HOW THEORY MATTERS: A COMMENTARY ON ROBERT SEDLER'S "THE 'LAW OF THE FIRST AMENDMENT' REVISITED"

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I am honored to have been asked by the editors of the *Wayne Law Review* to comment on Robert Sedler's *The "Law of the First Amendment" Revisited,*[1] a follow-up to his 1991 article: *The First Amendment in Litigation: The "Law of the First Amendment."*[2] I am pleased to do so not just because of my respect for Bob Sedler, but also because this commentary marks a homecoming of sorts for me. More than two decades ago, I published my first article on free speech in a symposium in this journal.[3]

In his current article, as well as in his previous one, Professor Sedler attempts "to analyze the First Amendment as it appears to judges and lawyers in the context of actual litigation and to explicate the meaning of

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1. 58 WAYNE L. REV. 1003 (2013).

2. Robert Sedler, *The First Amendment in Litigation: The "Law of the First Amendment,"* 48 WASH. & LEE L. REV. 457 (1991).

3. James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1992).

the 'Law of the First Amendment.'"[4] By "the Law of the First Amendment," Sedler means "the body of concepts, principles, specific doctrines, and precedents in particular areas of First Amendment activity that has emerged from the collectivity of the Supreme Court's decisions in First Amendment cases over a long period of time."[5] It is this body of material that, in Sedler's view, "controls the results in actual First Amendment litigation, or at least sets the parameters for the resolution of the First Amendment question at issue."[6] In contrast to the importance of this body of material, theory about the First Amendment typical of academic commentary is, in Sedler's view, "usually irrelevant" in actual First Amendment litigation.[7]

This Commentary will focus on Sedler's claim that "in actual First Amendment litigation," free speech theory is "usually irrelevant."[8] In doing so, I will also discuss his related assertion about the controlling

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4. Sedler, *supra* note 1, at 1004 (internal quotation marks omitted).

5. *Id.* at 1005 (alteration in original) (citations omitted) (internal quotation marks omitted). By "First Amendment," Sedler is implicitly referring only to the First Amendment's Free Speech and Press Clauses, and perhaps to its Assembly and Petition Clauses, but not to its Religion Clauses.

6. *Id.* (internal quotation marks omitted).

7. *Id.* Like Professor Sedler, I have been involved in actual free speech litigation throughout my academic career, though admittedly not to the impressive extent that he has. *See, e.g.*, Mullally v. City of Los Angeles, 49 F. App'x 190 (9th Cir. 2002) (counsel for whistle blower who revealed police cover-up of domestic abuse by Los Angeles Police Department); Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998) (counsel for plaintiff Arizona Civil Liberties Union in First Amendment challenge to Phoenix policy limiting advertisement on sides of city buses to commercial speech); Sabelko v. City of Phoenix, 120 F.3d 161 (9th Cir. 1997) (counsel for amicus Arizona Civil Liberties Union in First Amendment challenge to Phoenix "bubble ordinance" regulating demonstrations at health care facilities). *See also* United States v. Alvarez, 132 S. Ct. 2537 (2012) (with Eugene Volokh of the U.C.L.A. School of Law, drafted and filed an amici brief on our behalf defending the constitutionality of Stolen Valor Act); Sorrell v. IMS Health, 131 S. Ct. 2653 (2011) (advised Vermont's Attorney General's Office on briefing in defense of law restricting sale for marketing purposes of records of physicians' prescribing activity without physicians' consent); Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow, No. CV 04-2572–PHX-NVW, 2006 U.S. Dist. LEXIS 25579 (D. Ariz. Apr. 28, 2006) (advised Arizona State University in lawsuit involving denial of official recognition to discriminatory religious organization); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (advised Wisconsin Department of Justice on briefing and argument in defense of constitutional challenge to hate crime law). Indeed, it was in doing a small amount of work at Sedler's request on *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995), that I first became acquainted with Bob. It may also be relevant to our somewhat different views about the value of First Amendment theory to actual litigation that Sedler has extensive experience litigating free speech cases at both the trial court and appellate level, whereas I have been involved primarily (though not exclusively) with appellate cases.

8. Sedler, *supra* note 1, at 1005.

power of "the Law of the First Amendment."[9] At the end of this Commentary, I will briefly discuss the accuracy of Sedler's attempt to describe this body of law.

I. THE RELEVANCE OF THEORY TO ACTUAL FIRST AMENDMENT LITIGATION

A. Theory and the First Amendment

The value of theoretically-oriented legal scholarship to lawyers and judges (or to anyone else, for that matter) has been a hotly-contested issue in recent years.[10] In this Commentary, I can offer only a condensed version of my thoughts on this important topic, an issue that implicates nothing less than the proper role of the academy in American society. But before broaching this weighty subject, we first need to understand what First Amendment "theory" means. As I understand and use the term, First Amendment (or, more precisely, free speech) theory means, or at least includes, a systematic account of the values that underlie, or should underlie, contemporary American free speech doctrine. As my reference to values that underlie or should underlie signals, First Amendment theory ranges from purely normative theories that focus

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9. *Id.*

10. *See, e.g.*, David Hricik & Victoria S. Salzmann, *Why There Should be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 778 (2005) (citations omitted) (internal quotation marks omitted) ("[I]f law review articles are theoretical dialogues, mostly between professors, then law review articles will be deemed not merely unhelpful, but useless to the bench and bar"); Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J.L. BLOG (Apr. 7, 2010, 7:20 PM), http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more/ ("Roberts said he doesn't pay much attention to academic legal writing. Law review articles are 'more abstract' than practical, and aren't 'particularly helpful for practitioners and judges.'"). *But see* David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011) (showing a growth, rather than a decline, in the use of legal scholarship by judges over the last fifty-nine years). *See also* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998) ("[E]ven if moral theory can provide a solid basis for some moral judgments, it should not be used as a basis for legal judgments. Moral theory is not something that judges are, or can be, made comfortable with or good at, it is socially divisive, and it does not mesh with the actual issues in cases."); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L. J. 353 (1997) (defending the use of moral theory in judicial reasoning); Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 398 (1997) ("[B]etter philosophy might well make law better—more fair, coherent, less confused—in some contexts. But any claim of this sort should be supplemented by an emphasis on the need for a better sense of underlying facts.").

exclusively on which values should, ideally, inform free speech doctrine,[11] to the largely descriptive theories that seek to explain the pattern of decided cases in terms of free speech goals or values.[12] Though Sedler does not specify what he means by "theory," I assume that my understanding of the term is at least consistent with how he uses it in his article.[13]

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11. *See, e.g.*, C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT 251, 270 (2011); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 284 (2011).

12. While on one end of the spectrum I list *purely* normative critique, on the other I mention *largely* descriptive theory. This is because I doubt that any attempt to identify values underlying doctrine can itself be a totally value-free exercise. For one, unless the commentator is interested in excoriating current doctrine and advocating radical change (itself a highly normative stance), someone seeking to construct a theory that explains constitutional doctrine will usually not even consider, much less propose, explanatory values that the commentator finds repugnant. Moreover, if several values reasonably explain doctrinal structure, commentators are likely to emphasize the ones they find most normatively appealing. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1233 (1987). Indeed, I doubt that even the most arduous attempt to render a *non-theoretical*, descriptive account of free speech doctrine, such as Sedler's "Law of the First Amendment," can in fact be purely descriptive. Like judges deciding free speech cases, free speech commentators, especially those that have litigated free speech cases, must surely have some view about the value of free speech in our society, even if this view is intuitive, impressionistic, and unarticulated. But particularly if this view about free speech values has not been brought to consciousness, these values are likely to subtly, perhaps entirely unconsciously, influence the way in which the commentator organizes the material, explains doctrinal structure, and articulates doctrinal principles and rules, as well as influence which cases the commentator emphasizes and which are given less attention or even entirely omitted from the discussion.

13. In this regard, I note that Sedler states that it is "*grand* theory . . . about the meaning of the First Amendment" that he claims is "usually irrelevant" in actual First Amendment litigation. Sedler, *supra* note 1, at 1005 (emphasis added) (internal quotation marks omitted). It is not clear what Sedler means by "grand" as opposed to ordinary or petit First Amendment theory. He may mean highly normative theory that has little or no concern with how well this theory fits or explains the pattern of decided cases. I agree that purely normative theory is of limited use (*see infra* note 16), with only the best of it (such as the two examples cited in note 11, *supra*) being useful by setting an ideal for which actual doctrine should strive. It is more likely, though, that by "grand," Sedler means any "general" or "comprehensive" theory of the meaning of free speech guaranteed by the First Amendment. *See* Sedler, *supra* note 1, at 1006 (citing, as an example of such a general theory, Thomas I. Emerson, THE SYSTEM OF THE FREEDOM OF EXPRESSION 728 (1970) ("In academic discussions about the First Amendment, it has [long been] commonplace to lament the failure of the Supreme Court to develop any *general theory* of the First Amendment." (emphasis added))). So, as detailed in the text, if Sedler means that "general" or "comprehensive" theories of free speech are "usually irrelevant in actual First Amendment litigation," then depending on what he means by the qualification "usually," I may disagree with this assessment. And I am especially inclined

My own theoretical work has a distinctly descriptive cast to it, emphasizing as it does how the pattern of contemporary Supreme Court free speech decisions can largely be explained in terms of a profound commitment to participatory democracy.[14] Though normative appeal is also a crucial component of any good constitutional theory,[15] especially a theory about something as inherently value-laden as freedom of expression, a theory with good "doctrinal fit" brings coherence to what might otherwise seem to be a pointless jumble of cases and can rationalize seemingly arbitrary or apparently conflicting rules, standards, and principles. Such coherence will increase the doctrine's clarity, stability, and administrability, crucial desiderata when regulation of expression is at issue.[16] In this regard, it is significant that my preference for a theory with good doctrinal fit is in service of the same goal as

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to disagree if Sedler means that not only are such theories irrelevant to actual litigation but also that they *should* be irrelevant.

14. *See, e.g.*, James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2001). To avoid any misunderstanding, it bears emphasis that I do not maintain that the entirety of doctrine can be explained in terms of participatory democracy. *See id.* at 500-05 (describing other free speech norms that inform free speech doctrine). I do, however, maintain that a commitment to participatory democracy is the only core free speech norm. *Id.* at 499-500. My view about the crucial role that participatory democracy plays in free speech has been greatly influenced by Robert Post's seminal work on the subject. *See, e.g.*, Robert C. Post, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 284 (1995). For a more recent and more detailed exposition of Post's free speech theory, see Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011).

15. *See* James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT 361, 381-83 (2011) (arguing that if two theories fit doctrine approximately well, the more normatively appealing one should be deemed the better theory). So while it is its superb explanatory power that distinguishes a theory grounded in participatory democracy from all other free speech theories, participatory democracy's normative appeal also commends it as a good, and in my view, the best, free speech theory. *See* Weinstein, *supra* note 14, at 491-514. Reflecting this general appeal, and itself making it a particularly appealing norm to guide free speech adjudication, participatory democracy is a remarkably uncontentious norm—one that is accepted by most everyone in American society.

16. In addition, as Vincent Blasi insightfully observes, a theory that values doctrinal fit as well as appealing norms "introduces one kind of discipline that can stimulate normative insights and judgments that might not be forthcoming in a zero-based normative inquiry." Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 531 (2011). Blasi also charges that because of "lack of training or temperament," purely normative analysis by law professors "is almost inevitably of the second-best variety." *Id.* Another shortcoming of purely normative legal theory is the lack of agreement on standards by which to measure the merits of the various contending theories. "Bereft of such common ground normative debate often has the deep subjectivity—and hence the productivity of schoolyard boasts about whose dog is best." Weinstein, *supra* note 15, at 361.

Sedler's "Law of the First Amendment"—rationalizing what to even well informed observers can appear to be a "complex and conflicting body of constitutional precedent."[17] Crucially, however, I do not believe it possible to accomplish this salutary goal without reference to the free speech values underlying this precedent, as Sedler apparently believes can be done.[18] Rather, any attempt to construct "a law of the First Amendment" without reference to underlying values will, to some significant extent, result in description of seemingly meaningless decisional patterns as well as apparently arbitrary rules.

