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# Use Your Words: On the "Speech" in "Freedom of Speech"

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# USE YOUR WORDS: ON THE "SPEECH" IN "FREEDOM OF SPEECH"

*Leslie Kendrick**

*Freedom of speech occupies a special place in American society. But what counts as "speech" is a contentious issue. In countless cases, courts struggle to distinguish highly protected speech from easily regulated economic activity. Skeptics view this struggle as evidence that speech is, in fact, not distinguishable from other forms of activity.*

*This Article refutes that view. It argues that speech is indeed distinct from other forms of activity, and that even accounts that deny this distinction actually admit it. It then argues that the features that make speech distinctive as a phenomenon also make it distinctive as a normative matter. This does not mean that the skeptics are all wrong. It does, however, mean that they are wrong that freedom of speech is conceptually impossible. Speech is special in a way that makes it a plausible basis for a right of freedom of speech.*

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## Introduction

"Freedom of speech" is clearly important in American society. But what is it? Is free speech implicated when a bakery denies service to a same-sex couple shopping for a wedding cake?[1] Is it implicated when a town applies a zoning ordinance to a tattoo parlor?[2] Is it implicated when internet service providers would rather not follow net neutrality rules?[3] The fact that many litigants, and sometimes courts, think these cases involve the freedom of speech[4] is a sign that the law requires a better definition of what, exactly, free speech is.

Most people presented with the question would say that free speech has something to do with activities that we colloquially call speaking, and that these activities are important in some way. But when serving a cake is speech, and tattooing is speech, and providing internet access is speech, we might wonder whether we have strayed rather far both from the notion of "speech" as a phenomenon and from whatever it is that might make "freedom of speech" important as a legal, political, or moral right.

This matters. From a moral or political standpoint, if freedom of speech is a basic human right, we ought to be able to articulate when it is implicated and when it is not. And if every activity implicates it, we ought to suspect that something has gone wrong.

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1. *See, e.g.*, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276, 293 (Colo. App. 2015) (upholding state civil rights law against First Amendment challenge by bakery), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017); *see also*, *e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013) (same for photographer); *In re* Gifford v. McCarthy, 137 A.D.3d 30, 41–42 (N.Y. App. Div. 2016) (same for wedding venue); State v. Arlene's Flowers, Inc., 389 P.3d 543, 556 (Wash. 2017) (same for challenge by florist).

2. *See, e.g.*, Buehrle v. City of Key West, 813 F.3d 973, 979 (11th Cir. 2015) (invalidating ordinance prohibiting tattoo parlors in historic district on First Amendment grounds); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061–68 (9th Cir. 2010) (invalidating total prohibition on tattoo parlors on First Amendment grounds); Coleman v. City of Mesa, 284 P.3d 863, 873 (Ariz. 2012) (applying First Amendment intermediate scrutiny to the denial of use permit to tattoo parlor).

3. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016) (upholding net neutrality rules against First Amendment challenge by ISPs); Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014) (acknowledging but not deciding Verizon's claim to immunity from net neutrality rules under the First Amendment).

4. *See e.g.*, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015) (conflict mineral disclosures); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (meat labels); United States v. Caronia, 703 F.3d 149, 164–69 (2d Cir. 2012) (prescription drug marketing); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996) (milk labels); Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1113, 1127 (C.D. Cal. 2013) (condoms for adult entertainers); Martin v. Google Inc., No. CGC-14-539972, 2014 WL 6478416 (Cal. Super. Ct. Nov. 13, 2014) (search engine results).

From a legal standpoint, the First Amendment's function is to block the operation of otherwise valid laws. Invalidating civil rights laws, zoning ordinances, and net neutrality rules on free speech grounds is, in a word, undemocratic.[5] Courts enforcing the First Amendment should do so based on more than some vague sense that the activity in question is "speech" and that "speech" is in some vague way important.

But the problem seems to be growing. Litigants who can in any way characterize their activity as "speech" seek the protection of the First Amendment.[6] In an information economy, the number of litigants who can plausibly make such claims is on the rise.[7] The further this expansion goes, the more the First Amendment resembles a general right to be free from regulation, akin to the economic due process and related claims successfully leveraged by businesses in the *Lochner* era.[8] With the variety of activities now denoted "speech," we find ourselves back inside the bakery of *Lochner v. New York*, only this time we are arguing over whether the baker has a First Amendment right to be immune from labor[9] and civil rights laws.[10] If speech is different from other forms of activity, then that difference would be useful in distinguishing what is a free speech claim from what is not.

For a long time, skeptics have challenged our society's reflexive commitment to free speech.[11] The skeptics point out that our treatment of free

5. *See, e.g.*, Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 4–8 (1980).

6. For literature about the expanding First Amendment, see, for example, Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodation Law*, 66 Stan. L. Rev. 1205 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 Wm. & Mary L. Rev. 1199 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 Law & Contemp. Probs. 195 (2014); Frederick Schauer, *First Amendment Opportunism*, *in* Eternally Vigilant: Free Speech in the Modern Era 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2003); Amanda Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133.

7. *See* cases cited *supra* notes 3–4.

8. Lochner v. New York, 198 U.S. 45 (1905). For literature relating contemporary speech clause jurisprudence to the *Lochner* era, see, for example, Bagenstos, *supra* note 6; J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375; Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1 (1979); Kendrick, *supra* note 6; Purdy, *supra* note 6; Schauer, *supra* note 6; Shanor, *supra* note 6; Cass Sunstein, Lochner's *Legacy*, 87 Colum. L. Rev. 873 (1987); Howard M. Wasserman, Bartnicki *as* Lochner*: Some Thoughts on First Amendment Lochnerism*, 33 N. Ky. L. Rev. 421 (2006).

9. *Compare* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 (D.C. Cir. 2013) (businesses have a First Amendment right not to post notice of labor laws), *with* UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360, 365 (D.C. Cir. 2003) (businesses do not have a First Amendment right not to post notice of labor laws).

10. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015) (considering whether bakery has a First Amendment speech right to refuse to make wedding cakes for a gay couple), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017); *see also* Elane Photography, LLC v. Willock, 309 P.3d 53, 59–60 (N.M. 2013) (same for photographer); Gifford v. McCarthy, 137 A.D.3d 30, 41 (N.Y. App. Div. 2016) (same for wedding venue).

11. *See infra* Part II.

speech—as a matter of both constitutional law and moral- or political-rights discourse—suggests that free speech deserves to be singled out from other activities for special discussion. The skeptics challenge this view by arguing that speech is not different from other activities in any conceptually important way.[12] Because speech is not different from other activities, it should not be treated differently from them. As a normative matter, there should not really be "free speech" rights. What we mistakenly call a free speech right is either part of some larger right or nothing but the operation of the background principles that ought to apply to all regulation of all activity. These challenges by skeptics—and the increasingly far-fetched definitions of "speech" employed by litigants—put pressure on those who assume speech is special and different.

As deeply held as the American commitment to free speech is, it is often equally underdeveloped. If one really wants to answer the skeptics—and to address the expansion of the First Amendment to tattoo parlors and bakeries—one must start again from the very beginning and ask: Is speech different from other activities?

This Article does just that. It argues that speech is, in fact, different from other activities, in ways that would support its being singled out for identification as a special right. In saying this, this Article takes on a particular strand of arguments by the skeptics—that speech, as a phenomenon, is not distinguishable from other forms of activity. Skeptics make other arguments as well, and not all of them can be addressed here. But this Article explains the structure of their arguments and takes the necessary step of addressing the threshold claim—that speech cannot be distinguished from other activities.

Part I describes the problem of defining "freedom of speech" by reference to the case law of the last century. Part II looks at how commentators have tried to define and justify the freedom of speech during the same time period. It describes the basic understandings of free speech on offer, including the skeptical view. Part III explains that the quandary of whether freedom of speech counts as a special right actually involves more than one question about more than one kind of specialness.

