ARTICLES

BALANCING FREE SPEECH

ALEXANDER TSESIS*

This article develops a theory for balancing free speech against other express and implied constitutional, statutory, and doctrinal values. It posits that free speech considerations should be connected to the underlying purpose of constitutional governance. When deciding difficult cases involving competing rights, judges should examine (1) whether unencumbered expression is likely to cause constitutional, statutory, or common law harms; (2) whether the restricted expression has been historically or traditionally protected; (3) whether a government policy designed to benefit the general welfare weighs in favor of the regulation; (4) the fit between the disputed speech regulation and the public end; and (5) whether some less restrictive alternative exists for achieving it.

Recent Roberts Court free speech jurisprudence has gone in the opposite direction, becoming increasingly formalistic. Cases dealing with violent video games, cruelty to animals, aggregation of campaign financing, and lies about

* Professor of Law, Loyola University Chicago School of Law. I am deeply indebted for advice on earlier drafts from Eric Berger, Caroline Mala Corbin, Katie Eyer, Stephen Feldman, Olatunde Johnson, Heidi Kitrosser, Randy Kozel, Toni Massaro, Helen Norton, Elizabeth Pollman, David Pozen, Alexandra Roginsky, and Mark Tushnet. I also received extensive feedback at Yale Law School, Emory School of Law, and Loyola School of Law colloquia.

military achievements have applied a categorical approach that is inadequately contextual. The recently formalized categorical test undervalues important normative considerations and a variety of free speech doctrines.

On the normative side, free speech is not a separate value but one that fits within a sophisticated structure of constitutional law. After developing an ethical theory about the value of speech to representative democracy and discussing it in the context of several balancing doctrines, this article applies the framework to campaign financing legislation and copyright doctrine.

INTRODUCTION

The Roberts Court has left a significant mark on First Amendment jurisprudence, but not all of it has been positive. In several of the most prominent cases, the Court's reasoning has been fragmentary, lacking theoretical focus, and sometimes downright inconsistent. In recent years, the Court has used a variety of reasoning to find unconstitutional a sidewalk ban against speakers near abortion clinics,[1] a law limiting corporate campaign contributions,[2] and an aggregation limit on personal campaign contributions.[3] It has also dealt with a hodgepodge of cases with no unifying framework; overturning a statute that limited vendors' ability to distribute violent games to children,[4] striking another that restricted the dissemination of videos depicting cruelty to animals,[5] and yet upholding a statute that prohibited material support to terrorists.[6] With such a variety of decisions, scholars and lower courts are left wondering whether the Court's reasoning is constitutionally objective, ad hoc, or perhaps based on personal, social, or political leanings.

Increasingly, the Court has adopted categorical rationales that are incongruous with several established areas of First Amendment jurisprudence.[7] The function of free speech in a representative democracy is often lost in slogans for more speech. A catchy Supreme Court statement, such as "it is our law and our tradition that more speech, not less, is the governing rule,"[8] is question-begging. For one, it is clearly inaccurate. In matters of defamation,[9] copyright[10] and patent protection,[11] obscenity,[12] commercial speech,[13]

[1] *E.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2535-37 (2014).

[2] *E.g.*, Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[3] *E.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014).

[4] *E.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

[5] *E.g.*, United States v. Stevens, 559 U.S. 460, 468 (2010).

[6] *E.g.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2731 (2010).

[7] *See, e.g.*, *Stevens*, 559 U.S. at 460-61 ("[T]he First Amendment's free speech guarantee does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

[8] Citizens United v. FEC, 558 U.S. 310, 361 (2010).

[9] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[10] Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

incitement to violence,[14] child pornography,[15] and true threats,[16] the rule simply is not that more speech is adequately responsive to the individual and social harms involved. Specific causes of action prohibit the expression of harms to reputation, outrageous speech, theft of intellectual property, pornographic depictions of children, and purely prurient statements. Yet the Court has recently taken to a categorical analysis rather than closely examining why certain types of speech may be outside the limits of the First Amendment.

The word "speech" is itself ambiguous. Taken literally, the Free Speech Clause appears to be absolute in its rejection of restraints on expression.[17] Court doctrine, however, clearly allows the state to place certain limitations on the use of language.[18] Recognition that incitement, false advertisement, and a variety of other categories can be restrained in a civil society without violating the Constitution is a testament to Justice Oliver Wendell Holmes's assertion that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."[19] As Robert Post puts it, "the values served by the First Amendment," not simply syntax and semantics, come into play in free speech analyses.[20]

There are tradeoffs to limits and protections of speech that allow certain content regulations. Examples are abundant. Some audiences value the dissemination of terrorist dogma, but when it crosses from support into

[11] Diamond v. Chakrabarty, 447 U.S. 303, 307 (1980).

[12] Miller v. California, 413 U.S. 15, 20 (1973).

[13] Sorrell v. IMS Health, 131 S. Ct. 2653, 2672 (2011); Va. State Bd. Pharmacy v. Va. Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[14] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[15] New York v. Ferber, 458 U.S. 747, 756 (1982).

[16] Virginia v. Black, 538 U.S. 343, 347-48 (2003).

[17] U.S. CONST. amend I.

[18] The Court has rejected "the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 (1961) (citation omitted). *See also Chaplinsky*, 315 U.S. at 571 ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances."). The only Supreme Court Justice who held an absolutist view on speech was Hugo Black. *See* Hugo L. Black & Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962) ("The beginning of the First Amendment is that 'Congress shall make no law.' I understand that it is rather old-fashioned and shows a slight naivete to say that 'no law' means no law. It is one of the most amazing things about the ingeniousness of the times that strong arguments are made, which *almost* convince me, that it is very foolish of me to think 'no law' means no law.").

[19] Frohwerk v. United States, 249 U.S. 204, 206 (1919).

[20] Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995).

advocacy for harm, public safety outweighs the value of such speech.[21] So too, some members of the population who seek prurient stimulation may regard obscenity as a good, but their interest in watching it is "outweighed by the social interest in order and morality."[22] In a more benign setting, securities regulations balance publicly traded companies' interests in maintaining confidentiality, especially during the negotiation phases of transactions, with the investors' needs for full and fair disclosure "to prevent inequitable and unfair practices" in exchanges.[23] The constitutional protection of speech does not derive solely from the act of communication, but from the contextual balancing of personal liberties and social goods.

The question this article explores is whether a balanced theory can explain why courts regard some forms of language—such as political or artistic speech—to be more socially valuable than others—such as commercial advertisement or the symbolic destruction of draft cards. Such a theory should be prescriptive, functioning as a critical device for analyzing existing doctrine and an adjudicative tool for fresh cases. In order to avoid the risk of unpredictable and amorphous judicial decision making, I propose the following test for difficult cases, involving competing rights: Judges should weigh (1) whether unencumbered expression is likely to cause constitutional, statutory, or common law harms; (2) whether the restricted expression has been historically or traditionally protected; (3) whether a government policy designed to benefit the general welfare weighs in favor of the regulation; (4) the fit between the disputed speech regulation and the public end; and (5) whether some less restrictive alternative exists for achieving it.

In an article on why certain communications are not covered by the First Amendment, Fred Schauer asserts that the boundaries of free speech "cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals of the First Amendment."[24] I argue to the contrary that a robust theory is needed, one that will help evaluate the most recent Court decisions on campaign financing,[25] lies,[26] and funeral protests[27] through a unified lens of constitutional ideals. Specifically, I contend that analysis of these problems should be based on a weighing of individuals'

[21] *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

[22] Miller v. California, 413 U.S. 15, 20-21 (1973) (emphasis omitted) (quoting Roth v. United States, 354 U.S. 476, 484-85 (1957); *see also* Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 106 (2014) ("Obscenity law exists to limit the ways in which individuals can indulge their more shameful sexual interests.").

[23] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2884 (2010) (quoting Securities and Exchange Act of 1934, Pub. L. No. 111-257, 48 Stat. 881).

[24] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

[25] *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434 (2014).

[26] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537 (2012).

[27] *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207 (2011).

will to communicate ideas against relevant public interests. Emphasis on constitutional values requires the very balancing the Supreme Court has historically incorporated into its reasoning (although, in the most recent era, certain Justices have called such balancing into question).[28]

This article argues that the Free Speech Clause is part of a bigger constitutional paradigm, which I developed in several previous publications.[29] In its simplest terms, my claim is that the First Amendment is premised on one basic constitutional maxim: government must protect individual rights for the common good. Speech is part of the firmament of core government commitments for securing the development of individuals and the flourishing of communities. Thus, communications about public matters can only be restricted for compelling social purposes, such as public safety against imminent threats of harm.[30] Yet many other forms of communication regulations, such those on commercial advertisement or copyrighted work, receive only moderately heightened or even quite deferential judicial

[28] *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369, 2384 (2014) ("Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment. Rather, the First Amendment protection of a public employee's speech depends on a careful balance . . . .").

[29] ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS ch. 10 (2002); Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609 (2013); Alexander Tsesis, *Principled Governance: The American Creed and Congressional Authority*, 41 CONN. L. REV. 679 (2009). This unified approach runs counter to scholars who are skeptical about comprehensive constitutional explanations. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1 (2002) ("[F]oundationalism is doomed to failure . . . ."); J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY 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.").

[30] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (asserting that fighting words "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"). A similar social and personal balance is struck in copyright law, where the interest of copyright owners is balanced against the social interest in wider dissemination and derivative works. *See* Eldred v. Ashcroft, 537 U.S. 186, 244-48 (2003) (Breyer, J., dissenting) ("The Copyright Clause and the First Amendment seek related objectives—the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other . . . ."); Stewart v. Abend, 495 U.S. 207, 236 (1990) ("The fair use doctrine . . . permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." (quoting Iowa State Univ. Research Found., Inc. v. American Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980))); *see also* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("Striking the correct balance between access and incentives is the central problem in copyright law.").

scrutiny.[31] The selection and implementation of these various balancing approaches requires judicial consistency in the use of precedents in a manner that does not offend the fundamental rights and general welfare mandate of the Constitution.

This article develops a synthetic approach for courts to balance the diffuse constitutional concerns relevant to the Free Speech Clause of the First Amendment. Part I evaluates the three most widely accepted theories of free speech. This critical survey demonstrates their strengths and shortcomings, suggesting the need for a more comprehensive theory that is presented in Part II. I discuss my new approach in the context of synthetic constitutional priorities, rather than confining it solely to the Free Speech Clause. The doctrine of stare decisis sets a restraint on the factors judges can weigh; therefore, judges are institutionally limited in their balancing analyses. Given the constraint on judicial authority, the second best solution directs judges to rely on Supreme Court balancing precedents while seeking a solution in keeping with the first best aspirational values of the Constitution. Part III demonstrates that the Court's recent turn toward categorical appraisal of regulations governing communications ignores a long history of balancing that characterizes cases dealing with matters from child pornography to public employee speech, defamation, and copyright.

I. THREE THEORIES OF FREE SPEECH

Communication is intrinsic to every person's identity, both as an autonomic individual and as a member of various communities (interpersonal, social, and political). Freedom to express and exchange ideas is an essential feature of any representative democracy committed to the equal liberty of its citizens. Yet not all forms of expression are protected by the First Amendment. As Frederick Schauer has succinctly put it, "the speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives."[32]

Given this limited sphere of the First Amendment, distinguishing what is, or is not, at play is essential. Yet, I think Schauer is mistaken in arguing that the boundaries of free speech can be identified by pragmatic thinking.[33] Certainly the limits of the First Amendment are "far more than the doctrine lying within

[31] *See Eldred*, 537 U.S. at 221 ("[W]hen . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."); United States v. Edge Broad. Co., 509 U.S. 418, 426 (1993) (applying intermediate scrutiny in a case upholding a restriction on lottery advertisement).

[32] Schauer, *supra* note 24, at 1784.

[33] Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 677 (1991) (arguing that judges should follow a presumptively positivistic approach unless they find that the results of doing so would be egregious)*; see also* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

those boundaries."[34] While adjudicative finality is needed for the efficient and predictive operation of the legal system, analytic scrutiny should identify whether particular First Amendment outcomes are consistent with relevant constitutional principles. Hence, I disagree with Schauer that the limits of free speech cannot be "explained . . . by the background philosophical ideas and ideals of the First Amendment."[35] To the contrary, a strictly sociopolitical perspective leaves unacceptable uncertainty in the definition of constitutionally protected free speech. There can be little doubt that First Amendment theory develops in a "political, sociological, cultural, historical, psychological, and economic milieu,"[36] but the relevance of those factors to the resolution of disputes between speakers and regulators requires a unified theory against which they can be tested. A theory of free speech embedded in the underlying purpose of our representative democracy, which I argue in Part II to be protection of individual rights for the common good, empowers the people to hold officials accountable and to challenge subjective judicial rulings.

A consistent approach is needed to prevent constitutionally wayward adjudication. It should describe both why certain linguistic forms are protected by the First Amendment, such as political speeches and banners, and why others are not, such as true threats against the President. Theoretical clarity is also important to provide notice of what is within the limits of government authority and what is beyond its reach. Such clarity can aid the people—as individuals, through communicative associations, and by elected officials—to check the abuses of power. Theory can encompass aspirational value for reformers who seek change through constitutional structures, such as precedent and legislation. Thus, a foundational theory of the First Amendment can provide the means, vocabulary, and structural basis for critiquing Supreme Court cases, finding their strengths and weaknesses, and understanding how freedom of association draws from and contributes to constitutional norms. Theory can express concerns with existing precedents, indicate positive directions for improvement, and flag institutional mechanisms and limitations for change.

There are a variety of free speech theories that account for why the Constitution protects expression against government abuse.[37] But, as described

[34] Schauer, *supra* note 24, at 1768.

[35] *Id.*

[36] *Id.* at 1787.

[37] Some scholars have distinguished distrust of government as a separate theory of free speech. *See, e.g.*, Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 968-69 (2009). However, I believe the major schools of thought, and the one I present in this article, all account for the concern of government overreaching. Even *Citizens United*, a case on a First Amendment perspective, is consistent in following traditional reasoning. Citizens United v. FEC, 558 U.S. 310, 340-41 (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."). In that

infra, the most often adopted theories tend to be too narrow in scope, failing to account for important strands of First Amendment doctrine and, more importantly, essential features of representative democracy. This Part addresses the most influential schools of free speech theory. An explication of a more inclusive theory follows in Part II, and is applied to a variety of speech doctrines in Part III.

