THE VALUE OF FREE SPEECH

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Commentators and jurists have long searched for an explanation of the true value served by the first amendment's protection of free speech. This issue certainly has considerable intellectual appeal, and the practical stakes are also high. For the answer we give to the question what value does free speech serve may well determine the extent of constitutional protection to be given to such forms of expression as literature, art, science, commercial speech, and speech related to the political process.

There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression.[1] These efforts have been characterized by "a pattern of aborted doctrines, shifting rationales, and frequent changes of position by individual Justices."[2] Commentators, by contrast, have been eager to elaborate upon their unified theories of the value of free speech. Professor Emerson, probably the leading modern theorist of free speech, has recognized four separate values served by the first amendment's protection of expression: (1) "assuring individual self-fulfillment;"[3] (2) "advancing knowledge and discovering truth;"[4] (3) "provid[ing] for participation in decisionmaking by all members of society;"[5] and (4) "achieving a more adaptable and hence a more stable community, . . . maintaining the precarious balance between healthy cleavage and necessary consensus."[6] Al-

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[1] *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970) ("The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."); *see also* Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372 (1981).

[2] Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 526.

[3] T. EMERSON, *supra* note 1, at 6.

[4] *Id.*

[5] *Id.* 7.

[6] *Id.*

though Emerson sees these as distinct values, he believes that "[e]ach is necessary, but not in itself sufficient, for the four of them are interdependent." [7]

Other scholars have culled from the values suggested by Emerson, concluding either that the first amendment is designed to foster or protect only one of them, or that it protects a hierarchy of these different values, with the constitutional protection given to various forms of expression to be adjusted accordingly. Professor Meiklejohn, for example, spoke eloquently of the value of free speech to the political process.[8] In order to prevent the protection of such speech from being reduced to a matter of "proximity and degree," [9] he urged exclusion from the first amendment guarantee of all speech that did not relate to this self-government value.[10]

Although Meiklejohn in later years appeared to soften the rigidity of his lines of demarcation by effectively extending his doctrine—in a somewhat less than persuasive manner—to many forms of apparently nonpolitical speech,[11] other commentators have adopted his initial premise and kept within its logical limits. Judge Bork, now the leading exponent of the government-process school of thought, has concluded that the sole purpose served by the constitutional guarantee is to aid the political process, and that absolutely no other form of expression can logically be considered to fall within it.[12] Professor Blasi, although not rejecting all other asserted values of free expression, has urged recognition of what he labels the "checking value" as the primary purpose of the first amendment.[13] Under this analysis, speech relating to official misconduct would receive the greatest degree of constitutional protection.[14] Other commentators have selected various forms of an "individual development" model as the touchstone of first amend-

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[7] Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 423 (1980).

[8] *See* A. MEIKLEJOHN, POLITICAL FREEDOM (1960) (expanded version of Meiklejohn's *Free Speech* (1948)).

[9] *Id.* 55.

[10] *See infra* notes 28-32 and accompanying text.

[11] Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; *see infra* text accompanying notes 32-33.

[12] Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); *see also* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

[13] Blasi, *supra* note 2.

[14] *See infra* notes 69-74 & 76 and accompanying text.

ment protection,[15] and have structured their constitutional interpretation accordingly. Finally, some scholars, of course, are committed to the "marketplace-of-ideas" approach (long associated with the famous dissent of Justice Holmes in *Abrams v. United States*[16]), which posits that the primary function of free speech is as a catalyst to the discovery of truth.[17]

Although many respected scholars have appraised this myriad of free speech theories, it is time for a major reassessment of the subject, for each of these theories is, I believe, flawed in result, or structure, or both. Many first amendment theorists have failed to return to first principles in determining the value served by free speech, whereas others who may well be approaching an analysis of true first principles have neglected to examine the logical implications flowing therefrom. The result in virtually all cases is an unduly narrow description of the category of communication that is deserving of full constitutional protection.

The position taken in this Article is that the constitutional guarantee of free speech ultimately serves only one true value, which I have labeled "individual self-realization." This term has been chosen largely because of its ambiguity: it can be interpreted to refer either to development of the individual's powers and abilities —an individual "realizes" his or her full potential—or to the individual's control of his or her own destiny through making life-affecting decisions—an individual "realizes" the goals in life that he or she has set. In using the term, I intend to include both interpretations. I have, therefore, chosen it instead of such other options as "liberty" or "autonomy," on the one hand, and "individual self-fulfillment" or "human development," on the other. The former pair of alternatives arguably may be limited to the decisionmaking value,[18]

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[15] Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978) ("liberty"); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. Aff. 204 (1972) ("autonomy").

[16] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[17] *See infra* text accompanying notes 88-90.

[18] One authority interprets "autonomy" to mean:

> making one's own choices. A person is not autonomous whose choices are dictated 'from outside' at gunpoint or, perhaps, through hypnosis. . . . On the other hand, full deliberative rationality is not required for autonomy. Spontaneous or ill-considered decisions can be just as much *my* decisions, and that is the touchstone as I understand autonomy.

L. CROCKER, POSITIVE LIBERTY 114 (1980).

Professor Baker also adopts the term "liberty" to describe his operative model of free speech, yet appears to be referring to the concept of individual self-fulfillment. *See* Baker, *supra* note 15, at 990-96.

whereas the latter could be interpreted reasonably as confined to the individual development concept.

That the first amendment serves only one ultimate value, however, does not mean that the majority of values thought by others to be fostered by free speech—the "political process," "checking," and "marketplace-of-ideas" values—are invalid. I have not chosen from a list of mutually exclusive possibilities, nor do I argue that the value that I have selected supersedes these alternatives. My contention is that these other values, though perfectly legitimate, are in reality subvalues of self-realization. To the extent that they are legitimate, each can be explained by—and only by—reference to the primary value: individual self-realization. It thus is inaccurate to suggest that "the commitment to free expression embodie[s] a complex of values." [19]

This Article attempts to establish that this first principle—individual self-realization—can be proven, not merely by reference to some unsupportable, conclusory assertions of moral value,[20] but by reasoning from what we in this nation take as given: our democratic system of government.[21] It demonstrates that the moral norms inherent in the choice of our specific form of democracy logically imply the broader value, self-realization. It then concludes that all forms of expression that further the self-realization value,[22] which justifies the democratic system as well as free speech's role in it, are deserving of full constitutional protection.

An analysis of the self-realization value must avoid giving it an unduly restrictive interpretation.[23] Any external determination that certain expression fosters self-realization more than any other is itself a violation of the individual's free will, recognition of which

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[19] Blasi, *supra* note 2, at 538.

[20] Professor Baker, for example, attempts to establish the correctness of his "liberty" model by reasoning in the following manner: "Obligation exists only in relationships of respect. To justify legal obligation, the community must respect individuals as equal, rational and autonomous moral beings. For the community legitimately to expect individuals to respect collective decisions, *i.e.*, legal rules, the community must respect the dignity and equal worth of its members." Baker, *supra* note 15, at 991. Although I personally might accept Professor Baker's moral assertion, I—and, I expect, Professor Baker—would have a difficult time responding to someone who denied that an individual's obligation to obey the law has anything to do with government's respect for the individual, other than to say, "Oh, yes it does."

[21] *See infra* text following note 48.

[22] For an analysis of exactly how expression may be thought to foster the self-realization value, see *infra* text following note 51.

[23] Professor Baker's analysis is flawed in this respect. *See infra* notes 101-06 and accompanying text.

is inherent in the self-realization principle. This Article therefore argues that the Supreme Court should not determine the level of constitutional protection by comparing the relative values of different types of speech,[24] as is the current practice.[25]

This Article then proceeds to discuss briefly the appropriate role of "balancing" in first amendment analysis. Although recognition of the self-realization value leads to the view that all forms of expression are equally valuable for constitutional purposes, this does not necessarily imply that all forms of expression must receive absolute, or even equal, protection in all cases. Protestations of a number of commentators to the contrary notwithstanding,[26] there is no inconsistency in recognizing that individual self-realization is the sole value furthered by free speech and simultaneously acknowledging that, at least in extreme cases, full constitutional protection of free expression may be forced to give way to competing social concerns.

In summary, then, this Article rejects those authorities (1) who believe that the first amendment is multivalued, whether they superimpose a hierarchy upon those values or recognize them as interdependent coequals; (2) who argue that the first amendment is single-valued, with that value being something other than individual self-realization; (3) who, although accepting the self-realization value or its rough equivalent as the sole determinant of free speech, refuse to acknowledge one or more of the various subvalues that derive from it; and (4) who believe that total reliance on something akin to the self-realization value is inconsistent with any form of constitutional balancing process with regard to free speech.

After detailing the sources and parameters of the self-realization value[27] and demonstrating how each legitimate subvalue is explain-

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[24] *See infra* notes 119-202 and accompanying text.

[25] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

[26] *See infra* note 114.

[27] A word should be said at this point about the nature of my reasoning process. My argument is essentially a logical one, reasoning from what I take to be widely held premises. I make only brief and tangential reference to the history of the first amendment and the intent of the amendment's framers. *See infra* note 54. My theory therefore may be attacked by those who believe that historical analysis is the only appropriate method of constitutional interpretation.

Few, if any, of the commentators analyzing the value of free speech, however, place significant reliance on the intent of the framers. This is primarily because, as Judge Bork states, "[t]he framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject." Bork, *supra* note 12, at 22. To the extent that any consensus did exist, it appears to have been on an extremely narrow and technical conception of free expression. *See generally* L. LEVY, LEGACY OF SUPPRESSION (1960). It is therefore not surprising that historical reference has been of limited value in first amendment analysis.

able only as a manifestation of that principle, this Article considers how acceptance of these theoretical precepts would affect the level and form of constitutional protection given to three categories of expression: commercial speech, defamation, and obscenity.

I. SELF-REALIZATION AND THE DEMOCRATIC PROCESS: ASCERTAINING THE ULTIMATE VALUE OF FREE SPEECH

A. *The "Democratic Process" Value*

An appropriate way to begin analysis of the self-realization value is, ironically, with a discussion of the theory of free speech perhaps farthest in practical result from that value: the view that the sole purpose of the free speech guarantee is to facilitate operation of the democratic process. Advocates of this position are logically required to establish two propositions: first, that the first amendment facilitates the political process, and second, that the first amendment does not foster any value other than conduct of the political process. Examination of the writings of those expounding this view reveals that they have established the former with considerably greater force than they have established the latter.

As already noted, the original exponent of such a theory was Professor Meiklejohn. He began with the premise that "[g]overnments . . . derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers." [28] Because government officials in a democracy are merely agents of the electorate, the electorate needs as much information as possible to aid it in performing its governing function in the voting booth.[29] Therefore, "[t]he principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." [30]

Few would argue with Meiklejohn's logic to this point. If the electoral decisions made by the voters are to be based on anything more than emotive hunches, they need a free flow of information that will inform them not only about the candidates but also about the day-to-day issues of government.[31] But what seemed counter-

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[28] A. MEIKLEJOHN, *supra* note 8, at 9.

[29] Meiklejohn, *supra* note 11, at 255.

[30] A. MEIKLEJOHN, *supra* note 8, at 27.

[31] *Cf.* B. BERELSON, P. LAZARSFELD & W. MCPHEE, VOTING 307 (1954) ("If there is one characteristic for a democratic system (besides the ballot itself) that is theoretically required, it is the capacity for and the practice of discussion.").

intuitive to some was the apparent implication of Meiklejohn's theory that such "nonpolitical" forms of speech as art, literature, science, and education were not protected by the first amendment.[32] Meiklejohn himself ultimately concluded "that the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.' " [33] He thus included within the category of "political" speech numerous forms of expression that do not appear to have any direct—or arguably even indirect—impact upon the political process. He would presumably give full first amendment protection to both the author and the reader who profess absolutely no interest in the political system, and who have never voted and never will, but who simply enjoy writing or reading good fiction. For this extension of his theory, Meiklejohn has been attacked both by those who believe that the first amendment has no special political basis [34] and by political "purists" who accept Meiklejohn's initial premise about the relationship between the first amendment and the political process, but question the logic of his extension.[35]

Judge Bork begins his analysis with this same premise about the political process, but rigidly limits his conclusions to such speech, thus escaping the attack levelled at Professor Meiklejohn. Judge Bork, however, has great difficulty explaining why the first amendment should be read to protect *only* political expression.

Judge Bork's first amendment analysis flows from his concern that constitutional interpretation be premised on "neutral principles." [36] The decisions of the Supreme Court "must be controlled by principle," [37] which may be defined as " 'reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved.' " [38]

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[32] *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16; Chafee, Book Review, 62 HARV. L. REV. 891, 896 (1949).

[33] Meiklejohn, *supra* note 11, at 263.

[34] I include myself within this category. *See* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 437-38 (1971).

[35] According to Professor BeVier, "[t]he essential problem with accepting Meiklejohn's analogies is that one cannot know in principle which forms of thought and expression contribute to 'the capacity for sure and objective judgment.' " BeVier, *supra* note 12, at 317.

[36] Bork, *supra* note 12, at 1-20. In so doing, he draws upon the famous work of Professor Wechsler. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[37] Bork, *supra* note 12, at 2 (footnote omitted).

[38] *Id.* (quoting, with a minor error, Wechsler, *supra* note 36, at 19).

