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James Weinstein

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# FOOLS, KNAVES, AND THE PROTECTION OF COMMERCIAL SPEECH: A RESPONSE TO PROFESSOR REDISH

*James Weinstein\**

## I. INTRODUCTION

An unfortunate tendency among some legal academics is to become so persuaded by their own arguments that they conclude that anyone who does not agree with them must be either a fool or a knave. Professor Martin H. Redish's contribution to this Symposium provides a good example of this phenomenon. Redish believes that his argument that commercial speech deserves full First Amendment protection is so ironclad that anyone who continues to resist its force is either "illogical"<sup>1</sup> or is engaged in invidious "viewpoint discrimination" grounded in "ideological hostility to the premises of capitalism and commercialism."<sup>2</sup> This claim is much too overstated to be tenable.

Now, some who oppose strong First Amendment protection for commercial speech<sup>3</sup> may do so out of hostility to capitalism and

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\* Amelia D. Lewis Professor of Constitutional Law, Sandra Day O'Connor College of Law at Arizona State University. I am grateful to Larry Alexander, Ed Baker, Arthur Hellman, Robert Post and Marty Redish for their helpful comments and criticisms in reviewing earlier drafts of this article, and to David Ferrucci for his valuable research assistance.

1. Martin H. Redish, *Commercial Speech, First Amendment Intuition and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007); see *infra* text accompanying notes 21–22.

2. *Id.* at 130–31 ("It is time to recognize opposition to commercial speech protection for what it all too often is: a form of ideological hostility to the premises of capitalism and commercialism.").

3. *Id.* The Supreme Court has offered various definitions of commercial speech, but the one that it usually employs is speech that "does 'no more than propose a commercial transaction.'" *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburg Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)); accord Redish, *supra* note 1, at 75 ("It is probably reasonable to conclude that, at this point, the Court has unambiguously adopted the view that commercial speech is confined to expression advocating purchase."). In any event, this is what I mean by the term "commercial speech" as used in this article.

commercialism.<sup>4</sup> But there are simply too many people whose opposition to extending “full” protection to commercial speech is obviously not infected with any such animus for Redish’s broad-based charge to be plausible. For instance, Chief Justices William Rehnquist<sup>5</sup> and Warren Burger, Justices Lewis Powell, Potter Stewart, Byron White,<sup>6</sup> Sandra Day O’Connor,<sup>7</sup> and Judge Richard

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The currently applicable test for regulating commercial speech is set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). Under this test, to come within the coverage of the First Amendment, commercial speech “must concern lawful activity and not be misleading.” *Id.* But even if the speech thus comes within the coverage of the First Amendment, a content-based regulation will nonetheless be valid if the government can show that it has a “substantial” interest for regulating the speech; that the “regulation directly advances the governmental interest asserted”; and that the regulation “is not more extensive than is necessary to serve that interest.” *Id.* This is a form of “intermediate scrutiny.” See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). Several Justices have criticized the application of the *Central Hudson* test to bans on “truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process” and would instead apply “rigorous review” to such regulations. 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); see also *id.* at 518 (Thomas, J., concurring) (arguing that a governmental interest in “keep[ing] legal users of a product or service ignorant in order to manipulate their choices in the marketplace” is “per se illegitimate”) (emphasis omitted). Nonetheless, *Central Hudson* remains the standard for assessing the validity of content-based restrictions on commercial speech. See, e.g., *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 184 (1999) (noting that although *Central Hudson* has been criticized by judges, scholars and litigants, the test is “an established part of our constitutional jurisprudence” and “provides an adequate basis for decision” in this case).

4. For instance, Professor Steven Shiffrin’s remarks at the conference on which this symposium is based suggest that his view that commercial speech should receive limited First Amendment protection may be influenced by antipathy towards commercialism. (“Two hundred and sixty-five billion dollars are spent on advertising. That, it seems to me, contributes to exactly the kind of citizens who are materialistic, hedonistic, not much caring to participate in politics, and the value of commercial speech, it seems to me, is problematic.”). Steven Shiffrin, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb. 23–24, 2007), in *Thoughts on Commercial Speech: A Roundtable Discussion*, 41 *LOY. L.A. L. REV.* 333, 347 (2007); see also Steven H. Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 *NW. U. L. REV.* 1212 (1983) (“[A] basis for the discrimination [between commercial and non-commercial speech] is that commercial speakers are lining their pockets, seeking profit, and treating people as objects for exploitation while political and religious speakers are advancing a cause and seeking personal contact. Obviously this rationale is both overinclusive and underinclusive . . . . [But it contains] some appeal as a general matter.”).

5. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 404 (1977) (Rehnquist, J., dissenting) (“I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that appellants’ advertisement . . . is not the sort of expression that the Amendment was adopted to protect.”).

6. In *Central Hudson*, over Justices Harry Blackmun and William Brennan’s objection that the Court’s test did not provide “adequate protection for truthful, nonmisleading, noncoercive commercial speech,” 447 U.S. at 573 (Blackmun, J., concurring), Chief Justice Burger and Justices Stewart, White, (as well as Marshall) joined Justice Powell’s majority opinion, which

Posner<sup>8</sup> have all gone on record against extending “full” protection to commercial speech.<sup>9</sup> Are we really to believe that it was antipathy

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developed the test of “intermediate” scrutiny still applicable to regulation of commercial speech. *See id.* at 566 (majority opinion).

7. During her tenure on the Court, Justice O’Connor consistently supported less than “full” protection for commercial speech. *See, e.g., Fla. Bar*, 515 U.S. at 623 (“We have always been careful to distinguish commercial speech from speech at the First Amendment’s core. ‘[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’” (alterations in original) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978))). And in *44 Liquormart*, Justice O’Connor declined to join Justice Stevens’s opinion urging “rigorous review” of bans on the dissemination of truthful, nonmisleading commercial speech “for reasons unrelated to the preservation of a fair bargaining process,” 517 U.S. at 501 (opinion of Stevens, J., joined by Kennedy & Ginsburg, JJ.), and instead applied the *Central Hudson* test. *See id.* at 529–34 (O’Connor, J., concurring, joined by Rehnquist, C.J. and Souter & Breyer, JJ.).

8. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 39–40 (1986) (“Also sensible from an economic standpoint is the lesser protection given to speech or writing that is intended as commercial advertising . . . . A more radical proposition is possible: that there should be no *constitutional* protection for commercial advertising.”).

Other commentators whom no one could reasonably accuse of harboring anti-capitalist sentiments would similarly deny ordinary commercial speech the same protection as political speech. *See, e.g.,* Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 355 (1978) (“The Court’s extension of first amendment protection to the commercial speech situations that have arisen so far, because it is not justified either by principle or by pragmatic or institutional concerns related to principle, must be characterized as illegitimate.”); Robert H. Bork, *Activist FDA Threatens Constitutional Speech Rights*, LEGAL BACKGROUNDER (Washington Legal Foundation, Jan. 19, 1996), [http://www.aei.org/publications/pubID.18934,filter.social/pub\\_detail.asp](http://www.aei.org/publications/pubID.18934,filter.social/pub_detail.asp) (arguing for protection of truthful, nonmisleading commercial advertising based on the original understanding of the First Amendment, but noting that consistent with the common law tradition against commercial misrepresentation that “[t]he government may act to police the veracity of commercial speech, whereas its ability to regulate ‘false’ or misleading political speech is far more constrained”).

For what it’s worth, I count myself among those who favor capitalism, market solutions, and free trade, but who do not believe that commercial speech is entitled to “full” First Amendment protection. For a discussion of the meaning of “full” First Amendment protection, *see infra* text accompanying note 31.

9. Justice Scalia, someone else whom we can confidently acquit of hostility towards capitalism and commercialism, has also frequently applied or joined in opinions that apply the *Central Hudson* test. *See, e.g., Fox*, 492 U.S. at 477 (applying *Central Hudson* to uphold a ban on the selling of commercial products in dormitories, and explaining that the “no more extensive than reasonably necessary” requirement does not impose the “least restrictive” alternative requirement proper to strict scrutiny). However, in *44 Liquormart*, Scalia expressed “discomfort” with the *Central Hudson* test, which seemed to him “to have nothing more than policy intuition to support it.” 517 U.S. at 517 (Scalia, J., concurring). In his view, the proper level of protection for commercial speech should be determined by the legislative practices prevalent at the time that the First and Fourteenth Amendments were adopted. Since the briefs and arguments of the parties in *44 Liquormart* did not address this issue, he applied the *Central Hudson* test. *Id.* at 517. *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring in part), in which Justice Scalia joined Justice Kennedy’s expression of “concern” that the *Central Hudson* test “gives insufficient protection to truthful, nonmisleading commercial speech.”

toward capitalism and commercialism that lead this bevy of conservative and moderate jurists to support less than strict scrutiny for regulation of commercial speech?<sup>10</sup> Or that all those courts in the various jurisdictions throughout the world that give commercial speech less protection than political expression—including the European Union,<sup>11</sup> the United Kingdom,<sup>12</sup> Germany,<sup>13</sup> Australia,<sup>14</sup> and Canada<sup>15</sup>—are infected by hostility towards capitalism and commercialism?

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10. Redish seeks to explain away these numerous and thus fatal counterexamples to his thesis by arguing that these jurists and scholars have a “skimpy” and “grossly underprotective” view of free speech. See Redish, *supra* note 1, at 122. While this may explain Rehnquist and Bork, it does not account for Powell, Burger, O’Connor, White, Scalia, BeVier, or Posner, or the host of other jurists and scholars who have at least a modestly broad view of free speech protection but do not believe that commercial speech is deserving of the highest degree of judicial protection.

Indeed, no Justice of the Supreme Court has advocated “full” protection in the sense that Redish uses the term. Contrary to even those Justices most protective of commercial speech (and Robert Bork as well, see *supra* note 8), Redish believes that commercial speech and political expression should be treated identically. Thus, he has previously argued that “false commercial speech, much like most false political speech, should be measured by the ‘actual malice’ test of *New York Times Co. v. Sullivan*.” Redish, *supra* note 1, at 75 n.27 (citation omitted) (citing MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 55–56 (2001)). Though for the sake of “intellectual simplicity” Redish focuses his critique in this Symposium to those who argue for no or reduced protection for truthful commercial speech, see Redish, *supra* note 1 at n.27, his position that commercial and political speech should be treated identically even with respect to false statements raises the question of whether Redish believes that to the extent they disagree with this position the entire membership of the United States Supreme Court, both past and present, are also guilty of furtive viewpoint discrimination.

