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Veil of Ignorance:
Tunnel Constructivism in Free Speech Theory

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Modern free speech theory is dominated, in the courts and the academy alike, by a style of reasoning that posits a few axiomatic purposes of speech - "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[1] "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[2] "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."[3] –from these deduces detailed rules of law, and deems irrelevant any consequences that were not taken account of in that deduction. This way of thinking, which I will call *tunnel constructivism*, can damage both individual liberty and democracy.

Tunnel constructivism is a subset of a broader kind of political theory, called "constructivism" by John Rawls, which tries to derive concrete prescriptions for action from a parsimonious set of premises. What distinguishes tunnel constructivism from the more generic kind is that the theorist

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[1] Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969).
[2] Wooley v. Maynard, 430 U.S. 705, 714 (1977), quoting West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
[3] Citizens United v. FEC, 130 S.Ct. 876, 898 (2010).

deliberately excludes from consideration the consequences of those prescriptions, including consequences that most people, in the normal use of practical reason, would deem relevant as a matter of common sense. The metaphor of "tunnel constructivism" is intended to capture both of these characteristics. In a tunnel, there is only one direction you can go, and the tunnel prevents you from seeing anything outside. Tunnel vision is to be expected in a tunnel. Tunnel constructivism is not confined to free speech – libertarian views about property and contract are another example – but it is salient and increasingly influential in the free speech context.

The conjunction of these two properties, deduction leading to consequence-insensitivity, defines tunnel constructivism. Deduction is necessary but not sufficient to produce tunnel constructivism. The theorist must also be disposed to give the consequences of the deductions overriding weight. A principle can have a deductive provenance without having absolute strength.[4]

Constructivism in some sense is unavoidable. For example, the deduction of a political prescription from a narrow set of premises is characteristic of all law. More generally, the procedure of inferring a plan of action from a few premises is an inevitable and valuable part of normal human conduct. We could not get through a single hour without routinized behavioral protocols. But none of this entails blindness to consequences at the architectonic level, in the creation of the protocols themselves. It is this blindness that distinguishes tunnel constructivism.[5] The second property, blindness to consequences, is unhappily equally routine. It usually reflects nothing more than the limits of human intelligence. In the specific pathology I am describing, the blindness is an effect of the constructivism: a plan of action is clung to in the teeth of manifestly destructive results, because the actor is in the grip of a philosophical construct that tells him that these results don't matter. In the free speech area, the aim of tunnel constructivism is not merely to prevent judges from considering consequences. Again, all law does that. The aim is to insulate an entire civilization from cognizing certain consequences of legal rules.

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[4] I owe this formulation to Frederick Schauer.

[5] Of course, this blindness doesn't matter if the consequences being neglected are in fact negligible, or if the common-sense tendency to care about them is itself pathological, for example by being a manifestation of prejudice. (That is the appeal of the ideal of color-blindness in law, for example.) What makes tunnel constructivism pathological is that it ignores consequences that manifestly matter.

If my real grievance is consequence-insensitivity, why is deduction part of the definition?[6] I do so because tunnel constructivism is a distinctive syndrome. Compare a case where a medicine causes diabetes in some patients. The grievance is diabetes, but etiology matters: diabetes has many causes, most of them unrelated to this drug. The pattern of causation between this drug and the diabetes is a distinctive problem. If you want to prevent diabetes, you should disaggregate its causes and study them one at a time. Similarly, consequence-insensitivity has many causes. Here I examine one of them, a distinctive kind of abuse of constructivism.

Tunnel constructivism is not the only way to understand the First Amendment. The effort to deduce free speech rules from a parsimonious set of principles is a fairly recent development, emerging only in the 1970s. The idea of free speech, on the other hand, dates back to Milton's arguments in the 1640s. This Article will identify the pathologies of tunnel constructivism, and recover an older and more attractive free speech tradition.

That tradition is not deductive at all. It is frankly result-oriented. It aims at a vibrant sphere of public discourse, in which antagonistic views compete for public acceptance, and in which dissenting ideas proliferate. It rests on mutually reinforcing ideals of individual character and collective identity. Rules are tools that are created in order to protect the functioning of this sphere. Judges are given discretion to devise such rules for the mundane reason that they are more likely than legislatures to protect speech in an appropriate way. The test of any rule is precisely its consequences: does it help to produce thriving public discussion and culture in a society of free, self-governing people?

I begin with three examples of the pathologies of tunnel constructivism.

Campaign finance reform legislation typically imposes restrictions on campaign contributions and independent expenditures on elections. Such restrictions raise First Amendment issues, because they restrain political communication, but it is argued that they are necessary to the compelling purpose of preventing political corruption. Sometimes, when private interests spend large amounts of money helping officeholders to get elected, their reward is that they get to decide what the officeholders do with their offices. In the limit case, large donors can effectively purchase influence and

[6] Thanks to Vince Blasi for pressing me on this question. Both he and Richard Fallon demanded a clearer general definition of the kind of constructivism that I am criticizing.

then write legislation, confident that legislators who owe them favors will rubber-stamp what they have produced.

Opponents of such restrictions have offered two responses. One is to challenge reform's empirical basis – to claim that large donations and independent expenditures do not purchase political influence. (I express no opinion here about whether they are right.) If the empirical predicate of the legislation is false, then it cannot constitute a compelling interest. Everything turns on the correct description of the world.

However, the Supreme Court, when it recently invalidated the McCain-Feingold campaign finance law in *Citizens United v. FEC*, offered a different answer. It declared that even if these empirical claims of purchased political power are accurate, *it doesn't matter*. When there are restrictions on campaign speech by private donors, "the electorate [is] deprived of information, knowledge, and opinion vital to its function."[7] Any restriction on campaign speech "uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."[8] Even if large amounts are spent to influence elections, and even if the large spender succeeds in swaying the result and so purchases the winner's gratitude (or fear), this willingness to spend "presupposes that the people have the ultimate influence over elected officials."[9] The donor may have frequent access to the official, and the official may respond to each of the donor's concerns with an abject eagerness to please, but this is not corruption unless it can be shown that there is a direct, one-for-one trade of financial support for legislative favors. "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."[10] The way in which the Court conceives the world entails that the alleged corruption is invisible and irrelevant.

The tobacco industry depends on recruiting teenagers: 60% of smokers begin before the age of 14,[11] and 90% begin smoking before the age of 20.[12] Nicotine is perhaps the most addictive drug in existence, far more so than heroin or cocaine.[13] Most smokers want to quit and are unable to do so.[14]

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[7] *Citizens United,* 130 S.Ct. at 907, quoting United States v. CIO, 335 U.S. 106, 144 (1948)(Rutledge, J., concurring in the result).
[8] Id. at 908.
[9] Id. at 910.
[10] Id.
[11] See Vincent Blasi & Henry Monaghan, *The First Amendment and Cigarette Advertising*, 256 JAMA 502, 503 (1986).
[12] Mark Kleiman, Against Excess: Drug Policy for Results 451 n.27 (1992).
[13] Kleiman reports:

> Some evidence about what might be thought of as capture ratios for various drugs – the proportion of their users who go on to compulsive

There is substantial evidence that advertising helps induce teenagers to begin smoking,[15] and on this basis, tobacco advertising has been severely restricted.[16]

In *Lorillard Tobacco v. Reilly*,[17] however, the Court invalidated a statute barring billboard advertising of tobacco products within 1,000 feet of a school or playground. The Court did not dispute the state's evidence that tobacco advertising helps recruit children to the use of an addictive and deadly drug.[18] Even if these claims were true, *it didn't matter*. "We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products."[19] The burden on speech, the Court held, was too "onerous"[20] to survive scrutiny.

> use – comes from the surveys conducted by the Gordon S. Black Corporation. Respondents were asked both whether they had ever tried a given drug and whether they had ever "felt 'hooked' on" that drug. Nicotine was the outlier: 59 percent of those who had ever smoked a cigarette reported that they had been dependent at one time or another. The only other form of drug taking with a capture ratio greater than 1 in 5 was smoking cocaine (22 percent). The ratios for the other three powerful mass-market drugs were remarkably close together: 17.1 percent for alcohol, 16.6 percent for powder cocaine, and 13.7 percent for marijuana.

Id. at 41-42.

[14] The New York Times reports:

> Cigarette profits are growing thanks to price increases and a customer base of people who haven't kicked the habit. About 70 percent of the nation's 46 million smokers say they want to quit, government surveys show, and about 40 percent try every year. But only 2.5 percent succeed, the surveys say. The government estimates that 400,000 Americans die of smoking-related diseases each year.

Duff Wilson & Julie Creswell, *Where There's No Smoke, Altria Hopes There's Fire*, N.Y. Times, Jan. 31, 2010, at BU1.

[15] For example,

> children smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing. Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized "Joe Camel," the cartoon anthropomorphic symbol of R.J. Reynolds' Camel brand cigarettes. After the introduction of Joe Camel, Camel cigarettes' share of the youth market rose from 4% to 13%.

Lorillard Tobacco v. Reilly, 533 U.S. 525, 558 (2001), citations omitted.

[16] Most recently, the Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. 111-31, 123 Stat. 1776, gave the Food and Drug Administration broad authority over tobacco, including the power to regulate tobacco marketing. The constitutionality of this provision has not yet been tested.

[17] 533 U.S. 525 (2001).

[18] Id. at 556-61.

[19] Id. at 564.

[20] Id.

With both campaign finance and tobacco advertising, the Court thought that unrestricted speech simply means that the public is getting more information. Perhaps, in both cases, the public is being manipulated and harmed. The Court held, in both cases, that *awareness of the manipulation and the harm are impermissible from the standpoint of free speech theory*, which must assume, in the teeth of massive evidence to the contrary, that citizens are competent and capable of processing information.[21]

More generally, free speech theory seems to prohibit government restrictions on speech that are based on the desire to have certain kinds of speech flourish more than others. This kind of attention to consequences is treated as a kind of covert viewpoint discrimination, and viewpoint discrimination is always impermissible.

This requirement of blindness to consequences makes it hard even to cognize one of the most pressing contemporary free speech issues, the impact of copyright law on speech. Any modification of existing copyright law – in fact, any copyright law at all - requires precisely a tradeoff between different forms of speech, which must inevitably be animated by a choice about which of these forms is judged most desirable.

Consider the most parsimonious possible rule of copyright, one that bars the simple copying of copyrighted works.[22] Copyright is a source of income for authors, and creates an incentive for them to produce speech. But it does so by stifling other speech. When pirate editions are suppressed, that keeps the work out of the hands of some people who would otherwise read it.[23] We are trading some speech for other speech.

The same is true of any other rule of copyright law. Whatever level of protection is given to authors gives them an additional degree of incentive to produce, while simultaneously choking off the production of speech that would otherwise be

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[21] On the pervasiveness of this assumption, see Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 Ill. L. Rev. 799. Lidsky capably shows that audiences must be assumed to possess this kind of rationality for some free speech purposes. It does not follow that such rationality must be stipulated in all cases. See also Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 Creighton L. Rev. 579 (2004); Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 Vand. L. Rev. 199 (1983).

[22] This was the law at the time of the original Constitution. See Neil Netanel, Copyright's Paradox 59 (2008).

[23] Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 Houston L. Rev. 697, 726 (2003).

produced. You can't have one without the other. If such judgments are impermissible, then it is impossible even to begin to think about copyright law's effect on free speech.

Neil Netanel observes that copyright "has come increasingly to resemble and be thought of as a full-fledged property right rather than a limited federal grant designed to further a particular public purpose."[24] When copyright law was first enacted in 1790, the maximum term was 28 years;[25] now it can exceed 100 years.[26] Authors were originally free to build upon, reference, comment upon, or parody previous works. Today, authors can be sued if they merely appropriate themes or storylines from earlier works, and composers may be liable if their work creates an "impression of similarity" with previous work.[27] Speech-protective limitations on copyright, such as the rule that original expression is protected but ideas are not, the privilege of de minimis copying, and the privilege of "fair use," have all been weakened.[28] The consequence has been a massive chilling of speech, which has redounded to the benefit of a few large media conglomerates such as Time Warner and the Disney Corporation that own enormous inventories of well-known copyrighted works.

The Court's only serious engagement with this problem was *Eldred v. Ashcroft*,[29] which upheld Congress's decision to extend existing copyright terms for an additional 20 years, keeping a huge number of works out of the public domain for 120 years after their creation. There was no corresponding benefit for speech, because Congress in 1998 could not create additional incentives for authors in 1923. The Act was, in large part, a response to lobbying by large corporate copyright holders. The consequence was a heavy burden on speech, because authors' ability to build on earlier work – and nearly all creators do this – was massively restricted. Yet the Court upheld the Act with remarkable insouciance, showing little cognizance of what was at stake.[30] "The First Amendment securely protects the freedom to make--or decline to make--one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."[31] Eugene Volokh, drawing on a series of canonical First Amendment cases, has shown how inconsistent this is with the rest of free speech law:

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[24] Netanel, Copyright's Paradox, at 6.
[25] Id. at 57.
[26] Id. at 57-58.
[27] Id. at 58-59.
[28] Id. at 61-66.
[29] 537 U.S. 186 (2003).
[30] The opinion's weaknesses are anatomized in Netanel, Copyright's Paradox, at 172-85.
[31] *Eldred*, 537 U.S. at 221.

> Speakers often express themselves using words or symbols that communicate their own feelings or ideas more effectively than what they themselves could have created. Johnson, for instance, didn't invent flag burning, and the Tinkers didn't invent black armbands. Cohen may have taken the "Fuck the Draft" line from someone else, or perhaps may have even bought a ready-made jacket with that text. Union members regularly hand out leaflets written by others. Whenever someone waves a flag, distributes Bibles, or sings a song (whether a protest song or a love song) that others wrote, he is expressing himself using "other people's speech[]," at least in the sense of speech written (and sometimes even owned) by other people.[32]

The Court in *Eldred* evidently relied on a model of speech that fails to correspond to the way in which speech actually is generated in the world. Once more, that reality has somehow been filtered out of the picture.

In campaign finance, in tobacco advertising, and in copyright, the Court's way of thinking about free speech demands that certain destructive consequences of speech rules simply do not count, that they must be invisible to us.

Of course, any law of free speech will be, to some extent, deductive and consequence-insensitive. Legal claims must be honored whenever their elements have been proven by the party who invokes them.[33] This narrowing of the legal horizon is especially important in free speech law, which aims to protect unpopular, dissenting viewpoints. In the three cases just discussed, however, deduction and consequence-insensitivity prevail even at the architectonic level, in the design of the rules themselves.

The approach to free speech that now dominates the Court's thinking is not the only way to think about free speech. It is the product of an intellectual style that is fairly recent and only loosely connected to the foundational commitments that are the basis of the free speech tradition. A turn back to those foundations reveals that free speech theory can be far more flexible and capable of accommodating reality than the Court's approach implies.

These pathologies are the consequence of *free speech tunnel constructivism*: the effort to work out determinate rules of

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[32] Volokh, *Freedom of Speech and Intellectual Property* at 726-27, footnotes omitted.

[33] Clifford Geertz observes that "the defining feature of legal process" is "the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them." Local Knowledge: Further Essays in Interpretive Anthropology 170 (2d ed. 2000).

free speech from a few simple premises, and to filter out all information not involved in that deductive enterprise. It takes multiple forms, because different constructivisms have different starting points, but it is united by its style of reasoning.

Free speech tunnel constructivism in its pure form is only to be found in the academy. The Supreme Court has never adopted a single constructivist theory of speech. But constructivism's deductive style, and in particular its tendency to filter salient harms of speech out of consideration even at the highest level of decisionmaking, has become a part of Supreme Court jurisprudence. Some of free speech constructivists' most urgent concerns, such as the protection of campaign contributions and commercial speech, are now the law.

There have been two waves of tunnel constructivism in free speech theory. The first wave attempted a positive account of free speech, working out detailed doctrinal prescriptions. More recently, skeptical writers, criticizing the work of the first wave but sharing its assumption that any free speech theory must be tunnel constructivist, have concluded that no coherent defense of free speech is possible.

This Article proposes a different approach. Free speech, I will argue, is an historical artifact, aiming at a contingent set of purposes that have emerged from the Protestant Reformation, the scientific revolution, emergent patterns of democratic governance, and the Romantic ideal of authenticity. It is neither a deduction from first principles nor unbounded intuitionism. It is a practice that aims at a specific result, the realization and preservation of distinctive, interlocking ideals of individual character and public discourse –ideals that first emerged in the 1600s and that persist today. Because this practice coexists with other ideals and goals, the boundaries of free speech are necessarily indefinite and contestable. More importantly, the rules that properly constitute it are contingent on their likelihood, in any given social and political context, of achieving the complex set of goals that is their purpose.

It is generally possible to apply the rules of free speech without attention to its historical and cultural roots. But occasionally a problem arises that requires attention to foundations. The three problems I described at the beginning of this Article are examples.

Part I of this Article introduces constructivism by describing the work of John Rawls, the most prominent modern constructivist political theorist (and the coiner of the term), and James Madison, principal author of the First Amendment and, I shall argue, the most successful constructivist theorist of free speech. It concludes by noting the limitations of

Madison's approach, with illustrations from incitement and defamation law. Part II examines modern free speech tunnel constructivism, primarily by a critique of its most distinguished and persistent exponent, Martin Redish. I also engage the new negative tunnel constructivists, Larry Alexander and Stanley Fish. Part III describes the earlier tradition, focusing on John Milton and John Stuart Mill, and more briefly considering free speech's leading defenders in the early twentieth century such as Oliver Wendell Holmes, Louis Brandeis, Alexander Meiklejohn, and the most influential theorist just before the new wave of tunnel constructivist theories, Thomas Emerson. Part IV offers a synthesis of this tradition, describing the institutions and traits of personal character upon which the system of free expression depends. Rules are to be judged by how well they keep these in good working order. Part V returns to the problems with which the Article began by showing that a more substantive approach to free speech law can do better than tunnel constructivism at producing sensible answers to the problems of campaign finance, commercial speech, and copyright law. Part VI concludes.

I. Constructivism

A. Rawlsian constructivism

Constructivism in free speech theory is often presented as the only possible way to think about free speech, but it is a recent development. It begins in the early 1970s. During this time, the work of John Rawls was creating a revolution in political philosophy. Before Rawls wrote, Judith Shklar reports, Anglo-American philosophers scrupulously eschewed any substantive claims about morality or politics, because they "were determined not to compromise the rational purposes of conceptual clarification with expressions of purely personal feeling."[34] It was thought that normative political philosophy was dead: utilitarian, Marxist, and natural rights ideas had all been shown to be equally indefensible.[35]

Rawls brought about a methodological revolution. "The instant achievement of *A Theory of Justice* was to show that questions of great ethical urgency, such as the proper balance between liberty and equality, could be discussed without the slightest loss of rational rigor or philosophical rectitude."[36] Even those who disagreed with details of Rawls's theory – the

[34] Judith N. Shklar, *Injustice, Injury, and Inequality: An Introduction*, in Justice and Equality Here and Now 13 (Frank S. Lucash ed. 1986).
[35] Ian Shapiro, Political Criticism 3-4 (1990).
[36] Shklar, *Injustice, Injury*, at 13.

most prominent example was the libertarian Robert Nozick[37] - were nonetheless impressed by this possibility. By the early 1980s there was an explosion of new work in normative political theory.[38]

It probably is not coincidental that in the decade following the publication of Rawls's book, there was a similar proliferation of free speech theories in the Rawlsian style, attempting to deduce a detailed doctrinal structure from a narrow set of premises.[39] Different theorists relied on different premises. Robert Bork, Lillian BeVier, and John Hart Ely invoked democracy.[40] David Richards invoked individual dignity.[41] T.M. Scanlon invoked Millean self-direction.[42] C. Edwin Baker invoked self-expression.[43] Benjamin DuVal invoked the need to correct erroneous beliefs.[44] Martin Redish invoked self-realization.[45]

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[37] See Robert Nozick, Anarchy, State, and Utopia (1974).

[38] See Shapiro, Political Criticism, at 3-8.

[39] The similarity between these theories and that of Rawls is noted in Steven H. Shiffrin, The First Amendment, Democracy, and Romance 110-39 (1990).

[40] Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975).

[41] David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974).

[42] T.M. Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972).

[43] C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. Rev. 964 (1978); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1 (1976).

[44] Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest For Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 Geo. Wash. L. Rev. 161 (1972).

[45] Martin Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900 (1971); Martin Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 George Washington L. Rev. 429 (1971). I also note Thomas Jackson and John Jeffries, who thought free speech rested on two values, democracy and individual self-fulfillment. Thomas Jackson & John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 (1979).

Although the 1970s saw a great deal of scholarship in the constructivist style, there are important exceptions. The treatment in Laurence H. Tribe, American Constitutional Law 576-736 (1st ed. 1978), is very much in the mode of Thomas Emerson, discussed infra text accompanying notes 310-326: some general speech values are set forth, id. at 576-79, and then he proceeds forthwith to try to devise doctrines consistent with, but not deduced from, these values. Vincent Blasi, *The Checking Value in First Amendment Theory,* 1977 Am. Bar Found. Res. J. 521 (1977), emphasizes the function of speech in checking the abuse of official power, but states: "I do not purport to offer a comprehensive ordering of First Amendment values or

It is impossible to prove causation here, just as it is impossible to prove that, as Leonard Krieger alleges in his history of 18th century Europe, Pietist Protestantism and the German Enlightenment's growing emphasis on the emotions is reflected in the growing fluidity and passion of the later music of Haydn and Mozart.[46] The similarity of argumentative style is nonetheless striking. More importantly, although these writers' arguments partook of many of the strengths of Rawls's approach, they also acquired, and indeed accentuated, his vulnerabilities.

Political constructivism, as Rawls understands it, begins with a conception of free and rational persons, which Rawls thinks is implicit in modern democratic culture. It holds that "the principles of political justice (content) may be represented as the outcome of a certain procedure of construction (structure)."[47] Constructivism in ethics holds that ethical principles are constructed by human agents for human purposes, that they can establish practical prescriptions, and that those recommendations can be justified.[48] The constructivism Rawls offers "holds that moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept. Apart from the procedure of constructing the principles of justice, there are no moral facts."[49]

Rawls uses the term "constructivism" in a retrospective description of his own work. It does not appear in *A Theory of Justice*.[50] The description is nonetheless apt. The parsimonious conception of persons and their needs in the original position, and the decision procedure modeled in *A Theory of Justice*, generates the principles of justice. Rawls aims to show that acceptance of those principles "is the only choice consistent with the full description of the original position. The argument aims eventually to be strictly deductive."[51]

Rawls is not however a tunnel constructivist, because the deductions take place within a larger account of justification

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to suggest that the checking value should form the cornerstone of all First Amendment analysis." Id. at 528.

[46] Leonard Krieger, Kings and Philosophers, 1689-1789, at 151, 218 (1970).

[47] John Rawls, Political Liberalism 90 (expanded ed. 1996).

[48] See Onora O'Neill, *Constructivism in Rawls and Kant*, in The Cambridge Companion to Rawls 348 (Samuel Freeman ed. 2003). O'Neill also notes that the term "constructivism" is commonly used to refer to antirealist views, which holds that there are no distinctively moral facts or properties. Id. at 347-48. This aspect of constructivism is irrelevant here.

[49] John Rawls, *Kantian Constructivism in Moral Theory*, in Collected Papers 307 (Samuel Freeman, ed., 1999).

[50] See O'Neill, *Constructivism in Rawls and Kant*, at 350.