Judge Bork concludes that only speech serving the political process can be deemed "principled." [39]

The method by which Judge Bork reaches this conclusion may be described as a lesson in the limits of the "neutral principles" concept. It demonstrates all too clearly that if the selection of premises is flawed, "neutral principles" will not prevent a doctrine from being applied in a similarly flawed—albeit "principled" and consistent—manner. Judge Bork begins his analysis by quoting the well-known concurrence of Justice Brandeis in *Whitney v. California*.[40] Brandeis identified what Bork has distilled into four benefits provided by the free speech guarantee: "[t]he development of the faculties of the individual; [t]he happiness to be derived from engaging in the activity; [t]he provision of a safety value [sic] for society; and [t]he discovery and spread of political truth." [41] Bork then proceeds to explain why the first three values cannot be considered values of the first amendment under a "principled" analysis.

Since Justice Brandeis's first category is the closest to the concept of individual self-realization urged here, it is most relevant to determine why Judge Bork concludes that this value cannot be thought to lie behind the constitutional guarantee. Although Bork does not deny that free speech may develop individual faculties,[42] he nevertheless believes that the development of an individual's faculties and the happiness derived from engaging in speech

> do not distinguish speech from any other human activity. An individual may develop his faculties . . . from trading on the stock market, following his profession as a river-port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. . . . These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity.[43]

Judge Bork ultimately concludes that Justice Brandeis's fourth category—the search for "political truth"—is the only legitimate ground of the first amendment. This conclusion in turn leads him to adopt a first amendment construction that is quite probably the

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[39] Bork, *supra* note 12, at 26.

[40] 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[41] Bork, *supra* note 12, at 25.

[42] *Id.*

[43] *Id.* A similar argument is fashioned by Professor BeVier. BeVier, *supra* note 12, at 313-14.

most narrowly confined protection of speech ever supported by a modern jurist or academic: "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." [44]

Judge Bork's rationale for including political speech and excluding nonpolitical forms of expression, even if they further the value of self-fulfillment, is that it is logically possible to limit the value served by political speech to "speech." Self-fulfillment, on the other hand, cannot logically be limited to "speech," but must also be taken to include countless forms of action. Judge Bork's conclusion that political speech should be protected is, however, inconsistent with his belief that any acceptable rationale for free speech must be logically unique to speech. For there are countless actions—such as a bombing by the FALN to protest oppression of Puerto Rico, an assasination of a foreign political leader because of human rights violations in his country, and the breaking of windows at the Iranian Consulate to protest the treatment of Americans in Iran—that can be thought to convey very significant political messages. Those who undertake such activities could argue with a fair degree of persuasiveness that the public attention attracted to such acts is geometrically greater than that which would be received by public statements or pickets. Even if we rejected this argument, however, the issue for Judge Bork is not whether the value in question can be furthered by speech, as well as by conduct, but whether it can *only* be furthered by speech. Bork otherwise could not exclude nonpolitical speech that aids individual self-fulfillment on the ground that conduct may also aid such a goal. It is, therefore, difficult to understand how he can protect political speech, when countless forms of political action could achieve similar results.[45]

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[44] Bork, *supra* note 12, at 20. "Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law." *Id.*

[45] One might argue that these actions standing alone do not effectively convey any message. Rather, there also must be some oral or written communication by the perpetrators of the act describing their motivation. Assuming this to be true, the point in no way undermines the conclusion that the act is an essential aspect of the attempt to convey political truth, since the statement of motivation would make little sense without performance of the act.

Professor BeVier, arguing in support of Judge Bork's position, reasons that "beliefs and opinions are often most effectively communicated by forms of conduct other than verbal expression." BeVier, *supra* note 12, at 319 (footnote omitted).

Political actions, unlike some of the faculty-developing activities referred to by Judge Bork, have as an essential part of their purpose a communicative aspect. But it is unlikely that Bork would be satisfied with a distinction based on communicative purpose, since he leaves little doubt that he would not choose to protect such actions. In any event, there are numerous noncommunicative, nonspeech activities that may be thought to aid in the attainment of political truth. For example, working as a farmer could help one understand the problems and benefits of farm price supports; working as a doctor could do the same with respect to socialized medicine; living in a large urban area and taking public transportation might convince one of the need for greater federal aid to cities and mass transit. Thus, nonspeech activities could aid attainment of knowledge of political truth as much as does any political discourse. Bork's logic therefore must be rejected, because it inescapably results in the content of speech protected by the first amendment being a null set: there is no category of expression that furthers a value or values unique to speech.

If one were to look for an appropriate basis for limiting the protection of the first amendment to "speech," the natural starting place would seem to be the language of the amendment itself, which says nothing about protecting only political speech.[46] What the language does refer to is "speech," and not action. Thus, we need not find a logical distinction between the value served by speech and the value served by conduct in order to justify protecting only speech, for the framers have already drawn the distinction. Whether or not the constitutional language must be read to provide absolute protection to speech,[47] there can be little doubt that it was intended to provide greater protection to speech than to conduct, which is relegated to the fifth amendment's protection against deprivation of "liberty" without "due process of law." Indeed, that the framers deemed it necessary to create a first amendment at all, rather than merely including speech within the other forms of liberty protected by the fifth amendment, indicates that speech is to receive a constitutional status above and beyond that given to conduct.

My point is, simply, that the exact same thing can be said about political speech, the only category of expression that Judge Bork and Professor BeVier believe deserves constitutional protection.

[46] One would think that any attempt to develop a "principled" interpretation of a constitutional provision would not begin by inserting limitations that are not even hinted at in the constitutional language, and that indeed appear to depart from a natural reading of the words. The first amendment refers simply to "the freedom of speech, and of the press."

[47] This issue has been the subject of endless debate. *See infra* notes 112-16.

It is not hard to understand why constitutional protection of speech would be greater than that of conduct. If we were to draw a rough distinction—the kind that must necessarily have been drawn by the framers—we could reasonably decide that speech is less likely to cause direct or immediate harm to the interests of others[48] and more likely to develop the individual's mental faculties, and that speech thus deserves a greater degree of constitutional protection than does conduct. Bork's assumption that any principled first amendment theory must rely solely on values that are *uniquely* protected by speech drastically undercuts this status by effectively removing all categories of speech from the amendment's protection.

B. *Deriving the Ultimate Value*

The primary flaw in the analysis of Bork and Meiklejohn is that they never attempt to ascertain what basic value or values the democratic process was designed to serve. Examination of the "process" values inherent in our nation's adoption of a democratic system reveals an implicit belief in the worth of the individual that has first amendment implications extending well beyond the borders of the political world. Indeed, political democracy is merely a means to—or, in another sense, a logical outgrowth of—the much broader value of individual self-realization. The mistake of Bork and Meiklejohn, then, is that they have confused one means of obtaining the ultimate value with the value itself.

The logic employed by Meiklejohn and Bork to reach their conclusion that the protection of speech was designed to aid the political process would have absolutely no relevance except in a democratic system. For a monarchy or dictatorship to function politically, it of course is not necessary that the general public be able to speak freely or receive information about pressing political

[48] Dean Wellington has correctly noted that "speech often hurts. It can offend, injure reputation, fan prejudice or passion, and ignite the world. Moreover, a great deal of other conduct that the state regulates has less harmful potential." Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106-07 (1979) (footnote omitted). He cites, as one example of the latter, laws prohibiting certain forms of sexual relations between consenting adults. *Id.* 1107. But (as noted in the text), in establishing a constitutional rule that is to provide a guide for future generations, it is impossible to enumerate the specific instances that deserve a greater degree of protection and those that deserve a lesser degree. It is almost certainly true in the overwhelming majority of cases that speech is less immediately dangerous than conduct. In any event, I would argue, with respect to the example of laws regulating consensual sexual practices cited by Dean Wellington, that such conduct should (at least as a matter of logic and morals) be deemed fully protected by the self-realization principle. To the extent that it is not protected, it is probably because there is no constitutional provision giving it the high level of protection given speech by the first amendment.

questions, because private individuals will have no say in decisions. Even a benevolent dictator would be more likely to allow free expression in traditionally nonpolitical areas such as art, literature, and music than in the political realm. The free speech value emphasized by Meiklejohn and Bork, then, is inherently linked to a democratic form of government.

Democracy is by no means the only system that could have been chosen when our nation was founded. Indeed, it is probably safe to say that the overwhelming majority of organized societies throughout history have not chosen it, even in its most diluted form. It would seem, then, that there must be some values that the founding fathers believed to be uniquely fostered by a democracy, values that succeeding generations of political leaders presumably have shared, since there has been little or no effort to alter substantially our system of government by constitutional processes.

One conceivable value is "consequentialist" in nature: efficiency. One could believe that the results of a democratic system are somehow better than any other system's. Such an argument, however, would be very difficult to prove, for several reasons. Initially, it would probably be difficult to obtain agreement on the criteria for measuring results. How are we to decide what is "better"? Higher gross national product? More international influence? And better for whom? Elites? A majority? Oppressed minorities? Secondly, it is doubtful that we could establish empirically that throughout history democracies have fared better than other forms of government. After all, we do know that the trains ran on time in Mussolini's Italy; can the Chicago Transit Authority make the same claim? Moreover, it may well be counter-intuitive to believe, especially in a modern, highly technological society, that decisions made by the masses or their elected representatives—who are rarely chosen because of any degree of real expertise—would be either the wisest or the most efficient. Finally, 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. It is likely, then, that the values inherent in a democratic system are "process-oriented," rather than related to some objective standard of governmental efficiency.

These "process" values seem to translate into two forms: an "intrinsic" value and an "instrumental" value. The "intrinsic" value is one that is achieved by the very existence of a democratic system. It is the value of having individuals control their own destinies. For if one does not accept the morality of such a propo-

sition, why bother to select a democratic system in the first place? As Meiklejohn said, "[i]f men are to be governed, we say, then that governing must be done, not by others, but by themselves. So far, therefore, as our own affairs are concerned, we refuse to submit to alien control." [49] The point is so obvious that it requires no further elaboration, except to say that the core concept of "self-rule" appears to have formed the cornerstone of every theory of democracy to date.[50] It would seem to be so as a matter of definition.

The second value of a democratic system is labeled "instrumental," because it is a goal to which a democratic system is designed to lead, rather than one that is attained definitionally by the adoption of a democratic system. It is a goal that is associated primarily with "classical" (fully participatory) democracy: development of the individual's human faculties. In the words of a leading authority:

> The most distinctive feature, and the principal orienting value, of classical democratic theory was its emphasis on individual participation in the development of public policy. . . . Although the classical theorists accepted the basic framework of Lockean democracy, with its emphasis on limited government, they were *not* primarily concerned with the *policies* which might be produced in a democracy; above all else they were concerned with *human development,* the opportunities which existed in political activity to realize the untapped potentials of men . . . .[51]

My thesis is that: (1) although the democratic process is a means of achieving both the intrinsic and instrumental values, it is only one means of doing so; (2) both values (which, as noted previously,[52] may be grouped under the broader heading of "self-realization")

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[49] A. MEIKLEJOHN, *supra* note 8, at 9.

[50] In the words of Professor Bachrach, "[d]emocratic participation . . . is a process in which persons formulate, discuss, and decide public issues that are important to them and directly affect their lives." Bachrach, *Interest, Participation, and Democratic Theory,* in PARTICIPATION IN POLITICS: NOMOS XVI 39, 41 (J. Pennock & J. Chapman eds. 1975).

[51] Walker, *A Critique of the Elitist Theory of Democracy,* 60 AM. POL. SCI. REV. 285, 288 (1966) (emphasis in original); *see also* C. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 51 (1977) ("[D]emocracy drew the people into the operations of government by giving them all a practical interest, an interest which could bring down a government. Democracy would thus make people more active, more energetic; it would advance them 'in intellect, in virtue, and in practical activity and efficiency'."). John Stuart Mill is often associated with this "developmental" value of democracy. *See* Walker, *supra,* at 285; *see also* J. MILL, ON LIBERTY (1947) (1st ed. London 1859).

[52] *See supra* text preceding note 18.

may be achieved by and for individuals in countless nonpolitical, and often wholly private, activities; and (3) the concept of free speech facilitates the development of these values by directly fostering the instrumental value and indirectly fostering the intrinsic value. Free speech fosters the former goal *directly* in that the very exercise of one's freedom to speak, write, create, appreciate, or learn represents a use, and therefore a development, of an individual's uniquely human faculties. It fosters the latter value *indirectly* because the very exercise of one's right of free speech does not in itself constitute an exercise of one's ability to make life-affecting decisions as much as it *facilitates* the making of such decisions.

This conceptual framework indicates that the appropriate scope of the first amendment protection is much broader than Bork or Meiklejohn would have it. Free speech aids all life-affecting decisionmaking, no matter how personally limited, in much the same manner in which it aids the political process. Just as individuals need an open flow of information and opinion to aid them in making their electoral and governmental decisions, they similarly need a free flow of information and opinion to guide them in making other life-affecting decisions. There thus is no logical basis for distinguishing the role speech plays in the political process. Although we definitely need protection of speech to aid us in making political judgments, we need it no less whenever free speech will aid development of the broader values than the democratic system is designed to foster.

Before this thesis can be accepted, however, each of its two prongs must confront significant counterarguments:

> (1) The moral value of "self-rule" intrinsic in the adoption of a democratic system is not transferable to the private sphere, because that we value society's collective ability to control its destiny does not necessarily imply that we place an equal value upon individuals' power to direct their personal lives. Individual and collective self-determination are very different conceptually, and indeed are often in conflict.
>
> (2) Although classical theorists of democracy may have believed that human development would result from mass political participation, modern theorists—the "elitists" or "revisionists"—have totally undermined the basis for this belief. Furthermore, that such human development could be gained from participation in the political process would not imply that similar benefits would derive from indi-

> viduals' control over their private lives, because an essential premise of the classical theorists' belief was that this benefit stemmed from individuals extending themselves beyond narrow self-interest to concern about the common good.