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12. *See, e.g.*, Larry Alexander, Is There a Right of Freedom of Expression? (2005) [hereinafter Alexander, Is There a Right]; Larry Alexander, *The Misconceived Search for the Meaning of "Speech" in Freedom of Speech*, 5 Open J. Phil. 39 (2015); R.H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 Am. Econ. Rev. 384, 389 (1974); Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & Econ. 1, 9 (1964); Frederick Schauer, *Free Speech on Tuesdays*, 34 Law & Phil. 119 (2015) [hereinafter Schauer, *Free Speech on Tuesdays*]; Frederick Schauer, *On the Distinction Between Speech and Action*, 65 Emory L. J. 427 (2015) [hereinafter Schauer, *Speech and Action*]; Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. Rev. 1284 (1983) [hereinafter Schauer, *Must Speech Be Special?*]; Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U. L. Rev. 1319, 1321 (1983) (reviewing Frederick Schauer, Free Speech: A Philosophical Enquiry (1982)). For a skeptical view of most, but not all, free speech theories, see, for example, Frederick Schauer, Free Speech: A Philosophical Enquiry (1982) [hereinafter Schauer, Free Speech]; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); Jackson & Jeffries, *supra* note 8.

Part IV begins the project of defining freedom of speech by addressing the specialness of speech as a phenomenon. One argument made by the skeptics of free speech is that speech, as a phenomenon in the world, is no different from other activities. This is only one objection skeptics make, but if correct it is a fatal one. I argue that speech as a phenomenon is, indeed, sufficiently special. Part V argues that the distinctiveness of speech as a phenomenon offers a way to push back against claims that freedom of speech also lacks distinctiveness on a normative level. In brief, the very reasons that speech is distinctive as a phenomenon make it highly likely to support the recognition of a special right of freedom of speech.

Finally, I gesture toward the remaining work that must be done to develop a complete account of free speech as a special right. The end result of this piece will not be an all-purpose tool that can tell us whether civil rights laws, zoning ordinances, or net neutrality rules implicate free speech: quandaries that have taken decades to develop will require more than one article to resolve. The end result will instead be a necessary step toward that resolution.

## I. The Expanding First Amendment

The U.S. Constitution refers to "the freedom of speech" as though it were a freestanding right, distinguishable both from other rights and from the usual democratic processes of lawmaking.[13] Meanwhile, "freedom of speech" is often treated as a basic human right that exists regardless of the political system under which individuals live.[14] Discussions of freedom of speech as a legal, political, or moral right thus take for granted that free speech is meaningfully distinguishable from other rights and from the principles that govern the regulation of conduct generally. This status can be described by saying that free speech is generally considered to be a special right.[15]

At the same time, free speech theories almost always refer to some value that speech furthers.[16] No one claims that speech is normatively important

13. U.S. Const. amend. I.

14. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

15. *See, e.g.*, Ronald Dworkin, Religion Without God 131 (2013) ("Freedom of speech is a special right: government may not infringe that special freedom unless it has what American lawyers have come to call a '*compelling*' justification."). Fred Schauer has asserted that a free speech right must be "special" in order to be worth singling out. *See* Schauer, *Must Speech Be Special?*, *supra* note 12, at 1284; *see also* Bork, *supra* note 12, at 23 ("The first amendment indicates that there is something special about speech.").

16. *See, e.g.*, Frederick Schauer, *The Second-Best First Amendment*, 31 Wm. & Mary L. Rev. 1, 2 (1989). The exceptions to this generalization are theories holding that speech gets special protection not because it is special in and of itself, but because governments are particularly bad at regulating it. *See infra* note 63. Such theories, however, may also smuggle in premises about how speech is more useful or important than other activities. *See infra* note 96.

in itself.[17] The explanations for why speech deserves special treatment always lead to the invocation of some larger value. For example, one might argue that free speech is necessary to the discovery of truth[18] or to legitimate democratic governance.[19] One might argue that free speech is both facilitative and reflective of human beings' personal or moral autonomy.[20] These justifications—the search for truth, democratic self-governance, and autonomy—are the major ones offered in defense of freedom of speech. For these and any other plausible justifications, some value beyond speech itself is the reason that speech is important.

The quandary, then, is to explain why, if free speech can only be important in relation to some larger value, it is worth singling out and discussing on its own. In this Part, I will sketch the major attempts to address this question within American case law.

The modern First Amendment was born in separate opinions of Justices Holmes and Brandeis in 1919 and 1927. Then and ever since, there has been an impulse to explain the existence of the freedom of speech by reference to multiple and overlapping justifications: speech is special and different because it serves multiple functions at once, in a way that is implied to be exceptional, indeed unique. In this regard, the dominant approach has been *pluralistic*.

A signal example is Holmes's famous 1919 dissent in *Abrams v. United States*, which argued for First Amendment protection for distribution of a Socialist leaflet criticizing the draft. Holmes discussed the marketplace of ideas. He was skeptical about truth seeking and the power of government to dictate the right answer to anything:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon

17. *See* Schauer, *supra* note 16, at 2.

18. *See, e.g.*, JOHN MILTON, AREOPAGITICA 58 (Cambridge Univ. Press 1918) (1644) ("Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?").

19. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Bork, *supra* note 12, at 23; Ronald Dworkin, *A New Map of Censorship*, 35 INDEX ON CENSORSHIP, no. 1, 2006, at 130.

20. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 5 (1989); SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW (2014) [hereinafter SHIFFRIN, SPEECH MATTERS]; C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532 (1979) [hereinafter Scanlon, *Categories of Expression*]; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 209 (1972) [hereinafter Scanlon, *A Theory of Freedom of Expression*]; Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

> some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[21]

This passage was the first attempt to offer a justification for freedom of speech within the Supreme Court's corpus, and it remains one of the most influential.

A second was Brandeis's 1927 concurrence in *Whitney v. California*, which took a similarly pluralist tack.[22] In Robert Bork's estimation, Brandeis's concurrence identified four important functions for free speech: the development of the faculties, personal satisfaction, a safety valve for society, and the discovery of political truth.[23] Even if one disagrees with Bork's specific breakdown, it is undeniable that the arguments in *Whitney* come fast and furious, and if they come together in one coherent whole, it has many moving parts:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[24]

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21. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For dissections of Holmes's dissent and its context, see, for example, Thomas Healy, The Great Dissent 4, 206 (2013); Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 Cornell L. Rev. 1118, 1128 (1989); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719 (1975); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1205, 1271–73 (1983); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 Calif. L. Rev. 391, 414–19, 435–36 (1992).

22. 274 U.S. 357, 375–78 (1928) (Brandeis, J., concurring).

23. *See* Bork, *supra* note 12, at 24–25 (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)). For other interpretations of Brandeis, see, for example, Haig Bosmajian, Anita Whitney, Louis Brandeis, and the First Amendment (2010); Philippa Strum, Speaking Freely: *Whitney v. California* and American Speech Law 112–20 (2015); Melvin I. Urofsky, Louis D. Brandeis: A Life 619 (2009); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 Wm. & Mary L. Rev. 653 (1988); Rabban, *supra* note 21, at 1332–42.

24. *Whitney*, 274 U.S. at 375.

In *Abrams* and *Whitney*, the arguments made in support of free speech principles were varied and overlapping. For Holmes, they involved democratic legitimacy, truth seeking, and distrust of government. For Brandeis, they involved truth seeking, individual development and happiness, and democratic self-government. In this regard, free speech justifications have long been *pluralistic*.

Once free speech protections were recognized, they soon expanded. The early cases used the pluralistic approach to justify protection of speech that was explicitly political: Socialist pamphlets, criticism of the draft, and so forth. But the Court eventually applied these arguments to speech further afield from political discourse.

