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Half-Truths of the First Amendment

Cass R. Sunstein†

Much of the law of free speech is based on half-truths. These are principles or understandings that have a good deal to offer, that have fully plausible origins in history and principle, and that have mostly salutary consequences. But they also have significant blind spots. The blind spots distort important issues and in the end disserve the system of free expression.

In this essay, I deal with the four most important of these half-truths. (1) The First Amendment prohibits all viewpoint discrimination. (2) The most serious threat to the system of free expression consists of government regulation of speech on the basis of content. (3) Government may "subsidize" speech on whatever terms it chooses. (4) Content-based restrictions on speech are always worse than content-neutral restrictions on speech. Taken together, these half-truths explain a surprisingly large amount of free speech law. All in all, they may do more good than harm. But they also obscure inquiry and at times lead to inadequate outcomes.

The four half-truths are closely related, and it will probably be beneficial to understand their many interactions. Above all, I suggest that the doctrinal distinctions embodied in the half-truths are taking on an unfortunate life of their own; it is as if the doctrines are operating for their own sake. In some ways, the distinctions are threatening to lose touch with the animating goals of a system of free expression, prominently including the creation of favorable conditions for democratic government. Indeed, it sometimes seems as if free speech doctrine is out of touch with the question of whether the free speech principle is animated by identifiable goals at all. My effort to challenge the half-truths is spurred above all by a belief that whatever else it is about, the First Amendment is at least partly designed to create a well-functioning deliberative democracy. When free speech doctrine disserves democratic goals, something is seriously amiss.

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I. HALF-TRUTH NUMBER ONE: THE FIRST AMENDMENT PROHIBITS VIEWPOINT DISCRIMINATION

It is commonly said that government may not regulate speech on the basis of the speaker's viewpoint.[1] Indeed, viewpoint discrimination may be the defining example of a violation of the free-speech guarantee. Thus, for example, government may not prohibit Republicans from speaking on subways, even though government may be able to prohibit advertising on subways altogether, or even regulate the content of speech on subways if it does so in a viewpoint-neutral way.

If the First Amendment embodies a *per se* prohibition on viewpoint discrimination, then government's first obligation is to be neutral among different points of view. This principle recently received prominent vindication in *R.A.V. v City of St. Paul*,[2] in which the Supreme Court invalidated a "hate-speech" ordinance in significant part because it embodied viewpoint discrimination.[3] The prohibition on viewpoint discrimination has also played a central role in the key modern case on pornography regulation.[4]

As a description of current free speech law, the first half-truth has considerable merit. Upon first examination, there are very few counterexamples, and we can find a good deal of affirmative support for the prohibition on viewpoint discrimination. Whatever its descriptive force, the prohibition on viewpoint discrimination is not difficult to explain in principle. It can be defended by reference to two central constitutional concerns: the removal of impermissible reasons for government action; and the ban on skewing effects on the system of free expression.

The notion that the First Amendment bans skewing effects on public deliberation seems reasonably straightforward, but the prohibition on impermissible reasons is perhaps less clear. It should be connected with the requirement that judges be neutral.[5] A judge in a civil case may not have a personal stake in the outcome, even

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[1] See, for example, *American Booksellers Association v Hudnut*, 771 F2d 323, 332 (7th Cir 1985); *R.A.V. v City of St. Paul*, 112 S Ct 2538 (1992); Geoffrey R. Stone, *Anti-pornography Legislation as Viewpoint Discrimination*, 9 Harv J L & Pub Pol 461 (1986).

[2] 112 S Ct at 2538.

[3] Id at 2547-48. This part of the holding is discussed in Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 S Ct Rev 29; Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993).

[4] *Hudnut*, 771 F2d at 332.

[5] This analogy is suggested in David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334, 369 (1991).

if that stake would not affect his ruling. This ban on judicial bias operates regardless of whether it affects the outcome. So too, the First Amendment is best understood to mean that government, in its regulatory capacity, may not censor speech on the basis of its own institutional interests.

How might these ideas justify the ban on viewpoint discrimination? Imagine that a law forbids criticism of the current administration. Here the reasons for government action are most suspicious, for this sort of distortion of debate provides a good reason for distrusting public officials. The free speech clause declares off-limits certain reasons for censorship, and the ban on viewpoint discrimination seems admirably well-suited to ferreting out those reasons.[6]

Quite apart from the issue of impermissible reasons, viewpoint discrimination is likely to impose harmful skewing effects on the system of free expression. The notion that the First Amendment bans skewing effects on public deliberation is connected with the idea that government may not distort the deliberative process by erasing one side of a debate. Above all, government may not distort the deliberative process by insulating itself from criticism. The very freedom of the democratic process depends on forbidding that form of self-insulation.