Although each of these arguments deserves a detailed response, it is my contention that neither invalidates my thesis.

1. Collective Self-Rule and Individual Autonomy

One can argue that there is a conceptual difference between the value of collective self-rule and that of individual self-rule. In a democracy, numerous conflicts may develop between the majority's will and the desires of the individual. A "tyranny of the majority," under which there is little or no room for the exercise of individual autonomy, is readily imaginable.[53] But my purpose in this discussion is not to establish that the concept of collective self-rule necessarily implies an impenetrable sphere of individual autonomy (although the form of democracy established in this nation, both historically and morally, does include the existence of such a sphere).[54] My point, rather, concerns the level of constitu-

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[53] *See generally* THE FEDERALIST Nos. 10 & 51 (J. Madison); 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 241-54 (1966) (1st ed. Bruxelles 1835); J. MILL, *supra* note 51, at 1-14.

[54] The ideological father of the American Revolution is generally thought to be John Locke. *See* L. LEVY, *supra* note 27, at 100; J. ROCHE, COURTS AND RIGHTS 9-10 (1961); *see also* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 14, 283-84 (1969). Locke is widely thought of as a libertarian who

> assumed . . . that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred.

I. BERLIN, FOUR ESSAYS ON LIBERTY 124 (1977); *see also* G. PARRY, JOHN LOCKE 158-60 (1978).

It may well be, as Professor Roche suggests, that only "[a] careless reading of Locke's *Second Treatise* suggests that he was a militant defender of the rights of the citizen against government in general." J. ROCHE, *supra*, at 9; *see also* L. LEVY, *supra* note 27, at 103-04. However, Locke was undoubtedly a libertarian relative to his contemporaries, *see id.* 100-01, and, as Roche acknowledges, the image (perhaps mythical) of Locke as a strong believer in individual rights "had an enormous impact, particularly in the American Colonies." J. ROCHE, *supra*, at 9. *See also* G. WOOD, *supra*, at 283-84. In any event, there can be little question that the form of democracy that we have adopted imposes constitutional enclaves to protect the individual's autonomy from majoritarian interference.

For an alternative interpretation of the ideological origins of the American Revolution—one that de-emphasizes the role of Locke and substantiates the influence of the moral-sense philosophy of the Enlightenment—see G. WILLS, INVENTING

tional protection to be given to speech that is related to whatever decisionmaking the collective society does allow the individual to make. I intend to show only that the logic employed by Meiklejohn and Bork to justify first amendment protection for speech relevant to political decisionmaking dictates a similar level of protection for speech related to whatever decisions actually are allowed to the individual.

Let us imagine a hypothetical democratic society premised solely on the utilitarian belief in the greatest good for the greatest number, and with no moral or political regard for the individual as such, except assurances that every individual will have a say (a vote) in decisionmaking. Assume further that in this society *every* decision affecting individuals—including decisions about dinner menus, hair styles, entertainment activities, and bedtimes—is made by a collective vote. Although in concept such a society is democratic, it of course removes from the individual more choices than does virtually any authoritarian regime. Nevertheless, the inherent value on which the system is premised is (collective) self-rule.

Under Meiklejohnian logic, debate and information about every one of these decisions, no matter how trivial, would presumably have to receive full constitutional protection, because the individuals that make up this society are in fact their own "governors," and therefore need open communication to aid them in their "political" decisionmaking. This logic applies to speech of the minority as well as the majority, because we presumably cannot determine before the actual vote who will be in each group. Therefore, every voter must have the right to hear and learn every factor that might influence the final vote.

Now assume a slight alteration in the arrangement of this society: instead of collectively voting on every conceivable life-affecting decision, the members of the society vote periodically for specific governors, who make each life-affecting decision for the entire society. Under Meiklejohnian logic, here, too, we need full protection of information for the society's members about each of the issues that the governors will decide, because the underlying moral precept of the society is still self-rule. The individuals therefore need to know how the competing candidates for office will decide these issues—for example, whether they will order chicken or steak for dinner—so that they can choose the governors whose

AMERICA (1978). Wills' interpretation provides a historical and intellectual background that is consistent with the theory of individual self-realization advanced in this Article.

views coincide most closely with the individuals' personal preferences. Moreover, if the price of steak should rise during the governors' term of office, under Meiklejohnian logic the society's members would need the constitutional right to tell each other about it, so that they might better judge the dinner choices made by their governing agents. Simply put, Meiklejohn and Bork would protect all speech related to the political process, but the term "political" does not include a set category of specific substantive issues. Rather, it applies to whatever issues a society decides collectively, whether by direct popular vote or through elected agents.

Now assume that, whether because of moral concern about individual autonomy or simply because it does not wish to be bothered with so many decisions, the collective society cedes to each individual full decisionmaking power, much as our own democratic society does, on such questions as what to eat for dinner, what commerical products to buy, whom and whether to marry, what career to choose, and where and whether to go to college—decisions that previously were made by the collective or its agents and that therefore were "political." At this point, the individual has more than an indirect say in how these decisions are to be made; he now has full authority to make them, as well as commensurate responsibility for their consequences.

Once these decisions have been removed from collective authority and completely given over to individual will, presumably Meiklejohn and Bork would say that the individual no longer has a constitutional right to information that will help him make them, because they are no longer part of the political process. Their logic, however, leaves us with an untenable situation: when an individual only has an indirect say in governing his life, either by voting on particular questions or by selecting governing agents who will make the decisions, he has a right to information that will enable him to exercise his power more effectively; but when the individual has full and total authority to make the very same decisions, his right to the information mysteriously vanishes. Reason would seem to dictate, however, that the individual has at least as great a need for a free flow of information and opinion related to life-affecting decisions that he makes solely for himself. For whether the decisions are made collectively or by the individual, in a democracy we assume the moral value of self-rule. Thus, the first amendment guarantee of free expression is designed to play an important role in the exercise of that decisionmaking power at either level.

2. The Impact of the Elitist Theorists and the Definition of "Political"

A critique based on the findings and conclusions of the so-called "elitist" [55] or "revisionist" [56] democratic theorists—who have come into prominence mostly within the last forty years [57]—is aimed at the "instrumental" value of a democratic system: the development of individual abilities and faculties thought by classical theorists to flow from participation in the political process.[58] The argument, put simply, is that it is today unrealistic to expect the common masses to gain such benefits, because it is unrealistic to expect them to have both the interests and the ability to involve themselves on a significant scale in day-to-day political affairs. The pulls of work and family, Professor Lipset tells us, are too great to expect the individual to bother with the complexities of political affairs, especially when he sees the impact of those matters on his life as remote.[59] Professor Dahl writes that "neither by instincts nor by learning is [man] necessarily a political animal." [60]

Well-known empirical studies describing the average American voter's shocking lack of knowledge underscore this judgment.[61]

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[55] *See, e.g.*, P. BACHRACH, THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE (1967); Walker, *supra* note 51.

[56] Although the term "elitist" was apparently coined by one of the theory's proponents, *see* Lipset, *Introduction* to R. MICHELS, POLITICAL PARTIES 33 (1962), at least one of the theorists who is often thought to fall into this grouping rejects the term, because it is inaccurate and "even more so because in our language and in our society it is unavoidably . . . a pejorative, even a polemical epithet." Dahl, *Further Reflections on "The Elitist Theory of Democracy,"* 60 AM. POL. SCI. REV. 296, 297 n.7 (1966). The term "revisionism" is applied to this type of democratic theory in Keim, *Participation in Contemporary Democratic Theories*, in PARTICIPATION IN POLITICS: NOMOS XVI 1 (J. Pennock & R. Chapman eds. 1975).

[57] The origin of the theory of democratic elitism is contained in the later chapters of G. MOSCA, THE RULING CLASS (1939). *See* P. BACHRACH, *supra* note 55, at 10.

[58] *See supra* text preceding note 51.

[59] Lipset, *supra* note 56, at 17; *see also* P. BACHRACH, *supra* note 55.

[60] R. DAHL, MODERN POLITICAL ANALYSIS 55-56 (1963).

[61] *See, e.g.*, B. BERELSON, P. LAZARSFELD & W. MCPHEE, VOTING (1954); A. CAMPBELL, P. CONVERSE, W. MILLER & D. STOKES, THE AMERICAN VOTER (1960). *But see* N. NIE, S. VERBA & J. PETROCIK, THE CHANGING AMERICAN VOTER 123-73, 319-44 (1979). This more recent analysis suggests that the indicia of voter awareness, issue consistency, and issue voting have demonstrated a marked increase in voter awareness between 1956 (the terminal year of the Campbell, Converse, Miller, and Stokes study) and 1976. However, Nie, Verba, and Petrocik add this cautionary note to their data: "This is not to say that the mass citizenry now has patterns of attitude consistency equal to that of a group of political Elites such as congressional candidates." *Id.* 137.

Note that these studies dealt only with the lack of knowledge of voters; the

Revisionists have therefore presented a vision of democracy in which more-involved elites compete for the allegiance of the masses at election time, but in which most individuals have no significant role beyond exercising a periodic choice through election, or occasionally through other formalized procedures.[62] Such data and theories may seem to make the instrumental value of classical democracy a museum piece. If so, it might be argued that the implications I have drawn from my theory about the broader value of individual self-realization are inaccurate. This, however, is not the case.

First, it should be noted that the impact of the elitists' argument goes at most to the instrumental value of democracy, and in no way challenges the *intrinsic* value of allowing individuals to maintain self-rule.[63] More importantly, the elitist theorists do not seem to question the *normative* imperative recognized by classical theorists, but rather only its attainability. Indeed, the impact of the elitist theorists is arguably to shift the emphasis from attaining this goal through the political process to its achievement through individual involvement in the private sector. Modern theorists have redefined the concept of the "political" to include decision-making within areas such as the work place, where decisions are likely to have a more immediately recognizable impact on the individual's daily life.[64] Therefore, the elitist theory can be seen as

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implications about the many who do not even perform that minimal civic function are all too clear. Dahl has suggested an explanation for such behavior:

> The explanation, no doubt, lies in the fact that man is not by instinct a reasonable, reasoning, civic-minded being. Many of our most imperious desires and the source of many of our most powerful gratifications can be traced to ancient and persistent biological and physiological drives, needs, and wants. Organized political life arrived late in man's evolution; today man learns how to behave as a political participant with the aid, and often with the hindrance, of instinctive equipment that is the product of a long development. To avoid pain, discomfort, and hunger, to satisfy drives for sexual gratification, love, security, and respect are insistent and primordial needs. The means of satisfying them quickly and concretely generally lie outside political life.

R. DAHL, *supra* note 60, at 103-04. If Dahl is correct, the problem is not that the classical theories are outmoded in modern society, but rather that they were unrealistic from their inception. In any case, the problem remains with us.

[62] *See* Keim, *supra* note 56, at 7 ("[Under revisionist theory, *h*]*omo civicus* is constrained to a mode of participation characterized by the binomic 'yes' or 'no.' Participation is effectively reduced to the approval or disapproval of the performance of elected official and lobbyist.").

[63] *Id.*

[64] *See* P. BACHRACH, *supra* note 55, at 102-03. *See generally* R. PRANGER, THE ECLIPSE OF CITIZENSHIP (1968).

being totally compatible with the thesis asserted here; democratic political control is only one means of achieving the values inherent in a democratic system, and it is therefore necessary to recognize that free speech may aid attainment of those values in nonpolitical settings.

Elitist thinking, then, does not undermine—indeed, it may facilitate—the extension of Meiklejohn's reasoning about the role of free speech to such nonpolitical activities as various kinds of community groups, as well as to the work place.[65] What remains unclear, however, is whether this logic may be extended as well to such purely private decisions as commercial purchases or an individual's choice of friends. The difficulty is that it has been generally assumed, since democracy's origins in ancient Athens, that the moral benefits to the individual derived from being forced to look beyond his or her own narrow interests and to work with others to attain the common good.[66] It is perhaps for this reason that Professor Bachrach, the leading exponent of the redefined "political" sphere, believed it necessary to stay within the bounds of the "political," no matter how strained his definition of the term.[67] But whatever unique benefits one derives from involvement in organizations that look to the common, as opposed to the individual, good, it is impossible to deny that many of the developmental values—particularly the intellectual benefits—that are thought to result from participation in the political process also may be obtained from private self-government. After all, the elitists tell us that "[p]olitical participation constitutes an effort to protect threatened interests," [68] and by adopting a democratic system we are expressing a belief that presumably individuals are capable of deciding what is best for them. There is therefore no basis to believe that development can be derived solely from common, as opposed to individual, activity.

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[65] *See* P. BACHRACH, *supra* note 55, at 96 & n.2; *see also* Mansbridge, *The Limits of Friendship*, in PARTICIPATION IN POLITICS: NOMOS XVI 246 (J. Pennock & J. Chapman eds. 1975). Of course, the constitutional requirement of state or federal action would limit the first amendment's reach into these nonpolitical or private areas to restricting *governmental* interference with the exercise of free speech.

[66] *See* G. SABINE & T. THORSON, A HISTORY OF POLITICAL THEORY 64-66, 539-44 (4th ed. 1973).

[67] The political scientist must recognize, Bachrach says, "that large areas within existing so-called private centers of power are political and therefore potentially open to a wide and democratic sharing in decision-making." P. BACHRACH, *supra* note 55, at 102; *see also* Keim, *supra* note 56, at 13.

[68] Keim, supra note 56, at 7.