11. *Church of Scientology v. Sweden*, App. No. 7805/77, 16 Eur. Comm’n H.R. Dec. & Rep. 68, 73 (1979) (“Although the Commission is not of the opinion that commercial ‘speech’ as such is outside the protection conferred by Article 10 (1), it considers that the level of protection must be less than that accorded to the expression of ‘political’ ideas . . .”).

12. See *R. v. Adver. Standards Auth.*, [2000] E.H.L.R. 463, 472 (H.C.) (“The indications are that commercial expression is not regarded as so worthy of protection as political or even artistic expression . . .”).

13. See Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1583–84 (2004) (“[N]o commercial speech doctrine exists in Germany; the Federal Constitutional Court has sustained both legislation limiting advertising by pharmacies and banning advertising by physicians on the theory that commercial advertising does not implicate Article 5 [the provision of the Basic Law of the Federal Republic of Germany governing freedom of expression] values in a meaningful way.”).

14. See *Theophanous v. Herald & Weekly Times Ltd.*, (1994) 182 C.L.R. 104, 124 (Austl.) (“[S]peech which is simply aimed at selling goods and services and enhancing profit-making activities will ordinarily fall outside the area of constitutional protection.”).

15. Although “there is no distinctive ‘commercial speech doctrine’ as there is in the United States,” the Supreme Court of Canada “takes the value of the expression into account when determining whether its restriction is justified under section 1 of the Charter; commercial expression is entitled to less weight than political speech.” ERIC BARENDT, *FREEDOM OF SPEECH*

These numerous examples belying Redish's broad charge of viewpoint discrimination reflect the various legitimate grounds for denying commercial speech the extremely rigorous protection afforded political expression, including the fact that "restrictions" on commercial speech "do not often repress individual self-expression; they rarely interfere with the functioning of democratic political processes; and they often reflect a democratically determined governmental decision to regulate a commercial venture in order to protect, for example, the consumer, the public health, individual safety, or the environment."<sup>16</sup> In addition, there is greater reason to mistrust government when it seeks to regulate speech critical of it or its policies than when it regulates ordinary commercial advertising.<sup>17</sup> Of course, it is perfectly appropriate to argue, as Redish does, that none of these reasons for giving commercial speech less protection than political speech is persuasive, either alone or in combination. But it does not do much to advance the inquiry to claim further that

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406–07 (2d ed. 2005) (citing the judgment of McLachlin, J., in *Royal College of Dental Surgeons of Ontario v. Rocket*, [1990] 71 D.L.R. 68, 75, 79).

16. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting). Regulation of commercial speech does not "often repress individual self-expression" because, as I have explained, the First Amendment is concerned primarily with the expressive rights of individuals, not collective entities such as ordinary business entities. See James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1115–16 (2004). Redish correctly notes that "the values of free speech can be fostered by the receipt, as well as by the communication, of expression." Redish, *supra* note 1, at 87. But he is wrong when he insists further that "then it should logically make no difference whether the speaker itself deserves the benefits of the constitutional protection." *Id.* As I explain in greater detail below, when there is no constitutionally relevant speaker, then the speech at issue is usually valued only instrumentally, not because it is constitutive of some core free speech norm such as the right to participate in the political process. See *infra* text accompanying notes 58–61.

17. Redish argues that because "the legislative regulatory process is fraught with dangers of rent-seeking or improper influence by special interests and private parties," there is "no reason to believe that these dangers are any less when the subject of regulation is commercial, rather than political, behavior." Redish, *supra* note 1, at 94. He thus suggests that a legislature "captured" by a particular industry might pass laws invidiously restricting the advertising of competitors of this favored industry. *Id.* I have no doubt that Redish is correct that legislatures sometimes corruptly favor one economic interest over another, and might even do so by selective suppression of commercial advertising. It is even possible, though I think extremely unlikely, that for this reason Redish is right that the danger of the government illegitimately suppressing political speech is no greater than the risk of it improperly suppressing commercial speech. But in the absence of conclusive proof of this assertion, Redish simply has no basis to accuse those who do not agree with this highly counterintuitive surmise of holding a "logically indefensible" and thus "viewpoint driven" position. Redish, *supra* note 1, at 122. His analogy to those who would support something as truly logically indefensible as the suppression of anti-war but not pro-war literature on Michigan Avenue during rush hour, *id.* at 71–72, 115, is therefore singularly inapt.

virtually everyone who holds that view is motivated by hostility to capitalism and commercialism.<sup>18</sup>

Redish's charge is reminiscent of the similarly provocative but equally untenable accusations that opponents of affirmative action are motivated by racist animus, or that advocates of a sharp separation of church and state are hostile to religion. No doubt some of those who oppose preferential law school admission for minorities are racists, just as some of those who oppose prayer in public school are hostile toward religion. But the host of legitimate reasons for opposing either of these practices, together with the intractable problem of determining what truly motivates people in holding various beliefs, makes broad accusations such as these both unfair and unhelpful to a constructive dialogue. Similarly, the various legitimate and plausible reasons supporting the view that commercial speech should be afforded less protection than political speech are sufficient to rebut the charge that those who advocate less than "full" protection for commercial speech are engaged in invidious viewpoint discrimination.<sup>19</sup> In any event, this is basically all I have to say about Redish's grossly overstated charge that opposition to commercial speech protection usually reflects a form of ideological hostility to capitalism and commercialism.

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18. Indeed, far from evincing hostility to capitalism and commercialism, the view that commercial speech should be subject to greater regulation than political speech might be motivated by the belief that false or misleading commercial speech should be strictly forbidden because it impairs the efficient functioning of free markets; but that forbidding false or misleading political speech, which though in theory is similarly inimical to the political process, would be both dangerous and impractical.

19. More tenable is the particularized charge of viewpoint discrimination leveled against those who exclude commercial speech from an otherwise very broad view of speech protection. See Redish, *supra* note 1, at 71–72; see also *infra* text accompanying notes 23–27 (discussing the view that all speech is entitled to full First Amendment protection). Redish would have been on much firmer ground if he had limited his accusation of invidious viewpoint discrimination to such jurists and scholars. Although I might have doubts about whether even this more limited charge of bad motivation would be useful, I do agree that those who thus single out commercial speech for lesser protection have, in the immortal words of Ricky Ricardo, "some 'splainin' to do."

In this regard it is interesting to note that, at least among Supreme Court Justices, there do not seem to be any good candidates for such viewpoint discriminatory motivation. To the contrary, those Justices who broadly extend rigorous protection to speech (e.g., Justices Brennan, Blackmun, Stevens, Kennedy, and Ginsburg) have also been among those who have urged greatest protection for commercial speech. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 573–79 (1980) (Blackmun, J., concurring, joined by Brennan, J.); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501–04 (1996) (opinion of Stevens, J., joined by Kennedy & Ginsburg, JJ.).

More worthy of extended discussion is Redish's argument directed toward those opponents of "full" protection for commercial speech who he acknowledges might not be engaged in such invidious viewpoint discrimination. Redish thus allows that it might not be unprincipled for "one starting from the premise that the First Amendment is primarily or exclusively designed to protect speech relevant to the political process" to conclude that commercial speech deserves "little or no First Amendment protection."<sup>20</sup> But while such a position may not, according to Redish, evince "furtive" viewpoint discrimination,<sup>21</sup> it is nonetheless in his view an "illogical" position that "makes absolutely no sense" because individual and collective self-governance are both "grounded in identical normative concerns about self-development and self-determination."<sup>22</sup>

As I will show, the opportunity to participate in the speech by which collective decisions are made promotes the core democratic precepts of equality and legitimacy, which are "normative concerns" quite different from the values promoted by the protection of commercial speech. Thus, far from being "illogical," the position that ordinary commercial speech should be afforded less protection than political expression flows from the view that the core First Amendment value is democratic self-governance, not, as Redish believes, self-realization. But before examining the relationship between collective and individual self-governance in more detail, it is necessary first to discuss the structure of free speech doctrine and its underlying values. This discussion will, in addition, help clarify what is meant by "fully protected" speech, an ambiguous term that plays a crucial role in Redish's critique.

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20. Redish, *supra* note 1, at 80–81.

21. *Id.* at 122. Redish's allowance that there may be an exception from his charge that those who oppose full protection of commercial speech are engaged in viewpoint discrimination is, however, an extremely narrow one. In his view, even those who believe that the First Amendment is primarily designed to protect speech relevant to the political process are guilty of ideological hostility toward capitalism and commercialism if they do not also include publications such as *Consumer Reports* as unworthy of "full" First Amendment protection. *See id.* at 122–23. Like his broader claim on viewpoint discrimination, this attempt to impose a shibboleth to detect hostility toward capitalism and commercialism among those who believe that the primary purpose of free speech is to protect political speech is unpersuasive. However, because this charge requires an examination of what is meant by "full" First Amendment protection, *see infra* text accompanying notes 31, I will postpone further discussion of this point until after that discussion. *See infra* note 75.

22. Redish, *supra* note 1, at 81.



## II. FREE SPEECH STRUCTURE AND VALUES

## A. Structure

Under a commonly held view aptly dubbed the “All Inclusive Approach,”<sup>23</sup> “all speech receives First Amendment protection unless it falls with[in] certain narrow categories of expression . . . such as incitement of imminent illegal conduct, intentional libel, obscenity, child pornography, fighting words, and true threats.”<sup>24</sup> On this view, unless the speech falls into one of these forlorn categories, any law that regulates speech because of its content will be subject to strict scrutiny.<sup>25</sup> This appears to be the view that Redish takes of the structure of free speech doctrine.<sup>26</sup> Under the All Inclusive Approach, the failure to treat commercial speech as “fully protected speech” would certainly seem anomalous and would raise the question of why commercial speech is singled out for discriminatory treatment.<sup>27</sup>

The All Inclusive Approach is not, however, an accurate description of the structure of free speech doctrine.<sup>28</sup> In addition to the traditional exceptions already mentioned, one need only consider

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23. 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).

24. *Id.* I previously published a substantially similar critique of the All Inclusive Approach in James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493, 535–36 (2007).

25. McDonald, *supra* note 23, at 1009. For other statements of the All Inclusive Approach, or variations of it, see, for example, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.47, at 1226 (6th ed. 2000) (“A content-based restriction of [speech] is valid only if it fits within a category of speech that the First Amendment does not protect, for example, obscenity.”), and EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES, AND POLICY ARGUMENTS 2 (2001) (stating that besides the traditional “exceptions,” the settings in which government may regulate the content of speech are confined to those in which it is acting as proprietor or educator rather than as sovereign).