One clear example of this expansionist impulse comes from libel law. The landmark *New York Times Co. v. Sullivan* decision was distinguished for its relatively narrow focus.[25] It held that the First Amendment protected false and defamatory statements about public officials in their official duties unless the speaker knew the statements were false or was reckless about that risk.[26] The Court likened statements about officials to criticism of the government, which it said the First Amendment had long been understood to protect.[27] In essence, democratic self-governance required the full and free discussion of public affairs, and liability for negligent or innocent misstatements about public figures chilled that "uninhibited, robust, and wide-open" debate.[28]

But this narrow focus quickly gave way to more expansive protection and more diffuse premises. The Court soon began to ask whether the First Amendment was not also concerned with protecting all speech about public figures, or all speech about matters of public concern.[29] The Court ultimately concluded that the First Amendment protects speech about matters of public concern, and that speech about public figures relating to a matter of public concern gets the same protection articulated in *Sullivan* for speech about public officials.[30]

The arguments that originally applied to speech about public officials thus extended much further into the realm of public discourse. One First Amendment commentator, Harry Kalven, foresaw this expansionist impulse at the time of *Sullivan*: "[T]he invitation to follow a dialectic progression from public official to government policy to public policy to matters in the

25. 376 U.S. 254, 279–80 (1964).

26. *Sullivan*, 376 U.S. at 279–80.

27. *Id.* at 273–76.

28. *Id.* at 270.

29. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), *abrogated by Gertz*, 418 U.S. 323; Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

30. *Dun & Bradstreet*, 472 U.S. at 758; *Gertz*, 418 U.S. at 362; *Rosenbloom*, 403 U.S. 29.

public domain, like art, seems . . . to be overwhelming."[31] Kalven was correct.

Another crucial example of this expansionist impulse is the Supreme Court's reversal on commercial speech during the 1970s. After having long held that the First Amendment did not protect commercial speech, the Court executed an about-face and held that it did.[32] In drawing this conclusion, the Court emphasized the value of commercial information to consumers and to society as a whole.[33] Indeed, the Court noted that consumers might value, for example, prescription drug pricing information even more highly than they valued political information.[34] The Court seemed to assume that, because consumers valued commercial information, the First Amendment must value it as well. Justice Rehnquist, for one, was puzzled by this conclusion:

> The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.[35]

Here, the pluralist impulse leads to expansion: the First Amendment protects all things that matter to individuals, and that means it protects commercial advertising.

Since the 1970s, the dual impulses of expansionism and pluralism have continued in First Amendment case law and generated a seemingly limitless annexation of territory previously thought not to implicate the freedom of speech.[36] It is common for cases to dwell on whether the activity in question is "speech," as though this answers the question of whether it receives First Amendment protection.[37] It is also common for courts and litigants to take

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31. Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191, 221.

32. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) (holding protected particular ad for nonprofit providing factual information about abortion services). *Compare* Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding that commercial speech is not within the scope of the First Amendment), *with* Va. State Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (holding that it is).

33. *Va. State Pharmacy Bd.*, 425 U.S. at 762–65.

34. *Id.* at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

35. *Id.* at 787 (Rehnquist, J., dissenting) (citation omitted).

36. *See, e.g.*, cases collected *supra* notes 1–4; literature collected *supra* notes 6–8.

37. *See, e.g.*, U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016); Buehrle v. City of Key West, 813 F.3d 973 (11th Cir. 2015); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272

for granted that activities unquestionably involving speech are unquestionably within the ambit of the First Amendment.[38]

For example, in a case recently decided by the Supreme Court, businesses challenged a New York law prohibiting surcharges for using a credit card. The law states in its entirety:

> No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means.
>
> Any seller who violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed $500 or a term of imprisonment up to one year, or both.[39]

The litigants claimed that the law violated their First Amendment rights because it affected how they could describe their prices. They could charge $103 for credit cards and $100 for cash so long as they described that as a cash discount, but they could not describe it as a credit card surcharge.[40] The United States in its brief agreed that the law "is a regulation of speech, because it addresses the manner in which a merchant may present its pricing scheme to the public."[41] The Supreme Court likewise agreed that the law was a regulation of "speech" and that therefore the appeals court on remand had to apply First Amendment scrutiny.[42]

Yet the fact that a law implicates "speech" does not mean that it implicates "the freedom of speech." A great deal of speech regulation has always been treated as completely outside the scope of the First Amendment. Conspiracy, perjury, insider trading, antitrust violations, SEC disclosures, contracts, wills, trusts, deeds and conveyances, informed consent, failure to warn—these are a few areas of law that clearly involve speech and have never

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(Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017) (upholding state civil rights law against First Amendment challenge by bakery); State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (same for challenge by florist).

38. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015) (conflict-mineral disclosures); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (meat labels); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013) (labor-notice posting), *overruled in part by Am. Meat Inst.*, 760 F.3d 18; United States v. Caronia, 703 F.3d 149, 166 (2d Cir. 2012) (prescription drug marketing); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996) (milk labels); Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007) (search engine results); Martin v. Google Inc., No. CGC-14-539972, 2014 WL 6478416 (Cal. Super. Ct. Nov. 13, 2014) (same).

39. N.Y. Gen. Bus. Law § 518 (McKinney 2017).

40. Brief of Petitioner at 1–2, Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (No. 15-1391).

41. Brief of United States as Amicus Curiae Supporting Neither Party at 14, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391). The United States went on to recommend remand for further factfinding as to whether the law could pass First Amendment scrutiny. *Id.* at 33–35.

42. *Expressions Hair Design*, 137 S. Ct. at 1150–51.

been thought to create First Amendment problems.[43] The litigants' argument in *Expressions Hair Design* could just as easily apply to, say, the contract doctrine of express warranty of fitness for a particular purpose. Holding businesses liable when they make express warranties on their products *also* affects how they can describe their wares to the public. And yet this has never been thought to raise any First Amendment problems at all.

The result of pluralism and expansionism in the case law has been a runaway First Amendment. Many might find this to be a benign, even a salutary, development. What is the harm of too much protection? Others will see an alarming deregulatory parallel to the *Lochner* era. Perhaps everyone can agree that an ever-expanding First Amendment forces difficult, sometimes absurd questions. Should wedding photographers get immunity from state civil rights laws because what they do is "speech?"[44] If they do get such immunity, do other wedding vendors? Is floral arrangement sufficiently speechlike?[45] Is cake baking?[46] Is catering?[47] Each of these businesses can claim that what they do is "expressive." Is that all that it should take to have a successful First Amendment claim? If so, then Heart of Atlanta Motel and Ollie's Barbecue might have had winning claims too, if only they had thought to argue that providing lodging or serving food counts as "speech."[48]

First Amendment case law creates such questions, but it provides few answers. To describe the problem in further detail, and to begin to identify responses, I now turn to scholarly approaches to freedom of speech.

## II. The Specialness Debate

Commentary about the freedom of speech both reflects the forces of pluralism and expansionism and offers some ways to understand them. The overview that follows largely will not distinguish between constitutional arguments about what the First Amendment means and normative arguments about what the freedom of speech requires as a moral or political matter. This conflation will bother some people, but in the realm of free speech, it is justifiable.

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43. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1786 (2004) (listing categories of speech outside the purview of First Amendment).

44. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

45. State v. Arlene's Flowers, Inc., 389 P.3d 543, 550 (Wash. 2017).

46. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

47. *Cf.* Gifford v. McCarthy, 137 A.D.3d 30, 41–42 (N.Y. App. Div. 2016) (wedding venue).

48. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding federal Civil Rights Act against challenge by hotel refusing to serve African Americans on Commerce Clause, Fifth Amendment, and Thirteenth Amendment grounds); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding federal Civil Rights Act against Commerce Clause challenge by restaurant refusing to serve African Americans).

Most of the sources canvassed attempt to interpret the First Amendment, but they do so by reference to normative arguments about why freedom of speech might be important.[49] They may do this because they believe the frequent occurrence of freedom of speech in constitutions around the world suggests that the freedom is first and foremost a human right as a moral or political matter. They may do this because they think appeal to normative values is always a permitted part of constitutional interpretation. They may do this because they think the particular opacity of the phrase "the freedom of speech" requires it. In one way or another, most of these thinkers consider whether freedom of speech is justifiably special on a normative level, even when they are primarily engaged in constitutional interpretation.[50]

Nevertheless, the two endeavors are conceptually distinct. They may come apart when the Supreme Court asserts that speech is special because the Constitution says it is, or when the Court says it will only recognize categories of unprotected speech that have historically been unprotected.[51] These appear to be exclusively constitutional arguments. Even here, however, the normative and interpretive are likely ultimately to collapse back together. It soon becomes clear that "speech" in "the freedom of speech" cannot mean all "speech"—thus, one cannot simply say that "speech" is important without considering, as Holmes and Brandeis did, what normative values might make it so.[52] As for the Court's claims about the historical basis for unprotected categories (putting aside the inaccuracy of these claims), the Court's jurisprudence on unprotected categories itself involved engagement with the normative values underpinning freedom of speech.[53] In short, as Robert Bork long ago recognized, it is impossible to interpret the First Amendment simply by reference to its text or history.[54] For this reason, the normative

49. *See supra* notes 15–16, 19, 31, 43.

