opinions voiced by variously minded persons. Achieving the common good is therefore not merely a matter of shooting for some abstract general welfare but a matter of studied public policy that takes into account public order and the people specifically affected by the administration of laws with a direct or indirect effect on free speech.

Speech is both self-assertive and a means of getting others' attention, swaying them, and changing opinions. In addition, communication is necessary for visual arts, parodies, tragedies, poetry, religious performances, familial tranquility, and an enumerable number of other subjects defining personalities, giving wings to flights of fancies, and empowering persons to exercise their rational faculties. Expression can also have a direct impact on audiences. Dialogue is necessary to make informed healthcare decisions to share experiences and to commiserate with others, to acquire financial information, to lobby, to rely on legal remedies, and enumerable other human activities. Therefore, the power of speech and the constitutional protection of speech in inexorably connected with personal and public realms. The First Amendment relates to them both as it does to a more rudimentary concerns against government overreach into private and public decision making.

The diversity of subjects that fall under the rubric of free speech are connected to the root constitutional mandate that government protect liberties

necessary for a community of equals to enjoy safety, happiness, and tranquility; this is pithy statement is a synthesis of goals encompassed in the Preamble and Declaration of Independence. The First Amendment should be understood within the broader context of constitutionalism. As Andrew Koppelman has pointed out that from the evidently high importance of free speech "it doesn't follow that these values should always take priority over the effort to break up entrenched patterns of discrimination."[122] The value of speech should be determined contextually. By expressing ideas using an infinite number of linguistic and symbolic representations, people are empowered to enjoy their dignity, influence others, and strive for social change. The existence of these values as objects of speech indicate that they are likely to sometimes be of even more fundamental value than speech itself.

The Free Speech Clause is not alone in protecting speech. Not all portions of the Constitution that are relevant are obvious or commonly thought of as speech empowering. For instance, the Third Amendment's prohibition against quartering soldiers in peacetime implicitly allows homeowners to speak without being charged with breach of the peace for arguing with soldiers demanding ingress; likewise the Fourth Amendment right against unreasonable searches and seizures protects citizens who demand an explanation of arresting officers; the Fifth Amendment right to remain silent implies that a person is free to speak; the right to equal elective franchise is an expressive one, tied at least in part to the Equal Protection Clause and the right to choose a political representative; the right to jury trials would be meaningless if jury members were unable to confer among themselves; the Sixth and Seventh Amendment rights to a jury trial would be meaningless if the jury were unable to confer; the existence of a right to habeas corpus clearly means that a prisoner can petition for freedom; the right to amend the Constitution allows for debate on the subject of whether such a change is necessary; and the list could be expanded further.

This does not imply that all constitutional provisions have speech components. The Second Amendment right to bear arms, for example, is unrelated to free speech nor is Congress's power to coin money at all connected to expression. The meaning of these clauses is of course up for debate without fear of government interference, but their exercise is not intrinsically connected to communication. More surprisingly is that not all clauses dealing with representative democracy implicate the right of the people to speak freely. Most illustrative of this is the exclusion of ordinary citizens from congressional debates. Take for instance the Qualifications Clause of the first article of the Constitution that empowers the House of Representatives and Senate to judge "elections, returns, and qualifications of its own member." The provision protects the integrity of elections and creates a safeguard against voting irregularities.[123] There is a disconnect between this and the First Amendment. The latter First Amendment does not obligate the Senate or the House to open to the public debates about members' qualifications.

The main point I am making here is that interpretation of the Free Speech Clause requires a broader understanding of the Constitution than simply treating the

provision in a formalistically rigid fashion. Moreover, contrary to the Supreme Court's narrow claim that content restrictions can only be enforced against low value categories as they were defined in 1791, when the Bill of Rights was ratified,[124] the First Amendment should be read through the lense of the three Reconstruction Amendments, which were ratified in 1865, 1868, and 1870. The Thirteenth Amendment's prohibition on slavery and involuntary servitude, the Equal Protection Clause of the Fourteenth Amendment's restriction on discrimination, and the Fifteenth Amendment's restraint against racially exclusionary voting regulation augmented the power of government to act on behalf of civil rights. They should play an analytical role in government balancing of speech and counter claims.[125] The post-Civil War Amendment's mandate the favoring of antidiscrimination legislation. These provisions are particularly pertinent in the context of workplace and educational anti-discrimination measures. Courts adjudicating free speech claims should consider the issues in a broad constitutional framework, reviewing First Amendment doctrines not in isolation but in the context of other constitutional interests.

Formalistic solutions to the resolution of free speech disputes are inadequately nuanced for courts to apply law, doctrine, history, culture, and empathy to disputed facts. Narrow reliance on judicially created categories forces factually complex disputes into a small set of legal identifiers that are subject to selective interpretation that may not capture all the considerations relevant for legal resolution. Fred Schauer has demonstrated that a court's choice of categories–be they government speech, public forum, or content based doctrines–skew the outcomes of cases involving challenges to restrictions on speech, such as regulations prohibiting the display of Confederate symbols on license plates.[126] Rather than resorting to oversimplified categorization, judges should examine the constitutional, social-cultural, and individual considerations that are materially relevant to the resolution of a controversy. Legal doctrines and categories should suggest but not determine outcomes. A case might implicate a variety of constitutional factors, but they should not predetermine the outcome. Juries and judges should rather consider them in the context of real disputes, real people, real social conditions, real cultural concerns, real audiences, and real speakers. The facts should not serve as window-dressing for predetermined outcomes, rather the Court should deeply scrutinize the constitutional, statutory, regulator, and cultural components of cases challenging censorship.

4) Personal and Public Interests

Representative democracy requires the protection of fundamental rights and the advancement of the public good. This value is not concerned with the benefits audiences receive from free communications. Citizens are not solely civic actors but also self-interested individuals. A government beholden to the will of the people, must respect the will to participate in governance, on the one hand, and self-assertive communications, on the other. People are not divorced of their society or culture nor does the polity exist without unique constituents. The right to free speech

is therefore neither a purely democratic nor solely libertarian. A person enjoys constitutional safeguards even when raising a toast, joking, singing, or otherwise entertaining. Only a totalitarian government would restrict someone from engaging in expressive activity in the privacy of ones home, alone on a park bench with no one around, or under a deserted but acoustically sonorous viaduct. Courts are likely to find unconstitutional overbroad suppressions of private speech[127] as they are to strike regulation restricting public expressions about community concerns.[128] The First Amendment is a powerful instrument that empowers people to realize the Declaration of Independence's guarantee to pursue happiness. So too, voicing personal and public aspirations is secured by the Preamble's General Welfare Clause.

Freedom of speech therefore follows from the dual purpose of U.S. constitutionalism as set out in its founding documents. Equal rights guarantees provide for a maintenance of order and fairness that balances abuse of private or public influence. Each person enjoys the same right as any other to share perspectives with others. The American people are such adamant defenders of free speech because expression is a vital component to our lives in a democratic republic.

By safeguarding personal expression, individuals maintain the autonomy necessary to debate the latest news or to articulate mundane concerns. The power of speech, then, opens channels for the flow information about everything from politics to blasphemy and the exchange of recipes. The Constitution's protections of such deep concerns as sexual preferences[129] and family living arrangements[130] implicitly allow for the discussion of those subjects without government interference. Stated synthetically, the right to express oneself freely is a function of both the constitutional protections of equal citizenry with dignitary interests and the structural features of a deliberative government. The communication of ideas is both subjectively beneficial for the speaker, and objectively necessary for measuring legal standards applicable irrespective of any specific traits.

4) Public Principles

The terms of the First Amendment should be understood in the context of constitutional principle. The nation's statements of purpose, which are found in the Declaration of Independence and Preamble, establish a representative government whose policies must serve the civic and personal needs of the people. The ability to speak freely in a society of equals empowers each of us to articulate our thoughts and ideas–from the periphery of our consciences to the core of our personalities–at political rallies, coffee shops, museums, and the comfort of our hearths. The First Amendment is a key rampart against the overreach and favoritism of government. It safeguards constitutional democracy from the extremes of totalitarianism and the mundane abuses of local officials.

The Constitution and Declaration create uniform standards against which other laws, administrative actions, and judicial pronouncements must be measured. They operate as much on the national, the state, the local, and the county levels.

Constitutional law creates a unified system of nationally recognized legality, identity, and normativity. This characterization applies as much to the First Amendment as any other provision. Government is authorized to create laws and restrict conduct in accordance with the principle of liberal equality for the common good. Put in more specific terms, free speech protections advance self-fulfillment and public contentment. The protection speech is tied to the other guarantees memorialized in the Constitution: The Fourth Amendment prohibition against unreasonable surveillance cannot be understood without its free speech correlate,[131] the Free Speech Clause is also connected to the Due Process Clause through the doctrine of incorporation,[132] equal protection of laws is likewise essential to the protection of free expression,[133] and separation of powers imply that if the legislators pass laws or the executive issue an order then they are reviewable by the judiciary.[134] Libertarian theories of free speech miss this point of constitutional synthesis. They conceive the First Amendment as the foremost provision that, absent a compelling reason, trumps any other of the Constitution. A contexualized free speech advocates more balance. Rather than automatic preference for free speech, it requires evaluation of all the fundamental or statutory interests involved. History is likewise relevant to the inquiry as are alternative avenues for regulation and expression. Unlike the Supreme Court in the United States, the European Court of Human Rights has explicitly recognized "[t]hat protection of private life has to be balanced against the freedom of expression."[135]

The rationale behind the constitutional protection of free speech is best understood in the context of a representative democracy of equals. It does not stand on its own but within the context of other guarantees and, even more broadly, in the grander scheme of fair governance, respectful of the dignity and integrity of persons. The entire project of the Constitution combines anti-autocratic, rights-affirming, and national-welfare features that should play into all free speech analyses. The constitutional guarantee of speech prohibits government from forcing orthodoxy onto people.

The right to speech is not only individual but also collective. At times, a person seeks to articulate a unique perspective. At other times, he or she aims to associate with others, to join forces in their collective convictions about labor, the arts, or education.[136] Human contacts provide individuals with avenues for professional advancement, self-enrichment, and community involvement. In some cases, the meaningful associations will be intimate–limited to a small group of people, highly selective, and seclusive–while at other times persons seek comradery in organizations open to the general public.[137] In some cases, mutual cooperation is not simply a matter of convenience or affinity with one's associates as much as cooperating for a cause aggregates voices on economic, intellectual, or political issues. The Free Speech Clause correlates with private and collective aspirations. Social media outlets augment the ability of persons with common ideas to influence others.

5) Pluralistic Free Speech

The individual voice can shed light on subjects to enlighten others. There is a value of tolerating disparate opinions and tastes, adding to the depth of discussion and diversity of perspectives. Governmental institutions should be designed to protect citizens' abilities to meaningfully and sincerely engage with others. The First Amendment ennobles a plurality of voices to engage in democratic discourse about traditional and progressive views on matters ranging from law, society, and culture. The multifarious personalities that inhabit a polity of equals hold various and often divergent opinions about what constitute enjoyable lifestyles. Retaining an outlet for catharsis is coextensive of the Declaration of Independence's guarantee of individual's pursuit of happiness. The ability to express differing conflicting or supportive impressions without government interference tends to increase personal happiness and diversify input about public policies. The right to speak freely enables all people–regardless of their religion, race, socio-economic background, tastes, or group affiliations–to state their ideas.

Representative democracy presumes that policy will be informed by the airing of distinct opinions. The Supreme Court has noted that there is a "close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."[138] The First Amendment is a core safeguard for broadening representative democracy.[139] A government of the people presupposes the existence of differing, conflicting individual and associational points of view. Sometimes airing these differences goes no further than a debate at a bar or coffee shop, at other times, though, speakers can convince audiences to put pressure on elected officials to attend their efforts to some greater good. Pluralistic society is not a unity, but a community of distinctive personalities who act together but retain the right to disagree about preferred courses of action, convince each other, to reject the ideas of others, and even to castigate them for their views. The role of the First Amendment, then, is to safeguard the right of distinct individuals to vet their ideas as equals, but ones that often conflict.

Free speech is a correlate of popular sovereignty and personal autonomy. It provides both the guarantee to speak on public issues and the guarantee to keep out of politics. Freedom of expression is an anti-totalitarian guarantee that applies equally throughout the population.

A system that protects speakers to freely address private and public concerns provides legal redress against government obstacles placed in the way of personal exploration and engagement in efforts to advance the common good. Sometimes these goals are met through personal effort while at other times they are achieved by joining other activists, hobbyists, organizers, artists, or board members. The First Amendment has broad implications for the entire system of constitutional governance. It enables everyone to pursue selfish or altruistic goals that do not create harms such as conspiracies, corporate trusts, harassment, or fraud.