Thus far I have spoken of government censoring speech about itself, and this is indeed the most disturbing form of viewpoint discrimination. But even if viewpoint discrimination does not have this distinctive feature, there may still be cause for concern. Imagine that government says that speech in favor of the antitrust laws is permitted, but that the opposite message is forbidden; or that state law prevents people from criticizing affirmative action programs; or that a city concludes the pro-life point of view cannot be expressed. In these cases, too, the governmental motivation may be out of bounds and, even more fundamentally, the skewing effects on the system of free expression may not be tolerable.

From both precedent and principle, it is tempting to conclude that viewpoint discrimination is always or almost always prohibited. Indeed, the Supreme Court sometimes acts as if that is the case, and this view may be coming to represent current free speech orthodoxy.[7] But there are many counterexamples, and these greatly complicate matters.

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[6] See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 227-33 (1983).

[7] See *R.A.V.*, 112 S Ct at 2545-48.

For example, there is a good deal of viewpoint discrimination in the area of commercial speech. Government can forbid advertising that promotes casino gambling,[8] even if it does not simultaneously forbid advertising that is opposed to casino gambling. This prohibition is unquestionably viewpoint-based. Moreover, government can and does forbid advertising in favor of cigarette smoking on television,[9] although government does not forbid television advertising that is opposed to cigarette smoking. On the contrary, there is a good deal of such advertising. Precisely the same is true for advertising relating to alcohol consumption. In commercial speech, then, there is a good deal of viewpoint discrimination.[10]

As another example, consider the area of labor law, where courts have held that government may ban employers from speaking unfavorably about the effects of unionization during the period before a union election if the unfavorable statements might be interpreted as a threat against workers.[11] Regulation of such speech is plausibly viewpoint discriminatory, because government does not proscribe employer speech favorable to unionization.

As a final example, consider the securities laws that regulate proxy statements. Restrictions on viewpoint can be found here, too, as certain forms of favorable statements about a company's prospects are banned, while unfavorable views are permitted and perhaps even encouraged.

Almost no one thinks that there is a constitutional problem with these various kinds of contemporary viewpoint discrimination. The restrictions are based on such obvious harms that the notion that the restriction is "viewpoint based" does not even have time to register. For example, casino gambling, cigarette smoking, and drinking all pose obvious risks to both self and others. Government controls on advertising for these activities are a means of

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[8] *Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico*, 478 US 328, 344 (1986).

[9] See Public Health Smoking Act of 1969, 15 USC § 1335 (1988) (prohibiting television and radio advertising of cigarettes and cigars after January 1, 1971).

[10] It would be possible to say that there is no such discrimination, because there is not quite a category called "advertising against" smoking, or gambling, or alcohol consumption. On this view, messages that oppose these activities are not really "advertising against," and hence there is no discrimination on the basis of point of view. This claim might be supported by the fact that ideological messages arguing for smoking in general are not banned. Perhaps government must be viewpoint-neutral with respect to messages, as it is, and perhaps the ban on advertising does not run afoul of the prohibition. I think that this response is mostly semantic; it redefines categories to claim that there is no discrimination when in fact government is suppressing one side of the debate.

[11] See *NLRB v Gissel Packing Co.*, 395 US 575, 618-19 (1969).

controlling these risks. It is not entirely implausible to think that a liberal society should regulate or indeed ban some of these activities,[12] though this is extremely controversial, and our government has generally not chosen to do so. If government has the power to ban the activity, but has decided instead to permit it, perhaps it can permit it on the condition that advertising about it be banned. This was the Supreme Court's reasoning in the casino gambling case.[13]

One could respond that this reasoning is wrong because it permits a distinctively objectionable form of paternalism. Some people think that the First Amendment is undergirded by a principle of listener autonomy, one that forbids government to ban speech because listeners might be persuaded by it.[14] On this view, the ban on advertising for cigarettes, gambling, and alcohol consumption invades the autonomy of those who would listen to such speech. If we were serious about the principle of listener autonomy, perhaps we would rarely allow government to stop people from hearing messages. This is a reasonable position, but it is not relevant to my current claim, which is purely descriptive: laws that discriminate on the basis of viewpoint are indeed upheld in certain circumstances.

It is here that the first proposition emerges as a half-truth. Viewpoint discrimination is indeed permitted, and the Court should not pretend that it is always banned.[15] We might conclude from the cases that viewpoint discrimination is not always prohibited and that the Court instead undertakes a more differentiated inquiry into the nature and strength of government justifications in particular cases. What is the nature of that more differentiated inquiry? I suggest that it begins with the view that viewpoint discrimination creates a strong presumption of invalidity. In certain narrow circumstances, the presumption is overcome because (a) there is at most a small risk of illegitimate motivation, (b) low-

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[12] See Robert E. Goodin, *No Smoking: The Ethical Issues* (University of Chicago Press, 1987).