50. *See supra* notes 15–16, 19, 31, 43. Bork is an exception who does not purport to rely on normative values. Yet Bork's conclusions about the First Amendment explain why constitutional interpretation and normative deliberation are so entangled in many others' approaches. Bork, a committed originalist, determines that, when it comes to the First Amendment, "[w]e cannot solve our problems simply by reference to the text or to its history." Bork, *supra* note 12, at 22. Those sources, he says, are simply too indeterminate to provide any guidance on what the freedom of speech means. *Id.* at 21–22. Instead, "[w]e are, then, forced to construct our own theory of the constitutional protection of speech." *Id.* at 22. For him, this means an appeal to the structure of the Constitution, whose representative processes implied, in Bork's view, freedom of political discussion. *Id.* at 23. But the same indeterminacy Bork finds in the text and history has encouraged many other thinkers to ask what normative values might justify freedom of speech, even when they are engaged in constitutional inquiry.

51. *See id.* at 22 ("We cannot solve our problems simply by reference to the text or to its history.").

52. *See* Whitney v. California, 274 U.S. 357, 375–78 (1928) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

53. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 773 (1982); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *Whitney*, 274 U.S. at 375–78 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

54. *See* Bork, *supra* note 12, at 21–23.

question is difficult to avoid, and generally neither commentators nor the Supreme Court has attempted to avoid it. Thus, though matters of constitutional interpretation and those of political morality are distinct as a conceptual matter, in practice they overlap a great deal in the realm of free speech. My treatment of them in what follows will reflect that practice.

The dual forces of pluralism and expansionism are on display in mid-twentieth century scholarship on the freedom of speech. The major midcentury scholars all reflected these trends in their own ways. Alexander Meiklejohn was not a pluralist, in that he believed freedom of speech was rooted solely in democratic self-governance.[55] But he was an expansionist, in that he began with a narrow view of political speech and later greatly expanded his definition of what counted as political.[56]

In 1963, Thomas Emerson argued that freedom of speech serves multiple purposes, including self-fulfillment, discovery of knowledge, democratic decisionmaking, and maintaining the proper societal balance between adaptability and stability.[57] Relying heavily on a well-intentioned, but questionable, distinction between expression (fully protected) and action (not),[58] Emerson attempted to combine disparate justifications for speech protection into a unified system.[59]

Meanwhile, taking a different tack, Harry Kalven wound up in a similar place. Doubtful that any unified theory could explain the variety of First Amendment cases, Kalven endorsed a more common law approach to particular speech-related problems.[60] An underlying premise, however, was that many forms of speech could find protection, often for a variety of reasons. In their different ways, both Emerson and Kalven considered the justifications given by their predecessors and selected "all of the above."

From here, paths of thought diverged. Four trends seem particularly important. Each takes a different approach to the justifications for free speech and the expansiveness of free speech protection.

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55. *See generally* MEIKLEJOHN, *supra* note 19.

56. *Compare id.* (positing a narrow right to political speech), *with* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (positing a much broader right to political speech).

57. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–86 (1963); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970).

58. *See* Schauer, *Speech and Action*, *supra* note 12, at 436.

59. *See generally supra* note 57.

60. *See, e.g.*, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988) [hereinafter KALVEN, A WORTH TRADITION]; Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Kalven, *supra* note 31; *see also* Benno C. Schmidt, Jr., *A Nation Without Heretics*, N.Y. TIMES (Feb. 21, 1988), http://www.nytimes.com/1988/02/21/books/a-nation-without-heretics.html?pagewanted=ALl (on file with the *Michigan Law Review*) (reviewing KALVEN, A WORTHY TRADITION, *supra*).

*1. Unified Theories*. Some scholars have justified freedom of speech by reference to one value, such as democratic self-governance,[61] autonomy,[62] truth seeking, or distrust of government.[63] I use these terms loosely, as the individual theories differ quite a bit in their foundations and conclusions. Although a unified theory could be broad or narrow—Bork's democratic theory is an example of the latter—most are quite expansive. That is not to say there are no limits. For example, many autonomy theories exempt commercial speech from protection.[64] Some democratic theories exempt purely private speech.[65] But most theories are generally expansive.

Unified theories are a scholarly rather than a jurisprudential trend. The modern trend in Supreme Court jurisprudence has been not to say very much about the reasons for free speech protection. The Court does periodically say that political speech is particularly important, but it generally refrains from justifying the overall contours of its jurisprudence at all, let alone by reference to one particular value. This reticence leaves the impression that the Court is not relying upon a unified theory of freedom of speech.[66]

*2. Pluralistic Theories.* Other theories are explicitly pluralist. Such theories follow upon and refine the pluralist work of Emerson and others. These theories posit that speech has an important relationship to multiple values, including autonomy, democratic self-governance, the search for truth, and

61. *See, e.g.*, MEIKLEJOHN, *supra* note 19; Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *supra* note 12; Joshua Cohen, *Freedom of Expression*, *in* TOLERATION: AN ELUSIVE VIRTUE 173 (David Heyd ed., 1996); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

62. *See, e.g.*, BAKER, *supra* note 20; SHIFFRIN, SPEECH MATTERS, *supra* note 20; C. Edwin Baker, *supra* note 20; Scanlon, *Categories of Expression*, *supra* note 20, at 532; Scanlon, *A Theory of Freedom of Expression*, *supra* note 20, at 212–13.

63. *See, e.g.*, SCHAUER, FREE SPEECH, *supra* note 12, at 73–86; Daniel A. Farber, Commentary, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991). It is worth noting that distrust of government theories like these generally take the position that speech is not special per se, but only that (1) governments are particularly bad at regulating it or (2) it has some of the characteristics of a public good and therefore requires subsidization. These theories thus rely on a claim that speech is special, not inherently, but as a quasi-public good and as a particularly vulnerable target for regulation.

64. *See* SHIFFRIN, SPEECH MATTERS, *supra* note 20, at 98–102; Baker, *supra* note 62, at 996.

65. *See* Post, *supra* note 61, at 667–72; Weinstein, *supra* note 61, at 494–97.

66. Nor is this surprising in a multimember court. It is likely not a coincidence that Holmes and Brandeis said more about the foundations of the First Amendment in separate opinions than the Court has said since.

others.[67] These theories are pluralistic in their justifications and, unsurprisingly, usually expansive in their scope. Generally, most argue for a strong degree of protection for a broad scope of speech.

*3. The All-Inclusive Approach.* A third approach is not really a theory, nor does it usually endorse a particular justification. It is simply a default rule: all speech is protected, unless it is shown not to be.[68] This approach is sometimes explicitly adopted within the academy.[69] At other times, it appears to be the implicit basis for scholarly conclusions.

More importantly, this approach, more than any other, seems to be the driving force behind contemporary First Amendment jurisprudence.[70] To be sure, it is possible that what is really doing the work is a pluralistic account, or even a very expansive unified theory. But the all-inclusive approach is a very credible candidate for explaining First Amendment jurisprudence. When courts say that speech is protected because the First Amendment says so, they suggest that protection automatically belongs to anything that can be classified as "speech."[71] This is an approach that attempts to implement the freedom of speech without reference to any underlying justification. Similarly, when courts assume that the First Amendment applies to the regulation of words—even though plenty of regulations of words have never been thought to raise First Amendment issues—they seem to be implementing an all-inclusive approach.[72] In this approach, expansive protection has become unmoored from any justification. It is an end in itself.