A final, related argument is that speech concerning the political process is simply more important than speech concerning private decisionmaking, because it affects many more lives. One may question, however, whether this is true of all activity within the political process; one can imagine town council elections in miniscule hamlets, which, I assume, both Meiklejohn and Bork would include in their definition of "political," even though relatively few people would be affected. In any event, the argument is misleading, because it fails to recognize that, when we value private decisionmaking, we are referring to such decisionmaking on the part of *all* individuals.

II. Separating Value from Subvalue: An Inquiry into the Alternative Goals of Free Speech

This Article so far has established at most that values inherent in the democratic process extend the benefit of free speech well beyond the confines of the "political." The original claim made in this Article, however, was considerably more ambitious: that all of the so-called "values" of free speech, to the extent that they are to be accepted, derive ultimately from the single value of self-realization. Such a demonstration would preclude future theorists from asserting that, although they believe in the concept of free speech, they will select a value other than self-realization as the guiding force. The argument here is that, to the extent you accept the value of free speech at all, you must necessarily accept the self-realization value, for there is no other. In addition, for the thesis to be complete, it must be established that those who do accept the self-realization value cannot logically escape acceptance of these "subvalues" as well. It is to these issues that we now turn.

A. *The Checking Function*

Perhaps the asserted value most closely analogous to the "democratic process" value is Professor Blasi's "checking function." Blasi believes that speech concerning misconduct by government officials deserves special constitutional protection.[69]

[69] In Blasi's words, "if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate." Blasi, *supra* note 2, at 527. Although Blasi at one point asserts that "the checking value is to be viewed as a possible supplement to, not a substitute for, the values that have been at the center of twentieth-century thinking about the First Amendment," *id.* 528, he later asserts that speech related to the checking function "should . . . be accorded a level of constitutional protection higher than that given any other type of communication," because "the particular evil of official misconduct is of a special order." *Id.* 558.

The first question about Blasi's checking function concerns the precise scope of the speech included within it. At different points, Blasi refers to speech concerning "abuse of power," the misuse of official power," and "breaches of trust by public officials," [70] implying that these are the operative terms. But the meaning of these terms is by no means self-evident. A natural starting point would seem to be illegal conduct on the part of public officials, such as taking bribes, and Blasi unquestionably intends to include such activity.[71] But he does not stop there, nor could he without all but trivializing the free speech guarantee. If we are to understand where his theory is to apply, we must know exactly what, in addition to illegal conduct, Blasi would include under the heading of "misconduct." In attempting to define "a viable concept of official 'misconduct' that does not simply collapse into 'unwisdom' or 'unpopularity,' " [72] Blasi provides some illustrations:

> Some governmental actions such as the deliberate bombing of civilians during wartime, the assassination of foreign political figures, or less extreme examples of improper involvement in the domestic affairs of another nation might also be regarded as so in violation of shared standards of morality as to fall within a distinctive concept of misconduct.[73]

So described, Blasi's first amendment theory degenerates into little more than a means of fostering one individual's—presumably Professor Blasi's—political philosophy and foreign policy.[74] What about the individual who believed that *not* bombing civilians in the Vietnam War would have been "misconduct"—someone who would assert that "if we are going to fight a war, let's win it; it's immoral to have our boys die in a limited war"—or who believes that assassinating certain foreign political figures—perhaps Castro or Hitler or Idi Amin—is morally dictated? Are only those who share the views on these issues described by Professor Blasi to receive the special pro-

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[70] *Id.* 527.

[71] *See id.* 543 ("Behavior in violation of the applicable criminal code such as embezzlement or the acceptance of a bribe might provide a starting point for such a concept.").

[72] *Id.*

[73] *Id.*

[74] At the outset of his article, Professor Blasi notes the impact that public outcries had on limiting the Asian war policies of Presidents Johnson and Nixon. *Id.* 527; *see also id.* 640 ("[T]he communication achieved by the wave of draft-card burnings at the height of the United States involvement in Vietnam represents a paradigm example of the 'speech' with which the First Amendment is concerned.").

tection given speech concerning the checking function? Such a result-oriented, content-based approach to free speech must of course be rejected, yet it seems to be the implication of Professor Blasi's description of "official misconduct," for Professor Blasi's theory by its terms refers to conduct, rather than issues. Moreover, what about discussion of official conduct that, although perhaps not offensive to Professor Blasi, is considered by many to be so? Is it "misconduct" for the government to allow abortions? To pay welfare? Again, to deny the inclusion of speech concerning such official actions would constitute a wholly unacceptable interpretation of the first amendment on the basis of political or social viewpoint, for if the first amendment means anything it is that the level of constitutional protection cannot vary on the basis of differing viewpoints.[75]

Perhaps Professor Blasi did not intend to establish such a solipsistic view of the first amendment. At one point, he states that "[u]nder the checking value, that determination [of what actions can be considered misconduct] must be made by each citizen in deciding when the actions of government so transcend the bounds of decency that active opposition becomes a civic duty." [76] But Blasi's distinction of speech concerning official "misconduct" from speech about general governmental action collapses if the determination of what is official misconduct is to be left to the individual citizen. For how effective a limit would it be if any individual could render governmental action or inaction "misconduct" for first amendment purposes merely by characterizing it as such?

At least in a broad sense, however, it is accurate to recognize the value of speech, as Professor Blasi does, as a means of controlling governmental actions.[77] The question for discussion, then, is whether this value is independent of the self-realization value or, instead, as contended here, is merely derivative.

Professor Blasi describes the purposes thought to be served by the checking function. He argues primarily that "a proponent of

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[75] I have argued elsewhere that it is improper to provide stricter constitutional scrutiny to regulation of expression based on content than to regulation that is imposed equally on all speech. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981). However, this was not intended to imply that *less* scrutiny should be given to viewpoint regulation, but rather that *greater* scrutiny should be given to neutral regulation.

[76] Blasi, *supra* note 2, at 543 (footnote omitted).

[77] As restructured, Professor Blasi's "checking function" appears strikingly similar to the "democratic process" value of Meiklejohn, notwithstanding Professor Blasi's statements to the contrary, *see id.* 558.

the checking value views speech of a certain content as important because of its *consequences*: alerting the polity to the facts or implications of official behavior, presumably triggering responses that will mitigate the ill effects of such behavior." [78] If Blasi is correct in characterizing the checking function as fostering the consequential value of producing "good results," the value would in fact be distinct from the "process" goals inherent in the self-realization value. But closer examination of the reasoning behind the checking function reveals that this value can be sustained only on the basis of process, rather, than consequential values. To view the checking function as having a consequential value logically requires us to adopt the following reasoning: if government officials believe that it is correct to do "A"—a particular course of action or policy decision—and some or many members of the public believe that doing A would constitute "misconduct" and instead prefer that the officials do "B," we know that B will produce "better"—less evil or more beneficial—results than A will. But this conclusion surely does not follow as a matter of logic, and may well be counter-intuitive in light of the empirical evidence obtained by elitist theorists of a tremendous lack of political interest and knowledge on the part of the large mass of private citizens.[79]

Of course, if we were to read Professor Blasi to suggest that there is a set category of political actions that are to be objectively deemed "misconduct," [80] then we would be able to conclude that speech by private citizens criticizing such activity would produce "better" results. But, as already noted,[81] such an unprincipled construction of the first amendment, providing greater protection to speech urging results with which one agrees, is totally unacceptable. Therefore, we must assume, as Blasi states at another point, that it is the individual citizen's subjective characterization of official action as "misconduct" that is determinative.[82] Given

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[78] *Id.* 546 (emphasis in original). This emphasis on consequences is what Professor Blasi believes primarily distinguishes the checking function from what he describes as the "autonomy" value. *Id.* At another point, underscoring his "consequentialist" approach, he states that the evil of government misconduct "is so antithetical to the entire political arrangement, is so harmful to individual people, and also is so likely to occur, that its prevention and containment is a goal that takes precedence over all other goals of the political system." *Id.* 558 (footnote omitted).

[79] *See supra* note 61 and accompanying text. According to Professor Walker, "[a]t the heart of the elitist theory is a clear presumption of the average citizen's inadequacies." Walker, *supra* note 51, at 286.

[80] *See supra* text accompanying notes 71-73.

[81] *See supra* text accompanying note 75.

[82] Blasi, *supra* note 2, at 543.

that premise, we cannot support the checking value on consequential grounds, for we cannot be sure that the official policies thought by particular individuals to constitute "misconduct" necessarily would be more evil than the alternative policies urged by the private individuals.

To the extent that there is an important value behind the checking function, then, it must be a process value. And it is not difficult to determine what that value is; it is the intrinsic democratic value that individuals should have a say in the policies of their government, because their government, in a democracy, is acting on their behalf. As democratic theorist Edmond Cahn has stated, democracy requires "examining, judging, and assuming responsibility for what our representatives do in our name and by our authority, the unjust and evil acts as well as the beneficent and good." [83] Indeed, to the extent that Professor Blasi relies on the proposition that "the general populace must be the ultimate judge of the behavior of public officials," [84] he, too, is viewing the checking function as merely one manifestation of the intrinsic democratic value.[85] Because the checking function ultimately derives

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[83] E. CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 29 (1961).

[84] Blasi, *supra* note 2, at 542.

[85] Blasi acknowledges that "the checking value grows out of democratic theory, but it is the democratic theory of John Locke and Joseph Schumpeter, not that of Alexander Meiklejohn." *Id.* His reference to Schumpeter, however, is puzzling. Blasi asserts that, under Schumpeter's view, "the role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds." *Id.* (footnote omitted). However, Schumpeter actually raised serious doubts about the individual citizen's ability to question the specific policies of government. *See* J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 261 (3d ed. 1950); *see also* C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 3-4 (1970). Schumpeter urged an extremely limited role for private citizens, primarily that of "accepting or refusing the men who are to rule them." J. SCHUMPETER, *supra*, at 285. It is doubtful that this philosophy is consistent with Professor Blasi's view that private citizens have authority to determine for themselves what actions of public officials constitute misconduct. Blasi, *supra* note 2, at 543.

Blasi actually is probably much closer to Meiklejohn than he is to Schumpeter, for essential to Meiklejohn's philosophy was the belief that "[a] government of free men can properly be controlled only by itself. Who else could be trusted by us to hold our political institutions in check?" A. MEIKLEJOHN, *supra* note 8, at 16. Although Meiklejohn believed that the people were truly the "governors" and that elected officials were merely their agents, he did not advocate a system of direct democracy. Rather, he believed that citizens needed information and opinion, so that they could better perform their governing function *in the voting booth*. Meiklejohn, *supra* note 11, at 255-56.

Blasi asserts that "[t]he self-government value [of Meiklejohn] appears to place slightly more emphasis on argumentation (as contrasted with information) than does the checking value." Blasi, *supra* note 2, at 563. However, if Blasi believes that the activities of antiwar protestors (including draft card burning) constitutes a classic example of how the checking function operates, *see id.* 554, it is difficult

from the principle of democratic self-rule, and because that principle in turn follows from the self-realization value,[86] the checking function is merely one concrete manifestation of the much broader self-realization value.[87]

B. *The Marketplace-of-Ideas Concept*

"[T]he ultimate good desired," wrote Justice Holmes in his *Abrams* dissent, "is better reached by free trade in ideas—. . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution." [88] The theory, derived originally from John Stuart Mill,[89] posits, in the accurate description of one of its critics, that:

> [C]ompetition among ideas strengthens the truth and roots out error; the repeated effort to defend one's convictions serves to keep their justification alive in our minds and guards against the twin dangers of falsehood and fanaticism; to stifle a voice is to deprive mankind of its message, which, we must acknowledge, might possibly be more true than our own deeply held convictions. . . . Just as an unfettered competition among commodities guarantees that the good products sell while the bad gather dust on the shelf, so in the intellectual marketplace the several competing ideas will be tested by us, the consumers, and the best of them will be purchased.[90]

The "marketplace-of-ideas" concept, in its use as a defense of free speech, has often been subjected to savage attack,[91] and to a

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to accept his information-opinion distinction. For were not the primary activities of the antiwar movement more a matter of expressing opinion than of conveying information?

[86] *See supra* text accompanying notes 49-50.

[87] Blasi expends considerable effort in an attempt to establish a historical link between the checking value and the origins of the first amendment. Blasi, *supra* note 2, at 529-38. But most of the historical sources to which he refers were concerned primarily with ensuring the liberty of citizens—the intrinsic democratic value—and saw the checking of government not as an end in itself or as a means of assuring "better results," but as a means of assuring that government would not interfere with the individual's exercise of his liberty.

[88] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[89] J. MILL, *supra* note 51. According to Professor Baker, Mill provides the "marketplace-of-ideas" theory's "best formulation." Baker, *supra* note 15, at 968 n.9; *see also* R. WOLFF, THE POVERTY OF LIBERALISM 11-12 (1968).

[90] R. WOLFF, *supra* note 89, at 11-12; *see also* Baker, *supra* note 15, at 967.