[13] *Posadas*, 478 US at 345-46. The Court said that when the Constitution protects the subject of advertising restrictions, the state cannot prohibit such advertising. Id at 345. In the case at hand, however, the Court noted that the Constitution does not prohibit the Puerto Rican legislature from banning casino gambling by the residents of Puerto Rico. "[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." Id at 345-46.

[14] See, for example, Strauss, 91 Colum L Rev at 334 (cited in note 5); T. M. Scanlon, *A Theory of Free Expression*, 1 Phil & Pub Aff 204 (1972). See also Ronald M. Dworkin, *The Coming Battles Over Free Speech*, NY Rev of Books 55 (June 11, 1992).

[15] *R.A.V.*, 112 S Ct at 2547-48, seems to state this.

value or unprotected speech is at issue, (c) the skewing effect on the system of free expression is minimal, and (d) the government is able to make a powerful showing of harm. In the commercial speech cases, for example, we are dealing with low-value speech, and the risk of illegitimate motivation is small. In the case of securities regulation, there is no substantial skewing effect on free expression, and there is a highly plausible claim that government is protecting people against deception.

For present purposes, it is not necessary to devote a good deal of attention to these various considerations. My point is only that current law does not embody a flat ban on viewpoint discrimination. Certain forms of discrimination are found fully acceptable. They are not seen in this way only because the presence of real-world harms obscures the existence of selectivity. The pretense embodied in our first half-truth has impaired the analysis of a number of free speech issues, including those raised by hate speech and pornography. Instead of relying on a *per se* rule, we should decide such cases by inquiring more particularly into the nature, legitimacy, and strength of government justifications. There may be sufficiently neutral justifications for apparent viewpoint discrimination in some such areas. I do not, however, suggest such justifications here.[16]

II. HALF-TRUTH NUMBER TWO: THE REAL THREAT TO THE SYSTEM OF FREE EXPRESSION COMES FROM CONTENT-BASED GOVERNMENT RESTRICTIONS ON SPEECH

The second half-truth is a generalization of the first. It derives from the same basic framework. I think that it is even more misleading; in any case, it is the most important.

Our free-speech tradition, it is commonly said, is especially hostile to content-based restrictions on speech.[17] The principal recent exponents of this view see such restrictions as the most important obstacles to the system of free expression.[18] It is as if the other obstacles are invisible, or not worth attention at all. Indeed, the Court itself treats these restrictions as the defining illustra-

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[16] I do try to do this in Sunstein, *Democracy and the Problem of Free Speech* (cited in note 3); Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 Colum L Rev 1, 13-29 (1992). See also Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 Harv L Rev 124, 151-60 (1992).

[17] See Stone, 25 Wm & Mary L Rev at 196-97 (cited in note 6). See also Harry Kalven, Jr., *A Worthy Tradition* 6-19 (Harper & Row Publishers, 1988).

[18] I draw here upon Stone, 25 Wm & Mary L Rev at 194-233, 251-52 (cited in note 6); Kalven, *A Worthy Tradition* at 6-19 (cited in note 17).

tions of threats to democratic self-governance.[19] Although there is much to be said for this idea as a matter of principle, it is in large part an artifact of our particular history. The free speech tradition in America grows out of the clear-and-present-danger cases featuring the powerful dissenting opinions of Justices Brandeis and Holmes,[20] and culminating in the great case of *Brandenburg v Ohio*.[21] In all of these cases, the government attempted to censor political speech on the basis of its content.

The image bequeathed to the American legal tradition by these cases is exceptionally pervasive. It suggests that the real threats to free expression are indeed a result of content-based regulation of speech. Outside of the arguably distinctive context of politics, government censorship of literature and the arts also attests to the dangers of content-based regulation. The symbolic power of the great Brandeis and Holmes dissents is unrivalled, but other defining cases involve content-based restrictions as well. Consider in this connection the famous *Ulysses* litigation[22] and the more recent, highly publicized case involving the work of Robert Mapplethorpe.[23]

The antipathy to content-based regulation thus derives great support from history. Moreover, it is not hard to see the basis for the antipathy. If we are fearful of illegitimate reasons for government regulation, or if we are concerned about skewing effects from regulation, then content-based regulation is especially dangerous.

The basis for these judgments has been spelled out in great and often convincing detail.[24] Throughout the twentieth century,

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[19] See, for example, *New York Times Co. v Sullivan*, 376 US 254 (1964).

[20] See *Abrams v United States*, 250 US 616, 628 (1919) (Holmes dissenting) ("It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."); *Whitney v California*, 274 US 357, 373 (1927) (Brandeis concurring) (The state may not place restrictions on speech "unless [such] speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent[.]").

[21] 395 US 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[22] See *United States v One Book Entitled* Ulysses, 72 F2d 705 (2d Cir 1934). See also Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (Vintage Books, 1993), which recounts the historical saga of the publication of *Ulysses* in the United States.