[51] John Rawls, A Theory of Justice 121 (1971); revised ed. at 104 (1999).

that he calls "reflective equilibrium," in which we try to bring our considered moral judgments into line with our more general principles. "A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is the matter of the mutual support of many considerations, of everything fitting together into one coherent view."[52] Any general theory must be consistent with the specific judgments "in which we have the greatest confidence," such as our judgments "that religious intolerance and racial discrimination are unjust."[53] These are "provisional fixed points which we presume any conception of justice must fit."[54] The deduction, in short, does not always go in one direction. "It is a mistake to think of abstract conceptions and general principles as always overriding our more particular judgments."[55]

Freedom of thought and speech, Rawls thought, were among the basic liberties that his theory entailed.[56] The protection of sedition, for example, was a necessary condition of democracy.[57] But his endorsement of free speech was qualified by his more fundamental commitments. He was prepared to limit speech for the sake of political liberty, which "must be approximately, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions."[58] For these reasons, he criticized the Supreme Court's unwillingness to let Congress freely regulate campaign finance, and supported public financing of campaigns, limits on private political advertising paid for by interested industries, and access to public broadcasting.[59]

Samuel Freeman has observed that the "overriding concern" of all of Rawls's work "is to describe how, if at all, a well-ordered society in which all agree on a public conception of justice is realistically possible."[60] A well-ordered society, for Rawls, "is a society all of whose members accept, and know that the others accept, the same principles (the same conception) of justice."[61] The aim is a stable basis for

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[52] Id. at 21/19 rev.
[53] Id. at 19/17 rev.
[54] Id. at 20/18 rev.
[55] Political Liberalism at 45. For a good discussion of the role of reflective equilibrium in Rawls, see Samuel Freeman, Rawls 29-42 (2007).
[56] The basis for this conclusion was underspecified in *A Theory of Justice*. He clarified it in his later work. See Freeman, Rawls at 53-59.
[57] Political Liberalism at 342.
[58] Id. at 327.
[59] Id. at 356-63.
[60] Samuel Freeman, Justice and the Social Contract: Essays in Rawlsian Political Philosophy 4 (2007).
[61] John Rawls, *A Kantian Conception of Equality*, in Collected Papers at 255.

mutually respectful political life in a society that is profoundly divided about the good life. Political liberalism is first and foremost a response to a problem: "how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"[62]

Rawls's answer is that citizens can agree upon the basic structure that would be agreed to by parties in the hypothetical "original position," in which a "veil of ignorance" prevents any of the parties from knowing such morally irrelevant facts as their position in society and conception of the good.[63] The argument depends, of course, on a prior determination that what is put behind the veil is in fact morally irrelevant.[64]

Rawls argues that people with different comprehensive conceptions of the good – and difference about such comprehensive conceptions is a chronic condition of modern society - can and should reach an "overlapping consensus" on the principles of political cooperation. In an overlapping consensus, they may disagree about the ultimate foundations of the political principles that govern them, but they agree upon the principles, those principles are moral ones, and they are affirmed on moral grounds.[65] Rawls's aspiration depends on there being enough people with reasonable comprehensive views to make an overlapping consensus possible.

Rawls's constructivism intentionally abstracts away from the objects of disagreement. Political liberalism, he argues, should be freestanding, so that it "can be presented without saying, or knowing, or hazarding a conjecture about, what [comprehensive] doctrines it may belong to, or be supported by."[66] "[T]he political conception of justice is worked out first as a freestanding view that can be justified *pro tanto* without looking to, or trying to fit, or even knowing what are, the existing comprehensive doctrines."[67] Whether it abstracts too

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[62] Political Liberalism at 4.

[63] See A Theory of Justice, passim.

[64] The argument works better with one's position in society than it does with one's conception of the good: I value ends, not because they happen to be mine, but because I think they are worthy, worthy for anyone. See Robert P. George, Making Men Moral: Civil Liberties and Public Morality 129-39 (1993); George Sher, Beyond Neutrality: Perfectionism and Politics 79-83 (1997).

[65] Political Liberalism at 144-50.

[66] Id. at 12–13.

[67] John Rawls, *Reply to Habermas*, 92 J. Phil. 132, 145 (1995). For similar formulations, see Political Liberalism at xlvii; *The Idea of Public Reason Revisited*, in Collected Papers at 585; John Rawls, Justice as Fairness: A Restatement 37, 188–89 (2001). T. M. Scanlon explains why the strategy of surveying actual comprehensive views would not be satisfactory to Rawls. "It would be impossible to survey all possible comprehensive views and inadequate, in an argument for stability, to consider just those that are

much is an open question. The exactness of the physical sciences, Albert Johnsen and Stephen Toulmin observe, "is purchased only at a price. They are 'exact and idealized' because they are highly *selective*: they pay direct attention only to circumstances and cases that are 'abstracted' (i.e., selected out) as being relevant to their central theoretical goals."[68] Rawls similarly abstracts away from the plurality of comprehensive conceptions of the good.

Rawls understands that each person must fit the constructivist theory back into their own comprehensive conception in order for it to be persuasive to them. He never abandons the method of reflective equilibrium. The political conception Rawls offers "is a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it."[69] In order to accept constructivism in its strongest form, you must accept the starting point and every inference that is drawn from that starting point, and you must be prepared to override all values that conflict with those inferences. Constructivism is always an iceberg floating on an ocean of comprehensive views, solidified because of the circumstances that make this kind of theory necessary, but fundamentally made of the same stuff in which it is afloat. Constructivism may be deductive and consequence-insensitive, but the comprehensive conceptions on which it depends need not be, and probably cannot be. Rawls, once more, is not a tunnel constructivist, though the parties in the original position may give that impression.

Because many starting points are available, many constructivisms are possible. "[N]ot everything can be constructed and every construction has a basis, certain materials, as it were, from which it begins."[70]

An example of a tunnel constructivism that produces results antithetical to Rawls's own ideal of political equality is minimal-state libertarianism, which would forbid any redistribution of resources and permit the state only to enforce rules of property and contract. Libertarians begin with a conception of each person as a holder of whatever property he may find himself in possession of in the actual world, and then deem whatever private contracts these persons enter into to be just. Libertarianism is blind to the consequences of its

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represented in a given society at a given time since others may emerge at any time and gain adherents." *Rawls on Justification*, 164. On the other hand, as this Article will try to show, a consensus built around the convergence of a contingent set of actual views may last a long time.

[68] Albert R. Johnsen & Stephen Toulmin, The Abuse of Casuistry: A History of Moral Reasoning 31 (1988).

[69] Political Liberalism at 12.

[70] John Rawls, *Themes in Kant's Moral Philosophy*, in Collected Papers at 514.

construction of rights. There may be vast political inequalities. Some people may even be forced to accept slavery.[71] But since the process by which this result was reached was a just one, these inequalities do not matter. This vision of a just society is not liberalism, but rather resembles its ancient adversary feudalism, in which parties trade their allegiance for protection by the powerful.[72] In libertarianism, the idea of a common good, understood as the freedom of each individual to pursue his own freely adopted conception of the good so long as it is consistent with justice, disappears. The fundamental error of libertarianism is that it takes existing property rights for granted and fetishizes them, instead of recognizing property as an institution constructed by human beings for human ends, the details of which can and should be specified with those ends in mind.[73]

Tunnel constructivism is strictly speaking not refutable. It generates a closed system of results that follow from its premises, and a proponent can insist on those results regardless of the consequences. However, there must be a threshold decision whether to be constructivist, and this will depend on the cost, as assessed in terms of one's comprehensive view. That cost may be too high.[74]

The cases with which we began show that, as with Rawlsian constructivism, the Court addressing free speech cases uses a veil of ignorance to filter out facts it regards as not properly relevant to decisions about which speech the law may suppress. Here, too, the threshold decision to be tunnel constructivist demands justification.

B. Madisonian constructivism

The paradigm of free speech constructivism, in part because the author is the principal drafter of the First Amendment and

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[71] See Susan Moller Okin, Justice, Gender, and the Family 74-88 (1989).

[72] Samuel Freeman, *Illiberal Libertarians: Why Libertarianism is Not a Liberal View*, 30 Phil. & Pub. Aff. 105 (2001).

[73] On the specific flaws of Nozick's libertarian critique of Rawls, see Thomas W. Pogge, Realizing Rawls 15-62 (1989). The weaknesses of libertarianism are further explored in Andrew Koppelman with Tobias Barrington Wolff, A Right to Discriminate? How the Case of *Boy Scouts of America v. James Dale* Warped the Law of Free Association (2009).

[74] See Andrew Koppelman, *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, 71 Rev. Pol. 459 (2009); Andrew Koppelman, *The Fluidity of Neutrality*, 66 Rev. Pol. 633 (2004). Rawls increasingly appreciated this in his later work, in which he narrows the range of claims he thinks can be justified, makes more limited claims about the justifications that can be shared, and makes clear that he is writing only to an audience of people who already live in liberal democracies and value its institutions. See O'Neill, *Constructivism in Rawls and Kant*, at 349-53.

in part because it is one of the most powerful constructivist arguments that has ever been devised, is James Madison's 1799 *Report on the Virginia Resolutions*.

The Sedition Act of 1798 made it a crime to write about Congress or the President "with intent to defame" or "to excite against them . . . the hatred of the good people of the United States."[75] Madison wrote a resolution, subsequently enacted by the Virginia legislature, declaring that the Sedition Act was unconstitutional. The Act, the resolution declared, "ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[76] He supported the resolution with a report elaborating on its claims. Madison's best argument was the following:

> 1. The Constitution supposes that the President, the Congress, and each of its houses may not discharge their trusts, either from defect of judgment or other causes. Hence, they are all made responsible to their constituents, at the returning periods of election; and the President, who is singly entrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.
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> 2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the government may not have duly discharged its trust, it is natural and proper that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.
>
> 3. Whether it has, in any case, happened that the proceedings of either, or all of those branches, evince such a violation of duty as to justify a contempt, a disrepute or hatred among the people, can only be determined by a free examination thereof, and a free communication among the people thereon.[77]

If public officials are to be held accountable by elections, then the electors must be able to discuss among themselves the merits of the officeholders.

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[75] Ch. 74, § 2, 1 Stat. 596, 596-97 (1798).
[76] James Madison, *The Virginia Report*, *in* Marvin Meyers ed., The Mind of the Founder: Sources of the Political Thought of James Madison 243 (rev. ed. 1981).)
[77] Id. at 263-64.

The argument is elegant and sound, in part because it relies not at all on the ambiguous text of the First Amendment. It rather infers a right of free speech from the structural commitment to elections. Madison considers citizens only in their capacity as voters, ignoring everything else about them. If citizens are voters, then it follows that they may choose to vote out the incumbents. If they are to do that, then they must be able to communicate with one another about the merits of the proposition that the incumbents should be voted out of office. But the Sedition Act bars them from doing that. Ergo, the Sedition Act is inconsistent with the democratic structure.

C. The Limits of Madisonian constructivism

Even here, though, Madison is not a tunnel constructivist. He finds it necessary implicitly to deny the view – held by, among others, Alexander Hamilton[78] - that prohibitions of sedition are necessary for democracy, because seditious speech tends to drive good and capable people away from public office, thus hamstringing democracy in a different way.[79] And he certainly rejects the view famously laid down in *Tuchin's Case*, that "it is very necessary for all governments that the people should have a good opinion of it."[80] He does not even mention, much less confront, these empirical issues.

Nor does Madison attempt anything like a complete theory of free speech. His argument is narrowly confined to the case he is addressing, the targeted suppression of seditious speech. He does not address the protection of any other kind of speech,[81] or even the burdening of seditious speech through means other than

[78] Geoffrey Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism 34 (2004).

[79] The argument has never gone away. Similar concerns were stated by then-Judge (later President and Chief Justice) William Howard Taft, see David M. Rabban, Free Speech in its Forgotten Years 160 (1997), and by Justice Byron White, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 400 (1974)(White, J., dissenting). It is one reason why no other jurisdiction has adopted as speech-protective an approach toward defamation of public officials as American law. See Gatley on Libel and Slander 547-62 (Patrick Milmo et al., eds., 11th ed. 2008); Eric Barendt, Freedom of Speech 198-26 (2d ed. 2005).

[80] Tuchin's Case (1704), quoted in Leonard Levy, Emergence of a Free Press 9 (1985).

[81] Others have tried to work out the implications of Madison's argument. Robert Bork famously argued, on the basis of Madison's premises, that only political speech was protected. Bork, *Neutral Principles,* supra note 40. Alexander Meiklejohn, another neo-Madisonian, resisted this conclusion, but had difficulty explaining why. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 256-57. For an attempt to push the Madisonian premises to their outer limit, see Andrew Koppelman, *Madisonian Pornography or, The Importance of Jeffrey Sherman*, 84 Chi.-Kent L. Rev. 597 (2009).

sedition laws, such as the prohibition of incitement to crime, or the ordinary common law tort of defamation.

Madison's view did not prevail in the courts until the twentieth century, but arguments like his were made, albeit less rigorously, by many others at the time he was writing, and they kept on being made for many years afterward. It quickly became part of conventional wisdom that the Sedition Act had been improper and that discussion, at least of public political matters, was constitutionally protected.[82] Its power rested less on logic than on settled practice: Leonard Levy notes the "nearly epidemic degree of [unpunished] seditious libel that infected American newspapers after Independence."[83] In the popular culture, however, the claim for free speech lost its logical, constructivist edge, and became merely a set of slogans – slogans that were nonetheless politically powerful, and contributed to a vibrant culture of free discussion, at least outside the slaveholding South.[84]

Madison was a touchstone for thinking about the incitement question beginning with Learned Hand's justly celebrated opinion in *Masses Pub. Co. v. Patten*,[85] which tried to use Madisonian premises in order to cabin the speech-repressive implications of the World War I espionage law. The statute, Hand argued, could not reasonably be construed to "contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn on the justice of its substance or the decency and propriety of its temper."[86] Hand's argument, however, was not merely deductive. He relied on many premises not derivable from the fact of democracy itself, such as the premise that juries are likely to unfairly attribute an illegal purpose to a speaker who articulates an unpopular view.[87] The same point can be made about the other speech-protective incitement tests that have been devised, from the dissenting opinions of Holmes and Brandeis to the Supreme Court's exceedingly speech-protective test in *Brandenburg v. Ohio*.[88] All rest on evaluative and predictive judgments that it is better to tolerate than to repress speech that advocates law violation, so

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[82] See Michael Kent Curtis, Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History 52-116, 205-215 (2000).
[83] Levy, Emergence of a Free Press, at x.
[84] See generally Curtis, Free Speech.
[85] 244 F. 535 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917).
[86] Id. at 540.
[87] See the collection of materials on Hand in Ideas of the First Amendment 467-541 (Vincent Blasi ed. 2006).
[88] 395 U.S. 444 (1969).

long as the connection between the speech and the crime is at least somewhat attenuated.[89]

New York Times v. Sullivan[90] cites and relies on Madison,[91] but it, too, is not resolvable by Madisonian logic alone. The suit against the *Times* did not involve a sedition law. Yet it was obvious that tort law was being used by a government official to suppress unwelcome criticism. It was also clear that tort law's rules of strict liability for defamation could be the functional equivalent of a sedition law, by deterring criticism of public officials.[92] The Court however had no way to know how much valuable speech was deterred by defamation law, or how harmful this was to the political process.[93] The Court's argument untidily pulls together a number of different considerations to support its result: the analogy with seditious libel, the danger of chilling valuable speech, the public's duty to engage in political debate, and the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[94] The opinion also relies on a Stoical character ideal, constituting the public realm as a necessarily hurtful place where officials must be willing to forfeit the protections against defamation that ordinary citizens enjoy.[95] The Court reaches for the best alternative to common-law libel that happens to be on offer at the time: a minority rule in some state courts that comment on public affairs is presumptively privileged.[96] There is no deduction to a predetermined conclusion.[97] The opinion's

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[89] See Richard H. Fallon, Jr., The Dynamic Constitution: An Introduction to American Constitutional Law 41 (2004); Frederick Schauer, *Is it Better to Be Safe than Sorry? Free Speech and the Precautionary Principle*, 36 Pepperdine L. Rev. 301 (2009).

[90] 376 U.S. 254 (1964).

[91] See id. at 274-75.

[92] See Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America 60-73 (1988).

[93] Harry H. Wellington, *On Freedom of Expression*, 88 Yale L.J. 1105, 1113, 1115 (1979). Subsequent research has gone some way toward clarifying these questions, though much remains to be done. See, e.g., The Cost of Libel: Economic and Policy Implications (Everette E. Dennis & Eli M. Noam, eds. 1989). Inasmuch as the correct answer depends on contingent facts, it would be very helpful to learn what the facts are.

[94] *Sullivan*, 376 U.S. at 270.

[95] John Durham Peters, Courting the Abyss: Free Speech and the Liberal Tradition 167 (2005).

[96] Kalven, A Worthy Tradition, at 61.

[97] Fallon notes that Ronald Dworkin's attempt to justify the decision on constructivist grounds ignores the crucial role of instrumental calculations about the amount of self-censorship, good and bad, that the press would engage in under different liability regimes. Richard H. Fallon, Jr., Implementing the Constitution 28-31 (2001). Although one of Fallon's leading articles is *A Constructivist Coherence Theory of Constitutional*

unifying theme, Daniel Farber and Philip Frickey observe, is that it is "informed by an overall vision of a free society."[98] The Court in *Sullivan* is not merely making a particular judgment, however. It is laying down a rule that will govern future cases.

Free speech necessarily involves abstraction, a blinkering of particulars. As Frederick Schauer observes, in free speech law "Nazis become political speakers, profit maximizing purveyors of sexually explicit material become proponents of an alternative vision of social existence, glorifiers of sexual violence against women become advocates of a point of view, quiet residential streets become public forums, and negligently false harmful statements about private matters become part of a robust debate about issues of public importance."[99] These rules however remain *created*, with a discretion that is essentially legislative, and "anything short of permanent and conclusive entrenchment must permit the judge in every case to perceive all of those factors that might in the rare case lead to modification of the entrenched category."[100] Free speech law imposes veils of ignorance on the lower courts which administer it. They have to ignore facts that ordinary people would think highly relevant. But the architects of law do not belong behind that veil. They must construct the rules in full awareness of their probable consequences.

II. Modern free speech constructivism

Modern free speech constructivists, as noted earlier, do not all follow Madison in the core value from which they deduce their speech-protective rules. Some, like Madison, start with democracy, but then trace this commitment out to a more elaborate set of conclusions than anything Madison attempted.[101]

Interpretation, 100 Harv. L. Rev. 1189 (1987), he is not a tunnel constructivist.

[98] Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 U.C.L.A. L. Rev. 1615, 1637 (1987).

[99] Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. Chi. L. Rev. 397, 397 (1989)(book review).

[100] Id. at 411.

[101] In addition to the sources cited supra note 40, see Cass R. Sunstein, Democracy and the Problem of Free Speech (1993); James Weinstein, *Democracy, Sex, and The First Amendment*, 31 N.Y.U. Rev. of Law & Social Change 865 (2007); Robert Post, Constitutional Domains (1995). Redish, although he thinks that the fundamental value that speech promotes is self-realization, also belongs in the democratic theory camp, because he thinks self-realization entails democracy (and vice versa). For that reason, he has elaborated an original account of how democracy entails free speech. Martin H. Redish & Abby Mollen, *Understanding Post's and Meiklejohn's Mistakes: The*

Some start with the goal of individual self-realization.[102] Some aim at the attainment of truth.[103] Some start with Kantian autonomy.[104] Different constructivisms can, of course, yield different results. Martin Redish and C. Edwin Baker both aim at self-realization, but their different procedures of construction yield opposing results with respect to commercial speech.[105] And constructivism need not be tunnel constructivism: some constructivists are willing to abandon the consequences of their theories if the consequences are too severe.[106]

As I said at the outset, deductive theory is a necessary but not a sufficient condition of tunnel constructivism. The theorists just described varied considerably in their inclination to ignore consequences other than the master values they relied on. For example, T.M. Scanlon began as a tunnel constructivist. In a 1971 article, he argued that respect for citizens' autonomy entails that speech cannot be prohibited simply because it results in listeners having false beliefs, or in listeners coming to believe that they ought to perform certain harmful actions, however bad the consequences of such

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Central Role of Adversary Democracy in the Theory of Free Expression, 103 Nw. U. L. Rev. 1303 (2009).

[102] In addition to the sources cited supra note 42, 43, & 45, see C. Edwin Baker, Human Liberty and Freedom of Speech (1989); David A.J. Richards, Toleration and the Constitution 165-227 (1986); Martin H. Redish, Freedom of Expression: A Critical Analysis (1984).

[103] In addition to the source cited supra note 44, John Stuart Mill, On Liberty (1859; Gertrude Himmelfarb ed. 1974) is the classic citation, although as I will argue below, Mill is more complicated than this. The simple truth-advancement story has often been cited by the Supreme Court, however. See Baker, Human Liberty and Freedom of Speech, at 3-24. It is unclear whether what is doing the work here is a story about emerging truth or a metaphor of a market that is loaded with unstated assumptions. For the latter view, see Robert L. Tsai, Eloquence and Reason: Creating a First Amendment Culture 60-68 (2008); John Durham Peters, *"The Marketplace of Ideas": A History of the Concept*, in Toward a Political Economy of Culture: Capitalism and Communication in the Twenty-First Century 65 (Andrew Calabrese & Colin Sparks eds. 2004).

[104] In addition to the sources cited supra note 41, see Charles Fried, Saying What the Law Is: The Constitution in the Supreme Court 78-142 (2004); David A.J. Richards, Toleration and the Constitution 165-227 (1986); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 Harv. C.R.-C.L. L. Rev. 159 (1997); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression,* 91 Colum. L. Rev. 334 (1991). Wellington, *On Freedom of Expression*, is also in this camp, though his argument is less deductive and he does not draw out its doctrinal implications.

[105] Compare Redish, Freedom of Expression, at 60-68; Martin H. Redish, Money Talks: Speech, Economic Power, and the Values of Democracy 14-62 (2001); and Martin H. Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 Loy. L. A. L. Rev. 67 (2007), with Baker, Human Liberty and Freedom of Speech at 194-224.

[106] For example, Strauss, *Persuasion, Autonomy* explicitly takes this line.

beliefs might be.[107] He later recanted, precisely because the principle was too cost-insensitive. It may be that there should be some restriction on the costs that government should take as a justification for restrictions on speech, he wrote, but such an argument "must itself be based on a full consideration of all the relevant costs."[108]

A. Redish

A definitive critique of tunnel constructivism is probably impossible. It would have to survey and respond to every constructivist theory ever devised, and even then could not address future tunnel constructivisms that might answer its criticisms. All that one can do is take a particularly salient example, and offer reasons to think that the objections it elicits have analogues among its tunnel constructivist rivals.

I will therefore focus here on the work of Redish. His very large corpus of books and articles on free speech may together constitute the most thoroughly worked out tunnel constructivist speech theory that anyone has ever devised.[109] His is also probably the most influential constructivist theory. His First Amendment scholarship has been cited five times in

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[107] Scanlon, *A Theory of Freedom of Expression*.

[108] Thomas M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 533 (1979).

[109] Most of the leading constructivists of the 1970s wrote one article and then moved on to other subjects. See supra notes 41 - 45 (citing Richards, Bork, BeVier, Ely, Scanlon, and DuVal). Of the writers in the constructivist mode, the only author who worked out a position as sustained as Redish is C. Edwin Baker. See C. Edwin Baker, Media Concentration and Democracy: Why Ownership Matters (2006); C. Edwin Baker, Media, Markets, and Democracy (2001); Baker, Human Liberty and Freedom of Speech. Baker, however, is not really a free speech theorist, because he gives no special weight to speech as against other exercises of liberty. I follow Frederick Schauer in holding that a free speech principle must at least be "a principle according to which speech is *less* subject to regulation . . . than other forms of conduct having the same or equivalent effects." Frederick Schauer, Free Speech: A Philosophical Enquiry 7 (1982).

