FREE SPEECH CONSTITUTIONALISM

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In his Article, Professor Tsesis examines the three dominant normative rationales for free speech in the United States. In turn, he critiques the theories that free speech furthers democratic institutions, that free speech furthers personal autonomy, and, lastly, that free speech advances knowledge by perpetuating a marketplace of ideas. While Professor Tsesis finds much to recommend in each theory, he also finds each lacking. He concludes that the present theories are too narrow to describe the range of concerns encompassed by the First Amendment's Free Speech Clause. As such, Tsesis proposes that First Amendment doctrine should reflect a general theory of constitutional law that protects individual liberty and the common good of open society. To test his proposal, Tsesis applies it to the thorny free speech problems of defamation, intentional infliction of emotional distress, and incitement laws to demonstrate its normative superiority. In the end, Tsesis concludes that such a theory of free speech would better allow government actors to advance the underlying purpose of the Constitution, namely developing and enforcing policies conducive to the public good that safeguard individual liberties on an equal basis.

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I. INTRODUCTION

Three competing free speech theories dominate U.S. judicial and scholarly discourse.[1] Proponents of the first theory claim that the purpose of protecting free speech is to further democratic institutions.[2] Those of the second school conceive the constitutional commitment to personal autonomy to be the reason why courts and society at large diligently safeguard and treasure free speech.[3] And those of the third persuasion connect the high regard for free speech to the advancement of knowledge.[4] All three of these approaches recognize that careful judicial scrutiny of speech regulations is essential to prevent government intrusions into private and political lives. They also explain some of the rationale for a normative, constitutional guarantee that secures the free flow of information against government overreaching.[5] But they are all too narrow to describe the entire range of concerns embedded into the First Amendment's Free Speech Clause. While each identifies central facets of jurisprudence, their interpretations are confined to fixed categories instead of focusing on whether regulating particular forms of expression undermines the overarching constitutional principle.

Each of these three theories contains important elements of truth but is too monofocused to satisfactorily account for the Constitution's synthetic protection of communications for facilitating political engagement, personal development, greater certainty, and the pursuit of happi-

1. One of the most profound First Amendment scholars, Thomas Emerson, suggested a generation ago that there are four candidates for explaining free speech concerns: (1) the desire for self-fulfillment; (2) the advancement of truth; (3) social participation, in order to build "the whole culture"; and (4) the creation of a "stable community." THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970). The fourth of these, a communitarian perspective, strikes me as connected to the political speech expostulation. Although I understand these can be analytically distinguished, I do not deal separately with communitarianism in this paper but in the context of the democratic value of free expression. For an effort to develop a communitarian theory of speech see PHILIP SELZNICK, THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY 291, 531 (1992).

2. *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2362 (2000) ("The democratic theory of the First Amendment . . . protects speech insofar as it is required by the practice of self-government.") [hereinafter Post, *Reconciling Theory*].

3. *See, e.g.*, C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 259 (2011) (asserting that the "most appealing" theory of the First Amendment regards "the constitutional status of free speech as required respect for a person's autonomy in her speech choices").

4. Davis v. FEC, 554 U.S. 724, 755–56 (2008) (Stevens, J. concurring in part and dissenting in part) ("[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .") (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)); *see also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (quoting *Red Lion Broad. Co.*, 395 U.S. at 390).

5. Some scholars have identified another free speech concern to be distrust of government intrusion. *See, e.g.*, Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 968–69 (2009); *see also* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.") (citation omitted). I, on the other hand, believe that the three major schools of thought and the theory I put forth in this article are all meant to curb abuses of power. In *Citizens United*, for instance, the Court spends significant space detailing how corporations and their audiences benefit from political advocacy. I therefore imbed distrust of government into my analysis rather than discuss it as a separate consideration.

ness. None of those explanations of free speech adequately elaborates how free speech both mirrors the nation's founding ideals and furthers their evolution. The Supreme Court has been inconsistent in its application, and, indeed, has never definitively adopted one over the others.[6] Some scholars have adopted a polylithic approach. As one author explained: "Rather than embodying a single monolithic value, various speech practices implicate different values."[7]

My aim in this Article is to identify a unified statement of free speech theory. Since judicial doctrine will not supply the missing link, we will need to look for a normative explanation consistent with the ideals of constitutional democracy. A general statement of principle surrounding this topic should transcend the First Amendment and provide an analytical baseline for analyzing the special protections the Supreme Court has accorded persons expressing themselves on controversial, humorous, and creative topics. My claim is that First Amendment doctrine should reflect a general theory of constitutional law that protects individual liberty and the common good of open society. Unlike other explanations of free speech, the approach explored in this Article integrates deonotological and consequentialist aspects of representative democracy. A court scrutinizing a restriction on free speech should identify how it effects an individual's sense of identity and personal aims as well as the relevant community's collective life.

This Article focuses on how the Constitution's guarantee of representative democracy sets communicative norms. These are grounded in a system of self-governance, which I elaborate elsewhere,[8] and are predicated on an integrated system of deontological and constitutionalist values.[9] I parse the general function of constitutional law and then apply it to First Amendment puzzles. Democratic and autonomic explanations of the First Amendment usually only emphasize one or the other of these philosophical strands, when in reality the value of unfettered communication derives from both the human need to express ideas and the community right to enjoy equal citizenship.

Part II of this Article presents a synthetic theory of free speech, framing it in the abstract principle that government must protect equal rights in order to benefit the common good. The synthetic framework that I set out differs significantly from approaches that tend to focus exclusively on the framers' meanings, doctrinal analyses, or proceduralist explanations. Part III analyzes and critiques three opposing interpretive theories: the personal autonomy, democratic self-government, and marketplace of ideas theories of speech. After setting out the abstract theory

6. Post, *Reconciling Theory*, *supra* note 2, at 2372.

7. Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629, 1666 (2014).

8. Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693 (2012).

9. Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609 (2013) [hereinafter Tsesis, *Maxim Constitutionalism*].

of constitutional rights and the current debates on the function of free speech, Part IV presents a unified theory of the First Amendment, accounting for the democratic and autonomic theories and, further, providing the necessary foundation for judicial review and legislative policy making concerned with expression. In this final part of the Article, I apply my liberal equality theory to defamation, intentional infliction of emotional distress, and incitement laws to demonstrate its greater explanatory power than any of the three major interpretive methodologies of free speech.

II. SYNTHETIC FREE SPEECH VALUES

Free speech values are too often exclusively discussed with reference to the text of the First Amendment or its perceived purposes without providing sufficient context within the broader framework of constitutional governance.[10] Some commentators studying the subject have argued that no "comprehensive theory of the first amendment has been enunciated."[11] Focusing on the First Amendment alone has led some commentators to focus too narrowly on expressive value rather than consider it in the broader context of constitutional structure. The values for which the First Amendment stands should instead be understood in the context of a wider ideal of liberty and equality that is derived from the nation's core principles as they are set out in the Declaration of Independence and Preamble to the Constitution. Those mandates of governance are not static but aspirational in the sense that they establish a purpose for which state and federal governments must formulate policies. The polity is established to meet the needs of the people without engaging in institutional injustices. Those two founding documents mandate government to safeguard individual rights, like free speech, and to secure the general welfare. This Part of the Article develops a general theory of constitutional administration. Once it is elaborated, I will expand on how the First Amendment applies to public policy and doctrine affecting individual happiness and the common good.

Throughout this Article, I apply a model of constitutional interpretation, which I elaborated on in earlier publications,[12] to the First

10. *See, e.g.*, *Citizens United*, 558 U.S. at 347 ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 112 (1980) (writing that the First Amendment's "central function" is to "assur[e] an open political dialogue and process" as opposed to securing some substantive end).

11. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963) ("Despite the mounting number of decisions and an even greater volume of comment, no really adequate or comprehensive theory of the first amendment has been enunciated, much less agreed upon.").

12. For a full explication see ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS ch. 10 (2002) [hereinafter TSESIS, DESTRUCTIVE MESSAGES]; Tsesis, *Maxim Constitutionalism*, *supra* note 9; Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679 (2009) [hereinafter Tsesis, *Principled Governance*].

Amendment. Stated briefly, I argue that the core constitutional value is for government to protect individual rights for the common good. Public policy must further the general welfare of the community of equals, each striving to achieve his or her sense of self-identity. Judicial scrutiny is meant to safeguard personal rights against the exercise of authority irrationally infringing individual rights. 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.

A distinct feature of this approach is its adoption of deontological (rights based) and consequentialist (social benefit) aspects of the Declaration of Independence and Preamble to the Constitution. These documents recognize that humans have equal innate entitlements to pursue happiness and that representative government is created to enact institutions, laws, and regulations effective in protecting those rights. Such a regimen is not only good for persons atomistically but for the national community because it recognizes that each of us has the right to explore his or her unique life plan, including expressive aims, without undue restraints. It differs significantly from theorists like Judge Harvie Wilkinson and Professors Suzanna Sherry, Daniel Farber, and Richard Primus, who believe a search for comprehensive theory is distracting and hopeless.[13] Contrary to their skepticism on the subject, I believe a well-formulated, unified theory of representative democracy can provide aspirational guidance and predictive consistency, which legislators can then translate into policy and judges can interpret into doctrine. A foundational referent should provide people with an understanding of the government's core obligation to secure conditions for the flourishing of individuals and betterment of national, state, and local communities. The deontological component mandates the use of coercive government authority to protect individual rights on an equal basis. All three branches of government must function in ways that respect personal dignity, while severally aiming to establish certain statutory, regulatory, and common law rules for resolving interpersonal conflicts and advancing social well-being. The security of private interests is thereby linked to the consequences of policies.[14] Coercive measures, placing certain constraints on

13. *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1 (2002) (asserting that "foundationalism is doomed to failure"); J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 3–4 (2012) ("[T]he theories are taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive."); Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1083 (2013) (characterizing the Constitution as "a bundle of sticks that can be separated from one another or that can be recombined in varying configurations").

14. Space does not allow me to elaborate here, but I hope in what follows it will be clear that by good consequences I am not endorsing a form of utilitarianism that counts how many utils of happiness result from a particular action. *But see* James Mill, *Essay on Government*, *in* DEMOCRACY: THEORY AND PRACTICE 43, 44 (John Arthur ed., 1992) (discussing "the greatest happiness of the greatest number"). Instead, beneficial consequences on a national scale are those that provide the most ample opportunity for individuals to flourish. My theory varies from John Finnis's deontological

liberties, must be rationally designed to better society as a whole without arbitrarily favoring any group of citizens.

Given the constitutional link between private rights and social welfare, free speech theories that focus exclusively on self-determination or, in the reverse, on political participation, are insufficiently descriptive of the cohesive nature of the Constitution. A free speech theory should integrate individualist and communitarian concerns of the First Amendment, in particular, and the Constitution, in general.

The high value Americans place on free speech is rooted in the country's history of liberty poles of the Revolution: abolitionist meetings, books, and pamphlets prior to and during the Civil War, conventions charting structure of Reconstruction, and much more, like petition drives on behalf of woman's suffrage, unionization, and civil rights legislation.[15] Freedom of speech was essential for the country's development from a slave state to one committed to the advancement of civil rights, gender equality, and most recently, the gay rights movement. It provided an outlet to individuals committed to social change and was essential for fostering public dialogue about formally taboo subjects.

Many of the Constitution's explicit and implicit provisions provide enforceable means of eschewing tyranny and harboring inclusiveness. The purpose of government is the protection of rights enumerated in parts of the Constitution, such as the Bill of Rights, and implicitly derived from other clauses and the principles of ordered liberty.[16] The rights protected are, as the Declaration of Independence asserts, inalienable in the sense that they are innate to human beings by virtue of their humanity rather than any positive law.[17] The Constitution is a social contract providing government with the authority to protect those rights for the betterment of the whole community, which would otherwise be subject to the will of powerful groups. Thereby, social obligations are linked to the

theory of the common good. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 111–22 (rev. ed. 1999) (1980). Unlike Finnis, I believe it legitimate and necessary for government to seek beneficent goals rather than simply building on individual self-realization. No common good can come about without the protection of rights, and the equal protection of rights is the only means to achieving the common good.

15. 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).

16. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (stating that the Court's analysis has consistently and objectively recognized only those fundamental liberties and rights that are "deeply rooted in this Nation's history and tradition"); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 254 (1974) (finding that "[t]he right of interstate travel" is "a basic constitutional freedom"); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) (stating that the right to vote in federal elections is explicitly protected under Article I § 2, and "[i]t is argued that the right to vote in state elections is implicit"); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding the right to privacy in a number of enumerated provisions such as the Fourth Amendment prohibition against "unreasonable searches and seizures"); Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) ("[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.") (footnote omitted).

17. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

interests of individuals, especially those whose voices go unheard in majoritarian politics.

Speech advances enumerated and unenumerated provisions of the Constitution. Implicit rights, like voting in state elections, are unenumerated but derived from explicit guarantees of federal elections for the House of Representatives and more abstract statements about equal political representation.[18] Speech provides the opportunity for individuals to express public opinions that might sway others politically, aesthetically, and socially. The range of matters involving speech are all connected to a grand principle of representative democracy with the essential features of general welfare, such as self-government, self-fulfillment, the quest for knowledge, and entertainment. The political self is inexorably linked to the private individual. Manifestations of the people's will in their written and implied forms are beneficial to the polity as a whole and the citizens who compose it.

A government committed to the fair administration of representative democracy must craft its institutions for the protection of citizens' equal enjoyment of rights.[19] The U.S. Constitution grants the three branches of government power on the basis of the people's willingness to submit themselves to a legal authority.[20] It would be incredibly naïve to believe that a society of equals will always agree about the proper parity of goods and services. There will inevitably be disagreements, many of them pointed, between peoples stemming from their religious, political, and artistic tastes. Free speech is a necessary predicate for members of a representative democracy to voice their separate opinions and to compromise in the interest of community unity.[21] Protection of the free exchange of ideas is a necessary component of any nation committed to the interests of the entire population, not merely a few as in the case of totalitarian, aristocratic, plutocratic, or autocratic polities. A pluralistic community, on the other hand, does not speak in unity. The First Amendment, then, protects diverse individuals' will to vet ideas as equal members of a polity.

18. *Harper*, 383 U.S. at 665. In *Harper*, the Court refused to specifically address how the constitutional right to participate in state elections is related to the First Amendment right of political expression. *Id.*

19. *See* James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1532 (1998) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998)) (stating that implicit constitutional commitment to democracy conceives "concern for securing for everyone the status of free and equal citizenship" to be fundamental); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 754 (2004) (asserting that equality, liberty, and citizenship are "core democratic concepts"); James Weinstein, *Formal Equality, Formal Autonomy, and Political Legitimacy: A Response to Ed Baker*, 115 W. VA. L. REV. 29, 33 (2012) ("Measures that selectively restrict the ability of individuals to participate in the political process violate the fundamental precept of equal citizenship underlying contemporary visions of democracy.").

20. *See* U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America.").

21. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

The basic structure of a political system that protects speakers' abilities to freely address private and public matters secures for individuals the space for personal explorations and engagement with the common good (through political involvement, social clubs, community organizations, school boards, etc.). It enables them to pursue selfish and altruistic motives that are not harmful to others. On a practical level, this means that the laws of representative polities like the United States facilitate ordinary constituents' drives to enjoy unmolested private and engaged social lives. Even these values, absolute as they sound, have certain limitations because no amount of popular pressure can legitimate the will of majorities or minorities bent on the promulgation or enforcement of prejudicial laws such as those permitting photographers to assert free speech claims against being forced to photograph same sex, interracial, or interreligious marriages. Such laws, like the Colorado statute the Supreme Court found unconstitutional for prohibiting the passage of certain municipal antidiscrimination laws, clearly target groups because of opprobrium.[22] The popular will is thus not the end-all, even when it is indicative of majoritarian demands, personal vendettas, or the desire to monopolize personal wealth. When populist movements' aims are oppressive, a grand principle is needed to bridle governmental power and regulate private conduct. The Supreme Court has pointed out that a majority's prejudicial attitude toward a group, even one that it has not recognized to be a discrete and insular minority such as the handicapped, does not legitimize discriminatory public policy.[23]

Settled precedent establishes that there is no single path to civic consciousness. Persons with differing moral and religious convictions enjoy the same civil liberties—on subjects as diverse as whether to enroll children in religious or secular schools[24] and what sexual pleasures to enjoy[25]—without being saddled with overreaching content limitations. The

22. *See* Romer v. Evans, 517 U.S. 620 (1996).

23. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (holding that "the negative attitude of the majority of property owners" that is "unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently" from neighboring dwellings); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (deciding that private biases and the potential of social stigma are not legitimate sources of public policy).

24. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–36 (1925) (ruling that parents have a constitutional right to educate their children in either public or parochial school). Justice Brandeis, in a well-known concurrence, pointed out that one of the functions of the Free Speech Clause is to further democratic values. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Even more explicit on this point was a connection Justice William Brennan made in one of his dissents: "[T]here can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting).

25. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the Due Process Clause protects privacy). While sexuality has been dealt with in the context of privacy, the right to view its depiction usually focuses on the pornography, nude dancing, and adult book store industries. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) ("Being 'in a state of nudity' is not an inherently expressive condition. . . . [H]owever, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection.");

dignity to pursue often conflicting visions of happiness without government interference is connected to both the Equal Protection Clause and the statements of inalienable equality asserted in the Declaration of Independence.[26]

Conflicting ideals about what it means to be a fully equal member of society can be resolved through various structural mechanisms that enable individuals to express differing opinions through debate, negotiation, litigation, and franchise. Structural provisions, separating the three branches of government[27] and calibrating federal and state authority,[28] advance substantive protections for free speech and the free exercise of religion in the First Amendment.[29] Providing people with fora where they can seek redress, social change, or retention of the status quo is likely to commend the subjects' respect for laws. A legally cognizable norm for the protection of expression is both reassuring to individuals expressing themselves on controversial matters and reinforcing of a system geared against the abuse of tyrannical power. Where people are free to intellectually interact as equals in order to formulate statutes, ordinances, and regulations for protecting the equal exercise of fundamental rights, popular governance is most likely to achieve the domestic tranquility to which the Preamble to the Constitution aspires.[30]

The power of speech, however, is not absolute. Judicial review should check political majorities' abilities to discriminate against identifiable groups. This adjudicative role is at the heart of the heightened levels of scrutiny as they have been developed in the tradition of footnote 4 of *United States v. Carolene Products Co.*[31] The judiciary should step in when the popular will or private intolerance leads in a direction contrary to the overall purpose of representative constitutionalism.

Where the malicious will of a few, be they natural people or corporations, becomes a catalyst for injustice, the voice of the people becomes

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Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986) (holding that although the First Amendment protects the right to sell pornographic materials, it does not preclude the closing of a bookstore for tolerating prostitution).

26. U.S. CONST. amend. XIV, § 1; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

27. U.S. CONST. art. I, II, & III.

28. U.S. CONST. amend. X.

29. *See* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1023 (2011) ("The Bill of Rights is centrally concerned with allocation and separation of powers . . . ."); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1252–53 (2010) (arguing that the First Amendment expressly limits congressional powers).

30. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, [and] *insure domestic Tranquility* . . . .") (emphasis added); *see* Luis E. Chiesa, *Outsiders Looking In: The American Legal Discourse of Exclusion*, 5 RUTGERS J.L. & PUB. POL'Y 283, 309 (2008) ("[O]bedience to authorities and cooperation with the government decreases as the perceived legitimacy of law enforcement agencies diminishes."); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1161 (2000) ("A legitimate form of government receives obedience not for its policy choices, the charisma of its leaders, or the internalized moral values of a given individual; rather, government decisions are deferred to and its commands obeyed because the State has the 'right' to demand compliance.").

31. 304 U.S. 144, 152–53 n.4 (1938) (stating that heightened scrutiny may be appropriate in cases involving interference with the political process, fundamental rights, and discrimination against "discrete and insular minorities").

ineffective. The people, then, is a collective of all individuals and groups, and where any of them is excluded from the benefits of civil and political liberties the constitutional ideal is undermined. Civil liberties cases, from those prohibiting coercive school prayer and Bible reading[32] to those finding unconstitutional state requirements for students to salute flags,[33] conceive general welfare not to be majoritarian but comprehensive of the entire population.

The First Amendment, therefore, does not represent the right of the majority to force its desires onto the polity. Constitutional protection of free speech is based on the principle that the state cannot monopolize public debate about legal and social issues.[34] The free exchange of ideas allows people to join forces in reflecting on immediately needed policies as well as those that concern the ultimate goals of representative governance.[35] But the protection of free expression is much more: It further protects the personal right of self-expression, uninhibited by political intolerance nor political correctness. There are, however, limits both on political and private speech: Contemporary jurisprudence recognizes the constitutionality of laws limiting a variety of public and personal speech, including a restriction forbidding electioneering within 100 feet of a polling place on election day[36] and private defamation.[37]

Deliberation is essential to flesh out general statements of ultimate value or government functions, described in the Declaration of Independence and Constitution. The texts lack the specificity needed to decide unique disputes that are at the heart of legal conflicts. Terms charged with ideological value—such as "liberty," "equal protection," "commerce," "habeas corpus," and "due process"—require elaboration through formal political channels, town squares, social media, and face-to-face debates. Persons with opposing points of view seek to interpret these broad terms within the context of American history and culture in a quest to achieve meaningful agendas. Constitutional reform—such as

32. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, [and] to place them beyond the reach of majorities and officials . . . . One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.") (second and third alterations in the original) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

33. *See Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

34. My approach, then, regards free speech to be objectively beneficial rather than simply positivistically legitimate by virtue of its ratification into the Constitution through the First Amendment and incorporation through the Fourteenth Amendment. For a discussion on objectivity in law, see Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982) ("Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation.").

35. Joseph Raz has explained that "[u]ltimate values" have an explanatory value for reflecting on "non-ultimate goods." JOSEPH RAZ, THE MORALITY OF FREEDOM 200 (1986).

36. Burson v. Freeman, 504 U.S. 191, 206, 211 (1992) (finding a Tennessee statute survived strict scrutiny, in part, based on a "widespread and time-tested consensus" and "simple common sense").

37. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

that during the New Deal, the Civil Rights or the Reagan Eras—can evolve in a variety of ways, including what Professors Jack Balkin and Sanford Levinson have described as partisan entrenchment[38] or, on the contrary, what Professor Tushnet has conceived as periods of divided government.[39] In this Article, I do not want to decide between these two competing descriptions of policy making. Instead, I will focus on their overlap: Both recognize the importance of discussion and debate for effectuating change that conforms to the will of the people. Conflicts, leading to the passage of federal and state statutes, are resolved variously through entrenched and divided governments each seeking beurocratic leverage and popular support. Free speech protections provide the people with the ability to express their personal views about matters of great public relevance such as gun control, foster care reform, school governance, immigration, and much more.[40] Those who debate these matters may be arguing for their own cause or for the betterment of others. So too, the First Amendment safeguards mundane conversations. While the value of free speech is not decisive about the substance of counterviews, it is not simply neutral but entrenched in the value of representative democracy. In subsequent parts of this Article, I will show that the three dominant First Amendment paradigms fail to take into account the integration of this individualist and consequentialist picture of free speech. For the time being, I want to continue laying the foundation for my proposed method of interpretation.

Oral and written deliberations facilitate the relationship between individual constituents and the polity. Speech about public matters is therefore not solely of value to the speaker or to the state as a whole but for the public person, who lives in the sphere of private and external concerns. This is not to say there is no private side. Insofar as government is created for the people,[41] its obligation requires laws guaranteeing the testing of ideas behind closed doors and in public spaces. Speech is not only an end for personal catharsis but also for the achievement of social

38. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001).

39. MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 15, 97, 101 (2003).

40. *Cf.* Martin Edelman, *Written Constitutions, Democracy and Judicial Interpretation: The Hobgoblin of Judicial Activism*, 68 ALB. L. REV. 585, 592 (2005) (stating that while constitutions "proclaim all the values their framers believe essential to a good society," they "do not prioritize those values," leaving that job to "implementers and interpreters").

41. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union . . . ."). Mila Versteeg points out that the claim of popular sovereignty over constitutional rights is inaccurate because "constitutions are not usually written by the people as a whole. Most of the time, they tend to be drafted by small groups of experts who are consulted by international organizations as well as special interest groups, mainly in the form of national and international nongovernmental organizations." Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1180 (2014). Her description accurately describes contemporary constitution making. Placing the insight into late nineteenth century framework, the framers constructed the wording of the Constitution before presenting it to the people for their ratification. This method diminished populism from the outset and only allowed it to enter during state ratification conventions and popular debates that followed. See generally on the state ratifying conventions: PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2010).

ends, for example ending policy overreaching such as intrusion into bodily integrity[42]or advancing the administration of vaccination plans[43] and regulation of affordable health care.[44]

The people's vested rights to speak about abuses of government, private likes and dislikes, and various areas of personal and professional interests are not only a necessary function of American constitutionalism but that of any representative democracy. Focusing on the U.S. Constitution, the principle of free speech—as it is protected through the First Amendment and incorporated through the Fourteenth[45]—provides an organizing social value. It protects an individual's rights to participate in debates and engage in private conversations. The ability to express ideas even when they are contrary to the government's positions can further public tranquility[46] by enriching discourse and, simultaneously, empowering individuals.[47] Mutual respect for divergent opinions, coupled with an enforceable right against state infringement, is essential to basic civic functions extending from litigation to legislation and execution.

The exchange of ideas presupposes an evolving community that can analyze, process, and act on new ideas, while nevertheless being tethered to a constitutional norm. It is important to remark here that the avowed openness to differences of opinion also enables social movements to wage vigorous campaigns against institutionalized stereotyping, discrimination, and parochialism that have riddled the nation from its founding.[48]

The Preamble's obligation for government to provide for the general welfare[49] and the Declaration's statement on the equality of innate human rights[50] express a vision of government beholden to the will of the

42. Vacco v. Quill, 521 U.S. 793, 807 (1997) (expressing the commitment to "well-established, traditional rights to bodily integrity").

43. Jacobson v. Massachusetts, 197 U.S. 11, 27–29, 38–39 (1905) (upholding a public school prohibition against the enrollment of students whom had not been vaccinated against smallpox).

44. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (finding individual mandate portion of the Affordable Care Act to be constitutional).

45. Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

46. U.S. CONST. pmbl. (stating that one of the purpose of representative governance is to "insure domestic Tranquility").

47. For a discussion of how communication about such topics from constitutionality or mundane matters helps discussants achieve mutually accepted aims, see H. P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975).

48. *See* JACK M. BALKIN, LIVING ORIGINALISM 249–55 (2011) (describing how the Fifth Amendment's role in desegregation and rejecting the need of succeeding generations to follow the "expected application of 1791," as long as the new "proposed construction . . . makes the most sense of the clause in the context of the larger constitutional plan").

49. U.S. CONST. pmbl. (stating the central purposes for creating the Constitution including to "promote the general Welfare").

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (recognizing natural human equality and asserting that popular government was established to secure universal inalienable rights). It is important to understand the Declaration of Independence theory of natural rights within the context of attributes that are intrinsically human. Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1382 (2010) (writing about "American natural-rights morality" within the framework of "the theory of unalienable and

people. The original Constitution and the succeeding amendments provide governing structure and specificity about the terms of federalism, whose goal is to further the common good by protecting essential human entitlements against corrosive state actions. Just as the statements of the Preamble and Declaration are in need of elaboration through judicial opinions, statutes, and regulations, the First Amendment is only a shell without the details supplied by stare decisis and evolving legal culture.[51] Freedom of speech, then, is essential for the functioning of representative democracy because it provides the people, collectively and individually, represented by their elected office holders, with the means to express themselves publically through political debate, compromise agreement, custom, statutory formation, and constitutional amendment and privately through creative endeavors, associations, and day-to-day conversations.

III. ALTERNATIVE FIRST AMENDMENT THEORIES

With the basics of my consolidated understanding of the First Amendment's protection of free speech in place, taking into account both the personal and public value of speech, I turn to three of the most celebrated views about the constitutional purposes for protecting expression. This analysis will further demonstrate how the synthetic deontological and consequentialist theory better explains the values of speech in a representative democracy. Part IV later applies my theory to three First Amendment puzzles and distinguishes my approach from other methods of interpretation.

Free speech is entrenched within the very concept of representative democracy. It is essential to any systems whose policies are developed for the betterment of the populous, protecting both deliberative politics and expressive self-definition. The social value of the right to free expression lies in the individual's dignitary will to self-assertion, the public benefit of eschewing authoritarianism, and the gains to all areas of life from the constitutionally protected dissemination of information. While all three major interpretations of the First Amendment accurately portray some of the purposes protecting and advancing free expression, their advocates think of them as independent values rather than part of a greater scheme

natural rights set forth in the Declaration of Independence"). Lee Strang has pointed out that natural law philosophy connects norms with human characteristics. *See* Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2023 (2012) ("Natural law norms are natural because they are tied to human nature: they identify which actions are right and wrong by reference to a being with human characteristics.").

51. First Amendment doctrinal tradition does not derive from the literal wording of the First Amendment, which explicitly only prohibits Congress from abridging free speech. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . ."). The Supreme Court initiated the rigorous review of speech limitations. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (stating restrictions on speech are one area in which courts can exert close scrutiny over state actions); *see also* Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.").

of constitutional maxim. The value of speech is best analyzed within the broader framework of fair constitutional governance, rather than atomistically seeking out protected and unprotected categories. The driving purpose for preventing government interference with expression and the development of institutions facilitating it is the overarching constitutional guarantee of equal freedom for the advancement of general welfare.

A. Personal Autonomy

One of the most often stated rationales for protecting free speech is society's obligation to safeguard the right of thoughtful and articulate persons to communicatively exercise their intellectual capacities.[52] This view gets at the important truth that speech is a dignitary interest of each autonomous human being. Revealing one's ideas to others is a factor for anyone, which is to say every cognizant person, wishing to relate and convey facts, views, commands, and inquiries to others.[53] Personal identity is tied to the ability to formulate opinions and ascertain facts. 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 semantical and syntactic combinations of words, symbols, or other forms of categorization meant to interact with others and to gain their attention.[54] 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 change, catharsis, or intimacy.