A good example is free speech doctrine imposing First Amendment limitations of defamation law. As Sedler succinctly and accurately describes,

> In order to avoid a "chilling effect" on the discussion of issues of public interest, the *New York Times* rule mandates there can be no recovery for false statements of fact about public officials or public figures, unless the plaintiff can prove with "convincing

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17. Sedler, *supra* note 1, at 1007 (quoting Jesse H. Choper, Richard H. Fallon, Yale Kamisar & Steven H. Shiffrin, CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 641 (11th ed. 2011)).

18. The reason for the qualification is this: On the one hand, Sedler says that he does not "favor any general theory of the First Amendment" and is "pleased to see that the Supreme Court has made no effort whatsoever to promulgate one," but rather "has resolved First Amendment questions by the application of the 'Law of the First Amendment'" that he describes in his article. Sedler, *supra* note 1, at 1003-04 n.8. On the other hand, in describing the "Law of the First Amendment," Sedler observes that "[t]o the extent that the Supreme Court has developed any theory about the meaning of the First Amendment, it is that the First Amendment operates with the framework a *marketplace of ideas*." *Id.* at 1017. He then spends a considerable amount of time explaining this theory, the Court's use of it, and its implication for free speech doctrine, including that it is, in his view, "the foundation of the most important First Amendment principle, that of content neutrality." *Id.* at 1017-20. *See also id.* at 1017 (stating that under this theory, "the primary function of the First Amendment is to ensure that all ideas" have the opportunity to compete for public acceptance); *id.* at 1020 (stating that the marketplace of ideas theory is firmly established in First Amendment analysis); *id.* at 1021 (explaining how the content neutrality principle implements the marketplace of ideas theory). It may be that Sedler is simply describing, though not endorsing, what he sees as the Court's adoption of the marketplace of ideas theory, and thus there is no inconsistency with this description and his statement that he does not "favor" any general free speech theory. But even if Sedler's identification of the marketplace of ideas theory as the one theory that the Supreme Court has relied on does not reflect endorsement of this theory on his part, this description would seem to belie his claim that the Court has "made no effort whatsoever to promulgate" a general theory of the First Amendment. Sedler, *supra* note 1, at 1006-07 n.8. In any event, as I discuss in the text accompanying notes 154 to 158, *infra*, there are, contrary to Sedler, other theories "firmly established in [the Court's] First Amendment analysis." Sedler, *supra* note 1, at 1019.

> clarity" that the statement was knowingly false, or was made with "reckless disregard" for its truth or falsity.[19]

Sedler then explains that a somewhat less protective version of the *New York Times* rule applies in suits by private figures if the allegedly defamatory statement was "speech of public concern."[20] In contrast, he notes that in suits by private plaintiffs in which the defamatory statements "did not involve a matter of public concern," the *New York Times* rule does "not apply."[21] But what explains this special solicitude toward speech on matters of public concern but indifference toward speech of the same genre not of public concern—a distinctive pattern running throughout the Court's free speech jurisprudence?[22] Sedler's "law of the First Amendment" offers no explanation.

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19. Sedler, *supra* note 1, at 1051 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

20. *Id.* (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) and Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)).

21. *Id.*

22. Thus a lawyer has a First Amendment right to solicit clients when "seeking to further political and ideological goals" through litigation, but not for ordinary economic reasons. *Compare In re* Primus, 436 U.S. 412, 414, 434 (1978) (holding that the First Amendment prohibits discipline of a lawyer for soliciting a client for public interest litigation), *with* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-57 (1978) (finding no First Amendment obstacle to discipline of lawyer for in-person solicitation of clients in ordinary personal injury cases). Politically motivated economic boycotts receive rigorous First Amendment protection, while ordinary economic boycotts do not. *Compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-12 (1982) (holding that the First Amendment protects speech related to boycott seeking to bring about racial integration), *with* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426-28 (1990) (holding that the First Amendment does not protect boycott by lawyers aimed at increasing their own compensation). The First Amendment presumptively shields a public employee from workplace discipline for comments on matters of public concern but not on matters pertaining to the workplace that are not of public concern. *Compare* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (stating that the First Amendment forbids dismissal of public school teacher for writing a letter to the newspaper critical to the school board's handling of a matter of "public interest in connection with operation of the public schools"), *with* Connick v. Myers, 461 U.S. 138, 154 (1983) (stating that the First Amendment does not shield a public employee from dismissal for circulating a questionnaire that primarily involved internal office matters and not matters of public concern). *See also* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (stating that whether the First Amendment prohibits the plaintiff from recovering damages for speech constituting intentional infliction of emotional distress "turns largely on whether that speech is of public or private concern"); Bartnicki v. Vopper, 532 U.S. 514, 533-35 (2001) (holding that when a publisher was not involved in the illegal interception, the First Amendment forbids imposition of liability on publisher for contents of illegally intercepted cellular telephone conversation involving "truthful information of public

In my view, the best explanation of this pattern of protection of speech on matters of public but not private concern, and one that coheres with overall structure of free speech doctrine, [23] is a profound commitment to participatory democracy. My purpose here, however, is not to defend any particular theory of the First Amendment, including my own. Rather, my point is that the pattern of protection of speech on matters of public concern, but not for the same type of expression on matters of private concern, cries out for an explanation. In the absence of an explanation, the distinction seems mysterious, even arbitrary. Moreover, in my view, explaining phenomena, be it natural or man-made, is a primary goal of the academy. Admittedly, my point about the appropriateness of legal academics developing general theories to explain crucial features of American free speech jurisprudence does not contradict Sedler's specific claim that such theories are in fact "usually irrelevant" to lawyers and judges involved in actual free speech litigation. So having made the point that explaining the structure of free speech jurisprudence in terms of underlying First Amendment values speech theory promotes the essential academic goals of knowledge creation irrespective of whether this knowledge is directly useful to lawyers and judges, I will now focus on Sedler's specific charge that theory is "usually irrelevant" in "actual First Amendment litigation."

B. The Relevance of Theory to Actual First Amendment Litigation

In using the qualifier "usually," Sedler implies that on occasion free speech theory might be relevant to the bench and bar.[24] He does not, alas, say anything about how often and under what circumstances theory

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concern," but noting that such immunity might not have attached if the conversation had been on matters of private concern).

23. Considered by itself, the Court's solicitude for speech on matters of public concern might be explained by the marketplace of ideas rationale. That rationale, however, does not easily explain the rigorous protection afforded to flag burning and other types of highly-emotive expression not likely to make any significant contribution to the marketplace of ideas. *See* Texas v. Johnson, 491 U.S. 397 (1989). In contrast, democratic legitimacy is arguably served by the right of speakers to use inflammatory words and symbols in public discourse. See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. Rev. 2353, 2371 (2000) ("Even irrational and abusive speech . . . serve[s] as a vehicle for the construction of democratic legitimacy."). *See generally* Cohen v. California, 403 U.S. 15, 26 (1971) (emphasizing the importance of the emotive, non-cognitive function of free speech).

24. *Compare* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 2 (1999) (making an unqualified claim that "moral philosophy has nothing to offer judges or legal scholars so far as either adjudication or the formulation of jurisprudential or legal doctrines is concerned").

might be relevant to these actors. I will attempt to fill this lacuna by specifying the situations in which a general theory of the First Amendment might be relevant to actual free speech litigation. To help identify these situations, I will somewhat artificially separate free speech cases into three categories: easy, ordinary, and hard. Of course, like many legal classifications, this format puts into discrete categories what is in reality a spectrum of conditions. Still, this classification will, I hope, facilitate an understanding of where free speech theory is indeed irrelevant, where it is indirectly or potentially useful, and where it can be illuminating or perhaps even essential to reaching sound conclusions.

1. Easy Cases

For nearly a century, the United States Supreme Court has been deciding important free speech cases, often several in a single term. This sustained attention to free speech controversies by the Supreme Court has resulted in a contemporary free speech jurisprudence that both covers a lot of terrain and, in certain key areas, provides detail and nuance.[25] So with respect to a large group of free speech cases, the "body of concepts, principles, specific doctrines, and precedents in particular areas of First Amendment activity that has emerged from the collectivity of the Supreme Court's decisions in First Amendment cases over a long period of time"[26] does indeed dictate the result in free speech cases. With regard to this type of case, there is no need for theory, and sometimes not even much in the way of professional judgment. Cases in this category include trivially easy cases, such as those directly controlled by precedent, such as whether one has a right to wear a jacket in public bearing the message "Fuck the Draft,"[27] as well as those with trivial or irrelevant variations,[28] such as whether one has a right to wear a T-shirt in public saying "Taxes are Shitty." They also include cases that are squarely controlled by well-established rules, such as the rule against content-based regulation of speech in a traditional public forum.[29] Thus, there is no doubt that a ban on speeches in the speakers' corner of the park on the subject of Obamacare, or in favor of higher taxes, or critical of the withdrawal of

25. "Although it's hard to get an accurate count, the Supreme Court has decided over two hundred First Amendment cases, most of them since 1970." DANIEL A. FARBER, THE FIRST AMENDMENT 1–2 (2d ed. 2003).

26. Sedler, *supra* note 1, at1005 (internal citations omitted).

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

28. Of course, determining which factual variations from precedent are trivial or irrelevant rather than significant requires at least some impressionistic views of the purpose of free speech.

29. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988).

American troops from Afghanistan, would be unconstitutional. In cases such as these, resorting to First Amendment principles, let alone academic theory about how these principles relate to each other, is unnecessary.

The controlling force of contemporary doctrine over these types of cases is so strong that many free speech controversies in this category will never come to court, or better yet, will never even arise. A great benefit of mature doctrine, especially one that values clear rules and bright lines as does contemporary free speech jurisprudence, is that it allows lawyers to explain to clients with unmeritorious First Amendment grievances why their claims are legally untenable. On the other side of the same coin, and even more beneficial, the clarity and force of contemporary doctrine will often keep law enforcement officials and legislators from even attempting to suppress protected speech.

Note, however, that with changes in just a few significant facts, the easy cases I mentioned above become much more difficult. For instance, while it is well established that one has a right to use profanity in public as part of a political protest, it is not so clear that this right extends to public profanity more generally.[30] Similarly, while it would be patently unconstitutional to ban pro-abortion advocacy in a public forum, the Court has upheld a ban on such advocacy in family planning clinics receiving federal funds.[31] More generally, while the rule against content discrimination is clear and powerful with respect to speech in a public forum, there are many situations, including in the nonpublic forum, where the rule is inapplicable.[32] Making matters even more difficult, the line between public and nonpublic forums can itself be blurry.[33] So while I agree with Sedler that free speech doctrine directly and clearly controls the outcome of many cases, I suspect that we disagree about the size and range of this category of cases.

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30. *See, e.g.*, People v. Bommer, 655 N.W.2d 255 (Mich. Ct. App. 2002) (reversing Michigan man's conviction for using profanity after falling out of a canoe).

31. Rust v. Sullivan, 500 U.S. 173 (1991).

32. See, for example, Cornelius v. NAACP Legal Defense Fund, 473 U.S 788, 806 (1985) in which the Court explained that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral[]." Compare Sedler's circumlocution that in a non-public forum, government may impose "category-type restrictions" on access to the nonpublic forum. Sedler, *supra* note 1, at 1065-66. By any other name, subject matter restrictions are content-based.

33. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

2. Ordinary Cases

If an "easy" free speech case has difficulty quotient of one or two on a ten-point scale, and hard cases are those from seven to ten, then ordinary free speech cases are those in between. I designate these medium-difficulty cases as "ordinary" because they are the type of cases with which lawyers and judges involved in actual free speech litigation most often deal. Unlike "easy" cases, the body of precedent, principles, and rules do not directly "control the result."[34] Rather, for most cases in this category, this body of material at most "set[s] the parameters" for resolution of the First Amendment issue.[35]

An example of this type of case is litigation involving content-neutral regulation of speech in a public forum. The test for determining whether such regulations comport with the First Amendment is whether they are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information."[36] The problem is that this test, which the Court has described as imposing a form of "intermediate" scrutiny,[37] is indeterminate in that it requires individualized empirical inquiry (e.g., which alternative channels are in fact available to this speaker) and calls for relatively unguided quantitative judgment (e.g., are these channels adequate to convey the information?).[38] Unlike the rule against content-based regulation of speech in a public forum, which triggers an exceedingly rigorous scrutiny that virtually always leads to the law being invalidated, this rule, at least as formulated, does not "control[] the result" in any meaningful manner.[39] Nor, as formulated, does it "set[] the parameters for the resolution" of the case in any helpful way.[40] And because there are a myriad of different types of content-neutral regulation, individual precedent will rarely be helpful for lawyers or judges faced with challenges to this type of regulation.