26. As a normative matter, Redish would go even further and afford “full” protection to all human expression, even those categories excluded by the All Inclusive Approach. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 625–29 (1982).

27. See Redish, *supra* note 1, at 70.

28. See JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 40–43 (1999); Weinstein, *supra* note 24, at 535–36; see also Garcetti v. Ceballos, 126 S. Ct. 1951, 1973 (2006) (Breyer, J., dissenting) (“Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government’s speech-related restrictions differently depending upon the general category of activity.”).

the large range of speech regulated by securities, antitrust, labor, copyright, food and drug, and health and safety laws, together with the array of speech regulated by the common law of contract, negligence and fraud, all without a hint of interference from the First Amendment, to quickly realize that there is a multitude of “exceptions” beyond the few recognized by the All Inclusive Approach.<sup>29</sup> A more accurate snapshot of First Amendment protection is almost the photonegative of the All Inclusive Approach: highly protected speech is the exception, with most other speech being regulable with no discernable First Amendment constraint,<sup>30</sup> or, like commercial speech, receiving some, but not the most rigorous, protection.

So if by “full” First Amendment protection Redish means the intense scrutiny that would be applied, for instance, to an ordinance that prohibited anyone speaking on a street corner or in a public park from criticizing the war in Iraq, then there is nothing anomalous about extending less than “full” protection to ordinary commercial speech. As Professor Robert Post has demonstrated, and I discuss in more detail elsewhere, this extremely rigorous protection applies primarily within the domain of “public discourse”<sup>31</sup>—that is, to expression on matters of public concern in settings dedicated or essential to democratic self-governance, such as books, magazines, films, the Internet, or in public forums such as the speaker’s corner of the park. It is in this realm that the people, the ultimate source of political authority in a democracy, can freely examine and discuss the rules, norms, and conditions that constitute society. If, to the

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29. 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 16, at 1097–98.

30. See Schauer, *supra* note 29, at 1768 (observing that “even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communication reveals that the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule”); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 21 n.15 (“Constitutional lawyers often . . . say that all constraints on speech are banned in principle, and that exceptions must be justified, one by one, as special. But the vast range of acts of speech that are plainly not protected by the First Amendment makes it analytically clearer to say that it is protected speech that is special.”). For a trenchant criticism of the All Inclusive Approach, both generally and as a method for determining the protection afforded scientific speech, see Robert C. Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 715–17 (2000).

31. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 604 (1990); Weinstein, *supra* note 16, at 1096.

contrary, government were allowed to manage the content of this discussion, either by excluding certain ideas as wrong, offensive, or even dangerous, or by setting the agenda, the opinion formed by public discussion would reflect not the will of the people, but the preferences of those temporarily entrusted to govern society.<sup>32</sup>

However, precisely because public discourse in the United States is so strongly protected, the realm dedicated to such expression cannot be conceived as covering the entire expanse of human expression. Just as it is imperative in a democracy to have a realm in which any idea can be questioned as vituperatively as the speaker chooses, there must be other settings in which the government may efficiently carry out the results yielded by the democratic process. Thus, in settings dedicated to some purpose other than public discourse—such as those dedicated to effectuating government programs in the government workplace,<sup>33</sup> the administration of justice in the courtroom,<sup>34</sup> or instruction in public schools<sup>35</sup>—the government has far greater leeway to regulate the content of speech.<sup>36</sup>

This pattern of highly protected speech within public discourse and readily regulable speech outside that domain is perhaps most starkly apparent with respect to First Amendment limitations on defamation suits. When allegedly defamatory speech concerns a

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32. As James Madison declared in denouncing the Alien & Sedition Act, “The people, not the government, possess the absolute sovereignty.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 569–70 (1876)).

33. *See, e.g., Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that the discharge of assistant district attorney for criticism of her superior did not violate the First Amendment).

34. *See Jackson v. Bailey*, 605 A.2d 1350, 1359 (Conn. 1992) (upholding a contempt conviction for using profanity in the courtroom); *State v. Lingwall*, 637 N.W.2d 311, 315 (Minn. Ct. App. 2001) (same); *Dargi v. Terminex Int’l Co.*, 23 S.W.3d 342, 346 (Tenn. Ct. App. 2000) (upholding contempt conviction for use of profanity during a deposition).

35. *See Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (upholding against First Amendment challenge discipline of a student for holding up a banner at a school sponsored event that could be reasonably regarded as advocating drug use); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (rejecting a First Amendment challenge by a student suspended for using “offensively lewd and indecent speech” at a high school assembly); *Bonnell v. Lorenzo*, 2001 FED App. 0057P at 36–37 (6th Cir.) (holding that a university instructor’s suspension for using profane language in class did not violate the First Amendment).

36. *See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 200–01 (1995) (noting that unlike in the “public realm[,] . . . in which all goals or objectives are open to discussion and modification[,]” in nonpublic forums or “managerial” domains, the state is “permitted to regulate speech as necessary to achieve certain specified objectives”).

public official or figure, stringent First Amendment protection applies;<sup>37</sup> similarly, even when the speech is about a private person, considerable First Amendment protection is available if the speech is on a matter of public concern.<sup>38</sup> But if the speech addresses a matter of purely private concern, no First Amendment limitations restrain the normal operation of defamation law.<sup>39</sup>

This special constitutional immunity for speech on matters of public concern was extended to the criminal law in *Bartnicki v. Vopper*,<sup>40</sup> which involved a federal law making it a crime to intercept cellular telephone conversations or publish the contents of such a conversation if the publisher had reason to know that the conversation had been illegally intercepted.<sup>41</sup> The Supreme Court held that because the illegally intercepted conversation at issue in that case was “truthful information of public concern,” it was unconstitutional to impose either civil or criminal liability on someone (not involved with the illegal intercept) for publishing the contents of the conversation.<sup>42</sup> The Court noted, however, that such immunity might not attach if the conversation was of purely private concern.<sup>43</sup> This pattern of highly protected speech within public discourse but readily regulable speech outside that realm is repeated throughout free speech doctrine.<sup>44</sup> Whatever other First Amendment

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37. See *Sullivan*, 376 U.S. at 283.

38. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974).

39. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761–63 (1985).

40. 532 U.S. 514 (2001).

41. *Id.* at 520.

42. *Id.* at 533–34.

43. *Id.* at 533 (“We need not decide whether [such First Amendment immunity would attach] to disclosures of trade secrets or domestic gossip or other information of purely private concern.”); see *id.* at 535–36 (Breyer & O’Connor, JJ., concurring) (joining the Court’s opinion because of its “narrow” holding) (“[T]he information publicized involved a matter of unusual public concern, namely, a threat of potential physical harm to others.”).

44. For example, 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, 439 (1978) (holding that 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, 455–56 (1978) (finding no First Amendment bar to discipline of lawyer for in person solicitation of clients in ordinary personal injury case). Similarly, politically motivated economic boycotts receive rigorous First Amendment protection, while ordinary economic boycotts receive no First Amendment protection whatsoever. Compare *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–12 (1982) (holding the First Amendment protects speech related to boycott seeking to bring about racial integration and equality), with *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426–28 (1990) (holding the First Amendment does not protect boycott by lawyers aimed at increasing their own compensation).

value it may have, speech that “does no more than propose a commercial transaction”<sup>45</sup> is not part of the speech by which we govern ourselves.<sup>46</sup> Accordingly, when viewed against the background of the massive amount of speech that is entitled to no or limited First Amendment protection, the fact that ordinary commercial speech is not entitled to the rigorous protection primarily reserved for public discourse seems neither anomalous nor suspicious. To the contrary, seen from this perspective, it would be the extension of such rigorous protection to ordinary commercial speech that would require explanation.

### B. Values<sup>47</sup>

As the reservation of rigorous First Amendment protection primarily for public discourse suggests, the value that best explains the pattern of the Court’s free speech decisions is a commitment to democratic self-governance. While there is vigorous disagreement about what other values might also be central to the First Amendment, there is “practically universal agreement” that at least one such core norm is democracy.<sup>48</sup> In its narrowest but most

45. See *supra* note 3.

46. For further discussion of why ordinary commercial speech is not part of public discourse, see *infra* text accompanying notes 83–85.

47. A substantially similar version of the discussion in this subpart previously appeared in Weinstein, *supra* note 24, at 512–19.

48. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever 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.”); see also *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’” (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))); *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.”); *Claiborne Hardware*, 458 U.S. at 913 (explaining that because speech concerning public affairs “is the essence of self-government,” such expression “has always rested on the highest rung of the hierarchy of First Amendment values”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The 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, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that . . . public discussion is a political duty; and that this should be a fundamental principle of the American government.”); Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 25 (“[W]hatever else it is about, the First Amendment is at least partly designed to create a well-functioning deliberative democracy.”).

powerful conception, this core free speech precept recognizes the right of every individual to participate freely and equally in the speech by which we govern ourselves. As Learned Hand long ago observed, “public opinion . . . is the final source of government in a democratic state.”<sup>49</sup> Thus, if the government prevents people from freely participating in the conversation by which this opinion is formed, the people are no longer self-governing.<sup>50</sup>

The opportunity for each citizen to participate in public discourse is vital to the legitimacy of the entire legal system.<sup>51</sup> If an individual is excluded from participating in public discourse because the government disagrees with his views or finds his ideas too disturbing or dangerous, any decision taken as a result of that discussion would with respect to that person lack legitimacy. This right to participate equally in public discourse free of government-imposed content restriction is thus not just a collective interest, but a fundamental individual right that government may legitimately infringe, if at all, only in truly extraordinary circumstances.<sup>52</sup> Thus, even if the government could persuasively demonstrate that protests in the United States against the war in Iraq both dispirit our troops and encourage the insurgents to continue fighting, antiwar protests still could not be forbidden on these grounds.

While the emphasis of American free speech doctrine is on the right of *speakers* to participate in democratic self-governance,

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Indeed, while Redish believes that self-realization is the sole value underlying the First Amendment, he nonetheless seems to share the view that self-governance, if not a core value, is at least a very important one. Thus, Redish derives his self-realization value from a commitment to democracy. See *infra* text accompanying note 115. He also writes that, although the First Amendment promotes far more than democratic self-governance, “at the very least, the First Amendment must be deemed to protect the expression that influences and facilitates the voter’s democratic choice in the voting booth.” Redish, *supra* note 1, at 111 n.124. In addition, Redish recognizes that the core doctrinal command of “viewpoint neutrality,” which he believes is violated by the denial of “full” First Amendment protection to commercial speech, is “the logical outgrowth of the nation’s original commitment to democratically based rule.” *Id.* at 110.