As accurate as the personal autonomy perspective is in recognizing the agency aspect of free speech,[55] scholars, whose views I parse later in this Section, are mistaken to isolate it as the only reason behind First Amendment protection. As Justice Brennan pointed out in one of his dissents, free expression fosters self-government, and is "intrinsic to individual liberty and dignity," and advances "society's search for truth."[56]

52. *See* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1950 (2013) (describing surveillance as an infringement of self-construction).

53. *See* RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1253–54 (2013) (asserting that protections of anonymity speech "embraced the self-fulfillment and individual-autonomy goals of the First Amendment").

54. *See* Michael Tomasello, *Language Is Not an Instinct*, 10 COGNITIVE DEV. 131, 150 (1995) (reviewing STEVEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE (1994)).

55. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in Democracy*, 44 WAKE FOREST L. REV. 497 (2009) [hereinafter Tsesis, *Dignity and Speech*]. I take free speech to be directly tied to the natural human attributes of being a communicative and curious animal. One philosophical examination of the freedoms of speech and press similarly regards those First Amendments rights to be "legal codifications of our underlying moral right of free expression, which is to say that all people living in a society roughly comparable to our own ought to have these rights whether or not their legal system actually establishes or protects them." Alan E. Fuchs, *Further Steps Toward a General Theory of Freedom of Expression,* 18 WM. & MARY L. REV. 347, 348 (1976).

56. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 787 (1985) (Brennan, J., dissenting).

Interestingly, Brennan's characterization is both deontological, because it recognizes government's obligation to the person, and consequentialist, because it aknowledges the social value of articulation. The human will to state one's insights and demonstrate personality traits, some of which may be novel and controversial and others conservative and statist, typically withstands governmental interests to censure them.[57] The right to challenge authority and provoke dispute or, on the other hand, to argue against change are not, therefore, derived from the First Amendment but preserved by it.[58] The sense that people must retain the ability to express their views and ideas is preconstitutional, tied as it is to the natural human desire to communicate.

Another way to understand the importance of speech to our legal culture is through the lens of the Unalienable Rights Clause of the Declaration of Independence, which asserts that certain innate rights are retained by the people against state intrusion.[59] In fact, that right preceded both the adoption of the Declaration and the ratification of the Constitution. Those legal documents were adopted for social betterment by the exercise of governmental structures to protect exiting fundamental rights, like speech. Chief Justice Warren Burger similarly explained that the "guarantees of free speech and press" were important parts of our ideals "before and since 1776," which were very much on the minds "of those who drafted the Declaration, and later the Constitution."[60] Free speech under our system is, hence, not solely personal, as the personal autonomy theory of free speech would have it, but also of foremost public interest.

Litigants, lobbyists, pundits, and soapbox speakers in a public park or on blogs are all self-fulfilling *and* furthering public values. The underlying purpose, the super-value or maxim if you will, involved is the right

57. *See* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1159 (2003) ("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.").

58. On the importance of the First Amendment in preserving a channel for expressing dissatisfaction and provocation see Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

Several democracies are even more explicit about the connection of speech to humanity. The German Basic Law gives primacy to human dignity over free speech. *See* Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 372 (2008); Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1579 (2004); David Partlett & Barbara McDonald, *International Publications and Protection of Reputation: A Margin of Appreciation but Not Subservience?*, 62 ALA. L. REV. 477, 495 (2011). So too, in Canada concerns about dignity and pluralistic equality sometimes trump urges of speech. *See* Lisa P. Ramsey, *Free Speech and International Obligations to Protect Trademarks*, 35 YALE J. INT'L L. 405, 457 (2010); Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417, 434 n.49 (2009). Netherlands and Denmark are among the other democracies that provide dignitary protections that sometimes limit others' right to harmful forms of self-expression, like hate speech. *See* Gregory S. Gordon, *"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 147 (2004).

59. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

60. Warren E. Burger, *The Interdependence of Our Freedoms*, 9 AKRON L. REV. 403 (1976).

of individuals to pursue happiness within the public structure of a representative democracy. Government is instituted, in part, to secure self-expression against infractions like defamation and copyright infringement.[61] In the midst of the American Revolution, a Rhode Island newspaper published an anonymous author 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."[62] Another, writing against the Alien and Sedition Act of 1798, regarded free speech protected by the First Amendment to be an "unalienable right."[63] Speech, according to these views, 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 value to a just polity. Public measures are needed for its preservation because, left to their own devices, people and corporations can apply financial or state coercions to limit others' access to the common interest. If speech were solely of personal concern, we could realistically anticipate that some of those with more access to public places would seek to shut out or drown out others with fewer resources. Monopolization of accesses to the channels of communication proves to be counterproductive given that no one can be sure whether he or she will be one of the privileged or of the excluded. And even those with access to communicative networks cannot be certain whether they will retain their privileged position. The interest in personal autonomy, therefore, requires preservation on a broader scale.

Some regulation is needed to prevent private and state actors from running roughshod over the autonomy of others. Individual rights of autonomous beings are bound to conflict on occasion. The autonomy model understates the benefit speakers, inventors, and union participants enjoy from the availability of statutory and common law remedies. The use of language by speakers, innovators, comedians, and friends are all valuable to a culture whose focus is on individual equality. This perspective integrates the act of self-expression with self-realization and community participation. Personality is much more than speech—filled with emotional susceptibility, preference, social influences, among enumerable facets—but the personal autonomy view regards the First Amendment to only protect our private decisions.

61. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[T]o secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .").

62. *The Scourge, No. VI. London, Saturday, March 4, 1730*, PROVIDENCE GAZETTE & COUNTRY J., Sept. 9, 1780, at 3.

63. *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.").

Some scholars, such as Professor Martin Redish, regard self-realization as the "only one true value" of free speech.[64] 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."[65] While Redish is correct to draw attention to the value of self-realization, his unicentered account does not adequately explain why government can place limits on speech. The First Amendment has never been understood by the Supreme Court to be an absolute protection of personal expression. Some other value—such as equality and the common good—must help define when limits are appropriate. In the end, Redish is too concentrated on speech alone. He writes that other theories of free speech are manifestations of his self-realization approach,[66] but his reasoning fails to look behind all these approaches for the cornerstone theory of representative democracy. Self-realization is limited by the rights of others, not all of which are speech based.

Redish's argument is similar to that of Professor David A. J. Richards, who also believes that explanations of speech other than autonomy and self-respect, such as communication's value for acquiring knowledge, are "less powerful."[67] Contrary to my arguments in Part II of this Article on the joint private and public values of free expression, Richards asserts that all the various modes of expression—freedom of the press, speech, and association—"derive[] from the notion of self-respect."[68] Richards 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."[69] The autonomy value of self-expression is undoubtedly at the heart of why the United States and other liberal democracies place such a high value on its protection. 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.

If autonomy were the sole value at stake with the protection of free speech, copyright laws would be almost inexplicable. Copyrights are granted to incentivize and protect personal creativity. While they further one speaker's autonomy, they place limits on others. Copyright laws protect the author's self-expression in tangible forms,[70] but they also suppress the speech of would be infringers. The potential conflict between

64. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

65. *Id.* at 611, 615–18.

66. *Id.*

67. 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).

68. *Id.*

69. *Id.*

70. 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 . . . .").

copyright and free speech has long been recognized.[71] Most recently the Supreme Court, in *Golan v. Holder*[72] and *Eldred v. Ashcroft*,[73] determined that, under ordinary situations, First Amendment scrutiny will not apply to copyright law challenges.[74] A balance must be preserved between the ideas and facts of a work, which can be copied, and the manner of expression, which cannot.[75] Likewise, transformative fair use can be made of the work.[76] As long as those conditions are met, statutes can limit the speech rights of parties wishing to put unattributed chunks of a copyrighted work into their new product.[77] What's more, the Court has elsewhere stated that copyright furthers free expression, despite the fact that it subjects the speech of non-copyright holders to regulation.[78]

It is true enough that the copyright advances an author's will to purposefully pursue self-affirming projects but, as the Supreme Court described, copyright also "stimulate[s] artistic creativity *for the general public good*."[79] Thus, the principles of copyright have both a personal and public purpose. It allows only the first publisher to have exclusive use of the work for a set period of time.[80] This too is meant to both profit the individual and collective interests: It "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."[81] This dual purpose requires legislators to "balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[82] Copyright law thereby stifles the liberty of some in order to protect the liberty of others to retain

71. *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).

72. 132 S. Ct. 873 (2012).

73. 537 U.S. 186 (2003).

74. *Golan*, 132 S. Ct. at 890–91; *Eldred*, 537 U.S. at 219–21.

75. 17 U.S.C. § 102(b) (2012).

76. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright") (footnote and citation omitted).

77. *See, e.g.*, *Golan*, 132 S. Ct. at 889–93; *Eldred*, 537 U.S. at 219–21.

78. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

79. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (emphasis added).

80. 17 U.S.C. §§ 106, 302 (2012).

81. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[Copyright law] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

82. *Id.*

exclusive control over ideas readily available to the public;[83] in other words, where liberty interests clash there must be some factor at work to give priority to one party over another. This is especially true because both copyright and free expression are constitutionally protected values.

Likewise defamation law restricts the autonomy of slanderers in the interest of individuals to live free of libel and slander. I will explain more fully in Part IV of this Article how in defamation cases general welfare considerations interplay with personal autonomy.

Despite the value of speech for the advancement of individualization and the mutual interests of society, Professor C. Edwin 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."[84] The Supreme Court has, indeed, recognized the autonomy value of speech in a variety of decisions but not to the exclusion of 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."[85] But the majority realized that self-fulfillment was also directly connected with "the continued building of our politics and culture."[86] Thus 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.[87] Here too the majority thought that the protection of individual rights functioned to "ultimately produce a more capable citizenry."[88]

Thus, the Court has time and again integrated the values of the speaker with the social need for communicative liberties. There is no reason to think that Baker's personal development model of speech[89] would be less effectively protected were courts and legislators alike required to systematically consider whether regulations stifle both self-realization and social consequences rather than only one to the exclusion of the other. For instance, to return to our earlier examples, the self-realization of copyright and defamation laws serve both interests. Put another way, rather than differentiating the liberty theory from a society-benefitting theory of free speech, as Baker suggests,[90] the Court, quite rightly I be-

83. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[E]very idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.").

84. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) [hereinafter Baker, *Scope of the First Amendment*].

85. Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972).

86. *Id.*

87. Cohen v. California, 403 U.S. 15, 24 (1971).

88. *Id.*

89. Baker, *Scope of the First Amendment*, *supra* note 84, at 992.

90. C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 330–31 (1982) ("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.").

lieve, regarded the value of self-realization to be furthered by unintrusive regulations designed to protect individuals living and operating within a political unit.

Like Baker, philosopher Thomas Scanlon criticizes the consequentialist argument that speech is beneficial for certain acts.[91] The model of autonomy Scanlon has in mind recognizes individuals to be the determiners of their action; thus, they decide to abide by laws restricting their speech not solely because they carry the weight of authority but because they internally assess the strictures to be worthy of obedience.[92] Such a view is surely plausible, but it does not explain why the restriction on speech—in cases like copyright, patent, defamation, insider trading, and the like—are legitimate, where the autonomous agent disagrees with public policy. Scanlon runs into a problem because he reflects on only a narrow set of consequential rationales. He considers distributive justice policies such as the expense of policing unpopular groups.[93] While he is right to say a distributive rationale offers an incomplete defense for free expression, his discussion does not take into account the public good arguments for regulations protecting creativity, consumer name recognition, reputation, an even playing field for commodities trading, and many more topic specific policies on restricting certain forms of speech. These are required for a society committed to the public good and can be done while preserving autonomy. Without them, there would inevitably be continuous, daily conflicts of autonomous interests without any legal recourse.

B. Democratic Self-Governance

Besides self-fulfillment, the First Amendment is also critical for people to meaningfully participate in representative self-governance. Our common ability to participate in politics provides the means to engage in lawmaking on an equal basis. 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 a fair legal order.

The constitutional demand for the right to present views for the betterment of society was evident in the Revolutionary period. The battle for the right to petition government was a major, arguably *the* major, political impetus behind American independence from English colonial rule. Prior to announcing independence, colonists requested King George III, then monarch of Great Britain, to review their petitions against being taxed without a seat in Parliament.[94] For a time, leading co-

91. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 204–05 (1972).

92. *Id.* at 215–16.

93. *Id.* at 223.

94. *See* 1 GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 176, 193 (1984) ("In a flood of colonial pamphlets, speeches, and resolutions, debate on the Stamp Tax turned mainly on the

lonial spokesman, such as John Dickinson, made clear that they were not seeking to withdraw from England but only for the monarchy to review Parliamentary impost acts.[95] Colonial assemblies, in the pre-Revolutionary period, invoked freedom of speech as a right in their demands for self-determination against royal governors.[96] 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.[97]

Without an effective voice in politics individuals and groups would be at the whim of lobbyists and politicians alike. Participation in debates ranging from local to national issues provides an outlet for concerns extending beyond personal interests. Community involvement includes not only beneficent conduct but also the ability to participate in debates on pressing and mundane issues. The topics of communication may be ones of large scale concern, such as healthcare, or more localized, such as the placement of handicapped parking spaces. In either case, free speech enables persons to engage with a community, gives outlet to deep seated concerns, and gathers diversity of views for collective action. Public engagement and political action is critical to gaining others' attention about public abuses of trust, fisc, misappropriation, maladministration, and a host of other topics.

Alexander Meiklejohn is one of the principal advocates of the political process perspective of the First Amendment.[98] Self-government is at the root of First Amendment protections of opinions, ideas, skepticism,

point expressed in a slogan familiar to all Americans: 'no taxation without representation,' a cry that had been raised years before in response to the Molasses Act of 1733.").

95. JOHN FERLING, JOHN ADAMS: A LIFE 121–23 (1996) (discussing how the conservative faction at the Continental Congress sought to reconcile with England even after the battles of Lexington and Concord and while military training went forward); 1 PAGE SMITH, JOHN ADAMS 205–06 (1962) (elaborating on Dickinson's efforts at the Continental Congress to petition the King again to seek redress); 1 TINDALL, *supra* note 94, at 198 (writing of Dickinson's Olive Branch Petition humbly praying that the King of England acquiesce to the requests of the Colonists and desist from further hostilities).

96. 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) (going over the origins of the Speech or Debate Clause).

97. In the Early American Republic, women were only able to vote in New Jersey and that privilege was withdrawn from them in 1807. ALEXANDER TSESIS, WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW 153 (2008). It was then only in the mid- to late-nineteenth century that some states granted women the right to vote. *Id.* at 153–58; *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 173–211 (2000). And in 1920 the Nineteenth Amendment secured women's political participation throughout the United States. U.S. CONST. amend XIX. What's more, it was only in the 1820s that the voice of the state-by-state manhood suffrage movement influenced the reform necessary to gain propertyless men the vote throughout the country. ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 79–81 (2012).

98. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (Galaxy Books 1965) (1948) (drawing a connection between free speech and self-government).

and disagreements.[99] Democratic citizenry, as Meiklejohn explains, must be able to educate fellow citizens.[100] This perspective is not exclusively connected to politics.