A. *Acquisition of Truth*

The marketplace of ideas doctrine has the oldest pedigree for the justification of free speech doctrine. Its proponents stress the need for robust and open dialogue as a necessary part of discovering truth. The meaning of "truth" is often left ambiguous, but it usually means factual validity about any discussed subject, from the scientific to the artistic. The theory has a large following because it is hardly plausible to gainsay the need for debate, conversation, and coaxing in accurately portraying matters of private or public concern. But as an overarching theory, it is on the wane. Truth has little or nothing to do with much of what the First Amendment protects. Factually inaccurate opinions, hyperbole, or action movies are not truth-promoting, but they are all protected forms of expression.

The marketplace of ideas doctrine stems from one of the most seminal of all the free speech cases, *Abrams v. United States*.[38] In a field with so many prominent opinions, this itself is notable. In *Abrams*, which upheld the convictions of persons for publishing a pamphlet supportive of the Russian Bolshevik Revolution,[39] Justice Oliver Wendell Holmes wrote a dissent that is deeply imprinted in First Amendment 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 the power of the thought to get itself accepted in the competition of the market . . . .[40]

This powerful description became inspirational to the champions of open dialogue, who sought to prevent the government's suppression of ideas.[41] Holmes gave voice to all those who believe that expressing ideas, including controversial and unpopular ideas, is unavoidable and, indeed, of utmost

case, the Court spends significant space detailing how corporations and their audiences can benefit from political advocacy. *Id.* at 324. I therefore do not discuss government distrust as a separate theory.

[38] 250 U.S. 616 (1919).

[39] *Id.* at 624.

[40] *Id.* at 630 (Holmes, J., dissenting).

[41] *See, e.g.*, 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 . . . .").

importance for the testing of accepted views and the advancement of knowledge.

As compelling as the test is, it fails to identify a whole range of protected speech. From the analytic side, it seems illogical to argue that whether some fact is objective (by which I mean the correct, complete, and accurate articulation of reality) should be left to popular consensus or to a dominant strand of thought. Moreover, the test's focus on the marketplace of ideas is too narrow to defend free speech on a range of communications. As a leading scholar has put it, Holmes's test limits constitutional guarantees only to speech "embedded in the kinds of social practices that produce truth."[42] Hyperbolic remarks, fantasy movies, and abstract arts typically have no obvious truth value. They may contribute little to the advancement of knowledge, but no Justice or scholar suggests that the government could reasonably restrict their assertion without incurring First Amendment scrutiny.

Moreover, the search for truth through discourse explanation clearly does not fit the Supreme Court's actual approach to First Amendment doctrine. For example, in *United States v. Alvarez*,[43] a plurality found unconstitutional a criminal federal statute that sanctioned lying—expressly telling untruths—about receiving the highest military medal.[44] "[S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, [which is] expression the First Amendment seeks to guarantee."[45]

False statements are overtly misleading, but there are also more subtle forms of untruths that the Court has found to be protected. For example, parody relies on ridiculous humor to create an original work of criticism or commentary. In *Hustler Magazine v. Falwell*,[46] the Court found parody to be a protected form of expression under the First Amendment.[47] In that case, a pornographic magazine ran a mock advertisement about a well-known religious minister and political advisor, claiming that he had sex with his mother in an outhouse.[48] The Court found that the parody "could not reasonably have been interpreted as stating actual facts about the public figure involved."[49] The Court further explained that to recover for intentional infliction of emotional distress a public figure must prove that the publication was made with actual malice.[50]

---

[42] 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).

[43] 132 S. Ct. 2537 (2012).

[44] *Id.* at 2551 (holding the Stolen Valor Act, 18 U.S.C. § 704(b), to be unconstitutional).

[45] *Id.* at 2544.

[46] 485 U.S. 46 (1988).

[47] *Id.* at 53.

[48] *Id.* at 48.

[49] *Id.* at 50.

[50] *Id.* at 56.

The same is the case with hyperbole, which is protected despite the fact that it too is often not an articulation likely to enlighten some deep or factual truth. In *Greenbelt Cooperative Publishing Ass'n v. Bresler*,[51] for example, the Court overturned a slander conviction that had been brought by a real estate developer.[52] A trial court had found a small newspaper liable for reporting that some people at public meetings had characterized the developer's behavior as "blackmail."[53] While the characterization might have been false, the majority held that the columns were protected forms of expression because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."[54] Publications can report even false statements to inform the community of public proceedings where debaters used heated rhetoric to drive their points home to the audience.[55]

Political statements can sometimes also be emotive rather than factual. The value of some statements is the rise they produce from audiences rather than their truthful content. Even expletives can sometimes be thought provoking without adding any substantive information to a debate. For instance, in a well-known case, a defendant was arrested for walking through the corridor of a Los Angeles courthouse wearing a jacket with the words "Fuck the Draft."[56] The message was clearly political and self-expressive, but it was not factually assertive. Nothing from those words indicated whether the defendant was a draft dodger, objecting to standing armies in general or only the specific military conflict of the day (the Vietnam War), anti-American, a patriotic opponent of the war, or an active member of a civil liberties organization recruiting members or a loner. The message would have been factual for the marketplace of ideas if it said something like: "Fuck the draft it's leading to the deaths of innocents"; "Fuck the draft it's supporting an unjust foreign policy"; "Fuck the draft it's lining the pockets of the arms industry"; or even "Fuck the draft, it led to my brother's death." But these four factual statements might have been less effective than the shorter one he chose. Moreover, it is feasible that someone who chose the three words on Cohen's jacket would not be making any political statement but merely trying to look cool.

In some cases, the Court has upheld restrictions on speech that is factual. In *Lehman v. City of Shaker Heights*,[57] a plurality of the Court upheld a municipal ban on placing paid political advertisements for political candidates in the card

[51] 398 U.S. 6 (1970).

[52] *Id.* at 6.

[53] *Id.* at 7-8.

[54] *Id.* at 14.

[55] *Id.* at 13.

[56] Cohen v. California, 403 U.S. 15, 16 (1971).

[57] 418 U.S. 298 (1974).

spaces of city transportation.[58] Even though voting-age public transit commuters might have benefitted from reading the political ads and despite the fact that it was a content-based restriction, the plurality upheld the municipal ban.[59] Not only does the truth-seeking model not explain this conclusion, but it is also inconsistent with the political speech or self-expressive theories that I will examine in Sections B and C of this Part.

At play in many of these cases, is not exclusively a search for truth, but rather a form of balancing. The Court in *Lehman* found that the city could take into account public tranquility: "Users would be subjected to the blare of political propaganda."[60] When faced with conflicting claims of liberty (speech versus freedom from unwanted political messages), the city did not violate the First Amendment or Fourteenth Amendment by passing an ordinance it thought beneficial for the common good.[61]

None of this is to say that the truth-seeking model is unhelpful.[62] Rather, it is simply to point out some limits of the marketplace of ideas model, which explains only some but not the entire range of free speech doctrines such as those in *Falwell*, *Cohen*, and *Lehman*. The failure to advance the "free trade of ideas" is no reason to shut down the communication of happiness, fear, personal hopes and disappointments, anger, and the many other forms of expression that the Supreme Court has never regarded to be within the government's power to suppress. A broader analytical tool is necessary for identifying the full range of protected speech.

B. *Political Speech*

A sophisticated alternative theory of free speech posits that the First Amendment protects the right of people to engage in debates on self-government. That perspective has much merit, but as set out *infra*, it is also incomplete. Political debate surely provides voice for equals participating in democratic institutions. Citizens' ability to voice opinions on great and small issues of the day allows for equal participation in the institutions of government. Only through an effective public voice can individuals and groups influence policy at the national and state levels.

---

[58] *Id.* at 298.

[59] *Id.* at 304.

[60] *Id.*

[61] *Id.*

[62] To the contrary, it is sometimes the basis of decisions. In *Consolidated Edison Co. of New York v. Public Service Commission of New York*, the Court struck down a ban issued by the New York Public Service Commission against public utility companies that slipped pamphlets with information on public policies into envelopes with monthly bills. 447 U.S. 530, 532-33 (1980). Writing for the majority, Justice Powell found that the pamphlets were forms of public discourse, and no regulation on the content of the company's correspondence could withstand a free speech challenge unless it served a "compelling state interest." *Id.* at 534.

But with that said in its favor, it is inaccurate to characterize the political model of free speech as a complete expostulation of First Amendment meaning. For the champions of the political speech theory, like Alexander Meiklejohn, "the primary purpose of the First Amendment is" for citizens to understand the issues that "bear upon our common life."[63] For this reason they must be able to access all manner of ideas and beliefs for and against issues.[64] Citizens of a democracy educate each other, something only possible through open discourse.[65] As Meiklejohn expanded his theory in response to criticism that he differentiated too sharply between political and private speech, he came to believe that even communications about art, philosophy, science, and literature are connected with a community's ability to participate politically as intelligent voters.[66] Alexander Bickel later added clarity to the self-government explanation: "The social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process, so that the country may be able better 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."[67]

The political speech explanation of free speech doctrine continues to draw wide support. One of its foremost luminaries is Robert Post. He has added greater clarity, asserting that the presumption that free persons compose a democracy "underwrites the First Amendment doctrine's refusal to distinguish between good and bad ideas, true or false ideas, or harmful or beneficial ideas."[68] Each person's right to speech must be protected, Post explains, because each of us plays a role in the polity.[69] Cass Sunstein similarly propounds, "we should understand the free speech principle to be centered

[63] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960).

[64] *Id.* at 27.

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

[66] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256-57 (1961). Robert Bork took the political speech doctrine further than Meiklejohn. He regarded speech "specifically and directly" dealing with politics to be "different from any other form of human activity." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971). Bork regarded protected speech to cover "governmental behavior, policy or personnel . . . [but to] not cover scientific, educational, commercial or literary expressions as such." *Id.* at 27-28.

[67] ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 62 (1975).

[68] Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011).

[69] Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 176 (2007) (quoting 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 81 (Thomas McCarthy trans., Beacon Press 1987) (1981)) ("Most importantly, 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.'").

above all on political thought. In this way the free speech principle should always be seen through the lens of democracy."[70]

These participatory democracy explanations of the First Amendment tell an important part of the story. Yet, there is a large body of First Amendment jurisprudence that is not principally based in the self-government framework; indeed, it licenses restrictions on communications arguably directly relevant to principles of self-government.[71] It may be argued that restrictions on some political speech advance self-government, for example by keeping racist groups out of the political process as Germany does,[72] but that is not the perspective of the United States Supreme Court. While ordinarily in the First Amendment context U.S. courts apply strict scrutiny, in some cases involving self-government the Supreme Court has applied intermediate scrutiny to balance various factors with a nexus to constitutional interpretation. This is true of those decisions reviewing time, place, and manner restrictions, even those that apply to political speech in traditional public forums, like parks.[73] In one such case, the Court upheld the National Park Service's regulation on camping in a park against a First Amendment challenge by protesters who wanted to erect a tent city to draw attention to homelessness.[74] Elsewhere, the Court even upheld as a reasonable time, place, and manner restriction a state ethical statute requiring public officers to recuse themselves from voting and advocating the passage or failure of agenda items "with respect to which the independence of judgment of a reasonable person in his situation would be

[70] Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 316 (1992); *see also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 232 (1993).

[71] *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding a law that excluded political advertisements from public transit).

[72] The German Criminal Code forbids persons from using "flags, insignia, parts of uniforms, slogans and forms of greeting" to propagate undemocratic political parties like the National Socialist party. Juliane Wetzel, *The Judicial Treatment of Incitement Against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany* (Gerald Chapple trans.), *in* UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 83, 104-05 n.11 (Louis Greenspan & Cyril Levitt eds., 1993) (quoting STRAFGESETZBUCH [StGB] [PENAL CODE] § 86a (Ger.)). Article 21.2 of the Basic Law bans political parties that pose a threat to democratic order. CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE FEDERAL REPUBLIC OF GERMANY 10 (Albert P. Blaustein & Gisbert H. Franz eds., 2013).

[73] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny in upholding a time, place, and manner restriction on noise during a public concert held at a city park).

[74] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) ("[T]here is a substantial Government interest in conserving park property, an interest that is plainly served by, and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties. That interest is unrelated to suppression of expression.").

materially affected."[75] Thus, government can prohibit a public official from voting on matters of conflict of interests, even though the law clearly limits a person's political voice. In both instances, such seemingly neutral restrictions give government significant latitude for barring speakers wishing to voice controversial opinions about public policies. They balance other values against speech, such as public safety, noise nuisance, and conflicts of interests.

The self-government model does not justify any of these outcomes, which limit people's ability to communicate political ideas, but have clear social reasons for their implementation. It may be that these cases were wrongly decided, but what can we use to evaluate their validity? Surely the answer doesn't lie in the claim that all political speech is absolutely permissible because, as *New York Times v. Sullivan*[76] recognized, even a public official can sue for libel when a statement is uttered with actual malice.[77] And what of a party engaged in political communication to give material support to foreign terrorist organizations, like Hamas or Hezbollah? That form of political advocacy, as the Court held in *Holder v. Humanitarian Law Project*,[78] can also be prohibited without running afoul of the First Amendment[79]—and there are persuasive reasons to think it should be able to do so.[80]

C. *Self-Expression*

The third of the major free speech theories conceives the First Amendment as a guarantee of self-expression. This school of thought advances the important insight that speech is a dignitary interest to which every person is

[75] Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2346 (2011).

[76] 376 U.S. 254 (1964).

[77] *Id.* at 279-80.

[78] 130 S. Ct. 2705 (2010).

[79] *Id.* at 2731.