49. *Masses Publ’g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917).

50. As James Madison explained at the founding of this Nation, the commitment to popular sovereignty means that “the censorial power is in the people over the Government, and not in the Government over the people.” 4 ANNALS OF CONG. 934 (1794).

51. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 282 (1991).

52. As I shall discuss in Part III.B below, in addition to the concern for legitimacy, the fundamental precept of the moral equality of each individual is another deep norm undergirding the right to free and equal participation in the political process. See *infra* text accompanying notes 118–119.

audience interests are a core concern as well, but only in the space created by the important limitation on the *reasons* that government may regulate speech. Specifically, when addressing us as the ultimate governors in a democratic society, government may not limit speech because it believes that this speech will lead us to make unwise or even disastrous social policy decisions.<sup>53</sup> To regulate speech for this reason would violate the core democratic norm that the people are, collectively, the ultimate sovereigns and, individually, have a right to free and equal participation in the political process.<sup>54</sup>

For two reasons, this right to participate in democratic self-governance, both as a speaker and audience, is properly referred to as the core free speech norm. First, this norm explains the pattern of decided cases far better than does any other contender. While it may not explain every case,<sup>55</sup> it explains the great majority, and is contradicted by none. In addition, befitting a core constitutional norm, these participatory interests constitute a right in the strong sense of that term: an interest possessed by an individual that cannot be violated even on a single occasion just because general social utility would be maximized if it were sacrificed.<sup>56</sup> Thus, regulations that infringe this right of free and equal participation are invariably held unconstitutional even if the government can show that harm might result if the speech is left unregulated.<sup>57</sup>

These core participatory interests do not, however, exhaust the democracy-based interests served by the First Amendment. Even when the government has a legitimate reason for restricting speech, and there are no core speaker interests at issue, the audience might still have an overriding interest in receiving information needed to

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53. Weinstein, *supra* note 24, at 514–15.

54. As the Court explained in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), “[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . [I]f there be any danger that the people cannot evaluate the information and arguments . . . , it is a danger contemplated by the Framers of the First Amendment.” *Id.* at 791–92.

55. See *infra* text accompanying notes 58–74.

56. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977).

57. As discussed above, the right to protest against the United States’ involvement in a war is not defeasible even if such a protest would harm the war effort. See *supra* text accompanying notes 52–53. Nor does the First Amendment allow government to excise racist ideas from public discourse even on the quite plausible grounds that such expression leads to discrimination against minorities. See WEINSTEIN, *supra* note 28, at 52–59; see also *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

develop informed views on public policy matters.<sup>58</sup> To vindicate this interest, the Court has on occasion extended First Amendment protection to speech or activity just because it provides information needed for informed decision making on matters of public concern.<sup>59</sup> This norm cannot, however, be properly characterized as a core First Amendment value. Assuring the flow of information likely to enrich public discourse apart from any speaker's interest involved in its dissemination is a concern instrumental to the proper functioning of democracy, not constitutive of it. Thus, government interference with information flow (unless instituted for the illegitimate reasons discussed above) would not infringe an individual right in the strong

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58. This view was famously expounded by Alexander Meiklejohn, who wrote that the First Amendment does not require that "on every occasion, every citizen shall take part in public debate. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said." ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948). Contrary to Meiklejohn, however, American free speech doctrine is particularly concerned with the opportunity of "every citizen [to] take part in public debate." See Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1115 (1993) ("Traditional First Amendment doctrine, and a broad spectrum of modern political theories, . . . locat[e] the normative essence of democracy in the opportunity to participate in the formation of the 'will of the community' through 'a running discussion between majority and minority.'" (quoting HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 284-88 (Anders Wedberg trans., 1949))). Thus, no matter how many times we have all heard the message that Osama bin Laden is evil, I still have a right to voice that view in public discourse.

59. The Court has thus created a very narrow right of access when it is a "necessary precondition" to assuring access to information through which an "individual citizen can effectively participate in and contribute to our republican system of self government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). In addition, the Court, in a 5-4 decision, invalidated a Massachusetts law strictly limiting political contributions or expenditures by corporations "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 768 (1978) (internal quotation marks omitted). The restriction was challenged by corporations prevented from spending money to oppose a proposed amendment to the Massachusetts Constitution authorizing a graduated income tax. In responding to the contention that corporations have no First Amendment right to speak, the Court, in an opinion by Justice Powell, responded that "[t]he Constitution often protects interests broader than those of the party seeking their vindication" and noted that "[t]he First Amendment, in particular, serves significant societal interests." *Id.* at 776. The Court found that the speech the corporations in this case wished to engage in "is the type of speech indispensable to decision making in a democracy." *Id.* at 777 & n.11 (citing, inter alia, MEIKLEJOHN, *supra* note 58, at 24-26).

Particularly relevant to the issue of the proper level of protection to be afforded commercial speech, in extending First Amendment protection to commercial speech, the Court relied in part on the "general public interest" in the "free flow of commercial information." See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976); see also *Bellotti*, 435 U.S. at 783 ("A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information.'" (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 764)).



sense of the term. Confirming that laws impeding public access to information needed for democratic decision making do not implicate a core First Amendment right, the Court often defers to legislative judgments that restrictions on information relevant to matters of public concern are justified by some greater social welfare consideration.<sup>60</sup> Thus, the interest in information flow needed for public decision making is properly characterized as a secondary norm.<sup>61</sup>

Another popular candidate for the fundamental norm underlying the American free speech principle is the search for knowledge and “truth” in the marketplace of ideas. Although this rationale has long informed American free speech doctrine,<sup>62</sup> it is surely not a core value. Otherwise, the First Amendment would not let the government distort the marketplace of ideas through propaganda or maintain a national communications policy that allows media

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60. See, for example, *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld a ban on expenditures by corporations and labor unions for communications that refer to a clearly identified candidate for Federal office made 60 days before a general election or 30 days before a primary election. Invoking “respect for the ‘legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,’” the Court found that suppression of this speech is justified by the interest in curtailing the “‘corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support,’” as well as in preventing “‘circumvention of [valid] contribution limits’” imposed on these entities. *Id.* at 205 (alteration in original) (quoting *FEC v. Beaumont*, 539 U.S. 146, 155 (2003); see also *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654 (1990) (upholding 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”); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34–35 (1984) (rejecting a First Amendment challenge to a protective order in a civil suit preventing a party from disclosing information of public concern obtained in discovery, the Court cites state interest in preventing potential discovery abuse and in protecting privacy rights of litigants and third parties as justification for restricting the information). *But see* *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (sustaining an as-applied First Amendment challenge to a portion of the Bipartisan Campaign Reform Act, which was upheld against a facial challenge in *McConnell*, 540 U.S. 93).

61. At some extreme point, inadequate access to information can be said to impair the core democratic precept of popular sovereignty, for without a certain quantum of information available to them, in no meaningful sense can the people be said to be governing society.

62. First invoked by John Milton in the seventeenth century, see JOHN MILTON, *AREOPAGITICA* (1644), reprinted in JOHN MILTON, *PROSE SELECTIONS* 201–68 (Merritt Y. Hughes ed., Odyssey Press 1947), the truth-discovery rationale for free speech was more fully developed in the middle of the nineteenth century by John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859). Justice Oliver Wendell Holmes then introduced the rationale into Supreme Court jurisprudence, writing that “the ultimate good desired is better reached by free trade in ideas” and that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

concentration.<sup>63</sup> Another shortcoming with the marketplace of ideas rationale is that the entire premise that a completely unregulated market of ideas will lead either to discovery of truth or to social progress is highly contestable.<sup>64</sup> An even more fundamental problem with the marketplace of ideas rationale as a core free speech norm is that it justifies free speech in terms of the good it will produce for society as a whole, not as an individual right. Thus as a prominent theorist has concluded, the “marketplace of ideas theory is fundamentally unsound both normatively and descriptively.”<sup>65</sup>

Despite the lip service that the Supreme Court has paid to the marketplace of ideas,<sup>66</sup> if ever squarely presented with the question, the Court would, I believe, conclude that speech that promoted only this value is entitled to much less rigorous protection than that accorded the speech by which we govern ourselves. Such a result would be consistent with a recent case that refused to apply any meaningful scrutiny to a copyright law that arguably robbed the public domain of important ideas and information.<sup>67</sup> Far from a core free speech norm, the marketplace of ideas rationale is at most a peripheral value.

Several prominent commentators, including Redish, have argued that the core First Amendment value is to be found among the cluster of norms comprising individual autonomy, self-expression, and self-fulfillment.<sup>68</sup> But whatever might be said of these various theories as a normative matter, they simply do not describe current free speech doctrine. Indeed, Redish concedes that the commitment to the “development of the individual’s powers and abilities” or to “the individual’s control of his or her own destiny through making life-affecting decisions” is inconsistent with the entire concept of

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63. See James Weinstein, *Database Protection and the First Amendment*, 28 U. DAYTON L. REV. 305, 324, 344–48 (2002).

64. See *id.* at 324 n.109.

65. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 897 (2002).

66. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”).

67. See *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003).

68. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1975); Redish, *supra* note 26.

“unprotected speech” such as obscenity and fighting words.<sup>69</sup> More generally, this theory is also belied by the multitude of other types of speech noted previously that government routinely regulates without any First Amendment hindrance.<sup>70</sup>

Although autonomy is not a core free speech value, this does not mean that it has no role to play in current doctrine. In extending First Amendment protection to ordinary commercial advertising, the Court noted that, in addition to providing information needed to decide matters of public concern,<sup>71</sup> such speech also aids private economic decision making.<sup>72</sup> Still, because ordinary commercial speech is not a constitutive part of the speech by which we govern ourselves,<sup>73</sup> it is not entitled to the rigorous protection primarily reserved for public discourse.<sup>74</sup> Redish does not quarrel with the observation that ordinary commercial speech is not an essential part of what he refers to as speech “relevant to the political process.”<sup>75</sup>

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69. See Redish, *supra* note 26, at 593.