The latitude for open debate does not imply that popular pressure can legitimize inequality. The effectiveness of speech can be curtailed by other constitutional means. For example, in *Romer v. Evans*,[140] the Court invalidated a popularly adopted Colorado referendum preventing local or state agencies from

adopting anti-gay policies. Under those circumstances, the Court gave greater weight to the equal protection principle preventing arbitrary treatment of an identifiable group than to majoritarian interference with civil rights. A democratic referendum, a prized instrument in the pantheon of constitutional democracy, did not supersede, the comprehensive prohibition against discriminatory treatment. Likewise the majority has no license to stifle disfavored viewpoints. But speech is not an absolute right; therefore, no matter how powerful a corporate lobby promotes monopolistic practices and advances insider trading that content will not fall under the First Amendment's ambit. In all those areas, government can place restrictions on speech in favor critical social interests. Likewise, when popular movements advocate immediate harms or a person misappropriates another's creative work, the Constitution does not favor speech to the exclusion of other considerations. Resolutions are not easy, requiring difficult assessments of risks, burdens, regulatory fit, government interest, and alternative avenues available to creators of content, and must be resolved through a contextual parsing of facts, statutes, and precedents to arrive at sound resolutions.

Some mechanisms for resolving disputes are formal and others informal. The First Amendment favors neither, although in practice formal methods are more likely to be effective. The right to free speech extends to soap box preaching, art classes, philosophical debates, negotiations, and campaigning. Finding the proper role for enforcing, legislating, and adjudicating are matters of structural integrity and coordination between the three branches of government. The right to provide input about censorship policies is quintessential to the function of the First Amendment as a instrument for autonomy and communal deliberation. On the other hand, less is at stake with advertising consumer products, which has little to do with either natural person's private or civil identity.[141] In this matter, it is too simplistic to say that any restriction on content should be suspect, as the Court did in *Reed v. Town of Gilbert*; more correct is that in some contexts, especially those where an individual is expressing his or her humanity or a political opinion, the Court should use extra close scrutiny, but in matters of business more content restrictions are permissible without raising the same judicial concern for protecting constitutional rights.

At more fundamental levels–speech that is not purely motivated by economic enrichment–free speech protected the people's ability to express views about matter of such great relevance as gun reform, consumer protection, corporate taxation, foster care, school governance, immigration, and an infinite number of other topics. Unlike totalitarian states, the range of conversations in constitutional democracies are only limited by the people's imaginations. And this right extends not only to self-expression but also to advocacy for other's causes, even ones that the speaker may not believe. The value of speech is entrenched in the constitutional system of representative democracy, one that is open to divergent political perspectives and not limited by philosophical commitment to uncompromising ideology.

Freedom of expression has social value. It is not only of benefit to specific individuals. Culture advances through the exchange of ideas. As constituents of

communities, individuals can influence friends, persons on their block, those of their cities, states, and nation. Speech is therefore not only of value to the speaker or to the state but for the public person, which lives in a private sphere with external and cultural concerns. Insofar as government is created for the people, its obligation requires laws guaranteeing the testing of ideas behind closed doors and in public spaces. Speech is not only a personal outlet but also guaranteed for the achievement of social ends, for example ending policy overreaching such as intrusion into bodily integrity, or advancing the administration of vaccination plans, and regulation of affordable health care.

The exchange of ideas presupposes the possibility of organic process, an evolving community that can analyze, process, and act on new critiques, perspectives, and insights. Change must be tethered to a constitutional norm in keeping with the nation's written Constitution. It is important to remark here that tolerance of divergent opinions also enables social movements to wage vigorous campaigns against institutionalized stereotyping, discrimination, and parochialism that have riddled the nation from its founding. As Jack Balkin has put it, in the course of discussing the Bill of Rights, succeeding generations are not obligated to meet the detailed expectations of 1791 as long as the newly "proposed construction . . . makes the most sense of the clause in the context of the larger constitutional plan."[142] The First Amendment must be balanced against other constitutional and legal concerns germane to any dispute arising from direct or incidental effects on expression.

Free speech is not a separate right over and above all others, it is part of a grander scheme for protecting individual rights for the common good. It fits nicely with other portions of the First Amendment, such as the Free Exercise Clause, but so too with less obvious provisions such as the Copyright Clause, the Equal Protection Clause, and the Due Process Clause. Any time that there is more than one constitutional provision at play, a court must balance the several interests. Simply reviewing the differing texts of the constitution, will not suffice to offer a solution. Neither will the ideas of the founding nor the thought and ideas of the founding generation provide the rigorous analytical guidelines for interpretation. That is not to underestimate the important of written text and the historical record. But those are only some of the considerations involved. Neither can any particular justice's, nor even group of justices, words be said to be determinative, otherwise no case could ever be overturned. Of course, the Supreme Court makes the governing doctrinal rule for the time being. However, when the decision undermines the principle of liberal equality for the common good, history, the people's sense of equal common good, and narrowly tailored policy judicial opinion should be questioned, qualified, distinguished, and unusual cases overturned.

The underlying values of the First Amendment as any other portion of the Constitution are laid out in the Preamble to the Constitution's General Welfare Clause and the second paragraph of the Declaration of Independence, with its statement of equal and inalienable human dignity. Where speech violates that principle–for example, in cases of harassment in the workplace, speech is no

defense to the enforcement of crucial public policy. Defining this principle is not a static but evolving process; or more accurately, the central function of the free speech to provide the forum for individuality and communitarianism remains constant. But at no point in America's history can any generation claim an epiphany to its application in all circumstances and all times. Rather associations, individuals, social movements, government actors, and even foreigners contribute to the dialogue, to art, and knowledge. Additionally groups help establish the balance with other crucial rights against discrimination, poverty, and a other values.

Take, for example, the *Masterpiece Cake v. Colorado Civil Rights Commission Case*, in which a baker refused to bake a cake for a couple's same-sex marriage. The dispute between the baker and married couple, pitted the values of free speech and free exercise of religion against the dignitary freedom to have equal access to public services, there was no simple way to identify a hierarchy of rights. Just resolution required deep analytical analysis of facts, laws, historical values, and constitutional principles. No simple categorical examination would suffice to et at the full range of considerations relevant to the case.

The balance is not always between competing substantive rights. Sometime, speaker identity and relationship to a state entity affect free expression analysis. In the public employee line of case, where the *Pickering* rule is determinative, a court must take into account arguments for the speaker as citizen and those for the government as employer. And in the kindergarten through high school education cases, which are governed by the *Tinker* rule, balance must be struck between the interests of teaching, discipline, and order and those of expression and debate. So too, issues of privacy about intimate details of a person's life also implicate a speaker's right to communicate and the audience's to obtain information. As the Court put it in a due process case upholding the right to sexual privacy, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Values of self-expression should sometimes be balanced against equality and general welfare concerns.[143] In the employment discrimination field, for instance policies against discrimination can gainsay those of verbal harassers. Free speech, autonomy, fairness, and the public good are all values established by the Declaration and Preamble with no definitive hierarchy. Where litigants raise conflicting claims involving these rights, judges are left with no option but to balance them in the context of the dispute or controversy.

6) Balancing Content

The Roberts Court has on occasion warned against weighing free speech in a balance against other concerns. Justice Kennedy, just as others in the libertarian camp, rests on liberty portion of the autonomy equation rather than identifying the whole range of constitutional concerns, be they personal privacy or national security, that litigants might point to for counterbalancing free speech concerns. Justice Clarence Thomas made the most stark statement on this point. All content regulations, he asserted in *Reed v. Town of Gilbert*, must be judged by the highest levels of judicial interpretation. Roberts, Kennedy, and two other justices joined

Thomas's oversimplification, "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[144] Free Speech doctrine is far more complex, tangled, and contextual than to assume all restrictions on speech to be invidious.

Not all categories of speech are protected and some are explicitly balanced, as we note in the *Pickering* line of cases. And the reason behind the restrictions is not just a matter of past practices but of values, deep and rich connections to the ideal of fair protection benefitting representative democracy. Thus *Reed*'s categorical assertion mis-represents existing doctrine. Certain forms of speech are not protected because of their content. The antiharassment provision of Title VII of the Civil Rights Act of 1964 are telling.[145] The statutes provides remedies for victims of hostile work environments, even where there is no direct negative employment consequences. The statute is grounded on the principle that employees have the right to work without being subject to "discriminatory intimidation, ridicule, and insult."[146] The statute creates civil liability against employers who tolerate work environments where victims are subject to undesired sexual advances, other unwanted sexualized verbal requests, or sexualized hostilities and intimidations.[147] The statute is constitution despite its overtly content restrictions on self-expresion.

A court can only ascertain whether a statement is hostile by examining the words or gestures and the context in which they were uttered. For example, a worker's claim of sex harassment must demonstrate that the employer made or tolerated sexual derogatory comments. Court can evaluate whether victims were subject to insulting epithets or to sexual objectifications.[148] A finding against the employer requires evidence of allegedly offensive comments.[149] Content based evaluations are also made for other protected categories under Title VII. An Arizona based district court judge indicatively asserted, "To establish that a hostile environment claim based on national origin exists, plaintiff must show that: (1) he was subjected to verbal or physical conduct because of his national origin; (2) the conduct was unwelcome; and (3) it was sufficiently severe or pervasive to alter the conditions of his employment. ."[150] He can recover when the totality of circumstances indicate that the employer showed "manifest indifference or unreasonableness in light of the facts the employer knew or should have known"[151] of harassment, such as explicitly degradingly pejorative statements made at work.[152]

Thus the Court's formalistic statement in *Town of Gilbert* that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests,"[153] disregards case law and the operation of evidentiary standards. While employers sometimes propound First Amendment defenses in sexual harassment law suits, courts have found verbal discrimination in workplace settings to be unprotected. The Supreme Court has signaled the issue to be so much a nonstarter that even in a case wherein both sides briefed the matter during the course of litigation, the Justices refused to

address a First Amendment attack to Title VII's prohibition on workplace harassment and hostile environments.[154]

The Court's effort to justify the content neutrality standard and still maintain its deferential decisions on Title VII as not targeting expressive content[155] are not at all convincing. Indeed, there is an undeniably content based judicial assessment explicitly built into the current rule for finding a Title VII violation, "When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated."[156] There is simply no way to identify what statements are intimidating, ridiculing, and insulting without parsing out their contents, viewpoints, and contextual meanings.

Even if an employer or employee covered by Title VII were to be expressing misogynistic or racist speech to express authentic political or personal views, that would not be a basis to dismiss a suit from proceeding. Neither is it any defense to claim that photos of sexual acts, lynchings, or executions hung at work are factually accurate. Neither the EEOC nor a private litigant needs to prove that there is a compelling state interest in restricting harassing speech in the workplace. The antiharassment policy is not merely content discriminatory, but it disfavors a particular viewpoint, one that is abusive because of its degrading sexual, racial, xenophobic, or bigoted perspective.

There is a mix of personal and private concerns in this area of law that relates back to the guarantee of dignity as the best means of securing civility. In the case of workplace harassment, the Supreme Court has explained that the harm extends beyond the victim.[157] Workplace behavior has an impact and is influenced by "a constellation of surrounding circumstances, expectations, and relations which are not fully captured by a simple recitation of the words used or the physical acts performed." Judges must therefore bear in mind the "social context" of an act in Title VII cases[158] as well as the federal government's Commerce Clause power to pass laws regulating businesses that have a substantial effect on interstate commerce. We are members of a civil community, and any review of a speech regulation should look to social context and any nexus to other relevant constitutional clauses, statutory provisions, and common laws to weigh the state's purported policy against any private effect.

Even when the strict scrutiny standard is appropriate to protect core speech, the Supreme Court has in exceptional circumstances found a state can elevate above its high barrier against government interference. In *Burson v. Freeman*, the Court faced a challenge to a state election statute. Tennessee made it illegal for anyone within 100 feet of a polling station on the day of election to campaign, display of campaign posters and other materials, distribute of campaign literature, or make campaign speeches for or against a particular candidate or political party. A treasurer for a candidate seeking municipal political office in the state of Tennessee had facially challenged the law, arguing that it "limited her ability to communicate with voters." The law raised the Court's concerns because it restricted political

speech, was a content based limitation, and governed the communicative use of a public forum.