[91] *See, e.g.*, R. WOLFF, *supra* note 89, at 12-19; Baker, *supra* note 15, at 974-81. According to Professor Dworkin, "John Stuart Mill's famous essay *On Liberty* has on the whole served conservatives better than liberals. . . . [C]ritics

certain extent the attacks have been entirely valid. In one sense, the theory appears to suffer from an internal contradiction: the theory's goal is the attainment of truth, yet it posits that we can never really know the truth,[92] so we must keep looking. But, if we can never attain the truth, why bother to continue the fruitless search? More importantly, any theory positing that the value of free speech is the search for truth creates a great danger that someone will decide that he finally has attained knowledge of the truth. At that point, that individual (or society) may feel fully justified, as a matter of both morality and logic, in shutting off expression of any views that are contrary to this "truth." To be sure, Mill would not have accepted such reasoning. He believed that even views that we know to be false deserve protection, because their expression makes the truth appear even stronger by contrast.[93] But acceptance of Mill's initial premise that the goal of free speech is the ultimate attainment of truth does not necessitate acceptance of this second premise. For, as Dean Wellington has argued, "[i]t is naive to think that truth will *always* prevail over falsehood in a free and open encounter, for too many false ideas have captured the imagination of man." [94] Therefore, if the only value of free speech were the attainment of truth, we might persuasively argue that the view that the Earth is the center of the Universe does not deserve constitutional protection, because we know the truth to be different. Perhaps we could further conclude that constitutional protection should not be given to the assertion that cigarette smoking does not cause cancer, because the Surgeon General has already discovered the truth about this subject; the same could be said about the view that certain races are genetically inferior, since we know that all men are created equal. The danger—one that Mill would undoubtedly neither expect nor condone—should by now be clear.

It does not necessarily follow, however, that the marketplace-of-ideas concept must be discarded. To the contrary: if viewed as merely a means by which the ultimate value of self-realization is

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of liberalism have been pleased to cite the essay as the most cogent philosophical defense of that theory, and then, by noticing the defects in its argument, argue that liberalism is flawed." R. DWORKIN, TAKING RIGHTS SERIOUSLY 259 (1977).

[92] *See* I. BERLIN, *supra* note 54, at 188 ("[Mill's] argument is plausible only on the assumption . . . that human knowledge was in principle never complete, and always fallible; that there was no single, universally visible, truth . . . .").

[93] J. MILL, *supra* note 51, at 34-45.

[94] Wellington, *supra* note 48, at 1130 (emphasis in original). *See also* I. BERLIN, *supra* note 54, at 187.

facilitated, the concept may prove quite valuable in determining what speech is deserving of constitutional protection. In other words, it could be argued that, if the intrinsic aspect of the self-realization value [95] is to be maintained, the individual needs an uninhibited flow of information and opinion to aid him or her in making life-affecting decisions, in governing his or her own life. Since the concept of self-realization by its very nature does not permit external forces to determine what is a wise decision for the individual to make, it is no more appropriate for external forces to censor what information or opinion the individual may receive in reaching those decisions. Thus, an individual presumably has the right [96] not to associate with people of different races in the privacy of his home, and may decide to exercise that right because he believes those who contend other races are genetically inferior.[97] That is his choice, and he may reach it on whatever basis he chooses, no matter how irrational it may seem to others. Because individuals constantly make life-affecting decisions—from the significant to the trivial—each day of their lives, there is probably no expression of opinion or information that would not potentially affect some such decision at some point in time. Therefore, the marketplace-of-ideas concept as a protector of all such expression makes perfect sense.[98]

So revised, the marketplace-of-ideas concept can be successfully defended against another attack: Baker's contentions that the theory "requires that people be able to use their rational capacities to eliminate distortion caused by the form and frequency of message presentation and to find the core of relevant information or argument," and that "[t]his assumption cannot be accepted [be-

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[95] *See supra* text following note 49.

[96] In using the term "right" in this context, I do not intend to limit its meaning to a constitutional, or even a statutory, right, although in certain instances it could conceivably be either of these. I mean, rather, the absence of a governmental prohibition.

[97] An individual of course would not be allowed to decide on the basis of this information to kill members of these races, or to refuse to associate with them in public accommodations. These are situations in which society has decided to limit the individual's freedom of action.

[98] Although I will deal with the point in detail in subsequent discussion, *see infra* text accompanying notes 110-18, it is perhaps necessary to emphasize here that I am referring only to the issue of what speech rightfully belongs within the first amendment's umbrella of constitutional protection. Since I am not a believer in construing the first amendment to provide absolute protection to speech, the conclusion that speech falls within the first amendment does not necessarily imply that it will outbalance all competing social concerns.

cause e]motional or 'irrational' appeals have great impact." [99] If we accepted the attainment of truth as the theory's goal, Professor Baker's point would be well taken. But the point becomes irrelevant if we instead view the theory simply as a means of facilitating the value of self-realization. For if an individual wishes to buy a car because he believes it will make him look masculine, or to vote for a candidate because the candidate looks good with his tie loosened and his jacket slung over his shoulder, who are we to tell him that these are improper acts? We may prefer that he make his judgments (at least as to the candidate, if not the car) on more traditionally "rational" grounds, and hope that appeals made on such grounds will be heard. But in these areas society has left the ultimate right to decide to the individual, and this would not be much of a right if we prescribed how it was to be used.[100]

C. *The "Liberty" Model*

Although Professor Baker's primary attack on the marketplace-of-ideas theory is premised on the inability of the system to produce rational results, the essential elements of his own theory of free expression, if accepted, logically lead to a rejection of even the revised version described here. Professor Baker adopts as the center of his theory of free speech the "liberty model," [101] under which respect for individual autonomy leads us to protect communication

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[99] Baker, *supra* note 15, at 976. According to Baker, "[t]he assumptions on which the classic marketplace of ideas theory rests are almost universally rejected today." *Id.* 974. However, there may be some inconsistency in Baker's analysis. On the one hand, he attacks the marketplace-of-ideas concept because it is premised on a presumption of individual rationality that is unrealistic. Yet Baker's own theory of free speech is based on the view that individuals must be respected as "equal, *rational* and autonomous moral beings." *Id.* 991 (emphasis added). He rejects limitations on free speech that are designed "to protect people from harms that result because the listener adopts certain perceptions or attitudes," because to do so "disrespects the responsibility and freedom of the listener." *Id.* 998.

[100] It might be argued that the marketplace-of-ideas theory is unrealistic in assuming that, absent government regulation, individual decisionmakers will receive an unbiased flow of information because certain groups, holding particular viewpoints, control the media and exclude unpopular opinions from the information stream. Many who have recognized this difficulty have urged increased right of access to the communications media. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). Such an access theory faces serious constitutional questions itself, *see* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), but, at least under certain circumstances, provides an answer to this criticism. In any event, even if this criticism were accepted, it does not imply that the marketplace-of-ideas theory is useless, but merely that it is not perfect. Thus, this argument offers no support for any efforts to further impede the flow of information.

[101] Baker, *supra* note 15, at 990.

that defines, develops, or expresses "the self." [102] "[T]he values supported or functions performed by protected speech," he writes, "result from that speech being a manifestation of individual freedom and choice." [103] Therefore, he concludes, speech that "does not represent an attempt to create or affect the world in a way which can be expected to represent anyone's private or personal wishes" is not deserving of constitutional protection.[104] It is for this reason that Baker would give no constitutional protection to commercial speech.[105] Because there is presumably a considerable amount of information or opinion flowing to individuals from corporations and others who are motivated by economic considerations, Baker would not be likely to accept even the revised rationale for the marketplace-of-ideas theory. Although Baker correctly recognizes the self-realization value lying behind the protection given free speech, he has so narrowly confined this concept that he has effectively excluded significant amounts of expression that could substantially foster the self-realization value.

Baker's adoption of an extremely narrow view of how the self-realization value can be fostered apparently results from his acceptance of a truncated version of the value itself. The form of self-realization that he seems to be describing is limited to the "instrumental" value referred to previously: the value of having individuals develop their faculties.[106] Even with this truncated version, Baker has failed to acknowledge that individuals may develop their personal and intellectual faculties by *receiving*, as well as by expressing.[107] Once this is recognized, we can see that the

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[102] *Id.* 992.

[103] Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (footnote omitted).

[104] *Id.* Baker elsewhere has argued that "if it is not a manifestation of the speaker's values, even though the speech may cause change or advance knowledge, it does not serve this liberty value and is not protected," Baker, *supra* note 15, at 991 n.86, and that "to the extent that speech is involuntary, is not chosen by the speaker, the speech act does not involve the *self*-realization or *self*-fulfillment of the speaker," *id.* 996 (emphasis in original).

[105] Baker, *supra* note 103, at 3.

[106] Baker notes that, "[o]n the liberty theory, the purpose of the first amendment is not to guarantee adequate information." Baker, *supra* note 15, at 1007. He also writes, however, that "[s]elf-expressive and creative uses of speech more fully and uniformly promote the two key first amendment values, self-fulfillment and participation in both societal decisionmaking and culture building, than does speech which communicates propositions and attitudes." *Id.* 995 (emphasis omitted).

[107] At one point, Baker acknowledges that "[t]he listener uses speech for self-realization or change purposes and these uses provide the basis of the listener's constitutional right." *Id.* 1007. He adds, however, that "the constitutional analysis of any restriction must be in terms of who is restricted—the speaker or the listener.

motivation of the speaker may be irrelevant, as long as the individual's faculties are developed by the *receipt* of information whether it be opinion or fact. For example, that an author is writing primarily to make money, rather than to express his personality, does not diminish the potential development of the reader. More important, however, is Baker's refusal to recognize the correlative principle to self-fulfillment's instrumental value: the intrinsic value, self-rule. Thus, if an individual is given the opportunity to control his destiny, at least within certain bounds, he or she needs all possible information that might aid in making these life-affecting decisions. Because Baker fails to include this vital aspect of the self-realization concept, he develops a theory of free speech that is correspondingly incomplete.

Even if we were to accept Baker's unduly narrow conception of self-realization, his theory fails to deal adequately with the inseparability of the profit motive from the desire for self-expression. The problem arises because many people make a living by means of self-expressive work. Should the creative advertiser or commercial artist not be recognized for their "self-expression," merely because they are doing it to make money? Baker responds that "even if the speech happens to correspond to the speaker's values, the content is determined by the structure of the market and is not chosen by the speaker." [108] But surely within the dictates of the market structure the advertiser has a range of selection; there is never merely a single possible way to sell a product. Thus, can we not say that within that range the advertiser has exercised his or her self-expression? Moreover, if we accept Baker's analysis, what protection do we give to the political candidate who tailors his public positions to what he thinks will lead to his election, to the magazine or newspaper that chooses to publish what sells, or to the author who writes what he believes his audience will buy? Are *their* efforts not to receive first amendment protection? And what would Baker say about the level of first amendment protection to be given to welfare or social security recipients who picket to protest insufficient government aid? Is not *their* expression also dictated by the needs of the market?

Both parties have separate constitutional claims. Only if the restricted party does not have a constitutional claim is the government restriction permissible." *Id.* Thus, since Baker does not believe that those motivated by profit incentives, rather than self-expression, have a constitutional right, he must believe that these "speakers" can be constitutionally restricted, even though the listeners' ability to gain fulfillment may well suffer as a result.

[108] *Id.* 966 n.102.

Of all of these arguments, Baker attempts a response only to the question raised about political candidates. His answer is that:

> First, for many, if not most, political actors' [sic] political activity is not primarily and, more importantly, is not necessarily determined by the need to maximize either electoral support or economic profit. . . . Thus, no structure requires that the speaker choose increased chances of election (which is not even an option for minor parties) over increased advocacy of their values. Second, unlike the economic sphere . . . , many politicians and most defenders of the political process argue that, here, it is highly praiseworthy to truthfully and forcefully state, explain, and advocate one's own visions or understanding of the public good.[109]

Baker provides no statistical support for his first assertion, and it certainly seems counter-intuitive to me, at least, to think that most candidates for office do not have election as their primary goal. Nor am I convinced of the accuracy of his second assertion, but even if it were true it is irrelevant. That honesty may be "praiseworthy" does not mean that many candidates actually practice it, no matter how much they may purport to do so. Most importantly, what would Baker do if he could be convinced that ninety-nine percent of candidates were actually motivated more by the desire for election than by the desire to express their values? Would he urge no first amendment protection for their speeches? His logic would seem to lead to that conclusion. Baker's fundamental assumptions thus appear to be both pragmatically unrealistic and theoretically dubious.

III. The Self-Realization Value and the Balancing of First Amendment Interests

Professor Blasi writes that:

> The concept of human autonomy is largely irreducible. The libertarian argument from autonomy rests on the proposition that unless individuals retain a basic minimum of choice-making capability, they cease to be "individuals" at all. It is no accident, therefore, that claims based on the value of individual autonomy tend to be absolute in nature; they concern not interests to be promoted against competing regulatory interests but rather constitutive ele-

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[109] *Id.*

> ments the integrity of which must be respected if the whole edifice of constitutional limitations is to remain coherent.[110]

Professor Baker makes a similar point,[111] but it is difficult to understand. The concept of individual autonomy certainly has never been thought to lead to absolute protection for conduct, yet we may still maintain a belief in such an autonomy value. Why should our recognition of something akin to that value as the underlying force behind the protection of speech necessarily lead to any greater degree of absoluteness? There is, then, no logically necessary link between a belief in individual self-realization and a so-called "absolute" construction of the first amendment. In fact, the issue of absoluteness appears to present the same questions and to give rise to the same conflicting arguments whatever values are thought to be fostered by the free speech guarantee.

It is not the purpose of this Article to rehash the competing contentions on this issue, nor to consider the nuances of the various absolutist and balancing-test theories that have been suggested over the years. The primary goal, rather, has been to delimit the scope of the category of communication and expression that is to fall within the constitutional protection in the first place. But, in light of this suggested logical link, it is necessary to provide at least a brief explanation of why an absolute construction cannot be accepted, even if self-realization is recognized as the ultimate value underlying the first amendment.