For the same reason, I also exclude Ronald Dworkin, who gives no special protection to speech as such in his general theory of liberal equality, and whose speech-protective arguments are therefore fragile. Ronald Dworkin, *Pornography and Hate* and *MacKinnon's Words*, in Freedom's Law: The Moral Reading of the Constitution 214, 227 (1996); Ronald Dworkin, *Do We Have a Right to Pornography?*, in A Matter of Principle 335 (1985); for critique, see Rae Langton, *Whose Right? Ronald Dworkin, Women, and Pornographers*, in Sexual Solipsism: Philosophical Essays on Pornography and Objectification 117 (2009); Schauer, Free Speech, at 61-65.

It is also relevant that neither Baker's nor Dworkin's theories correspond to the present direction of free speech doctrine on the Supreme Court nearly so well as that of Redish.

Supreme Court opinions,[110] but this understates his importance. C. Edwin Baker observes that when it decided to give heightened protection to commercial speech, the Court "offered arguments that duplicated those that Redish had advanced several years before."[111] The same could be said of the *Citizens United* opinion. Increasingly, we are living in Redish's free speech world.

Redish disavows "attempts to resolve complex and difficult issues by means of rigid, hard-line distinctions and categorizations."[112] Rather, the aim should be "general guidelines of interpretation that simultaneously provide the strong deference to free speech interests that the language and the policies of the first amendment command while allowing the judiciary the case-by-case flexibility necessary to reconcile those interests with truly compelling and conflicting societal concerns."[113] As we shall see, however, with respect to the free speech issues considered at the outset of this Article, Redish is rigid indeed.

1. The argument for the self-realization value

Redish's theory is complex, but its basic elements are these. All speech that is relevant to individual or collective decisionmaking is entitled to exactly the same level of protection. Laws that restrict speech are subject to strict scrutiny. They can be justified only by interests that are truly vital. Some purported interests, however – notably the reasons typically given for restricting campaign spending and commercial speech - are not even permissible, much less compelling, reasons for restricting speech, because analysis can show them to be impermissibly viewpoint-discriminatory.

Redish's foundational claim is that all of the values that have been cited to support free speech are reducible to a single one, that of individual self-realization. All speech that fosters this value should therefore receive exactly the same level of protection. This first principle "can be proven, not merely by reference to some unsupportable, conclusory assertions of moral value, but by reasoning from what we in this nation take as given: our democratic system of government."[114] He argues that "the moral norms inherent in the choice of our specific form of democracy logically imply the broader value,

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[110] Westlaw search of "Redish" in Supreme Court database, Feb. 23, 2010.
[111] C. Edwin Baker, *The First Amendment* and *Commercial Speech*, 84 Ind. L.J. 981, 982 (2009).
[112] Redish, Freedom of Expression, at 3.
[113] Id.
[114] Id. at 12, footnotes omitted.

self-realization."[115] The intrinsic value of democracy, the one "achieved by the very existence of a democratic system," is "the value of having individuals control their own destinies."[116] The instrumental value of democracy is "development of the individual's human faculties."[117] It follows that "any speech that may aid in the making of private self-governance decisions is deserving of first amendment protection."[118]

To support his claim that speech relevant to collective and individual decisions should be given the same level of protection, Redish offers the following hypothetical.[119] Imagine a society in which every decision affecting individuals – dinner menus, hair styles, bedtimes – is made by a collective vote. Under the logic of democracy, debate and information about all these decisions would have to receive full constitutional protection. Then suppose that all of these decisions are ceded to individuals, as our own society does. What sense would it make to say that information relevant to those decisions is no longer a constitutional right? How can the individual have a right to information about decisions he controls indirectly as a voter, yet have that right disappear when he is given total authority over the same decisions?

If these arguments are accepted, then the approach the Court has followed since *Chaplinsky v. New Hampshire*,[120] "which recognizes a sublevel of speech that is unworthy of constitutional protection, would have to be abandoned."[121] As we shall see, Redish goes some way toward rebuilding the doctrinal structure he attacks here on the basis of compelling interest rather than the differential value of speech. Threats, libel of private figures, criminal conspiracies, and criminal solicitation would still be denied protection. Because he rules out many interests as impermissible, however, the consequence is a radical reformulation of the law.

In order for the argument to persuade, the reader needs to accept Redish's articulation of the moral basis of democracy – here understood as the sole moral basis, not one consideration among many that supports democracy.[122]

The undefended assumption that a longstanding social institution such as democracy must have a single moral basis is

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[115] Id.
[116] Id. at 20.
[117] Id. at 21.
[118] Id. at 80.
[119] Id. at 24-26.
[120] 315 U.S. 568 (1942).
[121] Redish, Freedom of Expression, at 55.
[122] Contrast Farber & Frickey, *Practical Reason and the First Amendment*, at 1640-41.

surprising.[123] Institutions evolve. They are not created by designers. Even if someone created the institution of free speech, there is no reason to assume that she did it for a single purpose. On the contrary, it is likely that any longstanding practice serves more purposes than any single human mind can comprehend.[124] Many different people support democracy for many different reasons. Redish confronts this difficulty by summarily stating and batting away a few rival justifications. For example, he dismisses the consequentialist justification, that democracy produces better results than other systems: "How are we to decide what is 'better'? . . . And better for whom?"[125] But we are no longer discussing the reasons why someone might support democracy. Redish is now looking for only those reasons that can persuade any rational person (and his hypothetical rational person is paralyzingly skeptical of consequentialist reasoning). An institution may however be stable over long periods of time without having *any* justification that can persuade all rational persons. (Try justifying the rules of baseball to Redish's hypothetical skeptic.) Democracy could be supported for many generations by a society of consequentialists who never agree among themselves about which of its consequences make democracy good.

An alternative view, suggested by Frederick Schauer, is that freedom of speech has no essential core, but rather be a cluster of interrelated principles; perhaps we have several different First Amendments.[126] Redish at one point concedes the possibility that free expression might be deemed to foster "a complex intersection of multiple values." He thinks, however, that the application of those values to specific cases "would

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[123] It is, however, an assumption with which Redish begins in the first sentence of his best-known article on free speech: "Commentators and jurists have long searched for an explanation of *the* true value served by the first amendment's protection of free speech." Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 591 (1982), reprinted in Redish, Freedom of Expression, at 9; emphasis added.

[124] This has been emphasized in Ronald Allen's criticisms of high constitutional theory. See Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 St. John's L. Rev. 1149 (1998); Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 Nw. U. L. Rev. 436 (1993).

[125] Redish, Freedom of Expression, at 20.

[126] Free Speech: A Philosophical Enquiry, at 14; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 277 (1981); Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. Rev. 1284 (1983); Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 Sup. Ct. Rev. 285, 313. Schauer's Free Speech: A Philosophical Enquiry, published in 1982, may be read as a reaction to the constructivisms of the 1970s, surveying the various premises that had been offered and trying to work out what can really be deduced from each of them.

presumably be no more or less syllogistic than the shaping of doctrine through the application of an assumed single underlying value."[127] If, however, no formula is available for weighing these values against one another, then the promised syllogisms will never appear. The fact that health is a complex set of incommensurable values is one of many reasons why medicine cannot be reduced to syllogisms.[128]

Redish has described his method as following this procedure: "ask why we choose a democratic system in the first place and, by this process of reverse engineering, glean more foundational normative values underlying the commitment to both democracy and free expression."[129] The danger of such reverse engineering, conspicuously instantiated by the so-called "scientific creationists," is that more than one sequence of causes can produce a given result. You can't deduce, from any result, what process must have produced it.

He also has a different argument, based on the intrinsic value of democracy: "it is doubtful that many of us would be anxious to discard democracy even if it were established definitely that an alternative political system was more efficient."[130] So if you support democracy only because of its good results (whatever you happen to think count as good results), Redish isn't talking to you; his audience is those who think democracy is intrinsically valuable. But some who value democracy intrinsically do so, not because of its positive contribution to self-realization, but for its negative effect of preventing citizens from tyrannizing over one another. Consider Jean-Jacques Rousseau, the most influential proponent of the intrinsic value of democracy. Rousseau, with no inconsistency, was an energetic proponent of censorship of both the arts and religious opinions.[131] Rousseau loved democracy but hated

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[127] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 104.

[128] See infra text accompanying notes 219 - 231.

[129] Redish & Mollen, *Understanding Post's and Meiklejohn's Mistakes*, at 1337 n.159.

[130] Redish, Freedom of Expression, at 20.

[131] See Jean-Jacques Rousseau, On the Social Contract (Judith R. Masters tr. 1978); Jean-Jacques Rousseau, Politics and the Arts: Letter to M. d'Alembert on the Theatre (Allan Bloom trans. 1960). This aspect of Rousseau's thought is made especially clear in Judith Shklar, Men and Citizens: A Study of Rousseau's Social Theory (1985); see also Jurgen Habermas, The Structural Transformation of the Public Sphere 96-98, 107 (T. Burger & F. Lawrence tr. 1989). He thought so because, to put the point in the terms of Robert Post, discussed infra text accompanying notes 159 - 172, he thought democracy needed extremely strong civility norms in order to survive, and that censorship was necessary to maintain this. The teaching of theologically intolerant religion, for example, was a danger to the state: "It is impossible to live in peace with people whom one believes are damned." On

individual self-realization. Many more people probably value democracy intrinsically just because it is their familiar way of life, in the same way they value the stories they read as children or the town in which they grew up.

Redish has succeeded in offering one rationale for free speech. It may be the most attractive rationale. But it is not the only possible coherent rationale.

Even if it is stipulated that free speech has a single moral basis, the reader must also to be willing to accept all the logical implications of that moral basis, however distressing they might be. As we shall see, Redish endorses the results the Court reaches in the campaign finance and tobacco advertising cases.[132] Must we follow Redish to these conclusions?

To see the limitations of his constructivism, consider how he addresses a different problem. He argues that the value of self-realization is logically inconsistent with the regulation of obscenity.[133] Self-realization entails that "it is not for external forces – Congress, state legislatures, or the Court itself – to determine what communications or forms of expression are of value to the individual; how the individual is to develop his or her faculties is a choice for the individual to make."[134]

But suppose someone – let's call him Harry[135] - thinks that people, especially young people, can be morally damaged by exposure to obscenity, and that this justifies censorship. What

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the Social Contract at 131. He was mistaken at the level of empirical reality, not at the level of high theory.

For modern writers who think that political self-rule is impossible but that elections can nonetheless prevent the worst political abuses, see Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 Harv. L. Rev. 1328 (1994); Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (3d ed. 1950). The claim that minority domination is inevitable probably cannot be proved or disproved at the high level of abstraction at which it is stated. Robert A. Dahl, Democracy and Its Critics 272-74 (1989).

[132] But not, perhaps, the specific result in *Lorillard Tobacco*. See infra note 392.

[133] Redish, Freedom of Expression, at 68-76; Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 120.

[134] Redish, Freedom of Expression, at 69-70.

[135] See Harry M. Clor, Public Morality and Liberal Society: Essays on Decency, Law, and Pornography (1996); Harry M. Clor, Obscenity and Public Morality: Censorship in a Liberal Society (1969). The Supreme Court has endorsed a similar view to justify the nonprotection of that subset of pornography it deems "obscene." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973). Many Americans share Harry's view. Since 1973, data from the Roper Center for Public Opinion Research indicates, about 40% of Americans (the number has held steady) have thought that there should be laws against the distribution of pornography whatever the age of the purchaser. See Roper Center website, http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html, advanced search function, search for "distribution of pornography."

leverage could Redish have over Harry? Redish might claim that Harry is being logically inconsistent if he believes in democracy but supports a law that contradicts the premise of self-realization. Harry can reasonably respond (1) that he is not committed to self-realization in the form that Redish presents, or (2) that he is not committed to democracy in the form that Redish presents, or (3) that there are worse things than inconsistency, and the harm caused by obscenity is one of those things. Harry may also think that obscenity is less important to the valuable forms of self-realization.

Harry could say that the commitment to self-realization to which he is committed is not the freedom to realize yourself in any way you happen to like, but rather the freedom to choose among valuable options. He could say (with Joseph Raz)[136] that there is no value in having the choice of a worthless option, or (with John Finnis)[137] that the exercise of practical reason is one among a number of goods, and is not a good reason to sacrifice those other goods. He could say that "where 'paternalism' on the part of the political community is justified it is, like the educative function of parenthood itself, to be no more than a help and support to self-correction and self-direction."[138] In other words, he could deem self-realization to be oriented toward a more specific set of goods than Redish posits, and on that basis, to discern degrees of salience within speech – to, as Farber and Frickey put it, "draw lines within the area of communicative conduct based on the same criteria."[139]

2. Redish's neo-Rawlsian argument

If Harry is deemed to be correct about the harm that pornography causes, then the suppression of obscenity could be deemed necessary to a compelling state interest.[140] But Redish rules this out, because the suppression of obscenity "grows out of regulatory hostility toward the moral and socio-political

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[136] See Joseph Raz, The Morality of Freedom (1986).
[137] See John Finnis, Natural Law and Natural Rights (1980).
[138] Id. at 220.
[139] Farber & Frickey, *Practical Reason and the First Amendment*, at 1622. Farber and Frickey think that Redish is inconsistent for *not* doing this, but Redish is committed to the premise that all speech that aids self-realization is of exactly the same value. He is consistent. The question is whether he can compel his readers to accept this premise.
[140] That is why I have thought it worth taking the trouble to show that he is not correct. See Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 Colum. L. Rev. 1635 (2005); Andrew Koppelman, *Eros, Civilization, and Harry Clor*, 31 N.Y.U. Rev. of Law & Social Change 855 (2007).

premises implicitly advocated by the obscene communication."[141] The government's purpose is to prevent readers from adopting a relaxed vision of sexual mores. There can never be a compelling state interest in viewpoint discrimination.[142]

Censorship on the basis of views like Harry's violates the principle of "epistemological humility," which holds that "no governmental body may impose restrictions on expression on the basis of predetermined moral values."[143] Free speech must be understood to be a closed system. Allowing substantive moral values into free speech doctrine would create "a political jungle in which those in power are able to suppress the expression of those whose views they find deeply offensive."[144]

Redish's argument for epistemological humility is explicitly modeled on Rawls. "First Amendment choices are necessarily made behind a Rawlsian 'veil of ignorance': when choosing a mode of First Amendment construction, one cannot know which particular values will be promoted as a result."[145] When we establish government, "none of us knows who in society will be part of which moral faction, or which moral faction will be more powerful."[146] Therefore, it is rational for us all to agree

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[141] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 120.

[142] Another argument that is sometimes made in favor of suppressing pornography is that it incites criminal violence against women. The evidence for that proposition is weak. See Koppelman, *Does Obscenity Cause Moral Harm?*, at 1663-72. But Redish thinks it doesn't matter: "even if one could conclusively establish some connection, regulation would still fail the Supreme Court's test of temporal imminence . . . ." Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 Calif. L. Rev. 267, 308 (1991). I noted earlier, see supra text accompanying note 88, that the *Brandenburg* test which Redish here invokes rests on contestable evaluative and predictive judgments. Redish, however, thinks that the demand for imminence rests on "the logic of free speech." Id. Does he really believe that, even if it were conclusively proven that women were being assaulted by the millions as a direct result of pornography's influence, we would be required by the logic of free speech to tolerate this result?

[143] Martin H. Redish, The Logic of Persecution: Free Expression and the McCarthy Era 9 (2005). See also Redish, Money Talks, at 6 (describing epistemological humility as the principle that no law restricting speech may "presuppose substantive moral truth, untied ultimately to the direct or indirect choices of the electorate.").

[144] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 112. Redish frequently makes this rhetorical move, raising the stakes of an isolated question so that unless his answer to that question is accepted, the entire structure of free speech law will be jeopardized. See infra text accompanying notes 155, 174, 181, 377, 378, 392, 433.

[145] Redish, The Logic of Persecution, at 183.

[146] Redish, Money Talks, at 27.

to disable government from suppressing speech in the name of its moral vision.

But why should the parties behind Redish's veil of ignorance focus specifically on *speech* as an object of protection? Perhaps they "could reasonably decide that speech is less likely to cause direct or immediate harm to the interests of others and more likely to develop the individuals' mental faculties than is purely physical conduct"[147] – this is Redish's explanation for why speech is appropriately singled out for special treatment - but if they are afraid of being tyrannized by some other moral faction, then protection of speech is not adequate to avoid such tyranny. Why not ban morals laws altogether, or adopt a libertarian minimal state, or eliminate the danger of an oppressive state altogether by agreeing to anarchy? Why should the parties behind the veil think that their interest in speaking is weightier than their interest in avoiding exposure to certain kinds of unwanted speech? Hasn't Redish presumed that the parties behind the veil share his high valuation of freedom of speech?[148]

Unlike Redish, Rawls abstracts for moral, not prudential, reasons. For Rawls, the reason you and I here and now are interested in the original position is that we are trying to devise fair terms of cooperation, in which morally irrelevant contingencies of fortune play no role.[149] That is why the parties must be ignorant of their wealth.

The motives for a prudential, neo-Hobbesian veil of ignorance are more contingent, and so the size and shape of the veil of ignorance should be contingent as well. (Redish often accuses less speech-protective theorists of being result-oriented, but prudential reasoning is *inherently* result-oriented.) The parties can allow themselves to know quite a lot about their substantive moral views if they feel reasonably confident that those views will continue to prevail in politics. Neutrality comes in many different forms.[150] Consider religious qualifications for public office. In 1787, non-Christians were

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[147] Redish, Freedom of Expression at 18.

[148] That high valuation is particularly clear in his treatment of content-neutral restrictions on expressive conduct, which he would disallow unless the challenged restriction could be shown to be necessary to a compelling government interest. See id. at 87-126. In cases where the interest is legitimate but not compelling, the government is regulating the challenged conduct for a good reason, but the right to speech overrides that reason. What reason could the parties behind the veil have for giving such great weight to speech interests, as against the interests furthered by the challenged law?

[149] See John Rawls, *Justice as Fairness: Political Not Metaphysical*, in Collected Papers at 402-03.

[150] See Koppelman, *The Fluidity of Neutrality*.

officially barred from public office almost everywhere in the United States, and most states barred Catholics as well.[151] This discrimination was at the same time a kind of neutrality, as for example New Jersey's 1776 constitution, which made eligible for office "all persons, professing a belief in the faith of any Protestant sect."[152] At this time in England, no one who was not a member of the Church of England could hold public office, and those who denied the Trinity could be imprisoned on the second offense.[153] American law operated behind a veil of ignorance about whether one was Anglican or Baptist, but not about whether one was Protestant or Catholic. Americans were afraid of the civic exclusion of Protestants. They weren't much troubled by civic exclusion of Jews or atheists. All this is distant from contemporary American law, which bars any requirement that officeholders believe in God.[154] By what prudential argument could the Americans of 1787 have been persuaded to go behind a thicker veil of ignorance? Their fear that perhaps the atheists would be able to seize office and oppress them? Why wouldn't it be sufficient for them to answer that that danger did not seem very likely to them, and that the power they were giving to the state seemed to them an important one?

A related question is how much the parties to the social contract should fear the results of state disempowerment. Harry thinks that viewpoint-neutrality, if construed to protect obscenity, will produce enormous harm. Any prudential calculation by Harry will take that into account. The same is true of commercial speech, or campaign spending by corporations. Any prudential calculus must take into account the harms that will occur if that speech remains unregulated. Perhaps the result will still be protection of speech. But a rational consumer will look at an item's price before buying it.

Redish claims that his rationale "does not represent a firmly held theory of moral epistemology so much as an instrumental construct designed to avoid totalitarianism."[155] But totalitarianism is not a real danger of every authorization of government to censor in the name of a substantive moral vision. The United States has never been as speech-protective as Redish wants – people continue to go to jail for distributing obscenity[156] – yet totalitarianism has been avoided. There may

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[151] See Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 Case W. L. Rev. 674, 681-83 (1987).
[152] Quoted in id. at 683.
[153] See Ursula Henriques, Religious Toleration in England, 1787-1833 (1961).
[154] Torcaso v. Watkins, 367 U.S. 488 (1961).
[155] Redish, Money Talks, at 28.
[156] See Greg Beato, *In Defense of Extreme Pornography: Why Janet Romano and Rob Zicari have no business being in federal prison*, Reason, Oct. 27, 2009.

be good reasons for objecting to those prosecutions. I think there are.[157] But the objection had better not be a prediction that, if we continue carrying on like this, we are on an inevitable path to Hitler's Germany. We've been prosecuting pornography for a long time without sliding down that particular slippery slope.[158]

3. Post and public discourse

The limitations of Redish's theory can be further elucidated by considering a rival theory, that of Robert Post. Post has his own blind spots, but he articulates some of the most important dimensions of free speech that are neglected in Redish's account.

More than any other contemporary free speech theorist, Post emphasizes the historically situated character of modern free speech law. He observes that not only can it not be deduced from first principles; it is not even well captured by the rules that the Supreme Court has crafted.

> The free-speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories. Yet, strange to say, those fluent in the law of free speech can predict with reasonable accuracy the outcomes of most constitutional cases. It seems that what is amiss with First Amendment doctrine is not so much the absence of common ground about how communication within our society ought constitutionally to be ordered, as our inability to formulate clear explanations and coherent rules capable of elucidating and charting the contours of this ground.[159]

Post's own explanation of this incoherence is the inherent instability of the ideal of public discourse. Public discourse, Post observes, has historically emerged as an autonomous sphere of discussion that is immune from both the management of government and the norms of particular communities. Within this sphere, democracy is a negative ideal; "it must refuse to foreclose the possibility of individual choice and self-development by imposing preexisting community norms or given

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[157] See, in addition to the works cited above, Andrew Koppelman, *Reading Lolita at Guantanamo*, 53 Dissent 64 (Spring, 2006).

[158] The basic mistake is treating a slippery slope argument as a logical one, when in fact it is an empirical one. See Frederick *Schauer*, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985).

[159] *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in Eternally Vigilant: Free Speech in the Modern Era 153 (Lee Bollinger & Geoffrey Stone eds. 2002).

managerial ends."[160] This sounds a lot like Redish. But unlike Redish, Post thinks that public discourse has a specific, collective goal: "to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society."[161]

Post observes that there must be a boundary between public and non-public discourse, since not every speech act receives First Amendment protection. "[A]ll speech is potentially relevant to democratic self-governance, and hence according to democratic logic all speech ought to be classified as public discourse."[162] That, too, sounds like Redish. But, Post notes, we have other commitments beside public discourse, and public discourse itself depends on some civility norms. Some considerations have considerable weight: material that is disseminated through media of mass communication is presumptively protected,[163] and the censorship of those media in order to foster particular communities' civility rules is always presumptively improper.[164] But this does not yield a clear code. "The many factors relevant to the classification of speech as public discourse thus resist expression in the form of clear, uniform, and helpful doctrinal rules."[165]

There is a paradox at the boundaries of public discourse: the very effort to distinguish public from private matters is already politically loaded, and presupposes controversial criteria about the proper subject of politics.[166] Nonetheless, if there is to be a sphere of public discourse, while the imperatives of community and management are also to be conceded their indispensable spheres of operation, then lines must be drawn.