The problem lies precisely in isolating what is political. In this regard, Professor Harry Kalven questions Meiklejohn's claim that political and private speech, such as artistic and literary depictions, are clearly distinguishable.[101] What may at first glance appear to be primarily personal, for instance artistic and literary expressions, can make important political statements. It is impossible to imagine the Court finding the publication of Oscar Wilde's novel *The Picture of Dorian Gray* or William Wordsworth's poem *My Heart Leaps Up* unprotected by the First Amendment because they are not directly political.[102] Zechariah Chafee 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."[103] While the self-government value of free speech is undeniable, it is not the only value associated with open expression. In response to this criticism, Meiklejohn revised his theory, asserting that education, philosophy, science, literature, and the arts are necessary for the functioning of self-governing communities.[104]

Another of the foremost proponents of the self-government explanation of free expression 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.[105]

Dean Robert Post has admirably continued within the public speech tradition, but he seeks to avoid Meiklejohn's definitional ambiguity. 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."[106] With that said, unlike Redish,[107] Post and Meiklejohn believe

99. *Id.* at 75 ("The primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.").

100. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 105–07 (1948) [hereinafter MEIKLEJOHN, FREE SPEECH].

101. Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15–16.

102. In his article, Kalven makes the same point referring to John Keats's poetry and William Shakespeare's plays. *Id.* at 16.

103. Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 899 (1949) (reviewing MEIKLEJOHN, FREE SPEECH, *supra* note 100).

104. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57.

105. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 62 (1975).

106. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011) [hereinafter Post, *Participatory Democracy*]. The overlap between Post and Meiklejohn is not to say that the two hold identical points of view. Indeed, Post criticizes Meiklejohn's dichotomy between a fixed "framework of democratic decisionmaking" and open-ended "content of government decisions."

that the principal function of First Amendment is the protection of public debate.[108] Thus, Post realizes the role of individuals in the polity, but places the importance of protecting each person's speech on a general, political basis.[109] In a similar vein, Cass Sunstein writes that "we should understand the free speech principle to be centered above all on political thought. In this way the free speech principle should always be seen through the lens of democracy."[110] Likewise Professor Owen Fiss asserts free speech doctrine should not be focused on "the protection of autonomy" but on whether the expression in question enriches public debate.[111]

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."[112] Post criticizes the personal autonomy model for not being unique to speech but also extending to noncommunicative actions.[113] 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 astutely explains the inherent function of free speech in a participatory democracy.[114] That is not, however, an exhaustive explanation of its purposes. There are plenty of protections of private speech. Free-

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Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1114 (1993). While Post is critical of Meiklejohn's collectivist ideas of free speech, Post's own views about speech as invaluable to democracy actually has echoes of conglomeration of rights. *See* Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 175–76 (2007) (asserting that "democracy is not about individual self-government, but about collective self-determination" and agreeing with the point of view that "democracy requires individual autonomy only to the extent that citizens seek to forge" a collective will) [hereinafter Post, *Viewpoint Discrimination*].

107. *See supra* text accompanying notes 64–66.

108. *See* Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1520–21 (1997) (reviewing OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996)) [hereinafter Post, *Equality and Autonomy*].

109. Post, *Viewpoint Discrimination*, *supra* note 106, at 176 ("[D]emocracy requires individual autonomy only to the extent that citizens seek to forge 'a common will, communicatively shaped and discursively clarified in the political public sphere.'") (quoting 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 81 (Thomas McCarthy trans., Beacon Press 1987) (1981) [hereinafter HABERMAS, COMMUNICATIVE ACTION]).

110. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 316 (1992); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 232 (1993) ("[T]he First Amendment is principally about political deliberation. A renewal of this view, asserted most vigorously in the work of the philosopher Alexander Meiklejohn, would help to resolve many current controversies.").

111. Owen M. Fiss, Essay, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986).

112. Post, *Participatory Democracy*, *supra* note 106, at 479.

113. *Id.*

114. *Id.* at 484–85 (distinguishing the greater state power to regulate private than public speech); *see also* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

dom of speech surely includes the power to hear ideas,[115] participate in debates,[116]and the power to keep one's utterances private.[117] Drawing a pictorial sketch in the lone comfort of one's bedroom or cubby, only to later throw it into the embers of a house furnace, is protected despite the art's sole function of creative catharsis. 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 participatory democracy.

I suggest in the Part IV of this Article that the problem with Post's view is precisely the same with all three major interpretive schools of thought: None of them adequately place the First Amendment within the greater context of constitutional value, the preservation of equal rights for the general welfare. One of their greatest concerns is to avoid valuating and thence preferring some forms of speech over others, but, as Part IV of this Article will show, specialized preferences affecting Americans' daily lives already exist for the regulation of areas like copyright and defamation laws, indicating that the libertarian and democratic views do not comprehensively describe the current doctrine nor the way that the First Amendment should fit into the overarching function of principled constitutionalism.

C. The Marketplace for Truth

The third major theory of free speech conceives the First Amendment as a protection on people's ability to sort through facts and arguments in order to gain accurate knowledge. Undoubtedly, open conversation and debate benefits the quest for accuracy on commercial and public topics. But the theory cannot explain the protection of opinions, sarcasm, most pornography, and a host of other protected categories of expression.

In U.S. jurisprudence, the quest-for-truth explanation of the First Amendment is derived from the marketplace of ideas doctrine. In his dissent to *Abrams v. United States,* Justice Oliver Wendell Holmes first infused this view of free speech into Supreme Court jurisprudence:

> [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

115. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen.").

116. 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).

117. *See* 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.").

> the power of the thought to get itself accepted in the competition of the market . . . .[118]

This assertion is one of the landmarks of First Amendment theory.

At first glance, the theory indicates that debate on differing ideas is the best means of discovering which argument most objectively represents some empirically verifiable matter.[119] But that rendition of Holmes's formula is certainly not in keeping with this, seemingly, semantical reading. Professor Vince Blasi has pointed out that Holmes "displayed an instinctive aversion to assertions of 'absolute' truth."[120] 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.[121] The majority's views, he thought, would become community truths, regardless of whether they were perspectively or scientifically correct. Holmes accepted the logical conclusion to his majoritarian relativism, even when dominant forces in society seek ill to other segments of the population: "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."[122] For Holmes, the determinant of truth is popular power, not the logical outcome of debates.[123] His outlook differed from the democratizing views of his colleague and another exponent of the free speech, Justice Louis Brandeis, who, to the contrary, thought the First Amendment was a safeguard against "tyrannies of governing majorities."[124]

Even ignoring Holmes's Social Darwinistic philosophy and taking the truth theory on its own terms, it is too narrow in scope to explain all of First Amendment doctrine.[125] Truth-seeking is clearly not descriptive of the entire range of constitutionally protected speech. The First Amendment, for instance, protects parody.[126] 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 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

118. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

119. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .").

120. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 14.

121. 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement.").

122. *Id.*

123. 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").

124. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

125. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 153, 164 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (stating that the marketplace of ideas theory is narrow because it does not require First Amendment protection for all communication of ideas, but only those "embedded in the kinds of social practices that produce truth").

126. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988).

actual facts about the public figure involved."[127] Indeed, it was the lack of factuality of such a "patently offensive" statement that prevented the subject in *Falwell*, a well-known minister named Jerry Falwell, from recovering for intentional infliction of emotional distress.[128] Falwell's status as a nationally known religious pundit placed him in a different position than would have been the case if he had been a private figure.[129] Thus, the Court would likely treat false statements differently depending on whom they target.[130] Professor Andrew Koppelman points out that if Falwell's mother were not dead when the lawsuit was initiated, she might have been a proper party plaintiff because she was not a public figure.[131] In *Hustler v. Falwell*, the Court followed well-developed precedent that is not focused on veracity. The Court has repeatedly iterated that the search for truth is a key function of First Amendment protection,[132] but also that the Constitution safeguards the right to exaggeration and political satire.[133] Most recently, in *United States v Alvarez*, a plurality found a law to be unconstitutional that prohibited lying about having been awarded the Medal of Honor.[134] Truth is clearly not the only value of expression that the First Amendment protects.

Among other protected forms of speech, most pornography and nude dancing also lack any truth value.[135] In no meaningful sense do these protected forms of speech call for rejoinder by counterspeech.[136] 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,

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 52 ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective.").

131. Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 681 (2013).

132. 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.") (emphasis in original) (internal quotation marks omitted) (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.").

133. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 125 (1995) (discussing First Amendment protection of political satire).

134. 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.").

135. 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).

136. *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").

but that describes a very small percentage of such displays of sexuality. 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.[137]

A further shortcoming of the marketplace of ideas doctrine is its oversight of the different access speakers have to means for influencing truth seeking discourse. In reality 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.[138] 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, a wealthy individual can turn to many more resources, from purchasing advertising 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 protective 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.[139] 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 means of explaining First Amendment protections of irrational

137. Frederick Schauer, Response, *Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 608 n.14 (1979).

138. Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983) ("Any confidence that we will know what is truth by seeing what emerges from such combat is ill placed."). The Supreme Court explicitly noted that wealth difference plays a role in the promotion of ideas. Citizens United v. FEC, 558 U.S. 310, 356 (2010) ("[W]ealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures [on lobbying].").

139. *See* Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962–63 (1997) (writing that transactions such as those on the New York Stock Exchange are not analogous to human factors like "altruism, habit, bigotry, panic, genius, luck or its absence, and factors such as peer pressures, institutions, and cultures that turn us into social animals") (quoting Paul Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 753 (1992)). Joseph Blocher further points out that Holmes's marketplace metaphor is based on the classic theory of economic competition, which post-1930s economists have "increasingly abandoned." Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 838 (2008).

communications and why some people can use greater resources to access the channels of communication. The truth-bearing model is a partial 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.

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, but at the root lies the maxim of representative governance to protect the common good through fair and equal procedures.

IV. INDIVIDUAL SPEECH AND THE COMMON GOOD

Part III of this Article observed that free speech benefits individuals, advances truth, and promotes democracy. It further explained that each of these theories has some shortcomings. They were accurate but incomplete descriptions of free expression. The shortcomings may be blamed, at least partly, on their supporters' almost single-minded emphasis on First Amendment values. I suggest, instead, that the function of free speech can only be fully understood in the context of overall constitutional governance, which is a much broader concept. The First Amendment should be understood as an essential component of a nation whose primary purpose is the protection of individual rights for the common good.

The underlying value of governance is both the self-government conception that Robert Post champions and the protection of individual rights, which scholars like Edwin Baker tout. A theoretically satisfying explanation of free speech should discount neither its public nor private components; the two go hand-in-hand because representative democracy legitimizes governmental authority insofar as it furthers the interests of individuals. My claim has two components. First that there are certain rights that people expect institutional authorities to protect. Institutional authority is held by persons with the power to enforce norms.[140] The highest legal norms are contained in the Constitution, which sets out the structure of governance for the protection of the people's vital interests. In such a state, each individual has an equal claim to government safeguards of fundamental and legally created rights. This equality of persons entails conflicts of interests. Therefore, second, where two sets of persons have as valid a claim to government intervention, concerns for the general welfare become deciding factors. The place of the First Amendment in this principle-rich schema is to safeguard freedom of expression and to only intervene where two or more people's assertions of that liberty conflict. In such circumstances, the common good requires the enforcement

140. Blocher, *supra* note 139, at 853.

of certain doctrines and regulations to protect matters like inventions, reputations, and integrity in the electoral system. The First Amendment, then, is not exclusively concerned with self-expression nor self-government but a combination of the two. Everyone is free to express views, but where such expressions intrude into the legally cognizable interests of others the people have empowered government to pass a narrow range of regulations. These two values of speech are part of the overall structure of a constitutional system opposed to the suppression of the individual in his or her private and civic capacities.

A well-rounded theory of free speech should explain the need for a constitutional guarantee that integrates the three most common understandings of free speech into a more complete analytical framework. The model presented in Part II of the Article regards representative democracy as a political structure whose legitimacy derives from its policy to safeguard the people's ability to pursue their "safety and happiness"[141] by formulating policy for the "general welfare."[142] This combination of private and public interests recognizes that where conflicts arise regulation, enforcement, and adjudication are necessary. The benefit of such a framework is that it provides consistent, predictable, dependable, and stable institutions for the protection of individuals living in a polity of equals. The legal order, therefore, should be designed to protect the people as individuals pursuing self-fulfillment, political aims, and knowledge. Where legal authorities resort to viewpoint suppression in order to maintain power it is neither legitimate nor conducive to the interchange of ideas.

Free speech is not an interest independent of any other; it is derived from the very function of a constitutional democracy. The purpose of representative governance is the protection of individual rights for the common good.[143] The uniqueness of individuals and the value of giving vent to diverse perspectives on religion, aesthetics, and politics places tremendous restraints on government censure. Every act of suppression diminishes society's ability to benefit from a unique perspective on everything from mundane to deep subjects. Each person's voice has an intrinsic value. Even false opinions, unrelated to public concerns, and asserted at the direction of others are expressions of individuality that enrich the cultural milieu of a state founded to protect and advance liberal equality. The general welfare is a composite of individual satisfactions. But liberty is not license. Citizens participating in majoritarian voting lack the electoral power to prevent equal participation in public debate and self-expression. The principle of free speech is formulated for the dual purpose of protecting persons and stimulating social advancement. These values cannot be unbundled in a constitutional democracy.

141. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
142. U.S. CONST. pmbl.
143. Tsesis, *Maxim Constitutionalism*, *supra* note 9, at 1609.

They are not separable as the proponents of the autonomy, truth value, and democracy schools would have it.

A variety of regulations on speech are designed to further the general welfare. This is overlooked by so astute a scholar of the First Amendment as Professor Thomas Emerson, who asserts that as a general matter "the right to control individual expression, on the ground that it is judged to promote good or evil, justice or injustice, equality or inequality, is not . . . within the competence of the good society."[144] To the contrary, this Part of the Article seeks to demonstrate that there are multiple areas in which government restraints on speech are in fact based on the value laden judgements. Space only allows me to explore three representative areas of First Amendment doctrine, with other work to follow fleshing out this theory in other contexts.