70. See *supra* text accompanying notes 29–30. In addition, such a capacious view of constitutionally protected decisional autonomy is in tension with the Court’s narrow view of autonomy in its Fourteenth Amendment substantive due process jurisprudence with respect to such crucial matters as the right of terminally ill people to determine the timing of their death. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

71. See *Va. State Bd. of Pharmacy*, 425 U.S. at 765; see also *supra* note 59. Unlike the Court and commentators such as Professor Post, I am not persuaded that ordinary commercial advertising is even instrumentally related to democratic governance in any significant way. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25 (2000) (arguing that the constitutional value of commercial speech is that it conveys “information of relevance to democratic decision making”). I do believe, however, that ordinary commercial advertising can significantly promote individual economic decision making and, thus, undue restrictions on this speech can interfere with individual autonomy protected by the Constitution. See *infra* text accompanying notes 81–82. While the First Amendment provides an acceptable source of protection for this interest, grounding a right to receive commercial information in the liberty provision of the Fifth and Fourteenth Amendments would, in my view, more accurately reflect the essence of the interest involved.

72. *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64. It remains to be seen how the Court will reconcile protection of commercial speech under this rationale with its adamant refusal since 1937 to directly afford any meaningful protection to private economic decision making under its Fourteenth Amendment substantive due process jurisprudence. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 511 (15th ed. 2004).

73. See Post, *supra* note 58, at 1115–20.

74. See *supra* text accompanying notes 31–44, 56–57.

75. As mentioned above, Redish allows that those who believe that the First Amendment is “primarily or exclusively designed to protect speech relevant to the political process” could in a principled manner conclude that commercial advertising is not deserving of “full” constitutional protection. See Redish, *supra* note 1, at 80–81. He carefully stipulates, however, that this concession applies only to those who are also willing to relegate to this “second class status” all other forms of speech about commercial products, including publications such as *Consumer Reports* magazine. *Id.* at 81. Before coming to a definite conclusion about the proper level of

constitutional protection that should be afforded publications such as *Consumer Reports*, I would want to carefully study the function that these publications perform in our society. My tentative view, however, is that these publications do not have sufficient connection to the “political process” to warrant the “full protection” that I and others believe is properly reserved primarily for public discourse. (For a discussion of the meaning of “full” First Amendment protection, see *supra* text accompanying note 31.) Rather, like commercial speech, the constitutional value of publications such as *Consumer Reports* would seem to inhere primarily in the information that they provide to the consumer. See *supra* note 59 and *infra* note 83.

This similarity does not mean, however, that *Consumer Reports* and ordinary commercial advertising are necessarily entitled to an identical level of First Amendment protection, especially with respect to false or misleading factual statements. As Redish notes, there is a plausible argument that because of the different motivations for conveying the information, *Consumer Reports* generally supplies more objective and accurate information to the audience. See Redish, *supra* note 1, at 81. Accordingly, the fact that publications such as *Consumer Reports* may be more valuable from a First Amendment perspective than is speech that “does no more than propose a commercial transaction,” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburg Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)), is arguably alone sufficient grounds to afford consumer magazines more protection than ordinary commercial speech.

An additional and even stronger justification for such disparate treatment is that publications like *Consumer Reports* are arguably more easily “chilled” than is commercial advertising. Accordingly, in order to prevent fear of product disparagement suits from causing editors to unduly restrict a particularly useful source of commercial information, publications such as *Consumer Reports* arguably need some limited First Amendment immunity for false and misleading statements of facts. See *Suzuki Motor Corp. v. Consumer Union of U.S.*, 330 F.3d 110 (9th Cir. 2003) (en banc) (Kozinski, J., dissenting from denial of hearing en banc) (“Groups like [Consumer Union] perform a valuable function in our consumer society, but they suffer from a constant threat of litigation. It’s easy for a jury to second-guess experimental design, and every suit carries the prospect of a massive damages award because the very purpose of a negative review is to convince the reader that the plaintiff’s product is not worth buying.”). In contrast, the valuable information that commercial advertising provides is not as likely to be deterred if, as is the current state of the law, false or misleading commercial speech is afforded no First Amendment protection. See *supra* notes 3, 9; see also *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (“[C]ommercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.”). Thus even if it were assumed that publications such as *Consumer Reports* and ordinary commercial speech are equally valuable from a First Amendment perspective, *Consumer Reports*’ greater propensity to be “chilled” provides a “coherent, non-viewpoint-based justification,” Redish, *supra* note 1, at 122, for providing consumer publications greater First Amendment protection than is afforded ordinary commercial speech.

Redish objects the “numerous categories of speakers who are obviously and unambiguously motivated by personal gain, yet whose speech unquestionably receives full First Amendment protection,” citing “welfare mothers picketing for increased benefits, anti-taxation groups, labor unions, and political lobbying groups.” *Id.* at 85–86. All of the examples Redish cites, however, involve expression that is plainly part of public discourse, a realm in which speech is afforded extraordinary protection not to primarily protect the audience interest in receiving information but to safeguard the right of individuals to participate freely and safely in the political process. See text accompanying notes 31–32. Since this special immunity is designed chiefly to protect core speaker interests rather than information flow, Redish’s examples are simply not germane to the question of whether two types of speech valued primarily for the information they convey should nonetheless be afforded somewhat different levels of protection.

The question of the level of First Amendment protection publications such as *Consumer Reports* should be afforded is a difficult and intriguing question, one worthy of a symposium of

Rather, he makes the much deeper objection that it is “illogical” to support giving less protection to commercial speech than to political speech because the normative underpinnings of both individual and collective self-governance are identical.<sup>76</sup> It is to this claim that I now turn.

### III. THE DIFFERENT VALUES SERVED BY COLLECTIVE AND INDIVIDUAL SELF-GOVERNANCE

Redish argues that although it may be principled for those who believe that the core free speech value is democratic self-governance to advocate affording commercial speech less protection than political speech, this view is “illogical” because “it fails to determine the normative reasons our system would choose democracy in the first place.”<sup>77</sup> Redish asserts that “speech concerning commercial products and services can facilitate private self-government in much the same way that political speech fosters collective self-government.”<sup>78</sup> He then insists that “private and collective self-government are grounded in identical normative concerns about self-development and self-determination.”<sup>79</sup> He therefore concludes that “it makes absolutely no sense to protect speech relevant to a situation where the individual has a minuscule fraction of a say in the outcome while simultaneously refusing to protect speech that will facilitate choices by the private individual that are solely her own.”<sup>80</sup>

#### *A. Democratic Norms and the Limits of Logic*

I agree with Redish that the information provided by ordinary commercial speech can facilitate autonomy and self-fulfillment. As I have previously written, knowing where to find a commercial product or service or how to obtain them at the lowest price can

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its own. Indeed, the question is so difficult that that when squarely faced with the question, the Court avoided deciding the level of protection to which *Consumer Reports* is entitled. See *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 513 (1984) (assuming but expressing “no view” on whether the *New York Times* malice standard is applicable to product disparagement suits against consumer magazines). This question is thus much too difficult and complex to serve as a shibboleth to detect invidious viewpoint discrimination.

76. See Redish, *supra* note 1, at 81.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

facilitate people carrying out their life plans.<sup>81</sup> Locating a much needed prescription drug at an affordable price can often make the difference between good and poor health and sometimes even between life and death.<sup>82</sup> And even when the stakes are not so high, access to commercial information can promote autonomy and self-fulfillment, for example, by informing consumers about more mundane products such as automobiles, mortgages, hotel accommodations, and airfares. I disagree, however, that commercial speech promotes individual self-governance “in much the same way” that political speech promotes collective self-governance. Commercial speech is protected primarily, if not exclusively, for the *information* it provides to the *audience*.<sup>83</sup> In contrast, political speech—and more generally, public discourse<sup>84</sup>—is protected not primarily for its informational value, but because in a democratic society each citizen has a right to participate in the process by which we determine our collective fate.<sup>85</sup> Relatedly, and more profoundly, I disagree that individual and collective self-governance are rooted in “identical normative concerns about self-development and self-determination.”<sup>86</sup> Since the crux of Redish’s charge is that it is “illogical” for those who think that the core First Amendment value is democratic self-governance to advocate lesser protection for commercial speech,<sup>87</sup> I will now examine this claim in detail.

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81. See James Weinstein, *In Search of the Constitutional Value of Commercial Speech*, <http://firstamendmentcenter.org/faclibrary.bookreview.aspx?id=18> (last visited Oct. 5, 2007) (reviewing ROGER SHINER, *FREEDOM OF COMMERCIAL EXPRESSION* (2003)).

82. See *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64.

83. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (“A commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’” (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 764)); Post, *supra* note 71, at 14–15 (“Commercial speech doctrine . . . is sharply audience oriented. From a constitutional point of view, the censorship of commercial speech does not endanger the process of democratic legitimation. It does not threaten to alienate citizens from their government or to render the state heteronomous with respect to speakers. Instead it merely jeopardizes the circulation of information relevant to ‘the voting of wise decisions.’” (quoting MEIKLEJOHN, *supra* note 58, at 25)). Unlike Professor Post, however, I believe that the more salient audience interest served by the free flow of commercial information is individual, not collective, decision making. See *supra* note 71.

84. See *supra* text accompanying note 31.

85. See *supra* text accompanying notes 48–54; Post, *supra* note 71, at 12–13.

86. See Redish, *supra* note 1, at 81.

87. See *id.*

In a previous work, Redish elaborates on what he believes to be the essential normative connection between individual and collective self-determination:

Our society chooses to function as a democracy for the very reason that we value individual autonomy and self-realization. Otherwise, democracy could not be morally justified. Society, after all, is made up of individuals, and if one places no value on a single individual's exercise of autonomy, it is impossible to justify placing a value on the collective exercise of autonomy. . . . [We value] a democratic form of government because . . . democracy enables individuals to develop their human faculties and control their own destinies. . . .

. . . .

. . . The concept of free speech, then, flows from the same overarching value that underlies the commitment to democracy in the first place, and if society chooses the latter political structure, society also must protect the former.<sup>88</sup>

Redish thus asserts that the position that self-realization is the core free speech value "can be proven" because "the moral norms inherent in the choice of our specific form of democracy logically imply the broader value, self-realization."<sup>89</sup>

While it is plausible to posit self-realization as the *raison d'être* of democracy, this conclusion does not as Redish asserts "logically" flow from the premise of democratic self-governance. It is also plausible to assert, as I do, that some other moral value, such as equality or legitimacy—not to mention a host of instrumental concerns, such as stability, prosperity, and avoidance of tyranny—is the primary reason we value democracy. I will argue below that

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88. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 245-46 (1998).