Post's anthropology is imperfect even on its own terms. His account of public discourse is incomplete, because he unduly privileges democracy as its basis.[167] He has, perhaps, not fully

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[160] Constitutional Domains 7 (1995).
[161] Id. at 145.
[162] Id. at 175.
[163] See id. at 164-73.
[164] See id. at 148-50.
[165] Id. at 173. See also Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 18 (2000)(the "common sense" on which the boundaries of public discourse depends is "complex, contextual, and ultimately inarticulate."). Post's critics complain about this vagueness; see Alexander, Is There a Right of Freedom of Expression?, at 139-44; Redish & Mollen, *Understanding Post's and Meiklejohn's Mistakes*, at 1342-48; Redish & Lippman, *Freedom of Expression and the Civic Republican Revival*, at 302; but they should be disarmed by this admission. Post does not purport to be offering clarity.
[166] Constitutional Domains, at 147, 268.
[167] In this he agrees with Redish. See Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 Loyola L.A. L. Rev. 169, 175 (2007).

freed himself from constructivism.[168] Democratic legitimation is perhaps one reason why scientific speech is protected, but it is not the most salient reason, and it cannot explain the protection of instrumental music. Post also cannot explain why private conversations are ever protected.[169] Truth and self-realization evidently play roles that are absent from his account.[170] These omissions suggest that Schauer was right: we have several different First Amendments, and Post has described only one of them.

Post's analysis nonetheless poses a challenge to any deductive free speech theory. Post claims that "[t]he aspiration to be free from the constraints of existing community norms (and to attain a consequent condition of pure communication) is in tension with the aspiration to the social project of reasoned and non-coercive deliberation."[171] Rational deliberation presupposes norms of civility. If the law cannot sustain these norms, then "public discourse corrodes the basis of its own existence."[172] Such paradoxes confound the aspiration to a simple deductive theory. They suggest that, as in Milton and Mill, any free speech regime will be justified, not by its theoretical elegance (which is not to be had), but by the vibrant public discourse it fosters.

4. Redish and the boundaries of public discourse

Redish must deny Post's paradox, because the ban on viewpoint discrimination prohibits any civility-based restriction on speech that reflects the offensiveness of the prohibited viewpoint.[173] An injunction against a Nazi march in a town heavily populated by Holocaust survivors, for example, would be "normative censorship by those in power," which is "a result wholly inconsistent with the foundations and premises of a democratic society."[174] When the point is put that broadly, it necessarily applies, not only in Skokie, but in Berlin and Vienna as well. Nazi speech is, of course, censored in Germany

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[168] Stanley Fish argues that this kind of theoretical tidying up is inconsistent with Post's anthropological method. Stanley Fish, *The Dance of Theory*, in Eternally Vigilant, supra note 159, at 205.

[169] Redish & Mollen, *Understanding Post's and Meiklejohn's Mistakes*, at 1347-48.

[170] Nor does he discuss the importance of a character ideal, even though, as we shall see, that has played a large role in developing the ideal of public discourse.

[171] Constitutional Domains at 147.

[172] Id.

[173] Redish & Lippman, *Freedom of Expression and the Civic Republican Revival*, at 292-94, 297-304.

[174] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 113.

and Austria,[175] and it is far from clear that this means that those countries are not democracies.[176] In order to sustain this claim, Redish would have to offer some evidence that public discourse does not depend on civility norms in the way that Post claims. He presents no such evidence, nor any interest in such evidence. Since his argument is a pure deduction from democratic theory, there does not appear to be any way in which the evidence could matter.[177] Rawls worried about the stability of liberal institutions.[178] Redish takes that stability for granted.

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[175] See Legislating Against Discrimination: An International Survey of Anti-Discrimination Norms 328-30 (Nina Osin & Dina Porat eds. 2005)(German statutes); id. at 86-88 (Austrian statutes); Eric Barendt, Freedom of Speech 166-67 (2d ed. 2005); Eric Barendt, Freedom of Speech 166-67 (2d ed. 2005); Walter F. Murphy, *Excluding Political Parties: Problems for Democratic and Constitutional Theory*, in Germany and Its Basic Law: Past, Present, and Future – A German-American Symposium 173 (Paul Kirchhof & Donald P. Kommers eds. 1993).

[176] In 1952, 37 percent of Germans agreed that "it would be better for Germany not to have any Jews in the country," while only 20 percent disagreed. In 1953, 55 percent of Germans disagreed with the statement that "German soldiers of the last war can be reproached for their conduct in the occupied countries." David Art, The Politics of the Nazi Past in Germany and Austria 55 (2006). (Thanks to Susan Scarrow for directing me to this volume.) Neither of these questions concerned free speech, but both answers are probative of the difficulties of creating a liberal, speech-protective culture in postwar Germany.

Nor is it clear that what legitimates constitutional restrictions on democratic decisionmaking is that they are subject to democratic repeal. See Redish, Money Talks, at 28. First of all, even in America, constitutional amendment is not possible without surmounting Article V hurdles that hamstring the capacity of present majorities to enact their will. For a majoritarian objection to this state of affairs, see Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988). Second, it is far from clear that some legally permissible exercises of that will, such as the reinstitutionalization of slavery, would be consistent with democracy.

A democracy is, of course, better functioning if respect for individual rights emerges from an unfettered electoral process rather than being imposed from above. See Corey Brettschneider, Democratic Rights: The Substance of Self-Government 136-59 (2007). But that does not dictate that the German-Austrian approach is wrong, in context.

[177] At one point, however, he responds by shifting the burden of proof to Post: if civility is allowed to limit public discourse, "we would suffer concrete, unambiguous limitations on public discourse, without any assurance that the sum total would ultimately represent a net gain to public expression." Redish & Lippman, *Freedom of Expression and the Civic Republican Revival*, at 300. This concedes that it is possible that Post is right, and simply demands more evidence than Post provides. Redish, however, does not engage with Post's evidence, summarily dismissing "the citation of sweeping, wholly unsupported assertions by sociologists." Id. at 294.

[178] See Freeman, Rawls, at 163-66.

Redish disagrees with Post's view that difficult questions are raised by *Hustler v. Falwell*.[179] That case was a lawsuit for intentional infliction of emotional distress based on *Hustler* magazine's publication of an advertisement parody, which fantasized about an incestuous encounter between the Rev. Jerry Falwell and his mother. The Supreme Court held that the parody was protected, because Falwell was a public figure.[180] Redish does not think that there is anything difficult about this case: a ban on any kind of offensive speech violates the prohibition of viewpoint discrimination. Any concession to civility rules would "sweep frighteningly far, with no apparent logical stopping point to prevent the eventual wholesale destruction of speech values."[181] Post notes, however, that the Court limited its holding to the abuse of public figures.[182] The result might have been different if *Hustler* "had picked a private person's name at random from the telephone directory"[183] and published the same parody about him. (Fortunately for *Hustler*, Falwell's mother died before the advertisement was published; it is far from clear that the Court would have reversed if she had been the plaintiff.) Redish can't make that concession.[184]

So Redish aspires to a world in which citizens can freely heap abuse on one another in this fashion with no available remedy from tort law. Perhaps protecting Falwell's mother is bad for community, because "squelching speech actually has the effect of decreasing inclusiveness in the deliberative project."[185] But Redish has shown us no reason to believe that.

Redish implicitly concedes that public discourse depends on some degree of community. In the more fully developed conception of "adversary democracy" that he offers in his most recent work, he acknowledges that democracy, even a conception of democracy that envisions endless conflict, presupposes some level of community: a common commitment to "the peaceful resolution of disputes and a continuation of the commitment to

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[179] 485 U.S. 46 (1988).
[180] See
[181] Redish & Lippman, *Freedom of Expression and the Civic Republican Revival*, at 302.
[182] Post, Constitutional Domains, at 127.
[183] Id. at 375 n.50.
[184] He does say, in defense of the distinction between public and private figures in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that it is reasonable to hold that "the defamation of an individual who has voluntarily entered the public arena is more tolerable than similar harm inflicted upon one who has assumed no risk." Freedom of Expression at 81. But he has not extended this reasoning to intentional infliction of emotional distress.
[185] Redish & Lippman, *Freedom of Expression and the Civic Republican Revival*, at 301.

the democratic process."[186] He assumes this commitment can be maintained without restricting much speech, and that, as Post describes the assumption, "community life is constituted by the voluntary choices of its members."[187]

Redish's implicit rejection of Post's paradox needs support from evidence about what in fact holds liberal communities together. It can't be deduced from democratic theory. The idea that liberal aspirations are all you need to maintain community has its attractions – the idea that America stands for liberty is potent[188] - but it depends on local conditions.[189] Redish is in no position to say what democracy requires in Berlin. That weakens his authority even over what democracy entails in the United States. Redish dismisses Post's free speech anthropology as irrelevant to normative theory,[190] but he evidently has, and needs, an anthropology of his own.

The argument for civility norms does not only rest on the paradox of public discourse. In part, it rests on a substantive judgment that, even if the community could go on functioning while it tolerates this kind of talk, it shouldn't have to.

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[186] Redish & Mollen, *Understanding Post's and Meiklejohn's Mistakes*, at 1370; for elaboration, see id. at 1352, 1354 n.234.

[187] Post, Constitutional Domains, at 138.

[188] For a particularly strong and succinct statement of the ideal of a liberal community, see Joel Feinberg, 4 The Moral Limits of the Criminal Law: Harmless Wrongdoing 108-13 (1988). Redish sometimes relies on this. Responding to a well-known epigram by Justice Stevens, he writes that "we are willing to send our sons and daughters off to war, presumably to protect the right of each individual to decide what books he or she will read and what movies he or she will see, free from the state's power to determine that such forms of communication are 'worthless.'" Freedom of Expression at 72. It is a telling point, but Redish would need to say more than he does about the conditions under which this liberal ideal can attract the allegiance of citizens.

At one point, Redish concedes the interdependent relation of community and individual:

> A vibrant self-governing community cannot function successfully unless individual citizens are themselves intellectually active and respected members of that community. Although theorists may differ over which is the ends and which is the means, it is clear that individual integrity and democratic community are intertwined in a symbiotic relationship.

Money Talks at 24. But the specification of both individual integrity and democratic community are far vaguer and more abstract than in Post.

[189] Thomas Jefferson famously stated the optimistic thesis in ringing tones: "If there be any among us who wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." First Inaugural Address (1801), in Writings 493 (Merrill D. Peterson ed. 1984). Sixty years later, the harmlessness of such views became less obvious.

[190] Redish & Mollen, *Understanding Post's and Meiklejohn's Mistakes*, at 1333; Redish & Lippman, *Freedom of Expression and the Civic Republican Revival*, at 294.

Falwell's mother just shouldn't have to put up with this kind of abuse, even if the civic consequences of subjecting her to it would not be especially severe. The same point can be made about some racist speech.[191] For example, when a black customer returns merchandise to a store and is required to sign a slip stating, "Arrogant Nigger refuses exchange – says he doesn't like products," is it really necessary that the First Amendment bar recovery for intentional infliction of emotional distress?[192] It depends on whether there exists any category of words "which by their very utterance inflict injury."[193] It is obvious that such a category exists in lived reality. The question is whether the First Amendment permits us to know that.[194]

A similar point can be made about speech in the sphere of management. Sometimes the law "organizes social life instrumentally to achieve specific objectives,"[195] and speech is restricted in the furtherance of those ends. One example is the regulation of speech between professionals and clients: dentists are forbidden to give certain advice to patients even if they sincerely believe it to be correct, because the state dental association regards such advice as false and irresponsible.[196] Full protection of such speech (which *would* be fully protected if the dentist published it in a book) would sacrifice the managerial goals of averting harm and guaranteeing competent services. In professional-client relations, assuming the full autonomy and competence of the patient would be tantamount to "masking particularly intolerable conditions of private power and domination."[197] Sometimes paternalism, even paternalistic interference with speech, makes us freer. And so an understanding of free speech that absolutely bars such interference would make us less free, more vulnerable to manipulation and abuse.

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[191] I agree with Redish that most racist speech should be protected in American law, but my reasons are more local and contingent than his. See Andrew Koppelman, Antidiscrimination Law and Social Equality 220-65 (1996).

[192] The facts are taken from Irving v. J.L. Marsh, 360 N.E.2d 983, 985 (Ill. App. 1977), which denied recovery. The court did not discuss the First Amendment.

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

[194] Redish quotes this passage of *Chaplinsky*, see Redish, Freedom of Expression, at 55, but the ensuing discussion considers "fighting words" as regulable only to the extent that they are likely to lead to a disturbance of the peace. See id. at 55-57.

[195] Post, Constitutional Domains, at 2.

[196] Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 Loyola L.A. L. Rev. 169, 171-72 (2007). Post's example is advice to replace mercury amalgam fillings with gold or composition fillings. Most dentists believe that this procedure subjects patients to considerable risk for no discernable benefit.

[197] Post, Constitutional Domains, at 284.

Redish, as noted earlier, rejects the doctrine that some kinds of speech are "deemed constitutionally regulable per se."[198] It is not clear whether this means all speech should be presumptively protected: Redish has never confronted the problem that free speech is not even salient with respect to perjury, price-fixing, conspiracy, and many other things that can be done with words.[199] However, Redish fully appreciates how destructive some speech can be, and so he proposes that free speech rights "must give way only in the presence of a truly compelling governmental interest."[200] Sometimes, the result will not be very different from the categories of speech protection in present doctrine, such as the rules of *New York Times v. Sullivan* and *Brandenburg v. Ohio*.[201] So Redish's reconstruction of free speech doctrine in some ways replicates the status quo, while vehemently denying that different levels of speech get different levels of protection. It is all done by the prudent calibration of compelling state interests.

I'm not persuaded that this reconstruction of doctrine advances understanding. In the first place, the flattening of all speech to the same level is deeply implausible. Farber and Frickey charge Redish with "a radical telescoping of values, in which a political dissenter can no longer be distinguished from a Mafia boss giving orders to a hit man."[202] This criticism is not fatal, because constructivism always deliberately aims for a radical telescoping of values. It abstracts away from ideals, paradigmatically religious ideals, that may be deeply felt, but which must be politically irrelevant. (Rawls claimed that the "intuitive idea" of his theory was "to generalize the principle of religious toleration to a social form."[203]) But is this particular telescoping what free speech requires? Redish, of course, doesn't really believe that there is no difference in the value of the speech of the dissenter and that of the Mafia boss. He thinks that "epistemological humility" requires that we not draw any such distinction *for free speech purposes*. But, as we have seen, the neo-Hobbesian argument for such abstinence does not work.

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[198] Redish, Freedom of Expression, at 56.

[199] See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765 (2004).

[200] Redish, Freedom of Expression, at 55.

[201] Id. at 119.

[202] Farber & Frickey, *Practical Reason and the First Amendment*, at 1623.

[203] See Rawls, A Theory of Justice 206 n./180n. rev.; see also id. at 220/193 rev. Other proponents of liberal neutrality toward ideals of the good have described their project in similar terms. See Bruce Ackerman, Reconstructing American Law 99 (1984); Charles Larmore, The Morals of Modernity 144 (1996).

Redish's success in reconstructing so much of free speech doctrine unchanged, together with the conceded malleability of his compelling interest test,[204] suggests that he is trying to preserve his theory in the face of substantial evidence to the contrary. If you jigger the compelling interest test in the right way, you can manage this, just as, if you're willing to construct the complex equations and add some assumptions about invisible forces, you can reconcile the data with the Ptolemaic theory that the sun revolves around the earth. But these are awfully complicated ways to account for phenomena that have much simpler explanations.[205]

Redish makes many effective arguments for a broadened conception of free speech. As noted earlier, the Supreme Court is coming round to his view. However, he misconstrues the source of his own power. His arguments sometimes persuade, not because they are deductions from unchallengeable premises, but because they offer considerations, rooted in liberal ideals of autonomy, in favor of protection – considerations that must however be weighed against (and sometimes really do outweigh) the enormous heterogenous lot of considerations on the other side of any particular question. Redish's own rhetorical appeal itself stands in the tradition we have been describing, and has unacknowledged roots in the substantive ideals first formulated by Milton and Mill. It depends on an aspiration to a certain kind of independence and power, the free and self-determining individual, which is itself quite historically specific.[206]

His arguments on behalf of unregulated campaign finance and commercial speech are not deductions from unquestionable premises, but appeals to this ideal. Those appeals show that such speech is salient for free speech purposes. It does not

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[204] By a "compelling interest," he means, not a "standard incapable of compliance," but rather "a matter of truly vital and important concern." Freedom of Expression at 119. This will sometimes generate categorical rules, but sometimes it demands ad hoc balancing, with a "thumb on the scales" in favor of free speech. Id. at 120.

[205] It is also worth noting that in some cases, the result can't be reached, because the Court has given different levels of protection to speech in cases where it has said that the state interest is exactly the same. See Post, *The Constitutional Status of Commercial Speech*, at 29-30.

[206] Charles Taylor observes that the modern tendency to privilege radical choice, unconstrained by any source of value outside the act of choice itself, arises from a description of the human situation in which there is a plurality of valid moral visions that are impossible to adjudicate. This gives rise to a specifically modern ideal of authenticity. "Granted this is the moral predicament of man, it is more honest, courageous, self-clairvoyant, hence a higher mode of life, to choose in lucidity than it is to hide one's choices behind the supposed structure of things, to flee from one's responsibility at the expense of lying to oneself, of a deep self-duplicity." Charles Taylor, *What is Human Agency?*, in 1 Philosophical Papers: Human Agency and Language 33 (1985).

follow that the speech's salience is exactly as great as that of other speech, or that the state interests involved are not stronger here.

Both Redish and Rawls seek to offer accounts of liberty that are insulated from the contingency of contesting political views. For both, that insulation cannot be achieved, because there is no secure Cartesian anchor for their arguments. Rawls understands this. Does Redish?

B. The new negative tunnel constructivism

In recent years, there has been a second wave of tunnel constructivism. Larry Alexander and Stanley Fish have each argued that, because no sound constructivist account of free speech is possible, free speech theory is a misguided project.

Alexander asks whether free speech can coherently be regarded as a human right, by which he means "a moral right that exists apart from any particular legal or institutional arrangement."[207] He is looking for "a negative liberty of a deontological, not indirect consequentialist, nature."[208] He capably shows that free speech cannot be shown to be such a right. Like Redish, he thinks epistemic abstinence is the foundation of free speech, but unlike Redish he thinks such abstinence is impossible. Any speech theory must be founded on substantive moral commitments.

Alexander infers that judges have no business enforcing most of contemporary free speech law, because the case for doing so is too speculative.[209] But perhaps judges should protect free speech because speech is a value worth protecting and the courts are, at least in this department, less untrustworthy than the other branches of government.[210]

Alexander concludes that "[t]here is no human right of freedom of expression," even though he concedes that "[t]here are many good reasons for governments not to regulate expression

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[207] Larry Alexander, Is There a Right of Freedom of Expression? 3 (2005).
[208] Id. at 7.
[209] Id. at 185-93.
[210] The best exposition of this argument that I know is still Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. J. 877, 896-899, 903-07 (1963). The claim is a contingent one. It was not true for most of American history. Until the mid-20th century, popular culture was often supportive of free speech claims, while courts were overwhelmingly hostile. See generally Levy, Emergence of a Free Press; Curtis, Free Speech; Rabban, Free Speech in its Forgotten Years. Today, on the other hand, courts are routinely presented with cases in which some legislative actor has repressed speech in ways that are clearly impermissible under present judicially crafted law. See Adam Winkler, *Free Speech Federalism*, 108 Mich. L. Rev. 153 (2009).

for the purpose of affecting messages."[211] This way of putting it presumes that human rights are made out of some material other than good reasons. It is true that the reasons to allow expression "will always be limited, local, and based on hunches about consequences."[212] But it may also be true that across a broad range of cultural circumstances, it is good, perhaps even morally urgent, to grant a legal right to free speech. A human right need not be more elevated than that.[213]

Stanley Fish similarly claims that "there is no such thing as free speech," because any argument for free speech must state the purpose of a speech-protective regime, and once that purpose has been specified, "it becomes possible to argue that a particular form of speech, rather than contributing to its realization, will undermine and subvert it."[214] Fish's point is devastating if and only if free speech cannot tolerate exceptions, or more generally if liberalism must present itself as viewpoint-neutral, "the principle of a rationality that is above the partisan fray."[215] If liberalism is a substantive position that can frankly acknowledge itself to be such, then Fish's objections lose all their force.

Fish understands this perfectly well. I do not take Fish to be disagreeing with the thesis of this Article. On the contrary, he states it nicely: "Speech . . . is never a value in and of itself but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict."[216] Like me, he argues that any defense of free speech must, in this, follow the model of Milton's *Areopagitica*.[217] His book's title, *There's No Such Thing as Free Speech and It's a Good Thing, Too*, is a silly caricature of his position, but it is so provocative that evidently he couldn't resist using it.

Fish's great weakness as a free speech theorist is that he is so obsessed with refuting, over and over again, the pretensions of tunnel constructivism that he never gets around to saying what the actual modern practice of free speech is, why

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[211] Is There a Right of Freedom of Expression? at 193.
[212] Id.
[213] James Griffin, for example, argues that human rights are tools devised to protect persons in their capacity as agents who can choose and pursue a conception of the good life. Among those tools are the basic necessities of life and liberty from unwarranted interference. See James Griffin, On Human Rights (2008). Free speech (which Griffin barely mentions) might merely be a tool of this kind.
[214] Stanley Fish, There's No Such Thing as Free Speech and It's a Good Thing, Too 13-14 (1994).
[215] Id. at 137.
[216] Id. at 104.
[217] Id. at 102-04.

it is valuable, or how the law ought to promote it. That practice, as it happens, consists in significant part of protecting the expression of views that we substantively reject, such as racism. There are excellent reasons for doing this which have nothing to do with tunnel constructivism, but Fish is blind to them.[218] In that sense, his title is accurate: there is no such thing as free speech between the covers of his book.

These skeptical views depend on the assumption that free speech discourse must rest on constructivist deduction. Until the 1970s, however, defenses of free speech weren't done that way at all.

III. Free speech as a practice

A. Healthy, robust debate

Albert Johnsen and Stephen Toulmin observe that in contemporary philosophy, there is a deep conflict between "two very different accounts of ethics and morality: one that seeks eternal, invariable principles, the practical implications of which can be free of exceptions or qualifications, and another, which pays closest attention to the specific details of particular moral cases and circumstances."[219] Johnson and Toulmin are proponents of the latter approach, which they find in the medieval tradition of casuistry. There is, they think, no "ethical algorithm"[220] that can provide definitive answers to moral questions. Rather, the locus of moral certitude, to the extent that certitude is available, lies in a "shared perception" of what is "*specifically* at stake in particular kinds of human situations."[221] Persuasive moral argument is less likely to be a deduction from inescapable premises than a rich description of the specific situation at hand.

Ethics, according to Johnsen and Toulmin, is less like logic than it is like clinical medicine. Medical practice is in part dependent on a general scientific knowledge of diseases and their treatment. But it also depends on the capacity to recognize specific syndromes, and to reason by analogy from past cases to the present problem. "[A]ll diagnostic conclusions are tentative and open to reconsideration if certain crucial

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[218] The closest he comes to endorsing any judicial test for First Amendment protection is an approving citation of Learned Hand's lamentable opinion in Dennis v. United States, 183 F.2d 212 (1950), aff'd, 341 U.S. 494 (1951). See There's No Such Thing as Free Speech at 127.

[219] Johnsen and Toulmin, The Abuse of Casuistry, at 2.

[220] Id. at 7.

[221] Id. at 18.

symptoms or circumstances have been overlooked or the later course of illness brings important new evidence to light."[222]

Medical judgments are teleological. They are oriented toward the end of health. Medicine, then, is a teleological practice.[223] Its end is historically situated. It is a result-oriented, value-laden enterprise, because "health" is a contested concept. Sickness is deviancy from a norm. The norm is not given by nature. The "blight" that strikes corn is labeled a disease because humans want the corn crop to survive; otherwise we would just talk about the competition between two species.[224] Health is simply a desirable state of affairs.[225] To take a lately familiar example, in the area of human health, sexual dysfunction as a consequence of the aging process is a familiar pathology, and new treatments, such as Viagara and Cialis, have been devised to address it. These treatments have received enthusiastic endorsement from prominent people as different as Hugh Hefner and Robert Dole. The treatment

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[222] Id. at 42.