*4. The Skeptical View.* Finally, various scholars are skeptical of all these approaches. They vary in their reasons and persuasions, but they unite in doubting that speech can be meaningfully distinguished from other activities.

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67. *See, e.g.*, Steven H. Shiffrin, The First Amendment, Democracy, and Romance (1990) (taking an eclectic approach to speech protection); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 521 (embracing the checking function of the First Amendment but noting it is not the exclusive value); Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989) (endorsing multiple justifications for freedom of speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212 (1983) (taking an eclectic approach to speech protection).

68. Barry McDonald dubbed this the "all-inclusive approach." Barry P. McDonald, *Government Regulation or Other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 Emory L.J. 979, 1009 (2005).

69. *See, e.g.*, Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 Va. L. Rev. 567, 584 (2011) (defending an all-inclusive approach); Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 Va. L. Rev. 1973, 1977 (2005) (stipulating an all-inclusive approach).

70. *See* McDonald, *supra* note 68, at 1009 ("The Court has generally taken an 'all-inclusive' approach to the protection of speech, asserting that all speech receives First Amendment protection unless it falls with certain narrow categories of expression . . . .").

71. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

72. *See supra* notes 29–40 and accompanying text.

In 1971, Robert Bork famously dissected the four rationales for speech protection that he found in Brandeis's *Whitney* concurrence—rationales that, in Bork's characterization, bore a striking resemblance to the four rationales for freedom of speech presented by Thomas Emerson.[73] Bork rejected self-development, happiness, and a safety-valve function and identified democratic self-governance as the only plausible justification for freedom of speech.[74] His particular view of protected speech was narrow enough to deny protection for literature, art, scientific speech, and anything else not explicitly related to formal policymaking.[75]

As important as his own view, however, was the skepticism Bork expressed toward the other theories. In dismissing self-development and happiness as free speech justifications, Bork said that these values

> do not distinguish speech from any other human activity. An individual may develop his faculties . . . from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors . . . . These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity.[76]

Bork believed that self-development and happiness bore the same relation to speech that they did to other activities. They thus failed as justifications for treating speech differently from those other activities.

Five years later, after the Supreme Court expanded speech protection to commercial advertising, Tom Jackson and John Jeffries criticized that development. They argued that protection for commercial speech was, in its justification and effect, indistinguishable from *Lochner*-era economic due process such that "economic due process is resurrected, clothed in the ill-fitting garb of the first amendment."[77]

The analogy to economic due process rested upon the view that commercial advertising was indistinguishable from the rest of commercial activity, which in the post-*Lochner* era was subject to mere rational basis review. To be clear, Jackson and Jeffries did not argue that *all* speech was indistinguishable from other activity. They simply argued that no plausible account of freedom of speech could distinguish commercial speech from other commercial activity.[78] To this extent, they sounded a skeptical response to the continuing expansion of the First Amendment.

Absorbing both the optimistic, expansive pluralism of some scholars and the Court, and the skepticism of various critics, a young First Amendment scholar in the late 1970s began work on a book that deeply considered

73. Bork, *supra* note 12, at 24–26; Emerson, *supra* note 57, at 878–79.

74. Bork, *supra* note 12, at 24–26.

75. *See id.* at 20.

76. *Id.* at 25.

77. Jackson & Jeffries, *supra* note 8, at 30.

78. *Id.* at 32–33.

the idea of an independent free speech principle.[79] Frederick Schauer's *Free Speech: A Philosophical Enquiry* scrutinized each rationale offered in favor of freedom of speech.[80] It argued that, if each individual argument was unconvincing, then their agglomeration should be no more convincing.[81] Giving close scrutiny to many rationales—such as truth seeking, democratic self-governance, and autonomy—Schauer concluded that most of them were far less persuasive than conventional wisdom suggested.[82] In a review of that book, Larry Alexander took an even more skeptical approach, expressing doubt that *any* freestanding justification of free speech was possible.[83] Ever since, Schauer and Alexander, in books and articles, have criticized free speech theory and doctrine for failing to distinguish speech successfully from other forms of activity.[84]

Meanwhile, similar arguments have been made by groups as varied as classical economists, feminists, and critical race theorists. Economists such as Aaron Director and Ronald Coase viewed the speech market as indistinguishable from any other market.[85] And if the arguments in favor of a free market are credited in the marketplace of ideas, they should be equally credited in the market for goods. Thus, speech is not distinguishable from other activities, and the proper response is to give *all* activities the immunity from regulation that speech enjoys. This argument has been taken up and developed by libertarians and others interested in heightening judicial review for economic regulation.[86]

If libertarians want to increase the level of protection for all activity, feminists, critical race theorists, and others have advocated for a decrease. Debates about both pornography and hate speech reveal skepticism about whether speech is different from other forms of activity. Different thinkers vary in the particulars of their views, but they share an emphasis on an important similarity between speech and other activities: "speech" can cause harm just as other "actions" do.[87] In their view, the harm-causing properties

79. Schauer, Free Speech, *supra* note 12.

80. *Id.*

81. *Id.*

82. *Id.*

83. Alexander & Horton, *supra* note 12.

84. *See* sources cited *supra* note 12.

85. *See, e.g.*, Coase, *supra* note 12, at 389; Director, *supra* note 12, at 9; *Ideas v. Goods*, Time, Jan. 14, 1974, at 28.

86. *See, e.g.*, Janice Rogers Brown, *The Once and Future First Amendment*, 2008 Cato Sup. Ct. Rev. 9; Richard A. Epstein, *The Monopolistic Vices of Progressive Constitutionalism*, 2005 Cato Sup. Ct. Rev. 11.

87. For arguments about pornography, see generally Andrea Dworkin, Pornography: Men Possessing Women (1981); Catharine A. MacKinnon, Only Words (1993); Jennifer Hornsby & Rae Langton, *Free Speech and Illocution*, 4 Legal Theory 21 (1998); Rae Langton, *Speech Acts and Unspeakable Acts*, 22 Phil. & Pub. Aff. 293 (1993); Catharine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1 (1985); Caroline West, *The Free Speech Argument Against Pornography*, 33 Canadian J. Phil. 391 (2003). For arguments about hate speech, see generally Mari J. Matsuda et al., Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993); Alexander Tsesis,

of speech are a reason to be critical toward claims about its normative distinctiveness and its enjoyment of a high level of protection.[88]

Skeptics have criticized all three of the other dominant approaches—unified theories, pluralist theories, and the all-inclusive approach. The major criticism ever since Bork's article is that these other views fail to articulate what differentiates speech from other forms of activity.[89]

The all-inclusive approach falls victim to this criticism because it purports to treat all speech specially, yet it does not explain how speech is different from other forms of activity. Moreover, because no one is actually an absolutist about freedom of speech, all-inclusive theories end up excluding certain forms of speech from protection—such as harassment, blackmail, insider trading, falsely shouting fire in a crowded theatre, and so forth.[90] These carve outs suggest that something else is really driving the all-inclusive approach.[91] Perhaps proponents actually think that some speech is more important than other speech. Perhaps they are suspicious of government regulation generally. After all, if the claim is that speech is protected unless it is harmful, then how different is it from other activities, which many people would say should be regulated only when they cause harm? The all-inclusive approach, on a skeptical view, is either a front for a different, unarticulated free speech theory or a symptom of more generalized libertarian sentiment that happens to have attached to speech.

Pluralist and unified theories face their own skeptical criticisms. Pluralist theories are only as plausible as their individual pieces, most of which the skeptics deem implausible.[92] Autonomy theories, in particular, are criticized for supporting a free speech right on the basis of values that, if taken to their logical conclusion, would protect a great deal of other activity as well. Bork's lines about river-port piloting and price fixing are just one example of this skepticism that autonomy arguments can successfully justify a special right of free speech, as opposed to a broader liberty right.[93]

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Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements (2002); Jeremy Waldron, The Harm in Hate Speech (2012); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 457–76; Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 Harv. L. Rev. 1596 (2010).

88. *See supra* note 87.