The answer is simply that an absolute construction is (1) not required by the language of the amendment, (2) not dictated by the intent of the framers, and (3) impossible in practice. As to the issue of language, the phrase "freedom of speech" is not necessarily the same as "speech," and is certainly not self-defining. As to the intent of the framers, what little evidence there is suggests that, to the extent they thought about it at all, they intended an extremely narrow construction of the first amendment,[112] and certainly not an absolute construction. Finally, I simply refuse to believe that anything in first amendment language or policy requires us to protect the statement of a mob leader, outside a poorly defended prison,

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[110] Blasi, *supra* note 2, at 547; *see also* BeVier, *supra* note 12, at 320.

[111] Baker, *supra* note 15, at 1009. Note, however, that Baker does not believe in "absolute" protection for speech (even though he does include certain types of conduct within the constitutional guarantee), since he excludes speech dictated by the market structure. *See id.* 996 & n.102.

[112] *See* L. LEVY, *supra* note 27, at 247-48.

urging his torch-carrying compatriots to lynch a prisoner inside.[113] Once it is acknowledged that the free speech interest must give way in such a situation to a competing social interest, acceptance of at least *some* form of balancing process is established. The question is simply where to draw the line.

The concept of balancing gained a bad name among civil libertarians during its heyday in the 1950's, because it was usually used simply as a code word for substituting legislative determinations for judicial review.[114] However, if we define "balancing" to include definitional balancing, as well as the *ad hoc* variety, we can see that the concept has gained wide acceptance,[115] for any general rule of first amendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing. The point, however, is to balance with "a thumb on the scales" in favor of speech.[116] Although the first amendment cannot practically be interpreted to

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[113] It appears that Professor Baker's construction of the first amendment would protect such expression. Although Baker believes that "[r]espect for individual autonomy hardly requires protection of speech when the listener is coerced," he also asserts that "outlawing acts of the speaker in order to protect people from harms that result because the listener adopts certain perceptions or attitudes disrespects the responsibility and freedom of the listener." Baker, *supra* note 15, at 998. Speech is protected because "it depends for its power on increasing the speaker's own awareness or on the voluntary acceptance of listeners." *Id.* 999. Because the harm in the lynching hypothetical results from "the voluntary acceptance of listeners," the conclusion seems inescapable that Baker would protect such speech.

[114] *See, e.g.*, Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1444 (1962) ("[I]t must be regarded as very nearly inevitable that a court which clings to the balancing test will sooner or later adopt a corollary that the balance struck by Congress is not only presumed correct, but is to be accorded extreme, almost total, judicial deference."); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 826 (1962) ("Above all, the open balancing technique is calculated to leave 'the sovereign prerogative of choice' to the people—with the least interference that is compatible with our tradition of judicial review."); *see also* Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

[115] It is not my purpose here to debate the relative merits of *ad hoc* and definitional balancing (also referred to as "categorization"). *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Nimmer, *The Right to Speak From* Time *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968). My point is simply that one need not be an absolutist if one relies on self-realization as the ultimate value of free speech. What form of "balancing" one adopts at that stage is beyond this Article's scope. The only point to be underscored is that, in the broad sense of the term at least, the categorizers, too, are engaged in "balancing," in that they reject an absolutist approach in favor of an analysis that allows fully protected speech to be superseded by overriding social interests.

[116] Frantz acknowledges that "it is conceivable that a court might apply the balancing test, yet attach so high a value to freedom of speech that the balance would nearly always be struck in its favor." Frantz, *supra* note 114, at 1440.

provide absolute protection, the constitutional language and our political and social traditions dictate that the first amendment right must give way only in the presence of a truly compelling governmental interest.[117] To be sure, such an analysis places a good deal of faith in the ability of judges to exercise their authority with wisdom and discretion, both in establishing and applying general rules of first amendment construction and, where necessary,[118] in engaging in *ad hoc* balancing. But, after all, that is what they are there for, and in any event we appear to have little choice.

IV. Acceptance of the Self-Realization Value: Implications for Constitutional Construction

If the self-realization value were accepted as the guiding force behind constitutional protection of free speech, it is likely that the Court's approach to numerous issues of first amendment construction would have to change. The "two-level" concept of speech derived from *Chaplinsky v. New Hampshire*,[119] which recognizes a sublevel of speech that is unworthy of constitutional protection, would have to be abandoned. That doctrine posits that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[120]

The theoretical fallacy in the *Chaplinsky* doctrine is the assumption that the value of free speech is as a means to attain truth. Once one recognizes that the primary value of free speech is as a means of fostering individual development and aiding the making of life-affecting decisions, the inappropriateness of distinguishing between the value of different types of speech becomes clear. Al-

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[117] I have discussed the application of a "compelling interest" test as a measure of free speech protection in Redish, *supra* note 75, at 142-50.

[118] *See id.* 150-51.

[119] 315 U.S. 568 (1942); *see also* Beuharnais v. Illinois, 343 U.S. 250 (1952).

[120] 315 U.S. at 571-72 (footnotes omitted).

though subsequent sections [121] deal explicitly with the categories of libel and obscenity to which the Court referred in *Chaplinsky*, the doctrine's problems can be seen clearly in its application to the type of speech actually at issue in that case: "fighting words."

In *Chaplinsky*, a Jehovah's Witness distributing literature was involved in a disturbance and was taken into police custody. On the way to the police station, he confronted the City Marshall and allegedly called him "a God damned racketeer" and "a damned Fascist." [122] He was convicted pursuant to a state statute that made it an offense to address "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place." [123] Why not view Chaplinsky's comments as a personal catharsis, as a means to vent his frustration at a system he deemed—whether rightly or wrongly—to be oppressive? Is it not a mark of individuality to be able to cry out at a society viewed as crushing the individual? Under this analysis, so-called "fighting words" represent a significant means of self-realization, whether or not they can be considered a means of attaining some elusive "truth."

This is not to suggest that fighting words should receive absolute protection, any more than any other form of expression deserves such a guarantee of freedom.[124] The point, rather, is that fighting words should not be deemed constitutionally regulable per se. If, in particular circumstances, such words are likely to have the effect of starting a riot or significantly and immediately disturbing the peace, their use can of course be subjected to penalty. But in *Chaplinsky* itself no such showing was even attempted, and, given the facts, it is unlikely that one could have been made. For the words were not spoken to militant armed opponents of Jehovah's Witnesses in the street, but to an apparently oversensitive city official on the way to the police station. Other than a slight ruffling of the official's feathers, Mr. Chaplinsky's colorful language did not cause any harm. Hence, if the Court had recognized the legitimate first amendment value in the use of such language, it would have been required to engage in a careful weighing of competing interests, an endeavor it seemingly found not to be worth the effort.

The discussion of the level of constitutional protection to be given so-called "fighting words" raises a broader issue: whether

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[121] *See infra* text accompanying notes 158-202.

[122] 315 U.S. at 569.

[123] *Id.*

[124] *See supra* text accompanying notes 110-18.

there is *any* form of pure expression that does not foster self-realization, and that therefore is not worthy of first amendment protection. In answering this question, it is necessary to recall the two different aspects of self-realization: self-governance and the development of one's human faculties.[125] As to the former, there is clearly a wide variety of speech that is irrelevant, for this branch of the self-realization value is furthered only by expression that provides information or opinion that will aid an individual in making decisions about how his or her life will be conducted. Thus, advocacy of unlawful conduct cannot be deemed relevant, because the individual is not allowed to undertake the conduct urged by that form of expression. Nor is the dissemination of undisputedly false factual information a valid means of aiding private self-government, since such information cannot be thought to provide legitimate guidance to individual decisionmaking.[126] A mere stream of obscenities must also be deemed irrelevant to the goal of private self-government.

There is more to self-realization, however, than private self-government. For it is highly doubtful that fine art, ballet, or literature can be thought to aid one in making concrete life-affecting decisions, yet all three seem deserving of full first amendment protection. This is because of the other branch of self-realization: the development of one's human faculties, recognized as an end in itself. Once this form of self-realization is acknowledged, it becomes significantly more difficult to exclude many of the categories of expression deemed irrelevant to the private self-government branch.

Of course, we might conclude that, whereas art, literature, and ballet are proper means of developing one's mental faculties, a mere stream of obscenities or advocacy of crime is not. But, although it may well be appropriate to distinguish among different forms of expression on the ground that some of them present greater danger of harming society,[127] it is considerably more doubtful that an arm of the state should have the authority to decide for the individual that certain means of mental development are better than others. If two consenting individuals wish to engage in a conversation consisting of little more than a stream of obscenities,

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[125] *See supra* text accompanying notes 49-51.

[126] There may still be a problem about suppressing certain false factual assertions, because of the potential chilling effect on expression of true factual statements. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[127] *See supra* text accompanying notes 110-18.

assuming no harm to others,[128] it is dangerous to provide the state with the power to prohibit such activity on the ground that such discourse is not "valuable."[129] For, if the state can make that decision, what is logically to prevent it from deciding that the works of Henry Miller are not "valuable" because of their constant use of obscenities? Or why could not the state similarly set up an administrative board to decide that certain works of literature, art, dance, or music are not as "valuable" as others, and can therefore be suppressed? Most of us would no doubt find such a process intuitively repugnant, presumably even if we agreed with the censor about the lack of quality of a particular book, movie, or performance. We would explain this feeling of repugnance, I suppose, by reasoning that it is simply not the state's business to decide for each individual what books, movies, or shows are "valuable"; that is a decision for the individual to make for himself or herself. But once we have gone that far, how could we rationally distinguish the stream of obscenities between consenting adults? There, too, we would have to reason that perhaps that particular form of discourse is not our cup of tea, but that this gives the state no more inherent right to suppress it than it would have to suppress a particular book or movie we found distasteful. A stream of obscenities may not develop one's *intellectual* abilities (though it could conceivably increase one's vocabulary), but neither does music, art, or dance. An individual's "mental" processes cannot be limited to the receipt and digestion of cold, hard theories and facts, for there is also an emotional element that is uniquely human and that can be "developed" by such "non-rational" forms of communication. Perhaps a libertarian reading this who still feels awkward about bringing the stream of obscenities within the bounds of the first amendment should simply transform the hypothetical into a Lenny Bruce- or George Carlin-type comedian,[130] who at various points in his act employs a string of obscenities. I would imagine that a libertarian would be most uncomfortable in totally excluding such

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[128] Even if a "stream of obscenities" were fully protected by the first amendment, legitimate "time, place, and manner" regulations could be imposed. For example, it would probably be legitimate to prohibit such a discussion on a public street corner, unless the people talking could establish somehow that it was essential that their discussion take place at that location.

[129] *Cf.* Cohen v. California, 403 U.S. 15 (1971) (state cannot prohibit display of "Fuck the Draft" on a jacket, because it is the individual's choice how to convey his substantive message).

[130] *Cf.* FCC v. Pacifica Found., 438 U.S. 726 (1978) (regulation of broadcast of George Carlin's "Filthy Words" monologue).

expression from the first amendment. A conversation between consenting individuals composed exclusively of obscenities raises no additional problems.

There may, of course, be some forms of expression that could be thought to fall beyond the outer fringes of even this relaxed realm of faculty development. A "primal scream," at least if not used to communicate a need for help, might be thought to be so lacking in communicative value as to fall outside the range of self-realization in the sense contemplated by the first amendment. But such a purely academic question[131] need not detain us for long. For however the question is ultimately answered, both the courts and the commentators are a long way from the primal scream in their unduly narrow classification of expression deserving of full first amendment protection.[132]

Some might deem it the height of absurdity to equate the value of a stream of obscenities with great literature or eloquent political discourse. But, of course, not all literature or political discourse is of such a high order. There is much political speech that many of us find nonsensical, stupid, vile, and repulsive, yet we take it as given that we cannot gradate first amendment protection on the basis of how vile or stupid a court or legislature finds the particular political expression to be.[133] The same holds true for literature, at least outside of the realm of obscenity. Again, the reason presumably is that we have construed the first amendment to leave to the individual final say as to how valuable the particular expression is.

This broad discussion has been designed to demonstrate how constitutional analysis should be generally altered to reflect acceptance of the self-realization value as the guiding philosophy of the first amendment. The following discussions are designed to indicate the specific alterations needed in three important areas of first amendment application: commercial speech, obscenity, and defamation.

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[131] The issue is largely academic, because it is difficult to conceive of a reason why the state would have an interest in regulating a primal scream other than in the form of traditionally accepted time, place, and manner regulations, which could be employed even if the actual speech were fully protected by the first amendment. *Cf.* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding neutral limits on the use of sound trucks).

[132] *See supra* text accompanying notes 1-17.

[133] *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

A. *Commercial Speech*

The impact of the self-realization value on the protection to be given commercial speech is not difficult to determine. My comment on the issue some eleven years ago is, I believe, equally applicable today:

> When the individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information, weigh it mentally in the light of the goals of personal satisfaction he has set for himself, counter-balance his conclusions with possible price differentials, and in so doing exercise his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment.[134]

To this should be added that information and opinion about competing commercial products and services undoubtedly aid the individual in making countless life-affecting decisions, and therefore can be seen as fostering both elements of the self-realization value.[135]

Although the Supreme Court for many years casually dismissed even the most minimal level of constitutional protection for commercial speech,[136] in 1976 the Court finally recognized this form of expression as falling within the constitutional guarantee, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[137] The Court's analysis in reaching this conclusion, however, contained the seeds of its own destruction. It is therefore not surprising that six years later commercial speech is perhaps only marginally better off than it was in the years prior to *Virginia Board*.[138]

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[134] Redish, *supra* note 34, at 443-44.

[135] In my earlier writing, I argued that commercial advertising that conveys significant factual information that will be of real service to the consumer should perhaps receive greater constitutional protection than its more "persuasional" counterpart. *Id.* 447. Under the analysis developed in this Article, however, such a distinction is unacceptable. Recognition of the individual's unencumbered right to make life-affecting decisions logically precludes the determination by external forces that certain grounds upon which to make such decisions are better than or preferable to others.