The Court engaged applied strict scrutiny analysis to the content restrictions on campaign speech but held that Tennessee had a compelling reason for securing voters unimpeded right to vote. The law allowed the state to maintain the integrity of elections against fraud, intimidation, interference, and manipulation despite the limitation it placed on core political speech. The administration of fair democratic elections outweighed Plaintiff's speech interests.[159] The fair administration of election is of highest importance to representative governance. Maintenance of a system where people can cast ballots freely, without harassment, in turn helps government guarantee speech to the general population rather than special interest groups who might otherwise undermine the legitimacy of election results. Comprehensive decision making goes beyond the more narrow approach to free speech articulated by some leading theories of free speech.

Chapter 3

I turn my attention to the three most commonly accepted views about the constitutional purposes for protecting free expression. My aim is to distinguish my theory from those primarily focused on free speech. This chapter demonstrates how an approach that synthesizes the personal and political aspects of expression explains the function of the First Amendment better than those three. Understanding free speech within the context of other legal guarantees is necessary for comprehensive adjudication. Courts should seek to carefully weigh the evidence before them rather than formalistically preferring speech irrespective of other explicit government priorities. Without such adjudicative rigor, litigants are more likely to turn to the First Amendment to thwart legitimate public policies that tangentially affect speech.

All three approaches discussed in this chapter narrower in their conceptions of speech than the contextual approach I propose. While I believe the First Amendment is a critical fixture of a more complete constitutional scheme of representative government requiring close balancing of various values, the dominant schools of thought regard the Free Speech Clause as the preeminent feature of the U.S. Constitution. My contention is that it is critical to a larger scheme of safeguarding liberal equality for the common good, which is the principle mandated by the Preamble and Declaration.

The right of expression is preserved against state abuse because representative democracy cannot function without it. Indeed, the freedom to articulate ideas is essential to any political systems guaranteeing deliberative lawmaking and heterodox self-expression. The social value of the right to free expression lies in the speaker's dignitary will, the public's anti-authoritarian drive, and the audiences' informational urge. This perspective seeks to be comprehensively contextual and to eschew atomistic formalism. Professor Fred Schauer correctly asserted that First Amendment theory should be formulated in a "political, sociological, cultural, historical, psychological, and economic milieu."[160] These and other facets of constitutional free speech protections should be understood within a unified theory of a government structured to protect individuals and advance the general welfare.

Theoretical clarity can provide insights into why certain linguistic content, such as political platforms, are protected and others, such as true threats against the President, are not. Clarity about the role of self-expression in a representative democracy can help individuals, associations, and government actors check abuses of power by balancing all relevant concerns for the resolution of disputes or the creation of policies. While theory should be backward looking to precedent and historical facts, aspirational values should also inspire public deliberation and morality. A foundational theory of the First Amendment can provide the analytical framework for critiquing Supreme Court cases, statutes, and regulations. The most commonly adopted theories of free speech, as this part seeks to demonstrate, are

too narrow in conceptual scope to account for important strands of constitutional thoughts and ideals.

A. *Personal Autonomy*

1) Autonomy Theorists

A widely accepted rationale for protecting free speech is predicated on the notion that the First Amendment safeguards personal rights to articulate thoughts, ideas, sensations, and preferences. Without protections on their speech, individuals could not reach their intellectual capacities and artistic abilities. Heavy-handed government regulations inflict dignitary harms by undermining persons' expressive self-construction.[161] This approach focuses on the individual. As Professor Rodney Smolla conceives it, "Freedom of speech is part of the human personality itself, a value intimately intertwined with human autonomy and dignity."[162] Speech is linked to "each person's central capacity to reason and wonder," thereby placing it above other forms of fulfillment.[163] Government cannot stifle a person's expressivism, even when the speaker might offend others, as might be the case if a person uses expletives to voice discontent in public places.[164] Professor Seana Shiffrin adds that, "A large part of what we value about speech is located in the speaker's intentions to communicate to an audience and to influence, through the transmission of content and its uptake, that audience's perceptions, beliefs, and plans."[165] Shiffrin thus adds insights into why a person seeks to express ideas and into their value to listeners.

Professor Edwin Baker also adopts a personalized perspective; however, he is firm in the conviction that audiences cannot dictate individual decisions. Democracies instead safeguard personal liberty of self-expression, self-exploration, and self-reliance against suppression.[166] His view is closely tied to Thomas Emerson's classic expostulation, "The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being."[167] Baker is even more nuanced, asserting that the "two key" values of the First Amendment are "self-fulfillment and participation in change." He recognizes the value of general welfare, which he links to government's obligation "not impose restrictions on a person's right to speak." It is up to the individual to identify what to value and government's duty to respect "individual autonomy."[168]

That respect assumes that each individual is self-determinating and free to express preferences.[169] Baker defines personal autonomy to be "a person's authority (or right) to make decisions about herself–her own meaningful actions and usually her use of her resources--as long as her actions do not block others' similar authority or rights."[170] Baker isn't arguing for a do-whatever-you-want libertarianism.[171] His conception is also more restrictive than other autonomy theorists, for instance he argues against commercial entities receiving the same free speech protections as "citizen governors."[172]

As convincing as Baker's theory is in explaining the rights of speakers, it lacks sufficient nuance about how to resolve conflicts between autonomous and free

people. His statements about personal autonomy fathoms a self-conscious individual directed by self-perceptive and self-assertive orations. But people are multi-dimensional creatures who hold many incongruous beliefs and desires. Sometimes we are willing to be self-sacrificing for some higher end: For instance, many men who voted for the Nineteenth Amendment, securing women's right to vote by constitutional amendment, diluted their own political votes in the name inclusive politics. It certainly contributed to the general welfare by allowing half the population to enjoy an equal privilege of citizenship. Some laws granting speech must limit the autonomy of a portion of the population in order to expand it for others.

Baker writes that "[s]peech is protected [by the Free Speech Clause] not as a means to a collective good but because of the value of speech conduct to the individual."[173] The Supreme Court has, indeed, recognized the autonomy value of speech in a variety of decisions but not to the exclusion of other public concerns. In one case striking an overbroad statute prohibiting picketing near schools, the Court asserted that the guarantee of free expression without government censorship was meant to "assure self-fulfillment of each individual."[174] But in the same opinion the majority realized that self-fulfillment was also directly connected with "the continued building of our politics and culture."[175] Speech is valuable on personal, civil, and social levels. Protection of the very personal values of "dignity and choice," the Court pointed out in another opinion, requires the removal of unwarranted government restrictions. Here too the majority thought that the protection of individual rights functions to "ultimately produce a more capable citizenry."[176]

Thus, the Court has time and again integrated the values of the speaker with the social need for communicative liberties. For instance, the self-realization of copyright and defamation laws serve both interests; they protect personal creativity and reputation while also respectively fostering social innovation and mutual respect. Put another way, rather than subsuming social-beneficence into personal liberty theory, as Baker's approach would counsel us to do,[177] the Court, quite rightly I believe, regards the value of self-realization to be furthered by regulations designed to protect individuals living and operating within a political unit.

Like Baker, Thomas Scanlon at one point in his philosophical career criticized consequentialists who argue that speech is protected to achieve beneficial outcomes.[178] In his early expostulation, Scanlon focused on individuals' right to follow their chosen courses of action and laws worthy of obedience.[179] His account lacked any explanation of why people follow regulations that they disagree with and regard deleterious to their personal interests, including laws governing copyright, patent, defamation, insider trading, and the like. Each of us can have unique views about the value of such regulations, but, whatever our attitudes, they will remain binding.

Scanlon was right to say that distributive rationale offers an incomplete defense for the value of free expression, but his early discussion did not take into account the public good arguments in favor of regulations that protect creativity, consumer name recognition, reputation, and compelled commodities disclosures.

These laws are required for a society committed to the public good without compromising autonomy rights to the pursuit of happiness. Without them, there would inevitably be continuous, daily conflicts of autonomous interests without any legal recourse.

Fascinatingly, in his later work Scanlon explicitly rejected the exclusively personal autonomy explanation for the protection of speech. Instead, he came to believe that "the best account of freedom of speech seems to me to be neither democracy-based, nor autonomy-based, but irreducibly pluralist."[180] His later view seems to me far more comprehensive and complete, but it lacks the important component of how to identify the multiple values of speech. It is here, I believe, that the theory must be grounded in the founding statements of nation purposes, as they are set out in the United States by the Declaration of Independence and Preamble Constitution. But these texts are far too abbreviated to resolve complex problems about all manner of issues from net neutrality to conflicts between establishment of religion and free speech. Courts and legislators adjudicating and formulating policies, especially those involved in the uses of modern communications tools, should balance interests rather than simply relying on formalistic tests. The weighing of interests, laws, precedents, and history should be contextual enough to give a full vetting to all the values at stake. The conclusion will often be incomplete and faulty, but that is the nature of common law reasoning and legislative deliberation. Balancing allows for regular reevaluations according to the core commitments to liberal equality for the common good, rather than some undefined plurality of values.

Professor Martin Redish is one of the most resolute supporters of the autonomy argument. He regards self-realization as the "only one true value" of free speech. Redish recognizes that there are, what he calls, "subvalues" such as the "checking function" and "marketplace-of-ideas concept" of free speech, but believes that they all derive from the "self-realization value." While Redish does a meticulous and nuanced job drawing attention to the value of self-realization, his uni-centered account does not adequately explain why government can place limits on any speech. The Supreme Court has never understood the First Amendment to be an absolute protection of personal expression. Some other value–such as equality and the common good–also identify the limits of what state actions are legitimate for the topic at hand. In the end, Redish is too concentrated on speech alone. He writes that other theories of free speech are manifestations of the self-realization approach, but his reasoning does not build up from a cornerstone theory of representative democracy.[181] Self-realization is limited by the rights of others, not all of which are speech-based.

Redish's argument is comparable to Professor David A. J. Richards's. Both believe that other explanations of free speech are "less powerful" than the autonomy and self-respect explanations. Richards asserts that all the various modes of expression–freedom of the press, speech, and association–"derive[] from the notion of self-respect." He locates the central significance of free speech in the "human

capacity to create and express symbolic systems, such as speech, writing, pictures, and music, intended to communicate in determinate, complex and subtle ways."[182]

The autonomy value of self-expression is undoubtedly at the heart of why the United States and other liberal democracies value it so highly. But this monofocus on autonomy does not get at the entire rationale for our constitutional protection of speakers, writers, comics, inventors, actors, scientists, academics, teachers, and all manner of other speakers. Without any additional factors, guaranteeing the self-realization of speech fails to differentiate between the plural social values of speech, including the fraudulent and informative. Redish's exclusive focus on personal agency creates a presumption against limitations set on individuals rather than identifying the importance of speech in contextual and balanced terms. Focusing on the individual alone leaves undifferentiated the various types of communications. For instance, the value of truthful advertisement or truthful journalism may be satisfy some people, while others will want to advertise fraudulently and misleadingly. We tend to think of the former as having greater value that the latter. Indeed given a commercial speech case, a court can enjoin a person who wishes to advertise advocate for some illegal product. Neither can a person communicatively put another into imminent fear of bodily harm, no matter what the expressive value might be.

2. Evaluating autonomist's claims

Autonomy theories get at the nature of human consciousness, personality, feelings, and other characteristics whose outlet includes communication. A significant aspect of each person's sense of dignity is the ability to convey facts, views, commands, and inquiries to others. Free speech is also critical to "moral growth."[183] Personal identity is directly tied to the ability to formulate opinions, ascertain facts, and relate ideas. Freedom of speech enables everyone to explore the innermost workings of his or her mind and to spread knowledge. All humans engage in the construction of semantic and syntactic combinations of words, symbols, or other forms of categorizations that enable us to interact with others and to gain their insights. Communication allows us to share what we have learned, our preferences, criticisms, pains, joys, and all the various experiences contained within our personal senses that would remain purely phenomenological without language, signs, and sometimes even grunts and gestures. The speaker may be seeking influence, catharsis, assertiveness, inquisitiveness, boastfulness, or intimacy.

The dignity-based justification is appealing because it resonates with the personal desire for self-assertion, but it is vague about how some regulations, such as those on obscenity, can be justified.[184] Schauer points out that dignity is a two edged sword. It can justify self-assertion but also to rationalize restrictions, as is the case with defamation.[185] While dignity might not be the complete explanation for why liberal democracies treasure free speech so dearly , it is undeniable that the ability to articulate one's desires and higher intentions is essential for the human pursuit of happiness, which is guaranteed by the Declaration of Independence.

The protection of free speech found in the Constitution stems from the Unalienable Rights Clause of the Declaration of Independence. Those two documents establish sovereign and particular institutions to work for the general welfare by allowing people to enjoy their equal human entitlement. The protection of individual expression and discourse is essential to personal dignity, aspiration, access, knowledge. insight, and wisdom. Chief Justice Warren Burger similarly asserted that the "guarantees of free speech and press" were among our ideals "before and since 1776" that "those who drafted the Declaration, and later the Constitution" had in mind.[186] The social contracts formed by these documents creates not solely a personal interest but also a public right to stir action, debate, disagree, and find commonality. But the autonomy branch of free speech only gets at the personal not public nature of free expression.