[23] See *Contemporary Arts Center v Ney*, 735 F Supp 743 (S D Ohio 1990).

[24] See Stone, 25 Wm & Mary L Rev at 217-27 (cited in note 6); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U Chi L Rev 46, 54-57 (1987); Laurence H. Tribe, *Ameri-*

major dangers have come from government regulations designed to impose on the polity a uniformity of opinion, to stifle artistic or literary diversity, and to entrench the government's own self-interest. In an era in which many countries are emerging from communist rule, it is especially salutary to focus on the risks posed by content-based regulation of speech.

But is it correct to say that the greatest threats to free expression stem from content-based regulation of speech? In contemporary America, I believe that an affirmative answer will divert attention from other important issues. Under current conditions, the second half-truth may even have become an anachronism. It renders other problems invisible. It sees the First Amendment through the wrong prism. It focuses attention on comparatively trivial problems—pornography prosecutions, commercial speech, private libel—and loses sight of the large picture.

Consider, for example, a conventional view about freedom of expression. If we were to examine recent books on this topic, we would generally find a firm consensus that the system of free expression is at risk to the extent that government censors sexually-explicit speech, purportedly dangerous speech, or commercial speech on the basis of its content.[25] The war against *Ulysses* is said to have found a modern parallel in the attack on violent pornography. The effort to deter a civil-rights advertisement through use of libel law in *New York Times Co. v Sullivan*[26] is said to be fundamentally the same as the continuing application of libel law to falsehoods about private people.[27] The restriction of the speech of political dissidents is said to have a modern analogue in the regulation of false and misleading commercial speech.[28]

Views of this sort are widespread. Moreover, it may even be right to say that the principal threats to free speech come from content-based restrictions; but the claim needs to be evaluated by reference to some sort of criteria. It should not be treated as an

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can Constitutional Law ch 12 (Foundation Press, 2d ed 1988); 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).

[25] See, for example, de Grazia, *Girls Lean Back Everywhere* (cited in note 22) (discussing government censorship of authors and publishers); Rodney A. Smolla, *Free Speech in an Open Society* 3-17 (Alfred A. Knopf, 1992); Anthony Lewis, *Make No Law* (Random House, 1991); Nat Hentoff, *Free Speech For Me—But Not For Thee* (Aaron Asher Books, 1992).

[26] 376 US at 254.

[27] See Dworkin, NY Rev of Books at 62-64 (cited in note 14).

[28] See Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va L Rev 627, 644 (1990).

axiom. Let me suggest provisionally that we should evaluate any system of free expression at least in part by attending to two matters: the amount of attention devoted to public issues and the expression of diverse views on those issues. Use of these criteria accords well with the original Madisonian vision of the First Amendment.[29] It also draws support from a range of important writings, most prominently those of Alexander Meiklejohn.[30] Many people are skeptical of the idea that the free speech principle should be understood wholly through the lens of democracy.[31] But one need not think that the First Amendment is exclusively or even primarily connected with democratic self-government in order to conclude that something is wrong if the system deals little with public issues and contains little diversity of views.

If these are our governing criteria, I suggest that the principal current problem is not content-based restrictions on speech but rather a speech "market" in which these values are poorly served. It is comparatively unimportant if the government is overzealous in its regulation of child pornography, or if government regulates commercial advertising that is not terribly deceptive. But it is far from unimportant if the system of free expression produces little substantive attention to public issues, or if people are not exposed to a wide diversity of views. If we are interested in ensuring such attention and such exposure, we may not be entirely pleased with the operation of the so-called free market in speech.

In large part, this claim is a factual one. To evaluate the claim, we need to have a very thorough empirical understanding of the free speech "status quo," and here there is a distressingly large gap in the free speech literature. There are few more important tasks for the study of free expression than to compile information on existing free speech fare. But a number of things do seem clear.[32]

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[29] See, generally, Sunstein, *Democracy and the Problem of Free Speech* (cited in note 3).

[30] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* 27 (Harper & Brothers Publishers, 1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."). See also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1 (1971); Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L Rev 1405, 1409-10 (1986).

[31] See, for example, Martin H. Redish, *The Value of Free Speech*, 130 U Pa L Rev 591 (1982).

[32] I draw here on Phyllis C. Kaniss, *Making Local News* (University of Chicago Press, 1991); Sunstein, *Democracy and the Problem of Free Speech* (cited in note 3). An especially valuable empirical treatment is C. Edwin Baker, *Advertising and a Democratic Press*, 140 U Pa L Rev 2097 (1992).

In most of the broadcasting that people watch, there is exceedingly little attention to public issues. The "soundbite" phenomenon assures that during electoral campaigns, public attention will be focused on marginally relevant matters—the "Murphy Brown" controversy, escalating allegations of various kinds—rather than on the real issues at stake. Such attention as there is often centers on sensationalistic anecdotes, usually with an unwarranted whiff of scandal.