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34. Sedler, *supra* note 1, at 1030.

35. *Id.*

36. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S 288, 293 (1984)).

37. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 443 (2002).

38. Making the test even more uncertain, the Court has explained that the "narrow tailoring" requirement does not require a regulation to be the least restrictive means of accomplishing its substantial interest, but demands only that it meet the less demanding but much vaguer standard that it not "burden *substantially* more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S at 799.

39. Sedler, *supra* note 1, at 1030.

40. *Id.*

Despite the indeterminacy of the verbal formulation, however, as actually applied by the Supreme Court, the test for determining the validity of content-neutral regulation of speech in the public forum is very deferential to the government,[41] with the result that such regulations are usually upheld[42]—but not always.[43] And there's the rub: For how are lawyers and judges, not just the Supreme Court Justices themselves but also lower court judges and lawyers involved in actual litigation, to identify the relatively small set of content-neutral regulations of speech in the public forum that violate the First Amendment?

Interestingly, Sedler agrees with my assessment of the indeterminacy of the test in this area. He writes that "when the Court is dealing with a matter to which intermediate scrutiny applies," such as content-neutral restrictions on speech in a public forum, "the articulated standard of review" has, in practice, "limited analytical significance."[44] In such

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41. *See, e.g.*, Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 925-26 (1993) (stating that scrutiny applicable to content-neutral rules "has not proven to be speech protective" and noting that "recent case developments have perhaps eviscerated whatever little speech-protective force track two might have had"); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1204 (1996) (describing scrutiny applicable to typical content-neutral regulation as "toothless"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 982 (2d ed. 1988) (noting that in the typical challenge to content-neutral regulations "government need show no more than a rational justification").

42. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 721 (2000); *Ward*, 491 U.S. at 781; Boos v. Barry, 485 U.S. 312, 331 (1988); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 313 (1984); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Heffron v. Int'l. Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Grayned v. City of Rockford, 408 U.S. 104 (1972); Cameron v. Johnson, 390 U.S. 611 (1968). *See also* United States v. Kokinda, 497 U.S. 720 (1989) (evenly dividing on the issue of whether a sidewalk in front of post office is a traditional public forum but upholding content-neutral ban on soliciting contributions). It should be noted that *Heffron*, *Grayned*, and *Cameron* were decided before *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), in which the Court established its current tripartite categorization of public property into traditional public forums, designated public forums, and nonpublic forums. *Heffron*, which was decided just two years before *Perry*, recites a version of the test applicable to content-neutral regulation of speech in public discussed in the text. *Heffron*, 452 U.S. at 640. In contrast, the analysis used in *Grayned* and *Cameron*, both decided more than a decade before *Perry*, employ a test significantly different from the test described in the text. *Grayned*, 408 U.S. at 104; *Cameron*, 390 U.S. at 611.

43. *See* United States v. Grace, 461 U.S. 171 (1983); Martin v. City of Struthers 319 U.S. 141 (1943); Schneider v. New Jersey, 308 U.S. 147 (1939). *See also* Watchtower Bible & Tract Soc'y, Inc. v. Village of Stratton, 536 U.S. 150 (2002); City of Ladue v. Gilleo, 512 U.S. 43 (1994); Int'l Soc'y. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Frizby v. Schultz, 487 U.S. 474 (1988). Each of these cases is discussed in the text or in a subsequent footnote.

44. Sedler, *supra* note 1, at 1030-31.

cases, Sedler continues, "the Court's analysis proceeds with reference to the components of 'the law of the First Amendment.'"[45] In describing "the law of the First Amendment" in this area, Sedler correctly observes that the Court "has been disposed to uphold most [content-neutral] restrictions on expression in the public forum."[46] He then proceeds to accurately describe the holdings in several of these cases and, in a couple of instances, to provide snippets of the Court's reasoning.[47]

Sedler's accurate observation that the Court upholds most content-neutral restrictions of speech in the public forum does indeed "set[] the parameters for the resolution"[48] of cases of this sort. In contrast, his equally accurate description of the holdings and reasoning in these decisions does not "control[] the results"[49] or even provide meaningful guidance for identifying the rare case in which a content-neutral regulation of speech in the public forum violates the First Amendment. Nor could any description of the holdings, reasoning, or general principles that the Court invokes in these decisions provide any such guidance. Rather, for the case law to provide such guidance requires, first, an exploration of the values underlying the Court's free speech jurisprudence, followed by an explanation of why the typical content-neutral regulation of speech in the public forum does not unduly impair these values and, conversely, what type of content-neutral regulation does unduly burden these values. In other words, First Amendment theory is needed to help identify the type of content-neutral regulation of speech in the public forum that does and does not violate the First Amendment.

To begin with the identification of underlying values, a deep commitment to formal equality underlying the First Amendment goes a long way in explaining the pattern of decided cases in this area of the law.[50] While complaining in a dissenting opinion about the lack of any serious scrutiny applied to content-neutral time, place, and manner regulations of speech in a public forum, Justice Thurgood Marshall aptly observed that

> the Court has dramatically lowered its scrutiny of governmental regulations once it has determined that such regulations are

45. *Id.*

46. Sedler, *supra* note 1, at 1061 (internal quotation marks omitted).

47. *Id.* at 1061-62.

48. *Id.* at 1005.

49. *Id.*

50. For a previous and similar explanation of the Court's jurisprudence relating to content-neutral regulations of speech, see James Weinstein, *Database Protection and the First Amendment*, 28 U. DAYTON L. REV. 305 (2002).

> content-neutral. The result has been the creation of a two-tiered approach to First Amendment cases: while regulations that turn on the content of the expression are subjected to a strict form of judicial review, regulations that are aimed at matters other than expression receive only a minimal level of scrutiny.[51]

An explanation that explains the stark dichotomy observed by Justice Marshall is that the core value underlying the American free speech doctrine is the right of each individual to participate in the formation of public opinion, which, as Learned Hand long ago observed, is the "ultimate source of authority" in a democratic society.[52] This right of democratic participation in turn rests on a basic precept of formal equality, reflecting the equal moral worth of each individual as expressed, for instance, in the Declaration of Independence[53] and on the entrance to the United States Supreme Court.[54] Laws that exclude speakers from expressing their views in public discourse because the government fears that these views are offensive, wrong, or even dangerous infringe on the core value of democratic participation and the commitment to formal equality, thereby compromising the legitimacy of the legal system.[55] Content-discriminatory laws are often motivated by hostility toward particular viewpoints.[56] Thus, the fierce, unbending rule

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51. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 312-13 (1984) (Marshall, J., dissenting).

52. Masses Pub. Co. v Patten, 244 F. 535, 539 (S.D.N.Y. 1917), *rev'd* 246 F. 24 (2d Cir. 1917).

53. "All men are created equal . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

54. "Equal Justice Under Law" is engraved on the front of the United States Supreme Court building. It bears emphasis that the equality I ascribe as underlying American free speech principle (and American democracy more generally) is a thin, procedural commitment that guarantees only a right to *formal* participation in the political process, which includes the right to be free from coercive laws forbidding one from expressing a particular view. *See* James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 643-44 (2011). It does not extend to such *substantive* equality concerns, such as having equal influence or even having one's voice heard. *Id.*

55. For a detailed discussion of how viewpoint-discriminatory laws impair political legitimacy, see Weinstein, *supra* note 15. Such laws also threaten to drive certain ideas from the marketplace, threatening both the audience interest in informed political participation as well as the marketplace of ideas more generally.

56. *See* City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) ("[C]ontent-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate."). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)) ("The rationale of the general prohibition

against content-discriminatory restrictions on public discourse is a bright-line, easily administrable method of guarding the core norm of the American free speech principle.[57]

Content-neutral time, place, and manner restrictions, it is true, often impede a broad range of speech, and thus sometimes will burden more speech than will narrowly focused, content-based laws. Still, content-neutral laws are by definition "equal opportunity" speech infringers and, as such, do not threaten the deep norm of *formal* equality underlying the American free speech principle.[58] Accordingly, content-neutral speech regulations, despite the talk of "intermediate scrutiny,"[59] actually come to the Court with a heavy presumption in favor of their validity. To overcome this presumption, the challenger must show that, even though the law might not threaten formal equality, it nevertheless places an undue burden on the right of political participation. In practice, this means that a content-neutral law will be invalidated only if a challenger can show both that the regulation imposes a severe burden on political participation and that the government's asserted interest in regulating the speech is not particularly weighty.

The paradigm case is *Schneider v. New Jersey*,[60] a case from an era when the concept of the public forum was just beginning to develop, in which the Court invalidated bans on leafleting imposed by municipalities to prevent littering. Emphasizing that free speech was "vital to the maintenance of democratic institutions,"[61] the Court found that the towns' interest in keeping the streets clean, albeit a legitimate purpose,

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[against content discrimination], after all, is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'").

57. "[I]t is quite true that regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. . . . But though our rule has flaws, it has substantial merit as well. It is a rule, in an area where fairly precise rules are better than more discretionary and more subjective balancing tests." *Ladue*, 512 U.S. at 60 (O'Connor, J., concurring).

58. Nor do they "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387 (quoting *Simon & Schuster, Inc.*, 502 U.S at 116). This is not to say that content-neutral regulations of speech in a traditional public forum might not implicate *substantive* equality concerns through their potential disparate impact on those who lack the resources to make their voices heard through print and broadcast media. This potential for disparate impact no doubt explains at least part of the reason that Thurgood Marshall, who was concerned about such disparate impact on the poor and powerless in all areas of constitutional law, vehemently decried the lack of scrutiny that the Court in fact applied to these laws. *See supra* text accompanying note 51.

59. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 443 (2002).

60. 308 U.S. 147 (1939).

61. *Id.* at 161.

was nevertheless "insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."[62] A similar case later in this formative era is *Martin v. Struthers*,[63] which invalidated an ordinance prohibiting the distribution of handbills by ringing doorbells or otherwise summoning residents to the door. The case involved a Jehovah's Witness who was convicted under the ordinance for knocking on doors and ringing doorbells in order to distribute leaflet invitations to a religious meeting.[64] In holding the ordinance unconstitutional, the Court noted that "[p]amphlets have proved most effective instruments in the dissemination of opinion" and that their distribution at residences was a particularly "effective way of bringing them to the notice of individuals."[65] The Court acknowledged that "door to door distributors of literature may be either a nuisance or a blind for criminal activities."[66] However, because "the dissemination of ideas" through door to door solicitation "was in accordance with the best tradition of free discussion" and "so clearly vital to the preservation of a free society," the Court held that these legitimate concerns were insufficient to support the ban in light of other methods available to address these interests.[67]

City of Ladue v. Gilleo[68] is a contemporary example of the Court invalidating a content-neutral law because of the heavy burden it placed on the right to political participation for insufficient reasons. Here, the Court invalidated a city's ban on the placement of most signs on residential property, including a sign containing an anti-war message ("For Peace in the Gulf") placed on a resident's own property.[69] In doing so, the Court focused on the "impact on free communication" of this

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62. *Id.* at 163.

63. 319 U.S. 141 (1943).

64. *Id.* at 142.

65. *Id.* at 145 (quoting *Schneider*, 308 U.S. at 164). In addition, expressing an equality concern that sounds more in substantive than in formal equality, the Court noted that door to door distribution of circulars is "essential to the poorly financed causes of little people." *Id.* at 146.

66. *Id.* at 145.

67. *Id.* at 145-47.

68. 512 U.S. 43 (1994). The ordinance contained a number of content-based exemptions, but the Court assumed *arguendo* that the ordinance was content-neutral. *Id.* at 53.