Justice Brennan, writing in a dissent, likewise integrated the two into his thought: "Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity."[187] The Petition Clause, which is a part of the First Amendment, protects an aspect of speech that extends beyond the individual. It safeguards the right to discuss ideas as a political equal. This constitutional safeguard vindicates a grievances American revolutionaries articulated in one of the Declaration's paragraphs, "In every stage of these pppressions we have petitioned for redress in the most humble terms: Our repeated petitions have been answered only by repeated injury."

This is not to equate the two founding documents. Some of the essential features of the First Amendment–right to a free press, free exercise of religion, assembly, and the prohibition against the establishment of a state religion–do not appear in the Declaration. It would nevertheless be too dismissive to ignore the older statement of sovereignty. The Declaration points to how important petitioning is to the people's ability to protect their independence. This is connected, no doubt, to the ability to express one's thoughts, but that is still too narrow an explanation.

The Declaration helps better understand the fuller meaning of the right of self-expression. Effective petitioning invokes not merely a right to write letters and not send them or to create political art but not display it. The people need access to politicians and fellow citizens to convince them to pursue specific policies. Citizens are more likely to effectuate beneficial change when they are united as a community of equals rather than as atomistic individuals. In addition, the right to speech and the safeguard of petitioning, are tied to the Preamble's predicate that government should act for the general welfare.

Both the Constitution and Declaration establish something greater than speech: A system of policies and practices for the protection of human dignity and the common good of constitutional society. Self-expression is a key component to this overall purpose of constitutionality.

The personal autonomy perspective on free speech correctly recognizes that the First Amendment protects individual self-presentation, but that explanation is too

atomistic, set apart from other aspects, clauses, and broader ideals of the Constitution. It is a mistake to identify it as the only reason for protecting expression.

Justice Brennan articulated in another dissent that free expression fosters self-government and is "intrinsic to individual liberty and dignity," and advances "society's search for truth.[188] This statement combines deontological duties to individuals and consequetialist aspirations for a better society. The human urge to assert insight and personality, to make novel and controversial statements, and to explore personal and public ideals typically outbalances the interests of government censorship. However, certain social interests–in intellectual property, trademarks, and so forth–sometimes counterbalance those of speakers. These interests are not always in conflict.

Litigants, lobbyists, pundits, and soapbox speakers voicing opinions in a public park or on blogs can enjoy self-fulfillment and further public values. The underlying purpose behind the First Amendment's commitment to free expression is to guarantee the individual freedom to pursue happiness within the public structure of a representative democracy. Representative government is no doubt instituted to secure rights, such as self-expression. But government as a sovereign unit is composed of multiple individuals, each with his or her own agenda, and in need of public policy that can dictate reasonable restrictions. Libertarian defenses of free speech miss the greater function of social contract, the need to maintain public standards against reputational harms, government accountability, and education that would be impossible to pursue if each person were an island of dignity. Harms require redress, which usually doesn't sit well with those who are punished. Government is answerable to the people for the policies it pursues. It is also obligated to maintain order that must limit incitement, conspiratorial criminality, and other harmful forms of expressiveness.

The dual personal and public importance of speech has been recognized since the days of the colonists. While free speech was not often discussed in those days (the right to petition was of much greater moment to revolutionaries), in the midst of the American Revolution, a Rhode Island newspaper published an anonymous author's column eloquently asserting: "Freedom of speech and public writing is the birthright of every man, a sacred and most invaluable privilege, so essential and necessary to the happiness of a free people, that the security of property, and the preservation of liberty, must stand or fall with it."[189] Another writing disapprovingly of the Alien and Sedition Act of 1798 regarded free speech protected by the First Amendment to be an "unalienable right."[190] The right to freedom of speech was tied to the rights of conscience and private judgment.[191] According to these views, speech is an individual right that is equally vested in all of humanity that must be guarded against government intrusion.

The individual value of speech does not, however, entirely capture its function and import to a just polity. American colonists regarded speech to be "necessary for the good and welfare" of their provinces.[192] Government interference in either debates on the sciences or politics were believed to impede edifying discussions in both, but false speech was regarded to be of lesser value.[193] Benjamin Franklin

recognized the value of discussing matters of "morality, politics, and natural philosophy," with companions at a weekly meeting.[194] From the Revolutionary period to the present, social movements have put great store into the ability to confront oppression, voice opposition, and seek reform. The power of speech has been advanced at liberty poles, abolitionist meetings, publishers' desks, conventions, union halls, woman and manhood suffrage conventions, and civil rights meetings.[195]

Speech has been essential at all stages of American history. Without the freedom afforded by the First Amendment the whole character of the country would have been different and representative democracy would be quashed. But the Amendment has never been understood to be an unlimited license. Various degrees of regulation are needed. Individual rights of autonomous beings are bound to conflict on occasion as they do in the intellectual property realm where one person's interest in maintaining proprietary rights over certain content regularly conflicts with the desire of another to use it for self-expression.

3) Autonomy and Copyright

Autonomy theory provides insight into why free people living in a liberal democracy communicate ideas, both to express their inner workings and to gain others' consent.[196] Disagreement is inevitable. Edward Baker explains that general consent is impossible, therefore an equal, autonomous agent is empowered to persuade but not to force assent. If a speaker fails to convince others, she remains free to act contrary to accepted orthodoxy, choose to avoid conflict and follow laws, or to engage in civil disobedience.[197] While autonomy theorists, like Baker, provide convincing explanations about why the First Amendment should at a minimum be understood to protect moral agency against government orthodoxy, they leave unanswered when and why government can censor autonomous speakers.

And there certainly is such a need. Baker, for example, acknowledges that copyright law is a "legal mechanism for restricting the content of other people's expression."[198] This begs the question of why government can restrict any expression of individuals who might want to use copyrighted materials to convince fellow citizens or to embellish artistic works.

Copyright is both beneficial to the creators, audiences, even more generally cultures.[199] Baker criticizes the restriction of noncommercial copying for the law's impact on personal and press liberties.[200] Copyrights are granted to incentivize and protect personal creativity. However, beyond the autonomy explanation, it is fair to recognize that while they further one speaker's autonomy, they place limits on others.

Copyright laws protect an author's self-expression in tangible forms[201] but also suppress the speech of would be infringers. The potential conflict between copyright and free speech has long been recognized.[202] However, the Supreme Court's copyright doctrine mistakenly separates analysis under the Copyright Clause from First Amendment scrutiny, rather than weighing the concerns of both in the broader structure of constitutionalism. Connecting the value of expressive

propriety and public information could allow for a full airing of copyright disputes, both commercial and noncommercial. In the remainder of this part of the chapter, I concentrate on how a contextual balancing of constitutional rights should approach the topic of copyright law without lending unneeded preference to autonomy concerns.

Copyright decisions should not solely be based on self-realization rationalization but, rather, an explicit balancing between the author's autonomy and utilitarian analysis.[203] The Supreme Court doctrine, unfortunately, separates autonomy from public concerns. An example of this compartmentalization is a case, *Golan v. Holder*, decided in 2012 where the majority separated its review of Congress's authority under the Copyright Clause from the First Amendment challenge.[204] Justice Ginsburg's majority opinion of the case neither reflected on how copyright fits into a broad constitutional scheme nor did it apply Free Speech Clause scrutiny. In upholding the constitutionality of Section 514 of the Uruguay Round Agreements Act ("URAA"), the Court relied on the idea/expression dichotomy and fair use privilege in an effort to reconcile the suppression of expressive content, which would have required strict scrutiny analysis under First Amendment review.[205] Constitutional balancing in this case was curtailed by precedent. It followed analogous precedential balancing of other areas–such as those involving public employee speech, fighting words, and defamation–insofar as the majority's consideration was limited to the particular speech at bar rather than to exploring a broader set of relevant constitutional values.

Golan's formulation of the Copyright Clause to the exclusion of First Amendment reflection was in keeping with an earlier decision, *Eldred v. Ashcroft*, where the Court upheld the constitutionality of the Copyright Term Extension Act ("CTEA"), which retroactively extended by twenty years the term of copyrighted works that would have otherwise entered the public domain. This buttressed the right to ownership of intellectual property at the expense of the speech of others wishing to reproduce work that had been scheduled to lose copyright protection. The petitioners in *Eldred* challenged the constitutionality of the law on the basis of the Copyright Clause's "limited times" wording and of the First Amendment's Free Speech Clause. They argued that the statute should be found unconstitutional on the basis of intermediate scrutiny because it burdened substantially more speech than was necessary to advance an important government interest. Instead, the Supreme Court upheld the law as a rational use of congressional discretion. The majority deferred to legislative authority under the Copyright Clause to pass a law extending the term of copyright to life-plus-seventy-years (up from the former life-plus-fifty-years).[206]

The Court's artificial dichotomy treated the Constitution as a document of isolated provisions. The majority refused to reflect on whether the rationales for copyright, both utilitarian and libertarian, were outweighed by the added restrictions on speech created by the extended protections of the CTEA. Nowhere did the Court consider whether the statute was content neutral, which is typically at the forefront of First Amendment analysis. The Court reasoned that heightened

scrutiny was unnecessary because the framers did not view limited copyright monopolies to be incompatible with free speech protections.[207] As Professor Neil Netanel has pointed out, that conclusion is unsatisfying since the Bill of Rights as a whole, including the First Amendment, was meant to limit congressional abuse of power under the original Constitution.[208]

The *Eldred* Court's holding was in line with an assertion made in *Harper & Row Publishers, Inc. v. National Enterprise* that copyright is "the engine of free expression."[209] That explanation rings more true than the statement about the framers because the fair use exception and the dichotomy between ideas and expressions do indeed balance the public's interest in the information against the author's desire for exclusivity. Nevertheless, the *Harper & Row* formulation is not entirely satisfying because inquiry into whether the burdens placed on speakers and on the public's ability to access facts or materials provides no meaningful judicial review of copyright monopolies. The Court left off such considerations. It reflected only on the reasonableness of the public policy to extend copyright protections rather than also considering the extent to which the laws negatively impacted speakers and audiences.

As a second best approach, the Court might have at least used one of the First Amendment's intermediate scrutiny balancing doctrines (such as time, place, and manner or perhaps even extend the relevance of the secondary effect tests). Other commentators' efforts to explain the balance between copyright and free speech interests yield valuable insights for assessing how courts should proceed with copyright interpretation,[210] but they should go further. The Court's reflection on "built-in First Amendment accommodations" of copyright law[211] should be extended further, to a definition of the Copyright Clause that safeguards personal dignity and benefits society. This would mean engaging in more thorough First Amendment analysis and balancing it against the creativity and utilitarian values of the Copyright Clause. It would require contextual case-by-case analysis, which will likely sometimes arrive at Baker's suggestion that noncommercial uses should not be bound to copyright limitations, but not for categorical but contextual reasons. Most litigation is inevitably unpredictable. What matters is fair, well-reasoned, legally grounding reasoning that fully explores all relevant public values arising from the cause of action.

The underlying purpose of the Copyright Clause requires broader constitutional balancing than remaining consistent with exclusively intellectual property precedents. The Copyright Clause is clear: "Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." This grant of authority contains the twofold principle: Congress must promote the discovery and creativity. Both benefit individuals and society, allowing for community progress, cultural enrichment, and personal fulfillment. Without being enhanced by integration into a more complete constitutional theory, the autonomy explanation does not alone explain why the social benefits of copyrights allow for a proprietary paradigm that restricts some people's expressive

conduct on the basis of the party's identity. If the distinguishing feature of copyright were purely one of ownership, then the limited time for the creator's exclusive copyright use is left unexplained by a libertarian explanation. Time restrictions on copyrights should be examined in light of the balance between ownership, speech, and informativeness.

B. Political Debate

In addition to its importance for self-fulfillment, the First Amendment is also critical for enabling people to meaningfully participate in representative self-governance. Communications are essential to political deliberations. The ability to express conservative, moderate, or liberal ideas enables ordinary people to exercise civic identity. Democratic participation prevents the emergence of autocracy, aristocracy, or plutocracy; three systems of government that exclude some groups and individuals from being full players in the creation of fair government.