[223] Here I follow Alasdair MacIntyre, who defines a "practice" as "any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended." Alasdair MacIntyre, After Virtue: A Study in Moral Theory 187 (2d ed. 1984). Practices, as MacIntyre understands them, don't have essences. They have histories.

"A practice," MacIntyre observes, "involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them." Id. at 190. Those standards of excellence can constitute virtues: "A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods." Id. at 191.

The practice of free speech as I describe it in this paper is historically situated within the liberal tradition. MacIntyre thinks that understanding that this is so entails skepticism: "each tradition is unable to justify its claims over against those of its rivals except to those who already accept them." Alasdair MacIntyre, Whose Justice? Which Rationality? 348 (1988). Liberalism itself, MacIntyre thinks, is a tradition in precisely this predicament. Id. at 335. He also thinks that "no tradition can claim rational superiority to any other." Id. at 348. One can regard his description of how traditions operate, and his characterization of liberalism as a tradition, without going this far. The fact that liberalism is a tradition does not entail that we cannot discuss its merits. But we must know how liberal practice operates before we can ask whether its ends are appropriately universalized.

[224] See Ronald Bayer, Homosexuality and American Psychiatry: The Politics of Diagnosis 183-86 (1987).

[225] See Dominic Murphy, *Concepts of Disease and Health*, Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/health-disease/.

presupposes, however, that sexual function is something that is desirable in the aging male. In Plato's *Republic*, a conversation is reported in which someone asked the tragedian, "Sophocles, how are you in sex? Can you still have intercourse with a woman?" Sophocles reportedly responded, "Silence, man. . . . Most joyfully did I escape it, as though I had run away from a sort of frenzied and savage master."[226] The dysfunction was to Sophocles no disease at all.

There is no way to settle the dispute between Sophocles and Hefner about the proper scope of medicine. It turns on fundamentally different conceptions of a good human life. (If you're not moved by this example, think of contemporary disagreements about how the psychiatric profession should address homosexuality.) That does not mean that it is not possible to have a coherent practice of medicine. But it does mean that the purposes of medicine cannot be deduced from first principles, and neither can the appropriate treatment for any particular patient.[227] The actual practice of medicine will be embedded in a way of life with distinctive values.

This shift in the purposes of medicine shows that Johnsen and Toulmin's call for a revival of casuistry fails to describe an important element of situation-specific practical reason. Its perception and assessment of particular situations will depend on the values that the diagnostician brings to the situation. These will be uncontroversial only to the extent that the others who assess his work belong to his culture and share his world view.[228]

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[226] Plato, Republic 329c, in The Republic of Plato 5 (Allan Bloom tr. 1965).

[227] Aristotle's methodological warning is pertinent here:

> Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts. . . . We must be content, then, in speaking of such subjects and with such premisses to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true and with premisses of the same kind to reach conclusions that are no better. In the same spirit, therefore, should each type of statement be received; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs.

Aristotle, Ethics I.3, 1094b11-27 (W.D. Ross tr.).

[228] As MacIntyre puts it, "each theory of practical reasoning is, among other things, a theory as to how examples are to be described, and how we describe any particular example will depend, therefore, upon which theory we have adopted." Whose Justice? at 333. MacIntyre is right only if he means "theory" broadly to include any framework for understanding what matters in human life. Most people engage in practical reasoning, and thereby display what they feel is most important to them, while remaining innocent of "theory" as it is practiced in philosophy departments and law schools. See

Freedom of speech, and specifically the construction of constitutional rules that protect the freedom of speech, is a practice much like medicine. It aims to preserve the operation of a certain kind of system, here a system of public discourse and debate, in order to facilitate the realization of the goods internal to the practice and to protect it from pathologies that impair its proper operation. As in medicine, however, what counts as "proper operation" can only be determined by reference to value judgments. Those value judgments rest on a vision of a certain kind of individual living in a certain kind of society.

The values that free speech serves are mutually reinforcing. The value of self-realization supports democracy and free speech, but these are also reasons to support self-realization, and one advantage of democracy is the free speech that it fosters. Considerations of rich community life, individual autonomy, and scientific advancement are likewise reasons to support free speech.[229] As with health, the goal of the practice is a complex of goods.

If I am going to make you appreciate the value of this practice, I cannot do that by a series of deductions from first principles. I must say, with Bernard Shaw, "I do not address myself to your logical faculties, but as one human mind trying to put himself in contact with other human minds."[230] I need to make you appreciate the substantive attractiveness of the kind of community that I am trying to create, a community that tolerates a broad range of expression. This is a problem less of logic than of rhetoric.[231] Addressing the rhetorical problem was the aim, I will now argue, of every major defender of free speech before the constructivists.

Free speech is a distinctive cultural formation that develops at a particular point in historical time. It is not a necessary implication from democracy, the search for truth, autonomy, or anything else. It is a political ideal, with roots in the Protestant Reformation, aiming at particular qualities of character among citizens and a particular type of institutions of public discourse.

Charles Taylor, Sources of the Self: The Making of the Modern Identity 21 (1989).

[229] Farber & Frickey, *Practical Reason and the First Amendment*, at 1640.

[230] *The New Theology*, in The Portable Bernard Shaw 305 (Stanley Weintraub ed.1977).

[231] The ways the Supreme Court has used rhetoric and metaphor to justify the development of a robust law of free speech are documented in detail in Robert Tsai's impressive book, Eloquence and Reason. It is also likely that the self-serving claims of opportunistic legal and political actors explain some of the free speech terrain. See Frederick Schauer, *First Amendment Opportunism*, in Eternally Vigilant, supra note 159, at 174; Schauer, *The Boundaries of the First Amendment*.

As with medicine, the conception of healthy discourse shifts over time. The rhetorical power of any defense of free speech depends on your accepting the normative attractiveness of the ideal that animates it. These ideals compete with other desiderata that are no less worthy of attention or allegiance.

What I propose here is something like the context-specific "practical reason" advocated by Farber and Frickey, though I emphasize more than they do that this reasoning is to be employed in the construction of rules that will govern future cases, rather than a particularistic judgment in every case.[232] Redish objects that they do not "explain how one actually goes about attempting to resolve a specific case on the basis of practical reason,"[233] and concludes that their approach "free[s] a reviewing court from the bonds of reason, consistency, and predictability that inherently characterize principled decision making"[234] and "ultimately amounts to a form of non-rational subjectivism and intellectual chaos."[235] The only way to answer Redish's claim that there is no coherent alternative to tunnel constructivism is to show that such an alternative exists and that it can produce a workable and speech-protective regime.

There are, of course, many human practices that seek to treat like things alike, but which cannot be reduced to algorithms: medicine is not merely non-rational subjectivism and intellectual chaos. But is it possible for free speech protection to be like medicine in this respect? To show that it is, I will examine the tradition of speech-protective argument that thrived for more than 300 years before the advent of constructivist theories.

I will begin with a sustained analysis of the classic defenses of free speech by Milton and Mill, as well as early American practice and the brief but very influential discussions by Justices Holmes and Brandeis. I will then consider the most prominent free speech theorist of the 1960s, Thomas Emerson, and other leading theorists from that period. None of these authors are constructivists, and all embrace substantive political and moral goals in ways that constructivists would find anathema. Milton, with whom the tradition begins, bases his claims almost entirely on his idiosyncratic variety of Protestantism. The tradition shows that it is possible to have a robust defense of free speech that is not at all constructivist.

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[232] See Farber & Frickey, *Practical Reason and the First Amendment*, passim. For criticism, see Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 96-106; Schauer, *Harry Kalven and the Perils of Particularism*.

[233] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 99.

[234] Id. at 101.

[235] Id. at 105.

B. Milton

The earliest articulation of the basis of free speech,[236] in which the basic elements of the new formation are already visible, is John Milton's 1644 pamphlet, *Areopagitica*. In 1641, during the struggles leading up to the English civil war, Parliament abolished one of King Charles I's most potent means of repression, the Court of Star Chamber. Until that point, one could legally publish only with a license from the Star Chamber. Its abolition was primarily aimed at depriving the King of his most potent means of exercising arbitrary power over his adversaries. An unintended side-effect was the removal of all restrictions on printing. "The immediate result," Vincent Blasi reports, "was a flourishing of political and religious ideas the likes of which England had never before experienced. . . By one count, the number of pamphlets published during the year 1640 was 22; in 1642, it was 1,966."[237]

In August 1642, Charles I raised his standard at Nottingham for the coming war against Parliament. Fighting began in October. Parliament, concerned about royalist propaganda and its own internal unity, and also about the proliferation of heretical religious opinions, decided to reinstitute licensing in June of 1643. It was this law that elicited Milton's protest.

In opposing licensing, Milton developed a positive account of the benefits of free speech. These benefits redounded to both the individual and society, in reciprocal fashion. Milton's account of those benefits was shot through with Protestant assumptions – assumptions that continue to influence modern thought about free speech.

At the core of Milton's account was a Christian ideal of individual perfection. This ideal rested on a distinct conception of virtue as the ability to face and overcome temptation. It demanded that each person grasp religious truth inwardly, not just by outward show. The truth that was to be pursued also had distinctive characteristics: it was

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[236] I agree with John Durham Peters that the call to tolerate speech that articulates evil ideas for the sake of a greater good is already present much earlier, in Socratic dialogue, Jewish Torah study and Talmudic commentary, and the epistles of St. Paul. None of these however attempted anything like the creation of a legal doctrine that protects speech. John Durham Peters, Courting the Abyss: Free Speech and the Liberal Tradition 29-67 (2005). Milton, on the other hand, is addressing state actors and calling for a reform of the law.

[237] Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment*, Yale Law School Occasional Papers, at 2 (1995), available at http://lsr.nellco.org/yale/ylsop/papers/6 (visited Dec. 21, 2009).

permanently elusive and would emerge over time, as a consequence of the collision of opposing ideas in a regime of unfettered discourse. The idea that truth was fixed once and for all, and that it could be advanced by blind allegiance to authority, was the core error of Roman Catholicism.

This understanding of the goals of individuals led in turn to a distinct conception of society. Human society was to be understood as unified, not by unanimity concerning any particular proposition, but rather by the common will to pursue truth together. The benefits of truth thus attained greatly outweighed whatever harms were caused by error, and in fact error itself made its own contributions to the emergence of truth. Because what drove the whole program was a vision of the goods achievable through discourse, nothing in particular followed about the limits of the tolerable, and in fact Milton offered little explanation for drawing the line where he did.

Milton's theology is key to understanding his claims about free speech. He radicalized the Protestant insistence on the unmediated communion between man and God. Even correct religious doctrine would not bring about salvation if it was the consequence of blind conformity rather than active engagement with religious questions. "A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."[238]

Religious salvation is to be achieved only by struggle against temptation. "Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary."[239] Traditionally, the crucifixion was the central event in Christian history, but for Milton, the great moment was Christ's rejection, in the desert, of Satan's temptations.[240] It follows that "all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest."[241]

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[238] John Milton, *Areopagitica* (1644), in Complete Poems and Major Prose 739 (Merritt Y. Hughes ed. 1957).

[239] Id. at 728.

[240] That episode is the subject of *Paradise Regained*, in Complete Poems and Major Prose at 470.

[241] Id. at 727. The importance of a free choice between good and evil is likewise emphasized in *Paradise Lost*, Book III, lines 102ff, in Complete Poems and Major Prose at 260. The speaker here is God the Father, explaining why it was right to allow the rebel angels and, later, Adam to transgress:

> Freely they stood who stood, and fell who fell.
> Not free, what proof could they have giv'n sincere
> Of true allegiance, constant Faith or Love,
> Where only what they needs must do, appear'd,
> Not what they would? what praise could they receive?

The truth does not need state assistance to prevail: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter."[242] The state, moreover, is likely to err in deciding what ideas to restrict: "if it come to prohibiting, there is not aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors."[243] Even if errors can be prevented by coercion, coercion cannot produce virtue, and "God sure esteems the growth and completing of one virtuous person more than the restraint of ten vicious."[244]

Orthodoxy in doctrine is not important. What matters is not outward conformity, but adherence to the inner light. All that coercion can produce is "the forced and outward union of cold and neutral and inwardly divided minds."[245] On the other hand, the pluralism that toleration would produce is not a bad thing; "those neighboring differences, or rather indifferences . . . whether in some point of doctrine or of discipline . . . though they be many, need not interrupt 'the unity of spirit,' if we could but find among us the 'bond of peace.'"[246]

What pleasure I from such obedience paid,
When Will and Reason (Reason also is choice)
Useless and vain, of freedom both despoil'd,
Made passive both, had serv'd necessity,
Not mee.

[242] *Areopagitica* at 746.

[243] Id. at 748. Censors are also likely to be incompetent, because no intelligent person will want their jobs. Id. at 734-35.

[244] Id. at 753.

[245] Id. at 742.

[246] Id. at 747-48. See also *Paradise Lost*, Book III, lines 183ff., in Complete Poems and Major Prose at 262-63, where the "sincere intent" of prayer is a lot more important than its content:

Some I have chosen of peculiar grace,
Elect above the rest; so is my will:
The rest shall hear me call, and oft be warn'd
Thir sinful state, and to appease betimes
Th' incensed Deity while offer'd grace
Invites; for I will clear thir senses dark,
What may suffice, and soft'n stony hearts
To pray, repent, and bring obedience due.
To Prayer, repentance, and obedience due,
Though but endeavor'd with sincere intent,
Mine ear shall not be slow, mine eye not shut.
And I will place within them as a guide,
My Umpire Conscience, whom if they will hear,
Light after light well us'd they shall attain,
And to the end persisting, safe arrive.

In an England in which speech is unrestricted, "there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making."[247] But all of this should be understood to be division of a superficial kind, concealing "one general and brotherly search after truth."[248] Truth is not a static thing that can be possessed once and for all. "Truth is compared in scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition."[249] Even religious division is a religious good. "[T]here must be many schisms and many dissections made in the quarry and in the timber, ere the house of God can be built."[250] This united effort will bring about historical progress, the completion of the great Protestant revolution: "there be pens and heads there, sitting by their studious lamps, musing, searching, revolving new notions and ideas wherewith to present, as with their homage and their fealty, the approaching reformation."[251]

Individual dignity, a major theme in modern free speech constructivism, plays a very limited role in Milton's argument. For an author to be compelled to bring his work "to the hasty view of an unleisured licenser, perhaps much his younger, perhaps far his inferior in judgment, perhaps one who never knew the labor of book-writing," and to then "appear in print like a puny with his guardian . . . cannot be but a dishonor and derogation to the author, to the book, to the privilege and dignity of learning."[252] But this is a decidedly secondary theme, it is closely linked to a claim about state incompetence, and Milton spends little time discussing it.

The argument as a whole depends, not just on Protestantism, but on Milton's peculiarly latitudinarian Protestantism. Christopher Hill observes that Milton's theology rests on a radical Arminianism, in which salvation is available to all men who believe, and is in no way dependent on the formal ceremonies of Catholicism or of the Anglican Church.[253] In sacraments as Milton understands them, "it is the attitude of the recipient that matters, not the ceremony."[254] This radical individualism is connected with a range of heretical religious views, many of

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[247] *Areopagitica* at 743.
[248] Id. at 744.
[249] Id. at 739.
[250] Id. at 744.
[251] Id. at 743.
[252] Id. at 735.
[253] Christopher Hill, Milton and the English Revolution 268-78 (1977).
[254] Id. at 306.

them idiosyncratic to Milton.[255] Prominent among these is the priesthood of all believers: anyone with a gift for making the Word of God known should be free to disseminate it.[256] Milton's defense of free speech depends crucially on his religious views.[257] If you don't share those views, Milton won't move you.

Milton does not propose to abolish all viewpoint-based restrictions on publication. His free speech theory contains no epistemological humility or veil of ignorance. "I mean not tolerated popery and open superstition, which, as it extirpates all religions and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely, either against faith or manners, no law can possibly permit, that intends not to unlaw itself."[258] It is not clear why he draws the line here. Was Milton convinced that there was a Catholic conspiracy to enslave England?[259] Did he think that the Catholics, because they did not themselves believe in (and indeed aimed to subvert) toleration, were therefore not entitled to it?[260] Did he think that Catholic speech was not about a matter reasonably in doubt, and so could not contribute to the advancement of truth?[261] Was tolerance only for the "neighboring differences" of those committed to Protestantism?[262] Was Milton perhaps simply betraying his own principles?[263] It is impossible to know.

Because the aim is to create a certain kind of society, and because speech is instrumental to that end, there is no way to deduce the limits of toleration from first principles. Milton is improvising here. The kind of free speech theory that focuses first of all on the boundaries of protection is not his concern. If he can get you to share his social vision, then the boundaries of protection can be left to your discretion.

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[255] See generally id. at 233-337. His religious views rested on a reading of Biblical authority which was equally idiosyncratic. See Regina M. Schwartz, *Milton on the Bible*, in A Companion to Milton (Thomas N. Corns ed., 2001).

[256] See William Haller, Liberty and Reformation in the Puritan Revolution 56-64 (1955).

[257] See generally Blasi, *Milton's Areopagitica and the Modern First Amendment*.

[258] Id. at 747.

[259] Hill, Milton and the English Revolution, at 155-58.

[260] Analogous arguments were made in the mid-20th century to justify withholding free speech protection from Communists. See Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. Chi. L. Rev. 173, 186-89 (1956); Bork, *Neutral Principles,* supra note 40, at 31.

[261] Ernest Sirluck, *Introduction*, 2 The Complete Prose Works of John Milton (Ernest Sirluck ed. 1959), excerpt in Blasi, Ideas of the First Amendment, at 124-26.

[262] Willmoore Kendall, *How to Read Milton's* Areopagitica, 22 J. Politics 439 (1960).

[263] Thomas N. Corns, John Milton: The Prose Works (1998), excerpt in Blasi, Ideas of the First Amendment, at 126-28.

C. Mill

An argument with the structure developed by Milton can however be formulated without the religious elements, and this was in fact done more than 200 years later by John Stuart Mill. The structure of the argument of Mill's 1859 book *On Liberty* contains all of the elements just described in Milton, standing in a similar relationship to one another. The foundation is different: the Christian idea of salvation through faith has been replaced by a Romantic ideal of authenticity. But the moves are recognizably Milton's.[264] Most importantly, they are equally teleological. Mill is not reasoning from first principles. He, like Milton, has a vision of individual perfection within a good society, and is proposing rules calculated to realize that vision.

The liberty that Mill wants to defend encompasses "liberty of expressing and publishing opinions," but also "liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish, perverse, or wrong."[265] The protection of speech is an exception to his principle that the state may interfere with liberty only to prevent harm to others: almost all speech is protected even when it is harmful. But the exception is embedded within the same commitments that generate the broader protection of liberty.

The reason for this broad liberty is an ideal of individuality. God is absent from that ideal – here is the fundamental difference between Milton and Mill – but it continues to be the case that every individual has an obligation to respond to an inwardly felt calling, which if courageously pursued will bring him closer to the ultimate good. Free speech and freedom of conduct are valuable as means, because they smooth the path toward this good.[266]

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[264] The parallels have also been noted by Alan Haworth, Free Speech 118-30 (1998), Lana Cable, Carnal Rhetoric: Milton's Iconoclasm and the Poetics of Desire 129-35 (1995), and Stewart Justman, The Hidden Text of Mill's *Liberty* 75-110 (1991). In a remarkable coincidence, Mill once lived in a house formerly occupied by Milton. Eugene August, John Stuart Mill: A Mind at Large (1975), excerpt in Blasi, Ideas of the First Amendment, at 312. Mill may be read as refurbishing Milton's argument, stripping it to the beams and rebuilding, but relying on the same basic structure.

[265] Mill, On Liberty, at 71.

[266] See Fred R. Berger, Happiness, Justice, and Freedom: The Moral and Political Philosophy of John Stuart Mill 271-74 (1984).

Like Milton, Mill places enormous value upon the ability to face and overcome temptation. Society needs "open, fearless characters."[267] His argument that truth is likely to emerge from the collision of ideas is familiar. Much more than Milton, he relies on the experience of the scientific revolution (though Milton does augment his case against censorship by recalling his visit with Galileo, then under house arrest in Italy).[268] But like Milton, Mill cares about the capacity to grasp truth inwardly, not just by outward show. He values "the clearer perception and livelier impression of truth produced by its collision with error."[269] If the reasons for even a true opinion are held without understanding the arguments both for and against it, "it will be held as a dead dogma, not a living truth."[270] As in Milton, a man may be a heretic even in the truth.[271] Truth held dogmatically "is but one superstition the more, accidentally clinging to the words which enunciate a truth."[272] The pursuit matters more than the attainment: "Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think."[273] Again like Milton, he uses a military metaphor[274] to describe the struggle he wishes to elicit: "Both teachers and learners go to sleep at their post as soon as there is no enemy in the field."[275]

Independence of character is valuable in itself:

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[267] Mill, On Liberty, at 94.
[268] *Areopagitica* at 737-38.
[269] Mill, On Liberty, at 76; see also id. at 95.
[270] Id. at 97.
[271] As Justman observes, Mill uses this metaphor sympathetically in his earlier essay on Coleridge. Justman, The Hidden Text, at 92.
[272] Mill, On Liberty, at 97.
[273] Id. at 95.
[274] Peters observes that for Mill, truth's triumph is less inevitable, more a matter of probability. "If Milton took truth as an undefeated wrestler, never vanquished in a match against falsehood, Mill's sporting metaphor might be a batting average." Peters, Courting the Abyss, at 129.
[275] Mill, On Liberty, at 105. Like Milton, he thinks that the moral distress of contemplating ways of life antithetical to your own is good for you. See Jeremy Waldron, *Mill and the Value of Moral Distress*, in Liberal Rights: Collected Papers 1981-1991, at 115 (1993). This is his answer to Justman's objection: "if people know best what makes them happy, then Mill has no warrant to criticize Victorians for their conformism, their meanness of soul – perhaps that's what makes them happy." Justman, The Hidden Text, at 100. Mill is not a neutralist liberal: he thinks that "the most important point of excellence which any government can possess is to promote the virtue and intelligence of the people themselves." *Considerations on Representative Government*, in 19 Collected Works 390 (John M. Robson ed. 1996), quoted in Justman, The Hidden Text, at 77.

> It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to.[276]

As John Durham Peters observes, Mill's ideal of character is an unstable mix of Stoicism and romanticism. As listeners, citizens must be willing to subject their dearest beliefs to challenge and criticism, and learn to articulate views the opposite of their own. Yet as speakers, they must present their ideas powerfully and with conviction.[277]

The valuable traits of character promoted by a regime of free speech have a negative counterpart in the malign effects of censorship. "The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed, by the fear of heresy."[278] The consequence is "a low, abject, servile type of character,"[279] and Mill bombards it with nasty metaphors: automatons in human form, apes, cattle, sheep; he even borrows Milton's metaphor of a "stagnant pool."[280] The rhetorical aim is to make the reader see the value of the kind of character that Mill prizes. Alan Ryan observes that *On Liberty* "does not so much lay out compelling arguments as depict a type of character to which one can react favourably or unfavourably."[281]

As in Milton, the truth is permanently elusive and will emerge over time, as a consequence of the collision of opposing ideas in a regime of unfettered discourse. "The exclusive pretension made by a part of the truth to be the whole must and ought to be protested against . . . ."[282] Progress is

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[276] Mill, On Liberty, at 127. The same theme is apparent in his essay *The Subjection of Women*, which condemns "the dull and hopeless life to which [society] often condemns them, by forbidding them to exercise the practical abilities which many of them are conscious of, in any wider field than one [childrearing] which to some of them never was, and to others is no longer, open." John Stuart Mill, The Subjection of Women 99-100 (1869; MIT Press 1970).

[277] Peters, Courting the Abyss, at 130-36.