89. *See* Bork, *supra* note 12, at 25.

90. *See, e.g.*, Kendrick, *supra* note 6, at 1218.

91. *See id.* at 1218–19 ("The all-inclusive approach cannot avoid the difficult questions: some activities will have to be defined out, and some set of values will have to govern that process.").

92. *See, e.g.*, Balkin, *supra* note 8, at 395 n.44 ("[I]f one thoroughly accepts the agnosticism of . . . democratic pluralism, there is nothing from which the 'public interest' could differ. Conversely, all forms of legislation become special interest legislation.").

93. Bork, *supra* note 12, at 25; *see* Schauer, *Free Speech on Tuesdays*, *supra* note 12, at 129 (criticizing Ronald Dworkin, Joseph Raz, Charles Fried, and Seana Shiffrin for failing to distinguish speech from other activities: "For both of them [Dworkin and Raz], and for some of those who understand free speech as an extension of freedom of thought, and for many others,

Meanwhile, if free speech is only one component of a search for truth or of democratic self-governance, then there are two possible outcomes. Either this theory needs an additional basis for distinguishing speech from these other components, or its advocates need to admit that speech is not so special after all.[94] Instead of talking about "freedom of speech," we should be talking about a right of truth seeking or a right to democratic self-governance. "Freedom of speech" is merely a subset of one of these rights that has been arbitrarily singled out for special attention and treatment.

Finally, the skeptics also doubt theories based on distrust of government. Arguably this is the minimal basis for treating speech specially: speech is not necessarily special in and of itself, but the government is particularly bad at regulating it.[95] On the skeptics' view, such theories (1) rest on questionable empirical claims about governmental competence and incentives; (2) are no more likely to be true of speech than of other activities; (3) generally fail to explain why some speech regulation is suspect and some speech regulation does not get challenged; and (4) purport to claim that speech is not special in any other regard but often smuggle in unstated premises about the specialness of speech.[96]

The skeptics ask searching questions about our easy acceptance of freedom of speech as a special right. According to some, speech should be regulated to the same degree as other activities.[97] According to others, different activities should be protected to the same degree as speech.[98] Either way, treating speech as special makes no sense. As Schauer puts it, "[T]o highlight a subset of a larger set without a special justification for doing so seems ordinarily, questions of pure political strategy aside, both misleading and pointless."[99]

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what they say about free speech could just as easily and just as accurately be said about free speech on Tuesdays, or free speech in Cleveland.").

94. *See* Schauer, *Free Speech on Tuesdays*, *supra* note 12, at 136; *see also* Alexander & Horton, *supra* note 12, at 1324 (noting that democratic self-governance is itself likely founded on a larger principle, such as "equality of respect for individuals," which makes it an unlikely candidate for a freestanding free speech principle).

95. *See, e.g.*, SCHAUER, FREE SPEECH, *supra* note 12, at 73–86; Farber, *supra* note 63, at 560–61.

96. *See, e.g.*, ALEXANDER, IS THERE A RIGHT, *supra* note 12, at 145 (2005) (asking why government should be particularly untrustworthy with speech); Jan Narveson, *Freedom of Speech and Expression: A Libertarian View*, *in* FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY 59, 90 (W.J. Waluchow ed., 1994) (noting that justifications for restricting speech "can often be met"); Schauer, *supra* note 43, at 1786 ("'Distrust of government' theories, for example, cannot explain why that distrust has not been extended to the SEC, the FTC, the FDA, the Justice Department, or judges managing a trial—all of which involve government officials making content-based decisions about speech, and none of which is now covered by the First Amendment."); Alexander & Horton, *supra* note 12, at 1328–36 (making versions of all four criticisms).

97. *See supra* note 87 and accompanying text.

98. *See supra* note 85 and accompanying text.

99. *See* Schauer, *Free Speech on Tuesdays*, *supra* note 12, at 124.

The question is of practical as well as conceptual moment. As long as we have a system that gives most other activity (such as economic activity) lower constitutional scrutiny than speech, there will be pressure on the boundary line between the two.[100] The skeptics' view matters because if speech is not different from other forms of activity, it should not be treated differently. Then claims of economic due process and general liberty should be recognized to the extent that the Constitution permits. Or, if one were to conclude that the First Amendment's explicit grant of protection to speech put it on different constitutional footing from other activities, this would be cause for regret rather than celebration. This question thus has grave constitutional import. Moreover, the expansion of the doctrine over the past forty years might create the uneasy feeling that the skeptics may be right.

## III. The "Special" in Special Rights

Hence the question: Is speech special? To answer this, we have to understand exactly what counts as "special." I have argued elsewhere that the question really conceals two questions: How *distinctive* is speech, and how *robust* should its protection be?[101] That is, (1) how distinguishable is an activity covered by a right from activity outside of it, and (2) how much protection should it get?[102] In essence, distinctiveness is about how wide the right is, and robustness is about how deep its protection is. These are questions for any special right, including a right of free speech.

Given where we are in the case law, it is tempting to begin to answer these questions by jettisoning the category "speech." We could decide that we should only talk about "the freedom of speech," not about "speech." The difference is that "speech" refers to a phenomenon in the world, one that people have a colloquial understanding of. The phrase "the freedom of speech" is a term of art, one that does not track people's understanding of the word "speech." By large-scale consensus, it excludes some forms of "speech" (insider trading, etc.), and it includes some nonspeech (music, abstract art, flag burning, etc.).[103] The category "speech"—referring to a phenomenon in the world—does not tell us very much about whatever normative value we are trying to protect when we talk about freedom of speech.

There is much to be said for this view. As my earlier description of the case law suggests, courts have become dangerously essentialist—they care a

100. Jackson & Jeffries, *supra* note 8; *see also* Schauer, *supra* note 6.

101. Leslie Kendrick, *Free Speech as a Special Right*, 45 Phil. & Pub. Aff. 87 (2017) [hereinafter Kendrick, *Free Speech as a Special Right*]; Leslie Kendrick, *How Much Does Speech Matter?*, 129 Harv. L. Rev. 997 (2016) (reviewing Shiffrin, Speech Matters, *supra* note 20) [hereinafter Kendrick, *How Much Does Speech Matter?*].

102. Kendrick, *Free Speech as a Special Right*, *supra* note 101; Kendrick, *How Much Does Speech Matter?*, *supra* note 101.

103. *See, e.g.*, Alexander, Is There a Right, *supra* note 12, at 103–23; Kendrick, *supra* note 6, at 1218; Schauer, *supra* note 43, at 1786.

great deal about whether a phenomenon counts as "speech," to the detriment of any consideration of whether it implicates "the freedom of speech."[104]

And yet to ignore "speech" entirely would be a mistake. Consideration of "speech" is the most promising route by which "freedom of speech" can be successfully singled out as a special right. Indeed, it may be impossible to think about the "freedom of speech" as a special right *without* thinking about what makes "speech" different and special as a phenomenon.[105]

Thus, the issue of distinctiveness can be further broken down into two subparts: How distinctive is speech as a phenomenon, and how distinctive is it normatively?[106] The second question is the most important for free speech jurisprudence: it is the one that would enable us to defend "freedom of speech" as a right worth singling out, rather than some indistinguishable part of some larger value. But the first question—whether speech is distinctive as a phenomenon—is necessary to answering the second.

## IV. Speech as a Phenomenon

Is speech special as a phenomenon? If not, this is fatal to the idea of free speech as a special right. This Part discusses and refutes a view that speech is not special as a phenomenon.

### A. *The Skeptical View*

Skeptics make arguments against both the phenomenological and the normative distinctiveness of speech. Any particular skeptic may be making only one kind of argument. For instance, when Bork says speech is no different from river-port piloting, he is not making any claims about their similarity as phenomena in the world. Instead, he is claiming that they are not normatively distinguishable in their relation to the values of self-development and happiness.[107] Note, however, that refuting his conclusion would likely require an argument about speech and river-port piloting. While both conducive to self-development and happiness, speech and river-port piloting are differently situated with respect to those values. Such an argument would require claims that speech does different things from river-port piloting. These would be claims about speech as a phenomenon. Thus, Bork is actually making assumptions about speech as a phenomenon: that it is not distinctive in any way that matters to its normative valence. And refuting this claim requires arguments for why it is indeed different as a phenomenon.