The Declaration of Independence guarantees the people's sovereignty in the operations of a representative republic. That document committed the newly constituted states to exercising sovereign powers empowering citizens to remain engaged in the formulation of policies likely to benefit their "safety and happiness." This was not meant to be a limitless license for the powerfully connected to dominate fellow citizens. Even in the revolutionary period prominent advocates for the Constitution's ratification, including James Wilson of Pennsylvania, believed that the social contract required giving up "a part of our liberty . . . for the security of the rest."[212] Equality for all requires limitations on autonomy. The people enjoy the freedom of speech to explore history, ideals, and norms either on their own or in the company of like-minded associations, social groups, and personal contacts. Speech enables isolated humans to join communities for collective legislative, judicial, and regulatory actions to affect their general welfare, in keeping with the Preamble to the Constitution's mandate.

The need for open debate was evident to American revolutionaries. A letter to a Philadelphia newspaper in 1791 asserted that the same "sages, who penned the Declaration of Independence, laid it down, as a fundamental principle, that government derives its just powers from the *consent of the people* alone."[213] Ordinary people, with their individual tastes and views, grant officials with limited power to govern. They play a role as individuals, in keeping with the autonomy perspective of free speech, but also as members of distinct groups. A major political impetus behind the Revolution was resentment for the English monarch's refusal to answer colonial petitions demanding parliamentary representation, just as other Englishmen enjoyed.[214] Colonial assemblies also exercised their freedom of speech to make demands and accusations against royal governors.[215] This is not, however, to say that the colonial period or even the Early Republic had the universal sense of political engagement of twenty-first century democracies. Women, slaves, and, for a time, propertyless white men were entirely excluded from open discourse.[216]

An effective voice in politics is critical to enjoy liberty and equality while participating in debates about how to effectively achieve social and legal betterment. Participating in discussions pertaining to local, state, and national issues provides people with a meaningful outlet to express concerns about issues, even when they are outside their personal spheres of interest. Legal status of persons as equals includes the common entitlements to participate in policy making.[217] The topics may be of national concern, such as healthcare, or more localized, such as he placement of handicapped parking spaces. In either case, free speech enables persons to engage with a community, to vent deep seated concerns, and to gather diverse views for guiding collective action. Engagement is critical for highlighting abuses of public trust, fisc, misappropriation, maladministration, and a host of other topics.

One of the most eloquent advocates for the political process perspective was Alexander Meiklejohn. He conceived the right to free speech to be analogous to a New England town meeting.[218] He thinks it legitimate to enforce rules to maintain order and to keep discussions on topic.[219] First Amendment protections nurture self-government by the dissemination of opinions, ideas, skepticism, and disagreements.[220] What is important, from his perspective, is that "everything worth saying" can be vented, but "not that everyone shall speak."[221] That is quite different from the autonomy school, which is joined to the dignity of each person to seek personal advancement, creativity, and self-affirmation.[222] Meiklejohn explains the importance of people accessing enough information to then influence elected leaders and promote favored public choices. They are free to call for change or for the perpetuation of existing policies.[223] But his approach downplays the relevance of speech for self-expression, be it artistic or emotive.

Cass Sunstein builds on Meiklejohn's thought. Adopting a "two-tier" approach to the First Amendment, Sunstein writes that free speech is core to deliberative democracy. Lower level communications includes all other speech. This leaves a disparate and unwieldy coterie of information outside the nexus of protected communications. Political speech enjoys greater protection than all others, but what is political is not always clear. Literature and art, for instance, can straddle both camps; indeed, people can disagree about the central message of a book, painting, or piece of music.

Sunstein's schema contains two separate categories.[224] Political speech is fully protected under the strictest judicial scrutiny while intermediate, persuasive justification is needed for the state to limit second tier speech. Even where the speech is not political, prosecutors must provide legitimate reasons for suppression. In turn, courts must check whether the sate acted for legitimate reasons or, rather, because the speaker disagreed with the government's policies and interests. Furthermore, even lower value speech is protected against coercive efforts to enjoin persuading or offending others.[225] His approach protects against biased suppression of ideas, but it adds little nuance for courts to evaluate the relevant weight of speech and other constitutional values.

Meiklejohn's and Sunstein's theories are enlightening about democratic participation but not informative about why personally fulfilling modes of expression might also constitutionally privileged. Both would require courts to identify what content is political. They do not, however, indicate how judges should differentiate mixed public and private communications. Under both of their approaches even restrictions on family communications about, say, choice of contraceptives or literary preferences would only warrant lower tier scrutiny, even though both involve privacy and dignity factors. But repression of such content would be better fit for a totalitarian state than a pluralistic democracy. Political repression is only one form of government abuse. Suppressing self-expression also offends the rights of free and equal individuals.

Professor Harry Kalven questions Meiklejohn's claim that artistic and literary depictions are clearly distinguishable from those that are political.[226] This demand for clarity is consistent with Kalven's advocacy for unambiguous jury instructions and First Amendment lawsuits. In support of Kalven's criticism, it seems utterly impossible that the Supreme Court would find the First Amendment allows censorship of Oscar Wilde's novel *The Picture of Dorian Gray* or William Wordsworth's poem *My Heart Leaps Up*, even though neither is political.[227] Professor Zechariah Chafee, another hugely influential free speech theorist and activist of the twentieth century, finds the same fault in Meiklejohn's public centered explanation of free speech: "The most serious weakness in Mr. Meiklejohn's argument is that it rests on his supposed boundary between public speech and private speech."[228] One of Chafee's colleagues, the lawyer and Librarian of Congress Archibald MacLeish, made this point pithily, "A poem should not mean/ But be."[229] If that's correct, a poem's value to poet and audience might be lived experience rather than the message it conveys, whether political or private.

While the self-government value of free speech is undeniable, it is not the only value associated with open expression. In response to critics, Meiklejohn revised his theory, asserting that education, philosophy, science, literature, and the arts are necessary for the functioning of self-governing communities.[230] But even this modification raises questions about why nonsense statements, such the author Lewis Carroll's Jabberwocky poem from the novel *Alice in Wonderland*,[231] should be protected since it has naught to do with governance and is more an exercise of ribald than rationality.

Another of the foremost proponents of self-government, Professor Alexander Bickel, refines Meiklejohn to mean:

> The social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth.[232]

This perspective is predicated on the notion that the value of speech is to achieve actual democratic will. The judiciary must then favor the desire of the majority, when judging cases.[233] Democratic decision making requires "normative choices and prophetic judgments . . . . [that] serve as a general term of praise for any wise and

moderate accommodation between conflicting values and interests."[234] This is a loaded statement: If political aims are to have substantive, rather than exclusively procedural or popular meaning, commitment to basic constitutional value of liberal equality for the common good must be decisive. Especially when democratic politics leads to tyranny, as it did during the American period of removal, the discriminatory immigration laws of the 1920s, or the pro-slavery state governments throughout the antebellum era. U.S. politics does not involve universal political participation nor usually does it include individual lobbying. Indeed, quite often the public and even politicians have inadequate opportunity to comment on proposed laws before they are passed on for the President's signature. Bills are often presented with little time for even congressmen to read, much less closely evaluate, them. This was, for example, the case with the Trump Administration's tax reform plan, which passed Congress with many congressmen complaining that the law had not been adequately reviewed and debated.[235]

Bickel believes the Court should be "a leader" in communicating legal values to the public at large.[236] The judiciary should play a role in advancing "enduring values," while exercising judicial restraint judges are empowered to construe the Constitution "against the wishes of a legislative majority."[237]

Nevertheless, there are limits on the Court's power to strike state laws restricting injurious communications, such as those that punish the use of extreme speech in public spaces. In this vein, Bickel argued that in *Cohen v. California*[238] the Supreme Court had wrongly overturned a defendant's disturbance of the peace conviction for profanity in public. He had worn a jacket to court with the swear word printed on it to express opposition to military conscription. Bickel recognized that the speaker's message reflected a political point of view. He nevertheless regarded vulgar speech in public to not be part of civil debate but an "assault" that inflicted "injury by its very utterance."[239] As with scholars who propound the self-expression school of thought, there are differences among those who argue that the central aim of the First Amendment is to protect political dialogue.

Like Bickel, Professor Robert Post regards the public value of speech to be the core of the First Amendment. Their perspectives nevertheless differ as to the value of speech that many members of the public would find to be offensive. Specifically, Post disagrees with Bickel's devaluation of profanity used in communications about matters of public importance. Post defends the Court's finding in *Cohen* that obscenity tainted speech has a legitimate role to play in public discourse. The Court should protect individualistic expression, he believes, including cussing that speakers resort to when opining about issues relevant to the body politic. "Outrageous speech," as Post puts it, "calls community identity into question, practically as well as cognitively, and thus it has unique power to focus attention, dislocate old assumptions, and shock its audience into the recognition of unfamiliar forms of life."[240] Post writes that the democratic presumption of equal, individual autonomy "underwrites the First Amendment doctrine's refusal to distinguish between good and bad ideas, true or false ideas, or harmful or beneficial ideas."[241]

Post expresses sharper divergence from Meiklejohn's collective notions of the First Amendment, arguing that the latter does not give enough consideration to the importance of individual autonomy in participating, legitimizing, and identifying political will. Self-exploration in the context of political debate, Post refers to, as the "communicative process."[242] Yet, elsewhere, Post downplays the individual in a collective democracy. He asserts, for instance, that "democracy is not about individual self-government, but about collective self-determination" and agrees that "democracy requires individual autonomy only to the extent that citizens seek to forge" a collective will.[243] Redish goes so far as to assert that Post falls into Meiklejohn's "very mistake" of collectivism. In Redish's view, liberty of speech is a private right that people enjoy irrespective of whether it contributes to public discourse.

Post acknowledges that individual voices are pivotal to a vibrant democracy. Deliberation would be incomplete without each member of a polity being able to fully participate in public debates. While his focus remains on the public value of protecting free expression, he is careful to elaborate on the worth of individual perspectives to public debate. Another words, in Post we find a picture of private persons who enjoys the right to speech and from whose insights the polity benefits. Similarly, Professor Tabatha Abu El-Haj, picks up on this perspective that the function of the First Amendment is to secure conditions "necessary to government responsiveness and accountability."[244] The Amendment, in the Free Speech Clause and other provisions such as the Assembly Clause, "cordons off certain spaces for individual and collective liberty in order to preserve the possibility that democratic majorities will be able to hold elected bodies accountable to the public interest."[245] Thus, "individual autonomy and freedom of conscience" are necessary components of "democratic citizenship."[246] Her focus nevertheless remains consistent with post: "Individuals' free speech rights ought not be so great as to undermine the co-equal rights secured by the text of the First Amendment."[247]

Redish, on the other hand, thinks it too narrow to argue that while the individual is important the primary function of the First Amendment is, nonetheless, self-governance. He faults Post for giving highest priority to "democratic legitimacy" and thereby downplaying other aspects of personal, expressive autonomy.[248] Redish's bigger point is that one set of speech values should not be preferred above others. But his autonomy based preference for expression is itself a form of value judgment that happens to be more inclusive. Both theorists focus their wrings on the value of speech, without giving adequate weight to other constitutional values, such as privacy, equality, or federalism. Any combination of these might be relevant to the resolution of specific cases.

Political and personal autonomy are among the fundamental concerns policy makers must consider for the creation of policy. However, complex problems often involve litigants' incompatible assertions. Resolution of these claims requires thorough vetting of claims and counterclaims rather than automatic acceptance that speech in general or one type of speech over others is categorically to be preferred. There are plenty of competing considerations for courts and legislators to evaluate,

including professional advice in medicine, law, and other regulated professions; public employee comments in their official capacities; and public school teachers' instruction in grammar and high schools. Regulating these fields involves content rich evaluations, case-by-case assessments, and analytical rigor. Autonomy in general or deliberative autonomy are not trumps but essential subsets of the grander norm of the Constitution. They are essential to constitutional resolution, but not always of greatest gravity. At the root of U.S. constitutionalism is the principle liberal equality for the common good, which will sometimes favor speech and at other times some other constitutional value.

Even the most basic aspect of representative democracy requires some intra-constitutional explanation. For instance, Article I of the Constitution, which establishes congressional powers, grants representatives special privileges for debate on the floors of the House or Senate. Indeed, the public elects persons who in office will have greater access than unelected citizens to the halls and other channels for political debate.

Later chapters will go into the details of comprehensive analysis in the context of existing doctrines on matters like campaign financing, national security, and inciteful speech. This chapter seeks to only differentiate my contextual proposal from the most popular explanations for the First Amendment.