[136] *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). For a discussion of the early history of the commercial speech doctrine, see Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080; *see also* Redish, *supra* note 34, at 448-58.

[137] 425 U.S. 748 (1976).

[138] *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). Occasionally, however, the Court does still provide a significant degree of constitutional protection to commercial speech. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977).

In *Virginia Board,* the Court advanced two grounds for providing constitutional protection to commercial speech, neither of which represented recognition of a true first amendment value in that form of expression. The first was more a concrete economic consideration than a first amendment value. The case concerned a prohibition on advertising of prescription drug prices, and the Court noted that "[t]hose whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged." [139] Information as to drug prices "could mean the alleviation of physical pain or the enjoyment of basic necessities." [140] Because of its focus on the immediate material benefits that flow from commercial advertising and on how governmental regulation impedes such benefits, the Court's analysis seems closer to the logic of the economic due process cases than it does to traditional first amendment doctrine.[141]

The second ground recognized by the Court was an indirect benefit of commercial speech: "Even an individual advertisement, though entirely 'commercial,' may be of general public interest." [142] The pharmacist affected by *Virginia Board,* for example, "could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof." [143] Advertising might well be "indispensable to the formation of intelligent opinions as to how that system ought to be regulated." [144] The primary first amendment value of commercial speech, in other

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[139] 425 U.S. at 763.

[140] *Id.* 764. The Court stated also that:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.

Id. 765.

[141] *See* Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,* 44 U. CHI. L. REV. 205, 216 n.75 (1976) ("The Court's ruling that the microeconomic functions performed by commercial speech constitute interests protected by the first amendment is a novel addition to the list of interests traditionally thought to have first amendment protection. . . . [T]he Court's recognition of resource allocation as a constitutionally protected interest, at least when 'speech' is involved, portends a partial return to *Lockner's* [sic] substantive due process review of business regulation.").

[142] 425 U.S. at 764.

[143] *Id.* 764-65.

[144] *Id.* 765.

words, is that it will lead individuals to think about not merely what purchasing decisions are personally best for them, but also about what level of political regulation of the economic system would be appropriate. The Court appeared unwilling to acknowledge that commercial speech might benefit individuals in the exact same ways that political speech does: by developing their individual faculties and aiding them in making life-affecting decisions.

Because it selected indirect and diluted first amendment values to rationalize protection of commercial speech in *Virginia Board,* the Court was conveniently able in subsequent decisions to afford "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." [145] Thus, the Court has felt free to allow regulation of commercial speech when it is shown merely that damage "may" occur,[146] or that harm is "likely," [147] or that there is a "possibility" of harm.[148] These standards are clearly unacceptable in virtually any other area of first amendment application. Recognition that protection of commercial and political speech derives from the same ultimate value—as well as that they are equally capable of causing serious harm—would have led the Court to provide them with a comparable level of constitutional protection.

The difficulty that gave the Court the greatest trouble in providing even the slightest degree of protection to commercial speech was the regulation of false and misleading advertising. The Court in *Virginia Board* suggested two bases on which to distinguish commercial speech from other forms of expression in order to validate such regulation: that "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than . . . news reporting or political commentary," [149] and that, "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation." [150] To these reasons, Justice Stewart, concurring, added that commercial advertisers do not suffer from the burdens on "the press, which must often

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[145] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[146] *Id.* 457.

[147] *Id.* 464.

[148] Friedman v. Rogers, 440 U.S. 1, 13 (1979). See also the diluted standard of protection outlined in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

[149] 425 U.S. at 772 n.24.

[150] *Id.*

attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines."[151]

To the extent that these assertions are accurate, they may properly influence first amendment analysis under the theoretical constructs established in this Article. For they are distinctions premised not on difference in the relative values of different categories of expression, but rather on regulation's differing *effects* on these types of expression. There are serious reasons, though, for doubting the accuracy of the Court's suggested distinctions.

First, it is questionable whether, in general, the truth of commercial claims is more easily verifiable than the truth of political assertions. The Court's contention that "[u]nder the First Amendment there is no such thing as a false idea" [152] is correct if one is comparing statements of political ideology with commercial assertions. But many statements made in the course of political debate—particularly by the press—are simply assertions of fact, which are presumably verifiable. Moreover, it must be recalled that many claims about commercial products are, in reality, assertions of scientific fact, since many commercial products are chemical compounds that may or may not perform the functions or have the effects claimed for them by scientists If a consumer organization is constitutionally protected in asserting that a certain product does not do what is claimed, why should the product's manufacturer not be similarly protected in contending that it does? [153]

Second, it is also incorrect to distinguish commercial from political expression on the ground that the former is somehow hardier because of the inherent profit motive. It could just as easily be said that we need not fear that commercial magazines and newspapers will cease publication for fear of governmental regulation, because they are in business for profit. Of course, the proper response to this contention is that our concern is not *whether* they will publish, but *what* they will publish: fear of regulation might deter them from dealing with controversial subjects. But could not the same be said of the commercial advertiser? The possibility of regulation would not deter him entirely from advertising, but it might deter him from making certain controversial claims for his product.

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[151] *Id.* 777 (Stewart, J., concurring).

[152] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

[153] One possible distinction is the speaker's motivation, as in Professor Baker's theory; however, as noted previously, this argument does not hold up under proper analysis. *See supra* text accompanying notes 107-09.

Finally, the argument concerning deadline pressure is similarly not accurate in all cases. For stories of long-range interest or for some infrequently published journals, the deadline pressure is not great. For some advertisers who are attempting to defeat a competitor or to gain first entry into a new market, timing may be critical. Time pressure is relevant to deciding the reasonableness of an assertion that later proves to have been inaccurate, whether made by by an advertiser or by the press. It appears irrelevant, however, to a general attempt to distinguish the two.

It does not necessarily follow, however, that false or misleading advertising must go unregulated. Even in the area of commentary on the conduct of public officials, which is considered by many to be of central importance to first amendment values,[154] the Supreme Court has recognized that consciously false assertions may constitutionally be punished as libelous.[155] It would not undermine recognition of the full first amendment value of commercial speech, then, to allow regulation of consciously false or misleading assertions about commercial products or services. Of course, under this analysis, the infliction of a penalty could only be justified by a showing that such assertions were consciously false, but it is unlikely that this requirement would preclude the bulk of existing regulation. If the regulation were limited to a cessation of the advertising, rather than imposition of a penalty for past conduct, it is possible that the danger of a chilling effect would be sufficiently reduced to justify regulation even absent a showing of knowledge or intent.

It is even conceivable that differences would remain under this approach in the levels of constitutional protection given commercial and political speech. We might reject automatically the existence of a governmental board to review each political speech or newspaper article and to censor those found to be misleading. But, again, the difference appears to derive not from a difference in the relative values of the forms of expression, but from the relative dangers of regulation. We presumably find such regulation in the political process so abhorent not because we wish to condone misleading political claims, but rather because of the dangers inherent in allowing the government to regulate on the basis of the misleading nature of assertions made in the political process. The

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[154] *See* Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment,'* 1964 SUP. CT. REV. 191; *see also supra* text accompanying notes 28-48.

[155] New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

fear is that those in power will use such authority as a weapon with which to intimidate or defeat the political opposition, a result that has been all too common in our political history. For, in the words of the noted social commentator Bret Maverick, "the dealer always cheats." [156] In contrast, there is no reason to believe that much regulation of misleading advertising is similarly motivated.

Even though this analysis may justify many forms of governmental regulation of false and misleading advertising, it does not support attempts to draw additional distinctions between commercial and other forms of expression.[157] Although regulation and free expression must be carefully balanced, if balancing leads to different levels of regulation for different forms of speech, it cannot be because some forms are deemed to be more valuable than others.

B. *Obscenity*

In light of the significant amount of existing scholarship on the subject,[158] it is neither necessary nor advisable to engage in an extended commentary on the various doctrines of obscenity regulation that have pervaded Supreme Court opinions over the last twenty-five years.[159] Instead, this critique will examine the ration-

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[156] J. ROCHE, *supra* note 54, at 130.

[157] *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) *with In re* Primus, 436 U.S. 412 (1978).

Of course, it might be argued that the suspect nature of *any* regulation of political expression justifies providing greater protection to all political speech. But the suspect nature of the regulation of political speech is most acute when imposed during the course of a political campaign and on such vague grounds as the misleading nature of the expression. More importantly, whereas the presence of an improper legislative motive for a regulation of speech will justify a finding of unconstitutionality, it in no way follows that legislative or administrative good faith automatically justifies regulation of speech. *See generally* Redish, *supra* note 75.

[158] *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW (1978); F. SCHAUER, THE LAW OF OBSCENITY (1976); Daniels, *The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making*, 17 SAN DIEGO L. REV. 757 (1980); Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185 (1969); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203; Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605 (1979).

[159] Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (holding zoning ordinances regulating locations of adult movie theatries permissible); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (holding expert testimony on obscenity of films unnecessary when films available as evidence, and that states have legitimate interest in regulating use of obscene material in local commerce); Miller v. Cali-

ales offered for the Court's total exclusion of obscenity from the first amendment in the light of the theoretical analysis of free speech adopted in this Article. For whatever difficulties the Court may face in defining obscenity, it continues to exclude obscenity from any constitutional protection.

The Court's initial exposition of the rationale for excluding obscenity from first amendment protection came in *Roth v. United States*,[160] where Justice Brennan in part relied, unconvincingly,[161] on historical considerations. More significant was his statement that "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." [162] Justice Brennan then made reference to *Chaplinsky*'s "two-level" theory of free speech.[163] Thus, the Court, employing a variation of the "search

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fornia, 413 U.S. 15 (1973) (enumerating basic guidelines for triers of fact in obscenity cases); United States v. Reidel, 402 U.S. 351 (1971) (holding statute prohibiting distribution of obscene materials through the mail—even to willing adult recipients—constitutional because commerce in obscene material is unprotected by any constitutional doctrine of privacy); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971) (holding statute prohibiting importation of obscene material constitutional on same grounds as in *Reidel*); Stanley v. Georgia, 394 U.S. 557 (1969) (holding individual has right to possess pornographic films in privacy of home); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966) (defining obscene material); Roth v. United States, 354 U.S. 476 (1957) (holding obscenity not within the area of constitutionally protected speech or press).

[160] 354 U.S. 476 (1957).

[161] Justice Brennan's historical evidence was that "[t]hirteen of the 14 States [which had ratified the Constitution by 1792] provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish any filthy, obscene, or profane song, pamphlet, libel or mock sermon in imitation or mimicking of religious services." *Id.* 482-83 (citations omitted). This is hardly strong support for a historical obscenity doctrine. As Professor Richards has written:

> Colonial legislatures in America appear to have been either unprovoked by or indifferent to obscenity. Justice Brennan cited only one example of preconstitutional obscenity law: an early Massachusetts law forbidding obscene or profane mockery of religious services. This law, however, is more properly viewed as a religious establishment law than as a law against obscene literature or art in general . . . .

Richards, *supra* note 158, at 75 (footnotes omitted). Indeed, Justice Brennan's historical reference to the Massachusetts law may prove too much, since there can be little doubt that today such a law would be declared unconstitutional, regardless of its historical status. Why, then, should obscenity's possible historical foundation preclude it from receiving better modern treatment?

[162] 354 U.S. at 484.

[163] *Id.* 485.

for truth" analysis, concluded that on this subject at least, it had discovered the "truth" and knew that obscenity was not related to it.

Even under a "search for truth" analysis, the Court's conclusion in *Roth* is subject to criticism, for regulation of obscenity can be seen as a means of rejecting whatever life style such expression may implicitly urge.[164] But the Court's greater fallacy is to believe that the primary—or even secondary—purpose of the free speech guarantee is as a means of attaining truth. If the centrality of the self-realization value were recognized, the Court would necessarily acknowledge 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 faculties is a choice for the individual to make.

In more recent decisions, the Court has attempted to either expand upon or revise its rationale for excluding obscenity from the constitutional guarantees. In *Paris Adult Theatre I v. Slaton*,[165] Chief Justice Burger, speaking for the Court, reasoned:

> If we accept the unprovable assumption that a complete education requires the reading of certain books, . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior?[166]

Burger's logic fails. That we assume that good books are good for people does not necessitate our believing that bad books are bad for people.[167] Burger's erroneous reasoning may perhaps be

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[164] *See* Richards, *supra* note 158, at 78-79.

[165] 413 U.S. 49 (1973).

[166] *Id.* 63 (citations omitted).

[167] The latter assertion is the inverse of the former. As a matter of pure logic, the inverse of a statement does not necessarily flow from acceptance of the statement itself, as Burger would have us believe. The *only* statement that does flow logically from acceptance of the statement itself is the contrapositive, the converse of the inverse. Thus, if we were to accept the primary statement, "if people read good books, they will become better people," the only other statement that is necessarily proven is that "if people have not become better people, they have not read good books." This has absolutely no relevance to the possible effect of so-called "bad" books.

forgiven, since he was apparently suffering from thinly-veiled irritation at those *literati* who readily assume—without any real empirical support—the practical value of good literature, yet denounce those who would restrict obscenity as harmful without any statistical foundation for their assertions. The Chief Justice failed to understand, however, that the former assertion does not need empirical support because no issue of constitutional interpretation turns on it. The same, of course, cannot be said of the latter. More importantly, the Chief Justice assumed that he, a state legislature, a city council, or a censor board is somehow morally entitled to determine for other individuals which movies and literary works are and are not "debasing."