69. *Id.* at 46, 58-59. Because the case involved a regulation of speech on *private* rather than public property, it did not technically concern regulation of speech in a public forum, the focus of Sedler's analysis. Nonetheless, it is a rare case that strikes down a content-neutral (if only by hypothesis, *see supra* note 68) regulation, and it is therefore instructive in trying to understand circumstances in which content-neutral regulation of speech in the public forum violates the First Amendment.

broad ban,[70] emphasizing that, because residential signs are often placed on lawns or in windows "to signal the resident's support for particular candidates, parties, or causes," the regulation had foreclosed "a venerable means of communication that is both unique and important."[71] In addition, the Court noted that "[r]esidential signs are an unusually cheap and convenient form of communication."[72] Finally, while acknowledging that the city's interest in preventing visual blight was "concededly valid," the Court noted that this interest was "much less pressing" than other interests, such as mediating among competing interests for use of the streets, which it had previously upheld as sufficient to warrant content-neutral regulation of speech.[73]

Most, if not all, of the other rare cases in which the Court has invalidated a content-neutral regulation of speech also involve laws that place a heavy burden on democratic participation but are justified by not particularly weighty governmental interest.[74] In contrast, the numerous cases in which the Court has upheld content-neutral regulation of speech in the public forum (or elsewhere) involve regulations that do not place a

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70. *Id.* at 54.

71. *Id.* at 54-55. Relevant to the ordinance's impact on political participation, the Court emphasized that it covered "absolutely pivotal speech as a sign protesting an imminent governmental decision to go to war." *Id.* at 54.

72. *Ladue*, 512 U.S. at 57. Echoing the substantive equality concerns expressed in *Martin v. Struthers*, 319 U.S. 141, 146 (1943), the Court added that "[e]specially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute." *Id.*

73. *Id.* at 58.

74. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992) (invalidating a ban on sale or distribution of literature in airport terminals justified by governmental interest in preventing congestion). *Cf. id.* at 684-85 (upholding a ban on solicitation and immediate receipt of funds justified by governmental interest in preventing fraud). *See also* Watchtower Bible & Tract Soc'y, Inc. v. Village of Stratton, 536 U.S. 150, 166-67 (2002) (invalidating municipal ordinance forbidding door to door canvassing without a permit, noting that the "surrender of . . . anonymity" inherent in the permit requirement may deter canvassing by people supporting unpopular causes; that the requirement "imposes an objective burden on some speech of citizens holding religious or patriotic views;" and that "a significant amount of spontaneous speech . . . is effectively banned by the ordinance"); Frizby v. Schultz, 487 U.S. 474, 485-88 (1988) (construing a content-neutral ban, apparently applicable to all residential picketing, as banning only picketing that "targets" residences, thereby vindicating the right of anti-abortion picketers to march by the home of an abortion provider); United States v. Grace, 461 U.S. 171, 172-73, 182-84 (1983) (invalidating ban on display of any "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" on the sidewalk in front of the Supreme Court building, justified on the grounds of preventing the appearance to public that the Supreme Court is influenced by such expression or that engaging in such expression is a proper way of appealing to the Supreme Court).

severe burden on democratic participation,[75] or if they arguably do, are justified by fairly substantial governmental interests.[76]

I do not contend that a free-speech theory based in democratic theory perfectly explains the Court's invalidation of a small handful of content-neutral regulations.[77] There may be better explanations of this phenomenon. I do, however, contend that this theory offers a superior organizing principle than Sedler's attempted value-free description of this area of the law in his "Law of the First Amendment." More generally, it shows how in ordinary free speech cases First Amendment theory can sometimes help lawyers and judges understand the forces that are actually determining the results in a particular area of free speech law. So, even if Sedler is right that theory is, in fact, irrelevant to lawyers and judges involved in these types of cases, it shouldn't be.

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75. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 784, 803 (1989) (upholding New York City regulation mandating use of the city's sound system and technicians to control the volume of concerts in the bandshell in Central Park against claim by band that the inability to use their own sound system violated their right to free expression); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984) (upholding federal law that prevents camping in certain national parks as applied to protestors wanting to sleep in tents in Lafayette Park, a park across from the White House, to protest the plight of homeless people).

76. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2003) (upholding in light of the strong privacy and health interests at issue, an ordinance limiting the ability to approach those on the public areas in front of health facility without the consent of the person being approached); *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 684 (upholding ban on solicitation and immediate receipt of funds in airport terminal justified by governmental interest in preventing fraud). *Cf. id.* at 685 (invalidating ban on sale or distribution of literature in airport terminals justified by governmental interest in preventing congestion).

77. Relatedly, I do not contend that from the perspective provided by this theory that all of these cases are rightly decided. For instance, in light of the keen participatory interests of anti-abortion protestors to protest at abortion clinics, the Court in *Hill,* 530 U.S. 703, may have not properly balanced the interests of anti-abortion protestors against the interests of patients entering and exiting those facilities, given readily available alternative means to effectively protect the privacy and health interests of patients. Thus a strict rule forbidding anyone from following or speaking further to a patient who has indicated that she is not interested in talking to the protestor would protect patients from being importuned but would not unduly trench upon the core participatory rights of anti-abortion protestors. Similarly, it is certainly open to dispute whether the Court was correct in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 789 (1984), in finding that the city's interest in preventing urban blight was substantial enough to outweigh the important participatory interests in using utility polls to post signs supporting candidates.

3. Hard Cases

While resorting to First Amendment theory is unnecessary in easy free speech cases and sometimes helpful in ordinary ones, it is essential to understanding hard cases. "Hard" free speech cases come in at least two very different varieties: (1) those claiming First Amendment protection for expressive activity that the courts, especially the Supreme Court, have neither recognized nor denied as worthy of First Amendment protection or even coverage;[78] and (2) those in which a plethora of applicable precedents, rules, standards, and principles relevant to the activity in question pull with about equal force in opposite directions.[79]

An example of the latter type of case arose fifteen years ago when political activist Marc Kasky sued Nike, Inc. and several of its officers and directors in California state court for making allegedly false and misleading statements about conditions in its foreign factories.[80] Nike made these statements in press releases, letters to newspapers, letters to university presidents, and other documents in response to charges by human rights organizations, labor groups, and newspaper editorials that Nike had mistreated workers in its overseas factories.[81] The trial court dismissed the complaint without leave to amend and the court of appeals affirmed on First Amendment grounds.[82] A divided California Supreme Court reversed.[83]

The key doctrinal question in *Nike* was whether Nike's speech should be classified as "commercial speech."[84] If the court classified it as "commercial speech" and found it to be false or misleading, the speech would be wholly outside of the scope of the First Amendment;[85] if the

78. For example, whether tattooing is activity entitled to First Amendment protection. *Compare* Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008) (finding that the "act of tattooing is one step removed from actual expressive conduct"), *with* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1055 (9th Cir. 2010) (holding that "tattooing is purely expressive activity fully protected by the First Amendment").

79. *See, e.g.*, Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002); Citizens United v. FEC, 558 U.S. 310 (2010).

80. *Kasky*, 45 P.3d at 248. The analysis of the *Nike* case in this Commentary draws substantially on James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV. 1091 (2004).

81. *Kasky*, 45 P.3d at 248.

82. *Id.* at 248-49. *See* Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854 (Cal. Ct. App. 2000).

83. *Kasky*, 45 P.3d at 262-63.

84. *Id.*

85. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 575-76 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72 (1976).

court classified it as "non-commercial"[86] speech, the speech was within First Amendment coverage and thus potentially entitled to First Amendment protection even if false or misleading. The California Supreme Court, in an opinion by Justice Joyce Kennard, attempted to extract a verbal formula from relevant United States Supreme Court precedent that would determine the proper classification of the speech in question.[87] Under the formula so divined, the majority concluded that Nike's allegedly false or misleading statements were properly categorized as commercial speech and thus were entitled to no First Amendment protection.[88] Similarly purporting to rely on Supreme Court precedent but reaching the opposite conclusion, Justice Janice Brown found that Nike's speech was "more like noncommercial speech than commercial speech" and thus concluded that Nike's speech was entitled to rigorous First Amendment protection.[89] Prominently missing from both opinions, however, was any serious examination of the underlying values served by the First Amendment's protection of speech. The United States Supreme Court granted review but, after hearing oral argument, dismissed the writ as improvidently granted.[90]

In "easy" or "ordinary" free speech cases, case matching or use of verbal formulae to determine the category in which to place the speech in question works well enough. In "easy" cases, there is precedent directly on point determining the proper category, and in "ordinary" free speech cases, even without controlling precedent, judges commonly use their intuition about the goals and purpose of free speech doctrine to make the right choice.[91] But in a case such as *Nike*, where there is no case directly on point and the intuition of informed observers is pulled equally in both directions, any attempt to derive the answer through case matching or verbal formulae will prove futile and might even mask irrelevant or even illegitimate considerations.[92] By the same token, Sedler's description of the "Law of the First Amendment" relating to commercial speech would have been little or no help to judges trying to figure out how to

86. In my view, the proper categorizing question is not whether the speech should be classified as "non-commercial" rather than commercial (lots of speech is non-commercial yet outside of First Amendment coverage—e.g., agreements to violate the anti-trust laws), but rather whether such speech is part of public discourse. *See* Weinstein, *supra* note 14, at 493. However, because the term "non-commercial" speech is often used in this context to mean protected non-commercial speech, I too will use the term in this way.

87. *Kasky*, 45 P.3d at 256.

88. *Id.* at 261, 269.

89. *Id.* at 269, 274, 278 (Brown, J., dissenting).

90. Nike, Inc. v. Kasky, 539 U.S. 654, 655 (2003).

91. *See supra* notes 27 -29 and 34-35 and accompanying text.

92. *See infra* p. 1135.

categorize the speech in *Nike* or otherwise determine the level of First Amendment protection, if any, such expression should have been afforded.

Rather, to help reach sound conclusions in cases like *Nike*, it is useful for judges to bring to consciousness and to analyze, perhaps with the aid of theoretically-oriented academic commentary, the intuitions and impressions that provide guidance in "ordinary" free speech cases. Specifically, reaching the right conclusion in the *Nike* case required judges to consider how the values underlying free speech doctrine explain the stark dichotomy between the lack of protection afforded to false or misleading commercial speech and the rigorous protection afforded to many types of false or misleading non-commercial speech—in other words, to think theoretically about free speech doctrine. A judge would then be in a position to evaluate how the application of the California law in that case to Nike's speech implicated free speech values, an inquiry essential to reaching a sound conclusion.

So what does explain the stark difference between treatment of commercial and non-commercial speech with respect to false or misleading factual statements, and how might this understanding have helped judges correctly decide the *Nike* case? Lying at the very foundation of the American concept of democracy is the basic precept that the government must treat each of us, in our capacities as the ultimate governors of society, as equal, autonomous, and rational agents.[93] No other view is consistent with popular sovereignty—the foundational democratic precept that "We the People,"[94] not the government or incumbent office holders, are the ultimate governors of society. If government limits speech because it fears that it might prompt the citizenry to implement some unwise public policy or to be misled about some fact relevant to such a collective decision, it contradicts the basic democratic precept that the people are the ultimate governors.[95]

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93. In the discussion about content-neutral regulations above, the focus was primarily on the impact of these regulations on *speakers'* interests in democratic participation. Here, in contrast, the focus is on *audience* interests. The reason for this shift in focus is that restrictions on the speech of ordinary business corporations do not implicate the core value of formal equality and political legitimation underlying the First Amendment, concerns applicable only to flesh-and-blood individuals. *See infra* note 96 and text accompanying note 134.

94. U.S. CONST. pmbl.

95. As James Madison explained at the founding of this Nation, under our constitutional scheme, "the people, not the government, possess the absolute sovereignty," JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS, *in* 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569-70 (1836). It follows from this basic premise that "the

This is true even if the regulation does not implicate any democratically-based *speaker* interest, as is the case here.[96]

The precept that the people are capable in their capacities as the ultimate governors of society to sort out truth from falsity[97] is so basic that it most likely forbids the government from punishing even intentional lies about political or social matters, if its justification for doing so is to prevent the people from being deceived into making an unwise decision.[98] Of course, it may well be doubted whether, even when considering information on matters of public concern, people in a democracy are, in fact, rational agents who can accurately sort out truth from falsity. However, rationality in this realm is not a *description* but an *ascription* required by the premise that the people are capable of and have a right to govern.[99]

"[C]onsistent with the view that the [core of the] American free speech principle derives from the very essence of democracy," this strong anti-paternalism principle "applies only when the government regulation addresses us qua citizen," such as when we are engaged in collective decision-making through public discourse.[100] In contrast, when the regulation addresses us in other capacities, such as consumers of commercial goods or services or persons dependent on professional advice, "the First Amendment poses no obstacle to the government [punishing] false or misleading speech."[101] In these situations, the ascription of full rationality and autonomy flowing from the basic precept of popular sovereignty is inapplicable, allowing the government, consistent with the First Amendment, to treat us as the not fully-rational beings that we in fact are.[102] It is for this reason that government can readily prohibit false or misleading commercial speech.[103]

"[The] crucial inquiry thus becomes whether the audience reading Nike's statements about its overseas working conditions in the

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censorial power is in the people over the Government, and not in the Government over the people." 4 ANNALS OF CONG. 934 (1794) (statement of James Madison).