While Post and others in the democratic explanation camp acknowledge that the self-fulfillment (or personal autonomy) model has played a significant role in First Amendment jurisprudence and secondary literature, they do not regard it as "especially helpful in explaining the actual" or normative "scope of the First Amendment."[249] Post criticizes the personal autonomy model for not being unique to speech but extending to noncommunicative actions.[250] But it is unclear why the dual explanatory function self-assertion plays in the characterization of speech and lawful conduct should detract from its explanatory power. After all, concepts like equality and liberty along with speech and other values exist side-by-side in constitutional doctrines without any negation, detraction, nor internal contradiction.

Post's "participatory democracy" model paints an elaborate picture of free expression, but it does not have the comprehensive power we are seeking. The protection of "joint political or democratic activity," which is championed by Professor Ashutosh Bhagwat provides a great starting point for assessing such matters as the regulation of net neutrality.[251] The "collective activities that are tied to . . . democratic citizenship" are indeed at the essence of the Free Speech Clause,[252] but so too is the "intellectual privacy" necessary, in the words of different author, "to develop ideas and beliefs away from the unwanted gaze or interference of others."[253]

Freedom of speech surely includes the power to hear ideas,[254] participate in debates,[255] but also the power to keep one's utterances personal.[256] Not all the dignitary interests of speech are publically oriented: Sketching or doodling at one's desk with no desire to retain the paper and later throwing it into recycling could be meaningfully cathartic. Despite their adding nothing to deliberative democracy, regulating such creative urges would interfere with individual pursuits of happiness

and detract from the general welfare. So too, it is unfathomable to think the government can regulate persons speaking to themselves in a bathroom, making mock gestures in a closet while getting dressed, reading the lines of a seditious play to a mirror, singing aloud in the woods, and yet none of them contribute to the critically important values of participatory democracy. The First Amendment has both a private and public orientation, meant to guarantee individuals' equal right to pursue happiness and the people's representative interest to articulate policy.

C. The Marketplace for Truth

The third major free speech theory regards the First Amendment to protect people's abilities to sift through facts and arguments in order to acquire accurate knowledge. Undoubtedly, robust conversations and debates advance commercial, historical, political, medical, legal, and all other forms of knowledge. But this narrow definition fails to account for the protection of opinions, sarcasm, abstract art, and a host of other non-informative but protected categories of expression.

The quest-for-truth explanation of the First Amendment is derived from the marketplace of ideas doctrine. The most influential formulation of the theory appeared in Justice Oliver Wendell Homes's dissent to *Abrams v. United States*.

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

This assertion is one of the landmarks of First Amendment theory. A later justice gave the "marketplace of ideas" label that has stuck ever since.[257]

At first glance, the theory seems to indicate that open debate best facilitates the discovery of empirically verifiable data. But that rendition is certainly not in keeping with his meaning. Professor Vince Blasi has pointed out that Holmes "displayed an instinctive aversion to assertions of 'absolute' truth."[258] In one of his later dissents, to *Gitlow v. New York*, Holmes wrote that all ideas, especially those that are eloquent, incite people to action or inaction. The views of the majority become community truths, regardless of whether they are objectively verifiable. Holmes embraced the logical conclusion to his majoritarian relativism: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[259] For him, the determinant of truth was popular will to power, not logical outcomes of debates.[260] His Social Darwinism differed from the democratizing views of his colleague Justice Louis Brandeis, who, to the contrary, thought the First Amendment was a safeguard against "tyrannies of governing majorities."[261]

Even setting aside Holmes's advocacy for majoritarian dominance and reinterpreting the truth theory as a search for real political meaning, the marketplace metaphor is not particularly helpful in recognizing why everyday forms of communications are protected. Much of our daily vocabulary is not factual. The

First Amendment, for instance, protects parody. The Court in *Hustler Magazine v. Falwell, Inc.*, a case decided five decades after Holmes's death, held that some statements are so absurd–in that case it was a claim that the subject of a magazine story had sex with his mother in an outhouse–that the parody "could not reasonably have been interpreted as stating actual facts about the public figure involved." Indeed, it was the lack of factuality of such a "patently offensive" statement that prevented the plaintiff, a minister named Jerry Falwell, from recovering for intentional infliction of emotional distress. Falwell's status as a nationally renowned religious pundit, with close connections among national politicians and frequent appearances on news shows, placed him in a different position than if he had been a private figure. Thus, the Court would likely treat false statements differently depending on whom they target.[262] Professor Andrew Koppelman points out that if Falwell's mother were not dead at the time of the lawsuit, she might have been a proper party plaintiff because she was not a public figure.[263] The Court's approach is not libertarian but content specific, predicated on the notion that public figures have greater access for response through channels of communication reaching large audiences. In *Hustler v. Falwell*, the Court followed well-developed precedent that is not focused on veracity but public affairs and humor. The Court has repeatedly iterated that the search for truth is a key function of First Amendment protection,[264] but also that the Constitution safeguards the right to exaggerate and engage in political satire. Truth is clearly not the only value of expression that the First Amendment protects. Most recently, in *United States v Alvarez*, a plurality found unconstitutional a law that prohibited lying about having been awarded the Medal of Honor.[265]

Among other protected forms of speech, most pornography and nude dancing also lack any truth value.[266] In no meaningful sense do these protected forms of speech call for rejoinder by counterspeech.[267] When they are not forms of exploitation, they may be self-expressive. If set in a political script, they may even contribute to political discourse, but that describes a subset sexual materials. In all fairness, proponents of the truth model of free expression are not the only ones who struggle to explain the value of pornography. The democratic model also has little to say about its value of social discourse. Displays of nudity or depictions of sexual intercourse, in fact, fit in the realm of autonomy but, short of political parody, they typically contribute nothing to democratic debate nor the exchange of rational ideas.[268]

The marketplace of ideas doctrine also ignores the different access speakers have to means for influencing truth seeking discourse. it is too narrow in scope to explain the full range of First Amendment doctrines. Neither does it account for disparities in access to media. In American society, as Professor Owen Fiss has pointed out, economically powerful persons are better equipped than the poor to find communications outlets through which to disseminate commercial or political messages.[269] Some persons–such as news media companies, newspaper owners and producers, labor unions, for-profit corporations, and popular webpage administrators–have vastly more access to the marketplace than ordinary U.S.

citizens. A speaker with a true message might have an insignificant position in the marketplace, being drowned out by false prophets, fraudulent advertisers, and self-interested actors. Hence debate might not lead to truth; to the contrary, the wealthy can turn to many more resources, from purchasing newspaper advertisements to lobbying politicians, in order to drown out their antagonists. Supporters of the marketplace of ideas doctrine overlook that market failures and the lack of rational argument in many forms of protected statements, such as humor and emotivity.

Moreover, the expression of fear, happiness, aspiration, dejection, and innumerable other internal and social reactions are nonmarketable, nor can they be unequivocally gainsaid by rational argument. These forms of speech, which do not fall under the marketplace of ideas doctrine, contribute to culture in a way that benefits individuals and society as a whole. So diffuse is their effect that the search for truth does not adequately describe all the benefits of constitutional free speech protections.

This is not to say that the marketplace of ideas model is unhelpful. To the contrary, it aids in explaining the importance of open dialogue for the acquisition of knowledge. The framework nevertheless lacks the analytical breadth of explaining First Amendment protections of irrational communications and why less informative people can sometimes use greater resources to access the channels of communication. The truth-bearing model is a profound but incomplete explanation of protected speech. Even in circumstances where the exchange of ideas leads to some certainty (and a skeptic might even question the probability of definitive conclusions on controversial subjects), there is no constitutional basis for shutting down further debate, wrongheaded and irrational though it might be.

D. Convergence and Divergence of Methodologies

The marketplace of ideas simply does not identify the full range of purposes for protecting free expression. Identifying whether the state can restrict speech is a matter of case-by-case evaluation, with considerations into political deliberation, self-expression, and facts. But at the root lies the maxim of representative governance to protect the common good through fair and equal procedures. The First Amendment, therefore, should not be conceived as a provision apart but as a component of a system of government that is valuated by the extent to which policies benefit the common good and treat the people as equal autonomous beings.

Courts and lawyers interpreting the First Amendment are likely find to rely on one of the three most commonly articulated approaches. However, whether the rationale is built on political, personal, or factual nature of speech is not the most fundamental question. Indeed, often these methods will converge. Political and factual reasons are often joined in a dispute, and both are important to explain why and to what extent speech is protected. The same synthesis can exist with politics and personal fulfillment or personal fulfillment and the expression of information. But speech interests often conflict with other concerns, for safety, national security, foreign policy and so forth. In the latter cases, there should be a consideration of all the relevant legal concerns. Free speech is not a trump but a critical component of

constitutional justice. Friction between values should not only be acknowledged but also play a role in judicial analyses and attorney arguments.

Categorical preference for one methodology or another threatens to rigidly deny the validity of valid legal concerns and preference for some forms of speech over others. Interpretive pluralism requires contextual consideration rather than knee jerk preference for speech over concerns about terrorist dissemination of propaganda, anti-competitive collusion, and the like. Arguments should not rest on a preconceived hierarchy but on a thorough examination of textual provisions, relevant histories, pertinent precedents, and so forth. Contextualism is more likely to strike a fair balance between competing interests than a formalistic appeal to imperfect methodologies. Comprehensive reflection requires integrative and synthetic reasoning.

ENDNOTES

[1] *See*, *e.g.*, Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

[2] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 264.

[3] United States v. Stevens, 559 U.S. 460 (2010).

[4] I am paraphrasing the *Miller v. United* test for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973).

[5] *R.A.V.*, 505 U.S. 377 (1992).

[6] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231-32 (2015).

[7] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[8] *Stevens*, 559 U.S. at 470.

[9] *Id.* at 470.

[10] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1303-04, 1306, 1308 (2007) (finding that the court sometimes uses strict scrutiny like a balancing test, at other times as a nearly categorical prohibition, and in other cases as a "a test of illicit motives"); Ashutosh Bhagwat, *Hard Cases and the (D)evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 964 (1998) ("a court applying 'strict' scrutiny will 'tilt the balance' in favor of the individual rights claimant, while a court using "rational basis review" will tilt the balance in favor of the government).

[11] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011).

[12] PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991).

[13] *Stevens*, 559 U.S. at 470.

[14] *See*, *e.g.*, Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008).

[15] *Stevens*, 559 U.S. at 470.

[16] Post & Siegel, *Democratic Constitutionalism*, https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism.

[17] *A Serious Address to the People of Pennsylvania*, PENNSYLVANIA PACKET, Dec. 5, 1778, at 2.

[18] *See*, *e.g.*, *Substance of the Charge*, SALEM MERCURY, Nov. 18, 1786, at 1.

[19] ALEXANDER MOULTRIE, AN APPEAL TO THE PEOPLE, ON THE CONDUCT OF A CERTAIN PUBLIC BODY IN SOUTH-CAROLINA 19 (1794).

[20] THE PERPETUAL LAWS OF THE STATE OF NEW-HAMPSHIRE, FROM THE SESSION OF THE GENERAL-COURT, JULY 1776, TO THE SESSION IN DECEMBER 1788, CONTINUED INTO THE PRESENT YEAR 1789, at 13.

[21] MASS. CONSTITUTION 1780, para. 19, *reprinted in* THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE, AND THE ARTICLES OF CONFEDERATION 17 (1786).

[22] PROCEEDINGS OF THE RHODE-ISLAND ANTI-SLAVERY CONVENTION, HELD IN PROVIDENCE, ON THE 2D, 3D AND 4TH OF FEBRUARY, 1836, at 68.

[23] Randy J. Kozel, *Institutional Autonomy and Constitutional Structure*, 112 MICH. L. REV. 957, 971 (2014).

[24] Gregory P. Magarian, *Substantive Due Process As a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 251-55 (2005)

[25] For a complete discussion of "constitutional ethos" see ALEXANDER TSESIS, CONSTITUTIONAL ETHOS (2017).

[26] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[27] Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 793-94 (2017).

[28] Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 695-98 (1963).

[29] Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring).

[30] One section of the Sedition Act created a criminal offense against any person who:

> shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States.

Sedition Act, ch. 74, 1 Stat. 596 (1798).

[31] ALEXANDER ADDISON, A CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT, OF THE STATE OF PENNSYLVANIA 14 (1799).

[32] *A Lengthy Address to the Citizens of the United States*, PROVIDENCE GAZETTE, Aug. 17, 1793, at 1.

[33] Cleanthes, *For the Commercial Advertiser*, COMMERCIAL ADVERTISER (New York, N.Y.), Mar. 30, 1799, at 2.

[34] JUHANI RUDANKO, DISCOURSES OF FREEDOM OF SPEECH 5 (2012).

[35] *Sullivan*, 376 U.S. 254, 274 (1964); Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 941 (2009); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 687 (1999).