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104. *See supra* Part I.

105. *See* Schauer, *Speech and Action*, *supra* note 12, at 427–30 (making the same point but evincing skepticism about whether freedom of speech is ultimately a special right).

106. Kendrick, *How Much Does Speech Matter?*, *supra* note 101.

107. Bork, *supra* note 12, at 25.

Thus, one fundamental argument is that speech is not different from other activities as a phenomenon.[108] If speech is not different as a phenomenon, it cannot be different normatively.[109] And if it is not different normatively, then it should not be singled out from other activities for special identification and special protection.

The argument that speech is not distinctive as a phenomenon emphasizes that speech acts, and acts speak. First, speech acts in more than one way: all speech involves activity (uttering, publishing), and much speech alters the world (promising, bequeathing).[110] At the same time, acts speak. If speech is communicative, so are other activities. In fact, everything communicates. As Larry Alexander argues, "All speech is symbolic," and

> [c]onversely, any token of conduct can be employed to symbolize an idea, a word, a syllable, or a letter. Any conduct can constitute a communicative code. Making marks and uttering sounds are common forms of employing symbols to communicate. But smoke signals, semaphore flags, facial expressions, and an almost infinite variety of other conduct can be employed as communicative symbols. Shooting the mailman may be an effective way of conveying the thought that one is fed up with the mail service. Covering oneself with chocolate may be an effective way of spoofing performance art, and so on.[111]

Others have voiced similar concerns in attempting to define the boundary between speech and other activity. Cass Sunstein has gestured in a similar direction in saying that the category "speech" cannot depend solely on meanings derived by an audience, because an audience can derive meaning from any activity.[112]

John Hart Ely similarly rejected efforts to distinguish speech and action.[113] Justices Black and Douglas, purporting to favor absolute immunity for all speech, tended to classify some speech as "action" in order to find it

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108. *See, e.g.*, Alexander, *supra* note 12, at 39; Alexander & Horton, *supra* note 12, at 1322, 1331.

109. *See, e.g.*, Alexander & Horton, *supra* note 12, at 1322.

110. *See, e.g.*, J.L. Austin, How to Do Things with Words (J.O. Urmson & Marina Sbisà eds., 1975).

111. Alexander, *supra* note 12, at 39; *see also* Alexander & Horton, *supra* note 12, at 1322 ("'Speech,' we contend, does not denote any particular set of phenomena. Everything, including all human activities, can 'express' or 'communicate,' and an audience can derive meaning from all sorts of human and natural events.").

112. Cass R. Sunstein, Commentary, *Low Value Speech Revisited*, 83 Nw. U. L. Rev. 555, 556 (1989). Sunstein therefore concludes that the purposes of the speaker, in particular whether the speaker meant to communicate a message, matters in determining where the free speech right applies. *Id.* at 559; *see also* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589, 606. Larry Alexander argues that taking the speaker's intent into account makes no sense and cannot avert the problem of distinguishing speech and action. Larry Alexander, *Low Value Speech*, 83 Nw. U. L. Rev. 547, 548 (1989).

113. See John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1493, 1495 (1975).

unprotected. For example, Justice Black joined a dissent in *Cohen v. California*, opining that Cohen's wearing a jacket with the slogan "Fuck the Draft" was "mainly conduct and little speech."[114] Meanwhile, Thomas Emerson sought to identify speech or action as the "predominate element" in a given activity.[115] Emerson concluded that draft-card burning involved more speech than action and therefore implicated freedom of speech.[116] Pouring blood on draft files, however, was more action than speech.[117] Ely ridiculed this approach as absurd. In response to Emerson, he said, "[B]urning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression."[118]

Ely's point was directed at "expressive conduct," such as draft-card burning or flag burning, but it can be broadened in the way that Alexander suggests. Certainly, all speech is action on some level, and all action can communicate. It could be said, then, that all activity is "100% action and 100% expression."

Thus, one type of skeptical claim is that speech cannot be differentiated from other actions, because the signal feature of speech turns out to be something it has in common with all other actions: they all communicate. Because everything communicates, speech is not different from other activities, and therefore speech cannot form the basis of a special right.

### B. *Speech as a Special Phenomenon*

The skeptics are right that all activity communicates—or at least that all activity *can* communicate. This does not mean that speech is not different. We prize speech because it communicates differently from, and often better than, other activities. These differences are sufficient to distinguish speech from other activities and to consider it as a basis for a normatively distinctive right.

"Speech," in common parlance, often refers to complex systems of communication—to languages, printed and spoken, and other complex systems such as sign language and Morse code. These systems communicate more thoroughly, and often more efficiently and effectively, than other activities. To many, this will seem an obvious point. Of course a system of communication communicates better than other forms of activity. But it is precisely this claim that some skeptics about "speech" downplay.[119] They would point out that plenty of activities communicate. Punching someone in the nose communicates. Not punching someone in the nose communicates. It is not a given that speech communicates differently in a way that merits distinction, so I will spend some time defending that claim.

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114. Cohen v. California, 403 U.S. 15, 27–28 (1971) (Blackmun, J., dissenting).

115. Emerson, *supra* note 57, at 80.

116. *Id.* at 84.

117. *Id.* at 89.

118. Ely, *supra* note 113, at 1495.

119. *See, e.g.*, Alexander, *supra* note 12, at 39; Alexander & Horton, *supra* note 12, at 1322.

Entire academic areas, such as linguistics, speech-language pathology, and developmental psychology, take for granted that complex systems of communication are different from other activities and indeed important to our development and our relationship to the world around us. Entire political theories, such as deliberative democracy,[120] depend on the premise that speech accomplishes interchange and fosters understanding, revision, and consensus in a way that nothing else does.

We need not go so far afield, however, to observe the distinctiveness of speech. Most parents nowadays, and plenty of nonparents, will be familiar with the phrase "use your words." This phrase often comes up when children are flagrantly using something other than their words, such as the hit, the bite, the pinch, or the kick. But we do not tell children to use their words just because violence is bad or antisocial, or because it begets more violence, or because it gets them sent home from preschool. Words are not exactly harmless, and some free speech theories have been criticized for essentially claiming that they are and stopping there, at the proposition that speech tends to compare well with other activities in its harm quotient.[121]

While speech may be an important alternative to violence in some contexts, that is not my basis for claiming that speech is special. Nor is it the only, or even the primary, reason that we tell children to use their words. It is also because these other actions do not explain very much beyond the raw fact of negative emotion. Only speech conveys feelings, propositions, and reasons with nuance, accuracy, and efficiency. Only speech offers the communication, and possible resolution, of internal states. This is not to say that speech is perfect in these regards.[122] But it is far and away the best we've got.

Attempting to interpret someone's thoughts without words is time-consuming and often impossible. It is an exercise in frustration for both those trying to send a message and those trying to receive it. Coming to understanding requires physical proximity and intimacy: one cannot do it with someone who is distant, or even someone who is in the next room. It is incredibly time-consuming, to the point where it is impossible to observe more than a few human beings with the required level of attention. And even when one tries it, success is often limited and never guaranteed.

Parents go through this stage when their children are preverbal, when they have to guess at the meaning of every positive and negative response. Do the tags on her shirt bother her? Does the night light comfort him or

120. *See generally* James S. Fishkin, When the People Speak: Deliberative Democracy and Public Consultation (2009); Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? (2004); Jürgen Habermas, *Three Normative Models of Democracy*, *in* The Inclusion of the Other 239 (Ciaran Cronin & Pablo De Greiff eds., 1998); Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* Deliberative Democracy 67 (James Bohman & William Rehg eds., 1997).

121. *See, e.g.*, Schauer, *Free Speech on Tuesdays*, *supra* note 12, at 123–25 (identifying and criticizing such theories).