96. Nike is neither an entity protected by the core equality precept of democracy, nor one capable of being engendered with the sense of the legal system's legitimacy that such participation produces. *See supra* text accompanying note 55.

97. *See supra* note 95 and accompanying text.

98. *See* Weinstein, *supra* note 80, at 1105. *See also* United States v. Alvarez, 132 S. Ct. 2537, 2537 (2012) (invalidating on First Amendment grounds federal law making it a crime to falsely claim receipt of military decorations or medals).

99. Weinstein, *supra* note 80, at 1112.

100. *Id.* at 1106.

101. *Id.* It is for this reason that the First Amendment is no obstacle to malpractice suits for negligent medical, legal or financial advice.

102. *Id.* at 1112-13.

103. *Id.* at 1113.

newspaper, either as recounted in a story and attributed to a Nike press release or in a full page editorial advertisement, or in a letter addressed to university presidents and athletic directors," should be deemed autonomous and rational agents, or, instead, as dependent and not fully rational actors.[104] The ultimate conclusion—how this audience *should be* regarded—is a normative one. However, a key intermediate consideration involves a mixed normative and factual assessment of how the various communicative formats[105] utilized by Nike fit in to the "structural skeleton that is necessary . . . for public discourse to serve the constitutional value of democracy."[106] In addition, the ultimately normative inquiry as to how the audience should be regarded involves the following subsidiary empirical judgment:

> [Whether the audience] was likely to accept [Nike's] assertions without critical inquiry or further investigation, much the way the average consumer will accept a claim on a bag of potato chips that it contains only two grams of fat . . . or conversely, [whether the] audience [was] more likely to critically assess the validity of these claims in the way people ordinarily tend to skeptically evaluate statements by one side in a contentious public policy debate, such as whether [President Obama was born in Hawaii or Kenya.][107]

"In light of both the content and format of Nike's statements," the better view is "that the audience targeted by Nike's campaign is in fact as independent and rational as an audience addressed in a public policy debate unalloyed with commercial purpose," such as Presidential politics, "in which the participants make any number of conflicting," and sometimes patently false, factual claims.[108]

> An assertion in a letter from Nike in a newspaper defending its labor policies or a statement in a newspaper story relating to statements made by Nike in a press release is likely to trigger a reader's critical faculties much more than, say, a statement on a package listing a product's ingredients or even an ordinary advertisement in a magazine, newspaper, or television program

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104. *Id.* at 1122-23.

105. *See* Kasky v. Nike, Inc., 45 P.3d 243, 248 (Cal. 2002).

106. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995).

107. Weinstein, *supra* note 80, at 1122-23.

108. *Id.* at 1123.

> proclaiming where and by whom a product was produced. In addition, the content of [the] statements [in *Nike*] made clear to the audience that Nike's claims were in response to contrary factual assertions made by Nike's critics on matters of public concern.[109]

Finally, newspaper articles and letters to the editor are plainly a central part of the communicative structure necessary "for public discourse to serve the constitutional value of democracy."[110] Accordingly, Nike's audience in this case should be deemed rational and independent agents engaged in public discourse. "Such an ascription (informed in this case by description) of audience rationality would [in principle] render unconstitutional the application of California's false advertising regime to speech such as Nike's."[111]

Citizens United v. Federal Election Commission [112] is another example of a "hard case" in which theory might have helped to illuminate the interests that were—and more crucially, were not—at stake. At issue in that case were restrictions imposed by § 441b of the Bipartisan Campaign Reform Act of 2002 ("BCRA") on expenditures by corporations and unions for communications about candidates for federal office.[113] Even more so than in *Nike*, precedent, as well as general

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109. *Id. See Kasky*, 45 P.3d at 247.

110. Post, *supra* note 106, at 1276.

111. Weinstein, *supra* note 80, at 1124. Even if the audience for Nike's statements was not deemed rational and autonomous, and thus the regulation on Nike's speech did not violate a core democratic precept, punishing Nike for these statements might still be unconstitutional if doing so unduly interfered with the audience's interest in receiving information needed to make informed decisions on matters of public concern. *See id.* at 1129-33.

112. 558 U.S. 310 (2010).

113. *Id.* at 321-22. § 441b of BCRA prohibited corporations and unions from using general treasury funds to make "'any broadcast, cable or satellite communication' that 'refer[red] to a clearly identified candidate for Federal office' . . . within 30 days of a primary or 60 days of a general election." *Id.* at 321 (citing 2 U.S.C. § 441b(b)(2) (2002) and 2 U.S.C. § 434(f)(3)(A) (2002)). In addition, BCRA carried over another provision, part of federal law since 1947, that prohibited corporations and unions from using general treasury funds for communications that expressly advocated in any media the election or defeat of any candidate for certain federal elections. 2 U.S.C. § 441b. *See Citizens United*, 558 U.S. at 342-43. For a general overview of BCRA's various provisions, see James Weinstein, *Campaign Finance Reform and the First Amendment: An Introduction*, 34 ARIZ. ST. L.J. 1057, 1071-72 (2002). Although § 441b applied to unions as well as corporations, for simplicity, I will hereafter refer to the section as restricting the speech of corporations.

doctrinal rules and principles, pulled in opposite directions.[114] A bare majority of the Court found these key provisions of federal campaign finance law to be an unconstitutional speaker-based restriction on core political speech,[115] while four justices would have upheld these provisions as reasonable speech restrictions needed to ensure the integrity of the political process.[116]

Justice Kennedy's majority opinion has often been characterized as protecting the First Amendment interests of corporations.[117] Although there was language in the opinion that could be construed to support this view,[118] the Court's primary concern was manifestly not with the free speech interests of corporations, but rather with the First Amendment interests of the flesh-and-blood individuals who, in the Court's view, were deprived by the restriction on corporate speech of crucial information needed to make informed political decisions.[119] "Corporations and other associations, like individuals," the Court explained, "contribute to the 'discussion, debate, and the dissemination

114. As the Court observed, "[We are] thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them." *Citizens United*, 558 U.S. at 348. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668-69 (1990), upheld a state law prohibiting corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office. For a detailed description of the state of the relevant precedent at the time BCRA was enacted, see Weinstein, *supra* note 113, at 1058-70.

115. *Citizens United*, 558 U.S. at 318-366. Justice Kennedy wrote for the Court and was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

116. *Id.* at 393-478 (Stevens, J., concurring in part and dissenting in part). Justice Stevens was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Stevens's opinion concurred with the Court's upholding of BCRA's disclosure provisions. *Id.* (Stevens, J., concurring in part and dissenting in part.) Justice Thomas was the sole dissenter from this holding. *Id.* at 480-85 (Thomas, J., concurring in part and dissenting in part).

117. *See* Adam Liptak, *The Roberts Court Comes of Age*, N.Y. TIMES, June 29, 2010, http://www.nytimes.com/2010/06/30/us/30scotus.html?_r=0 (claiming that *Citizens United* "showed great solicitude to the interests of corporations"); Ted Loewenberg, Letter to the Editor, *What We Want From a Justice*, S. F. CHRON., April 14, 2010, http://www.sfgate.com/opinion/letterstoeditor/article/Letters-to-the-editor-3192346.php (stating that *Citizens United* "promot[ed] corporate interests over the people's in our elections").

118. *See, e.g., Citizens United*, 558 U.S. at 340-41 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."); *id.* at 347 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or groups of citizens, for simply engaging in political speech.").

119. *See id.* at 469 (Stevens, J., concurring in part and dissenting in part) ("[T]he Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say.").

of information and ideas' that the First Amendment seeks to foster."[120] In the Court's view, § 441b "'muffle[s] the voices that best represent the most significant segments of the economy,'" thereby depriving the electorate "'of information, knowledge and opinion vital to its function.'"[121] For this reason, the Court subjected the speech restrictions of § 441b to "strict scrutiny,"[122] and, finding that these provisions could not withstand such rigorous examination, held them unconstitutional.[123]

Justice Stevens' lengthy and impassioned dissent disagreed that the restrictions unduly interfered with information needed by the electorate.[124] He emphasized that § 441b only forbids corporations from using treasury funds to convey their message and that corporations remain free to speak for or against candidates through political action committees ("PACs"), "segregated funds established by a corporation for political purposes" that may be financed by the stockholders or executives of the corporation.[125] In light of the important interests served by § 441b, most importantly the prevention of political corruption or its appearance,[126] the four dissenting justices would have upheld the restrictions.

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120. *Id.* at 343 (majority opinion) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

121. *Id.* at 354. *See also id.* at 339 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential" (citations omitted) (internal quotation marks omitted)); *id.* at 344 ("Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitally important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." (quoting United States v. Auto. Workers, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting))); *id.* at 364 ("Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.").

122. *Id.* at 339-40.

123. *Id.* at 364-65.

124. *Id.* at 466.

125. *Id.* at 414-19 (Stevens, J., concurring in part and dissenting in part). *See also id.* at 474-78. The majority responded that the availability of speech by PACs is not an adequate substitute for corporate speech because "[a] PAC is a separate association from the corporation" and thus "does not allow corporations to speak." *Id.* at 337 (majority opinion). In addition, the majority contended that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Id.* at 337.

126. Justice Stevens recounted how the voluminous trial court record in *McConnell v. FEC*, 540 U.S. 93 (2003), in which the Court had previously rejected a facial attack on BCRA's restriction on corporate speech, revealed that: (1) members of Congress are aware of which organizations are running advertisements on their behalf; (2) that they are

There are many ways in which free speech theory might have benefitted the Court's decision in *Citizens United*,[127] and in which it can still provide a better understanding of that decision, including whether it was correct. In this brief discussion of a very complicated decision, I will focus on three related insights provided by free speech theory, each pointing to the conclusion that no fundamental free speech rights were violated by § 441b. The first insight concerns the government's justifications of the restrictions imposed by § 441b: the prevention of political corruption or its appearance and the protection of the interests of dissenting shareholders and union members.[128] Unlike the justification for the speech restriction in *Nike*, which mistrusted the audience's ability in its capacity of ultimate sovereign to sort out truth from falsity, neither

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particularly grateful for negative advertisements running against their opponents, leaving the Congressman or Senator "to run positive advertisements and [to] be seen as above the fray"; (3) that "after the election, these organizations seek credit" with the Member of Congress for their support; and (4) that "a large majority of Americans (80%)" believe that these organizations then "receive special consideration from these officials when matters arise that affect these corporations." *Citizens United*, 558 U.S. at 448-50 (Stevens J., concurring in part and dissenting in part) (citations omitted). Justice Stevens also argued that restrictions on corporate speech imposed by BCRA prevent corporations from using their wealth to "distort" public debate about electoral politics and protect the interests of dissenting shareholders. *Id.* at 465-79.

127. To its credit, the majority opinion discusses in some detail the audience interest it believes was imperiled by BCRA's restrictions on corporate speech. *See id.* at 339-40, 344, 354, 364 (majority opinion). Justice Kennedy, however, makes no effort to explain how the listener-based interest that he relies on in his opinion squares with the emphasis that contemporary doctrine places on speakers' interests, a focus that would not include the interests of ordinary business corporations. *See supra* notes 52-57 and accompanying text. *See also infra* notes 133-34 and accompanying text. The majority also emphasized that the First Amendment is "[p]remised on mistrust of government power" and, in accord with this skeptical view of government, contended that "[s]peech restrictions based on the identity of the speaker," such as those imposed by BCRA's restriction of corporate speech, "are all too often simply a means to control content." *Citizens United*, 558 U.S. at 340-42. Justice Stevens' dissent, in contrast, was remarkably light in its discussion of free speech values. *Citizens United*, 558 U.S. at 393-479 (Stevens J., concurring in part and dissenting in part). Stevens did note that fundamental concerns of the First Amendment are to "'protect[] the individual's interest in self-expression,'" to "'make men free to develop their faculties,'" to respect individual "'dignity and choice,'" and to "facilitate[] the value of . . . 'self-realization,'" values that he insisted are not promoted by corporate speech. *Id.* at 466-67 (citations omitted). Aside from this brief and rather unilluminating reference to free speech values, Stevens made no attempt in his extremely lengthy dissent to tie the multifarious arguments in support of the constitutionality of § 441b to First Amendment values. *Id.* at 393-479.