89. Redish, *supra* note 26, at 594. By "self-realization," Redish means both the "development of the individual's powers and abilities" and the "individual's control of his or her own destiny through making life-affecting decisions." *Id.* at 593. In his view this is the "one true value" served by free speech. *Id.* In the material quoted in text accompanying note 88 *supra*, Redish also refers to the related but thinner concept of "individual autonomy" which he apparently uses here as limited to individual decision making. In Part III.C, below, I deal separately with the relationship between democracy and autonomy.

equality and legitimacy, or at least the commitment to free and equal participation in the political process that these values serve, are not only a plausible explanation of free speech doctrine, but a much better explanation of that practice than self-realization.<sup>90</sup> But here, I want to emphasize that political equality and legitimacy are very different values than self-realization, as are the instrumental concerns I just mentioned. Thus, one can logically value the equal moral worth of each individual and the legitimacy that the opportunity to participate in the political process bestows on the legal system without embracing a commitment to the “development of the individual’s powers and abilities.”<sup>91</sup> Similarly, one can for instrumental reasons value a system that is most likely to provide stability and respect for at least basic human rights without being committed to a concept of autonomy requiring that individuals control their “own destiny through making life-affecting decisions.”<sup>92</sup> Pace Redish, the question of the norms that underlie democracy is far too complex and is itself too normatively laden to be decided as a matter of logic. There is thus simply nothing “illogical” in believing that free speech is primarily in service of democracy while at the same time rejecting self-realization as a core free speech value or in holding that ordinary commercial speech should be afforded something less than the rigorous First Amendment protection reserved for political speech and other forms of public discourse.

*B. The Relative Merits of Self-Realization  
and Participatory Democracy as an  
Explanation of Free Speech Doctrine*

Self-realization may well be an important or even core value of American democracy. But before coming to a conclusion about the relationship between democracy and self-realization, I would need to study the question more deeply than is necessary to rebut Redish’s claim that self-realization flows from a commitment to democracy as a matter of logic. But whatever the relationship between the *overall* practice of democracy and self-realization, Redish’s self-realization

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90. See *infra* text accompanying notes 115–119.

91. Redish, *supra* note 26, at 593.

92. *Id.* Even if a respect for basic human rights entails a vision of at least minimally autonomous individuals, it does not necessarily entail this richer view of autonomy. See *infra* text accompanying notes 128–136.



theory is, both descriptively and normatively, a poor explanation of that aspect of democratic practice instantiated by free speech doctrine. Descriptively, a self-realization theory fails to account for the pattern of free speech cases in which a relatively small amount of expression is rigorously protected, while most is readily regulable.<sup>93</sup> Normatively, adopting self-realization as a core value would likely dilute the rigorous protection needed to assure that American citizens can freely participate in the formation of public opinion essential to democracy, including the right to criticize government officials and policy.

As Redish observes, the self-realization approach “leads to the view that all forms of expression are equally valuable for constitutional purposes.”<sup>94</sup> But as he also recognizes, his approach will require “balancing” through which even “full constitutional protection of free expression may be forced to give way to competing social concerns.”<sup>95</sup> For instance, in Redish’s view, face-to-face insults (so called “fighting words”), which are presently bereft of First Amendment protection, would receive “full” constitutional protection. Redish emphasizes, however, that such “full” protection does not mean that “fighting words should receive absolute protection, *any more than any other form of expression deserves such a guarantee of freedom.*”<sup>96</sup> Rather, in Redish’s view, whether one has a right in a particular situation to use fighting words or to engage in any other form of expression, depends upon “a careful weighing of competing interests.”<sup>97</sup> Though I prefer the current approach of a narrowly defined category of fighting words entitled to no First Amendment protection, I have no strong objection to subjecting fighting words to such an ad hoc balancing test. But subjecting core political speech to such an amorphous procedure would greatly reduce the near absolute protection from content regulation that such speech currently enjoys. In addition, it would

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93. See *supra* text accompanying notes 30–44.

94. Redish, *supra* note 26, at 595.

95. *Id.*

96. *Id.* at 626 (emphasis added).

97. *Id.*

invite the very judicial viewpoint discrimination that Redish rightly deplors.<sup>98</sup>

Consider, for instance, how a critique of immigration policy that contained a vicious attack upon the Muslim religion would fare under such an amorphous balancing test. If cases in other democracies that “balance” the right to engage in offensive political speech against “competing social concerns”<sup>99</sup> are any guide,<sup>100</sup> Americans might lose their right to express “hateful” ideas about groups of people as part of public discourse.

Redish will no doubt object that the goal of his theory is to raise the level of protection afforded to speech that currently enjoys no protection or less than “full” protection, not to reduce the level that certain privileged types of speech now enjoy. He would thus apparently protect all speech unless the government had a “compelling need to prevent harm (narrowly defined), usually physical harm.”<sup>101</sup> But even if courts were to adopt Redish’s view that all speech should receive “full” constitutional protection, it is extremely doubtful that they would adopt the rigorous standard he proposes as the test for regulating the content of *all* speech. There

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98. See James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 481–85 (1996).

99. Redish, *supra* note 26, at 595.

100. For example, in *Regina v. Keegstra*, [1990] 3 S.C.R. 697 (Can.), the Canadian Supreme Court held that the right of individuals to express racist and anti-Semitic ideas as part of public discourse was outweighed by various competing societal interests, including: preventing members of groups vilified in such speech from feeling “humiliated and degraded,” *id.* at 746; reducing the risk of “serious discord between various cultural groups,” *id.* at 747; and protecting “the enthusiasm with which the value of equality is accepted and acted upon by society,” *id.* at 758.

Similarly, in the United Kingdom in 2004, and again in 2006, Nick Griffin, the leader of the British National Party, was criminally charged under Britain’s law against incitement to racial hatred for calling Islam a “wicked, vicious faith” in a speech to his supporters. See Martin Wainwright, *Cabinet Rethinks Race Hate Laws After Jury Frees BNP Leaders*, GUARDIAN (U.K.), at 6, Nov. 11, 2006, available at <http://politics.guardian.co.uk/farright/story/0,,1945265,00.html>. After he was twice acquitted by a jury, the government called for review of the existing laws with an eye toward prohibiting such speech. *Id.* (The acquittals may have resulted because the jury concluded that insulting Islam, even in the context of criticizing immigration reform, was not an incitement to “racial” hatred.) In another British case, a member of the British National Party was convicted under the Public Order Act of 1986 for displaying a poster in the window of his house depicting one of the twin towers of the World Trade Center in flames, together with a crescent and star surrounded by a prohibition sign, and stating “Islam out of Britain” and “Protect the British People.” See *Norwood v. Dir. Pub. Prosecutions* [2003] EWHC (Admin) 1564, discussed in Ivan Hare, *Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred*, PUB. L. 521, 521 (2006).

101. Redish, *supra* note 1, at 98.

are numerous examples of speech that can cause harm other than physical injury, such as misleading proxy statements, profanity in the classroom, negligently written instructions on consumer products, and works that infringe copyright, to mention just a few. While government has a legitimate, or perhaps even a substantial or important, need to prevent or redress harms such as these, it does not have a “compelling” need to do so, at least not as that term is used in current jurisprudence.<sup>102</sup> I am fairly certain, however, that if Redish’s view that all speech must be given the same level of protection were formally adopted, courts would nonetheless continue to allow government to regulate most, if not all, of this expression on the basis of its content.<sup>103</sup> Since the test for regulating “fully” protected speech would then be far less rigorous in practice if not in name,<sup>104</sup> my fear is that the fierce protection currently given core political speech will be diminished if thrown in the same hopper as other types of speech that cause harm.

And political speech *can* cause harm. A public official can be harmed by false accusations about his personal life in a political diatribe, just as advocacy of law violation can persuade others to break the law or even commit acts of violence. Or to return to the example of a critic of immigration policy who wants to bar the door to Muslims: vicious condemnation of Islam might well cause emotional injury to Muslims presently living in this country and, furthermore, might make them feel insecure about their rights, especially if the speaker engages in such “self-expressive” epithets

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102. With very few exceptions, application of the “compelling” interest standard as used in the Supreme Court’s free speech jurisprudence leads to invalidation of a law restricting speech. See WEINSTEIN, *supra* note 28, at 39.

103. I suspect that Redish too might find at least some of expression on this list constitutionally proscribable. I would predict, for instance, that he would permit a third grade teacher in a public elementary school to discipline a student who as a means of self-expression continually used the “scurrilous epithet” favored by the defendant in *Cohen v. California*, 403 U.S. 15, 22 (1971) (upholding right of anti-war protestor to wear a jacket with the message “Fuck the Draft”). Or even if he would not so limit the expressive rights of the student, I would expect (and hope) that he would allow the state to prevent elementary school teachers from using this expletive in the classroom.

104. Courts might still use the terms “compelling state interest” and “strict scrutiny” to refer to a massively watered down version of the current test. Cf. ERIC BARENDT, *supra* note 15, at 174–75 (“The best argument for restricting racist hate speech is undoubtedly that a state has a compelling interest to protect members of target groups against the psychological injuries inflicted by the most pernicious forms of extremist hate speech.”); Erwin Chemerinsky, Remarks at the Loyola of Los Angeles Law Review Symposium: Commercial Speech: Past, Present & Future (Feb 23, 2007).

such as “cockroach” to refer to them.<sup>105</sup> Arguably, the prevalence of such expression might even make it more likely that others will engage in illegal discrimination against Muslims.<sup>106</sup> Indeed, core political speech could even lead to physical injury or death, such as might be the case with anti-war protests that have the effect of encouraging insurgents in Iraq to keep attacking American troops in the hope that public opinion here will lead to the withdrawal of our forces. Yet despite the harm such expression can cause, American citizens currently have a right to make negligently libelous statements about government officials;<sup>107</sup> to advocate lawless conduct up the point of incitement;<sup>108</sup> to deliver anti-Islamic diatribes as part of public discourse;<sup>109</sup> and to denounce our country’s war effort even if it encourages the enemy to fight harder.