Coverage of public issues often involves misleading "human interest" anecdotes, in which people are asked how they "feel" about policies that appear to have harmed them. Frequently public issues are entirely absent. For example, the local news sometimes consists of discussion about the movie that immediately preceded it. Marketplace pressures, including the desires of advertisers, encourage the press to avoid substantive controversy. Often advertisers affect content, partly by discouraging serious discussion of public affairs, partly by avoiding sponsoring controversial programming, and partly by encouraging a favorable context for their products.[33] In the place of genuine diversity of view, offering perspectives from different positions, most of the broadcasting that people watch typically consists of a bland, watered down version of conventional morality. It would therefore be extremely surprising if commercial television were able to take a firm "pro-choice" or "pro-life" position in a news special or a prime-time movie, or a strong defense or critique of affirmative action.

In these circumstances, some major threats to a well-functioning system of free expression, defined in Madisonian terms, come not from content-based regulation, but from free markets in speech. Market pressures are compromising the two goals of a system of free expression. This is of course only a contingent fact. It is a product of a particular constellation of the current forces of supply and demand. If market forces were different, we might see a great deal of attention to public issues and a large amount of diversity of view. But under current conditions, this is hardly the case.

We might go further. The contemporary problem lies not merely in market forces, as if these were brute natural facts, but more precisely in the legal rules that underlie and constitute those markets. Broadcasters and newspapers are of course given property rights in their media. Without such government grants, the speech

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[33] See Baker, 140 U Pa L Rev at 2139-68 (cited in note 32).

market would be entirely different. It is these rights—generally of exclusive use—that make it possible for owners to exclude people who would like to speak and be heard. If a critic of a war, or of *Roe v Wade*,[34] cannot get onto network television, it is not because of nature or "private power," but because legal rules prevent him from doing so. Property laws at both the federal and state levels make any efforts to obtain access to television airwaves a civil or criminal trespass.

Market forces are a product of law, including the law that allocates entitlements. That law, like all other, should be assessed for conformity to the First Amendment. The law of property, granting rights of exclusive use, is of course content-neutral rather than content-based. When CBS excludes someone from the airwaves, it is not because government has made a conscious decision to exclude a particular point of view. But it is also untrue to say (as current law perhaps does)[35] that government is not involved, that we have a problem of "private power," or that there is no state action for free speech purposes. There is a content-neutral restriction on speech. The question is whether that content-neutral restriction is helping or harming the system of free expression. To make this assessment, we should compare it with other possible systems. Alternatives might include a "fairness doctrine" that calls for attention to public issues and diversity of view; a point system creating incentives to license applicants who promise to cover important issues; a system of subsidies and penalties designed to increase coverage of important issues; or legal restrictions on the power of advertisers over programming content.[36]

If our current system of free expression is functioning poorly, it is because of the content-neutral law that underlies current markets. I believe that many important problems for the current system of free speech in America lie not in content-based regulation—which generally involves peripheral issues and almost never strikes at what I am taking to be the core of the free speech guarantee—but instead in the operation of the free market and in the legal rules that constitute it. In these circumstances, it is worse than ironic that people interested in the theory and practice of free speech focus on such comparatively trivial issues as commercial speech, disclosure of the names of rape victims, and controls on

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[34] 410 US 113 (1973).

[35] *CBS v Democratic Natl Committee*, 412 US 94 (1973).

[36] For details, see Baker, 140 U Pa L Rev at 2178-2219 (cited in note 32); Sunstein, *Democracy and the Problem of Free Speech* (cited in note 3).

obscenity. The principal questions for the system of free expression lie elsewhere.[37]

III. Half-Truth Number Three: Government "Penalties" on Speech Are Fundamentally Different from Selective Funding of Speech

In the next generation, some of the most important free speech issues will arise from selective funding of speech. What if government funds some artists but not others, imposes conditions on what libraries may obtain, or regulates political expression by refusing to pay for the literature of certain causes? On the constitutional question, the Supreme Court's cases are exceptionally hard to unpack. We might distinguish five different propositions, which in concert seem to reflect the current law.[38] Once we have them in place, we will be able to see the key role of the third half-truth.

(A) *Government is under no obligation to subsidize speech.* Government can refuse to fund any and all speech-related activities. In this sense, it can remain out of the speech market altogether.

(B) *Government may speak however it wishes.* Public officials can say what they want. There is no free speech issue if officials speak. Speech of this kind "abridges" the speech of no one else.

(C) *Government may not use its power over funds or other benefits so as to pressure people to relinquish rights that they "otherwise" have.* This is an obscure idea in the abstract, but it can be clarified through some examples. Government could not say that as a condition for receiving welfare, people must vote for a certain political party. Government could not tell people that if they are to have drivers' licenses, they must agree not to criticize the President. In both cases, government makes funding decisions so as to deprive people of rights of expressive liberty that they would otherwise have.