Many of the arguments employed to justify regulation of obscenity are not confined to the worthlessness of the expression. Rather, it is contended that such speech, in addition to being worthless, is harmful in that it may lead to increases in the levels of sex-related crimes.[168] Under the first amendment analysis suggested here, regulation of speech may be justified, in rare cases, on a showing of harm to competing social interests.[169] But this argument cannot of its own weight justify an exclusion of obscenity from the scope of the first amendment. Initially, the harmful effect alleged is so speculative that in no area of protected speech would such a showing justify regulation.[170] If such a showing were sufficient, government could constitutionally regulate nonobscene movies or books that contained detailed depictions or even the slightest approval of violent acts, since these might result in some harm.[171] But this is clearly not the case,[172] so some other distinction must be thought to exist between obscenity and other forms of expression. This brings the analysis back full circle, to the contention that obscenity is inherently worthless. The argu-

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168 The Chief Justice's opinion in *Paris Theatre*, for example, noted that "[t]he Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime." 413 U.S. at 58.

169 *See supra* text accompanying notes 113-18.

170 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969). Even under the heavily criticized version of the "clear and present danger" test of Dennis v. United States, 341 U.S. 494, 505 (1951), the Court required a substantially greater showing before allowing regulation of speech advocating violence.

171 In fact, much pornography may in no way directly encourage crime, as violent movies might be thought to, since it can consist of relations between fully consenting adults. *See* Yaffé, *The Law Relating to Pornography: A Psychological Overview*, 20 MED., SCI. & L. 20 (1980); *see also* Cochrane, *Sex Crimes and Pornography Revisited*, 6 INT'L J. CRIMINOLOGY & PENOLOGY 307 (1978).

172 *See supra* note 170.

ment for excluding obscenity from the first amendment's scope therefore necessarily relies on its assumed lack of social value.

The final method that the Court has employed to justify the exclusion of obscenity is simply to resort to rhetorical devices. "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material," wrote Chief Justice Burger in *Miller v. California*,[173] "demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." [174] In *Young v. American Mini Theatres, Inc.*, Justice Stevens, speaking for the Court, added that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," [175] and that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." [176] By contrasting pornography in a demeaning or negative way with exalted political speech, the Court precludes, rather than contributes to debate. But, if we are to deal in such rhetorical terms, I suppose that the appropriate response to Justice Stevens is 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." For such freedom is an important element of the freedoms of self-rule and self-fulfillment, the very same principles

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[173] 413 U.S. 15 (1973).

[174] *Id.* 34.

[175] 427 U.S. 50, 70 (1976).

[176] *Id.* 70. Justice Stevens was not even referring to material that was legally defined as obscene. It was, rather, in a sort of constitutional twilight zone: not extreme enough to meet constitutional standards of obscenity, but nevertheless predominantly erotic in tone. *Id.*

The actual holding in *Young* may well have been correct. The Court held that zoning ordinances regulating the location of adult theatres were permissible:

> Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures.

Id. 71-72 (footnote omitted). In a footnote, the Court added: "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* 71 n.35. In a decision last Term, the Court, in invalidating a local ordinance that excluded similar expression, distinguished *Young* on just such grounds. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 71 n.10 (1981).

of autonomy from which ultimately derives the freedom to choose our political leaders.

C. *Defamation*

Professor Meiklejohn reportedly declared that the decision in *New York Times Co. v. Sullivan* [177] was an occasion for dancing in the streets.[178] Such a reaction on his part is not difficult to understand. In *New York Times,* the Court held that a state could impose penalties for libel of public officials only upon a showing of "actual malice," defined to include knowledge of falsity or reckless disregard for the truth.[179] Although the Court declined to provide the absolute protection urged by Meiklejohn, and made no direct reference to his writings, his influence was clear.[180] Indeed, that the Court limited its holding to protection of libels against public officials about their official conduct underscores the "political speech" influence of Meiklejohn. For if the voters are the true "governors," they need an uninhibited flow of information and opinions about the conduct of their "agents." As the Court stated in *Garrison v. Louisianna* [181] (another public official libel case) shortly after its decision in *New York Times,* "speech concerning public affairs is more than self-expression; it is the essence of self-government." [182]

In subsequent years, the Court came to face many of the logical difficulties encountered by Meiklejohn himself.[183] In particular, the Court was not able to limit the special protection of the *New York Times* doctrine to public officials, since numerous technically private individuals might well have a significant impact upon the course of political decisionmaking. Therefore, the doctrine was extended to apply also to "public figures." [184] In the

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[177] 376 U.S. 254 (1964).

[178] Kalven, *supra* note 154, at 221 n.125.

[179] 376 U.S. at 280.

[180] Justice Brennan, author of the Court's opinion in *New York Times,* is also the author of an article discussing Meiklejohn's philosophy of free speech. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1 (1965).

[181] 379 U.S. 64 (1964).

[182] *Id.* 74-75.

[183] *See supra* text accompanying notes 31-35.

[184] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Justice Harlan and three other Justices would have adopted a more easily met standard of liability in defamation cases involving public figures; under this standard, public figures could recover damages upon "a showing of highly unreasonable conduct constituting an

closely related area of privacy "false light" cases,[185] the Court applied logic similar to that of *New York Times* to suits both by a family that had been held hostage by escaped convicts and later made the subject of a fictionalized play,[186] and by a star baseball pitcher who was the subject of an unauthorized, fictionalized biography.[187]

One may question whether the apparent underlying premise of *New York Times*—that speech about the conduct of public officials is "the essence of self-government"—justifies the Court's extension of the doctrine to cases involving fictionalized stories about a family held captive or about baseball players. Apparently recognizing the logical difficulty of this extension, Justice Brennan's opinion for the Court in *Time, Inc. v. Hill* emphasized that:

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One

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extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* 155. However, Chief Justice Warren, joined by Justices Brennan and White, favored the *New York Times* standard, and Justices Black and Douglas argued for absolute protection, as they had done in *New York Times*. Thus, a majority of the Court desired to impose at least as stringent a protection as that imposed in *New York Times*. *See* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267.

As was the case with my discussion of obscenity, *see supra* notes 158-77 and accompanying text, this analysis of defamation is not intended to supply a detailed description of the relevant case law. The goal, rather, is to analyze the state of the law in terms of the theory of free speech described earlier. For a description of the case development, see J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 158, at 781-89.

[185] According to Dean Prosser, the tort of invasion of privacy breaks down analytically into four categories: intrusion, revelation of private facts, commercial use of one's name or face, and holding someone up to the public eye in a "false light." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971). It is conceptually difficult to understand why the "false light" cases are part of the privacy tort. It appears that the doctrine actually arose indirectly. Under New York's statutory right against commercialization of name or face, the courts accepted as a defense (used primarily by newspapers and magazines) that the use was in the public interest. An exception to that defense then developed for fictionalized or false description. *See, e.g.*, Time, Inc. v. Hill, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965), *rev'd*, 385 U.S. 374 (1967); Julian Messner, Inc. v. Spahn, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated*, 387 U.S. 239 (1967). From this background, Dean Prosser apparently conceived a separate category of the invasion-of-privacy tort.

[186] Time, Inc. v. Hill, 385 U.S. 374 (1967).

[187] Julian Messner, Inc. v. Spahn, 387 U.S. 239 (1967) (per curiam). The Court vacated and remanded the New York Court of Appeals judgment in Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), in light of the *Time* decision. The state court had granted damages for the unauthorized publication of a fictitious biography of a baseball player.

> need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. . . . We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest.[188]

Justice Brennan's statement fails to explain either why our society "places a primary value on freedom of speech," or what limits, if any, remain on the extension of the *New York Times* logic. Having begun in *New York Times* by justifying the potential imposition of significant harm to individuals on eloquently described precepts derived from the concept of self-government, the Court in *Time* retreated to some vague notion of "public interest." And in doing so, the Court neglected to explain whether the "public interest" concept was a descriptive or normative principle. If the latter, it remains unclear what that normative principle is, what there is about particular stories such that the public will benefit from reading them. If the former, it remains unclear why the first amendment should be construed to allow the imposition of harm on an individual merely to satisfy the public's idle curiosity. What began as an attempt at a coherent theory of the value of free speech thus rapidly dissipated into a collection of vague and unsupported assertions.

The absence of any coherent underlying first amendment theory was even more evident in *Gertz v. Robert Welch, Inc.*[189] In *Gertz,* the Court rejected the "public interest" concept[190] on two grounds: that it "would abridge [a] legitimate state interest[191] to a degree that we find unacceptable";[192] and that "it would occasion the additional difficulty of forcing state and federal judges

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[188] 385 U.S. at 388 (citations omitted).

[189] 418 U.S. 323 (1974).

[190] In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), Justice Brennan's plurality opinion had adopted a "public interest" test as the guiding principle for determining application of the *New York Times* principle in defamation cases.

[191] This "legitimate state interest" reference is to the Court's conclusion "that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Gertz,* 418 U.S. at 345-46.

[192] *Id.* 346.

to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not." [193] The *Gertz* majority instead applied the "actual malice" standard of liability only to suits by "public figures." The Court left to the states the task of defining the standard of liability for suits concerning "private" individuals involved in an issue of "public interest," but with the caveat that they "not impose liability without fault." [194] Two factors that were to influence the determination whether a defamation plaintiff is a "public figure" were "evidence of general fame or notoriety" and the extent to which the plaintiff had voluntarily thrust himself into the public eye.[195] The Court's emphasis on public officials' access to opportunities for effective rebuttal [196] indicates the importance of this factor in defining "public figure."

Although the Court thus has curtailed significantly the level of constitutional protection given to defamatory statements, it has also substantially expanded that protection in other respects. The Court held in *Gertz* that a state could not constitutionally impose a standard of absolute liability [197] or allow damages to be presumed [198] in defamation cases, even though both were well established practices at common law.[199] The Court was necessarily imposing these limitations under the first amendment; no other constitutional provision was mentioned, and certainly the Court has no authority to invalidate state common law or statutory practice without a finding of unconstitutionality. Yet the Court failed to point to any theory of free speech that justified imposing constitutional limitations on wholly private defamation.[200]

The Court was left, then, with a seemingly unprincipled crazy quilt of first amendment theory as it applied to defamation. On the one hand, the guiding principle of "public interest" was rejected, and the Court's emphasis on "voluntary" entry into the public eye was wholly irrelevant to the Meiklejohnian reasoning

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[193] *Id.*

[194] *Id.* 347.

[195] *Id.* 351-52.

[196] *Id.* 344.

[197] *Id.* 347. *See supra* text accompanying note 194.

[198] *Id.* 349. The Court qualified this latter prohibition, however, by adding: "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.*

[199] *See* W. PROSSER, *supra* note 185, § 113.

[200] Although a totally absolute interpretation of the first amendment would lead to this conclusion, the earlier portion of the Court's opinion made clear that it was not adopting such an interpretation. *See* 418 U.S. at 339-40.

from which the Court had implicitly begun in *New York Times*. For, if the operative norm of the first amendment for Meiklejohn was the need for voters to receive information related to the political process, it would make no difference that that information concerned someone who had not voluntarily thrust himself into the public eye. The Court seemed to rely upon a tort concept rather than a theory of free speech. On the other hand, the Court was willing to use the first amendment as a means of limiting state choices in adjudicating private defamation suits.

Although it is almost certain that no member of the Court consciously applied the concept, it is quite possible to employ the self-realization principle developed here to rationalize many of the Court's conclusions in *Gertz*. First, under this rationale of the first amendment, it is not necessary to find a broad "public interest" in speech prior to providing it with significant constitutional protection: any speech that may aid in the making of private self-governance decisions is deserving of first amendment protection. Comments about a private individual may be relevant to numerous life-affecting decisions of others, such as whether they should deal with him socially, enter into a business arrangement with him, or buy in his store. And imposition of either a strict liability standard or presumed damages might well deter many defamatory comments. Thus, the self-realization principle allows us to fashion an arguable rationale for providing at least a certain level of first amendment protection even to wholly private defamations.

The self-realization principle cannot be employed so easily as a rationale for the remaining distinctions among public and private defamations drawn by the Court in *Gertz*. For it should be recalled that, although the Court gave a certain degree of constitutional protection to defamation about entirely private individuals, it retained use of *New York Times*' "actual malice" standard only for defamation of public officials and public figures. But, as noted previously,[201] recognition of the self-realization value does not preclude balancing the interest of free speech against competing social values. Under a balancing concept, we could accept on a theoretical level the equal value of different types of speech, yet still decide that the different areas of expression may be treated differently because of external considerations. Hence, the Court could arguably conclude that the social harm of defamation of an individual who has voluntarily entered the public arena is more tolerable than

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[201] *See supra* text accompanying notes 113-18.

similar harm inflicted upon one who has assumed no risk, even though all types of defamation—at least in the absence of "actual malice"—may be thought to foster the self-realization value. Application of the theory developed here, combined with a form of categorical balancing,[202] thus could well lead to the complex structure of constitutional protection for defamatory statements adopted—albeit without much supporting explanation—in *Gertz*.

V. Conclusion

This Article has presented both a critique of preexisting first amendment theory and a new approach to the issue. Although each of the existing theories is correct as far as it goes, none sufficiently extends the scope of the constitutional protection. None of these theories recognizes that the values they advocate are manifestations of the broader principle of individual self-realization. Once this conclusion is reached, the values recognized in specific categories of expression will be seen to be no greater than the benefits of other forms of expression that in turn foster individual self-realization.

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202 Although the *Gertz* Court was undoubtedly engaged in a "balancing" process, in that it declined to give speech absolute protection, it was a form of categorical, rather than *ad hoc*, balancing.