[80] The explanation must be found elsewhere, as Part II will elaborate, in a bigger picture of the Constitution where free speech is a fundamental right among others rather than a trump against all others. That bigger picture is provided in the Preamble to the Constitution. Tsesis, *Maxim Constitutionalism*, *supra* note 29, at 1635-42 (explaining why the Preamble sets a national norm to safeguard liberty for the general welfare). In *Humanitarian Law Project*, the majority cited the Preamble for proposition that government's duty to "provide for the common defence" allowed for certain limitations on the uses of communications without interfering with legitimate free speech values. *Humanitarian Law Project*, 130 S. Ct. at 2731; U.S. CONST. pmbl. The Preamble provides for collective rights that authorize government to use authority for the general welfare when the risk to public order is compellingly warranted. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (stating that the Preamble is one of three constitutional provisions that "arguably refer to 'the people' acting collectively"); Downes v. Bidwell, 182 U.S. 244, 377-78 (1901) (Harlan, J., dissenting) (describing the Preamble's statement to be directed at the "collective capacity" of "the people of the United States").

entitled.[81] Free speech is intrinsic to human autonomy.[82] It enables speakers to explore the innermost workings of their own thoughts and to engage other independently minded people. While speech is essential to the expression of personality, it is misleading to claim the entitlement to autonomy alone explains the full, constitutional significance of free speech.

Speech is not only self-expressive but also a vehicle for engaging in public debates, even when they are concerned with subjects that do not directly affect the speaker. Thus, speech is "intrinsic to individual liberty and dignity" and also advances "society's search for truth."[83] The First Amendment thus safeguards both individual liberty and the social functions of communication of truth-seeking and political engagement.[84] Articulation has both a personal and social value. Speech is significant for communicating ideas and intentions to audiences as well as for influencing others, whether friends or politicians, in matters mundane, novel, controversial, mainstream, and cutting-edge. Even when a person simply repeats a message to another, with no personal autonomy interest in what is said, that expression is constitutionally protected. The First Amendment safeguards private parties' free communication and prevents government intrusion, sometimes about matters of personal concern and at other times challenges to official policies.[85]

Martin Redish is too limiting in his claim that the "only one true value" of free speech is self-realization.[86] He believes other theories of free speech to describe "sub-values," such as the marketplace of ideas, but derives them from the "self-realization value."[87] Similarly, David A.J. Richards adopts the

[81] Citizens United v. FEC, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part) (discussing a line of Supreme Court precedents that stands for the proposition that "[o]ne fundamental concern of the First Amendment is to" protect self-expression and people's ability to make dignified choices); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J., dissenting) ("[W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.").

[82] *See* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 287 (2011) (asserting that free speech theory conceives "to be central the individual agent's interest in the protection of the free development and operation of her mind").

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

[84] *See supra* Sections I.A, I.B.

[85] The First Amendment is critical for preserving the ability to express dissatisfaction and to effectuate change through political channels. Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.").

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

[87] *Id.* at 615-16, 618.

autonomy explanation, regarding other theories to be "less powerful."[88] Like Redish, Richards regards various modes of expressive freedom, including press and association to "derive[] from the notion of self-respect."[89] Another prominent proponent of the individualized model, Edward Baker, states that "[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual."[90]

These perspectives do not provide a comprehensive reason for why government can limit free speech in areas like copyright, defamation, and imminent incitement. In these areas, freedom of expression is balanced against social values of equality, dignity, creativity, and public peace. While autonomy is undeniably an important value of speech, public concerns are often at the heart of Supreme Court's reasoning. In a case that found a statute against picketing near schools to be over-broad, the Court was mindful to say that protecting expression against censorship is meant to "assure self-fulfillment for each individual."[91] But the Court did not stop there. It recognized the connection between self-fulfillment and "the continued building of our politics and culture."[92] In another decision, the Court pointed out that removal of unwarranted government restriction was essential for the exercise of "dignity and choice."[93] From there, the Court went on to reiterate that safeguards for individual rights serve to "ultimately produce a more capable citizenry."[94] The majority thereby linked the personal value of speech with its social value.

* * *

Each of these three theories has normatively and descriptively appealing aspects, but each is incomplete and cannot account for the Court's breadth of approaches. Part II of this article proposes a more robust and multifaceted theory to account for the various constitutional values that should be weighed by courts to advance the individual and social benefits of free speech.

II. FREE SPEECH AND COMMUNITY GOOD

I propose to move beyond the most commonly accepted theories of speech, which were analyzed in Part I of this article. Each has its strengths: there can be little doubt that the First Amendment helps secure autonomy, advance political deliberation, and facilitate attainment of truth. While these models purport to be comprehensive, none of them fully explains the constitutional

[88] 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).

[89] *Id.*

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

[91] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

[92] *Id.* at 95-96.

[93] Cohen v. California, 403 U.S. 15, 24 (1971).

[94] *Id.*

purposes of the Free Speech Clause. Instead, as I explain in this Part, a more robust explanation of free expression must balance personal and social interests of specific communications, rather than separating them into discrete legal frames of reference, none of which adequately account for other compelling state interests that should drive jurisprudence.

A synthetic approach differs from the Supreme Court's current embrace of a categorical rule. Free speech is not a separate value, standing over and above any other in the constitutional hierarchy; to the contrary, it is a vital element of a representative polity committed to advancing the general welfare by safeguarding individual liberties on an equal basis. Free speech is essential to popular government, but any analysis of its scope should look beyond the First Amendment to a more comprehensive ideal of the Constitution. A broad understanding of constitutional analysis sheds light on why courts should examine whether regulations on the content of speech infringe individual liberty balanced against significant social considerations. Theoretical context is necessary to explain why the Supreme Court finds a variety of content-based restrictions on speech (such as securities regulations, antitrust laws, and incitement statutes) to be legitimate, while others (such as those limiting political debate or placing prior constraints on licenses) do not withstand judicial scrutiny. A robust theory should provide the normative basis for balancing free speech against other values, and it should mark a descriptive baseline for assessing existing doctrine.

On the normative side, free speech is not a separate value but one that fits within a broader construct of constitutional law. Rather than adopting a comprehensive doctrine, the Court usually takes a compartmentalized approach to expressive rights: viewing commercial, campaign, libel, and other forms of speech within their narrow semantic structures rather than informing its inquiry through broader analyses of constitutional purpose.[95] In these cases, individuals express themselves through linguistic or symbolic representation. The theory developed in this section is general. I describe it in the context of specific contemporary doctrines in Part III of this article.

"Speech" is a term encompassing a wide variety of utterances and symbols. Communications are often directed at the rational faculty, but at times can be raunchy statements appealing to our animalistic nature or grunts expressing physical states. Communication is as far ranging as political, personal, scientific, and humorous expressions. The First Amendment covers an infinite set of communications about perceptions, ideas, sensations, emotions, and other internal and external stimuli. Grammatical structure and vocabulary create some limitation on our ability to fully articulate our feelings and ideas. At the same time, each of us has the power to affect culture by adopting semantic and syntactic standards of language to construct new theories and empirical explanations; this can be done by borrowing from other languages,

[95] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

abandoning past words and phrases as archaic, and creating something new to better depict modern technological and political realities.

Usage of language, therefore, reflects individual and human group apprehension, understanding, and historical background. Free expression is a vital force in our constitutional community. It animates legal, public, and personal actions. The ability to communicate with others provides individuals with a means of distancing themselves or, conversely, integrating themselves with society, culture, religion, community, and so forth. By itself language is a neutral medium available for conservative and liberal causes, for personal fulfillment and public mindedness, and as a catalyst for change or stasis. Not all forms of speech raise constitutional issues. The purpose of this Part is to identify values lying at the heart of constitutional free speech protections.

None of the three major theories of free speech—democratic, self-expressive, and truth-seeking—is complete enough to explain why some forms of speech are protected and others are outside the constitutional ambit.[96] Their shortcomings are better attributed to the failure to articulate speech norms in the context of a comprehensive constitutional framework than any isolated, mistaken construction of the First Amendment. A unified perspective on speech is necessary for judges to assess all constitutional values relevant to a case and controversy, rather than rendering ad hoc decisions. Speech is a feature of the underlying purpose for which the people formed a "more perfect Union":[97] the protection of the individual in a legal structure beneficial for the common good. An inclusive free speech doctrine should be broad enough to account for the personal and communitarian protections of the Constitution.[98]

The first take at explaining this point is historical.[99] At all stages of United States history, the value of speech has intersected the personal and public realms. Take for instance the abolitionist, feminist, labor, or gay rights movements. These movements all have clearly distinct aims, differ in their membership in many instances, and seek distinct achievements. However, in all these movements, speech is essential to the advancement of personal and group agendas. The speeches they delivered and the pamphlets they distributed

[96] *See supra* Part I.

[97] U.S. CONST. pmbl.

[98] The Bill of Rights contains constitutional clauses meant to protect personal interests. U.S. CONST. amend. I-X. The Preamble, on the other hand, speaks of a collective "people" who are at the root of constitutional power. Dist. of Columbia v. Heller, 554 U.S. 570, 579 (2008) (stating that the Preamble's formula, "We the people," referred to "'the people' acting collectively"); Downes v. Bidwell, 182 U.S. 244, 377-78 (1901) (Harlan, J., dissenting) ("[T]he people of the several states, taken collectively, constitute the people of the United States. But it is in their collective capacity, it is as all the people of the United States, that they established the Constitution.").

[99] The Court has often restated the value of historical inquiry for identifying rights. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . .").

were essential to the nation's introspective end of putting a stop to discriminatory laws and customs. Going even further back, American Revolutionaries writing against taxation without representation were seeking improvements for themselves as individuals living in unique circumstances and for the nascent nation. Thus, the American speech tradition is linked to activism, personality, and sociability. Cut out any one of these values (the personal, public, or informative), all of which must be weighed for adjudication, and we are left with a hole in the explanation of why speech is relevant to constitutional culture.

The revolutionaries' battles against autocracy—with the heated political correspondences between Sons of Liberty societies, meetings in coffee houses and taverns, and newspaper debates—is almost two and a half centuries behind us. Theirs was a period of constitution-making, while for us it is a time of building, elaborating, and reinterpreting precedents, historical norms, and contemporary ideals. The normative value of the legal guarantee of free speech remains to provide the necessary personal space for people to share, elaborate, discuss, disagree, and argue. The First Amendment contains no wording to countenance arbitrary viewpoint discriminations of the type so common in totalitarian states or autocracies.

None of us lives in a vacuum; therefore, social welfare sometimes trumps personal desire, allowing for laws against incitement, fighting words, antitrust regulations, patents, and other types of restraints that do not implicate core constitutional concerns. In the broadest sense, the First Amendment safeguards the voices of individuals living in a constitutional community. Individuals seek to make sense of their external surroundings and internal perceptions and then to communicate those ideas to others or jot them down for themselves. Speakers express their sense of meaning and audiences engage with it through cultural and personal filters. Schools of free speech that seek to separate the personal from the public facets of speech leave out constitutionally protected aspects of expression.

Liberal democracies place so much stress on free speech because it is connected to the advancement of many enumerated rights. The various clauses securing voting rights are intrinsically connected with the Free Speech Clause.[100] The Court has also found that Congress can use its power under the Copyright Clause to pass laws protecting speech through the fair use doctrine and idea/expression dichotomy without even subjecting those provisions to strict First Amendment scrutiny.[101] Free speech is also a value in

[100] John Doe No. 1 v. Reed, 130 S. Ct. 2811, 2834 (2010) (Scalia, J., concurring) ("We have acknowledged the existence of a First Amendment interest in voting . . . ."); Burdick v. Takushi, 504 U.S. 428, 434 (1992) (explaining the relevance of the First Amendment to a voting rights infringement claim).

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

unenumerated rights such as press and public access to criminal trial.[102] The Court, furthermore, regards freedom of association to be a fundamental liberty closely tied to freedom of speech.[103] Likewise, expressive conduct is a well-established facet of the First Amendment, but the Court has inferred its existence rather than finding it explicitly mentioned by the Amendment.[104] The legally cognizable right to free speech provides persons with the necessary space to engage in social activity and to participate in community discussion, debate, and creativity.

To discuss speech as a separate right—exclusively tied to politicking, self-fulfillment, or truth-seeking—without connecting it to other relevant constitutional norms diminishes its diffuse importance. Courts hearing free speech cases should consider whether there are any countervailing constitutionally recognized values—such as privacy, travel, suffrage, the guarantee against self-incrimination, and so forth—rather than confining their reasoning to narrow categories of communication. Free speech is not only connected to specific doctrines and traditions but also to the broader constitutional value of equal dignity secured by a system of government whose aim should be the common good.[105] Speech is both self-expressive and a means of getting others' ears about everything from politics to humor, art, familial autonomy, parody, and enumerable other subjects. The ability to speak one's mind helps arouse others to thought about personal matters like health, to get advice from others about financial matters, and to chat about personal achievements; meanwhile, it is also critical for social activism, legislative

[102] Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 604 (1982) (recognizing the unenumerated right to access criminal trials and stating that "[t]he First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558-81 (1980) (holding that the press and general public have a First Amendment right of access to public trials that applies to the states through the Fourteenth Amendment).

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

[104] Virginia v. Black, 538 U.S. 343, 358 (2003) ("The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech."); Texas v. Johnson, 491 U.S. 397, 404 (1989) (stating that the First Amendment "literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word," and includes conduct intended to express an idea).

[105] *See* Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.").

lobbying, and legal proceedings. The power of speech is therefore inexorably connected to the personal and public realm, and its First Amendment protection relates to both.

With all that said, not all categories of speech are protected. An explanation must be found for why certain forms of speech, such as those creating a hostile work environment[106] or campaigning within a hundred feet of a polling place on the day of election,[107] are unprotected. In the workplace example, defendants might assert that their misogynistic or racist speech was simply expressive or indicative of their personality. In the polling place example, campaigners might say they are trying to get out a political message. But in neither case would those arguments gainsay the Court's reasoning for upholding restraints on expressions. Neither the autonomy nor the political claim would be enough to outweigh the public interests. There is a mix of personal and private concerns that relates back to the guarantee of dignity as the best means of securing civility. In the case of workplace harassment, the Supreme Court has explained that the harm extends beyond the victim.[108] Workplace behavior has an impact and is influenced by "a constellation of surrounding circumstances, expectations, and relations which are not fully captured by a simple recitation of the words used or the physical acts performed."[109] Judges must therefore bear in mind the "social context" of an act in Title VII cases[110] as well as the federal government's Commerce Clause power to pass laws regulating businesses that have a substantial effect on interstate commerce. With the campaign harassment case, not only could coercion affect the vote tally, which is a harm to the representational nature of government, but it could also intimidate the individual voter. We are members of a civil community, and any review of a speech regulation should look to social context and any nexus to other relevant constitutional clauses to weigh the state's purported policy against any private effect.