But—and this is an important qualification—government may indeed "condition" the receipt of funds, or other benefits, on some limitation on rights, if the condition is reasonably related to a neu-

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[37] See Lee C. Bollinger, *Images of a Free Press* chs 2, 5 (University of Chicago Press, 1991); Commission on Freedom of the Press, *A Free and Responsible Press* 107-33 (University of Chicago Press, 1947) ("Hutchins Report").

[38] *Rust v Sullivan*, 111 S Ct 1759 (1991) (allowing selective subsidy); *Harris v McRae*, 448 US 297 (1980) (same); *FCC v League of Women Voters*, 468 US 364 (1984) (banning penalty).

tral, noncensorial interest. For example, the government could forbid you from working for the CIA unless you agree not to write about your CIA-related activities, or could prevent you from political campaigning if you work for the federal government.[39] In both cases, the government has legitimate justifications that do not involve censorship. Its limitation on CIA employees is designed to ensure the successful operation of the CIA, which entails a measure of secrecy. Its limitation on government employees is designed to ensure that political campaigning does not compromise basic government functions. Of course this principle will create some difficult line-drawing problems.

(D) *Government may not "coerce" people by fining or imprisoning them if they exercise their First Amendment rights.* Fines and imprisonment are the most conventional examples of free speech violations. They do not raise "unconstitutional conditions" issues at all, and may be approached far more straightforwardly.[40]

(E) *The government may apparently be selective in its funding choices.* In other words, government may direct its resources as it chooses, so long as it does not run afoul of principles (C) and (D) above. Government may give funding only to those projects, including those speaking projects, of which it approves. Thus government may fund art, literature, or legal and medical care and impose limits on the grantees, even on their speech, if the limits regard what may be done with government money.

Rust v Sullivan, a highly controversial Supreme Court decision, is the source of this last proposition.[41] In *Rust*, the Court suggested that so long as government is using its own money, and not affecting "private" expression, it can channel its funds however it wishes. The problem arose when the Department of Health and Human Services issued regulations banning federally-funded family-planning services from engaging in (a) counseling concerning, (b) referrals for, and (c) activities advocating abortion as a method of family planning. The plaintiffs claimed, among other things, that these restrictions on abortion-related speech violated the First Amendment. In particular, they argued that the restrictions discriminated on the basis of point of view. The Court disagreed,

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[39] *Snepp v United States*, 444 US 507 (1980).

[40] I will question this view below.

[41] 111 S Ct at 1759.

holding:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[42]

In response to the claim that the regulations conditioned the receipt of a benefit on the relinquishment of a right, the Court held that "here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[43]

Rust seems to establish the important principle that government can allocate funds to private people to establish "a program" that accords with government's preferred point of view. In this area, even viewpoint discrimination is permitted. In fact, the Court seems to make a sharp distinction between government "coercion"—entry into the private realm of markets and private interactions—on the one hand and funding decisions on the other. Hence we arrive at our third half-truth: Government may not "penalize" speech (propositions (C) and (D)), but it may fund speech selectively however it chooses, by allocating its funds to preferred causes (propositions (A) and (E)).

This view captures an enduring principle, one that will inevitably play a role in the constitutional law of freedom of expression. Often government has legitimate justifications for treating funding decisions differently from criminal punishments. As noted, it may conclude that people who work for the CIA must refrain from speaking on certain matters, on the ground that the speech could compromise national security. Hence government could conclude

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[42] Id at 1772. The Court added:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 USC § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.

Id at 1773.

[43] Id at 1774.

that if it is to provide people with the benefit of CIA employment, it may condition their speech. So too, the President could conclude that Cabinet-level employees must speak in ways of which the President approves. Without imposing this kind of condition on speech, the President's power to execute the laws would be severely compromised. The condition is therefore acceptable. It can be justified by reference to sufficiently neutral justifications.

But the sharp distinction between penalties and subsidies is inadequate. It is far too simple. It sets out the wrong sets of categories. Most generally, there are no such fundamental distinctions among the law that underlies markets, the law that represents disruption of markets, and the law that calls for funding decisions. All are law, and the First Amendment directs us to assess each in terms of its purposes and effects.

To make the point a bit more dramatically: All constitutional speech cases are in an important sense unconstitutional conditions cases. When the government says that someone will be fined for speaking—our category (D) above—it in effect imposes an unconstitutional condition. It is generally saying that your property—which is, as a matter of fact, governmentally conferred[44] —may be held only on condition that you refrain from speaking. To be sure, a case of this sort is not seen as one of unconstitutional conditions at all. But this is only because existing holdings of property are seen, wrongly, as pre-political and pre-legal. To support the outcome in category (D), it would be more precise to say that a condition is usually unconstitutional when government is using its power over property that it has created through law to deprive you of something to which you are otherwise entitled—and you are always otherwise entitled to property that you now own. But to put things in this way would be to place funding cases and other cases on the same analytic ground. The sharp split drawn in *Rust* is therefore misconceived. It is here that the distinction between penalties and subsidies is merely a half-truth.