A. Defamation

The Supreme Court's analysis of public defamation, beginning with *New York Times Co. v. Sullivan*,[145] conceived the First Amendment as a guarantee of private and public interests. Free speech is a means of securing liberal equality against the abuses of public office. *Sullivan* arose from perceived criticism leveled against L. B. Sullivan, who supervised the police department of Montgomery, Alabama, for failing to comply with desegregation orders.[146] Sullivan filed a civil libel complaint.[147] His ire was roused by an expositive advertisement that a grass roots organization, the Committee to Defend Martin Luther King and the Struggle for Freedom in the South ("CDMLKSFS"), ran in the *New York Times*.[148] Signatories of the statement included such household names as politician Eleanor Roosevelt, entertainer Harry Belafonte, and civil rights activist Bayard Rustin.[149] A variety of assertions—such as the precise nature of the desegregation protest and the exact location where civil rights activists had sought integrated services—were certainly inaccurate.[150]

Sullivan was nowhere mentioned in the advertisement, and there was no proof that he suffered any harm as a result of it.[151] The jury, nevertheless, returned a verdict for half a million dollars in damages.[152] The Supreme Court overturned the liability, and, more importantly, announced a new standard for public officials seeking recovery for defama-

144. Emerson, *supra* note 11, at 880.
145. 376 U.S. 254 (1964).
146. *Id.* at 256–57.
147. *Id.* at 256.
148. *Id.*
149. *See* Heed Their Rising Voices (advertisement), N.Y. TIMES, Mar. 29, 1960, at L25.
150. *Sullivan*, 376 U.S. at 258 ("It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery."); *see also id.* at 258–59 (detailing discrepancies between the advertisement and the events of the desegregation protests).
151. *Id.* at 294 (Black, J., concurring).
152. New York Times Co. v. Sullivan, 144 So. 2d 25, 28 (Ala. 1962).

tion. On appeal, the Supreme Court held that in light of the important guarantees of free speech involved in the case, a successful tort action could only be mounted where the plaintiff could prove with convincing clarity that the speaker was moved by actual malice or with reckless disregard of the statement's fallacy.[153]

The holding in *Sullivan* should be understood to reflect an integrated commitment to personal autonomy and general welfare. Free speech is one of those unalienable rights, mentioned in general terms in the Declaration of Independence and particularized by the First Amendment,[154] whose value extends beyond the individual to a necessary component of representative democracy. A citizenry cannot be said to consent to the exercise of sovereignty unless it receives the opportunity to engage in dialogue leading up to the adoption of laws and the inculcation of norms. This binding ideal set in the deliberative process enables individuals to engage others in dialogue and thereby derive a community solution to social problems. Defamation negatively impacts this order because it not only involves falsity but also unjustly causes harm to the reputation of its object.[155] However, innocent mistakes about public matters, absent a statutory or contractual obligation, are not actionable,[156] especially where citizens seek to exercise the democratic privilege of criticizing discriminatory and otherwise misconceived policies. Nor does a cause of action lodge when a party vents ire against a politician or seeks to elicit a visceral response from the audience.[157] On a personal and public level, the equal right to voice views on social policy allows individuals to fulfill their personal sense of life-mission and participate in the rational debates of civil advancement. Sometimes these conversations are informative and at other times they are emotive.

Edwin Baker's self-fulfillment model does not satisfactorily explain why free speech doctrine treats public defamation differently than the private variety, since in both types of defamation the speaker might personally enjoy spreading untrue statements about the object of his an-

153. *Sullivan*, 376 U.S. at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

154. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 10 (1963) ("Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression"); Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 902 (1995) ("Free speech is associated with the bedrock principle, embodied in the Declaration of Independence and the Bill of Rights, that everyone has a right to liberty.").

155. *Sullivan*, 376 U.S. at 267 (stating that the defendant's "privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based").

156. *See, e.g.*, Hindo v. Univ. of Health Scis./Chi. Med. Sch., 65 F.3d 608, 613 (7th Cir. 1995) ("Innocent mistakes . . . are not actionable under this section [of the False Claims Act].").

157. *Sullivan*, 376 U.S. at 271 (reiterating that "enlightened opinion and right conduct" are needed for "the citizens of a democracy") (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

ger.[158] As for Robert Post's democratic model, it certainly gets at the political nature of *Sullivan*, given that the case was brought by a public official to vindicate his professional reputation,[159] but cannot alone explain why such false statements should be protected by a higher burden of proof. After all, the structure of representative democracy is based on the presumption that consensual political choices can best be made on the basis of accurate information,[160] and misstatements, like the one in the advertisement, do not help the people exert their rational will about public policies. The ability to engage in self-governance on the basis of accurate knowledge (even giving some deference to government's need to maintain a level of secrecy in matters like foreign and military deliberations) goes to the heart of representative democracy.[161] This may be the ideal, the reality however is that ordinary conversation often involves hyperbole, one-sidedness, error, and all manner of other misstatements.

Speech provides a personal outlet for anyone wishing to express convictions in the public and private spheres, even when mistakes slip into conversations,[162] and allows individuals to mobilize others to achieve social advancement, which in *Sullivan* was desegregation. Sullivan's alleged interest in reputation simply did not trump the *New York Times*'s interest in printing an advertisement calling for social justice. In its opinion, the majority approvingly cited a state case that had recognized the public benefit of discussion on controversial subjects sometimes results in unavoidable injuries.[163] The value of speaking on public matters in public fora is so overriding that not even the possibilities of innocent error, as seems to have been the case with the mistakes in the advertisement, can

158. As far as I can tell, Baker never fully worked out why he believed the self-fulfillment model better applies to *Sullivan* than the democratic one. The closest he seems to have come is in a footnote where he simply states that while some may argue that the case is "limited to being a part of political positive liberty" he believed "the better arguments would show that they should not be," but did not parse out the kernel of this idea. *See* C. Edwin Baker, *In Hedgehog Solidarity*, 90 B.U. L. REV. 759, 783 n.78 (2010).

159. Robert C. Post, *Remembering Justice Brennan: A Eulogy*, 37 WASHBURN L.J. xix, xxi (1997).

160. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 374–75 (William Rehg trans., 1996) (1992) (evaluating how autonomous a public decision is based on whether a complex society was informed and engaged in the deliberations about the official uses power); Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2021 (2011) (asserting that the legitimate power of a liberal democracy derives from the informed "'consent of the governed'").

161. *See* Caldwell v. Caldwell, 545 F.3d 1126, 1133 (9th Cir. 2008) ("An interest in informed participation in public discourse is one we hold in common as citizens in a democracy."); Detroit Free Press v. Ashcroft, 303 F.3d 681, 711 (6th Cir. 2002) ("A true democracy is one that operates on faith—faith that government officials are forthcoming and honest, and faith that informed citizens will arrive at logical conclusions.").

162. *Sullivan*, 376 U.S. at 271 ("Th[e] erroneous statement is inevitable in free debate").

163. *Id.* at 281 ("It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small, that such discussion must be privileged.") (quoting Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908)).

override the importance of dialogue and debate in a representative democracy.

A more comprehensive normative understanding is necessary for explaining why inaccurate public defamation enjoys special constitutional protection. Standing alone none of the three popular theories of free speech fully explain the Court's special treatment of public defamation. Neither do they provide adequate explanatory power for the protection of practical jokes made at the expense of public officials, even though they are no doubt protected by the First Amendment. The following is an abstract example to help demonstrate this point: A person, *X*, takes it in hand to go to the state capitol at the urging of a dying friend, *A*. As her dying request, *A* asks that *X*, with whom she is best friends, to seek out senators to tell them that *A* loves grey dogs. *A*'s motive is to play a practical joke because she actually dislikes grey dogs and prefers black labradors, and the humor is in the lie and the absurdity of the conduct. She finds it funny to disrupt the political process with such an out-of-place statement. It's important to *A*, who wants to distract *X* from worrying about *A*'s illness. *X* goes to the state capitol, relates his message to a state senator who is a mini-autocrat with a passionate hatred of dogs and a love for cats. Concerned that his reputation would be harmed and his votes would be diminished among his cat-loving constituents, the senator calls over the capitol police, who promptly arrest *X* for naught but making the public statement. Clearly this is protected speech and *X* will be acquitted for exercising his right to free speech, but why? There's no truth value in the statement that *A* loves grey dogs. In fact, it's patently false, so the marketplace of ideas doctrine doesn't explain its First Amendment value. The issue is not a public one, it is humorous and about someone's tastes, so the democratic expression model is inapplicable. Nor is *X* expressing her own view, but doing the bidding of *A*, so the self-expression explanation of free speech does not fit. Rather, the protection of free speech in this situation goes to the heart of the representative democracy at a higher level of legal protection than speech. The protection of speech in my hypothetical is explicable by the principle that *X* lives in a constitutional culture that respects his individuality as the best means of securing the happiness of society as a whole. It also prevents the exercise of arbitrary power. A country in which persons can be arrested for making a joke to a state senator would be oppressive not only to *X*, and *A* for that matter, but to all citizens, who would live in fear of arbitrary arrest. There was no actual malice in what *X* did by bearing the joke.

Private defamations, where the plaintiffs are private figures and the offending statements are about private matters, are handled differently than the scenario in *Sullivan*.[164] Common law regulations are reasonable

164. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (holding that the actual malice standard does not apply to defamation suits brought by private parties for statements of private concern).

in those cases because they give rise to different concerns than the *Sullivan* scenario. Contrary to Justice Anthony Kennedy's misleading claim that the First Amendment involves no balancing but only historical grounding,[165] in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* the Court explicitly balanced "the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression."[166] Weighing these interests should not be ad hoc but tied to the reputational harms that the people empower state governments to prevent. Where private reputation is at stake, First Amendment concerns are less acute than in cases involving public figures and public issues, as in *Sullivan*, or where public issues and private parties are involved, as was the case in *Gertz v. Robert Welch, Inc.*[167]

The doctrine that treats private defamation differently in matters that concern only personal reputation than those involving issues of public concern derives from the overall constitutional purpose to curb autocracy. Within the popular egalitarian structure of the Constitution provides special protection for free speech directed against government suppression. By definition representative government must be responsive to the people.[168] Censorship shuts down debate and eliminates viewpoints

165. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) ("[T]his Court has rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'") (second alteration in original) (omission in the original) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)); *see also* McCutcheon v. FEC, 134 S.Ct. 1434, 1449 (2014) ("The First Amendment does not contemplate such 'ad hoc balancing of relative social costs and benefits.'") (quoting *Stevens*, 559 U.S. at 470); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735 (2011) (asserting that the Court in *Stevens* "rejected" the "view of governmental power to abridge the freedom of speech based on interest-balancing"). If taken literally, these statements would upend First Amendment doctrine, where balancing has long been an accept part of free speech analysis in cases like *Dun & Bradstreet, Inc.*, 472 U.S. at 758–59, and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1941), which established the fighting words doctrine. In that case the court found that incitement to an immediate breach of peace "has been well observed that such utterances are no essential part of any exposition of ideas, and 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." *Chaplinsky*, 315 U.S. at 572.

For critiques of the Court's recent rejection of balancing, see David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 85–86 (2012) (arguing that the Court's recent introduced historically linked analysis of First Amendment analysis is "fundamentally illusory" and contrary to the balancing of cases that excluded obscenity and fighting words from First Amendment protection); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 176 n.67; Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 CATO SUP. CT. REV. 67, 81 ("The *Stevens* approach is essentially backward-looking, treating the finite exceptions that had been generally accepted since the First Amendment's adoption as a closed, fixed set of all such exceptions. In contrast, *Chaplinsky* invites the very argument that the government made in *Stevens*: that the Court may now and in the future continue the process of recognizing potentially unlimited new categories of unprotected expression, beyond those with a longstanding historical pedigree, so long as the Court deems the expression at issue to fail the open-ended, subjective balancing test that the last sentence of the *Chaplinsky* passage sets out.").

166. 472 U.S. at 757.

167. 418 U.S. 323, 325 (1974).

168. *See, e.g.*, Protect Our Mountain Env't, Inc. v. Dist. Court, 677 P.2d 1361, 1364 (Colo. 1984) ("In a representative democracy government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to governmental

contrary to the official line. *Sullivan* represents the constitutional commitment to maintaining the rights of individuals to challenge official policies. *Dun & Bradstreet, Inc*., on the other hand, concerns the interest in personal reputation. Common law defamation suits empower neutral fact finders—be they juries or judges—to resolve conflicts set off by false statements causing harms to reputation. Private defamation actions are unrelated to the suppression of controversial points of view. They are suits that can be resolved through civil review without First Amendment scrutiny.

In *Sullivan*, on the other hand, the Supreme Court dealt not only with the right to publish political advertisements but a constitutional system that respects dissent, a matter that extends beyond speech. The advertisement, which had been published in the *New York Times*, had called for an end to segregation.[169] Those who signed the ad wanted as grand a change in public practices as American Revolutionaries had called for: They were not simply seeking to ruin someone's reputation but to overturn unequal citizenship, based on racist traditions, that had caused and continued to cause immeasurable social harms both to markets and persons' dignities.[170] Sullivan did not simply bring his lawsuit for the sake of his standing as a private citizen but because he opposed the social change sought by the CDMLKSFS, which paid for the advertisement.[171] The defamation lawsuit was, therefore, a ruse aimed at stifling debate. *Dun & Bradstreet*, on the other hand, arose not from a matter intrinsic to the value of constitutional order. The Plaintiff in the latter case sued when it discovered that a credit reporting agency, Dun & Bradstreet, had sent subscribers a false credit report.[172]

The more public the concern involved, the more the matter requires judicial intervention for the protection of constitutional rights.[173] But this is not solely a matter of free speech but the people's retention of sovereignty through open avenues for debate.[174] Speech is a necessary but not

officials acting on their behalf."); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 708 (2013) (suggesting that politicians have a fiduciary duty in a representative democracy to loyally serve the people who elected them); Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1950–57 (2012) (writing of the role that the Guarantee Clause plays in representative democracy); Tsesis, *Principled Governance*, *supra* note 12, at 697 (explaining how ordinary people can work through representative governance to "exercise their evolving understanding of inalienable rights").

169. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 257 (1964).

170. *Id.* at 256.

171. *Id.* at 257.

172. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751 (1985).

173. While *Gertz* required a showing of "fault," understood to mean negligence, for private person to recover for defamation about matters of public concern, 418 U.S. 323, 347 (1974), *Dunn & Bradstreet*, never imported the negligence standard into the private party/private matter context. Indeed Justice Powell, writing for the plurality, concluded that the *Gertz* fault standard "involved expression on a matter of undoubted public concern." *Dun & Bradstreet, Inc.*, 472 U.S. at 756 (plurality opinion).

174. A proponent of the democratic theory of free speech might argue that what is at stake is really the ability to express views necessary for meaningful political participation. For instance, James Weinstein asserts that "the specific moral basis for the conception of democracy that I believe underlies the American free speech principle—popular sovereignty and the individual right of political par-

sufficient condition for a free and equal society committed to the interests of the people. Greater protections of speech should be brought to bear where the state prevents individuals from weighing in on subjects they believe to affect the common good.

B. Intentional Infliction of Emotional Distress

Just as the First Amendment does not bar private parties from pursuing defamation lawsuits, under ordinary circumstances suits arising from the intentional infliction of emotional distress ("IIED") raise no constitutional concerns. Neither of these tort causes of action threatens the ability of defendants to express their personality or to engage in free and open debate, unless they touch on matters of public concern.[175] Both types of private suits empower individuals to resolve conflicts through official channels of redress, with the judicial system functioning as a forum for the adjudication of grievances. Limits on state power are nevertheless required where lawsuits suppress the expression of ideas. Correctly parsing First Amendment theory is essential for defining legitimate limits of regulations affecting communications.

Private IIED causes of action typically raise no constitutional issues even though they provide a civil remedy against outrageous statements.[176] That does not mean that all emotionally charged expressions are actionable. The Court in *Hustler Magazine, Inc. v. Falwell* found there are "First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress."[177] As with the defamation scenario in *New York Times v. Sullivan*, the Court in *Falwell* ruled that public figures seeking to recover for IIED must demonstrate that the offending statement was made with actual malice.[178] The Court

ticipation—is a profound commitment to formal political equality." James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361, 363 (2011). This seems to me to put the matter backwards. It is political equality that is at the core of constitutional commitment and free speech protections facilitate its proper functioning by maintaining power in the hands of the people to check government authority.

175. *See Sullivan*, 376 U.S. at 271 (recognizing that free debate often includes erroneous statements).

176. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) ("Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.'"); State v. Carpenter, 171 P.3d 41, 56 (Alaska 2007) ("Heightened First Amendment protection does not extend to IIED claims based on speech that is not about a public figure or about a matter of public concern."); Citizen Publ'g Co. v. Miller, 115 P.3d 107, 111 (Ariz. 2005) (discussing Supreme Court doctrine that simple IIED claims do not give rise to First Amendment concerns, but ones that concern public matters and public officials do have constitutional implications); Esposito-Hilder v. SFX Broad. Inc., 665 N.Y.S.2d 697, 699 (N.Y. App. Div. 1997) (holding that the First Amendment is not a bar against IIED actions where the plaintiff is a private party, not a public figure; the issue was not one of public concern; and there was intent to injure).

177. *Falwell*, 485 U.S. at 50.

178. *Id.* at 56 ("[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,'

reiterated this public/private dichotomy in a more recent case, *Snyder v. Phelps*.[179]

Synder arose from a funeral protest staged by members of the Westboro Baptist Church.[180] Protestors carried posters with outrageous statements, such as "God Hates the USA/Thank God for 9/11," "Priests Rape Boys," and "God Hates Fags."[181] They sought to both offend and call for pubic changes in attitudes by protesting against gay rights and Roman Catholicism.[182] The Westboro Church was so unconscionable as to use the internment of a military veteran, killed in combat, to amplify its message. A small group of protestors stood 1000 feet away from the internment service, had not entered the cemetery, and remained on public land in keeping with a police order.[183] Persons attending the funeral were not a captive audience,[184] to the Church's message because it was not even visible to them during the service. The father of the deceased soldier, whose funeral the Church picketed, filed a lawsuit claiming to have suffered "severe and lasting emotional injury."[185] The appellate court overturned the district court's finding of liability,[186] and the Supreme Court affirmed the circuit court's decision.[187]

Chief Justice John Roberts, writing for the court, found that the content, form, and context were publicly protected forms of free speech because the church and its members had made their statements on "broad issues of interest to society at large" in a public place:[188] "Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt."[189] Citing *Falwell*, the Court asserted, "The Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress."[190] The First Amendment shields speech even when it is uttered under circumstances that some people might find to be hurtful, upsetting,

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i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.").

179. 131 S. Ct. 1207 (2011).

180. *Id.* at 1213–14.

181. *Id.* at 1216–17.

182. *Id.* at 1213, 1217.

183. *Id.* at 1213. It would have been unreasonable for the Plaintiff to claim he was a captive audience with no means of eluding the outrageous remarks of Westboro. *Id.* at 1219–20; *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (describing circumstances in which the government can selectively censor offensive expression because "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure").

184. *See* Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech.").

185. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

186. Snyder v. Phelps, 580 F.3d 206, 226 (4th Cir. 2009).

187. *Snyder*, 131 S. Ct. at 1221.

188. *Id.* at 1216.

189. *Id.* at 1219.

190. *Id.* at 1215 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988)).

or misguided.[191] Just as in the defamation cases, public or private context matters in the IIED area for evaluating the relevance of the speech to the overall structure of constitutionalism.

The Free Speech Clause is a foundational guarantee against official intrusion that is meant to leave debate and disagreement unhindered. Face-to-face communications, publications, and political statements—even more than distant funeral protests—can cause shock, consternation, feelings of anxiety, and a host of other jarring emotions. Legal institutions should nevertheless preserve the right to make statements that audiences find to be offensive. The prohibition against unwarranted government control does not, on the other hand, foreswear state interest in providing damages for tortuously caused emotional harms.[192] As in the case of defamation, in the area of IIED, the Supreme Court balances private and public interests. Chief Justice William Rehnquist asserted in *Falwell* that a state's interest "in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type."[193] The statement is an explicit balancing of interests. This approach remained unchanged and has, presumably, not fallen to Chief Justice Roberts' assertion that "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[194] The Court's dichotomy between tort cases and emotionally charged political statements preserves the overall policy of protecting an individual's right to express thoughts on topics uniquely interesting to himself or herself or about subjects of social significance, but the First Amendment places no barri-

191. *See id.* at 1219 ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.") (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

192. *Falwell*, 485 U.S. at 53 ("It is the intent to cause injury that is the gravamen of the tort, and the State's interest in preventing emotional harm simply outweighs whatever interest a speaker may have in speech of this type.").

193. *Id.*

194. United States v. Stevens, 559 U.S. 460, 470 (2010). The Court's new stance on balancing of the First Amendment has not overturned Chief Justice Rehnquist's balancing in *Falwell* or Justice Powell's balancing in *Dun & Bradstreet, Inc. See supra* text accompanying notes 127–34, 167–74. The debate about whether balancing is appropriate in First Amendment cases has roots in the balance versus absolute right debate of Justices Felix Frankfurter and Hugo Black. *Compare* Konigsberg v. State Bar, 366 U.S. 36, 67 (1961) (Black, J., dissenting) ("The Court, by stating unequivocally that there are no 'absolutes' under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the 'balancing test'. . . . In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed, our entire structure of government rest."), *with* Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring) ("The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.").

ers against legislation for compensating persons injured by the wrongful conduct of others and passed to deter future wrongful conduct.[195]

The function of the Free Speech Clause cannot be fully explained as a matter of truth telling, democracy furthering, nor self-fulfillment. The prevention of severe emotional distress with the concomitant allowance for emotionally charged public speech is neither solely a matter of truth-telling, democracy furthering, nor simply self-expressiveness. Emotional speech need not have a truth value to be of public significance. It may simply be filled with intentionally outrageous invective about the members of Congress; a specific politician; a church; the family of a public figure, like the spouse and children of the President; or an identifiable class of people. If anything, such statements undermine democracy, not further it because they are neither rational nor contributive to serious policy debates. But they are nonetheless protected by the First Amendment. All these forms of expression could inflict emotional distress, but private vitriol and bombastic vendetta is nevertheless constitutionally protected as it would not be if the statements were about private parties' personal dealings. Causes of action for IIED may also inhibit others from being assertive, prohibiting them from spouting emotionally damaging statements in the direction of their hated object.

The dichotomy between IIED torts and First Amendment protected bombast, and indeed outrage of the type in *Snyder*, is better explained as the contrast between government enactment of laws likely to protect the public peace by resolving private conflicts while remaining a bastian of representative governance. Private harms may interfere with our ability to choose how to live, set long-term goals, and generally guide our own steps.[196] Injuries to dignity and autonomy from IIED and defamation are actionable because they affect a person's ability to chart his or her destiny.[197] They are among a system of tort law that sets limits on private be-

195. *See, e.g.*, Willis v. Wu, 607 S.E.2d 63, 69 (S.C. 2004) (describing the "primary purpose of tort law" to be "compensating plaintiffs for the injuries they have suffered wrongfully at the hands of others"); RESTATEMENT (SECOND) OF TORTS §901(c) (1977) (stating that a purpose of tort law is "to punish wrongdoers and deter wrongful conduct"); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 1–2 (12th ed. 2010) (stating that the purpose of tort law is to "restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury").

196. Here, I am drawing on Joseph Raz's formulation of procedural protections of the Rule of Law.

> We value the ability to choose styles and forms of life, to fix long-term goals and effectively direct one's life toward them. One's ability to do so depends on the existence of stable, secure frameworks for one's life and actions.

JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 220 (1979). I do not subscribe to Raz's legal positivism but we see eye-to-eye in the value he places on observing laws in order to respect human dignity by treating people as the planners of their own futures. *Id.*

197. *See* Brengle v. Greenbelt Homes, Inc., 804 F.Supp.2d 447, 453 (D. Md. 2011) (stating that in Maryland conduct will only be found outrageous for IIED purposes where it "completely violate[s] human dignity" and strikes "to the very core of one's being, threatening to shatter the frame upon which one's emotional fabric is hung"); Walker v. Covance Clinical Research Unit Inc., No. 08-CV-493-SLC, 2008 WL 4460380, at *2 (W.D. Wis. Sept. 26, 2008) (finding that in Wisconsin the standard of extreme and outrageous conduct is only met where the "'average member of the community' would

haviors that negatively impact autonomous individuals' wills to participate as equal members of society.[198]

The risk of restraint on free and open participation in debates, even when they involve false and emotionally charged statements that are not actually malicious, is not solely a matter of restraining the badgering of one citizen by another. The potential for abuse by the unwarranted interference with the speech rights of individuals wishing to express themselves about social, political, and civic issues threatens to undermine people's ability to participate in representative democracy. Speakers who assert controversial perspectives on subjects like gay marriage, abortion, immigration reform, or welfare payments will inevitably offend and in some cases deeply distress and outrage some audiences, but their ability to relate opinions to others opens the way to constructive changes to the status quo. These calls for changes can be about the democratic structures of government. Not all emotionally distressing communications, however, are democratic in nature; some are about private matters like property ownership, the health of relatives, and details of employment. The public topics involved can also be closely aligned to matters of local concern, such as fixing potholes on roads spiced with negative statements about the county board in charge of road projects and their families. Unless spoken with actual malice, then too the First Amendment protects individuals' rights to free speech from government restrictions, even when the basic structure of democracy is not at stake. The expression of diverse opinions about the relative value of public projects and policies might be upsetting, but they contribute to common deliberations and have the potential of improving the functioning of organized society.

C. True Threats and Incitement

The constitutionality of incitement statutes is much in dispute.[199] The lack of stable, constitutional theory in this area of law has left a

view the defendant's treatment of the plaintiff 'as being a complete denial of the plaintiff's dignity as a person'"); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do about It*, 73 TUL. L. REV. 173, 196 (1998) ("[I]ntentional infliction of emotional distress . . . protect[s] the dignity of the individual."); Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 182 (2010) ("IIED liability is designed to protect the autonomy of the victims of outrageous conduct . . . .").

198. *Cf.* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 354 (1996) ("For social contract theory, the interests at stake in accidental risk impositions are not mere preferences properly measured in dollars, but interests in liberty. These interests represent the background conditions necessary for the pursuit of conceptions of the good over the course of complete lives. Accordingly, proper evaluation of risks and precautions requires the *qualitative* assessment of the way particular risks and precautions burden the liberties necessary for persons to pursue the aims and aspirations that give meaning to their lives.") (emphasis in original). I realize the economic theory of tort law would probably not share this conception of the field but have no space in this article to enter the debate between it and the normative perspective.

199. For an excellent debate on the issue, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 and Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484. For further discussion on the constitutionality of hate speech, see David E. Bernstein, *Defending the First Amendment from Anti-Discrimination Laws*, 82 N.C. L. REV. 223 (2003); Richard Delgado*, Campus Antiracism Rules: Consti-*

wake of seemingly inconsistent Supreme Court decisions. This area has undergone significant revision in the past century with the Court setting tests for differentiating the many forms of confrontational communications that can enrage listeners, cause emotional injuries, and pose imminent threats of harm.[200] Case law in this area has sought to clarify what regulations adequately protect individual free speech, even when it is abusive, while allowing the state to limit some forms of imminent harm or true threats.[201]

Proponents of the three leading methods of free expression interpretation typically claim that racist and ethnocentric incitement fall under protected First Amendment expressions. This conclusion, I believe, overemphasizes free expression and gives too little consideration for how hate speech threatens constitutional order and public peace. As a result, all three inadequately reflect on the legitimacy of common interest in suppressing intentionally threatening speech, fixating on the rights of the speaker without giving sufficient consideration of how incitement negatively impacts personal and public tranquility. By narrowing their inquiry exclusively to the right of free speech, they fail to adequately account for the general purpose of representative constitutionalism: the protection of equal rights for the general welfare.

Hate speech subsumes antagonistic, dehumanizing, and threatening statements about particular groups, such as those defined by class, ethnicity, race, gender, color, religion, and sexual orientation. Opponents of hate speech regulations often lean on the marketplace of ideas doctrine.[202] But this seems to be an ineffective explanation for maintaining that the First Amendment protects such expression. The Court has pointed out that "fighting words," which can provoke a brawl, 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

tutional Narratives in Collision, 85 NW. U. L. REV. 343 (1991); Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617 (2010).

200. Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145 (2013) (differentiating protected offensive speech from unprotected forms of incitement to injury).

201. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("Such speech cannot be restricted simply because it is upsetting or arouses contempt."); Virginia v. Black, 538 U.S. 343, 363 (2003) ("Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

202. One author holding to the view that hate speech furthers truth writes that "hate speech should be protected because it reveals important truths about our world" and its "ugliness." Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 999 (2004). Therefore, he continued, "there is a place in the marketplace of ideas for hate speech because it reveals the truth of hate." *Id.* Professor Daniel Farber argues along the same vein that explaining why the First Amendment prohibits blocking a Nazi march on a neighborhood with a higher than usual concentration of Holocaust survivors: "[A]s in the case of racist invective, to reduce the ugliness of the Nazi's speech would only conceal the real ugliness, the ugliness of their ideas. That truth is too important to suppress . . . ." Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283, 301.

and morality."[203] Moreover, hate speakers trade in stereotypes not historical data.[204] Furthermore, arguing that hate speech is a necessary evil in a democracy[205] equates intentional disparagement with legitimate political expression.[206] Justice Byron White mocked such a connection.[207] Moreover, were we to examine the regulation of hate speech on the basis of self-fulfillment,[208] we would find two competing claims of liberty: One of the speaker and the other of the person seeking to live an autonomous life without the interference of belligerence. Regulations on hate speech are better judged through the constitutional prism of liberal equality for the common good.

Just as he developed the marketplace of ideas formulation,[209] Justice Oliver Wendell Holmes played a significant role in the creation of First Amendment incitement jurisprudence. In a series of cases arising from convictions under the Espionage Act of 1917, Holmes set the initial standard for criminal statutes limiting expression. In the first of these cases, *Schenck v. United States*, Holmes established the "clear and present danger" test for identifying the "proximity and degree" of the harm Congress can legitimately curb.[210] The test turned out to be ambiguous enough to grant wide latitude to subdue unpopular political ideas, such as those espoused by persons ideologically committed to communism

203. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

204. W. Bradley Wendel, *"Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases*, 65 LAW & CONTEMP. PROBS. 33, 66 (2002) ("Hate speech props up that ideology by distancing people of different races and perhaps subconsciously operating to convince them of the truth of racist stereotypes.").

205. Robert Post, *Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 123, 136 (Ivan Hare & James Weinstein eds., 2009) [hereinafter Post, *Hate Speech*] (asserting that restrictions on hate speech "can have the counterintuitive effect of undermining democratic cohesion"); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 322 (1991) [hereinafter Post, *Racist Speech*] ("If, as I have argued, racist speech is and ought to be immune from regulation within public discourse, we can expect courts guided by the concept of democratic education to be quite hostile to the regulation of racist speech within universities, preferring instead to see students realistically prepared for participation in the harsh but inevitable world of public discourse.").

206. Tsesis, *Dignity and Speech*, *supra* note 55, at 499 (arguing that restricting speech that "intimidate[s] targeted groups from participating in the deliberative process" strengthens equality-based self-government by protecting dignity and furthering pluralism).

207. Justice Byron White, in a concurrence, dismissed the claim that hate speech is a legitimate form of political discourse: "Instead, it permits, indeed invites, the continuation of expressive conduct that . . . is evil and worthless in First Amendment terms . . . . [C]haracterizing fighting words as a form of 'debate[]' . . . legitimates hate speech as a form of public discussion." R.A.V. v. City of St. Paul, 505 U.S. 377, 402 (1992) (White, J., concurring in judgment). White further argued that hate speech is a particularly dangerous form of social evil meant to "provoke violence or to inflict injury" rather than to exchange ideas. *Id.* at 401.