[36] Contrast ANNALS OF CONGRESS, 6th Cong., 2d Sess 931 (statement of Rep. John Rutledge, Jr., Federalist, S.C.) (Jan. 21, 1801) from Elizabeth Priestley, *on the Propriety and Expedience of Unlimited Enquiry*, *in* TOMAS COOPER, POLITICAL ESSAYS 62, 62 (1800), *quoted in* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 278 (2017).

[37] Campbell, *supra*, at 310.

[38] *See*, *e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963).
[39] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1449 (2014).
[40] KEVIN W. SAUNDERS, FREE EXPRESSION AND DEMOCRACY: A COMPARATIVE ANALYSIS 30 (2017).
[41] Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015).
[42] Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265 (2015).
[43] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 854 (1992).
[44] JOSEPH RAZ, PRACTICAL REASONS AND NORMS 39-40, 46-47 (1990) (discussing first-order and second-order reasons).
[45] Walker v. Sons of Confederate Veterans, 135 S. Ct. 2239 (2015).
[46] Barnes v. Glen Theater, Inc., 501 U.S. 560, 569 (1991).
[47] 134 S. Ct. 2518, 2524 (2014).
[48] McCullen v. Coakley, 134 S. Ct. 2518, 2524, 189 L. Ed. 2d 502 (2014), Brief for the Defendants-Appellees, 2012 WL 2872265.
[49] *See Barnes*, 501 U.S. at 569 ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.").
[50] Ohralik v. Ohio State Bar Association, 436 U.S. 447, 464-65 (1978).
[51] Florida Bar v. Went For It, Inc., 515 U.S. 618, 627-30 (1995).
[52] *See Went For It*, 515 U.S. at 628–29 ("we are satisfied that the ban on direct-mail solicitation in the immediate aftermath of accidents, unlike the rule at issue in Edenfield, targets a concrete, nonspeculative harm").
[53] *Ohralik*, 436 U.S. at 455-56; *Went For It*, 515 U.S. at 623 *et seq.*
[54] *McCullen*, 134 S. Ct. at 2541 (Scalia, J., concurring) (stating level of scrutiny majority relied on).
[55] Edenfield v. Fane, 507 U.S. 761, 771 (1993).
[56] Sorrell v. IMS Health, 131 S. Ct. 2653, 2666 (2011).
[57] Sorrell v. IMS Health Inc., 2011 WL 661712, *3-4 (Brief for Petitioners in S. Ct.).
[58] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 566 (1980).
[59] Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1121 (2015). 1121; Martin H. Redish & Kelsey B. Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1488 (2015).
[60] Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 796–97 (1988) ("First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say").
[61] DWORKIN, TAKING RIGHTS SERIOUSLY 188-93 (1977).
[62] 558 U.S. 310.
[63] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).

[64] *Id.* at 1448.
[65] *Id.* at 1440-41.
[66] Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. Ill. L. Rev. 799, 810-11(stating that "two articles of faith in modern First Amendment theory: (1) audiences are capable of rationally evaluating the truth, quality, credibility, and usefulness of core speech without the aid of government intervention; and (2) more speech is better than less"); Owen K. Fiss, *The Censorship of Television*, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 257, 268 (Lee C. Bollinger & Geoffrey Stone eds., 2002) ("From the First Amendment Perspective...more speech is better."),; Erwin Chemerinsky, *More Speech is Better*, 45 UCLA L. REV. 1635, 1641 (1998) (arguing that irrespective of what speech value is chosen, more speech is always better).
[67] *Citizens United*, 558 U.S. at 411 (Stevens, J., dissenting).
[68] McCutcheon, 134 S. Ct. 1434, 1481 *et seq.* Appndx A.
[69] *494 U.S. 652.*
[70] 540 U.S. 93 (2003).
[71] *Citizens United*, 558 U.S. at 362.
[72] *McCutcheon*, 134 S. Ct. at 1446-47, *discussing and refusing to follow Buckley v. Valeo*, 424 U.S. 1, 38 (1976).
[73] *See*, *e.g.*, Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 Stan. L. Rev. 1389, 1422-44 (2017); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016).
[74] *Citizens United*, 558 U.S. at 343.
[75] *See* Harman v. Forssenius, 380 U.S. 528, 539, 85 S. Ct. 1177, 1184, 14 L. Ed. 2d 50 (1965) ("One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise. Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax.").
[76] *Id.* at 350.
[77] *Id.*
[78] Burt Neuborne, *Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 909 (2017).
[79] Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257 (1986).
[80] *Citizens United*, 558 U.S. at 350-51.
[81] *McCutcheon*, 134 S. Ct. at 1450 (plurality).
[82] *Citizens United*, 558 U.S. at 340
[83] *McCutcheon*, 134 S. Ct. at 1449 (plurality).
[84] *Id.* at 1468 (Breyer, J., dissent)..
[85] *Id* at 1467.
[86] R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).
[87] *Id.*
[88] *See*, *e.g.*, *Reed*, 135 S.Ct. 2218.
[89] Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).
[90] *See*, *e.g.*, Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly

tailored to serve compelling state interests.").
[91] *Taxonomy of Lies* at 12 (Draft 4-12-2017, on file with author).
[92] For an exposition of the underlying function of government see ALEXANDER TSESIS, CONSTITUTIONAL ETHOS (2017).
[93] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787 (2004).
[94] For this originalist line of thinking see R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382–83 (1992) ("From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'").
[95] Playboy Entertainment Group v. United States, 529 U.S. 803 (2000).
[96] Brown v. Entm't Merchants Ass'n, 564 U.S. 786 (2011).
[97] United States v. Stevens, 559 U.S. 460 (2010).
[98] Snyder v. Phelps, 562 U.S. 443 (2011).
[99] United States v. Alvarez, 567 U.S. 709 (2012).
[100] These and other examples of how plaintiffs rely on the First Amendment in litigation challenges to social regulation efforts to rely on the First Amendment as a trump to social regulations are cited in Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614-15 (2015).
[101] Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384.
[102] Schwarzenegger v. Entertainment Merchants Association, 2010 WL 2787546, at *3, 10 (California's brief to Supreme Court); Video Software Dealers Assoc. and Entertainment Software Association v. Schwartenegger, 2008 WL 412514 (9th Cir. Ct. App. 2008) (California's brief to Court of Appeals).
[103] *See* Lee Epstein, Christopher M. Parker, and Jeffrey Segal, *Do Justices Defend the Speech They Hate?*, APSA 2013 Annual Meeting Paper, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572. For a critique of the study's methodology see Todd E. Pettys, *Free Expression, In-Group Bias, and The Court's Conservatives: A Critique of the Epstein-Parker-Segal Study*, 63 BUFF. L. REV. 1 (2015). For a short discussion of both of the above pieces see Carolyn Shapiro, *Numbers, Motivated Reasoning, and Empirical Legal Scholarship*, 63 BUFF. L. REV. 385 (2015).
[104] *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963).
[105] Whitney v. California, 274 U.S. 357 (1927).
[106] Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 671-73 (1988).
[107] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[108] Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916-1939*, 77 FORDHAM L. REV. 1731, 1732 (2009) ("Not only did communists in the 1920s and 30s in America espouse the destruction of all the laws and institutions to which lawyers pledged their loyalty, they also took cues from a country that regularly and fairly unabashedly suspended civil liberties--one of the central weapons in the lawyer's arsenal. While it was not until the thirties that most Americans grasped the extent of Joseph Stalin's terror, it was widely understood well

before that that Stalin ruled without the process and protections to which Americans were accustomed."); Charles E. White, *Department of Law* (Michigan v. Foster), 6 BI-MONTHLY L. REV. 157, 157-58 (1922-23); People v. Lloyd, 136 N.E. 505 (Ill. 1922); People v. Taylor, 187 Cal. 378 (Cal. 1921)

[109] *Id.* at 373 (Brandeis, J., concurring).

[110] *See* Gitlow v. New York, 268 U. S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U. S. 204 (1919).

[111] *Gitlow*, 268 U.S. at 666.

[112] PHILIPPA STRUM, SPEAKING FREELY: WHITNEY V. CALIFORNIA AND AMERICAN FREE SPEECH 114 (2015).

[113] Alien Act, ch. 58, 1 Stat. 570 (1798).

[114] Rosenfeld v. New Jersey, 408 U.S. 901, 908 (1972) (Powell, J., dissenting).

[115] John Doe No. 1 v. Reed, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) ("We have acknowledged the existence of a First Amendment interest in voting ...."); Burdick v. Takushi, 504 U.S. 428, 434 (1992) (explaining the relevance of the First Amendment to a voting rights infringement claim).

[116] Golan v. Holder, 132 S. Ct. 873, 890-91 (2012) (stating that because Congress adopted the "speech-protective purposes and safeguards" of fair use and the idea/expression dichotomy, there is no need for the judiciary to use a heightened standard of review).

[117] Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

[118] Wolff v. McDonald, 418 U.S. 539 (1974); Younger v. Gilmore, 404 U.S. 15 (1971).

[119] Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 604 (1982).

[120] Shelton v. Tucker, 364 U.S. 479, 486 (1960) ("[R]ight of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.").

[121] Texas v. Johnson, 491 U.S. 397, 404 (1989) (stating that the First Amendment "literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word," and includes conduct intended to express an idea).

[122] Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1835 (2002).

[123] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Roudebush v. Hartke, 405 U.S. 15 (1972).

[124] The Court narrowed federal and state governments' abilities to regulate speech to categories that existed in 1791 in United States v. Stevens, 559 U.S. 460, 468 (2010).

[125] *See*, *e.g.*, *Mosley*, 408 U.S. at 96; Morse v. Republican Party of Virginia, 517 U.S. 186, 285 (1996) (Thomas, J. dissenting); Hadnott v. Amos, 394 U.S. 358, 364 (1969).

[126] Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans, *Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265 (2015).

[127] *See*, *e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969).

[128] *See*, *e.g.*, Police Dep't of City of Chicago v. Mosley, 408 U.S. 92 (1972).

[129] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (holding that the Due Process Clause protects an individual's right to engage in sexual acts in private).

[130] Moore v. City of E. Cleveland, 431 U.S. 494, 503-06 (1977) (upholding the right of extended family members to live together and striking a zoning ordinance that prohibited their cohabitation at a grandmother's house).
[131] United States v. U.S. Dist. Court for the Eastern Dist. of Mich., 407 U.S. 297, 313, 314-15 (1972) ("As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression.").
[132] Gitlow v. New York, 268 U.S. 652, 666 (1925).
[133] Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972).
[134] *See* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 414 (1982) ("Where . . . a fundamental free speech value is at stake, heightened separation of powers based scrutiny always requires the invalidation of a permit system that violates both negative and functional separation of powers.")
[135]
[136]
See Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (upholding expressive associational rights of a discriminatory organization against a gay scout leader); NAACP v. Alabama, 357 U.S. 449, 460 (1958) (recognizing an organization's right to keep its list of members confidential because of the constitutional "freedom to engage in association for the advancement of beliefs and ideas").
[137] Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984) (discussing various types of associations and their value to individuals).
[138] Knox v. SEIU, Local 1000, 567 U.S. 298, 308 (2012).
[139] Brown v. Hartlage, 456 U.S. 45, 52 (1982).
[140] Romer v. Evans, 517 U.S. 620 (1996),
[141] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 787 (1976) (opposing the use of heightened scrutiny for commercial speech and asserting, "The Court insists that the rule it lays down is consistent even with the view that the First Amendment is 'primarily an instrument to enlighten public decisionmaking in a democracy.' I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.").
[142] JACK M. BALKIN, LIVING ORIGINALISM 249-55 (2011).
[143] Lawrence v. Texas, 539 U.S. 558, 562 (2003).
[144] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).
[145] 42 U.S.C. § 2000e-2(a)(1) (2012)).
[146] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).
[147] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
[148] E.E.O.C. v. Int'l Profit Assocs., Inc., 654 F. Supp. 2d 767, 784 (N.D. Ill. 2009).
[149] Harrison v. Se. Radiology, 2013 WL 633584, at *4 (M.D.N.C. 2013).
[150] Marasco v. Arizona Bd. of Regents, 2013 WL 4029167, at *3 (D. Ariz. 2013).