We may go further. The First Amendment question is not whether there is a subsidy or a penalty. For two reasons, it is wrong to ask that question. First, the question is exceedingly hard

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[44] This has no normative implications. By saying that property rights are a creation of law, I do not mean in any way to disparage the institution of private property, which is crucially important to, among other things, individual liberty, economic prosperity, and democratic self-government. I mean only to suggest that to have a system of private property, government controls are necessary, as people in Eastern Europe have recently learned very well.

to answer; it forces us to chase ghosts. Second, it is essentially irrelevant.[45] We might have a perfectly acceptable "penalty," and we might have an impermissible refusal to subsidize.

The first problem is that in order to decide whether there is a subsidy or a penalty, we need a baseline to establish the ordinary or normatively-privileged state of affairs. When government denies Medicaid benefits to artists, has it penalized speech, or has it refused to subsidize it? We cannot answer that question without saying what it is that artists are "ordinarily" or "otherwise" entitled to have.[46] The Constitution does not really answer that question, and without a textual resolution it is very difficult for courts to resolve it on their own.

More important, the First Amendment does not say that "penalties" on speech are always prohibited and that "subsidies" are always allowed. Even if we could tell the difference between the two, we would not have accomplished very much. Perhaps government can "penalize" speech when it has legitimate justifications for doing so. Perhaps government must sometimes subsidize speech when its failure to do so is grounded on an impermissible reason. The notions of penalty and subsidy seem to truncate analysis at a too early stage.

I do not claim that funding decisions affecting speech should be treated "the same" as other sorts of government decisions that affect speech—whatever this ambiguous claim might mean. The development of constitutional limits on funding that interferes with expression raises exceedingly complex issues. But for now, we have reason to doubt whether our third half-truth, and *Rust*, would be taken to their logical extreme. Can it seriously be argued that government could fund the Democratic Convention but refuse to fund the Republican Convention? Is it even possible that government could give grants only to academic projects reflecting governmentally-preferred viewpoints? More likely, *Rust* will come to be understood as a case involving private counselling rather than public advocacy, in the distinctive context in which a ban on abortion counselling is ancillary to a ban on the performance of abortions. It will not be taken to authorize government selectively to subsidize one point of view in a controversy over some public issue.

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[45] See Kagan, 1992 S Ct Rev at 30 (cited in note 3); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413 (1989); Cass R. Sunstein, *The Partial Constitution* ch 11 (Harvard University Press, 1993).

[46] See Robert Nozick, *Coercion*, in Sidney Morgenbesser, ed, *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* 440 (St. Martin's Press, 1969).

In short: Adherence to the First Amendment requires an analysis of the effects of selective funding on the system of free expression, and of the legitimacy of the government justifications for selectivity. A sharp split between penalties and subsidies will not do the job; some penalties are acceptable and some selective subsidies are not. The third half-truth is thus rooted in anachronistic ideas about the relationship between the citizen and the state. It poses a genuine threat to free speech under modern conditions.

IV. HALF-TRUTH NUMBER FOUR: CONTENT-BASED RESTRICTIONS ON SPEECH ARE WORSE THAN CONTENT-NEUTRAL RESTRICTIONS ON SPEECH

We arrive finally at the last and most general half-truth. From what has been said thus far, it should be clear that the Supreme Court is especially skeptical of content-based restrictions and especially hospitable toward content-neutral restrictions.[47] Content-based restrictions are presumed invalid. Outside the relatively narrow categories of unprotected or less protected speech—libel, commercial speech, fighting words, and so on—the Court rarely upholds content-based restrictions. By contrast, content-neutral restrictions are upheld so long as they can survive a form of balancing. In undertaking that balancing, the Court is often highly deferential to government judgments about the need for content-neutral restrictions. One of the most striking developments in recent law is the Court's increased hostility to content-based restrictions and its increased deference to content-neutral ones. Indeed, the distinction between the two kinds of restrictions seems to become sharper every term. Thus it is striking to compare the recent invalidation of a relatively narrow content-based restriction—the ban on cross-burning—with the recent validation of a broad content-neutral restriction—the ban on solicitation in airports.[48]

There is much to be said in favor of this fourth half-truth.[49] As noted, it does tend to capture current law. Moreover, it makes considerable sense as a matter of principle. Generalizing only slightly from the previous discussion of viewpoint-based restrictions, we might conclude that content-based restrictions are pecu-

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[47] See generally Stone, 54 U Chi L Rev at 54-117 (cited in note 24).