As the routine regulation of many types of self-expressive speech demonstrates,<sup>110</sup> the reason certain types of speech are afforded immunity from the usual legal precept that harmful activity may be suppressed cannot possibly be to vindicate self-expression or self-realization. Rather, this special immunity from the normal operation of the law is made available to public discourse because individuals have a fundamental right to freely participate in the speech by which we govern ourselves. In the words of Justice William Brennan: “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>111</sup> If, as Redish advocates, all speech is entitled to the same protection, and the unitary standard for protecting speech is appropriate for promoting self-fulfillment,<sup>112</sup> then the special immunity presently afforded

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105. British National Party activist, Mark Collett, a co-defendant in the prosecution of Nick Griffin discussed *supra* note 100, was charged with inciting racial hatred for referring to asylum-seekers as “cockroaches.” Martin Wainwright, *Retrial Begins of BNP Leaders Accused of Stirring Racial Hatred*, GUARDIAN (U.K.), Nov. 4, 2006, at 6, available at <http://politics.guardian.co.uk/farright/story/0,,1939351,00.html>.

106. See *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.) (upholding a ban on hate speech, Canadian Supreme Court noted that such speech might lead to “discrimination, and perhaps even violence, against minority groups in Canadian society”).

107. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

108. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

109. See *supra* note 57.

110. See *supra* text accompanying notes 28-30, 33-36.

111. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

112. It could certainly be argued that racist or other types of hate speech interfere with the right to “self-fulfillment” of members of the victimized groups, and that such harm outweighs the

political speech despite the harm that it can sometimes cause would likely disappear.<sup>113</sup>

In my view, a much preferable free speech doctrine is the present one, which rigorously protects speech that is part of democratic self-governance but which allows most other types of expression to be regulated if the government has a legitimate reason for doing so. Thus, not only does a democracy-based theory describe current doctrine much better than does Redish's self-realization theory, it is also normatively more attractive because it reserves the most stringent protection for an interest that virtually everyone agrees is a fundamental right: the opportunity to participate on a free and equal basis in the speech through which society's collective decisions are made.

It is telling that in attempting to root his self-realization theory in a firm foundation rather than on "some unsupportable, conclusory assertions of moral value,"<sup>114</sup> Redish attempts to reason "from what we in this nation take as given: our democratic system of government."<sup>115</sup> Redish, however, fails to show a necessary or even close connection between democracy and self-realization, thus leaving his self-realization theory hovering in mid-air. In contrast, the participatory democracy theory of free speech that I espouse is rooted firmly in democracy. I would not go so far as to claim that the very concept of democracy "logically" implies that each citizen has an equal right to participate in the political process, including the speech by which public issues are decided. But such a right is

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speaker's minimal self-fulfillment in making hateful comments as part of public discourse. See *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

113. Of course, there are those that would applaud such a result, especially as it might be applied to racist, sexist, homophobic, or seditious public discourse. But I suspect that, like me, Professor Redish would not be among them.

114. Redish, *supra* note 26, at 594. In criticizing Professor C. Edwin Baker's "liberty" model of the First Amendment, Redish explains that he might agree with Baker's foundational view that for the community to legitimately expect individuals to respect collective decisions, "the community must respect individuals as equal, rational and autonomous moral beings." *Id.* at 594 n.20 (internal quotes omitted). But, Redish continues, if someone denied that the obligation to obey the law had anything to do with the government's respect for the individual, Baker would have little more to say than "Oh, yes it does." *Id.* However, since democracy does not "logically imply" self-realization as Redish claims, *id.* at 594, and since he fails to make any substantial argument about the relationship between democracy and self-realization, Redish's theory is on no firmer footing than Baker's. Thus, according to Redish's own criteria for a foundational theory, his theory should be summarily rejected.

115. Redish, *supra* note 26, at 594.

undeniably a basic premise of contemporary American democracy.<sup>116</sup> Unlike self-realization, this formal right of equal political participation is so intimately related to the practice of democracy in this country that it is, to borrow Redish's phrase, "take[n] as given"<sup>117</sup> and, thus, forms a solid foundation for constitutional theory.

While there may be a consensus that in a modern democratic society each person has a formal right to equal participation in the political process, the deeper norms that justify this right are both more obscure and contentious. I have already mentioned legitimacy as one crucial norm vindicated by this right of participation.<sup>118</sup> Another core norm that can be seen as underlying this right is the precept of equal moral worth. Ever since the idea of moral equality was loosed upon the world, there has been perpetual debate about what this precept entails. There is now, however, general agreement that this precept includes at least formal or procedural equality in the political process. This is not to deny that there may be other core values besides legitimacy and formal equality underlying democracy writ large. But these two values would seem to be the best explanation of that aspect of democracy—the individual right of equal participation—of which free speech is a constitutive part. Among other things, these values explain why the right to participate in the discussion by which collective decisions are made is thought of as a fundamental right worthy of protection even if its exercise might cause harm sufficient to justify the suppression of an ordinary exercise of individual liberty. But whether or not formal equality and legitimacy are the best explanations of the deep moral norms underlying the American free speech principle, they are surely better explanations than self-realization.<sup>119</sup>

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116. As well as being reflected in such doctrines as the "one person, one vote" requirement, *see Reynolds v. Sims*, 377 U.S. 533 (1964), the right to equal participation is also the best explanation of the free speech doctrine's intense hostility toward viewpoint discrimination. It is thus no coincidence that the case that first introduced the rule against content discrimination into modern doctrine technically rested on the Equal Protection Clause of the Fourteenth Amendment. *See Police Dept. v. Mosley*, 408 U.S. 92 (1972); *see also Redish, supra* note 1, at 118 ("Few, if any, knowledgeable observers would dispute the inherently invidious nature of viewpoint-based discrimination in light of the manner in which it inevitably undermines the values served by democracy and the system of free expression of which it is a part.").

117. *See Redish, supra* note 26, at 594.

118. *See supra* text accompanying notes 51–52.

119. It bears emphasizing that even if I am wrong about the deeper values that underlie the right to free and equal participation in the political process, this would not undercut the consensus that American citizens have a right to free and equal participation in the political process.

### C. *The Relationship Between Democracy and Individual Autonomy*

I want to end this discussion of the normative essence of democracy with a tip of my hat to Professor Redish. Such is Redish's enormous talent as a constitutional law scholar that even when he defends an untenable thesis, as I believe he has here, he cannot help but raise interesting and important issues. As discussed above, although I leave open the possibility that the best explanation of the deepest norm underlying American democracy may be some version of self-realization, I disagree with Redish that a commitment to democracy *logically* entails such a norm. Redish is on much firmer ground, though, to the extent that he makes the much less ambitious claim that a commitment to democracy logically entails a vision of individual citizens as autonomous agents.<sup>120</sup> Redish writes: "Society, after all, is made up of individuals, and if one places no value on a single individual's exercise of autonomy, it is impossible to justify placing a value on the collective exercise of autonomy."<sup>121</sup> I agree that the practice of participatory democracy requires a robust vision of the autonomy of the participants. I believe, however, that this ascription of autonomy extends to individuals only to the extent that they are participating in the practice of democracy but not beyond. In contrast, Redish believes that the commitment to democracy logically entails a vision of fully autonomous beings for all purposes, including private decision making.

When government addresses us in our capacity as the ultimate sovereigns in a democratic society, such as when it attempts to regulate public discourse, it must treat us as fully autonomous and rational agents.<sup>122</sup> Thus, it would be per se impermissible for government to outlaw arguments in favor of repealing bans on smoking in public places on the grounds that the people are not

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Although identifying the core free speech norm as a commitment to equal political participation might cry out for deeper normative exploration, it is perhaps as normatively deep as we can go without losing what is arguably the only point of consensus among all informed observers about at least one important value underlying the First Amendment. *See generally* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

120. *See supra* text accompanying note 88.

121. Redish & Wasserman, *supra* note 88, at 245.

122. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . [I]f there be any danger that the people cannot evaluate the information and arguments . . . , it is a danger contemplated by the Framers of the First Amendment." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978); *see* Weinstein, *supra* note 16, at 1104-06; *see also supra* text accompanying notes 53-54.

sufficiently rational to sort out the various arguments on the subject, some of which will undoubtedly be tendentious and misleading, or to properly weigh the dire health consequences from secondhand smoke if the ban were repealed.<sup>123</sup> Allowing the government to restrict speech on this ground would be inconsistent with the premise that in a democracy the ultimate sovereign is the people, not the government. And in our democracy at least, this right to ultimate sovereignty is an individual right, not merely a collective one. Thus, even if a majority of the people wanted to restrict speech because it might lead the people to make some foolish social policy decision, it would still be impermissible to do so.

In contrast, when addressing us in some capacity other than as ultimate sovereigns in a democratic society, such as consumer, motorist, or patient, this strong precept of autonomy inherent in democracy is not applicable precisely because these activities are not part of this democratic project.<sup>124</sup> Thus, the government may treat us as not fully rational or autonomous agents in protecting us from misleading commercial advertisements, requiring us to wear motorcycle helmets, or restricting what doctors may say to us.<sup>125</sup>

It could be argued that this dichotomy makes no sense: we either are or are not fully rational, autonomous beings. But the requirement that the government treat us as fully rational, autonomous agents in our capacity as ultimate political sovereigns flows not from a description of human psychology or the human condition; rather, it is an ascription inherent in the basic premise that, as James Madison explained, “[t]he people, not the government, posses[s] the absolute sovereignty.”<sup>126</sup> Prohibiting the people from hearing some argument on a matter of public concern because the government fears that the people are not sufficiently rational to reach the correct decision

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123. This would include a blanket ban on cigarette companies’ urging such a repeal if justified on the ground that self-interested parties would likely give distorted views that would mislead the people into voting for the repeal. See *Bellotti*, 435 U.S. 765 (invalidating state law generally prohibiting corporations from making contributions or expenditures for the purpose of influencing the vote on any question submitted to the voters).

124. See Weinstein, *supra* note 16, at 1106.

125. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Interaction*, 147 U. PA. L. REV. 771, 845–46 (1999); Weinstein, *supra* note 24, at 520, 532.

126. James Madison, *Virginia Resolutions*, in 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569–70 (1836)).



would, as to that issue at least, invert this basic premise by making the government, not the people, the ultimate sovereign. But when we are acting outside of this democratic realm, such as when we are acting as a consumer, motorist, or patient, this core democratic norm is not breached if the government treats us in accord with our actual nature and limitations, that is, as less than fully rational or autonomous agents.