208. *See* C. Edwin Baker, *Autonomy and Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY, *supra* note 205, at 139, 147 (expressing the view that racist expression is an individual's prerogative unless a causal connection could be shown to link it to "virulent racist or genocidal practices") [hereinafter Baker, *Autonomy and Hate Speech*].

209. *See supra* text accompanying notes 118–25.

210. 249 U.S. 47, 52 (1919). "[F]alsely shouting fire in a theatre" is an example of speech outside the bounds of the First Amendment. *Id.*

even when there was no showing that the speaker was engaged in a conspiracy to the government or participate in violence.[211]

Holmes strongly opposed the use of political pressure to force ideological conformism. In *Abrams v. United States*,[212] which upheld the conviction of several communists who published leaflets opposed to U.S. military efforts to put down the Soviet Bolshevik revolution, he wrote a lucid dissent. Holmes spoke of the marketplace of ideas as being essential for attaining the "ultimate good desired" by the majority;[213] although Holmes did not define what constituted the ultimate good, in a later opinion, he expressed a Social Darwinistic vision of power.[214] As discussed in Part III.C of this Article, Holmes accepted the view that dominant forces of the community had the right to secure their will.[215] His marketplace of ideas doctrine provided no means for weaker forces to prevent those with greater resources and access to media to stifle opposition.

The marketplace of ideas doctrine stuck, but without Holmes' Social Darwinistic baggage, and is now firmly established in jurisprudence.[216] The "clear and present danger" test, however, was reformulated by the Warren Court, which adopted a more exacting standard of proof. In *Brandenburg*, the Court held that government can proscribe "advocacy of the use of force or of law violation" only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[217] Still questions remained about whether the *Brandenburg* test would apply to all forms of incitement, including clearly unprotected speech that causes immediate damage, such as espionage,[218] or only a subgroup of speech on private property, such as the one

211. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516–17 (1951) (finding the advocacy of communism to pose a clear and present danger to US. democracy).

212. 250 U.S. 616 (1919).

213. *Id.* at 630.

214. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

215. *Abrams*, 250 U.S. at 630. *See* infra text accompanying notes 116–21.

The Court has repeatedly relied on this test. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 885 (1997) (determining that the Internet was a new marketplace of ideas and holding some provisions of the Communications Decency Act unconstitutional); Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (holding that commercial speech has some value in the marketplace of ideas); Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 389–90 (1969) (upholding the "fairness doctrine").

216. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring in the judgment) ("[F]alse factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas."); N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference."); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007) ("[C]ontent discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed."); Texas v. Johnson, 491 U.S. 397, 418 (1989) ("The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas.").

217. 395 U.S. 444, 447 (1969) (per curiam).

218. Gorin v. United States, 312 U.S. 19, 28 (1941) (upholding the constitutionality of the current 18 U.S.C. § 793, a portion of the Espionage Act, that punishes anyone who obtains or delivers information harmful to the United States defense). While the United States Constitution protects freedom

that gave rise to the original criminal complaint in the case, where no one attending the rally had been threatened.[219] Therefore, the Court overturned the incitement conviction, finding that there was no imminent threat of harm to anyone at the event. If matters stood there, it could be argued that while Klansmen conveyed no truth they were self-expressive and engaged in political dialogue. But the doctrine is more complicated than it first appears.

Where burning crosses convey threats, the Court has found that a speaker can be held criminally culpable, even where there is no imminent likelihood that a crime will be committed. In 2003, in *Virginia v. Black*,[220] the Court further clarified the extent to which government can regulate racist speech. Petitioners challenged the constitutionality of a state statute prohibiting the burning of "a cross on the property of another, a highway or other public place."[221] In *Black*, the Court consolidated cases.[222] In one of them defendants lit a cross on a neighbor's property and in the other Klan members burnt a cross in a public place where it was clearly visible from the road and adjacent properties.[223] The Court made clear that "true threats," which are unprotected by the Free Speech Clause, "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[224] This definition of "true threats" contains no imminence component, clearly differentiating it from *Brandenburg*. Neither did the cross burning statute require specific intent.[225] The Court only split on the scienter element, with the plurality arguing for the defendant's mind frame must be proven beyond a reasonable doubt, not simply presumed as the concurrence and dissent asserted.[226]

Pursuant to *Black*, courts must engage in content rich analyses of whether the symbol, spoken word, or other depiction of a burning cross is intimidating under the circumstances.[227] Burning a cross "with the intent to intimidate," as Justice Sandra Day O'Connor wrote for the Court,

of speech, "it is not a suicide pact." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963) (stated in the context of draft evasion); *see also* Gitlow v. New York, 268 U.S. 652, 669 (1925) (holding that the government may enact laws to protect "public peace and safety" without having to "defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency").

219. The Klan had invited a reporter from a Cincinnati television station to their rally. *Brandenburg*, 395 U.S. at 445. According to the record, the reporter arrived to the event with a cameraman who filmed the proceedings, but everyone else in attendance was a member of the Klan. *Id.* at 445–46.

220. 538 U.S. 343 (2003).

221. VA. CODE ANN. § 18.2-423 (1996).

222. *Black*, 538 U.S. at 351.

223. *Id.* at 348–51.

224. *Id.* at 359.

225. *Id.* at 359–60 ("The speaker need not actually intend to carry out the threat.").

226. *Id.* at 363–68 (plurality opinion).

227. *See id.* at 360–61 (majority opinion).

is unprotected by the First Amendment.[228] The state can legitimately criminalize cross burning "because burning a cross is a particularly virulent form of intimidation."[229] Thus *Brandenburg*'s imminence standard is inapplicable to some forms of cross burning. Concurrences written by Justices John Paul Stevens and Antonin Scalia both agreed that burning a cross with the intent to intimidate is unprotected by the First Amendment.[230] These modes of contextual interpretation, which allow judges to reflect on the history of the Ku Klux Klan and its use of the burning cross, moved away from a nearly categorical rejection of content-based regulations, which an earlier case had adopted.[231]

Most First Amendment scholars have avoided discussing the dynamics separating *Brandenburg* and *Black*.[232] Both cases arose from cross

228. *Id.* at 363. The Court distinguished *Brandenburg* and *Watts*, thereby clearly differentiating the two lines of First Amendment precedents. *See id.* at 359 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.") (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)); *id.* ("And the First Amendment also permits a State to ban a 'true threat.'") (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).

229. *Id.* at 363 ("Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence."); *see* Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 704, 724, 781 (1999) (discussing how the Ku Klux Klan uses burning crosses to intimidate and organize).

230. *Id.* at 368 (Stevens, J., concurring); *id.* at 368 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

231. R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992). In *R.A.V.* the Court had found a St. Paul, Minnesota ordinance to be unconstitutional for regulating public and private displays of Nazi swastikas or burning crosses because they "arouse[] anger, alarm or resentment on the basis of race, color, creed, religion or gender." *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). The majority found the ordinance violated the First Amendment because it relied on content discrimination. *See id.* at 391–96.

Four justices wrote scathing concurrences. Justice White asserted that the majority had misleadingly presented past precedent because it legitimized communications "long held to be undeserving of First Amendment protection." *Id.* at 401 (White, J., concurring in the judgment). Legislators had the constitutional latitude, White went on to say, to regulate a subset of fighting words because of "the social evil of hate speech." *Id.* Hate speech posed a danger because it was likely to "provoke violence or to inflict injury." *Id.*

In another concurrence, Justice Harry Blackmun berated the majority's categorical rejection of content regulations. Blackmun believed no First Amendment values were violated "by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns." *Id.* at 416 (Blackmun, J., concurring in the judgment).

Justice John Paul Stevens, who wrote the third concurrence in the case, listed other content based regulations that the Supreme Court had already found to be constitutional. *See id.* at 419–22 (Stevens, J., concurring in the judgment). In another sharp rebuke to the majority, Stevens asserted that the majority's opinion "[d]isregard[ed] this vast body of case law" that had "created a rough hierarchy in the constitutional protection of speech." *Id.* at 422.

232. For examples of the passing mention of *Black* in the works of some leading First Amendment scholars, see DAVID A. STRAUSS, THE LIVING CONSTITUTION 54 (2010). In his discussion, Strauss writes about the significance of *Brandenburg* without mentioning that the case arose in a private location nor giving any mention to *Black*. Dean Robert Post wrote a lucid chapter about hate speech, but left out how *Black* affected the doctrine. Post, *Hate Speech*, *supra* note 205, at 123. Professor Eugene Volokh, a prolific scholar who has raised doubts about the constitutionality of hate speech laws, has only once mentioned the *Black* opinion in the text in any of his articles, and that in passing. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1135–36 (2005). Elsewhere, Volokh has only made string citation references to *Black*. *See* Eugene Volokh, Essay, *Freedom of Speech and*

burnings, yet in the former the Court had found the expressive conduct not to be culpable while in the latter it reached the opposite conclusion. In many cases, those few scholars who do compare the two distinguish them, explaining that one dealt with incitement doctrine and the other with true threats doctrine, without delving into any substantive differentiation.[233] The plurality's own definition of "true threats" insufficiently deals with the public harm posed by hate speech. The "true threats" doctrine, as Justice O'Connor understands it, recognizes the need to regulate serious statements expressing the "intent to commit an act of unlawful violence to a particular individual or group of individuals."[234] But such a narrow definition inadequately addresses the social evils appertaining to the use of hate symbols like burning crosses, swastikas, or Hezbollah flags. Many a lynch mob or pogrom were fueled by general incitement against blacks, Jews, homosexuals, and other dehumanized victims, with the participants willing to hurt members of the hated group.[235] To kneecap authorities from preventing general incitement puts individual and group safety at risk and raises the likelihood of social instigation to violence.

What's more, one of the cases consolidated in *Black* involved the burning of a cross that terrified viewers who saw it from the road and a nearby residence, but involved no particularized threat.[236] While the Court affirmed the Virginia's Supreme Court's decision to vacate the original conviction, it did so because of a faulty jury instruction which did not require the prosecution to prove up the speaker's intent.[237] The Court found nothing wrong with bringing a charge and proving up a case against the burning of a cross in public with the intent to intimidate others.[238] This is an internal contradiction of its own particularlized definition of "true threats." The doctrine might better be understood to be an offshoot of the fighting words doctrine, as Justice Stevens pointed out in his concurrence to *R.A.V. v. St. Paul*.[239] When looking at the "context of the regulated activity," cross burning laws "restrict[] speech in confrontational and potentially violent situations."[240] The regulation of such speech pits public tranquility above cathartic instigation of violence. Justice

Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 703 n.31 (2003); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 670 n.171 (2006); Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*s, 16 TEX. REV. L. & POL. 295, 314 n.84 (2012).

233. *See, e.g.*, Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 283 n.216 (2012).

234. *Black*, 538 U.S. at 359.

235. *See* JAMES H. MADISON, A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA 67–69 (2001); STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930, at 47 (1995); Peter W. Bardaglio, *Rape and the Law in the Old South: "Calculated to Excite Indignation in Every Heart"*, 60 J. S. HIST. 749, 752 (1994); James W. Vander Zanden, *The Ideology of White Supremacy*, 20 J. HIST. IDEAS 385, 401 (1959).

236. *Black*, 538 U.S. at 348–49.

237. *Id.* at 367.

238. *Id.* at 363.

239. R.A.V. v. City of St. Paul, 505 U.S. 377, 432 (1992) (Stevens, J., concurring in the judgment).

240. *Id.*

White's concurrence in to the same case likewise analogized hate symbols to fighting words, writing, "This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression."[241]

None of the three leading descriptions of free speech adequately explain the differences between *Black* and *Brandenburg*. The practical judicial insight from these contrasting opinions is that publically made intentionally intimidating expressions are outside the realm of constitutional protections, while privately made racist statements posing no immediate threat are within First Amendment parameters.

Intentionally intimidating hate speech made in public threatens the happiness of individuals and their allies, influences others to exclude identifiable groups, and disrupts multicultural tranquility. These consequences are realistic because the burning cross is not merely an abstract symbol but a call to racial, ethnic, and religious intolerance. At stake is the ability of individuals to enjoy common goods on an equal basis. Limits on hate speech, like those recognized in *Black*, are not based only on truth, democracy, or self-expression. It matters not whether a racist uses a true or false stereotype to intimidate. Nor is it relevant whether a democratic or representative majority is willing to intimidate an outsider group. The desire of an individual to vent anger is also not determinative of the constitutionality of regulations.

Cross burning statutes promote public safety by deterring the instigation of violence and various forms of unlawful discrimination. The fine line between protected and unprotected racist expletives and threatening symbols is not predicated on the truth value of either. Both are offensive and bereft of any valid information relating the nature or qualities of the object. The principal question is whether intimidating expressions using historical symbols of violence are meant to terrorize others in a manner inimical to the maintenance of a peaceful, just, and equitable society.

The foremost scholar of the democratic theory of First Amendment, Robert Post, wisely counsels that determining whether racist speech regulations violates the Free Speech Clause should reflect the "social context" of racialist communication.[242] Post is mindful that speech is protected because of its personal value to self-determination, but he thinks its primary function is to advance deliberation about public matters.[243] Attentive to the public value of open dialogue, he believes that those who advocate the limitation of hate speech "carry the burden of justifying" the democratic value of such laws.[244] He further writes that discourse is so important to society that "racist speech is and ought to be immune from regulation within public discourse."[245] His definition of hate speech,

241. *Id.* at 399 (White, J., concurring in the judgment).
242. Post, *Racist Speech*, *supra* note 205, at 325–26.
243. *Id.* at 326.
244. *Id.* at 327.
245. *Id.* at 322.

which regards the critical issue to be whether "otherwise appropriate emotions become so 'extreme' as to deserve legal suppression,"[246] is too narrow to capture the intimidation, threat, and instigation that such communications are meant to elicit. It is precisely there that Post's democratic theory ceases to be mindful of the dual role of representative democracy. Post espouses the aggregative claim that "democracy requires individual autonomy only to the extent that citizens seek to forge 'a common will, communicatively shaped and discursively clarified in the political public sphere.'"[247] His overemphasis on the collective aspects of democracy unnecessarily diminishes government's obligation to provide for the public safety of individuals. Whether a voting majority in a democracy will choose to advance the interests of the entire population or only a favored part is speculative. Indeed the majority is likely to protect speech that furthers its goals with inadequate regard for the dignity and reputation of politically weak groups.

In contrast to Post's perspective, most democratic countries find that the enforcement of hate speech laws meet social obligations to individuals and bridge the deontological and consequentialist duties of governance. The limits of democratic self-government are the rights of individuals; there is no democracy where fundamental rights are not safe against arbitrary attack. Hence hate speech regulation must be carefully calibrated to respect the interests of individuals and advance the general welfare. European nations and Canada have found that hate speech laws reflect the values of pluralistic democracy. The democratic identity these countries espouse requires governments to pursue a normative approach, which Martha Nussbaum has called the "capabilities approach," requiring governments to "secure for all citizens the prerequisites of a life worthy of human dignity."[248]

Canada, to take one example of a vibrant democracy, has remedies for the victims of hate speech that are both socially and individually conscious:

> [Hate propaganda] undermines the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.[249]

246. Post, *Hate Speech*, *supra* note 205, at 123.

247. Post, *Viewpoint Discrimination*, *supra* note 106, at 176 (quoting HABERMAS, COMMUNICATIVE ACTION, *supra* note 109, at 81). See further on Post's aggregative theory of democracy in Post, *Equality and Autonomy*, *supra* note 108, at 1523 ("The value of collective self-determination does not inhere in the people's power to decide their own fate, but rather in their warranted conviction that they are engaged in the process of deciding their own fate.").