[48] See *R.A.V.*, 112 S Ct at 2547-49, discussed in text accompanying notes 2 and 3; *Intl Society for Krishna Consciousness, Inc. v Lee*, 112 S Ct 2701, 2705-09 (1992) (holding that an airport terminal is not a public forum and that the port authority's ban on solicitation was a reasonable means of minimizing inconvenience and disruption of travelers).

[49] See Stone, 54 U Chi L Rev at 54-57 (cited in note 24).

liarly likely to stem from an illegitimate government reason, and peculiarly likely to have intolerable skewing effects on the system of free expression. A law that forbids AIDS-related advertising on subways, for example, is more objectionable than a law that forbids all advertising on subways. Content-neutral restrictions are far more trustworthy, for the reasons for regulation are apt to be more legitimate and the skewing effects less worrisome. On this basis, a legal system could do far worse than to set out a presumption against content-based restrictions and a presumption in favor of content-neutral ones.

These presumptions should not, however, be pressed too hard. There are cases in which content-neutral restrictions are especially damaging, and cases in which content-based restrictions are not so bad. Suppose, for example, that government forbids all speech in airports, train stations, and bus terminals. Here we will have a fundamental intrusion on processes of public deliberation. Indeed, one of the most effective strategies of tyrants is to limit the arenas in which public deliberation can take place. Surely this sort of intrusion is more severe than what arises when, for example, small public universities ban a narrow category of racial hate speech. The content-neutral restriction may seriously restrict the number of expressive outlets and thus impair the system of democratic deliberation. It may also have content differential effects: when people are prevented from engaging in door-to-door canvassing, or from using public parks, there are severe adverse effects on poorly financed causes. Moreover, some content-based regulation—consider a limited ban on racial hate speech or narrow classes of violent pornography—is at least plausibly a modestly intrusive corrective to an already content-based status quo. Whether or not such content-based regulations should be upheld, it seems wrong to think that regulations of this sort are automatically more objectionable than regulations that are content-neutral.

I do not suggest that the distinction between content-based and content-neutral regulations is a failure, or that it should be abandoned. The danger arises if the doctrine becomes too rigid and mechanical. There is a risk, for example, that the current Court will become exceptionally receptive to content-neutral restrictions on speech, giving them the strongest presumption of validity. It is possible that something of this kind has already occurred. There is also a risk that outside of a few narrow categories, the Court will invalidate all content-based restrictions without looking seriously at the reasons for regulation in the particular case. But many content-neutral restrictions have extremely harm-

ful consequences and some content-based restrictions are founded on adequate justifications. The fourth half-truth is dangerous above all because in its rigidity, it operates as a substitute for close analysis of particular problems.[50]

CONCLUSION

With any well-elaborated body of legal doctrine, there is a pervasive danger that the doctrinal lines and distinctions will take on a life of their own. The purposes and goals that gave rise to those lines and distinctions sometimes become increasingly remote. This is, I believe, the source of the problem with all four half-truths. The larger goals of free speech doctrine have often been abandoned in favor of continued attention to particular doctrines that serve those goals in only partial and indirect ways.

It is of course possible to debate the content of those larger goals. Much ink has been spilled on that highly-contested question.[51] But we need not enter into especially controversial territory in order to assert that at least a part of the justification for a strong free speech principle is its contribution to the American conception of self-government. This conception—associated with the Madisonian view of free speech—helps explain the persistence of each of our half-truths. All of them can be seen at least in part as efforts to protect against skewing effects on democratic deliberation and illegitimate government efforts at self-insulation. It is for this reason that the propositions I have discussed can fairly be described as half-truths, rather than as simple illusions.

But the four half-truths have indeed taken on a life of their own, and in important ways they disserve the system of free expression. In their generality and abstractness, they distract attention from current threats to the system of free expression and, even worse, they threaten to make those threats invisible as such. One of the extraordinary characteristics of the American system of free expression is its capacity to grow and change over time. If the

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[50] Of course, it may sometimes be worthwhile to insist on rules that are crude but that reduce the costs of individualized inquiry. Some of the oversimplification in free speech law might be justified on this ground.

[51] See, for example, Scanlon, 1 Phil & Pub Aff at 204 (cited in note 14) (autonomy theory); T. M. Scanlon, *Freedom of Expression and Categories of Expression*, 40 U Pitt L Rev 519 (1979) (partial retraction of that theory); Strauss, 91 Colum L Rev at 334 (cited in note 5) (autonomy theory); Kent Greenawalt, *Free Speech Justifications*, 89 Colum L Rev 119 (1989) (overview of theory of free speech value); Frederick Schauer, *Free Speech: A Philosophical Inquiry* chs 2-5 (Cambridge University Press, 1982) (same); Redish, 130 U Pa L Rev at 591 (cited in note 31) (autonomy theory).

system is to promote democratic goals in the twenty-first century, I suggest that the four half-truths should be recognized not only for their contributions to human liberty, but also for their limitations and their damaging effects on some of the most important current free speech controversies.