128. *See Citizens United*, 558 U.S. at 356, 361-62. As the majority opinion notes, *id.* at 356, the government did not press the highly contentious "antidistortion" rationale, on which the Court in *Austin* relied and which the dissent in *Citizens United* embraced. *See* 558 U.S. at 465-75 (Stevens, J., concurring in part and dissenting in part). *See also infra* note 129 and accompanying text.

of the rationales advanced by the government in support of § 441b contravened the core democratic precept that the people are the ultimate governors of society. Neither justification involved the fear that the restricted speech will mislead the audience or persuade the electorate of some view that the government found undesirable. Indeed, both justifications turned on the prevention of harms largely independent of any effect that the speech might have on its intended audience.[129] So, when justified by the interest in preventing corruption (or its appearance) and the protection of dissenting shareholders, any impairment of the optimal flow of information needed by the electorate was an incidental consequence rather than the object of the speech restrictions imposed by § 441b. As such, this provision is not unlike speech restrictions imposed by a myriad aspects of federal communications policy or copyright law that arguably have a similar detrimental impact on the optimal information flow needed for a well-informed public.[130]

Next, just as the government's justification of § 441b was not inconsistent with any core First Amendment precepts, so too the restriction imposed by that provision did not impair any core free speech interests. Ronald Dworkin's useful distinction between speech that is

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129. This is particularly true of the protection of dissenting shareholder rationale, for shareholders might well object to the use of treasury funds to support a candidate they oppose or to attack a candidate they support regardless of the effectiveness of the political advertisement in question. With respect to the anticorruption rationale, it may well be that Members of Congress will take more notice and be more grateful to corporations who run effective attack ads against their opponents. *See supra* note 126 and accompanying text. But this potential connection between the rationale and the effect of the restricted speech on its audience is tangential and does not reflect any governmental distrust of the electorate's ability to perform its function. In contrast, the antidistortion rationale, largely pretermitted from the government's arguments in support of § 441b, *is* related to the effect that the restricted speech would have on its audience. Whether this renders the antidistortion rationale inconsistent with any basic democratic precept or otherwise impermissible is an extremely complex and difficult question that I cannot address here. For a discussion of the consistency with basic democratic precepts of a similar rationale for restricting campaign speech, see Weinstein, *supra* note 80, at 1091-92.

130. *See, e.g.*, Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (rejecting First Amendment challenge to FCC ruling upholding policy under which broadcasters refused to sell time to individuals or groups who wanted to present their views on controversial issues). *See also* Eldred v. Ashcroft, 537 U.S. 186 (2003) (refusing to subject to any meaningful First Amendment scrutiny extension of copyright term for already existing works despite strong arguments that the extension would impede cultural development without any significant offsetting benefit to society); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (upholding against First Amendment challenge a public television station's decision to exclude a third party candidate from televised debate between Democrat and Republican candidates for Congressional seat); Weinstein, *supra* note 50, at 336-49.

instrumental to, as opposed to constitutive of, democracy[131] provides a helpful framework for evaluating the nature, and hence the weight, of the free speech interests implicated by § 441b. Like the interest in voting, the interest that people have in trying to persuade others about matters of public concern is a constituent part of the practice of democracy. For this reason, restrictions that prevent individuals from expressing their views in public discourse, either because the government disagrees with these views or finds them offensive or even dangerous, are, *in principle,* wrong in that they contravene the core precept of formal equality underlying the American free speech principle.[132] In contrast, the interest of the electorate in having the full range of viewpoints and information needed to vote wisely, while undoubtedly an important interest, is nonetheless a concern instrumental to democracy, not constitutive of it. For this reason, restrictions on speech justified by some legitimate governmental interest are not, in principle, wrong just because they result in less than optimal information flow needed by the electorate to perform its function. This is not to say that a speech prohibition that has the effect of depriving the electorate of vital information is constitutional just because it is justified by some permissible government interest. As instrumental as the interest in the full panoply of perspectives and information may be, it is still an important democratic interest that requires judicial vigilance and protection. Still, unlike viewpoint-based restrictions on public discourse, laws that have the effect of depriving the electorate of valuable information are constitutional if the negative impact on information flow is outweighed by other instrumental concerns, especially democratic ones.

Finally, restrictions on the ability of flesh-and-blood individuals to participate in the political process, whether by voting or expressing one's viewpoint in public discourse, can deprive laws of legitimacy to the extent that they are applied to these excluded individuals and tend to diminish the legitimacy of the entire legal system.[133] In contrast, despite whatever negative effect restrictions on the speech of ordinary business corporations might have on information flow required by the electorate, such restrictions do not compromise the legitimacy of laws applied to those entities or undermine the legitimacy of the legal system any more than not allowing corporations to vote impairs political legitimacy. The reason for this difference is that the question of political legitimacy, to which democracy is a partial answer, and which arises from the problem

131. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 200-01 (1996).

132. *See supra* notes 50-57 and accompanying text.

133. *See supra* note 55 and accompanying text.

of justifying the government using force to make people comply with laws with which they disagree.[134] Lacking autonomy, will, reason, and emotion, artificial entities such as ordinary business corporations are not in need of the legitimation that democratic participation engenders.

In combination, the three theoretical insights reveal that the speech restrictions involved in *Citizen United* did not implicate a core free speech value but rather involved only what I have referred to elsewhere as an important secondary First Amendment interest.[135] The significance of this conclusion is that it suggests that, unlike when a core free speech value is at issue, the Court, as it had done previously,[136] should have assumed a more deferential stance towards restrictions on corporate political speech that Congress had found inimical to the integrity of the political process.[137] Such deference was particularly appropriate because the primary governmental interest in restricting corporate speech—preventing corruption or the appearance of corruption—was, like the interests in protecting the speech at issue, an important instrumental democratic concern.

I do not claim that the use of First Amendment theory in hard cases, such as *Nike* and *Citizens United*, will reveal some uncontestably right answer.[138] For one, there are differing theories of the best interpretation of the First Amendment.[139] Indeed, even under the democratic theory that I embrace,[140] one might reasonably argue that the audience for Nike's communication should not be considered rational and autonomous, and thus, punishing Nike for its false or misleading statements was consistent with the First Amendment. Similarly, while I do, for the reasons

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134. *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 263 (2011); Weinstein, *supra* note 15, at 362-64.

135. *See* Weinstein, *supra* note 14, at 501.

136. *See, e.g.,* McConnell v. FEC, 540 U.S. 93, 205 (2002); Austin v. Mich. Chamber of Commerce, 494 U.S 652, 660 (1990). *See also* Weinstein, *supra* note 14, at 501.

137. Unlike my late friend Ed Baker, I do not advocate total deference in cases involving incidental impairment of information flow required by the electorate. *Compare* C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Quandary in* Nike, 54 CASE W. RES. L. REV. 1161, 1174 (2004), *with* Weinstein, *supra* note 80, at 1135-36 ("[W]hile I am in nearly complete agreement with Baker with respect to the proper judicial role in assuring proper information flow *in general*, we part company when it comes to assuring information needed for *democratic decision making[,]* . . . . [which] the judiciary has had, and in my view, should continue to have, a crucial role in protecting. . . . [and] over which the legislature cannot be safely given unreviewable discretion.").

138. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (arguing that even where "no procedure exists . . . for demonstrating what legal rights the parties have in hard cases," there nonetheless usually is a right answer in these cases).

139. *See, e.g.,* Baker, *supra* note 11; Shiffrin, *supra* note 11.

140. *See supra* notes 93-103 and accompanying text.

previously stated, think that *Citizens United* was wrongly decided, I do not think it unreasonable to maintain that the information flow needed by the electorate was unduly impaired by BCRA's restriction on corporate speech, especially by the "chilling effect" caused by the criminal sanctions that BCRA imposed. The constructive role that I claim for theory, which I hope the foregoing discussion demonstrates, is that in hard cases reference to theory can illuminate the issues in a helpful manner.

In conclusion, my claim for the relevance of First Amendment theory is a relatively modest one. It is not that theory will cast a blazing beacon across a vast, dark legal landscape. Rather, like a beam from a flashlight held by a hiker on a dusky trail, it can sometimes help lawyers and judges find their way over particularly difficult patches of legal terrain.[141] In addition to its power to illuminate relevant issues and interests, theory can reduce the opportunity for judges to smuggle, perhaps quite unconsciously, their political biases or other irrelevant considerations into the decision making process. For instance, justices who, over the course of deciding a number of previous cases, had articulated a theory centered upon a core, speaker-based right of democratic participation, but who called for deference to the legislature when instrumentally-justified listeners' interests were at stake, would, in the immortal words of Ricky Ricardo, "have some 'splainin' to do" before invalidating § 441b. By the same token, justices who had previously embraced a theory, such as the one famously articulated by Alexander Meiklejohn—which emphasized that the "ultimate interest" guarded by the First Amendment is not the right of speakers but the assurance that perspectives and information for "the voting of wise decisions" will be available to the audience[142]—could be expected to find these provisions unconstitutional, or at least to examine these restrictions with extreme care to ensure that they did not rob the electorate of valuable perspectives or information. Finally, a coherent view about the values underlying the First Amendment provides a principled vantage point from which academics, as well as other citizens, can critique free speech decisions. In the absence of such a standpoint, how can one, in any meaningful way, proclaim that *Citizens United*, or any other free speech decision, was rightly or wrongly decided?[143]

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141. *Accord,* Sunstein, *supra* note 10, at 398 ("[B]etter philosophy might well make the law better—more fair, coherent, less confused—in some contexts.").

142. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

143. I am confident that Sedler has a view about the correctness of *Citizens United* and that the perspective of someone with his experience in teaching, writing, and litigating

II. SEDLER'S DESCRIPTION OF "THE LAW OF THE FIRST AMENDMENT"

As previously discussed, I think Sedler significantly overstates the range of cases over which the "Law of the First Amendment" casts such a decisive influence.[144] Still, a thoughtful, well-organized, and accurate statement of "'th[e] body of concepts, principles, specific doctrines,' and precedents in particular areas of First Amendment activity that has 'emerged from the collectivity of the Supreme Court's decisions'"[145] can provide a helpful tool for practitioners and judges, not to mention law enforcement officials and legislators. I will therefore conclude this Commentary with a few remarks on Sedler's Herculean effort to organize this vast body of material into a coherent and comprehensive framework. With some important reservations and criticisms, I conclude that the effort was successful.

A. Description of the Court's Use of the Marketplace of Ideas Theory

As a segue from the discussion of the relevance of free speech theory to an examination of the content of Sedler's attempt to describe the material that he believes actually controls or sets the parameters for the results in free speech cases, I will briefly comment on the section of Sedler's article titled "A Bit of First Amendment Theory: The Marketplace of Ideas."[146] Here, Sedler claims,

> To the extent that the Supreme Court has developed any theory about the meaning of the First Amendment, it is that the First Amendment operates within the framework of a marketplace of ideas. Under this theory, the primary function of the First Amendment is to ensure that all ideas enter the marketplace of ideas and compete with one another, seeking to win acceptance by the public as a whole. This means that, under the First Amendment, there can be no such thing as a false idea, that the

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about the First Amendment would be valuable for others to hear. But, demonstrating the intellectual limitations of Sedler's "Law of the First Amendment," all that he can fairly say within its framework about the most important free speech case in decades is that although *McConnell* upheld the key provision of BCRA, "in the later and highly controversial case of *Citizens United v. Federal Election Commission*, a sharply divided Court" overruled *McConnell*, holding "that the First Amendment protected the right of corporations and labor unions to use corporate and union funds to make expenditures on behalf of political candidates." Sedler, *supra* note 1, at 1072.

144. *See supra* notes 30-49, 78-79, 91-92, 112-14 and accompanying text.

145. Sedler, *supra* note 1, at 1005.

146. *Id.* at 1017-21.