Institutions of government are created both to protect the citizens' ability to engage as equal actors of the polity and to benefit from its social goods. In a society of equals, disagreements will inevitably arise; indeed, in deliberative democracy discourse is essential to the evolving views of law, society, and culture. Differences of opinion about lifestyle choices and civic matters will manifest both in the different personalities that compose the polity and in their

[106] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.").

[107] 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").

[108] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[109] *Id.* at 81-82.

[110] *Id.* at 81.

differing, and often conflicting, views about matters as diverse as happiness and public policy. The right to speak freely enables all people—regardless of their religion, race, socio-economic background, tastes, or group affiliations—to voice their ideas. Representative democracy presumes that policy will be informed by the airing of distinct opinions that can be either antagonistic or compromising.[111] Self-government presumes the existence of different, often conflicting opinions, and the ability to associate with others amplifies one's opinions and strengthens collective pressure on elected officials to carry out policies. Pluralistic society is not a unity, but a community of distinctive personalities who act together but retain the right to disagree about preferred courses of action. The role of the First Amendment, then, is to safeguard the right of distinct individuals to vet their ideas as equals.

This basic premise is not only essential for the preservation of autonomy but also gives individuals the space to grow as self-directed human beings with interests both inside and outside the polity. They can do so in the quiet of their homes, at bingo games, in art colonies, or in coffee shops. The power of a constitutional amendment is that it creates a uniform standard that operates throughout the nation, states, and municipalities. Here too the First Amendment is not unique but an aspect of supreme constitutional system structured to authorize the branches of government to separately advance laws consistent with liberal equality for the common good: everyone benefits from free speech protections, thereby increasing personal and collective contentment.

The centrality of the individual is essential to this legal scheme to keep tyrannical majorities at bay. Speech is protected against forced orthodoxy in matters of opinion, such as politics, nationalism, and religion.[112] Yet if individuals were unable to freely associate and join forces with others of similar convictions,[113] their voices would rarely be heard outside their immediate circle of contacts. Clearly some associations are intimate or affiliative—confined to a few people, highly selective, and seclusive—while others are open to the public.[114] Whether closed or open, human contact provides the individual with an outlet for self-enrichment and civility. Few

[111] *See* Knox v. SEIU, Local 1000, 132 S. Ct. 2277, 2288 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."); Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed.").

[112] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[113] Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000) (upholding expressive associational rights of a discriminatory organization against a gay scout leader); NAACP v. Alabama, 357 U.S. 449, 460 (1958) (recognizing an organization's right to keep its list of members confidential because of the constitutional "freedom to engage in association for the advancement of beliefs and ideas").

[114] Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984) (discussing various types of associations and their value to individuals).

people have the resources to be widely heard without amplifying their voices by association with like-minded people. Together they can pool their resources and contacts and thereby disseminate their ideas. Therefore, the Free Speech Clause relates to the ability to speak both collectively and alone. With the advent of the Internet, the individual has been further empowered to join expressive groups through social media services like Facebook, Twitter, and Instagram.

A person alone or in the company of others is free to speak about everything from an experience in jail, which might contribute to formulating future policy, or a case of bad indigestion, which is a purely personal matter. Explaining the diversity of protected content requires a unified explanation of free speech. The First Amendment fits into the broader function of the Constitution, empowering individuals to maintain dignity by representing their ideas in infinite linguistic or symbolic forms. Speech is not only protected by the Free Speech Clause but also by many other constitutional provisions, even ones not typically thought to be concerned with expression. For instance, the Third Amendment's prohibition against quartering soldiers in peacetime implicitly allows homeowners to speak without being charged with breach of the peace for arguing with soldiers demanding ingress;[115] likewise the Fourth Amendment right against unreasonable searches and seizures protects citizens who demand an explanation of arresting officers;[116] voting rights, located in a variety of clauses,[117] clearly imply the right to speak for and against candidates; the right to jury trials would be meaningless if jury members were unable to confer among themselves;[118] the existence of a right to habeas corpus clearly means that a prisoner can petition for freedom;[119] the right to amend the Constitution allows for debate on the subject of whether such a change is necessary;[120] and the list could be expanded even further. This does not mean speech is a factor of all constitutional provisions; for example, the right to bear arms is not connected with free speech,[121] and neither is Congress's power to coin money related to expression.[122] Some clauses of the Constitution are part of the bigger project justice and equality but not related to free and open public debate. For instance, the House of Representatives can judge "elections, returns, and qualifications of its own members."[123] This clause protects the integrity of the electorate and the democratic process, but it does not require

[115] U.S. CONST. amend. III.

[116] U.S. CONST. amend. IV.

[117] *See, e.g.*, U.S. CONST. amend. XVII (popular election of senator); U.S. Const. art. I, § 2, cl. 1 (House of Representatives elections).

[118] U.S. CONST. amend. VII.

[119] U.S. CONST. art. I, § 9, cl. 2.

[120] U.S. CONST. art. V.

[121] U.S. CONST. amend. II.

[122] U.S. CONST. art. I, § 8, cl. 5.

[123] U.S. CONST. art. I, § 5, cl. 1.

the House to open the floor debate to all members of the public who might want to participate.

The main point here is that interpretation of the Free Speech Clause requires a broader understanding of the Constitution than treating it simply as a stand-alone provision from which the judiciary can draw static categories.[124] The dignity right to expostulate one's ideas is tied to various clauses of the Constitution and its overall purpose of maintaining equal justice and the common good.[125] Courts adjudicating free speech claims would do well to consider the issues in a broad constitutional framework, reviewing First Amendment doctrines not in isolation but in the context of other constitutional interests.

Representative democracy requires constitutional limits to safeguard the rights of all its constituents. Contrary to the purely democratic notion of free speech, selfish speech is also protected. Persons can indulge themselves by telling jokes that only they enjoy, singing songs that only they find entertaining (whether in the privacy of their homes, on park benches, or beneath viaducts), and writing poetry that only the composers find meaningful. From a practical standpoint, in the absence of extenuating circumstances—like excessively loud noise or incitement to imminent violence[126]—a court will strike as unconstitutional any law prohibiting the private enjoyment of creativity just as it will the public expression of community concerns. The First Amendment, then, protects the unmolested right to give voice to one's private and public personae. It is a guarantee against both the suppression of individuality, just as it is a guarantee for civic involvement.

Free speech is of critical importance to some of the grandest purposes of American constitutionalism. On a personal level it plays a vital role in the pursuit of happiness.[127] Additionally, at the community level general welfare

[124] This broader understanding reads the First Amendment through the lens of post-Reconstruction Amendments, especially the Fourteenth Amendment's Due Process and Equal Protection Clauses.

[125] Balancing speech against dignity is more common in European free speech cases than in U.S. decisions. *See* Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1179 n.185 (2013) ("Germany prohibits the distribution of 'written materials . . . which describe cruel or otherwise inhuman acts of violence against humans . . . in a manner expressing glorification or which downplays such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which violates human dignity.'").

[126] Ward v. Rock Against Racism, 491 U.S. 781, 792-93 (1989) (holding that a city's content-neutral anti-noise ordinance furthered a substantial government interest and was narrowly tailored); Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) (upholding a "fighting words" statute).

[127] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

demands equal treatment to share one's perspective with others.[128] Speech is so guarded by the American people because it can be used to express private and civic consciousness, providing them with an outlet for unique features of their personalities and as players in a democratic state.

While personality is inseparable from expression, the Constitution also secures individual's ability to engage others in heated debates and in mundane interactions. The power of speech, then, opens channels for the flow of everything from debates on politics to blasphemy and the exchange of recipes. The Constitution's protections of such deep concerns as sexual preferences[129] and family living arrangements[130] implicitly allow for the discussion of those subjects without government interference. And that is not all—on an even higher order of generality, these matters relate to dignity and general welfare. Put more expositively: a constitutional norm recognizing the equal fundamental right of self-expression safeguards people's ability to participate effectively in representative self-governance. The communication of ideas is both subjectively beneficial for the speaker, and objectively necessary for measuring legal standards applicable irrespective of any specific traits.

III. BALANCE AND FREE SPEECH

The commitment to safeguarding free speech as an essential value for individuals to pursue happiness, engage in deliberative democracy, and seek truth must be balanced against the needs of society to prevent violence, defamation, child pornography, and other communications harmful to communities of dignified equals. That is the first order constitutional theory of free speech: one that safeguards individuals' will to be creative, political, self-expressive, communicative animals in a society committed to the development of representational institutions, organized on principles most likely to affect the people's safety and happiness.[131] This Part of the article looks at a more pragmatic question: What jurisprudential method comes closest to achieving the aspirational purposes of the Free Speech Clause?

The Court has recently taken to distancing itself from earlier free speech precedents that balance government and private interests. In this Part, I first discuss the Court's new approach and show how it deviates from traditional

[128] U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, . . . promote the general Welfare . . . .").

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

[130] Moore v. City of E. Cleveland, 431 U.S. 494, 503-06 (1977) (upholding the right of extended family members to live together and striking a zoning ordinance that prohibited their cohabitation at a grandmother's house).

[131] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[I]t is the Right of the People to alter or to abolish [their government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness.").

balancing of free speech against pressing social concerns. I then show how the Court's traditional balancing identifies constitutional values associated with free speech better than the categorical approach. After a general discussion of free speech balancing doctrine, I analyze the relevance of broad constitutional theory to recent decisions in the context of campaign finance reform and copyright protections.

A. *Balancing Speaker and Community Interests*

Many cases in the canon of free speech jurisprudence have traditionally balanced the speakers' interests against those of the public.[132] The Court has created numerous tests relevant to evaluating the weight of private and public interests. For example, in upholding a restriction against parties communicating with terrorist organizations, the Court found it relevant that "Congress has also displayed a careful balancing of interests in creating limited exceptions to the ban on material support."[133] Thereby, Chief Justice Roberts, writing for the majority, acknowledged Congress's specialized knowledge in assessing safety risks to the general welfare.[134] Such a balance of public safety concerns against private desire to speak takes a broader view of government powers that extends beyond the limited sphere of free speech to matters of public safety.[135] The weighing of speech against other compelling constitutional rationales is consistent with the theory I proposed in Part II of this article.

In the realm of public employees' speech, the Court has repeatedly held that the extent of First Amendment speech protection depends on a careful balance "between the interests of the [employee], as a citizen, in commenting upon

---

[132] For critiques of the Court's recent rejection of balancing, see Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 176 n.67; *see also* 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 recently introduced historically-linked approach to free speech analysis is "fundamentally illusory" and contrary to the balancing of cases that excluded obscenity and fighting words from First Amendment protection); Nadine Strossen, United States v. Stevens*: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009-2010 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.").

[133] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728 (2010).

[134] *Id.*

[135] *See* U.S. CONST. pmbl.; *see also* THE FEDERALIST NO. 41 (James Madison) (discussing the federal government's constitutional "power of self-defense").

matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[136] As recently as 2014, in *Lane v. Franks*,[137] the Court repeated that standard verbatim, holding that a community college director's sworn judicial testimony on a public matter enjoyed First Amendment protection.[138] Rather than using a rigid approach, Justice Sonia Sotomayor asserted that "[a] public employee's sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern."[139] Her analysis employed the *Pickering* test to determine first whether "an employee speaks as a citizen on a matter of public concern."[140] If that is indeed the case, an adjudicator must next consider whether "the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer."[141]

Certainly, in *Lane*, Justice Sotomayor did not engage in "simple balancing," but sophisticated balancing. The *Pickering* test is a contextual and factually sensitive method of determining whether a public employee's statement is made during the course of official duties or in the capacity of an equal private citizen. This approach is not categorical; instead, it recognizes speech as a fundamental right but also acknowledges that it is connected to other constitutional values, such as testifying truthfully in judicial proceeding and education. In future public employee cases the Court should be even clearer about what constitutional rights it is balancing and how to deal with conflicting levels of scrutiny.

The precedents offer a good starting point for advancing constitutional balancing, but require a more clear signaling as to whether any countervailing constitutional, common law, or statutory entitlement is being weighed against free speech.[142] This will affect the level of scrutiny relevant to any particular

[136] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[137] 134 S. Ct. 2369 (2014).

[138] *Id.* at 2373 (citation omitted).

[139] *Id.* at 2380.

[140] *Id.*

[141] *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)).

[142] We can anticipate that it is most likely that any value that might trump free speech would be a constitutional one. When two rights are pitted against each other, judges must scrutinize the potential limitations and harms on all interested parties. Justice Souter spoke of the ambiguities of the Constitution giving rise to just this sort of conflict among two or more "high values of the Constitution":

> Not even [the Constitution's] most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day . . . . [These] tensions . . . are the . . . creatures of our aspirations: to value liberty, as well as order, and fairness and equality, as well as liberty. And the very opportunity for conflict between one high value and another reflects our confidence that a way may be found to resolve it when a conflict arises.

case. The theoretical method described by this article is more in line with traditional free speech doctrine than the more recent shift toward Supreme Court supremacy in defining content-based categories.[143] Even the prior restraint doctrine, which is one of the most sacrosanct restrictions on speech regulations,[144] does not bar public employers from putting written or unwritten conditions on employee disclosure of secret information, such as those necessary to retain the element of surprise for successful military missions, which are connected to the Common Defense Clause of the Preamble. Many types of communication are unprotected not solely because they have historically and traditionally been denied First Amendment protections but also because some public concern outweighs the speaker's liberty interest. Indisputably the state can prohibit blackmail,[145] insider trading,[146] libel,[147] true threats,[148] fraud,[149] perjury,[150] defamation,[151] and many other exchanges of ideas without running afoul of the First Amendment. Their unprotected status should not, however, categorically be taken for granted. Instead, content-based statutes should be subject to scrutiny commensurate with their constitutional nexus in order to assess whether they further some substantial or compelling general interest while adequately protecting the inalienable right to pursue happiness through self-expression.

> That is why the simplistic view of the Constitution devalues our aspirations, and attacks that . . . confidence.

Justice David H. Souter, Commencement Address at Harvard University (May 27, 2010), *in* HARV. GAZETTE, http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ [http://perma.cc/4PWN-UXDB]).

[143] *See infra* Section III.B.

[144] New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (stating any prior restraints carry the presumption of constitutional invalidity).