A more powerful objection to the constitutional ascription of autonomy to individuals only when acting in their sovereign capacity is this: the precept that individuals have a right to participate in collective decision making must presuppose agents with a sufficient degree of rationality and autonomy to be conceived of as rights-bearing beings. And with respect to the right to govern in particular, individuals must be conceived as possessing the minimal ability to understand and articulate both their own interests and those of society. Moreover, such agents must have enough independence from others so that the views they express are their own and not the product of coercion or undue influence. This is why the exclusion of children and people with certain types of mental illness or severe mental retardation from the franchise does not violate the core precept of participatory democracy. Unlike the rationality and autonomy ascribed to individuals when acting in their capacity as ultimate sovereigns in a democratic society, this is an even more basic presupposition about the nature of individuals in a democratic society, one needed for the practice of participatory democracy to make sense. Thus, unlike the ascription of rationality and autonomy proper to the realm of democratic self-governance, this more basic view of the individual arguably persists even outside this domain.<sup>127</sup>

I therefore agree with Redish that it is difficult to justify the practice of democracy while placing “no value” on a single individual’s exercise of autonomy, even when that individual is not involved in the process of collective decision making. But this

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127. The objections recounted in this and the preceding paragraph is an amalgam of views expressed to me in discussions over the years with Larry Alexander, Richard Arneson, Ed Baker, and Seana Shiffrin. In formulating the description of the minimal autonomy presupposed by democracy set forth in this and the next paragraph, I greatly benefited from discussions with Ronald Dworkin, Ross Harrison, Jeffrie Murphy, Robert Post, and Cynthia Stonnington. The two types of autonomy that I describe here are roughly similar to the dichotomy between ascriptive and descriptive autonomy described by Richard Fallon. See Richard H. Fallon, *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994).

means only that the vision of participatory democracy that I believe underlies the First Amendment presupposes *some degree* of individual autonomy; it by no means entails Redish's view that individuals must be allowed to control their "own destiny through making life-affecting decisions."<sup>128</sup>

The precise nature and parameters of this irreducible residuum of individual autonomy that flow from a basic presupposition of participatory democracy and persist even when we are engaged in purely private decision making are very difficult questions about which I remain uncertain. How it should be accounted for in constitutional doctrine is also a difficult question, but one about which I can offer at least some tentative views.<sup>129</sup>

As a descriptive matter, we know that this minimum vision of autonomy does not make paternalistic measures aimed at people outside the political realm unconstitutional. Current constitutional doctrine has no general prohibition against paternalism, as is attested to by the constitutionality of laws mandating use of seat belts and motorcycle helmets, and outlawing gambling and recreational drugs.<sup>130</sup> Nor, under current doctrine, would there likely be a constitutional obstacle to a ban on the sale or consumption of cigarettes even on overtly paternalistic grounds.<sup>131</sup>

Interestingly, however, suppressing *speech* for such paternalistic reasons might well be unconstitutional even if the speech is not part

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128. Redish, *supra* note 26, at 593.

129. Because the minimal autonomy we are examining here is not an underlying *value* served by participatory democracy but rather a *presupposition* of that practice, free speech doctrine might properly disregard this concern. The following discussion, however, proceeds on the tentative assumption that constitutional doctrine should (or at least may) properly account not only for underlying values but for deeper presuppositions underling those values.

130. See David Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 359 (1991) ("The Constitution does not generally prohibit the government from paternalistic action; that is well settled. Thus the government would be free to ban gambling even on strictly paternalistic grounds."); see also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973) (noting that the "state statute books are replete with constitutionally unchallenged laws" against activity that "only directly involve 'consenting adults'").

131. The level of scrutiny required to protect the minimal autonomy inherent in democracy is thus itself quite minimal, most likely the rational basis test, which has been aptly described as "minimal . . . in theory and virtually none in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). This does not mean, of course, that this minimal vision of autonomous individuals in a democratic society should not forbid paternalism or more generally deserve greater constitutional scrutiny. But such an important normative question is beyond the scope of this limited inquiry.

of public discourse.<sup>132</sup> Thus, a substantial constitutional question would be presented if, rather than banning the sale of cigarettes, the government decided to reduce demand for the product by forbidding cigarette advertising.<sup>133</sup> Why the supposed greater power to ban a

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132. See *Va. State Bd. of Pharmacy v. Va. Citizen Consumers Council*, 425 U.S. 748, 769 (1976) (invalidating a ban on price advertisement by pharmacists, the Court condemns as “highly paternalistic” the state’s argument that customers will buy low cost, low quality pharmaceuticals, and drive the “professional” pharmacists out of business); *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 96 (1977) (striking down a town ordinance banning the posting of “For Sale” or “Sold” signs on residential property in order to stem the flight of white homeowners from an integrated neighborhood, and explaining that the government does not have the power to restrict the free flow of information because it fears that otherwise the audience will make decisions inimical to what the government views as its self-interest); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (invalidating a federal ban on advertising compounded drugs violates the First Amendment, and observing that the Court had “previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information”); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (opinion of Stevens, J., joined by Kennedy & Ginsburg, JJ.) (“The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”).

However, as Justice Breyer explained in his dissent in *Western States Medical Center*, the government’s rationale for regulation in that case is not in fact paternalistic:

It is an oversimplification to say that the Government “fear[s]” that doctors or patients “would make bad decisions if given truthful information.” Rather, the Government fears the safety consequences of multiple compound-drug-prescription decisions initiated not by doctors but by pharmacist-to-patient advertising. Those consequences flow from the adverse cumulative effects of multiple individual decisions each of which may seem perfectly reasonable considered on its own. The Government fears that, taken together, these apparently rational individual decisions will undermine the safety testing system, thereby producing overall a net balance of harm.

535 U.S. at 387 (Breyer, J., dissenting, joined by Rehnquist, C.J., and Stevens & Ginsburg, JJ.) (alteration in original) (citation omitted).

Accordingly, despite the Court’s use of the term “paternalism,” all of the cases discussed in this footnote, with the exception *44 Liquormart*, are perhaps better characterized as involving a collective action problem rather than a truly paternalistic measure such as was upheld in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986) (Court upholds against First Amendment challenge a Puerto Rican law prohibiting gambling casinos from advertising their facilities to residents of Puerto Rico justified by the desire to prevent excessive casino gambling among local residents). For a discussion of collective action problems, see Wikipedia, *Collective Action*, [http://en.wikipedia.org/wiki/Collective\\_action](http://en.wikipedia.org/wiki/Collective_action) (last visited Oct. 5, 2007).

133. In *National Ass’n of Broadcasters v. Kleindienst*, 405 U.S. 1000 (1972) (affirming *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.C.D.C. 1971)), the Court summarily affirmed a three judge district court’s decision upholding the constitutionality of a federal ban on cigarette advertising on radio and television. This case was, however, decided before the Supreme Court extended First Amendment protection to commercial speech in *Virginia State Board of Pharmacy*, 425 U.S. 748 (1976), as well as before the cases condemning “paternalistic” measures discussed *supra* note 132. Its continuing validity is therefore in doubt. See generally *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (applying *Central Hudson* test to invalidate on First Amendment grounds a ban on outdoor advertising of smokeless tobacco and cigars within 1,000

dangerous product or activity does not include, as the Court once held that it did,<sup>134</sup> the allegedly lesser power to ban its promotion, is an interesting question. Since a direct ban on the sale of cigarettes does not sufficiently implicate individual autonomy to render the law unconstitutional, it would be difficult to argue that it is some general commitment to autonomy, such as the minimal autonomy implicit in democracy that we are now considering, that is offended by the advertising ban.<sup>135</sup> The best argument that I can think of, though I do not find it persuasive, is that unlike the sale of cigarettes, cigarette advertising provides the public with information needed to decide public issues about smoking and health.<sup>136</sup> My purpose here, however, is not to explore in detail why a ban on cigarette advertising is a difficult constitutional question, while a ban on cigarettes themselves is not. Rather, it is to suggest that the irreducible minimum autonomy that flows from the very premise of democracy and arguably attaches even outside the realm of democratic participation is likely not the explanation.

#### IV. CONCLUSION

Upon initial consideration, the question of the level of protection commercial speech should receive might seem to be a dry, technical inquiry. But grappling with this question quickly reveals that it raises one of the most profound and interesting questions in all of

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feet of a school or playground and an indoor point-of-sale requirement that such advertisements be placed no lower than five feet from the floor).

134. See *Posadas de Puerto Rico Assocs.*, 478 U.S. at 345–46 (“In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . .”). This greater-includes-the-lesser rationale was seemingly repudiated in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1996), where the Court rejected a similar argument in support of a prohibition against revealing the alcoholic content of malt beverages on product labels, noting that the statement in *Posadas* occurred only after the majority concluded that the regulation survived the *Central Hudson* test; see also *44 Liquormart*, 517 U.S. at 511 (opinion of Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.) (concluding that the “greater-includes-the-lesser” rationale should be rejected because it is “inconsistent with both logic and well-settled doctrine”).

135. David Strauss makes an interesting argument that restrictions on speech that persuade someone from doing something involve a greater intrusion on autonomy than laws that directly forbid someone from doing the same activity. In Strauss’s view, suppressing speech because it will persuade the audience to do something which the government disapproves of is “similar in kind (although not in degree) to lies that are told for the purpose of influencing behavior” and, thus, “involve a denial of autonomy in the sense that they interfere with a person’s control over her own reasoning processes” in ways that an outright ban on the activity does not. See Strauss, *supra* note 130, at 354.

136. See *supra* note 59 and text accompanying note 71.

constitutional law: whether the First Amendment is primarily an instrument of democracy, as I think it is, or a key instrument of liberalism, as Redish maintains. This question, in turn, raises the even deeper and more difficult question of whether a commitment to democratic self-governance presuppose autonomous individuals even when acting in capacities not directly related to self-governance.

I agree with the basic liberal premise that each of us is the author of our own life, and therefore find most types of paternalism offensive and unjustifiable. But whether the United States Constitution generally prohibits such intrusions on personal autonomy, or whether the propriety of paternalism should instead be decided by the political process, is a different and much more difficult questions. If there is such a general constitutional limit on paternalism, it is, in my view, more properly found in the liberty protected by the Due Process Clause of the Fifth and Fourteenth Amendments than as part of the right to free speech protected by the First Amendment. The primary purpose of the First Amendment is to set strong and definite constitutional limitations on the government's ability to interfere with the right of the people, both collectively and individually, to freely discuss all matters of public concern. If, however, the First Amendment is made to do work inappropriate for it, such as protecting a general precept of autonomy or self-realization, its ability to carry out its primary function will likely be impaired.

The extent to which the individual right to participate in collective decision making presupposes autonomous individuals is an interesting and difficult issue, as is the related question of whether the First Amendment properly protects such autonomy. It is a pity that Redish did not spend more time exploring this issue rather than attacking the motives of those who do not share his view about the level of protection the First Amendment affords commercial speech.