[278] Mill, On Liberty, at 95.

[279] Id. at 114.

[280] Id. at 129.

[281] Alan Ryan, J.S. Mill 141 (1974).

[282] Mill, On Liberty, at 114.

nonetheless possible: "As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase; and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested."[283]

Like Milton, Mill also stresses the likely incompetence of state authorities. Censorship of opinion presumes an infallibility to which the state is not entitled. Even when it interferes with conduct rather than speech, "the odds are that it interferes wrongly, and in the wrong place."[284]

This understanding of the goals of individuals leads in turn to a distinct conception of society, unified not by common opinions but by the common will to pursue truth. Again, error contributes to the emergence of truth.

The liberty of conduct, which is treated in a different section of *On Liberty* from the freedom of speech, has the same foundation. Liberty of conduct is good for one's character; it also has collective benefits, because it makes important information available to mankind. Mill's call for "experiments of living"[285] is not merely a metaphor; it is offered in a scientific spirit. He thinks that it is possible to make progress with respect to values as well as facts: mankind can discover higher pleasures which, once known, will be preferred to the lower ones.[286] "[T]he only unfailing and permanent source of improvement is liberty, since by it there are as many possible independent centres of improvement as there are individuals."[287] Developed human beings are of use to the undeveloped primarily because "they might possibly learn something from them."[288] As with Milton, even errors help to advance truth. Action that brings "great harm to the agent himself" are beneficial to others, because, "if it displays the misconduct, it displays also the painful or degrading consequences which, if the conduct is justly censured, must be supposed to be in all or most cases attendant on it.[289] This is why "[m]ankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest."[290]

Finally, once more the limits of the tolerable are drawn without much explanation. Opinions lose immunity

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[283] Id. at 106.
[284] Id. at 151.
[285] Id. at 120.
[286] See Berger, Happiness, Justice, and Freedom, at 30-63.
[287] On Liberty at 136.
[288] Id. at 129.
[289] Id. at 150-51.
[290] Id. at 72.

> when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.[291]

How is a court to tell what constitutes a "positive instigation"? The fact that bad conduct is a probable result of the speech? That test was adopted by the Supreme Court for a while, with lamentable results.[292] Or something more speech-protective, such as clear and present danger, the counseling of actual law violation, or something like the *Brandenburg* test? Mill does not say. He is as vague about the boundary as Milton. It is not his central concern. Like Milton, he is trying to create a kind of society, and to get the reader to see its appeal. The creation of appropriate rules of law is ancillary to his project.

D. Milton and Mill compared

In short, there are major structural similarities between the arguments of Milton and Mill. At the core of both is an ideal of individual perfection, consisting in personal, inwardly felt connection with a source of value that is not reducible to any formula or received set of behaviors. The good toward which the individual strives is dynamic and ever-changing, and demands a corresponding dynamism in the individual. Individual virtue, then, consists in the ability and the courage to weigh alternatives for oneself and choose properly. One facet of this virtue is the capacity to discern truth, a truth that one can only progress toward in an asymptotic process that is never complete. The collision of ideas helps the individual in this task, by forcing the individual to confront the real range of choices before him.

Both also have a vision of communal life that is largely driven by the need to facilitate the realization of this individual ideal. The task for society is to foster conditions of experimentation and debate that make it likely that the

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[291] Id. at 119, but see a somewhat different articulation of the limit at 76n., where he says that incitement to violence may be punished "only if an overt act has followed, and at least a probable connection can be established between the act and the instigation." Mill does not appear to notice the large differences between these two formulations.

[292] See Redish, Freedom of Expression, at 175-83.

individual will engage in the necessary moral confrontation. Even errors are valuable, and their dissemination should be tolerated, because they help to promote such confrontation. The struggles of individuals produce benefits for society, both in the advancement of truth and the discovery of new and better ways of living. The social unity both envision depends on a general understanding of the way in which a regime of liberty tends to promote self-development, which is the core ideal for both.

Their ideals of self-development – and this is the gap that separates them from Redish - are culturally specific (though neither of them would likely have seen this). Milton's depends on his radical Protestantism. Mill's relies on his peculiar combination of romanticism and stoicism. Neither embraces anything so abstract as truth, democracy, or self-realization. Both have very specific ideas of how freedom ought to be exercised. It is the appeal of those ideals that powers their arguments.

Alan Haworth, who has also noted the similarities between *Areopagitica* and *On Liberty*, thinks that the very different context in which Mill is writing weakens Mill's reformulation of Milton's argument. "Milton gains sharpness by keeping his target restricted":[293] he is arguing against licensing, not against all silencing of discussion. When Milton argues that speech advances truth, he is only thinking about moral truth, the knowledge of right and wrong, and he is right that licensers have no legitimate claim to superior understanding about that. Mill tries to generalize the point into areas of discourse where it is less clearly correct. Milton's argument against taking ideas on trust, too, makes more sense in the context of Protestant religion than it does with respect to the rest of human knowledge, where such trust is indispensable to the conduct of ordinary life.

Haworth's objections do not undermine Mill so much as make his claims more diffuse. Mill's power comes from the distinctive ideal of the human person that he is putting forth, not from any particular argument that he is making.[294] As with Madison, when Milton's arguments are displaced from their original context, they lose some of their logical power, but continue to articulate a set of value commitments that can sway decision about which speech should be tolerated.

Milton and Mill both offer attractive responses to certain inescapable tendencies of modernity. That is the source of their enduring appeal. In modern societies, Peter Berger and

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[293] Haworth, Free Speech, at 123.

[294] See Isaiah Berlin, *John Stuart Mill and the Ends of Life*, in Four Essays on Liberty 173 (1969).

his coauthors observe, individuals typically live in a plurality of life-worlds, in which family life at home, one's tasks and identity at work, and political life involve vastly different, often discrepant meanings and experiences. Ideologies of pluralism, such as these writers articulate, function to legitimate this experience.[295] Given the extent to which the individual must continually refashion his social identity, the right to freely plan and shape one's own life naturally becomes salient, because it is rooted in the fundamental structures of modern society.[296]

Milton and Mill are both important and influential theorists of free speech, but you will doubtless have noticed that both are English. How have Americans thought about free speech?

E. The American tradition

From the beginning, there were two American approaches to free speech: an orthodox legal view that construed the liberty narrowly, as merely freedom from prior restraints, and a popular free speech tradition that was far more speech-protective. The popular tradition is invisible in the cases. "To the extent that a popular free speech tradition helped to prevent repressive legislation," Michael Kent Curtis observes, "it left no court decisions or statutes."[297] But Curtis shows that this tradition was an important part of American discourse. It went beyond prior restraints, and repudiated the idea that speech could be suppressed whenever it had a tendency to encourage bad conduct. It was intuitionist, in the sense that it had no well-developed account of the boundaries of protected speech. But it was the principal reason why free speech was a well-established practice.[298] The crucial exception was the antebellum South,

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[295] Peter Berger, Brigitte Berger, and Hansfried Kellner, The Homeless Mind: Modernization and Consciousness 68 (1974).

[296] Id. at 79.

[297] Curtis, Free Speech, at 15.

[298] Nor did it rely entirely on Madisonian premises; it also tended to invoke a character ideal. A prominent example is the series of English pamphlets entitled Cato's Letters, by John Trenchard and Thomas Gordon, which were ubiquitously reprinted and quoted in the colonies. See Levy, Emergence of a Free Press, at 113-14. Cato was concerned about political oppression, but also argued that, in regimes without free speech, "[t]he minds of men, terrified by unjust power, degenerated into all the vileness and methods of servitude: Abject sycophancy and blind submission grew the only means of preferment, and indeed of safety; men durst not open their mouths, but to flatter." *No. 15: Of Freedom of Speech; That the same is inseparable from publick Liberty,* in 1 Cato's Letters, or, Essays on Liberty, Civil and Religious, and Other Important Subjects 115 (Ronald Hamoury ed., Liberty Fund 1995).

where antislavery speech was increasingly repressed. Precisely because free speech was valued in popular culture, this repression was bitterly denounced in the North.

This pattern – popular support for free speech, combined with repressive courts – continued until the mid-twentieth century. By the late 1800s, free speech was an important element of a dissenting libertarian radicalism, and the first scholarly defenses of free speech appeared.[299] But these writers remained marginal, and had no influence on the courts and little on the larger culture. That popular tradition occasionally led state actors to adopt rules much like the ones we have today, but those rules were neither embedded in any larger theory nor judicially enforced to invalidate legislation.[300]

The absence of a theory can be regarded as a problem. Zechariah Chafee complained that in the nineteenth century, free speech was not given any specific legal content.[301] Alexander Bickel responded that it is better if legal doctrine never needs to be forged in the first place, because "law can never make us as secure as we are when we do not need it. Those freedoms which are neither challenged nor defined are the most secure."[302]

One can see fragments of the Milton-Mill ideal in the epigrammatic, highly influential formulations of Justices Holmes and Brandeis, which were the wellspring of modern judicial protection of speech. When Holmes invokes "the competition of the market"[303] as a test for truth, he invokes both the scientific revolution rationale and, implicitly, the idea of a dynamic, agonistic society, here heavily inflected by the influence of the pragmatists and Darwin.[304] A distinctive character ideal, and the fear of a blindly repressive society, animate Brandeis's claims that "courage" is "the secret of liberty" and his claim, dense with images and metaphors, that "it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."[305] The arguments of both are too brief and

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[299] Rabban, Free Speech in its Forgotten Years, at 177-210.
[300] See generally id.
[301] Zechariah Chafee, Free Speech in the United States 506-09 (1971).
[302] The Morality of Consent at 60.
[303] Abrams v. United States, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting).
[304] See Louis Menand, The Metaphysical Club: A Story of Ideas in America (2001); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 Sup. Ct. Rev. 1.
[305] Whitney v. California, 274 U.S. 357, 375 (1927)(Brandeis, J., concurring). The importance of this character ideal for Brandeis is elaborated in Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis*

conclusory to be constructivist. The specific legal tests they proposed have been discarded, but their statements of free speech ideals have endured.

A more constructivist approach may seem to be offered by Alexander Meiklejohn, who declared that freedom of speech is "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[306] As his critics have noted, however, Meiklejohn's pretensions to deduction are a sham. His work is full of undefended assumptions about the appropriate scope of the political agenda and the nature of political freedom, and the boundary he draws between protected and unprotected speech is notoriously conclusory and indeterminate.[307] No court could administer it as a rule even if it wanted to. What he really offers is a bold – in context, heroic - rhetorical intervention in a repressive political environment, masquerading as a deductive argument.[308] His main achievement lies in stating reasons why speech that advocates the overthrow of the government, the speech of Communists, has political value and should be protected. In the United States, the power to suppress such speech was used, throughout Meiklejohn's career, to repress legitimate dissent, almost always from the political left, and thereby to deprive the electorate of legitimate political choices.[309] Meiklejohn fought the good fight, but he was not a constructivist.

F. Emerson

The title of Thomas Emerson's *Toward a General Theory of the First Amendment*,[310] which is one of the most cited law review articles on free speech ever written,[311] is often taken to aim at

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Opinion in Whitney v. California, 29 Wm. & Mary L. Rev. 653 (1988), and Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in Eternally Vigilant, supra note 159, at 60.

[306] Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1960).

[307] Lee Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America 147-58 (1986); Redish & Mollen, *Understanding Post's and Meiklejohn's Mistakes*, at 1312-21; Post, Constitutional Domains, at 268-89; Wellington, *On Freedom of Expression*, at 1110-12, 1116-17.

[308] See Bollinger, The Tolerant Society, at 152-58.

[309] See Redish, The Logic of Persecution, passim.

[310] Emerson, *Toward a General Theory of the First Amendment*.

[311] In 1985, it was number 26 among the top 50 articles ever written. Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 Calif. L. Rev. 1540, 1550 (1985). The only other article that had free speech as its central focus was Bork, *Neutral Principles,* supra note 40, (tied for number 24) which very slightly outranked it with four more citations. By 1996, Bork had risen to number 7 and Emerson had declined to 33. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751, 768 (1996).

a constructivist theory.[312] However, the article actually offers a statement of a set of general value commitments, relevant to but not dispositive of a broad range of free speech problems, together with a description of the environment in which those values are to be realized. His aim, he says, is to analyze "(I) what it is that the first amendment attempts to maintain: the function of freedom of expression in a democratic society; (II) what the practical difficulties are in maintaining such a system: the dynamic forces at work in any governmental attempt to restrict or regulate expression; and (III) the role of law and legal institutions in developing and supporting freedom of expression."[313]

He articulates multiple speech values without assigning priority to any one of them. Speech is valuable for individual self-fulfillment, to advance the discovery of truth, to provide for participation in decisionmaking, and to achieve a more adaptable community. These commitments have no further foundations. The theory of freedom of expression rather "comprehends a vision of society, a faith and a whole way of life."[314]

He then anatomizes, at some length, "the powerful forces that impel men toward the elimination of unorthodox expression."[315] He undertakes a rich sociological and institutional description of contemporary America, which he takes to be the indispensable predicate of the protections he advocates. Those forces are illustrated by the history of speech suppression in America, notably the period of the Alien and Sedition laws, the restrictions of World War I, and the restrictions that followed World War II.[316] It is because those forces are so powerful that there must be a strong commitment to the right to free expression, and any exceptions to protection "must be clear-cut, precise and readily controlled."[317]

Emerson thus argues for rigid speech-protective rules, not because they are logical deductions from his premises, but

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[312] Thus, for example, Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212 (1983), makes clear that Emerson is one of his targets. See id. at 1283. By "theory," however, Shiffrin means constructivism: "high level abstractions that dictate results in all or more concrete cases." Id. at 1254. It is anachronistic to attribute this kind of theory to Emerson, but Shiffrin's assumption that this must be what Emerson was trying to do is revealing, because it shows how pervasive the assumption had become by 1983 that any free speech theory must be constructivist.

[313] Emerson, *Toward a General Theory of the First Amendment*, at 878.

[314] Id. at 886; see also Thomas I. Emerson, The System of Freedom of Expression 7-8 (1970).

[315] *Toward a General Theory of the First Amendment*, at 887.

[316] Id. at 891-93.

[317] Id. at 889.

because recent memory shows that the existing law of free speech is too weak to afford the protection that is necessary if the goods of a free society are to be realized. The rules he proposes are crafted with that experience in mind. The four purposes of free speech that he lays out are not premises from which he deduces anything. They are values that the reader should keep in mind when evaluating his proposals. His proposals are cobbled together instrumentally, in a spirit of problem-solving rather than logical inference. Judges are authorized to implement these proposals merely because their exercise of discretion is more trustworthy than that of the legislative and executive branches of government.[318] In this there is a huge gap between Emerson and the later writers who seize one of the values he lays out and make it the major premise of a constructivist theory.

The analogy with the practice of medicine, considered above, helps us to understand why Emerson organizes his article as he does. Before you can be a doctor, you need to (1) understand what constitutes health, (2) have a detailed factual description of the situation that presents obstacles to its attainment, and from these (3) devise a provisional plan for treatment, revisable in light of experience. Emerson offers (1) a statement of free speech ideals, (2) a description of the environment in which free speech is endangered, and (3) proposed rules to address the dangers. No wonder constructivists were impatient with Emerson.

Emerson leaves some important matters vague. The doctrinal structure he proposes is crude. Schauer observes that "if a number of diverse values are served by the First Amendment, it would seem more likely that an equally diverse doctrinal structure would result."[319] Emerson gives no explanation for the diminished protection of commercial speech.[320] He makes protection of all kinds of speech depend upon a potentially misleading distinction between "expression" and "action," the labels suggesting that protection turns on something intrinsic in the "essential qualities"[321] of the communication that puts it

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[318] Id. at 896-899, 903-07. On the limited validity of this claim, see supra note 210.

[319] Schauer, *Codifying the First Amendment*, at 313.

[320] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 97.

[321] *Toward a General Theory of the First Amendment*, at 917. Any search for such "essential qualities" is delusory, because there are no such essential qualities. Stanley Fish correctly observes that "insofar as the point of the First Amendment is to identify speech separable from conduct and from the consequences that come in conduct's wake, there is no such speech and therefore nothing for the First Amendment to protect." Fish, There's No Such Thing as Free Speech, at 106. For further analysis of the incoherence of the

on one or the other side of the line. But as he develops the distinction, it turns on a purely consequentialist judgment, "a question of whether the harm attributable to the conduct is immediate and instantaneous, and whether it is irremediable except by punishing and thereby preventing the conduct."[322] On this basis, for example, he concludes that defamation of private figures,[323] undesired publicity,[324] perhaps even publication of information that might prejudice a fair trial,[325] is "action."[326] The limits of First Amendment salience aren't considered at all: Emerson has nothing to say about the exclusion of, say, contract law, which consists almost entirely of visiting unwanted consequences on persons because of words that they have said.[327] In short, as Schauer concludes, he "attempts to put too much of a diverse phenomenon into too sparse a doctrinal structure."[328]

The reason why certain kinds of speech are particularly salient for Emerson, evidently, is that those kinds of speech are necessary to achieve the ends that he valorizes. We have discovered distinctive goods of discourse that make sense in our time and place. We need rules that will preserve this sphere of discourse. The rules are tools created to do a job. This is the right way to think about the problem. The weakness of Emerson's theory is that his tools were too crude for the job as he himself conceived it.

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distinction, see Redish, Freedom of Expression, at 201-04; Laurence Tribe, American Constitutional Law 825-32 (2d ed. 1988); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277 (2005).

[322] *Toward a General Theory of the First Amendment*, at 917.

[323] Id. at 922.

[324] Id. at 927.

[325] Id. at 925.

[326] In his later discussion in The System of Freedom of Expression, Emerson again describes the issue as presenting the (incoherent) question "which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental?" Id. at 80. In the discussion that follows, however, he focuses instead, much more sensibly, on an entirely distinct issue: whether the government's purpose in restricting any particular conduct is to curtail expression. Id. at 80-90. The Court itself has taken a similar line, holding that restrictions on communicative conduct are permissible "if the governmental interest is unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968). Emerson denounces the *O'Brien* test, but it appears that his real concern is that the Court is misapplying it in that case: "it is apparent that governmental control was directed at prohibiting the expression in draft card burning, not at punishing the action." The System of Freedom of Expression at 84.

[327] See Schauer, *The Boundaries of the First Amendment*.

[328] Schauer, *Harry Kalven and the Perils of Particularism*, at 410.

As late as the mid-1960s, there was no constructivist theory of free speech. Two other leading writers are further illustration.[329] All you will find in Harry Kalven's *The Negro and the First Amendment*[330] is close critical readings of cases, with no overarching theoretical framework.[331] Alexander Bickel's treatment of speech issues in *The Least Dangerous Branch* is similarly case-specific,[332] and in his last work, perhaps reacting to the early emergence of free speech constructivism, he flatly repudiates the idea that the First Amendment is a "coherent theory that points our way to unambiguous decisions."[333]

V. Institutions and Character in the System of Freedom of Expression

Milton, Mill, Holmes, Brandeis, Emerson, and Post all can be understood as articulating the imperatives of the emerging category of public discourse. All are, in different ways, consequentialist, describing the good results that discourse will produce. The label of "consequentialist" may however obscure the fact that no consequence is self-evaluating: all these writers work in a cultural milieu in which those results *count* as good. All are ideologists of an emerging practice.[334] All would agree with Owen Fiss that freedom of speech refers to "a social state of affairs, not the action of an individual or institution."[335]

The elements of a healthy realm of public discourse are multiple and mutually reinforcing. Much recent scholarship has identified values of free speech in addition to those enumerated

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[329] Another prominent work is Laurent B. Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962), which argues strongly against ad hoc balancing in favor of rules. He says little about how the rules are to be derived, except to endorse the argument of Meiklejohn. If Meiklejohn is no constructivist, see supra text accompanying notes 306 - 309, then neither is Frantz. Thanks to Steven Shiffrin for calling my attention to this article.

[330] Harry Kalven, Jr., The Negro and the First Amendment (1965).

[331] The contingencies and doctrinal embarrassments of *New York Times v. Sullivan* are discussed, with no attempt or even inclination to clean them up with an elegant theory, in id. at 52-64; see also Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191 (1964). For a shrewd assessment of Kalven's ambivalence toward grand theory, see Schauer, *Harry Kalven and the Perils of Particularism*.

[332] Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 51-55, 88-100, 149-50, 232-34 (1962).

[333] Alexander Bickel, The Morality of Consent 57 (1975).

[334] Here I use the term "practice" in MacIntyre's sense. See supra note 223.

[335] Owen M. Fiss, *Free Speech and Social Structure*, in Liberalism Divided: Freedom of Speech and the Many Uses of State Power 15 (1996).

by Emerson.[336] These works have often been criticized as inadequate or partial accounts of the purpose of free speech, but they are better understood as descriptions of single elements of the cluster. Schauer's hypothesis, that we have several different first amendments, has already been noted. Let us now consider how they fit together.

The sphere of public discourse has many interlocking elements, in addition to appropriate speech-protective rules of law. I here consider them in two broad categories: the institutional framework, and the character of individuals.

With respect to the institutional element, Jurgen Habermas's historical analysis of the emergence of the public sphere is helpful. In Europe, beginning late in the seventeenth century, a new set of institutions developed – newspapers, literary salons, coffeehouses, novels, and works of art criticism – that were separate from both the state and private civil society. These generated a new sphere of public reason that could then become the basis for criticizing both. Printedness took on a new cultural meaning, implying a new mode of societal integration as resting on the common use of reason, through discourse addressed to a broad and impersonal audience.[337]

Habermas's later work is less historical and more abstract, elaborating the norms he thinks implicit in the practice of discourse. For example, he claims that when people engage in communicative action, they "must commit themselves to pragmatic presuppositions of a counterfactual sort," notably "that the participants pursue their illocutionary goals without reservations, that they tie their agreement to the intersubjective recognition of criticizable validity claims, and that they are ready to take on the obligations resulting from consensus and relevant for further interaction."[338] From these abstract premises, Lawrence Solum deduces a doctrine of free speech that gives privileged protection to speech that aims at the consensual coordination of action, rather than speech that merely attempts to manipulate its audience.[339]

The Habermas-Solum approach begins to look like another constructivism. Habermas's theory aims to reconstruct our actual practice, and Solum aims to do the same with free speech

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[336] See supra text accompanying note 314.

[337] See Jurgen Habermas, The Structural Transformation of the Public Sphere (T. Burger & F. Lawrence tr. 1989).

[338] Jurgen Habermas, *Between Facts and Norms* 4 (1996). For elaboration, see Jurgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in Moral Consciousness and Communicative Action 43-115 (1990).

[339] Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 Nw. U. L. Rev. 54, 96-97, 111-113 (1989).

doctrine. But the abstraction of Habermas's later theory obscures the historical specificity of any particular public sphere. Habermas's public sphere is an ideal type subject to a broad range of possible elaborations.[340] Critics have pointed out, and Habermas has agreed, that his early work excessively idealized the discourse of the 18th century and exaggerated the novelty of modern pathologies.[341]

One key parameter is the community of participants. Habermas optimistically assumes that it includes everyone in the polity, but Michael Warner has shown how, in early America, the audience for books and newspapers was presumptively white, male, and upper class. Indeed, printing was one of the markers that constituted a specifically white community.[342] A lively debate took place among Southern white Americans, in the late nineteenth century, over the proposal to disenfranchise black citizens. The proposal was adopted.[343] Many public spheres imply narrow audiences.