[151] Blankenship v. Parke Care Ctrs., 123 F.3d 868, 873 (6th Cir.1997).
[152] Jackson v. Quanex Corp., 191 F.3d 647, 653, 659 (6th Cir. 1999).
[153] *Town of Gilbert*, 135 S. Ct. at 2226.
[154] *Compare* Brief for Respondent at 31, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (No. 92-1168), 1993 WL 302223 (briefing First Amendment implications), and Reply Brief of Petitioner at 10, Harris, 510 U.S. 17 (No. 92-1168), 1993 WL 632335 (same), with Harris, 510 U.S. 17 (not discussing First Amendment concerns). Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 13 ("[T]he Supreme Court's failure to notice a First Amendment question would signal its unanimous view that there was no question to be noticed--a judgment that the prohibited category was so clearly unrelated to the First Amendment's purposes that it should not be dignified with an explanation as to why it constituted an 'exception.'").
[155] R.A.V. v. City of St. Paul, 505 U.S. 377, 389-90 (1992).
[156] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
[157] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).
[158] *Id.* at 81-82.
[159] Burson v. Freeman, 504 U.S. 191 (1992).
[160] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1787 (2004).
[161] *See* Neil M. Richards, The Dangers of Surveillance, 126 Harv. L. Rev. 1934, 1950 (2013) (describing surveillance as an infringement of self-construction); Rogers M. Smith, The Constitution and Autonomy, 60 Tex. L. Rev. 175, 185 (1982) ("The infusion of autonomy into constitutional thought was most easily accomplished in the area of free speech.").
[162] Rodney Smolla, *Speech Overview*, *in* FRED D. WHITE & SIMONE J. BILLINGS, A WELL-CRAFTED ARGUMENT 493 (6th ed. 2017).
[163] Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 LAW & CONTEMP. PROBS. 195, 200 n.22 (1990); *see also* RODNEY A. SMOLLA, 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:21 (2010) ("[F]ree speech is also an end itself, an end intimately intertwined with human autonomy and dignity.").
[164] *See* Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.").
[165] Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1159 (2003).
[166] C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 972-73 (1983).
[167] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

[168] C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 314-5, 333 (1982) [Herein after, *The Process of Change*].
[169] *Id.*
[170] C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 254 (2011).
[171] *Id.* at 252.
[172] *Id.* at 272.
[173] C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978)
[174] Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972).
[175] *Id.*
[176] Cohen v. California, 403 U.S. 15, 24 (1971).
[177] Baker, *The Process of Change*, *supra*, at 330-31 ("Although the liberty theory of the first amendment is premised on respect for autonomy rather than on the societal need for an adequate process of change, one of its merits is that it protects a process of legitimate and progressive change through political action much better than does the generally accepted marketplace of ideas theory.").
[178] Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 204-05 (1972).
[179] *Id.* at 215-16.
[180] T.M. Scanlon, *Comment on Baker's Autonomy and Free Speech*, 27 CONST. COMMENT. 319, 325 (2011).
[181] Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593, 611, 615-18 (1982).
[182] David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).
[183] Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 314-15 (1981).
[184] *See* Guy E. Carmi, *Dignity-The Enemy from Within*, 9 U. PA. J. CONST. L. 957, 958 (2009).
[185] Frederick Schauer, *Speaking of Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178 (Michael J. Meyer & William A. Parent eds., 1992).
[186] Warren E. Burger, *The Interdependence of Our Freedoms*, 9 AKRON L. REV. 403 (1976).
[187] Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting in part).
[188] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) (Brennan, J., dissenting).
[189] *The Scourge, No. VI. London, Saturday, March 4, 1730*, PROVIDENCE GAZETTE & COUNTRY J., Sept. 9, 1780, at 3.
[190] *Communication*, GREENLEAF'S N.Y. J. AND PATRIOTIC REG., July 18, 1798, at 1; see also *Goshen, August 14*, VT. GAZETTE, Sept 8, 1798, at 2 ("Therefore, Resolved, that the liberty of speech and the press these unalienable rights, we never will part with but with our lives.").
[191] *Philadelphia*, PENNSYLVANIA LEDGER, Mar. 25, 1778, at 3.
[192] *See*, *e.g.*, JOURNAL OF THE HOUSE OF REPRESENTATIVES. AT A GREAT AND GENERAL COURT OR ASSEMBLY OF HIS MAJESTY'S PROVINCE OF THE MASSACHUSETTS-BAY IN NEW-ENGLAND 39 (1724).
[193] *See* JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCONTROULABLE NATURE OF THE HUMAN MIND 15 (1801).

[194] WORKS OF WILLIAM SMITH, D.D., LATE PROVOST OF THE COLLEGE AND ACADEMY OF PHILADELPHIA 56 (1803).
[195] For an extensive discussions of the role of free speech to the successes of these movements see STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY CHS. 3, 6, 9 (2008).
[196] C. Edwin Baker, *Michelman on Constitutional Democracy*, 39 TULSA L. REV. 511, 533 (2004).
[197] *Id.* at 541-43.
[198] C. EDWIN BAKER, MEDIA, MARKETS AND DEMOCRACY 305 (2002).
[199] R. Anthony Reese, *A Map of the Frontiers of Copyright*, 85 Tex. L. Rev. 1979, 1984 (2007) ("The articles make clear that audience interests are important at a very fundamental level--they inform the need for a principle of copyright law that keeps systems and processes free of its protection,27 as well as a potential preference for a copyright law that facilitates rather than limits opportunities for cultural democracy.28 But the authors also demonstrate that copyright law may need to account for quite specific audience interests--such as being able to make certain personal uses of a music file that one has purchased online or being able to search online easily for books that address a particular topic--and that such specific interests may not necessarily be easily accounted for in the marketplace.").
[200] C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 951 (2002) ("the best interpretation, which elsewhere I defend both descriptively and normatively, sees protection of individual liberty at the heart of the Speech Clause and protection of democratic communications structures at the heart of the Press Clause. Relying on this constitutional understanding, this Essay argues that copyright generally cannot be applied to limit noncommercial copying.").
[201] 17 U.S.C. § 102 (2012) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression ....").
[202] *See*, *e.g.*, Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1184-93 (1970) (arguing for a balanced approach to define speech protected by the First Amendment or protected by copyright).
[203] Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 242 (2012) ("authors' rights-based conceptions of the copyright entitlement are perhaps the most dominant, according to which copyright law serves a set of autonomy-related purposes internal to the author, and often independent of the institution's overall utilitarian ideals"). Balganesh goes on to state that "copyright law and scholarship have struggled to develop a coherent mechanism by which to achieve the reasonable accommodation of these nonutilitarian goals and values with the institution's core utilitarian foundation. This failure has in turn resulted in copyright's nonutilitarian ideals either receding into the backdrop and diminishing in significance or, alternatively, in their being reconceptualized in distinctly utilitarian terms in order to achieve their accommodation (through a direct tradeoff) with the institution's widely accepted utilitarian tenets." *Id.* at 242-43.
[204] 132 S. Ct. 873, 884, 889 (2012).
[205] *Id.* at 890 (quoting Eldred v. Ashcroft, 537 U.S. 186, 219 (2003), for the proposition that the idea/expression dichotomy and fair use provisions are "built-in First Amendment accommodations").

[206] *Eldred*, 537 U.S. 186, 194, 204 (2003); Brief for Petitioners at 25, *Eldred*, 537 U.S. 186 (No. 01-618).
[207] *Eldred*, 537 U.S. at 219.
[208] NEIL W. NETANEL, COPYRIGHT'S PARADOX 178-79 (2008).
[209] Eldred, 537 U.S. at 219 (quoting Harper & Row, 471 U.S. 539, 558 (1985).
[210] *See*, *e.g.*, Keith Harris, *For Promotional Use Only: Is the Resale of a Promotional CD Protected by the First Sale Doctrine?*, 30 CARDOZO L. REV. 1745, 1749 (2009); David Kohler, *This Town Ain't Big Enough for the Both of Us–or Is It? Reflections on Copyright, the First Amendment and Google's Use of Others' Content*, 5 DUKE L. & TECH. REV. 1, 46 (2007); David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 593 (2010); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in A Work's "Total Concept and Feel*, " 38 EMORY L.J. 393, 395 n.18 (1989).
[211] Golan v. Holder, 132 S. Ct. 873, 890 (2012).
[212] *Miscellanies*, NEW-HAVEN GAZETTE & CONN. MAG., Mar. 1, 1787, at 9.
[213] *American Intelligence*, FREEMAN'S J.; OR, N.-AM. INTELLIGENCER (Phila.), Aug. 24, 1791, at 3.
[214] *See* 1 GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 176, 193 (1984).
[215] James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 23-24 (1999).
[216] ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 79-81, 153-58 (2012).
[217] Snyder v. Phelps, 562 U.S. 443 (2011); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[218] MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 19 (1948).
[219] MEIKLEJOHN, POLITICAL FREEDOM 24-26 (1960).
[220] *Id.* at 161.
[221] *Id.* at 3.
[222] *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 636 (1996); C. Edwin Baker, *Of Course, More Than Words* 61 U. CHI. L. REV. 1181, 1202 (1994).
[223] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 38-39 (1982).
[224] CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-24 (1993).
[225] *Id.* at 155.
[226] Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16.
[227] Kalven makes the same point referring to John Keats's poetry and William Shakespeare's plays. *Id.* at 16.
[228] Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 899 (1949).
[229] MacLeish, *Ars Poetica* (1926), https://www.poetryfoundation.org/poetrymagazine/poems/17168/ars-poetica.
[230] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256-57.
[231] Carroll, *Jabberwocky*, https://www.poetryfoundation.org/poems/42916/jabberwocky.
[232] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 62 (1975).
[233] BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 36 (1970).

[234] *Id.*
[235] Lauren Fox *et al.*, *Senate Passes Sweeping GOP Tax Plan in Early Hours of Saturday Morning*, CNN, http://www.cnn.com/2017/12/01/politics/senate-tax-bill-vote-uncertainty/index.html ("Democrats sharply criticizing Republicans for not giving members enough time to read the sweeping legislation that would overhaul the US tax system"); *GOP Nearing Vote on Tax Bill Nobody Has Read*, Nov 30, 2017, http://www.msnbc.com/all-in/watch/gop-nearing-vote-on-tax-bill-nobody-has-read-1107270211559; Jonah Goldberg, *Will Tax Reform be the GOP's Obamacare?*, L.A. TIMES, Dec. 12, 2017, www.latimes.com/opinion/op-ed/la-oe-goldberg-gop-taxes-20171212-story.html.
[236] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 239 (1962).
[237] *Id.* at 20.
[238] *403 U.S. 15 (1971).*
[239] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 72 (1975).
[240] Robert C. Post, *The Constitutional Concept of Public Discourse*, 103 HARV. L. REV. 601, 632 (1990).
[241] Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011).
[242] Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1114-18 (1993); ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 4, 11 (1995).
[243] Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175-76 (2007).
[244]
Tabatha Abu El-Haj, *"Live Free or Die"-Liberty and the First Amendment*, 78 OHIO ST. L.J. 917, 919 (2017).
[245] *Id.* at 921.
[246] *Id.* at 927.
[247] *Id.* at 924.
[248] Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1308 (2009).
[249] Post, *Participatory Democracy*, *supra*, at 479.
[250] *Id.*
[251] Ashutosh Bhagwat, *When Speech Is Not "Speech"*, 78 OHIO ST. L.J. 839, 874 (2017).
[252] *Id.* at 876.
[253] Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1347 (2010).
[254] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen.").
[255] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) ("[T]he First Amendment must ... safeguard not only the right of the public to hear debate, but also the right of individuals to participate in that debate and to attempt to persuade others to their points of view.") (emphasis in original).
[256] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 n.7 (1985) ("[T]he State's interest is outweighed by even the reduced First Amendment interest in private speech.").

[257] Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).
[258] Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 14.
[259] *Gitlow*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement.").
[260] John C. Ford, *The Fundamentals of Holmes' Juristic Philosophy*, 11 FORDHAM L. REV. 255, 264 (1942) (examining Holmes' views and concluding that for him "the essence of law is physical force, that might makes legal right").
[261] Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).
[262] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52, 57 (1988).
[263] Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 681 (2013).
[264] *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) ("False statements of fact harm both the subject of the falsehood and the readers of the statement. . . . There is no constitutional value in false statements of fact.") (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth–whether administered by judges, juries, or administrative officials–and especially one that puts the burden of proving truth on the speaker.").
[265] 132 S. Ct. 2537, 2551 (2012) (plurality opinion) (holding the Stolen Valor Act to be unconstitutional for criminalizing falsely claiming to have received military honors); see also Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1091 n.2 (2008) ("The State may only punish deliberate falsehoods when they cause significant harms to individuals.").
[266] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."); Miller v. California, 413 U.S. 15, 24-25 (1973) (establishing three part test for legitimate government regulations of obscene materials).
[267] *See* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 617 (stating that depictions of sexual violence can produce harm that is not easily "countered by more speech because it bypasses the process of public consideration and debate that underlies the concept of the marketplace of ideas").
[268] Frederick Schauer, *Response, Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 608 n.14 (1979).
[269] FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 16-27 (1996).