> government cannot keep what it considers to be false ideas out of the marketplace, and that if someone engages in what many of us would consider "bad" speech, . . . then the remedy must be "more speech, not enforced silence."[147]

Sedler notes that this theory was introduced into American free speech jurisprudence by Justice Holmes in his dissent in *Abrams v. United States*,[148] has often been cited, quoted, and relied on by the Court, and thus has become firmly established in First Amendment analysis.[149] He adds that this theory is the basis for the key First Amendment principle that government may not regulate speech because of its content.[150] In addition, he asserts that the theory "does not permit the government to regulate the marketplace to ensure that every idea can compete fairly with every other idea" and that "governmental efforts to regulate the marketplace in order to bring about equal competition . . . are violative of the First Amendment."[151]

Sedler's description of the Court's use of the marketplace of ideas theory is problematic in several respects. He is correct that the Court has often cited Holmes's paean to the "free trade of ideas" as being "the best test of truth" and that this rationale has thus become "firmly establish[ed] . . . in First Amendment analysis."[152] He is mistaken, however, in claiming that "[t]o the extent that the . . . Court has developed any theory about the meaning of the First Amendment," it has been the marketplace of ideas theory.[153] Belying the assertion that the marketplace of ideas is

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147. *Id.* at 1017 (emphasis omitted).

148. *Id.* at 1018 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.")).

149. Sedler, *supra* note 1, at 1019.

150. *Id.* at 1020.

151. *Id.* at 1021 (citing Davis v. FEC, 554 U.S 724, 744 (2008); Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2829 (2011)).

152. Sedler, *supra* note 1, at 1019.

153. *Id.* at 1017. Sedler's qualification "*to the extent* that the Supreme Court has developed any theory about the meaning of the First Amendment" is correct in its implication that the Court has never issued a detailed exposition of the values underlying the American free speech principle. Rather, like Holmes's *Abrams* dissent, the passages in opinions discussing these values or the purpose of the First Amendment are usually fairly short rhetorical statements. *See Abrams*, 250 U.S. at 630. Occasionally, however, opinions do cite academic exposition of free speech theory. *See, e.g.*, N.Y. Times Co. v.

the only theory that the Court has embraced are numerous statements explaining the essential relationship between free speech and democracy. For instance, the Court observed long ago that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system."[154] More recently, the Court has explained that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[155] Indeed, not only has the Court relied on democratic theory as well as the marketplace of ideas rationale to "explain the meaning of the First Amendment,"[156] it is democracy, not the marketplace of ideas or any other norm, that the Court has deemed to be the core free speech value. Thus the Court has explained that because "speech concerning public affairs . . . is the essence of self-government,"[157] such expression

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Sullivan, 376 U.S. 254, 272 n.13, 279 n.19 (1964) (quoting JOHN STUART MILL, ON LIBERTY 15, 47 (1947)). *See also* First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.11 (1978) (quoting THOMAS EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 (1961)); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 765 n.19 (1976) (citing MEIKLEJOHN, *supra* note 142); *N.Y. Times Co.*, 376 U.S. at 297 n.6 (Black, J., concurring) (citing MEIKLEJOHN, *supra* note 142).

154. Stromberg v. California, 283 U.S. 359, 369 (1931). *See also* DeJonge v. Oregon, 299 U.S. 353, 365 (1937) ("[F]ree speech, free press and free assembly . . . maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("The safeguarding of [First Amendment] rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. . . . Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.").

155. Mills v. Alabama, 384 U.S. 214, 218 (1966). *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); Roth v. United States, 354 U.S. 476, 484 (1957). See also the citations in Supreme Court opinions to the works of Alexander Meiklejohn, the preeminent advocate of his time of a democratic theory of the First Amendment, *supra* note 153.

156. *See* Sedler, *supra* note 1, at 1019.

157. *Garrison*, 379 U.S. at 74-75.

"has always rested on the highest rung of the hierarchy of First Amendment values."[158]

Sedler claims that the marketplace of ideas theory "is the foundation of the most important First Amendment principle, that of content neutrality."[159] Sedler is correct that the content neutrality principle (or rule, as I prefer to call it) is a crucially important feature of contemporary free speech doctrine.[160] I do not agree, however, with his implication that the marketplace of ideas theory is the sole foundation for the content-neutrality principle.[161] Another basis for this rule—and, in my view, its central pillar—is the democratic precept of formal equality assuring free and equal participation in the political process. It is this profound commitment that prevents a person from being selectively excluded from

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158. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). *See also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410-11 (2000) (Thomas, J., dissenting) ("I begin with a proposition that ought to be unassailable: Political speech is the primary object of First Amendment protection."). Indeed, it has been argued that Holmes's marketplace of ideas rationale is itself essentially a *democratic* theory. *See* Vincent Blasi, *Propter Honoris Respectum: Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1349, 1351 (1997) (claiming that Holmes's *Abrams* dissent "rests on a vision of the political function of free speech" and "builds on a sophisticated conception of the role of 'the people' in the system of government enacted by the Constitution"). The references to "fighting faiths," to people having "their wishes safely carried out," and to the statement earlier in the dissent that "Congress certainly cannot forbid all effort to change the mind of the country," see *supra* note 148, supports this view. In this regard, it is interesting to note the distinct democratic underpinnings of the passage in Cohen v. California, 403 U.S. 15, 24 (1971), invoked by Sedler as "a more recent emanation" (Sedler, *supra* note 1, at 1019-20) of the marketplace of ideas rationale:

> The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of *public discussion*, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately *produce a more capable citizenry and more perfect polity* and in the belief that no other approach would comport with the premise of individual dignity and choice *upon which our political system rests.*

Cohen, 403 U.S. at 24 (emphasis added). See also Sedler's quotation from *New York State Board of Elections v. Torres*: "The First Amendment creates an open marketplace where ideas, *most especially political ideas*, may compete without government interference." Sedler, *supra* note 1, at 1019 n.69 (citing *Torres*, 552 U.S. 196, 208 (2008) (emphasis added) (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting))).

159. Sedler, *supra* note 1, at 1020. *See also id.* at 1037-38 n.176 ("[T]he theory of the marketplace of ideas is the foundation for the content neutrality principle. The content neutrality principle implements the theory of the marketplace of ideas by ensuring that under the First Amendment, there can be no such thing as a "false idea," and that all ideas, "good" and "bad" must be able to compete in the marketplace of ideas.").

160. *Id.* at 1037.

161. *See id.* at 1020.

voting, [162] or even from having her voting power diluted by malapportionment, [163] or from being prohibited from expressing her views in public discourse—be it about the war in Afghanistan, health care reform, same sex marriage, or a proposed tax hike.

Of course, a claim about the foundation of a judicial principle is not as susceptible to conclusive empirical disproof as is an assertion about whether or not a court has expressly relied on a particular type of theory. Still, the different bases of a commitment to the marketplace of ideas (at least one not premised on a commitment to democratic self-governance[164]) and a commitment to participatory democracy strongly suggest that the foundation of the content-neutrality principle is democracy, not the marketplace of ideas. The marketplace of ideas theory posits that an unregulated market of the free exchange of ideas is the best strategy for discovery of the truth.[165] But such a rationale is concerned with promoting the general social welfare based on the premise that society will be better off if we discover the truth not just about politics but about all matters, including science, engineering, mathematics, and medicine.[166] As a general social welfare concern, however, there is no reason why a commitment to ascertaining the truth through free trade in ideas cannot be outweighed by other general social welfare concerns, such as preventing harm to a nation's war effort caused by vehement anti-war protests or preventing the injury caused by the expression of virulent racist ideas. However, as Sedler correctly realizes, such expression is protected despite the harm it might cause.[167]

A much better explanation of why the First Amendment disallows government from engaging in content discrimination even to prevent significant harm to society is that speech repression of this type infringes an individual right founded in the moral premise of formal equality on

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162. One remaining exception to this modern muscular commitment to political equality is the ability of states to constitutionally disenfranchise convicted felons. *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

163. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 565 (1964) (explaining, in its announcement of the "one person, one vote" standard, that "full and effective participation in state government requires . . . that each citizen have an equally effective voice in the election of members of the state legislature").

164. See *supra* note 93.

165. Sedler, *supra* note 1, at 1041.

166. *Id.*

167. *Id.* at 1085-86. For a further discussion of the shortcomings of the marketplace of ideas rationale as a free speech theory, see Weinstein, *supra* note 14, at 502; C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 897 (2002) (arguing that the "marketplace of ideas theory is fundamentally unsound both normatively and descriptively").

which our political system rests.[168] Accordingly, if someone is barred from vehemently condemning our country's involvement in a war, or from expressing racist or homophobic views in opposition to civil rights legislation, then to that extent and with respect to that citizen, the government is no democracy, but rather an illegitimate autocracy. Crucially, infringement of a fundamental individual right, unlike interference with a general welfare concern, cannot be justified by social welfare concerns, at least not without a showing that the infringement is strictly necessary to achieving some extraordinarily pressing governmental interest.[169] This is not to say that the marketplace of ideas rationale did not play a role in establishing the rule against content discrimination.[170] And it no doubt reinforces and thus strengthens this crucial feature of American free speech jurisprudence.

Sedler claims that the marketplace of ideas theory "does not permit the government to regulate the marketplace to ensure that every idea can compete fairly with every other idea" and that, therefore, "governmental efforts to regulate the marketplace in order to bring about equal competition in the marketplace are violative of the First Amendment."[171] The claim that there is some First Amendment prohibition against regulation of speech to ensure fair competition is both overstated, and in addition, to the extent that such a prohibition does exist, dubiously assigns its basis to the marketplace of ideas rationale.

In support of this claim, Sedler cites two decisions that struck down attempts to equalize the funds available to candidates receiving public funds and candidates self-financing their campaigns.[172] Both of those decisions, however, turned on the finding that the regulations at issue imposed "a substantial burden" [173] on the exercise of the First Amendment right recognized in *Buckley v. Valeo* to use personal funds for campaign speech.[174] This is scant authority for the broad proposition

168. *See supra* notes 50-57 and accompanying text. *See also* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)) (striking down a content-based restriction under the Equal Protection Clause of the Fourteenth Amendment and the First Amendment and explaining that there is "an 'equality of status in the field of ideas'").

169. For the seminal discussion of why fundamental individual rights in our constitutional scheme are and should be considered trumps on general welfare concerns, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

170. Sedler, *supra* note 1, at 1020.

171. *Id.* at 1021.

172. *See* Davis v. FEC, 554 U.S 724 (2008); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

173. *Davis*, 554 U.S. at 740; *Ariz. Free Enter.*, 131 S. Ct. at 2824.

174. 424 U.S. 1, 52-53 (1976).

that the First Amendment disallows *all* regulation, including non-censorial funding schemes, intended to give more prominence to ideas or viewpoints underrepresented in or absent from the marketplace of ideas. To the contrary, there is considerable precedent upholding the validity of regulation designed to serve precisely this purpose.[175]

Moreover, it is perverse to suggest that a commitment to the marketplace of ideas was the basis of the Court's invalidation in the cases that Sedler cites as attempts to regulate speech to bring about fair competition in the marketplaces of ideas. If such regulations would, in fact, bring to the public's attention some idea or information to which they would not otherwise have been exposed, and do so in a way as to not deprive the audience of other perspectives, then far from impairing the functioning of the marketplace of ideas, the regulations would have promoted that goal.[176] So is not surprising that in the campaign cases Sedler cites, the Court did not strike down the regulation at issue because it impaired the truth-seeking goals of the commitment to the marketplace of ideas or otherwise interfered with any audience interests, but because in the Court's view the regulations unduly interfered with *speakers'* constitutionally protected interests.[177]

B. Description of First Amendment Coverage

Sedler correctly recognizes that not all speech is within the purview of the First Amendment and, therefore, that some expression may be regulated or even banned because of its content without any "First Amendment analysis."[178] In attempting to delineate the expression that is

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175. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (upholding federal law that required cable television operators to carry a specified number of local broadcast stations against First Amendment challenge and noting that among the interests served by the law are "promoting the widespread dissemination of information from a multiplicity of sources, and . . . promoting fair competition in the market for television programming"); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369 (1969) (upholding against First Amendment challenge the Federal Communication Commission's "fairness doctrine," which required that "discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage").

176. Accordingly, in upholding the fairness doctrine in *Red Lion*, the Court noted that the regulation promoted the First Amendment purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . ." *Red Lion*, 395 U.S. at 390.