248. Martha C. Nussbaum, *Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 7 (2007).

249. Taylor v. Canadian Human Rights Comm'n, [1990] 3 S.C.R. 892, 894 (Can.).

The Canadian Charter of Rights and Freedoms, like the U.S. Bill of Rights, guarantees freedom of expression.[250] The Canadian Supreme Court has interpreted three values to be associated with the Charter's guaranty of free expression: The rights to (1) seek truth, (2) participate in "social and political decision-making," and (3) engage in a pluralistic society for achieving "self-fulfillment and human flourishing."[251] The Canadian approach does not drift off into libertarianism, which Post rightly asserts is not the essential aspect of democracy.[252] Balanced regulations of fundamental liberties, Canada has determined, are compatible with "reasonable limits prescribed by law" needed to maintain "a free and democratic society."[253] The Court explained that a statute against telephonic hate propaganda was based on Parliament's determination that such conduct harms dignity, undermines the targeted group's sense of self-worth, and destabilizes multicultural society committed to equality.[254]

Like Canada and the United States, France is a democracy that regards "free communication of ideas and opinions" to be "one of the most precious of the rights of man."[255] Its constitutional commitment to democratic values and free expression exist side-by-side with a statutory prohibition against, among other things, "incitement to violence or racial hatred."[256] Furthermore, Germany's Constitution both guarantees "the right freely to express and disseminate" information[257] and prohibits political participation of parties that seek to "undermine or abolish the free democratic basic order."[258] German law criminalizes the distribution of "written materials . . . which describe cruel or otherwise inhuman acts of violence against human . . . beings in a manner expressing glorification or which downplays such acts of violence or which represents the cruel or

250. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, § 2(b) (U.K.) ("Everyone has the following fundamental freedoms . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication").

251. Regina v. Keegstra, [1990] 3 S.C.R. 697, 728 (Can.); *see also* Switzman v. Elbling, [1957] S.C.R. 285, 326 (Can.) ("The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.").

252. Post, *Viewpoint Discrimination*, *supra* note 106, at 175.

253. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, §1 (U.K.).

254. Taylor v. Canadian Human Rights Comm'n, [1990] 3 S.C.R. 892, 919 (Can.).

255. Déclaration des droits de l'homme et du citoyen [Declaration of the Rights of Man and of the Citizen], August 26, 1789, art. 11 (Fr.).

256. *See Terrorism*, FRENCH MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL DEVELOPMENT, http://www.diplomatie.gouv.fr/en/global-issues/defence-security/terrorism/ (last visited Feb. 5, 2015) ("French practice focuses on infringements of the law (incitement to violence or racial hatred, etc.), not on support for a particular position, which would be contrary to the French conception of freedom of conscience and expression.").

257. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 5(1) (F.R.G.), translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat et al., trans. 2012), *available at* https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf.

258. *Id.* at art. 21.

inhuman aspects of the event in a manner which violates human dignity."[259] Imprisonment is also available in the criminal prosecution of anyone inciting hatred against a particular segment of the population, calling for "violent or arbitrary measures" to be taken "against them," or "insulting them, maliciously exposing them to contempt or slandering them."[260] And British law likewise criminalizes hateful propaganda degrading someone based on "colour, race, nationality (including citizenship) or ethnic or national origins."[261] Elsewhere, I have provided a more extensive survey of democracies' laws that prohibit the incitement, intimidation, and humiliation of specified groups.[262] These countries' experiences answer Post's inquiry about whether democracies can prohibit racist speech without compromising open debate. They can both remain participatory states, where citizens are deeply involved in social policy and the development of culture, while punishing misethnic incitements and threats.

Professor Edwin Baker questions the constitutionality of all hate speech regulations, except those that only punish immediate threats, for a different reason than Robert Post. Baker lauds "American exceptionalism" distinct from the European approach, announcing that he is "an advocate of almost absolute protection of free speech."[263] Adopting a civil libertarian perspective, Baker argues that persons should be allowed to explore their political views without restrictions, irrespective of whether their statements harm others.[264] Free debate, he writes, is too important to individuals to restrict solely because some listeners regard statements to be repulsive. On this point, I agree with him because, as the Court recently asserted in *Snyder*, someone's offense is not enough without threats or incitement to create adequate reason to curtail free speech.[265]

Where I think Baker is mistaken is in his insufficiently researched denial of the grave ills that hate speech has instigated against individuals and society. To be clear, Baker, like Post, is a vehement opponent of racism. Baker asserts his willingness to consider historical evidence that hate speech instigated such grave harms of humanity as the Rwanda genocide and the Holocaust.[266] The problem is that he expresses a readiness and then drops the ball, without actually delving into the historical record.[267]

259. Strafgesetzbuch [StGB] [PENAL CODE] Dec. 2007, § 131(1) (Ger.), translated in THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION 116 (Michael Bohlander trans., 2008).

260. *See* STGB § 130.

261. Public Order Act, 1986, ch. 64, § 17 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts1986/pdf/ukpga_19860064_en.pdf.

262. *See* TSESIS, DESTRUCTIVE MESSAGES, *supra* note 12, at ch. 12.

263. Baker, *Autonomy and Hate Speech*, *supra* note 208, at 139–40.

264. *Id.* at 142.

265. *See supra* text accompanying notes 179–91, 263–64.

266. Baker, *Autonomy and Hate Speech*, *supra* note 208, at 146.

267. For instance, to make the point that hate speech laws might be turned against the very minorities they are meant to protect, Baker writes: "Minorities in Ethiopia were published under hate speech laws for their criticism of Ethiopia's dominant ethnic group." *Id.* at 154. For this proposition his footnote provides the following credit: "This observation was made at the conference in Budapest . . .

The historical evidence, I believe, clearly demonstrates that genocides, mass crimes against humanity, and overt discriminations are not carried out in a vacuum but are instigated through intimidating and threatening dehumanizations. As one of the foremost psychologists of ethnocentric hatred, Gordon W. Allport, put it, "prolonged and intense verbal hostility always precedes a riot."[268] Elsewhere, I have extensively detailed the history of hate propaganda[269] and here provide only a few examples of how hate speech has inflamed popular animosity and violence. Jews were slaughtered over the centuries for purportedly using the blood of Christian children in the preparation of the Passover matzah.[270] In the United States, Canada, and throughout various parts of South America, Amerindians were labeled savages to justify extinguishment of their land titles, perpetration of mass murder, enslavement, and physical removal.[271] Rumors of black men raping white women was a battle cry for many a lynch mob in the United States.[272] Paving the way for Japanese internment on the West Coast of the United States during World War II were decades of vitriolic statements and books about their lack of loyalty, laziness, and commercial exploitation.[273] In Rwanda, years of popular press, humor, and political assertions that Tutsis were cockroaches who should be exterminated eased the task of genocide when the opportunity presented itself to the Bahutu movement.[274] And, in Kenya, hate radio pro-

by an activist focused on Africa". *Id.* at 154 n.32. The statement is unconvincing because it lacks the sort of rigorous research needed to examine the validity of the activist's claim. It does not even name the minority groups, cite to the law at issue, the case or cases referred to, nor the prevalence or lack thereof of hate speech law being turned on its head against minorities.

268. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 60 (25th anniversary ed. 1979).

269. TSESIS, DESTRUCTIVE MESSAGES, *supra* note 12, chs. 1–5.

270. *See* MAX I. DIMONT, JEWS, GOD AND HISTORY 240–41 (Ethel Dimont ed., Signet Classics 2d ed. 2004) (1962); RAPHAEL ISRAELI, POISON: MODERN MANIFESTATIONS OF A BLOOD LIBEL 21 (2002); EMIL MURAD, THE QUAGMIRE 252 (1998); TADEUSZ PIOTROWSKI, POLAND'S HOLOCAUST: ETHNIC STRIFE, COLLABORATION WITH OCCUPYING FORCES AND GENOCIDE IN THE SECOND REPUBLIC, 1918-1947, at 135 (1998).

271. *See* BEN KIERNAN, BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR 318–30 (2007); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 747–51 (2000).

272. *See* MADISON, *supra* note 235, at 67-68; TOLNAY & BECK, *supra* note 235, at 47; Mary E. Odem, *Cultural Representations and Social Contexts of Rape in the Early Twentieth Century*, *in* LETHAL IMAGINATION: VIOLENCE AND BRUTALITY IN AMERICAN HISTORY 353, 364 (Michael A. Bellesiles ed., 1999).

273. *See* CAREY MCWILLIAMS, PREJUDICE: JAPANESE-AMERICANS: SYMBOL OF RACIAL INTOLERANCE 119–21 (1945); JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 262–65, 302 (1958) (1954); Eugene V. Rostow, *Our Worst Wartime Mistake*, HARPER'S MAG., Sept. 1945, at 193–94.

274. *See* Alison Des Forges, *Call to Genocide: Radio in Rwanda, 1994*, in THE MEDIA AND THE RWANDA GENOCIDE 41, 42–43 (Allan Thompson ed., 2007); Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, in THE MEDIA AND THE RWANDA GENOCIDE, *supra*, at 90, 97–98. Baker demonstrates a significant misunderstanding of the role of hate radio leading up to the genocide. He thinks it to be no more than merely the expression of ethnic tensions. Baker, *Autonomy and Hate Speech*, *supra* note 208, at 156. To the contrary, survivors and scholars of the Hutu genocide against the Tutsis relate how years of dehumanization against the Tutsis made it easy for the perpetrators to rationalize committing crimes against humanity. *See* JEAN HATZFELD, MACHETE SEASON: THE KILLERS IN RWANDA SPEAK 55 (Linda Coverdale trans., Farrar, Straus & Giroux American ed. 2005) (2003) (describing radio broadcasts openly calling for Tutsi extermination prior to the 1994 genocide

grams and text messages helped instigate violence between the Kikuyu and Luo peoples.[275]

The indubitable historical record demonstrates that there are a variety of normative reasons—communicative, retributive, and deterrent—for prohibiting the dissemination of hate incitement even though such state actions would limit Baker's principal bedrock justification for free speech: personal autonomy. Democracies that enforce anti-incitement laws set communicative standards for socially tolerated behavior, seeking both to educate the population about the evils of group defamation and to stymy the political growth of groups committed to mass violence and discrimination.

The very purpose of instigative group defamations, burning crosses, or symbols of terror is to exclude hated and dehumanized groups of individuals from the equal privileges enjoyed by other citizens.[276] My liberal equality model of the Constitution posits that the government has a deontic duty to protect individual rights and an overlapping consequentialist duty to protect the public good.[277] Individual free speech is of central importance to the development of a constitutional republic, but social safety requires some limits on that liberty when self-expression is likely to instigate violence or threaten others. There is no American exclusivity in the public obligation to secure safety and the equal ability to participate in constitutional community. Hate speech regulations should be designed to advance governance meant to protect ordinary people. When incitement threatens others' well-being, rather than erring on the side of more vitriol, some restriction is necessary to prevent groups or individuals from translating inciteful sentiments into violence. These forms of instigation are not protected by the First Amendment.[278] Destructive messages do not advance truth. Democracies around the world deem them dangerous to the stability of multicultural societies.

Speakers who menace others through historically recognizable hate symbols—like burning crosses or Nazi flags—and age old stereotypes—like those that dehumanize Jews as being vermin worthy of extermina-

in Rwanda); MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 212 (2001) (quoting from the Hutu-power Kangura newspaper, which dehumanized the Tutsis and called for their destruction); JOSIAS SEMUJANGA, ORIGINS OF RWANDAN GENOCIDE 171–72 (2003) (providing an account of how racist ideology of the 1950s took root in Hutu politics and permeated the popular view of Tutsis).

275. Kwamboka Oyaro, *Kenya: The Media Is Not Innocent*, INTER PRESS SERVICE (Feb. 2, 2008), http://www.ipsnews.net/2008/02/kenya-the-media-is-not-innocent/; Ofeibea Quist-Arcton, *Tracing the Roots of Ethnic Violence in Kenya*, NAT'L PUB. RADIO (Jan. 31, 2008, 4:00 P.M.), http://www.npr.org/templates/story/story.php?storyId=18582319.

276. *Cf.* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 117 (1996) (stating that a [cross burning] ordinance seems "to end a pattern of behavior that tends to silence one group and thus distorts or skews public debate").

277. For a full elaboration of my theory see Tsesis, *Maxim Constitutionalism*, *supra* note 9.

278. Post, *Racist Speech, supra* note 205, at 281–82 ("'The will of the community, in a democracy, is always created through a running discussion between majority and minority . . . .' [That] subjects the political and social order to public opinion, which is the product of a dialogic communicative exchange open to all.") (quoting HANS KELSEN, GENERAL THEORY OF LAW AND STATE 287–88 (A. Wedberg trans., 1961)).

tion or those that charge aborigines of savagism—can be used to destabilize pluralistic society, instigate violence, and attack the dignity of targeted groups. Hate speech does not advance the constitutional right to express oneself; rather, it is an attempt to intimidate people on an individual level, to spread lies, to make them insecure in the exercise of equal liberties, and to exclude them from democratic self-governance. Injury to the individual diminishes from the general welfare of society, which is a composite of all the people who form our polity.

The liberal equality theory I propose balances public safety against the right to communicate freely. Private communications that are neither threatening nor imminently dangerous enjoy a wealth of protections against government overreaching. Expressions of ideas that seek truth, advance political agendas, and exercise personal volition enjoy the most exacting scrutiny against government overreaching. But where statements relying on discriminatory stereotypes instigate violence, discrimination, or widespread civic exclusion, regulations are appropriate to preserve the core constitutional purpose of liberal equality for the common good.

V. CONCLUSION

The three foremost theories of free speech offer useful models for identifying the limits of legitimate regulations. The Constitution protects the right to explore ideas as a means of discovering truth, to participate in democracy, and to exercise an important aspect of self-definition. However, each of these explanations has its shortcomings. Not only does the First Amendment protect the right to pursue truth but also to express opinions and exaggerate accomplishments. Safeguarding expression is essential to gain expertise, advance democracy, reap commercial gain, and a plethora of other goals. Yet the democratic model does not sufficiently explain the rationale for protecting personal creativity through copyright laws; consumer confidence by patent laws; or humor, even when it is insulting. The self-determination model puts the power of constitutional law behind personal will. It allows individuals to file causes of action to vindicate their rights against state censorship. Yet it poorly explains the collective ability to express ideas for social change, the requirement to limit one's speech when it harms another's reputation, and rules out almost all forms of hate speech legislation.

I have sought to demonstrate that a better approach to free speech theory is one that allows government actors to advance the underlying purpose of the Constitution. That purpose is the development and enforcement of policies conducive to the public good that safeguard individual liberties on an equal basis. This overarching concept better explains why truth and falsehood are protected; why democratic as well as narcissistic speech enjoy First Amendment protections; and why speech is not purely libertarian since it can harm the legally recognized interests of other members of a complex society.