The norms of the community, when it is defined in this exclusionary way, can imply limits on permissible viewpoints. Charles Taylor observes that the democratic imperative to bond citizens together, so that the losers in majority voting will nonetheless retain allegiance to the polity, can create "an all-but-irresistable pull to build the common identity around the things that strongly unite people, and these are frequently ethnic or religious identities."[344] In the limiting case, "the logic of democracy can become that of ethnic cleansing."[345] Or milder incursions on rights: Community ideals can underwrite limitations on speech, such as bans on blasphemy and pornography.[346]

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[340] Peters observes that its ideal-typical character is exaggerated by the neologism "public sphere" in the translation of Habermas's book, which aims to explain the origins of what in German was an ordinary and familiar political term. John Durham Peters, *Distrust of Representation: Habermas on the Public Sphere*, 15 Media, Culture, & Society 541, 543-44 (1993).

[341] See the critical essays, and Habermas's response, in Habermas and the Public Sphere (Craig Calhoun ed. 1992). Craig Calhoun also observes that Habermas almost completely neglects the internal organization of the public sphere,: "the power relations, the networks of communication, the topography of issues, and the structure of influence." *Introduction*, in id. at 38.

[342] Michael Warner, The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America 12 (1990).

[343] See C. Vann Woodward, The Strange Career of Jim Crow 67-109 (3d rev. ed. 1974).

[344] Charles Taylor, *Modes of Secularism*, in Secularism and Its Critics 46 (Rajeev Bhargava, ed., 1998).

[345] Id. at 48.

[346] See Post, Constitutional Domains, at 89-116.

Another key parameter is the media that are available.[347] An inchoate public realm exists whenever writing is done for an audience of strangers: it is implicitly present in Homer. Each medium implies a different audience. Contrast cheap paperback editions with expensive hardcovers.[348] The internet implies a public that is different still.

The state can have a powerful influence on the shape of public discourse, by means that have nothing to do with the censorship that First Amendment law concerns itself with. Christianity spread quickly because the Roman Empire guaranteed that travelers could journey safely between cities. The press in the early American republic depended heavily on the Federal policy of preferential mailing rates for newspapers.[349] As noted at the beginning of this Article, the shape of public discourse would be very different without copyright law.

Shifts in the medium of public discourse can have both positive and negative effects for the multiple values of free speech. The internet, for example, has made it far cheaper to disseminate information, but it has also gutted revenue sources for newspapers and thus devastated their newsgathering staffs, which have suffered massive cutbacks across the country.[350] Vincent Blasi long ago noted the need for "well-organized, well-financed professional critics to serve as a counterforce to government – critics capable of acquiring enough information to pass judgment on the actions of government."[351] Those critics are disappearing.

Finally, the values promoted by public discourse depend on ongoing institutional practices that are recognized as valuable. The truth-promoting rationale for free speech, for example, rests on the paradigm of scientific inquiry, and would be far less persuasive were there not an ongoing practice of such inquiry that manifestly improves human welfare. Literature, too, exists in concrete institutional forms that presupposes an audience that shares, or can be made to share, aesthetic judgments. Free speech protects art only because, and to the

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[347] On the impact of media on thought, see also Richards, Toleration and the Constitution, at 167-68.

[348] That is why English censors often were willing to tolerate expensive but not cheap editions of erotically charged classics like Boccaccio and Balzac. See Ian Hunter, David Saunders, and Dugald Williamson, On Pornography: Literature, Sexuality and Obscenity Law 75 (1993).

[349] See Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 Hastings L.J. 671 (2007); Richard B. Kielbowicz, News in the Mail: The Press, Post Office, and Public Information, 1700-1860s (1989).

[350] See Eric Altman, *Out of Print: The Death and Life of the American Newspaper*, THE NEW YORKER, March 31, 2008 at 48, *available at* http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman.

[351] Blasi, *The Checking Value*, at 541.

extent that, judges perceive art as valuable. The bounds of perceived value shift over time. The constitutional protection of pornography might not have happened had not writers such as Lawrence and Joyce undertaken to merge two genres, the educative and the erotic novel, which previously had coexisted in absolutely distinct channels of distribution.[352]

The Supreme Court occasionally (without admitting it) gives constitutional weight to the distinctive function of institutions such as public television stations, the National Endowment for the Arts, the legal profession, universities, and media corporations.[353] There is reasonable controversy over whether doctrine would be better served if these institutional categories were expressly incorporated. But this infrastructure of free speech is obviously indispensable for public discourse. Its healthy operation should be taken into account at least at the architectonic level.

But institutions are not all that the public sphere consists of. It has crucial elements within the minds of citizens. The public sphere demands that the people have certain distinctive traits of character. Literacy is only the beginning. The practice of free speech also includes a character ideal, which continues to have elements first articulated by Milton and Mill. Vincent Blasi has observed that it incorporates a complex set of virtues:

> inquisitiveness, independence of judgment, distrust of authority, willingness to take initiative, perseverance, courage to confront evil, aversion to simplistic accounts and solutions, capacity to act on one's convictions even in the face of doubt and criticism, self-awareness, imagination, intellectual and cultural empathy, resilience, temperamental receptivity to change, tendency to view problems and events in a broad perspective, and respect for evidence.[354]

Lee Bollinger observes that one particularly valuable trait is the capacity to tolerate opposing views. By "carving out one

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[352] See Hunter et al., On Pornography, at 92-134.

[353] See Richard Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 Villanova L. Rev. 273 (2008); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 U.C.L.A. L. Rev. 1747 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 Minn. L. Rev. 1256 (2005); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 Temple L. Rev. 1 (2003); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84 (1998).

[354] Blasi, *Free Speech and Good Character*, at 84. There is a rich literature on the importance of education for democratic citizenship. See, e.g., Stephen Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy (2000); Amy Gutmann, Democratic Education (rev. ed. 1999); Eamonn Callan, Creating Citizens: Political Education and Liberal Democracy (1997).

area of social interaction for self-restraint," the free speech regime helps to "develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."[355] The social benefits of a free speech regime include "the spirit of compromise basic to our politics and the capacity to distance ourselves from our beliefs."[356]

Steven Shiffrin notes that the free speech tradition is especially concerned about protecting and promoting dissent.[357] One reason is obviously that dissent checks the abuse of government power,[358] but another is character. Blasi observes that the principal source of the character effects he enumerates is the environment that free speech creates, in which "dissent is both an option and an inescapable reality."[359] People develop these traits in the course of having to cope with the experience of habitually encountering views with which they disagree, in an atmosphere in which it is safe to hold heretical views.

John Durham Peters observes that, since Milton, the ideology of free speech has celebrated the ability to encounter evil ideas and come away unscathed. "Satan represents a key figure in the dramatis personae of free expression, the troublemaker who nonetheless brings about, by the very force of his negativity, good in the end."[360] Pornographers, Nazis, and other transgressors of the sacred thus form a stable alliance with civil libertarians. Peters emphasizes the cultural peculiarity of this valorization of "sponsoring study-abroad sojourns in the land of fire and brimstone."[361] Most cultures "do not train souls for the kind of ironic contortionism that liberal subjectivity calls for."[362] Rather, most of the world's population "cannot hear certain things without wanting to hit somebody."[363] Free speech is a distinctive cultural formation. Those who would maintain it had better know what it is that they are maintaining.

It is thus an oversimplification to say that the practice of free expression can be derived from a few simple principles.

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[355] Bollinger, The Tolerant Society, at 10.
[356] Id. at 141. Redish's hostile response to Bollinger shows that he rejects the whole idea of designing the free speech regime in order to promote traits of character. "[T]he use of free speech protection to foster right thinking," Redish writes, is "an obvious form of mind control." Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 Crim. Just. Ethics 29, 34 (1992).
[357] Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America (1999); Steven H. Shiffrin, The First Amendment, Democracy, and Romance (1990).
[358] See Blasi, *The Checking Value.*
[359] Blasi, *Free Speech and Good Character*, at 84.
[360] Peters, Courting the Abyss, at 84.
[361] Id. at 14.
[362] Id. at 93.
[363] Id.

The traditional goals of free speech – the advancement of truth, the protection of democracy, the facilitation of individual autonomy and self-realization – are elements of a broader pattern of action. The practice has multiple parts, like the organs of a body. And as with a body, it is a mistake to focus on only one function, such as respiration or nutrition, because health is more than that one function. Nor will it do simply to say that there are multiple purposes of free speech.[364] Understanding the importance of respiration, nutrition, and the other functions isn't enough to qualify you as a doctor. You need to understand how the whole system works, and which interventions are likely to have which consequences for the system.

The job of courts is to devise rules that protect the integrity of this field of activity while giving appropriate weight to the whole range of other interests that can conflict with it. This will sometimes produce contestable compromises like *New York Times v. Sullivan*. (This is emphatically not an argument for ad hoc balancing in each case, which, for reasons amply shown by Emerson and many others, is likely to yield inadequate protection for speech.)

Because free speech is an historical cultural formation, the goods associated with it have developed over time, in unpredictable ways. If it is a right, it is so on the terms described by Scanlon: "limits on the power of governments to regulate expression are necessary to protect our central interests as audiences and participants, and we believe that such limits are not incompatible with a healthy society and a stable political order."[365]

Compare the game of baseball. There are many good things about baseball, but some of them are late developments. Some baseball fans get great pleasure from radio call-in shows that focus on the sport.[366] There may even be some for whom this has become one of the main attractions of the game. Yet this development was unforeseeable when the modern game of baseball was invented in the mid-1800s, long before the invention of the

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[364] Joshua Cohen characterizes free speech as derived from a few fundamental interests (expressive, deliberative, and informational) and then notes, as the basis for rights, government's tendency to underprotect these interests. See Joshua Cohen, *Freedom of Expression*, in Toleration: An Elusive Virtue 173 (David Heyd ed. 1996); Joshua Cohen, *Freedom, Equality, Pornography*, in Justice and Injustice in Law and Legal Theory 99 (Austin Sarat & Thomas R. Kearns 1996).

[365] *Freedom of Expression and Categories of Expression*, at 536.

[366] Prof. Redish is well-known among many Chicagoans who listen to such shows as the frequent radio caller, "Marty from Highland Park." Steven Shiffrin points out in conversation that fantasy baseball has transformed the game for many fans.

telephone and the radio. In some ways, the point is similar to the old question of whether the right is prior to the good. With respect to free speech, the good is prior to the right: the goods achievable by the practice of free speech give the protection of speech its point, and that protection should be shaped with those goods in mind. It is because these goods have no necessary priority over other goods that censorship in the name of non-speech goods, for example of the kind that obscenity law attempts, cannot be ruled out a priori at the level of high theory. The promised goods of censorship must rather be engaged one at a time.[367]

The fact that the practice of free speech is embedded within local cultural values does not mean that there is no leverage with which to criticize existing rules of law for being insufficiently protective of speech.[368] Obscenity law, for example, can be shown to be inadequate for achieving its own deepest purposes, so that the burden it imposes on speech is unjustified even on its own terms.[369] The nonprotection of "fighting words" might be justifiable in theory, but in practice it has almost always been used inappropriately, to punish criticism of public policy, often directed at police officers.[370] The power of the Federal Communications Commission to demand "fairness" in broadcasters' coverage of politics was in fact abused to suppress dissenting views.[371] Child pornography law has drifted so far from its original purposes that it now creates a climate of orthodoxy and fear, in which parents are warned not to photograph their children in the bathtub.[372] That orthodoxy, what George Kateb has called the tendency "to speak and perhaps to think and feel by permission,"[373] is the

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[367] One might generate a formalized account of free speech that began with these goods and virtues and their institutional entailments, and then attempt to deduce rules from these. Such a model, if it could be sustained, would be in some sense constructivist, but it would not be tunnel constructivist. Thanks to Samuel Freeman for pressing me on this point.

[368] Ian Shapiro articulates an analogous concern about Michael Walzer's embedded social criticism, which also aims at preserving culturally contingent norms, in Political Criticism at 55-88.

[369] See Koppelman, *Does Obscenity Cause Moral Harm?*

[370] See Stephen W. Gard, *Fighting Words as Free Speech*, 58 Wash. U. L. Q. 531 (1980).

[371] See Thomas G. Krattenmaker & Lucas A. Powe Jr., Regulating Broadcast Programmming (1994); Thomas W. Hazlett & David W. Sosa, *"Chilling" the Internet? Lessons From FCC Regulation of Radio Broadcasting*, 4 Mich. Telecom. Tech L. Rev. 35 (1998).

[372] See Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921 (2001).

[373] George Kateb, *The Freedom of Worthless and Harmful Speech*, in Liberalism Without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar 235 (Bernard Yack ed. 1996).

antithesis of the virtues of character that free speech aims to foster.

There are at least two ways to think about the amorphous category of public discourse that since Milton has come to be so salient. You may regard it as a mess that badly needs a theorist to tidy it up.[374] But might it not rather be one of the great achievements of modern civilization?

V. The pathologies of tunnel constructivism

A. Campaign finance

Return to the campaign finance problem. Justice Stevens, in his dissent in *Citizens United*, explained why the majority's concept of political corruption was unduly narrow:[375]

> Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.[376]

Redish's response to this is the same as the Court's: it doesn't matter. Any restriction on campaign contributions or speech is "a governmentally orchestrated increase in public ignorance" which, because it is "motivated by a paternalistic concern over the citizens' ability to comprehend the expression," constitutes "an impermissible affront to the dignity of the individual citizen."[377] The interest in preventing corruption is adequately addressed by statutes that criminalize bribery. More generally, any suggestion that the law should be manipulated to change the results of the political process, so that it is less responsive to wealthy campaign

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[374] Constitutional law is shot through with this kind of untidiness, which has produced consternation among some theorists. See Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 Const. Comm. 177 (2010).

[375] The Court also, as in *New York Times v. Sullivan*, made predictions about the chilling effect of the challenged restriction. Citizens United v. FEC, 130 S.Ct. 876, 890-91, 892, 894-97 (2010). As Justice Stevens noted in dissent, prior individual opinions on which the majority relied had also speculated that the purpose of the law might be the protection of incumbent officeholders. Little evidence supports these allegations. Id. at 968-70 (Stevens, J., dissenting). The Court, in short, offered guesses dressed in constructivist garb.

[376] Id. at 961.

[377] Redish, Money Talks, at 5.

contributors and more responsive to everyone else, violates the absolute prohibition of viewpoint-based regulation: "Such an approach views free expression as nothing more than a device to be manipulated in order to achieve predetermined normative political agendas."[378]

It is true that any influence that is obtained by large campaign contributions is of the same kind that any constituent legitimately seeks from elected officials.[379] That casts doubt on the corruption claim. But it does not follow that this cannot possibly constitute corruption. If you concentrate a large enough share of the influence in a small enough share of the people, differences of degree will become differences in kind. There are also consequentialist worries, and worries about corruption, in the other direction: limiting the impact of money in politics will, and may be intended to, magnify the power of other untrustworthy organized interests, such as large media corporations.[380] But determining the balance of distrust is an inquiry in which the Court showed no interest.

For tunnel constructivism, even if the campaign financing system produces oligarchy, responsive only to the interests of the wealthy, this is not inconsistent with a free and democratic society. On the contrary, it *defines* a free and democratic society. Any inequalities "derive, not from direct governmental manipulation of the expressive marketplace, but rather from events and actions wholly untied to the communicative system or its regulation."[381]

Democracy is not only a set of procedures. It is a state of affairs in which people control their own lives, and in which government power is not controlled by elites. That is the result that a properly result-oriented free speech doctrine should aim at. Proponents of the severe restrictions on political speech at issue in *Citizens United* would have to show that those restrictions are necessary for democracy, thus understood. It is not at all obvious that this can be shown. Certainly Stevens does not show it. But in the Court's constructivist world, that showing, even if it could be made, would not matter. We are in the tunnel. Elite domination can

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[378] Id. at 144. If this claim is taken literally, then it is not clear why bribery statutes are constitutionally permissible, since such statutes restrict a form of expression by someone who wants to influence government decisionmaking, and the restriction is motivated solely by the desire to prevent that influence from becoming effective.

[379] Money Talks at 115-46; see also Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663 (1997).

[380] Thanks to John McGinnis for emphasizing this.

[381] Money Talks at 12.

constitute democracy. Its oppressive character has disappeared behind the constructivist veil of ignorance.[382]

The Court's clinging to a constructivist model in the name of democracy, without attention to its consequences for democracy, is like a doctor who constructs a model of what the patient must be like and then administers those treatments entailed by the model, without ever examining the patient to determine the consequences of the treatment (because that would be result-oriented).

B. Commercial speech

One of the most prominent triumphs of Redish's constructivist theory is the growing protection of commercial advertising by the Supreme Court. In 1970, it was taken for granted by nearly everyone that such speech was outside the protection of the First Amendment. Now, as *Lorillard Tobacco* shows, such speech receives substantial protection. It remains less protected than other speech, however.[383] Pertinently here, advertising can be required to contain "such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive,"[384] prior restraints may be permissible,[385] and "misleading" commercial speech is unprotected.[386]

Redish continues to press to make commercial speech as protected as political speech. For example, he argues for strong protection of tobacco advertising. Any restriction on such advertising would "reflect government's paternalistic mistrust of its citizens' ability to make lawful choices on the basis of free and open debate."[387] Nor is it permissible, when

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[382] A related blind spot appears in Redish's treatment of the activities of the House Un-American Activities Committee in the 1950s. HUAC used its subpoena power to expose many Americans' former Communist affiliations, thereby creating a poisonous atmosphere of intimidation and silence. If the goal of free speech is to establish a vibrant and diverse community of discourse, then HUAC was free speech's deadly enemy. Redish, however, thinks that "HUAC in a sense was facilitating the exercise of non-associational First Amendment rights of those individuals who, because of their own ideological beliefs, wished to have nothing to do with any current or former member of the American Communist Party." The Logic of Persecution at 135. Redish acknowledges the risks of chilling speech, but thinks that the appropriateness of the Committee's action under the First Amendment is a close question. Id.

[383] See Money Talks at 14-18.

[384] Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 772 n.24 (1976).

[385] Id.

[386] See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 36, 142 (1994).

[387] Redish, Money Talks, at 57.

regulating advertising, for government to be influenced by its view that smoking is bad for you: suppression "on the basis of government's perception of the speech's wisdom or persuasiveness undermines the basic premises of governmental epistemological humility, without which the First Amendment cannot survive."[388] Tobacco advertising can cause enormous harm, but Redish observes that this is also true of much political speech, and you wouldn't want to give government the power to censor that. Advertising restrictions are viewpoint discriminatory: the speech is targeted because "it conveys an unpopular (albeit perfectly lawful) social message that challenges the views of those who presently hold political power,"[389] in that it urges individuals "to risk the possibility of future health injury in order to obtain certain largely intangible social or personal benefits, as is true of an individual's choice to participate in numerous other risk-producing activities."[390] The use of cartoon characters such as Joe Camel is presumptively protected, because such images "are quite reasonably designed to attract the attention of adult viewers or readers."[391] Regulation of such speech, then, "takes on the ominous character of governmentally orchestrated suppression, manipulation, and mind control – the epitome of the type of expressive regulation the First Amendment precludes."[392]

The veil of ignorance here keeps the architects of free speech doctrine from noticing that speech is being used to

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[388] Id.
[389] Id. at 60.
[390] Id. at 59.
[391] Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 Iowa L. Rev. 589, 629 (1996).
[392] Redish, Money Talks, at 60. On some questions, however, Redish becomes surprisingly accommodating to regulation of tobacco advertising. Five years before *Lorillard Tobacco*, he declared that it is permissible to ban tobacco ads near schools, and specifically referred to proposed federal regulations that would ban advertising within 1,000 feet of schools and playgrounds, which is what the statute invalidated in *Lorillard* did. Redish, *Tobacco Advertising and the First Amendment*, at 607. (His general point might be distinguished from the facts of *Lorillard*, where the Court noted that in "some geographical areas," the law "would constitute nearly a complete ban" on advertising tobacco. Lorillard Tobacco v. Reilly, 533 U.S. 525, 562 (2001).) He says that these are "appropriate time-place-manner restrictions," Redish, *Tobacco Advertising*, at 607, but how can they can be categorized in this way when they are obviously not content- or viewpoint-neutral? He also accepts mandated warnings on cigarette packets, id. at 625, and even the ban on broadcast advertising of cigarettes, see id. at 631-34, in each case saying that these rules may simply be too well-established to change. It is surprising to find him making such concessions. He is, as we have seen, unreconciled with other longstanding rules inconsistent with his theoretical commitments, such as the ban on obscenity, see supra notes 133 - 134 and accompanying text.

entice children to experiment with a deadly, addictive drug. Those children's predicament, of entering adulthood already hooked on a substance that is spectacularly difficult to quit and likely to kill them, is construed by free speech doctrine to manifest their *freedom*.

The protection of commercial speech has other dangerous entailments. One of the most pressing problems facing the United States is the "war on drugs," which has become a humanitarian and financial catastrophe.[393] One possible alternative is to legalize recreational drugs, but to tightly control their distribution and bar them from advertising. That last step, however, would violate Redish's Constitution. You might want to legalize cocaine, in order to eliminate the huge illegal traffic that is destroying our inner cities. But if you do that, then you must permit the formidable persuasive resources of modern advertising to be mobilized on that substance's behalf. Imagine what Joe Camel could do with those enormous nostrils.

This result is hard to reconcile with the idea that it is sensible to outlaw cocaine in the first place. If consumers must not be paternalized, then it is impossible to justify the outlawing of the drug. If such paternalism, with its horrendous human consequences, is permissible, then why is this milder solution not permissible? The justification I am proposing is not the "greater includes the lesser" analysis that Justice Rehnquist offered, which would give government absolute power to bar communication about any lawful product so long as government had the power to criminalize it.[394] That would give the government almost boundless power to restrict speech.[395] Rather, the best justification for outlawing cocaine is that there is a very small class of activities – call them vices - that tend to overwhelm people's rational faculties and cause them great harm, and cocaine use is one of these. Perhaps this category, narrowly bounded, should be brought into free speech law, so that advertising of products that have long been understood to be associated with this kind of destruction is eligible for tighter restriction. There would have to be a new First Amendment category of unprotected speech – call it "vice advertising" – restricted to a very small category of merchandising. Notice what I'm doing here: trying to invent

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[393] See Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 Nw. U. L. Rev. 279 (2006).

[394] There would still be restrictions on the government's ability to bar advertising of contraceptives, because it cannot bar their sale. See Eisenstadt v. Baird, 405 U.S. 438 (1972).

[395] Redish notes this in *Tobacco Advertising and the First Amendment*, at 599-604.

free speech rules that preserve a broad field for unrestrained discourse while directly addressing the harm that speech can do. Whether or not you agree with my specific proposal, my larger methodological point is that this is how the creation of free speech doctrine should be done.[396]

Tobacco and cocaine are extreme cases, but the problem with full protection of commercial speech goes deeper. Redish reasons that, because commercial speech should be entitled to the same protection as political speech, it should receive the protection of *New York Times v. Sullivan*: false and misleading advertising should be actionable only if the speaker knows that it is false or publishes with reckless disregard of whether it is false or not.[397]

Redish's proposal would work a revolution in consumer protection law. Under the present standard of *Central Hudson*,

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[396] The *Lorillard* case raises another problem: the state was restricting speech to adults in order to prevent the speech from reaching children. In Butler v. Michigan, 352 U.S. 380, 383 (1957), the Court held that a state could not "reduce the adult population . . . to reading only what is fit for children." But *Butler* was a case in which the speech was of the highest value – the law covered all printed materials of any kind – and the harm to children of exposure to indecent material was doubtful and speculative. With respect to tobacco advertising, the value of the speech is lower and the harm is far more severe. Thanks to Martin Redish for demanding clarification of this point.