177. *See supra* note 174 and accompanying text. *Accord*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (invalidating as an unconstitutional "intrusion into the function of editors" a Florida law mandating that newspapers grant a right of reply to political candidates criticized by a newspaper).

178. Sedler, *supra* note 1, at 1009.

thus outside the scope of the First Amendment, Sedler employs an interesting and innovative variation on what has been aptly called the "all-inclusive approach."[179] This view posits that "all speech receives First Amendment protection unless it falls within certain narrow categories of expression." [180] According to Sedler, these forlorn categories are (1) unlawful verbal acts, (2) obscenity, (3) child pornography, and (4) government speech.[181] Sedler's position that except for certain narrowly defined categories of expression, all other forms of expression are entitled to First Amendment protection, or at least are within First Amendment coverage, [182] is a widely-shared view. [183] Commonly held position though it may be, the "all-inclusive approach," including Sedler's version, is manifestly inaccurate in its stunted view of expression that is beyond the protection or even the purview of the First Amendment.

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179. Barry P. McDonald, *Government Regulation or Other "Abridgments" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 1009 (2005).

180. *Id.* According to Professor McDonald, the categories of unprotected speech are "incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words, and true threats." *Id.*

181. Sedler, *supra* note 1, at 1009.

182. Unlike the more common statement of the "all-inclusive approach" (*see, e.g.*, *infra* note 183), Sedler more modestly, and thus somewhat more plausibly, does not claim that all speech other than the categorical exceptions is entitled to First Amendment *protection* (i.e., is immune from governmental repression or unduly burdensome regulation). Rather, he claims that that all speech other than the exceptions he mentions is within the scope or *coverage* of the First Amendment in that its regulation "triggers First Amendment analysis" according to "the Law of the First Amendment." As I discuss in the text, however, even this more modest claim is an untenable description of the Court's free speech jurisprudence. For further discussion on the distinction between First Amendment protection and coverage, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267-70 (1981).

183. In addition to McDonald, *supra* note 179, see, for example, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1132 (7th ed. 2004) (stating that other than (1) incitement to imminent violence; (2) "fighting words"; (3) obscenity; (4) child pornography; (5) certain types of defamatory speech; and (6) certain types of commercial speech, the government may not ban speech because of its content unless the regulation passes "strict scrutiny"). For recent Supreme Court dicta reciting a version of the all-inclusive approach, see United States v. Stevens, 130 S. Ct. 1577, 1584-85 (2010) ("The First Amendment provides that Congress shall make no law . . . abridging the freedom of speech. . . . From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas . . . . These historic and traditional categories long familiar to the bar—including obscenity, defamation, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.") (citations omitted) (internal quotation marks omitted).

In addition to the somewhat differing list of exceptions listed by commentators and the Court,[184] consider the large range of expression that is either regulated or outright prohibited on account of its content by securities, antitrust, labor, copyright, food and drug, and health and safety laws; the array of speech regulated by the common law of contract, negligence, and fraud; and the regulation of speech by doctors, lawyers, and other professionals.[185] So employers can be held liable for posting inadequate or erroneous safety information at the workplace; an author for copying another's work; competitors for agreeing to fix prices; lawyers and doctors for giving bad advice; manufacturers for providing erroneous instructions on how to use a product; and contracting parties on the basis of the content of their written or oral agreements—all usually without a hint of First Amendment concern.[186] But rather than belabor my disagreement with the "all-inclusive approach," a position that I have previously criticized,[187] I will conclude this Commentary with some remarks on Sedler's version of this approach.

Sedler's most significant innovation is a considerably shorter list of exceptions from First Amendment coverage or protection than are contained in other statements of the all-inclusive approach. This is because the first category on his list, "unlawful verbal acts"—that is, unlawful acts "carried out" by means of speech or writing[188]—combines many of the exceptions on other lists, such as "fighting words," true threats, and advertisements for illegal activities.[189] Even more helpfully, it covers categories of expression that do not often appear on such lists, such as perjury, bribery, and illegal solicitation,[190] but which are plainly not within the coverage of the First Amendment.[191]

I applaud Sedler's ambition to find some rationale that ties together several of the seemingly disparate categories of speech not covered by the First Amendment. His approach seems to work well enough for perjury, bribery, and illegal solicitation; however, it runs into trouble in its extension to "fighting words," that is, speech directed from one person to another in face-to-face encounters that are "likely to provoke

184. *See supra* notes 180, 183, and text accompanying note 181.

185. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768, 1778-84 (2003). *See also* Weinstein, *supra* note 80, at 1097-98.

186. *Id.*

187. *See* Weinstein, *supra* note 14, at 491-92.

188. Sedler, *supra* note 1, at 1009-10.

189. *Id.* at 1009-11. *See supra* notes 12-13.

190. I assume that Sedler means solicitation to engage in an illegal act such as murder or prostitution.

191. Sedler, *supra* note 1, at 1010.

the average person to retaliation and thereby cause a breach of the peace."[192] And although not mentioned by Sedler, another harm noted by the Court in excluding fighting words from the First Amendment coverage is the psychic injury that such speech is likely to inflict on the listener.[193] But if speech by which unlawful activity is "carried out" includes speech that is likely to cause the audience to engage in some harmful conduct, such as physical retaliation, or to inflict emotional injury on the audience, then Sedler's category of "unlawful verbal act" exceptions becomes much too capacious to accurately describe current doctrine. It would, for instance, include the expression of virulent racist ideas that are likely to persuade others to discriminate against vulnerable minorities, or to inflict emotional distress on minorities who encounter such expression. But as Sedler accurately notes, racist speech as part of public discourse is protected speech.[194]

Evidently realizing that his initial specification of "unlawful verbal acts" as unlawful activity "carried out" by speech or writing is far too slippery and much too broad, Sedler adds the caveat that the category "does not involve the expression of an idea or the discussion of matters of public interest."[195] For example, because the harm arising from expression constituting defamation, invasion of privacy, or the intentional infliction of emotional distress "resulted from the expression of an idea or the discussion of matters of public interest," these categories of speech do not come within his "unlawful verbal act" exception.[196] In light of my view that free speech is primarily in service to democratic participation, I am sympathetic to Sedler's desire to limit this category of expression unworthy of First Amendment coverage to speech that does not involve "the discussion of matters of public interest."[197] Still, I do not believe that this criterion should *always* be sufficient to warrant First Amendment coverage. For instance, while I agree that defamation should come within First Amendment coverage if part of a "discussion of matters of public interest," I do not believe that the same should be the case with respect to true threats. Thus, a serious threat against the life of the President does not, in my view, warrant First Amendment coverage just because it is made as part of a diatribe against how the President is governing the country.

192. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).
193. *Id.* at 572.
194. Sedler, *supra* note 1, at 1040.
195. *Id.* at 1011.
196. *Id.* at 1012.
197. *Id.*

But whatever might be said about exempting "discussion of matters of public interest" from the category of "unlawful verbal acts," stipulating that this category does not apply to speech or writing that involves "the expression of an idea" would effectively nullify the entire category.[198] Almost any form of human communication expresses an idea, albeit in varying degrees of specificity or articulateness. This is true even of Sedler's prime example (borrowed from Holmes) of falsely shouting "fire!" in a crowded theater.[199] It is certainly true, as Sedler asserts, that someone who makes such a statement is "trying to induce panic as an automatic response."[200] But trying to induce an automatic response and the expression of an idea are by no means mutually exclusive categories. So it simply does not follow, as Sedler claims, that someone who falsely shouts fire in a theater in order to induce panic is therefore "not trying to convey an idea."[201] To the contrary, such an exclamation conveys a very precise idea, namely that the theater is on fire.

Sedler apparently believes that statements that attempt to "induce . . . an automatic response"[202] nullify the ideational content of the statement. But this is a most dubious proposition. If the theater were in fact on fire, I doubt Sedler would maintain that the cry of "fire" is "not trying to convey an idea" even though the exclamation is trying to induce an automatic response from the audience. So it seems that it is the falsity of the statement, along with severe harm that such exclamations are likely to cause, and not the lack of ideational content of the statement, that are the primary reasons that falsely crying fire in a theater and like statements are unprotected and are most likely even beyond First Amendment coverage. The fact that the statement "tries to induce . . . an automatic response" is relevant to this determination only because in this context there is no time for the audience to evaluate the truth or falsity of the statement.

Admittedly, shouts of "fire!" in a theater (whether true or false) are not invitations to rational deliberation and thus are quite different from typical arguments for or against a proposition. But as a descriptive matter, it is simply inaccurate to say that those who in engage in such false and harmful exclamations are not "trying to convey an idea." And as a normative matter, I think it is a mistake to suggest that speech intended to "induce . . . an automatic response" is not within the

198. *See id.* at 1011.
199. *Id.*
200. Sedler, *supra* note 1, at 1011.
201. *Id.*
202. *Id.*

coverage of the First Amendment or is, for this reason, entitled even to a lesser degree of protection. Such a position would put into question the rights of anti-abortion protestors to display pictures of aborted fetuses as well as the rights of those who want to distribute or use pornography for purposes of sexual arousal.[203]

As with falsely shouting "fire!" in a theater in order to induce a panic, the use of "fighting words," such as calling someone a "damned fascist" and a "damned racketeer,"[204] or the host of other epithets that people commonly hurl to others in anger, surely express an idea, as do threats to kill or injure someone. So, while Sedler's attempt to find a common theme for several of the traditional exceptions from First Amendment coverage is commendable, it is not, alas, successful.

A more fruitful innovation in Sedler's statement of the all-inclusive approach is the designation of "government speech" as a categorical exception from First Amendment coverage.[205] Government speech is indeed immune from all of the "First Amendment analysis" applicable to governmental regulation of speech, even from the otherwise unbending rule against viewpoint discrimination.[206] Thus, Sedler should be credited for his insight in categorizing this speech as not within First Amendment coverage. I do not, however, agree with his assertion that under current First Amendment doctrine, grants to artists provided by the National Endowment of the Art are "government speech," such that any funding condition imposed by that program does not trigger any "First Amendment analysis."[207] Sedler is also mistaken in classifying the expressive activity by officially recognized student groups at public

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203. *See* James Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 887-88 (2007).

204. These epithets were involved in Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

205. Sedler, *supra* note 1, at 1015.

206. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 464 (2009) (holding that "government speech" is "not subject to scrutiny under the Free Speech Clause").

207. *See* Sedler, *supra* note 1, at 1015. The case on which Sedler relies is National Endowment of the Arts v. Finley, 524 U.S. 569 (1998), a challenge to a content-based (arguably viewpoint-based) funding condition on grants to artists. In that case, only Justice Scalia's concurrence took the position that funding conditions do not trigger any First Amendment analysis, but he did so not on the grounds that "government speech" was involved, but because the funding condition at issue, which he found to be clearly viewpoint-based, did not "abridge" anyone's right of free speech. *Id.* at 590-600 (Scalia, J., concurring). In contrast, the majority opinion applied "First Amendment analysis" in rejecting the facial challenge to the funding condition, as did Justice Souter's dissenting opinion, which found the condition facially unconstitutional. *Id.* at 572-73; *id.* at 600 (Souter, J. dissenting).

universities as government speech. [208] Rather, in analyzing the constitutionality of such a regulation in the case cited by Sedler, the Court applied "the First Amendment analysis" applicable to regulation of speech in a limited public forum.[209]

The disagreements that I have noted in this section should not obscure what is, on the whole, a successful effort by Professor Sedler to describe "the body of concepts, principles, specific doctrine, and precedents in particular areas of First Amendment activity that has emerged from the collectivity of the Supreme Court's decisions in First Amendment cases over a long period of time."[210] Producing such a "Law of the First Amendment" is a formidable task, and Sedler should therefore be justly proud in delivering an insightful, well-organized account of the First Amendment. The work usefully fills a gap between First Amendment study guides and constitutional laws treatises, thus providing a readily-available and inexpensive account of the Supreme Court's free speech jurisprudence useful to judges, lawyers, and perhaps most of all, to law students.[211]

208. *See* Sedler, *supra* note 1, at 1016 (citing Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010)).

209. *See Christian Legal Soc'y*, 130 S. Ct. 2971.

210. Sedler, *supra* note 1, at 1084.

211. With Sedler's permission, I assigned a draft of *The "Law of the First Amendment" Revisited* to the students in my First Amendment seminar. The students uniformly reported that they found the article to be helpful to their understanding of free speech doctrine.