[145] *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

[146] *See* SEC v. Lipson, 278 F.3d 656, 664 (7th Cir. 2002) (holding that the imposition of the maximum civil penalty for insider trading was not a violation of the First Amendment).

[147] *See* Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2348 (2011) ("Laws punishing libel and obscenity are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since.").

[148] *See* Watts v. United States, 394 U.S. 705, 706-07 (1969) ("What is a threat must be distinguished from what is constitutionally protected speech.").

[149] *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud.").

[150] *See* United States v. Alvarez, 132 S. Ct. 2537, 2540 (2012) ("[P]erjured statements lack First Amendment protection not simply because they are false, but because perjury undermines the function and province of the law and threatens the integrity of judgments.").

[151] *See* Herbert v. Lando, 441 U.S. 153, 176 (1979) (holding that complete immunity for defamation suits is "an untenable construction of the First Amendment").

A means/ends balancing framework can provide the necessary judicial specificity: A judge should examine (1) whether a law limiting an individual's right to free expression is likely to cause constitutional, statutory, or common law harm; (2) whether the restricted expression has historically been constitutionally protected or unprotected; (3) whether government policy designed for benefiting the general welfare weighs in favor of the regulation; (4) the fit between the speech regulation and the public end; and (5) whether some less restrictive alternative exists for achieving it. This form of scrutiny, one that requires a judge to uphold "the regulation if and only if satisfied that the duly authorized issuing body has applied its mind responsibly and competently to the questions in the protocol and has decided them, reasonably, in favor of constitutionality."[152]

Any explanation of why each form of unprotected speech is not granted First Amendment protections should be channeled through the means/ends test to frame the constitutional context of justice for the common good and to identify the appropriate level of scrutiny. This approach balances national normativity interspersed throughout the Constitution and the regulatory needs of civil society. It also stays true to the doctrine of stare decisis. No more restriction than necessary should be put on speech, but rather than categorically rejecting legislative efforts out of hand, courts should determine how they affect speech, their social value, whether the same can be achieved without enforcing the law, whether its enforcement is needed to meet the public objective, and how precedents inform adjudication. Examining the type of speech involved and how it affects greater constitutional values, such as equality in representative democracy, requires that judges evaluate the "content, form, and context" as they are "revealed by the whole record."[153] With no unifying theory, each case would unacceptably be left to the political whims of judges rather than subject to objective constitutional norms.

Besides the facial examination of a regulation, the events surrounding a communication must be taken into account when determining whether, under the circumstances, the law's application resulted in constitutional harm.[154] When content-based restrictions seek to achieve some compelling objective, competing interests must be scrutinized contextually rather than on the basis of categorical conditions. Take for instance the case of intentional infliction of emotional distress, which amounts to intentionally outrageous harmful

[152] Frank Michelman, *Legitimacy, Strict Scrutiny, and the Case Against the Supreme Court*, *in* ROBERT C. POST, ET AL., CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 106, 113 (2014).

[153] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (citation omitted).

[154] For an example of this contextual approach to speech, see *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("[T]he character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

statements. The circumstances pit private parties with constitutional rights against each other—one wanting to make statements and the other wanting to be left in peace. Under ordinary circumstances the state interest in preventing emotional harm will outweigh the speaker's desire to communicate emotional harm.[155] However, if the claim for emotional distress concerns speech on public matters, such as gay rights or religious liberties, the Court evaluates their content, form, and context. For instance, in *Snyder v. Phelps*,[156] a case brought by the father of a deceased soldier against a church group making disparaging statements at his son's funeral, the majority found that the speakers had followed police directions about where to stand and were 1000 feet from the services.[157] During the funeral services and while he was leaving, the father could not read the protestors' placards, hear their message, or read their signs because they were so far from the cemetery. Only when he watched the evening news did the Plaintiff find out the messages on their placards.[158] The Court held that the protestors had a First Amendment right to use a public place for statements about "broad issues of interest to society at large."[159] Rather than making a categorical pronouncement, the majority in *Snyder* carefully weighed interests at the core of representative democracy, taking into account personal claims, public interests, and how enforcement of the law would affect the litigants. The Court's inquiry focused both on the constitutionality of government intrusion and the social space in which the statements were made.

In other areas too, the Court uses the ends/means method of balancing: the Justices evaluate the speakers' interests, the objectives of regulations, the claims of other parties to the action, whether the stated objectives are narrowly tailored, and whether the chosen means accord with the objectives or are arbitrarily chosen and applied. This interpretive process is broadly constitutional and not limited to the more narrow contours of the democratic or atomistic theories of free speech.[160] The doctrine could be refined further by requiring judges to always consider whether competing constitutional claims are at stake, and if that is the case to give more weight to those interests than to statutory or common law entitlements. Take for illustration incitement, an area that already relies on a nuanced methodology. In this sub-group of free speech jurisprudence, the Court must conduct contextual evaluations about broad social concerns for maintaining peace, safety, and tranquility, and weigh them

[155] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) ("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.").

[156] 131 S. Ct. 1207 (2011).

[157] *Id.* at 1213.

[158] *Id.* at 1213-14.

[159] *Id.* at 1216-17.

[160] *See supra* Part I.

against the speakers' expressive interests.[161] Too much is at stake, both in terms of open dialogue and the social effects of imminently harmful incitement, to resort to simplistic formalism.

Legislation can legitimately safeguard general welfare and pluralism against incitement to imminent harm because, in the words of Justices Robert Jackson and Arthur Goldberg, the Constitution with its Bill of Rights is not a suicide pact.[162] Context is important here. Judgment should not simply be based on historical and traditional categories. Fair adjudication requires contextualization and balance. A two-bit demagogue with no following, shouting slogans on a street corner, certainly will not pose the sort of imminent risk that can give rise to government concerns sufficient to justify an intrusion of liberty. On the other hand, the leader of a political or social group with a large following and the resources to carry out an oppressive uprising or even an isolated terrorist strike can conspire with supporters to the peril of others. We might distinguish an individual supporting terror from a terrorist leader advocating the use of violence to achieve some specific political or religious agenda; under some circumstances only the latter might possibly pose a substantial enough social threat to warrant regulation, arrest, and conviction.

In *Holder v. Humanitarian Law Project*,[163] a recent case that weighed public safety against freedom of expression, Chief Justice Roberts drafted an opinion upholding the material support of terrorism statute, expressly recognizing that Congress had "displayed a careful balancing of interests in creating limited exceptions to the ban on material support."[164] The government's interest in preventing the incitement of a coordinated conspiracy, coupled with the circumstances where it is likely to be carried out, differs from abstract advocacy of a disfavored political point of view.[165] The Court upheld a statute against giving "material support or resources" to any organization "designated as a terrorist organization under . . . the Immigration and Nationality Act."[166] In its decision, the Court was not categorical. To the contrary, gathering the context of the government's decision to name material support of terror to be a criminal offense was essential to the Court's ruling that the statute survives First Amendment scrutiny more rigorous than the intermediate approach.[167] In its opposition to the law, the Humanitarian Law Project ("HLP") sought to show that its right to engage in a free exchange of discourse with terrorist

[161] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359-60 (2003); Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1941).

[162] *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963); Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[163] 130 S. Ct. 2705 (2010).

[164] *Id.* at 2728.

[165] *See* Dennis v. United States, 341 U.S. 494, 501 (1951).

[166] 18 U.S.C. § 2339B(g)(6) (2012).

[167] *Holder*, 130 S. Ct. at 2724.

organizations had been statutorily blocked. The Court ruled against HLP, deferring to legislative policy because the law targeted conduct that was likely to "harm the United States' partners abroad" and negatively impact the country's diplomatic agenda.[168] The government had shown a compelling interest in regulating HLP's proposed conduct.

The Court has also balanced individual rights and social policy in a way that more closely corresponds with the constitutional maxim approach presented in Part II of this article than with its three principal competitors, analyzed in Part I. If I am correct, balancing must concern itself with individual rights, such as the dignity of communication, and the government interest, which may be public safety or some other compelling or important use of authority. This analysis extends beyond the self-expressive, democratizing, or marketplace of ideas analogies to a much broader principle of constitutional law. Another balancing case, *New York v. Ferber*,[169] can also be explained through the lens of general constitutional theory—one that considers individual interests, the government's regulatory legitimacy, and the precise fit of the legal solution to the social problem.

In *Ferber*, the Court differentiated child pornography from its adult counterpart, refusing to apply the same test as it had to adult pornography and obscenity because of the different contexts involved in their production.[170] Child pornography certainly is not prohibited solely because it has no value in democratic discourse. We could imagine a film whose primary focus is political with a sex scene involving children, and the Court would nevertheless review a law prohibiting its showing on the basis of rational scrutiny. But there is something deeper at stake, which transcends free speech and concerns the individual rights of exploited children both in their private capacity and as members of a society committed to the welfare of its citizens.

The majority in *Ferber* distinguished juvenile from adult pornography because regulation of the former reflects "a government objective of surpassing importance" to prevent the "sexual exploitation and abuse of children."[171] This objective supersedes the personal desire of child pornography makers, distributors, and anyone else interested in communicating or perusing minors engaged in sexual acts. The Court did not arrive at the holding on the basis of ad hoc balancing, but on a careful assessment of the harm to child victims, the government's *parens patriae* power to safeguard the "well-being of its youth," and the need to codify a solution to combat a social evil.[172] The Court found the state's interest in

[168] *Id.* at 2726.

[169] 458 U.S. 747 (1982).

[170] *Id.* at 764 ("The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity.").

[171] *Id.* at 757.

[172] *Id.* at 757, 761, 776.

preventing the exploitation of children to be of greater value than the creation and distribution of ordinary pornography.[173]

The Court's asserted recognition of the state's interest even went beyond the concerns of individual victims. The *Ferber* majority also identified the welfare of society to rest "for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[174] A purveyor's right to self-expression is diminished by the inability to enjoy the desired visual stimulation, but the victim's privacy rights are preserved, as is the moral order of protecting children. Under the circumstances no less restrictive means is possible than a total ban. What is at play in *Ferber* at the general level is the function of government to protect children's ability to pursue happiness without the albatross of child pornography (coerced or willfully engaged in) hanging around their necks, limiting their ability to equally participate in social and political life because it may rear its ugly head in a job interview, in a Google search, at an adult video store, or on digital social media. Possessing and viewing child pornography can be outlawed, even when the party downloads it for free and has no causal connection to the victim's losses. The Court has even found that people not involved in producing, recruiting, or filming child pornography can nevertheless be held liable for any proximately caused losses to victims resulting from its distribution, marketing, possession, or trade.[175] Put more broadly through my suggested means/end test,[176] the function of government is to protect the people's access to the common good, which can be perversely diminished where a child has been the victim of a pornographic production; therefore, child pornography statutes are narrowly tailored to achieve a compelling public purpose, even though no alternative forum is legally available for their dissemination.

The need for balance arises when speech interests conflict with other pressing values. In the case of defamation, an unrefined categorization of protected speech fails to get at the depth of litigants' legal claims. In cases of libel or slander, a speaker's interest is pitted against a party seeking to enjoin a false statement that causes damage to her reputation. The Court has successfully followed a carefully developed doctrine, where individual dignity[177] is weighed against the social need to safeguard free and open debate

[173] *Id.* at 761.

[174] *Id.* at 757 (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

[175] *See, e.g.*, Paroline v. United States, 134 S. Ct. 1710, 1729 (2014).

[176] *See supra* text accompanying note 152.

[177] While dignity is not expressly protected by the United States Constitution, the Supreme Court has found it to be a right running through various Clauses. For example, the Court reads the Eighth Amendment "[t]o enforce the Constitution's protection of human dignity." Hall v. Florida, 134 S. Ct. 1986, 1992 (2014). Framing the issue more broadly, the Court considers citizenship to be a "dignity . . . which the Constitution confers as a birthright upon every person born within its protection [that] is not to be withdrawn or extinguished by the courts except pursuant to a clear statutory mandate." Mandoli v. Acheson, 344 U.S. 133, 139 (1952). At times the Court's discussion of dignity appears

on public issues.[178] Whether speech is private or public is determined by examining the "content, form, and context" of the contested statement.[179] A court must consider whether limiting a specific defamatory statement would stifle debate or, to the contrary, be a restrained way of advancing the government objective of protecting reputation and compensating victims. When the insult is made against a public figure and concerns a public matter (even if the statement is false), the balance favors open debate rather than regulation.[180] But greater value is given to personal dignity when private parties bring lawsuits involving their private interests.[181]

Courts balance reputation, childhood safety from molesters, and peace from war against the interests of persons wishing to defame, create or peruse childhood pornography, or incite others to violence. A contextual assessment of speech is most likely to accurately identify whether some particular statement is constitutionally protected. The issue goes beyond autonomy, the value of knowledge, or even self-government, to a more general constitutional commitment to the preservation of liberal equality for the common good. Individual welfare is an essential component to public well-being. Constitutional interpretation should therefore be a synthesis of both. This broad perspective allows for a thorough weighing of interests, rather than requiring a court to pigeonhole only one aspect of communicative value at the expense of overlooking others.

B. *Categorical Approach to Free Speech*

The Roberts Court has issued several decisions that malign balancing in free speech cases, opting instead for an inflexible, categorical approach. Justice Antonin Scalia, writing for the majority, was adamant on this point in *Brown v. Entertainment Merchants Ass'n*,[182] which held unconstitutional a California

framed in some type of natural law conception. *See* Cohen v. California, 403 U.S. 15, 24 (1971) (writing that the First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

[178] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

[179] Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).

[180] *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.").

[181] *Dun & Bradstreet*, 472 U.S. at 757 ("[W]e must . . . balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression.").

[182] 131 S. Ct. 2729 (2011).

law that prohibited the sale and rental of violent video games to minors.[183] He called the state's proposed "'simple balancing test' that weighs the value of a particular category of speech against its social costs" a "startling and dangerous" proposition.[184] His characterization ignored the many forms of balancing the Court has undertaken in the area of free speech.