[397] Redish, Money Talks, at 55-56. He explains this proposal in detail in *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433 (1990). He acknowledges that it is difficult to prove knowledge. Even though he is troubled by "regulating even good faith factual assertions," he suggests that "in the area of product health claims, a complete absence of even arguably probative scientific data to support the claim reasonably could be found to constitute recklessness." Id. at 1455. It is not clear, however, how recklessness can fairly be attributed to a marketer who doubts the veracity of science, as many marketers of alternative remedies do. (Compare Model Penal Code § 2.02(2)(c): "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.") Redish would also allow regulation even absent recklessness if "serious physical harm" could result from a consumer's acceptance of a scientifically inaccurate claim. Id. at 1456. Finally, the interest in avoiding consumer confusion can be addressed by "requiring inclusion of a disclaimer of government approval." Id. at 1457. But why is this not impermissible compelled speech? See Post, *The Constitutional Status of Commercial Speech*, at 26-28; Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in* United Foods, Zauderer, *and* Abood, 40 Val. U. L. Rev. 555 (2006). Redish does not want any differential in treatment of commercial and noncommercial speech, but if books could be censored whenever they made claims that were not supported by even arguably probative scientific data, the result would be a far more oppressive scientific orthodoxy than the state is now constitutionally permitted to impose.

"misleading" commercial speech is unprotected. The Court has not explained what this category means. Misleading speech is a fuzzy category: all speech misleads some people. As Steven Shiffrin has observed, the definition of misleading speech is a normative question: we have to decide how many people are too many, and how much misinformation is too much.[398]

The federal agencies charged with enforcing statutory prohibitions of misleading commercial speech have, of course, issued regulations that in practice clear up the fuzziness. Whether they do so consistently with the requirements of free speech is another question. Redish's argument, if accepted, would entail dismantling a great deal of consumer protection law.[399]

FDA regulations provide that health claims for food "must be supported by the totality of publicly available scientific evidence, and there must be significant scientific agreement among experts qualified by scientific training and experience to evaluate such claims that this support exists."[400] Applying this standard, the FDA allows marketers to assert only a very few specified relationships between foods and the prevention of disease,[401] and foods may not make any health claims if they contain nutrients at levels that increase the risk of disease (such as more than thirteen grams of fat per serving).[402] If you are a food manufacturer, even if you sincerely believe that your product prevents a disease that is not on the FDA's approved list, you are required to remain silent about it when marketing your product. The FDA's evident assumption – an assumption that is entirely realistic – is that, as Post has put it, "an adequate understanding . . . would require more time and

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[398] Shiffrin, *The First Amendment and Economic Regulation*, at 1219. For an analysis of considerations that are relevant if this problem is approached on a case-by-case basis, see Strauss, *Persuasion, Autonomy, and Freedom of Expression*, at 369-70.

[399] Schauer notes that "the Securities and Exchange Commission, the National Labor Relations Board, the Federal Trade Commission, the Antitrust Division of the Justice Department, the Office of the Register of Copyrights, the law of evidence, regimes of professional regulation, and quite a few other established mechanisms" are likely to remain undisturbed by free speech law. Schauer, *The Boundaries of the First Amendment*, at 1806.

[400] 21 C.F.R. § 101.14(c).

[401] The permissible health-related claims under the regulations are (1) calcium and osteoporosis, (2) dietary lipids and cancer, (3) sodium and hypertension, (4) dietary saturated fat and cholesterol and heart disease, (5) fiber containing grain products, fruit, vegetables, and cancer, (6) fiber containing grain products, fruit, vegetables, and heart disease, (7) fruit and vegetables and cancer, and (8) folate and neural tube defects. 21 C.F.R. §§ 101.72 – 101.79. The regulations go on to elaborately specify precisely how these relationships can be described to the consumer.

[402] 21 C.F.R. § 101.14(a)(5).

resources than the average consumer could reasonably be asked to invest."[403]

Under the FTC Act, a claim made in an advertisement, or a material omission of fact, is actionable if it is likely to mislead the reasonable consumer. A representation may be made by implied claims, which the FTC determines by looking at the overall context of the advertisement as well as its literal words. If an advertiser cannot show a reasonable basis for its claim, the FTC will force the advertiser to cease making the claim until it can be substantiated.[404]

Neither the FDA nor the FTC standards turn at all on the seller's state of mind. Neither knowledge nor reckless disregard of the falsity matters.

Why should it matter? The consumer is equally harmed whether the seller is an unscrupulous swindler or a sincere but deluded quack. Under Redish's proposal, however, absent the risk of serious physical injury, everything would turn on that distinction. Consumer protection would be much harder to provide. People would be misled about the value of what they were purchasing.

If truthful claims are absolutely protected, then a fatty, sugary product with insignificant traces of vitamins would be able to truthfully put "contains vitamins!" on its label. New Lipido Chips would compete with other, genuinely healthy products. Some consumers would be able to figure out the differences between the really healthy products and the misleadingly labeled ones. But a lot of people would be fooled. They would consume less nutritious foods. There would be higher levels of disease. People would live shorter lives. Sickness and death tend to impede self-realization. But *none of that matters*. The really important thing is preserving free speech principles.[405]

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[403] Post, *The Constitutional Status of Commercial Speech*, at 41 n.190. These regulations are sensible and valuable, but what I write here should not be construed to bless everything the FDA does. See Marion Nestle, Food Politics: How the Food Industry Influences Nutrition and Health (2002).

[404] Douglas W. Hyman, *The Regulation of Health Claims in Food Advertising: Have the FTC and the FDA Finally Reached a Common Ground?*, 51 Food & Drug L. J. 191, 195-97 (1996).

[405] On the destructive effects of full First Amendment protection for misleading commercial speech, see also Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 Loyola L.A. L. Rev. 227 (2007). Redish does show that producer advertising and labeling has been a source of valuable information about information about the benefits of fiber for significant numbers of consumers who were not reached by other sources. Redish, *Product Health Claims and the First Amendment*, at 1460 n.153. But this took place in an environment in which that speech was screened for accuracy by the state. There may be overreach by regulators, and some valid information may not be reaching the

One of the classic single-value constructivist justifications for free speech is the advancement of truth. It is claimed that an unregulated marketplace of ideas will promote the advancement of truth better than any government regulation could. This is an empirical claim, and so is subject to testing. It may turn out to be true in some contexts and false in others, so that government regulation of speech is truth-advancing in some contexts and not others; this question cannot be settled from the scholar's armchair.[406] But tunnel constructivism makes a different use of the truth rationale: once the consumer is assumed to be perfectly rational and capable of processing information, then the "advancement of truth" becomes available as an ideological rationale for constitutional rules that will in fact promote deception and misinformation.

In both the campaign finance and the advertising cases, the large corporate entities that prey upon ordinary citizens are merely the environment in which liberty is exercised. And any effort to restrict the speech that produces these results would be an infringement on liberty. As a speech regulator, you are not allowed even to know that these consequences exist.

Regulation in both cases is, of course, paternalistic. It treats people as if they were not perfectly rational. But people in fact are not perfectly rational. Regulation that pushes people's choices in one direction rather than another can therefore facilitate self-realization by helping to bring about the choices that those people would make if they were perfectly rational.[407]

One more example of paternalistic government regulation of commercial speech. Medicare Advantage (Medicare Part C) is a program in which the government pays private insurers a monthly capitated rate that is set at 95% of the average Medicare cost for a Medicare patient in the area. Each company then insures individuals, and must pay to provide all Medicare services to each beneficiary. As part of their agreement with the Federal government, each company must agree that all marketing materials are subject to prior review by the regulator agency, the Centers for Medicare & Medicaid Services, Department of Health and Human

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public, but this calls for adjustment, not wholesale destruction, of the regulatory regime.

[406] See Alvin I. Goldman, Knowledge in a Social World 189-217 (1999); Frederick Schauer, *Facts and the First Amendment*, 57 U.C.L.A. L. Rev. 897 (2010).

[407] See generally Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (2009).

Services.[408] The materials must be submitted for agency approval at least 45 days before they are distributed.[409]

This is, of course, a prior restraint on speech. Worse yet, it is a licensing scheme just like the one Milton opposed, in which the exact language must be approved by a government regulator before it can be published. This restraint only applies to the beneficiaries of government contracts, and no one is required to contract with the government. But it is settled law that government grants to speakers cannot be conditioned on the speaker's agreement to relinquish its right to spend its own money on speech the government doesn't like.[410] If commercial speech is entitled to exactly the same level of protection as noncommercial speech, then, this regulation is unconstitutional. But should it matter at all that the recipients of the information are elderly people who are likely to be confused by aggressive marketing of insurance products?

Redish thinks that any diminished protection for commercial speech constitutes a kind of viewpoint discrimination, based on disagreement with the capitalist values that advertising conveys. He offers two arguments to support this conclusion. One of these claims that, as with obscenity, diminished protection is based on "some form of hostility to or disdain for the capitalist system of which commercial speech is a part."[411] This ad hominem argument reveals again the unreliability of reverse engineering. It rests on speculation about the motives of those who support diminished protection. It may be true of some scholars who take this position, but Redish makes the far stronger claim that there are no other grounds for nonprotection.

Robert Post, for example, thinks that the basis is the capitalism-friendly goals of consumer protection and the facilitation of "transparent and efficient markets."[412] Post's point can be expanded upon. Modern capitalism depends on high levels of trust among strangers. Without such trust, it is impossible for a large-scale economy to operate.[413] Government regulation of misleading commercial speech, by encouraging people to trust commercial representations, makes it more likely that they will buy unfamiliar products, and so facilitates the

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[408] See 42 CFR §§ 422.2260 - 422.2276. Thanks to Brian Glassman for telling me about these regulations.
[409] See 42 CFR §§ 422.2262.
[410] FCC v. League of Women Voters, 468 U.S. 364 (1984).
[411] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 121; see also Redish, Money Talks, at 21, 41-43.
[412] Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 Loyola L.A. L. Rev. 169, 177 (2007).
[413] See generally Francis Fukuyama, Trust: The Social Virtues and the Creation of Prosperity (1995).

operation of the capitalist system. Similarly with offerings of securities. To say that the motive for diminished protection of commercial speech is hostility to capitalism gets matters exactly backward. If you're hostile to capitalism, you should want very strong protection for misleading commercial speech.

Redish's other argument is that the nonprotection of commercial speech rests on "moral and/or socio-political considerations that are external to the First Amendment."[414] Any effort to shape public discourse in the name of values that are not derived from free speech principles is "an indirect form of viewpoint discrimination,"[415] because the rules are adopted in hopes of fostering a public discourse that contains a set of viewpoints more to the legislator's liking than those that would otherwise exist. Redish is right that his veil of ignorance would filter out such considerations. But that brings back the fundamental question of whether it is a good idea to place yourself behind Redish's veil of ignorance.

C. Copyright

In the campaign finance and tobacco advertising cases, determinate results were reached by reasoning within the veil of ignorance. My objection was not that tunnel constructivist reasoning is impossible, but rather that it produces illiberal and destructive results.

With copyright, however, it is not possible to even begin thinking about what the law should be if one is behind a veil of ignorance about what kind of universe of discourse one wants to create. There is no way to resolve these questions at the level of high theory – or more precisely, if we try to do so from the perspective of high theory, we miss the point. The purpose of copyright law is to foster a vibrant sphere of discourse, in which it is possible for authors who are not independently wealthy to quit their day jobs. That, however, is a result, not a process. Engineering it should be an undertaking in the spirit of Milton, Mill, and Emerson. It depends on understanding how the world works and calibrating the law to what we learn about the world.

The proper entailment of constructivist free speech theory might be to do away with copyright law altogether. Copyright law casually violates many of the core principles of free speech jurisprudence. Content-based restrictions on speech are presumptively unconstitutional and subject to strict scrutiny. Yet in order to tell whether a work infringes on a copyright,

[414] Redish, *Commercial Speech, Intuitionism and the Twilight Zone of Viewpoint Discrimination*, at 110; see also id. at 113.
[415] Redish, Money Talks, at 111.

one must read it, read the copyrighted work, and compare the content of one to the content of the other.[416] Prior restraints are supposedly never permissible, but in copyright cases courts issue injunctions all the time.[417] Viewpoint discrimination is supposed to be unconstitutional per se, but borrowing from a copyrighted work is more likely to be permissible if it is a parody that is "critical" of that work.[418] Regulations of speech are not constitutional when they prohibit particular ways of expressing ideas, rather than the ideas themselves; the Court rejects the notion that ideas are distinguishable from the way that they are expressed. Yet copyright law turns on precisely that distinction.[419] Copyright law is not a restriction on the time, place, or manner of speech, because it does not permit ample alternative channels for the same speech.[420] Rights vary depending on the identity of the speaker: works created "for hire," typically by employees of entertainment corporations, get different durations than works created by individuals.[421] Even with respect to unprotected categories of speech, such as obscenity, libel, incitement, and fighting words, the Court has developed rules ensuring that restrictions do not infringe on core speech interests.[422] Yet there is "astonishingly little contemporary judicial discussion of copyright's First Amendment implications."[423]

The limits of tunnel constructivism are clearest in libertarian debates over copyright law. Libertarians fall into two opposing camps on the intellectual property issue. One, friendly to very strong intellectual property rights, holds that the creation of ideas is a kind of labor. Since individuals have a natural right to the fruits of their labor, a person who creates a work should have an absolute right in perpetuity to control its use. It follows that limited terms of copyright, even the very long ones that the Court upheld in *Eldred v. Ashcroft*, are deeply unjust. The other camp, suspicious of monopoly privileges created by government, notes that this is a very peculiar kind of property right: my copyright over my work

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[416] Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L. J. 1, 5 (2002).
[417] Id. at 6; Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).
[418] Rubenfeld, *The Freedom of Imagination* at 6-7, 17.
[419] Id. at 13-16.
[420] Volokh, *Freedom of Speech and Intellectual Property* at 703-11.
[421] See 17 U.S.C. § 302. There are other major differences of treatment of works for hire, too complex to go into here. See Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.03 (2009). Thanks to Peter DiCola for calling my attention to this area of copyright doctrine.
[422] Rubenfeld, *The Freedom of Imagination* at 7.
[423] Id.

means that I can tell you what you can or (more pertinently) can't print with your own press, using your own ink and your own paper. There is no scarcity that requires government intervention: my copying a book does not prevent anyone else from copying the same book. It follows that there should be no intellectual property rights at all. Both libertarian positions are tunnel constructivisms that start with different sets of assumptions and work out their logical implications. Each depends on fetishizing its own favored property rights, which have nothing to do with the actual liberty of human beings in the world. (That, God bless them, is what makes them libertarian.) They simply differ about which ones to fetishize. The inability of both to justify their starting points guarantees that their debate will remain sterile.

The pathologies of libertarianism matter here, because they have infected copright law. As Netanel observes, copyright has come to look more like a full property right than a limited government grant for a particular purpose. The consequence has been an increasingly tight bottleneck for speech by small, independent speakers, and a loss of creative diversity in the arts.

Jed Rubenfeld responds to these pathologies with his own deductive theory of free speech protection. The core of free speech, he claims, is the "freedom of the imagination." That freedom broadly means "the freedom to explore the entire universe of feeling-mediated-by-ideas. It means the freedom to explore, without state penalty, any thought, any image, any emotion, any melody, as far as the imagining mind may take it."[424] In practice, this would mean that copyright protection would only apply to the exact text or image produced by the author. Persons other than the author would have the right to make modifications and derivative works, subject only to a claim for disgorgement of the proportionate share of profits attributable to using the underlying work. Injunctions would never be available for anything other than literal pirating and copying.

There are two difficulties with Rubenfeld's principle. The first is its foundation, which is vulnerable for the reasons we have already seen with Redish. Rubenfeld disavows "giant-sized First Amendment theories" that try to derive free speech from democracy or autonomy.[425] The First Amendment "is not a 'universal right of man'; it is a piece of the ineluctably political, historical United States Constitution."[426] He then notes that First Amendment law protects works of art. From this

[424] Rubenfeld, *The Freedom of Imagination* at 38.
[425] Id. at 30.
[426] Id. at 30.

paradigm case he derives his principle of freedom of imagination.

However, to whatever extent the freedom of imagination entails a revolution in present American practice, it cannot be presented as merely an inference from American practice. The speech-infringing copyright rules that Rubenfeld denounces are as much a part of American practice as the protection of art. The latter cannot provide the ground from which to attack the former, because Rubenfeld's decision to base his rules on local practice without more leaves him no basis for privileging either over the other.

Rubenfeld's second difficulty is that his proposed rules could produce unfortunate incentive effects – just the kind of effects with which copyright law is legitimately concerned. Netanel observes that some secondary works that are similar to the original, such as edited books or films, can act as market substitutes for the original. Some works, such as screenplays, are created only so that they can be the basis for derivative work. Some derivative works, such as film adaptations of books, take years to produce and require significant capital investment. In all of these cases, the incentive to create the original may disappear unless the creator is given the power to bar derivative works, at least for a few years.[427]

Netanel's objections are sympathetic ones. They preserve the operation of Rubenfeld's principle with a few narrowly drawn exceptions. The exceptions, however, raise all Rubenfeld's free speech objections anew. They are content-based. They authorize prior restraints. (So does Rubenfeld, with respect to outright copying.) Netanel's approach is consistent with the greater protection of parodies, a distinction which is viewpoint-based.

More generally, when we craft rules of copyright law, we are restricting some speech for the sake of a broader and more vibrant world of speech. This kind of enterprise is quite foreign from free speech theory as the Court conceives it. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,"[428] the Court declared in its leading campaign finance case, *Buckley v. Valeo*. That, however, is what copyright law does. We will get one mix of publicly available books, music, and movies if there is no copyright, a different mix if there is strong copyright

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[427] Netanel, Copyright's Paradox, at 198.

[428] Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). In the same opinion, however, the Court endorsed a teleological vision: "[T]he First Amendment ... was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources.'" Id. at 49, quoting New York Times v. Sullivan, 376 U.S. 254, 266 (1964).

protection; one mix if derivative works are enjoinable and a different mix if they are not.

Thus, it is no surprise that the critics of the modern copyright regime, which has become far more producer-protective since Congress enacted major amendments in 1976,[429] have not been content to make the tautological point that copyright stifles some speech. Instead, they have offered specific evidence of the speech that has been stifled, and compared it with the speech that is thus facilitated, in order to persuade the reader that the tradeoff is not worth it.[430] Netanel correctly concludes that the appropriate level of copyright protections cannot be determined "without making value judgments about the types and mix of expression and speakers we want our copyright system to foster."[431]

More generally, questions of how to preserve the thriving sphere of public discourse, which facilitates the participation of a broad range of diverse and antagonistic views, reach beyond free speech law or even intellectual property to matters that do not involve any coercive sanctions upon speech, such as the design of the internet, the architecture of computer code, and the regulation of telecommunications.[432] Here, too, we must make value judgments about the kind of universe of discourse we wish to inhabit.

Such value judgments would constitute the twilight zone of viewpoint discrimination that Redish thinks is forbidden: we would be adopting rules for the regulation of speech because we hope to encourage certain speech and discourage other speech. "[T]he ideological neutrality of the system of free expression is essential to that system's very existence; without it, the system will inevitably implode."[433] Redish does not, however,

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[429] Netanel, Copyright's Paradox, at 54-80.

[430] Kembrew McLeod & Peter DiCola, Creative License: The Law and Culture of Digital Sampling (forthcoming 2011); Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. Davis L. Rev. 477 (2007); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. Rev. 101 (2006); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing,* Porgy and Bess *and Unfair Use*, 37 Rutgers L.J. 277 (2006); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use*, 95 Cal. L. Rev. 597 (2007); Madhavi Sunder, *IP3,* 59 Stan. L. Rev. 257 (2006); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 Cal. L. Rev. 1331 (2004); Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy (2008); Lawrence Lessig, Free Culture: The Nature and Future of Creativity (2005).

[431] Netanel, Copyright's Paradox, at 128.

[432] See Lawrence Lessig, Code Version 2.0 (2006); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepperdine L. Rev. 707 (2009); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1 (2004).

[433] Redish, Money Talks, at 42.

tell us how such choices can be avoided in copyright law. As long as there is copyright law, the system will reflect such choices. Yet it has not imploded.

VI. Conclusion

Redish, who as noted earlier is the leading theorist of free speech tunnel constructivism, argues that "the principle of epistemological humility . . . underlies the entire concept of free speech protection."[434] His veil of ignorance follows from this: "preference for a particular ideology should never play any part in justifying governmental restriction of expression."[435]

Larry Alexander has shown why the principle of epistemological humility, which he thinks is characteristic of any free speech theory, generates internal contradiction:

> Freedom of expression is paradoxical within any plausible normative theory. That is because the requirement of evaluative neutrality is the core of any right of freedom of expression, but evaluative neutrality cannot coexist with *any* normative theory. Any normative theory, liberal or not, will perforce take positions on what ought to be done given our best judgment of what the world is like. To the extent that expression . . . threatens to produce states of affairs inconsistent with those the normative theory prescribes, to that extent the normative theory must, as a matter of logical consistency, rule the expression to be pernicious and of negative value.[436]

The consequence of the paradox is that no theory of free speech can maintain absolute epistemological humility. Even a theory that made freedom of expression so absolute as to override all other human interests "would face a paradox in dealing with expression that threatened to undermine *it*."[437]

Alexander's point is devastating only if free speech must take the form he describes, as committed to absolute evaluative neutrality. However, as we have seen, the style of reasoning that is committed to absolute evaluative neutrality is a fairly recent development in free speech theory. Milton, Mill, Hand, Holmes, Brandeis, Meiklejohn, and Emerson were not committed to absolute evaluative neutrality. They did aspire to a field of neutrality – any conception of free speech will do that – but within limits. They were unapologetically devoted to certain

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[434] Id. at 48.
[435] Id. at 43.
[436] Alexander, Is There a Right of Freedom of Expression?, at 177.
[437] Id. As noted earlier, Redish responds to this difficulty only by assuming that there is no speech that could undermine his system.

substantive values. It was from those substantive values that they derived their commitment to free speech, and so they had no problem limiting speech in the way that Alexander describes.[438]

Samuel Freeman has suggested that the recurring popularity of libertarianism in the United States is the consequence of living in a free market system in which people are led to believe in the sanctity of property and the justice of market distributions. Once they come to believe that they have a fundamental right to whatever the market delivers, they will resist taxation to pay for public infrastructure or for health care and income support for the poor, elderly, or handicapped. Freeman thinks this is a problem for liberalism as an ideal: "classical liberal institutions may be prone to disintegrate into libertarianism."[439] Free speech may present an analogous problem: in a society that values speech, speech-protective rules can be fetishized in the same way that libertarians fetishize property rules, with similarly illiberal results.

Free speech theory should return to its roots. It should understand that it stands for a very specific understanding of freedom and individual dignity, which it seeks to realize in the actual lives of human beings in the world.

Any theory of liberty commits itself to neutrality about some questions. But no individual commitment to neutrality entails commitment to every kind of neutrality.[440] The neutrality entailed by free speech does not logically mean that we must consent to rule by moneyed elites, or that tobacco advertisers must be free to prey on children, or that we cannot recalibrate the rules of copyright to produce less Disney and more small, independent writers and artists.

Constructivism is a valuable rhetorical tool. It provides one useful lens through which to think about government. But our ultimate goal should not be elegantly constructed, deductive rules of free speech. It should be a free society made up of free people.

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[438] Only once does Alexander concede that liberalism may be understood as "a way of life, a vision of the Good, a partisan view among partisan views." Id. at 169. He declares it unattractive, because "cosmopolitanism inevitably tends to homogenize and shallow out the various ways of life." Id. This is Nietzsche's old complaint that a liberal society does not produce heroic or admirable characters, but merely meek bourgeoisie who do not take anything very seriously. I will here simply record my view that liberalism has its own heroes and deeply felt ideals (some of which have been described here), and that Alexander does not specify which alternative to liberalism he finds preferable. Some followers of Nietzsche have been less circumspect.

[439] Freeman, *Illiberal Libertarians*, at 150.

[440] See Koppelman, *The Fluidity of Neutrality*.