Justice Anthony Kennedy and Chief Justice John Roberts have taken a less strident position, but they likewise have stated that the First Amendment's high position in the constitutional hierarchy prevents judges and legislators from weighing speech against other social values. Thus, for example, writing for a plurality in *United States v. Alvarez*,[185] Kennedy dismissed "ad hoc balancing of relative social costs and benefits" as a "startling and dangerous . . . free-floating test for First Amendment coverage . . . ."[186] Instead, Kennedy claimed, the Court alone enjoyed the authority to identify what "historic and traditional" categories of speech are exempt from the general prohibition against content-based regulations.[187] Those exceptional categories include "advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent."[188] This characterization of the doctrine takes account of neither the careful balancing that went into the creation of those categories,nor the balancing involved in as-applied challenges.

Likewise, Chief Justice Roberts has rejected judicial or legislative balancing of particular speech to determine its social benefits for the democratic process.[189] Roberts was more categorical than Kennedy but less adamant than Scalia. In *United States v. Stevens*,[190] which struck down a broadly worded federal statute prohibiting the depiction of animal cruelty, the Chief Justice rejected the government's proffered balancing test, which called on the court to determine "[w]hether a given category of speech enjoys First Amendment protection" by performing "a categorical balancing of the value of the speech against its societal costs."[191] While he found that test to be "free-floating" and "startling and dangerous,"[192] the majority did not overturn any balancing precedents. Nevertheless, rather than weighing relevant constitutional values like free speech or parental control, the Court adopted a traditional categorical

[183] *Id.* at 2742.

[184] *Id.* at 2734 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

[185] 132 S. Ct. 2537 (2012).

[186] *Id.* at 2544 (quoting *Stevens*, 559 U.S. at 470).

[187] *Id.*

[188] *Id.* (citations omitted).

[189] *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1449 (2014) (plurality opinion).

[190] 559 U.S. 460 (2010).

[191] *Id.* at 470 (citing Brief for United States at 8, United States v. Stevens, 559 U.S. 460 (2010) (No. 05-2497)).

[192] *Id.*

approach.[193] In recognizing a new unprotected category of speech, the majority asserted, the Court would "reject the Government's highly manipulable balancing test as a means of identifying them."[194] Nowhere did Roberts examine Court doctrine on balancing interests to determine whether past justices had already developed adequate analytical structures to help judges avoid manipulative decision-making. The same absence of precedential examination of balancing is found Scalia's *Entertainment Merchants* and Kennedy's *Alvarez* opinions. The prohibition against balancing is taken as axiomatic without any close consideration of doctrines developed over the course of the twentieth century.

Indeed, in *Alvarez*, Justices Stephen Breyer and Elena Kagan joined in concurrence to reject the "strict categorical analysis."[195] Rather than relying on Kennedy's and Roberts's oversimplifications of free speech doctrine, Breyer would have balanced the "speech-related harms" against the "nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so."[196] Breyer's statement is far more doctrinally accurate[197] and contains kernels of the more holistic interpretation of free speech I outlined in Part II.

C. *Corporate Electioneering*

During its 2009 Term, the Court issued one of the most controversial rulings in a generation, *Citizens United v. FEC*.[198] Rather than engaging in an

[193] *Id.* at 460-61.

[194] *Id.* at 472.

[195] United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring).

[196] *Id.*

[197] *See* discussion *infra* Sections III.C, III.D. Besides being a better reflection on case law, Breyer's perspective is in the spirit of Justice Felix Frankfurter. In a separate concurrence to *Dennis*, Frankfurter rejected "dogmas too inflexible for the non-Euclidian problems to be solved." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring). Instead, he and Justice Robert Jackson, writing a separate concurrence, recognized that when an organized group calls for violent overthrow of the government, the risk so posed is much higher than the individual advocating the same. *Id.* at 573 (Jackson, J., concurring). The reach and influence of a group makes the imminent threat of violence more likely than the revolutionary harangue of a soapbox speaker with little or no influence to make his advocacy a reality.

[198] 558 U.S. 310 (2010). President Barack Obama put an exclamation point on the controversy during his 2010 State of the Union Address asserting, "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections." President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 Cong. Rec. H414-20 (daily ed. Jan. 27, 2010). Sitting in the well of the House of Representatives, Justice Samuel Alito openly voiced his disdain, asserting that the President's comments were "simply not true." Laurie Kellman, *Justice Looks Askance as*

"intricate case-by-case" analysis, which it should have used to determine "whether political speech is banned,"[199] the majority opted for a categorical rejection of a congressional initiative to prevent political campaign corruption.[200] The case arose from a challenge to a section of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[201] Rather than resolving only the as-applied challenge brought by the petitioners,[202] the Court went further by holding the statute facially unconstitutional.[203] Thereby the Court expressly rejected the FEC's argument for treating incorporated entities differently than natural persons.[204] The Court viewed speech produced by campaign contributions to be necessary for citizens to hear, articulate, and form knowledgeable democratic opinions.[205]

The majority relied on strict scrutiny analysis to determine the constitutionality of § 203 of the BCRA.[206] It held that Congress lacked a compelling interest in preventing the distorting effect of corporations using their general treasury funds for electioneering.[207] This decision reversed a 1990 Rehnquist Court ruling that found that the government did have a compelling reason to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[208] With several new personalities on the Court, the majority in *Citizens United* found

Obama Criticizes Court, BOSTON.COM (Jan. 28, 2010), http://www.boston.com/news/nation/washington/articles/2010/01/28/justice_looks_askance_as_obama_criticizes_court/ [http://perma.cc/JRQ7-VHHS].

[199] *Citizens United*, 558 U.S. at 329.

[200] *Id.* at 336.

[201] *Id.* at 321-24.

[202] Citizens United sought injunctive and declaratory relief to distribute an electioneering movie within thirty days of primary elections, which would have subjected the corporation to civil and criminal penalties. *Id.* at 321. The corporation argued that "(1) § 441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer and disclosure requirements, BCRA §§ 201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie." *Id.*

[203] *Id.* at 365 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified at 2 U.S.C. § 441b (2006)).

[204] *Citizens United*, 558 U.S at 343 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'").

[205] *Id.* at 339.

[206] *Id.* at 340 (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

[207] *Id.* at 349-51.

[208] *Id.* at 348 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

no compelling reason to prevent corporations and unions from presenting political facts and opinions to the public.[209]

Its decision was formalistic, demonstrating an insufficiently careful consideration of how virtually unlimited campaign financing significantly diminishes the ability of ordinary individuals, without millions of dollars to contribute to candidates' coffers, to meaningfully influence representative democracy. The Court simply did not balance all the relevant interests (corporate, personal, and societal), but categorically equated the corporate claim to expression with that of individual voters. The Court's focus on an audience's ability to gain information to the exclusion of other constitutional values created a holding that augurs a future of increasingly expensive political campaigns funded by business entities that have no access to the franchise.

The Court was inconsistent in its application of theory, and at various points it gave a nod to two major schools of free speech. For one, the majority conceived corporate speech to be part of the "general public dialogue."[210] This allusion to the marketplace of ideas doctrine views corporate speech as important to ascertaining truth.[211] By hindering corporations from communicating, the majority reasoned, the Federal Election Commission was inhibiting the flow of ideas.[212] This formalistic conception of a market as a place of exchange similar to exchanges occurring in the economic sphere led the majority to dismiss the rationale, and ultimately overturn its decision, in *Austin v. Michigan Chamber of Commerce*.[213] *Austin* held that limits on corporate speech were constitutionally permissible to prevent the distortion of the "political marketplace," through the "unfair advantage" corporations gain from using "amassed" resources.[214]

The *Citizens United* majority also dipped into the self-representation rationale. Without differentiating between natural and artificial persons, the Court found that corporate speech was essential to democracy: "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[215] The majority's argument is two-fold: (1) corporations, like humans, participate in self-government;[216] and (2) democracy requires the free flow of information, from both corporations and natural people, to reach

[209] *Id.* at 339 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.").

[210] *Id.* at 341.

[211] *Id.*

[212] *Id.* at 335.

[213] 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310.

[214] *Id.* at 659 (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

[215] *Citizens United*, 558 U.S. at 339.

[216] *Id.* at 343 (quoting First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978)).

citizens.[217] We might add that electoral speech enables individuals to express personal views and opinions about public subjects; this is a form of catharsis that need not be directed at self-government. In other words, meaning can be achieved as a unique human capable of exercising personal analytical skills or as a member of a political community.

It is, then, no doubt correct to say, "First Amendment doctrine is structured on the premise that the value of self-governance is most likely to be realized if persons are free to participate in public discourse in the manner they believe will be most effective."[218] But that is only part of the equation. A person's constitutional right to participate in electioneering is a function of her right as a citizen to vote, take part in political office, litigate cases, seek habeas corpus, be a member of a jury—in short, to enjoy the full panoply of constitutional rights. A corporation enjoys some of these rights, such as the right to due process, but certainly not all aspects of citizenship, such as access to voting, political office, or jury service.

The Court in *Citizens United* disregarded the potential of enormously capitalized entities to confuse voters through advertisements and other campaign spending aimed at companies' bottom lines rather than public good. To the contrary, the *Citizens United* majority believed corporate campaign spending was "the means to hold officials accountable to the people."[219] Grafting a concept typically applied only to human beings, the majority regarded it impermissible for Congress to differentiate on the basis of the source of money.[220] So too the majority discounted the legislative finding that big corporate spending would lead "the electorate to lose faith in our democracy."[221] Lost in the Court's opinion is the distinction between corporations and people, which an earlier, differently constituted Court highlighted:

> The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[222]

Corporate special interests have particular agendas, some of which may favor tyrannical governments in other countries where they do business, such as China or Sudan. Under those circumstances, political discourse can be

---

[217] *Id.* at 341.

[218] Robert C. Post, *Second Lecture: Campaign Finance Reform and the First Amendment*, *in* ROBERT C. POST, ET AL., CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 44, 51 (2014).

[219] *Citizens United*, 558 U.S. at 312.

[220] *Id.* at 342 (quoting *Bellotti*, 435 U.S. at 784).

[221] *Id.* at 360.

[222] FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986).

distorted from seeking the best outcomes for constitutional beings, the people, to seeking the best outcomes for statutory creations, corporations. Sovereignty only resides in the former, and representative governance is the realization of the people's will by their elected political agents. By enacting the BCRA, Congress had placed special limits on corporate spending, as the *Citizens United* dissent put it, "because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets."[223] The process of elections and representation is a loop that is uniquely connected to the Constitution's ultimate end, which as we saw in Part II of this article, is the protection of rights for the common good.

While the Court's holding in *Citizens United* adopted the marketplace of ideas and self-representation frameworks, the majority's underlying decision placed corporate expenditures on a par with personal spending on elections. The majority framed this point differently, purporting to be a defender of free speech.[224] While the majority did not conceive itself as a supporter of the rich dominating electioneering, in reality, Justice Kennedy championed the cause of corporations determined to spend massive funds on political campaigns: "First Amendment protections do not depend on the speaker's 'financial ability to engage in public discussion.'"[225] From his perspective, just as any natural person, corporations can spend immense resources to influence the political process.[226] As an abstract argument for the marketplace of ideas where speech is viewed in commodified terms, this may seem like a judicial unfettering of the political voice that the legislature had sought to stifle. But this willfully overlooks that only in singular cases, such as Bill Gates or Warren Buffett, can any person have the resources of a corporation—especially a publicly traded corporation, whose coffers might be in the billions, allowing it to dole out sums to political candidates who support policies favorable to the business entity logarithmically exceeding any counter effort by ordinary American citizens.

Kennedy rightly asserted that the "First Amendment stands against attempts to disfavor certain subjects or viewpoints."[227] But from there the Court ignored doctrine, writing that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others."[228] Kennedy oversimplified precedent, which grants different levels of scrutiny to natural speakers,[229] whom government can only prohibit for

[223] *Citizens United*, 558 U.S. at 446 (Stevens, J., dissenting).

[224] *Id.* at 385.

[225] *Id.* at 313 (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976)).

[226] *Id.* at 314.

[227] *Id.* at 340.

[228] *Id.* (citing First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

[229] NAACP v. Button, 371 U.S. 415, 438 (1963) ("[O]nly a compelling state interest . . . can justify limiting First Amendment freedoms.").

compelling state reasons and through narrowly tailored laws, and commercial speakers, who are subject only to intermediate scrutiny.[230] Indeed, sometimes speakers are treated differently without any requirement of heightened review. The prohibition against viewpoint suppression is based on the premise that government cannot discriminate against an individual's perspectives on politics, culture, science, and so forth.[231] This function of the First Amendment is further connected to the constitutional right to live and pursue happiness freely without arbitrary government interference. A constitutional perspective is broader in its assessment of law and judicial opinion than simply looking at the free speech issues involved in campaign financing. Kennedy treated corporations as "associations of citizens," essentially aggregated entities made up of people with contrasting political opinions,[232] and mistakenly equated them with ordinary people, who are, after all, individual voters who constitute the shareholders of corporations. The different constitutional statuses of corporations and ordinary people is relevant for weighing their different constitutional interests in speech. Preventing corruption in the electoral process is a concern of the electorate, which is only composed of natural, not artificial, people. The speech of voters carries much more weight because, by definition, only they enjoy the right to express political opinions and then vote, allowing for greater regulation of corporate campaigning.

A corporation is "[u]ndoubtedly . . . in law, a person or entity distinct from its stockholders and officers."[233] Incorporation is meant "to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[234] The speech of for-profit corporations is therefore separate and apart from that of its shareholders. Matters are different when it comes to associations formed with the purpose of advancing specific ideas, but in *Citizens United* the Court made no such distinction.[235]

A comprehensive theory of free speech constitutionalism would have revealed that the constitutional status of corporations is quite different from that of natural persons.[236] Multiple examples demonstrate just how different all corporations, not just for-profit corporations, are from humans. For instance, corporations are not thought to have privacy rights, but rather to have trade

[230] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564-66 (1980) (establishing a four-part intermediate scrutiny test for regulations on commercial speech).

[231] *See Citizens United*, 558 U.S. at 312.

[232] *Id.* at 354.

[233] J. J. McCaskill Co. v. United States, 216 U.S. 504, 514 (1910).

[234] Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001).

[235] *Citizens United*, 558 U.S. at 364.

[236] In a dissent to *First National Bank of Boston v. Bellotti*, Justice White made the point that "when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would." 435 U.S. 765, 806 (1978) (White, J., dissenting).

secrets.[237] In part, that is because the intimacy of privacy concerns—matters like contraception[238] and abortion[239]—simply does not apply to the corporate form.[240] Public service participation by members of a jury is also something that is personal and not shared by corporate entities.[241] Unlike the right to full liberty and equality enjoyed by all members of the human polity, trade secrets law does not protect the common rights of citizens, but only harm to the corporation.[242] Neither is a corporation protected by the Fifth Amendment personal privilege against self-incrimination,[243] nor does it enjoy Article IV Privileges and Immunities Clause rights.[244] The interests of citizens in campaigning for candidates outweigh those of corporations because election outcomes affecting issues like abortion and congressional redistricting only directly impact people.

Put succinctly, the corporate right to free speech adopted in *Citizens United* is not only a free speech problem, which can be unwound by some focused analysis on one of the three dominant theories of the field. What is called for instead is a deeper, balanced analysis that allows Congress to protect individual rights—here special rights to electioneering speech not enjoyed by

[237] Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65-67 (1974); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy.").

[238] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

[239] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[240] Robert G. Bone, *The (Still) Shaky Foundations of Trade Secret Law*, 92 TEX. L. REV. 1803, 1809-10 (2014) ("[T]he typical subject matter of trade secrets is not the sort of intimate information that justifies a moral claim to privacy.").

[241] *See* Lockhart v. McCree, 476 U.S. 162, 176 (1986) (asserting that excluding persons from jury service based on group status may constitute a substantial deprivation of a basic right).

[242] Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 288 (1998) ("In the trade secret context, this means that the deontologically based privacy rights of employees are not likely to be violated by trade secret appropriation directed at and intended to harm the corporation.").

[243] *See* Braswell v. United States, 487 U.S. 99, 100 (1988); Hale v. Henkel, 201 U.S. 43, 69-70 (1906). The Court has actually extended some personal constitutional rights to corporations, but further analysis of this line of cases would be too far outside the scope of this article. Suffice it to say, however, that the interpretive method I am suggesting has implications far beyond the free speech doctrine, and will need to await discussion in a different article. As things have long stood, corporations enjoy limited constitutional rights against unreasonably broad and indefinite subpoenas, due process, equal protection, and takings. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (Takings Clause protections); *Hale*, 201 U.S. at 76 (search and seizure); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.").

[244] *See* Zobel v. Williams, 457 U.S. 55, 73-74 n.3 (1982).

corporations—and the general welfare—such as the social benefits of representative governance.

Covering another theory of corporate personhood, the *Citizens United* majority also rejected Congress's differentiation of corporations from individuals and other organizations.[245] Conceptualizing a corporation as an aggregation of individuals, like any other communicative organization, is too formalistic because it fails to consider a corporation's unique role, which is incompatible with electioneering equality. There is also good reason to differentiate for-profit corporations from expressive associations, such as book clubs or think tanks, the weight of whose speech entitlements is predicated on the rights of its members.[246] Those types of groups may take on a corporate form, but they are created to express the ideas of their members and not for business purposes.[247] The function of a for-profit corporation is quite different, as it is ordinarily created and operated to realize economic interests. A for-profit corporation is composed of a collection of shareholders who pool resources in order to generate profits under the management of a board of directors.[248] Its ability to participate in politics is therefore not uniquely its own—as is the case for each voter—but specifically tied to the governance philosophies of those who control the entity.[249] Non-profit communicative organizations—of which Citizens United was one—may be said to represent the combined expressive will of members, but the same cannot be said about for-profit corporations. Shareholders of for-profit companies, especially those that are publicly traded, ordinarily have hardly any say in corporate affairs apart from voting for directors and on issues like mergers and dissolutions.[250] Most decisions about the companies' short- and long-term plans—such as what

[245] Citizens United v. FEC, 558 U.S. 310, 355-56 (2010). In his concurrence, Justice Scalia clearly stated this point: "The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'" *Id.* at 392 (Scalia, J., concurring).

[246] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (defining an expressive association to be a group that engages "in some form of expression, whether it be public or private").

[247] FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263-64 (1986).

[248] *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348-49 (1985) ("The managers [of a corporation], of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals."); Bruce Lymburn, *General Counsel Keeps Company Goals in Mind and Risk in Check*, *in* BEST PRACTICES FOR GENERAL COUNSEL 35 (2014), 2014 WL 3773049, at *3 ("The common view in American corporate law is that the overriding purpose of a corporation is to generate profit for its stockholders, which means that the directors cannot consider other values or constituencies that are secondary to, or contradict, or do not directly result in, that primary purpose.").

[249] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659-61 (1990), *overruled by Citizens United*, 558 U.S. 310.

[250] Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 64-65 (2014).

politicians to lobby and when, which political candidate is most favorable to the companies' interests, and whether to consult an outside lobbying organization—are entirely out of the shareholders' control.

That is not to posit that for-profit corporations have no right to speech. They certainly can engage in commercial expression, and this surely includes lobbying for economic policies. But the scope of that right is limited by the very function of the entity. Indeed, the BCRA did not prohibit corporations from any and all political speech; to the contrary, it permitted corporations to use money separated from the general funds into Political Action Committee treasuries to be used for political advocacy.[251] This empowered shareholders and corporate officers to contribute to an expressive entity rather than lassoing all stock owners into giving money for expressive causes about which they may be indifferent, or worse yet explicitly opposed.

Moreover, democracy thrives on change resulting from the life cycles of voters and the limited careers of politicians.[252] The finitude of human life limits the time that natural persons and politicians can impact politics. Not so with corporations, which are presumed to have perpetual life, unless their charters specify otherwise.[253] Thus, a corporation's potential to influence politics outlasts that of any citizen. Treating the corporation as a natural speaker is thus detrimental to the ordinary fluctuations of democratic voting. The constitutional commitment to citizens' equal access to politics[254] should have trumped the for-profit corporations' demand for parity in electioneering. The *Citizens United* majority's decision to base its holding in both the

[251] *Cf. Citizens United*, 558 U.S. at 337 (finding the Political Action Committee exemption from § 441b inadequate to save the statute from First Amendment scrutiny).

[252] A variety of literature identifies political turnover as a necessary component of democratic politics. *See, e.g.*, MILADA ANNA VACHUDOVA, EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE, AND INTEGRATION AFTER COMMUNISM 12-13 (2005) (discussing "why political turnover is essential for efficient rule making in the new polities"); Arye L. Hillman, *An Economic Perspective on Radical Islam*, *in* RADICAL ISLAM AND INTERNATIONAL SECURITY: CHALLENGES AND RESPONSES 44, 60 (Hillel Frisch & Efraim Inbar eds., 2008) ("The political turnover in office necessary for sustained democracy requires political competition to present voters with choices among alternative policies or candidates with different competencies."); Kathryn Hochstetler, *Democracy and the Environment in Latin America and Eastern Europe*, *in* COMPARATIVE ENVIRONMENTAL POLITICS 199, 261 (Paul F. Steinberg & Stacy D. VanDeveer eds., 2012) ("Political change is clearly endemic to modern society and is indeed a necessary condition for human betterment.").

[253] *See Citizens United*, 558 U.S. at 438 (Stevens, J., concurring in part and dissenting in part); Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 773-77 (2012).

[254] *See* Reynolds v. Sims, 377 U.S. 533, 557-58, 568 (1964) (adopting the one-person-one-vote doctrine); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

marketplace of ideas theory and democratic representation theory means that the Court found that corporate speech is valuable to both audiences and corporate entities. Missing from the *Citizens United* opinion is any sense of representative governance being tied to the Preamble's guarantee of popular sovereignty. Instead the decision muffles the voices of citizens, whose role as civic actors is related to other aspects of the Constitution. Thereby the Court enabled corporations to have an inordinate influence on the information voters weigh in making elective choices.

A corporation simply does not enjoy the full panoply of constitutional rights.[255] Profit making is a perfectly legal enterprise, but it is a far more narrow purpose than life, liberty, and the pursuit of happiness. Shareholders are ontologically and legally separate from the corporation.[256] Considering the diversity of reasons that went into passing the BCRA restriction on corporate electioneering required just the balance of constitutional rights discourse that the Court sought to avoid, but avoiding context led to the formalistic decision of *Citizens United*.

A constitutionally grounded approach, rather than one focused almost exclusively on the value of more speech, might have led the justices to a different result that would have allowed for a balancing of various interests. The Constitution is the mandate of the people, whose voice is much diminished by large corporate spending. They are the source of sovereignty. The Court's authority, as well as the power of the other two branches of federal government, is a grant given by the people, not by any artificial entity.[257] The Constitution, in the words of the Preamble, is the work of "We the People."[258] The people, as an aggregation of individuals, function through elected representatives. One of the most effective ways to express their will is through elections. But where the average citizen—whose mean household income is $53,046 and whose per capita money income is $28,155[259]—competes to be

[255] *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) ("[T]here is only minimal constitutional protection of the freedom of *commercial* association. There are, of course, some constitutional protections of commercial speech—speech intended and used to promote a commercial transaction with the speaker. But the State is free to impose any rational regulation on the commercial transaction itself.").

[256] Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003).

[257] The people's sole power to confer sovereign power to governing institutions has a pedigree reaching deep into the Revolutionary Era. *See, e.g.*, *American Intelligence*, FREEMAN'S J., Aug. 24, 1791, at 3 ("[S]ages, who penned the Declaration of Independence, laid it down, as a fundamental principle, that government derives its just powers from the *consent of the people* alone . . . ."); Ploughman, *To the People*, INDEP. GAZETTEER, Oct. 5, 1782, at 1 ("It is a general maxim that government was instituted for the protection and happiness of the people . . . .").

[258] U.S. CONST. pmbl.

[259] U.S. CENSUS BUREAU, *State and County Quick Facts*, http://quickfacts.census.gov/qfd/states/00000.html [http://perma.cc/3WAB-69SV].

heard over the electioneering of a multi-million or multi-billion dollar corporation,[260] there can be no doubt whose message is more likely to be broadcast to audiences. Widespread reporting of the special access to representatives that major corporate donors enjoy diminishes public trust and the desire to participate in electoral politics.[261] The Court thought naught of this inequality, and it narrowed the definition of corruption (which had been codified by the BCRA's expenditure restriction) just as readily as the *Lochner* Court before it had discounted the New York law for the public safety of bakers.[262]

Citizens United rejected the national interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections,"[263] thereby giving too much weight to the demands of for-profit corporations. Setting aside Congress's balance between corporate speech and the need to prevent corruption, the Court took a categorical path that is sure to enhance electoral inequalities. The majority overturned a decision recognizing that corporate expenditures prevent "the corrosive and distorting effects of immense aggregations of wealth" on political debate.[264] By striking down the BCRA's prohibition against independent corporate expenditures to advocate on behalf of a specific candidate, the Court rejected the balance between the "problem of large campaign contributions . . . where the actuality and potential for corruption have been identified . . . while leaving persons free to engage in independent political expression . . . ."[265] The Court's categorical approach rejected the balance needed for electoral integrity. For the Court, *Citizens United* was a black and white case about the ability of an aggregate entity to assert its political interests through general expenditures.

After *Citizens United* had been decided, one might have thought the Court's ruling to be based on federalism, leaving it up to the states to regulate

[260] Unlike Citizens United, a nonprofit corporation that contained a "finite identifiable group who had joined together for the specific speech-related purpose[,] . . . it would not even be possible to identify all of the individual natural persons who might be said to be 'represented' by" publicly traded corporations, like Coca-Cola, many of whose shareholders and employees are not even U.S. citizens. Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1734 (2015).

[261] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (asserting that the people are likely to perceive a system to be corrupt where large contributors have special access to candidates, leading to "the cynical assumption that large donors call the tune," which could "jeopardize the willingness of voters to take part in democratic governance").

[262] *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (striking a state maximum hours law because it violated the fundamental right to contract).

[263] Citizens United v. FEC, 558 U.S. 310, 380 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 48 (1976)).

[264] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990), *overruled by Citizens United*, 558 U.S. 310.

[265] *Buckley*, 424 U.S. at 28.

corporate electoral spending. But two years after deciding *Citizens United*, the Court suppressed that limitation, finding a state campaign financing law unconstitutional. In *American Tradition Partnership, Inc. v. Bullock*,[266] the Court struck down a state regulation prohibiting any corporation from making "an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[267] The Court found that the statute violated a corporation's First Amendment right by enforcing the law in the absence of a compelling state reason.[268] The Court made it even clearer that a majority regarded the corporation to be as invaluable to electoral politics as real people. At oral argument, Justice Sonia Sotomayor pointed out that "the Court imbued a creature of State law with human characteristics."[269]

This fundamentally contradicts the notion that humans have an inalienable right, the value of which can supersede state interests, and from which state obligations are drawn. Unlike any artificial person, an individual's political power is born of his or her humanity, dignity, and status as an adult member of a community bound by political institutions, norms, and history. The human element of electoral politics derives from the whole Constitution as the primary legal instrument for protecting the rights of real people, the electorate, in their quest for personal and social betterment. Communicative groups, like religious congregations or civil rights organizations, are closely tied to the people who compose their ranks, and they seek to influence the outcome of elections on their members' behalf. Not so with a for-profit corporation, whose general funds are amassed from stockholder investments not expressly meant for political purposes.

There is an intrinsic difference between the people, who are the sources of governmental power,[270] and corporations, which have no power that is not granted by the government. The Court has itself stated, "corporate contributions are furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members, and of the public in receiving

[266] 132 S. Ct. 2490 (2012).

[267] *Id.* at 2491 (quoting MONT. CODE ANN. § 13-35-227(1) (2013)).

[268] *Id.* In 2011, the Roberts Court placed an additional obstacle, impeding state efforts to equalize access to political speech. Writing for the majority, the Chief Justice held that Arizona lacked a compelling interest to equalize campaign expenditures through a campaign finance system that granted qualified candidates for state office public funding to equalize the amount of money spent by privately financed candidates. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2821 (2011).

[269] Transcript of Oral Argument at 33, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), http://www.supremecourt.gov/oral_arguments/argument_transcript/2008 [http://perma.cc/HUS3-65RJ].

[270] The Preamble to the United States Constitution specifically states that government is formed by the People, and the Declaration of Independence also makes clear that the People are the source of public power. U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

information."[271] Corporations clearly do not hold an equal place in the election process with natural people and political action committees.

Simply put, governmental sovereignty does not derive from corporate charter but from the people. It is the people who have granted power to legislatures to approve corporate charters as a means of limiting liability, issuing stock, and so forth. Corporations do not share in the people's sovereignty, but rather they are products of it. Therefore, corporations are not on equal electioneering terms with natural speakers. Use of for-profits' general treasury funds need not even reflect the will of its stockholders, much less the general welfare.[272] Instead, its electioneering is driven by the business: profit-maximizing decisions of its board of directors. Generally, the board has a fiduciary duty to the corporation and its shareholders to exercise its best judgment for maximizing wealth and minimizing expenses, not to express the political will of its shareholders. Equating corporate and human electioneering is not only incompatible with ordinary free speech theory, but on a broader constitutional scale it mistakenly equates artificial entities with constitutional personhood. The recent campaign financing cases, therefore, give constitutional weight to entities that exist at the sufferance of state laws.

D. *Balancing Copyright*

While the Court avoids balancing analysis in the landmark corporate financing case, choosing a categorical approach instead, its copyright jurisprudence openly engages in balancing of private and public interests. However, the Court has demonstrated a pronounced unwillingness to consider how the free speech protections embedded in the Copyright Clause correspond with the more general ideals of the Constitution. The Court's copyright doctrine mistakenly separates analysis under the Copyright Clause from First Amendment scrutiny, rather than weighing the concerns of both in the broader structure of constitutionalism.

The most recent example of copyright balancing appears in *Golan v. Holder*,[273] where the majority separated its review of Congress's authority under the Copyright Clause from the First Amendment challenge.[274] Justice Ginsburg's opinion neither reflected on how copyright fits into a broad

---

[271] FEC v. Beaumont, 539 U.S. 146, 161 n.8 (2003) (citations omitted).

[272] There are three theories of corporate identity for First Amendment purposes:

> Those theories are the aggregate theory, which views the corporation as an aggregate of its members or shareholders; the artificial entity theory, which views the corporation as a creature of the State; and the real entity theory, which views the corporation as neither the sum of its owners nor an extension of the state, but as a separate entity controlled by its managers.

Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1001.

[273] 132 S. Ct. 873 (2012).

[274] *Id.* at 884, 889.

constitutional scheme nor did it apply Free Speech Clause scrutiny.[275] In upholding the constitutionality of Section 514 of the Uruguay Round Agreements Act ("URAA"), the Court relied on the idea/expression dichotomy and fair use privilege in an effort to reconcile the suppression of expressive content, which would have required strict scrutiny analysis under First Amendment review.[276] The social balancing in this case was constrained by precedent. It followed analogous precedential balancing of other areas—such as those involving public employee speech, fighting words, and defamation—insofar as the majority's consideration was limited to the particular speech at bar rather than to exploring a broader set of relevant constitutional values.[277]

Golan's balanced formulation was in keeping with *Eldred v. Ashcroft*,[278] where the Court upheld the constitutionality of the Copyright Term Extension Act ("CTEA"), which retroactively extended by twenty years the term of copyrighted works that would have otherwise entered the public domain.[279] The petitioners in *Eldred* challenged the constitutionality of the law on the basis of the Copyright Clause's "limited times" wording and of the First Amendment's Free Speech Clause. They argued that the statute should be found unconstitutional on the basis of intermediate scrutiny because it burdened substantially more speech than was necessary to advance an important government interest.[280] Instead, the Supreme Court upheld the law as a rational use of congressional discretion.[281] The majority deferred to legislative authority under the Copyright Clause to pass a law extending the term of copyright to life-plus-seventy-years (up from the former life-plus-fifty-years). The Court entirely failed to reflect on whether the rationales for copyright, both utilitarian and libertarian, were outweighed by the added restrictions on speech created by the extended protections of the CTEA. Nowhere did the Court consider whether the statute was content neutral, which is typically at the forefront of First Amendment analysis. The Court reasoned that heightened scrutiny was unnecessary because the framers did not view limited copyright monopolies to be incompatible with free speech protections.[282] As Neil Netanel has pointed out, that conclusion is unsatisfying

[275] *Id.* at 890-91 (asserting that the Copyright Act amendment contained built-in protections for speech and, therefore, finding that there was no reason to engage in heightened review).

[276] *Id.* at 890 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), for the proposition that the idea/expression dichotomy and fair use provisions are "built-in First Amendment accommodations").

[277] *See infra* notes 279-289 and accompanying text.

[278] 537 U.S. 186 (2003).

[279] *Id.* at 194.

[280] Brief for Petitioners at 25, *Eldred*, 537 U.S. 186 (No. 01-618).

[281] *Eldred*, 537 U.S. at 204.

[282] *Id.* at 219.

since the Bill of Rights as a whole, including the First Amendment, was meant to limit congressional abuse of power under the original Constitution.[283]

The *Eldred* Court also followed an earlier assertion in *Harper & Row Publishers, Inc. v. National Enterprise*[284] that copyright is "the engine of free expression."[285] That explanation rings more true than the statement about the framers because the fair use exception and the dichotomy between ideas and expressions do indeed balance the public's interest in the information against the author's desire for exclusivity. The *Harper & Row* formulation is not, however, entirely satisfying because inquiry into whether the burdens placed on speakers and on the public's ability to access facts or materials provides no meaningful judicial review of copyright monopolies.

As a second best approach, the Court might have at least used one of the First Amendment's intermediate scrutiny balancing doctrines (such as time, place, and manner or secondary effect tests). Other commentators' efforts to explain the balance between copyright and free speech interests[286] yield valuable insights for assessing how courts should proceed with copyright interpretation, but they should go further to a first order analysis to discuss copyright in the context of the Constitution more generally. Put in a slightly different way, the Court's reflection on "built-in First Amendment accommodations" of copyright law[287] should be extended further, to a definition of the Copyright Clause that safeguards personal dignity and benefits society. This would mean engaging in more thorough First Amendment analysis and a balancing with the creativity and utilitarian values of the Copyright Clause.

In upholding Section 514 in *Golan*, the Supreme Court's reasoning was in lockstep with *Eldred* and *Harper & Row*. Rather than resorting to First Amendment scrutiny, the Court held that the protection of ideas and fair uses against copyright claims was enough to accommodate free speech.[288] The Court conceded that copyright law places "some restriction on expression"[289] but refused to scrutinize the Act with any eye toward First Amendment precedents about content-neutral and content-based restrictions. It would have

[283] NEIL W. NETANEL, COPYRIGHT'S PARADOX 178-79 (2008).

[284] 471 U.S. 539 (1985).

[285] *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 558).

[286] *See, e.g.*, Keith Harris, *For Promotional Use Only: Is the Resale of a Promotional CD Protected by the First Sale Doctrine?*, 30 CARDOZO L. REV. 1745, 1749 (2009); David Kohler, *This Town Ain't Big Enough for the Both of Us—or Is It? Reflections on Copyright, the First Amendment and Google's Use of Others' Content*, 5 DUKE L. & TECH. REV. 1, 46 (2007); David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 593 (2010); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in A Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 395 n.18 (1989).

[287] Golan v. Holder, 132 S. Ct. 873, 890 (2012).

[288] *Id.* at 889-92.

[289] *Id.* at 889.

been better to employ heightened scrutiny to reflect on the extent to which the statutory definition of fair use satisfies the Court's concerns that content regulations be neutral and not aimed at suppressing disfavored ideas.

It is clear that the inclusion in Section 514 of two traditional defenses against copyright infringements was critical to the Court's decision not to engage in First Amendment review. But what if the United States were to enter into an international treaty with different defenses, ones not precisely commensurate with Supreme Court precedents but based on international conventions? Perhaps then the First Amendment would come into play in determining whether new defenses sufficiently protect free expression. Balancing would need to be achieved, but how? Going forward, to stay true to *Golan* the Executive Branch will need to include provisions in treaties to ensure that they do not impair the idea/expression dichotomy and fair use defenses, limiting its negotiating position in international forums, and the Senate may only be able to consent to international copyright agreements with those provisions explicitly or implicitly built in. A more flexible approach would allow policymakers to analyze a proposed international agreement by balancing copyright and free speech concerns.

Whether international or domestic law is at stake, judges should err on the side of finding use of the copyrighted work to be an idea rather than expression, except in the obvious case where the material in question is copied directly from the original. This will help to balance the copyright's protection of private property with the First Amendment's function of preventing government overreaching.

The underlying purpose of the Copyright Clause requires an even broader constitutional balancing than remaining consistent with exclusively intellectual property precedents. The Copyright Clause is clear: "Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[290] This grant of authority contains the twofold principle that correlates precisely with the maxim of liberal equality for the common good that I parse in Part II. Congress must promote the common good of scientific discovery and developmental arts. These are beneficial to society, allowing for community progress, cultural enrichment, and individual fulfillment. To better understand this robust construction of constitutional balancing, we may examine the founding generation's understanding of "progress of science," but we need not limit our inquiry to eighteenth-century sources.

In 1786, just a year before the Constitutional Convention met to draft the Copyright Clause, an author wrote: "The science has been progressive; every age has added something to the general stock, but still there is room for farther additions and improvement. The art is still imperfect, and demands the aid of

[290] U.S. CONST. art. I, § 8, cl. 8.

the humane and ingenious to remove that imperfection."[291] By living together in an organized "union," people can pool together their "resources never to be met with in the labours of individuals."[292] The individual was thought to be intrinsic in the project of unified protection of creativity and social betterment. In January 1788, James Madison published a *Federalist* explaining the Copyright Clause: "The public good fully coincides . . . with the claims of individuals."[293] It was commonly thought that working alone or in associations like medical societies would "add to the general stock of knowledge among mankind, and promote the reputation and improvement of our country."[294] At a 1790 Independence Day celebration in Trenton, New Jersey, members of the Order of Cincinnati discharged artillery for thirteen toasts including "Public honor and private happiness," which was followed by, "The progress and science and benevolence."[295]

We need not adopt originalism to embrace the founding generation's balance between the public and private benefits of copyrights. The majority in *Elder* and *Golan* confirmed that the Copyright Clause is based on the "economic philosophy" that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.'"[296] The private motive to profit from the copyrighted work incentivizes creative behavior that "will redound to the public benefit by resulting in the proliferation of knowledge."[297] In an earlier era, the Supreme Court regarded the inventor's reward to be of secondary importance to the advancement of science and useful arts.[298] Extending the significance of *Golan* and *Eldred*, we might add that the free expression aspect of copyright should be viewed as equally important under a contiguous understanding of the Constitution, one that analyzes the Copyright Clause while also scrutinizing it in accordance with First Amendment balancing. Such an analysis would likely yield added speech and advancement-of-knowledge protections and not be as deferential to copyright owners.

---

[291] CONNECTICUT MAGAZINE, May 18, 1786, at 105, 107.

[292] *Id.*

[293] THE FEDERALIST NO. 43, at 1 (James Madison).

[294] *Progress of Science*, CITY GAZETTE, Aug. 11, 1790, at 4.

[295] *Burlington, July 13*, BURLINGTON ADVERTISER (Burlington, N.J.), July 13, 1790, at 3. For similar Independence Day toasts by the Society of Cincinnati to "Public honor and private happiness" and "The Progress of science and benevolence," see *Philadelphia, July 9*, PENN. EVENING HERALD (Philadelphia), July 9, 1785, at 2.

[296] Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (quoting Mazer v. Stein, 347 U.S. 201, 219 (1954)). For a similar connection between the exclusive right of patent owners and the promotion of "the progress of science, the useful arts and, no doubt, the general welfare," see *United States v. Line Material Co.*, 333 U.S. 287, 345 (1948).

[297] *Eldred*, 537 U.S. at 212 n.18 (quoting Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992)).

[298] *See, e.g.*, United States v. Masonite Corp., 316 U.S. 265, 278 (1942).

This by no means diminishes the constitutional value of copyright. The Copyright Clause protects the interest in creative autonomy but also empowers Congress to set certain limits on its expression. Even when a person seeks to borrow another's copyrighted material to engage in politics, to create art, to quote a novelist, or to borrow a passage from popular culture, the First Amendment does not automatically preempt the Copyright Act, but provides specific fair use and idea/expression qualifications on reproductions.[299] But judicial reflection should not stop with interpretation of the Copyright Clause. Protecting the interests of individual expression, when it involves borrowing or republishing others' works while giving them proper attribution, should be balanced against ownership incentives in retaining exclusive possession of work for a set period. This requires a heightened constitutional analysis that weighs factors relevant to the Copyright Clause's grant of congressional power and the First Amendment's safeguards against governmental abuses. A comprehensive theory of copyright and free speech should balance individual and public interests in the expression of ideas in light of the constitutional nexus between exclusive ownership of copyrighted works and exercise of free speech.

CONCLUSION

Discussions, speeches, writings, and any other forms of communication strengthen the community by giving each person the ability to assert her self-identity as an autonomous being and a member of a deliberative society. Free speech is composed of independent opinions interacting with others, not as undifferentiated members of a sovereign unit or of some political party, but as persons whose expressive contributions are uniquely valuable to speakers and the public.

The people's retained right of free expression is twofold: It preserves the dignity of speakers and the audience's right to hear and know. But these rights are not absolute. They must be balanced against substantial, and in some cases compelling, state interests of preventing imminent threats to violence, the production of child pornography, and secondary effects of vice. Regulations should not simply be categorized but contextualized according to the principle of liberal equality for the common good.

Contextual components of free speech theory include historical, doctrinal, semantic, and aspirational details about the Constitution. Free speech plays a central function in a representative government built by and for the will of the people. The First Amendment protects the equal, personal right to access channels of communication. It safeguards views supportive of and antagonistic to public policy, offensive and laudatory, heated and docile.

The ability to express divergent views without state interference presupposes national, state, and local communities' abilities to evolve in their understanding of tolerance, civility, and fundamental freedoms. The

[299] *Eldred*, 537 U.S. at 218-19.

constitutional norm maintains the constitutional baseline that no claim for self-expression can surmount. Legitimate limits on private speech include those on sexual harassment, defamation, campaign finance, and copyright laws. Even political speech has its limits, such as when it includes material support for terrorists. The Court's recent embrace of a categorical approach to free speech analysis runs counter to a holistic framework of the Constitution, as well as to many precedents that balance private interests with relevant considerations of general welfare.