122. Nor did we need twentieth-century interpretive theory to alert us to this fact. *See, e.g.*, William Shakespeare, Twelfth Night act 3, sc. 1 ("To see this age! A sentence is but a cheveril glove to a good wit. How quickly the wrong side may be turned outward!").

keep him up? Without words, parents get only a rough sense of what is going on, and some things remain mysterious. It is a great relief to everyone when young children can begin to articulate their thoughts and feelings. We want children to use their words so that they can identify for themselves what is bothering them and so that others can understand their point of view and respond to it. Language is their only bridge from inarticulate unhappiness to understanding by themselves and others.

But that is just the beginning. We ultimately want children to use their words on the playground because doing so is a necessary step toward being able to do everything else we do with speech. It is worth taking a moment to appreciate all the things that complex systems of communication allow us to do that we otherwise could not. What follows is only a partial and inexpert list.[123] First, here are some things that we, as potential recipients, would largely miss out on in the absence of speech:

- the existence and status of people, things, and events outside our immediate field of observation;
- complex or nuanced representations of the thoughts and feelings of others, both outside and within our immediate field of observation;
- the needs and desires of others;
- the occurrence of events in the past that we did not personally experience;
- predictions and discussions of potential future events that we do not ourselves foresee;
- presentations of hypothetical situations that do not occur to us personally;
- most products of others' imaginations, such as fiction, improvisation, and pretend play; and
- the introduction and discussion of abstract ideas, including abstract assessments of any of the above phenomena.

As potential communicators and participants, too, we would miss out on a great deal, including the ability to

- express our interior states with accuracy and precision;
- express complex or nuanced statements;
- express and seek assistance with needs and desires;
- share memories;
- share products of the imagination;
- share worries, concerns, or uncertainties;
- discuss the future;
- share hypothetical situations, including talking through and seeking advice on potential courses of action;

123. Seana Shiffrin similarly catalogues the ways in which speech enables people to share the contents of their minds, a communicative process that she sees as vital to our status as moral agents. *See* SHIFFRIN, SPEECH MATTERS, *supra* note 20. My goal here is more minimalist, in that I am not advancing a particular free-speech theory at the present. I am simply pointing out the ways that speech allows us to communicate. Nevertheless, I want to acknowledge Shiffrin's prior work and its thoughtfulness in detailing all of the various ways in which communication through speech enriches us.

- coordinate with others;
- ask questions of others;
- invite or prompt others' reactions to our thoughts, beliefs, and feelings; and
- express abstract ideas, about any of the above and anything else.

The idea of communication advanced here is about information and interchange. First, it is about information broadly construed. I am not concerned exclusively with facts or propositions, but with the ability to figure out what others are thinking and feeling, to apprehend concepts and ideas, and to express thoughts, feelings, and ideas to others. Second, it is about interchange. As Seana Shiffrin has argued, putting the communicative process in terms of inputs and outputs is an oversimplification.[124] The sharing process, the literal "communication," is larger than the simple acts of sending or receiving.[125] Communication enables people to ask and answer questions, to react, to respond to reactions, to develop ideas together, to collaborate, to coordinate, and so forth.

Speech is a particularly effective way of communicating, in terms of both conveying information and creating interchange. It does these things with far more accuracy, precision, and efficiency than other activities do. This does not mean that other activities do not have their communicative virtues. A punch in the nose can convey a message quite powerfully.[126] But left to convey and receive information or to attempt exchange through means other than speech, individuals would suffer a serious diminishment of communicative ability.

I have used children as an example. I could mention the experience of individuals who have experienced strokes and other medical conditions that interfere with their ability to communicate through speech.[127] Recent research has linked deafness to the development of dementia, with one theory being that reduced ability to engage in exchange leads to diminished mental capacity.[128]

But again, we need not rely on such evidence for what is ultimately an intuitive point. Perhaps the best evidence for it is that anyone who wants to deny that speech is special has to do so with speech. What alternatives are there? Without a complex system of communication, debating the specialness of speech, or any other activity, would be essentially impossible. There

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124. Shiffrin, Speech Matters, *supra* note 20, at 81.

125. It is for this reason that Seana Shiffrin emphasizes communication and thought, rather than, say, speaking and listening. *Id.* Though I take both speakers and listeners to have speech interests, when it comes to the question of defining what is distinctive about speech, Shiffrin is right that talking about speakers and listeners misses the importance of the exchange.

126. *See id.* at 113.

127. *See, e.g.*, Jean-Dominique Bauby, The Diving Bell and the Butterfly (1997); William Gibson, The Miracle Worker (1956).

128. Frank R. Lin et al., *Hearing Loss and Incident Dementia*, 68 Archives Neurology 214 (2011); Richard F. Uhlmann et al., *Relationship of Hearing Impairment to Dementia and Cognitive Dysfunction in Older Adults*, 261 JAMA 1916 (1989).

is simply no other way to convey the idea that a particular activity is or is not special. There is simply no other way to convey any abstract idea. The fact that we are having a debate over whether speech is special is proof that it is.

### C. *The Structure of the Claim*

My claim, then, is about the characteristics of speech as a phenomenon. The skeptics point out that the only reasonable basis on which to distinguish speech from other activities is its communicative power.[129] To this, they reply that everything communicates, and thus speech is not special. I have just pointed out all the ways that speech communicates differently from other activities. It is often the most efficient and effective means of conveying any proposition, and certain ideas—particularly abstract, hypothetical, or nonimmediate ones—can only be conveyed using some form of language.

Note that it need not be the case that speech is better at conveying everything: "A picture paints a thousand words," or "You say it best when you say nothing at all."[130] (Both sentiments, one might point out, that one can only convey in words.) These things can be true, and at the same time certain speech may not convey very much. Yet it can still be the case that, on the whole, speech communicates differently from other activities, in a way that makes it essentially irreplaceable.

This is a claim that takes the structure of a rule or category. It need not be the case that every occurrence of speech communicates better than every incident of other activity in order for the two to be distinguishable as phenomena, just as all birds need not fly in order for flight to be a distinguishing characteristic of birds.[131]

Thus, the claim is not that all speech communicates well, or that only speech communicates. It is that, on the whole, speech communicates in a particularly accurate, precise, thorough, and efficient way. There are things we could do without it. But there is much that we could not do as well, and there is much that we could not do at all. This is enough of a reason to distinguish speech as a phenomenon.

Some have asked whether this is a claim about what makes us essentially human. It is not. For one thing, there are many activities that only humans can do: cooking, playing tennis, river-port piloting.[132] The fact that only humans can do these things does not necessarily make these things distinctive within the realm of things that humans can do. For another, it is not evident that only humans use systems of language of the kind that I am

129. *See, e.g.*, Schauer, *Speech and Action*, *supra* note 12, at 439–40.

130. *See e.g.*, Keith Whitley, *You Say It Best When You Say Nothing at All*, *on* Don't Close Your Eyes (RCA Nashville 1988). But don't see Notting Hill (Universal Pictures 1999).

131. *Cf.* Frederick Schauer, *The Best Laid Plans*, 120 Yale L.J. 586, 613–14 (2010) (book review) (arguing that for law, as for birds, important characteristics need not be universal or essential characteristics).

132. *See* Bork, *supra* note 12, at 25.

describing. Nothing about my claim turns on whether animals communicate in similar ways. If they do, then their speech may be distinctive within their realms of activity just as human language is within ours. (And this activity could link up to some normative value in relation to these other creatures, such that depriving them of speech would be a particular type of harm to them.)

Some have asked the related question of whether this is really about the kind of speech that only humans can do: speech about abstract ideas, hypothetical situations, future and past experiences.[133] Some may endorse this view, and to the extent that it leads them to conclude that speech is special as a phenomenon, we will agree on that point. But this is not the thrust of the argument advanced here. First, most of us are not qualified to opine on whether humans are the only kinds of animals that can refer to abstract concepts. Second, even if other animals did, that would not say anything about the importance of speech within the realm of human activity. Third, it is indeed striking that there are so many types of ideas that we can really only communicate through language, but those are not the only communications that matter or for which speech is particularly effective. Anyone who has cared for a baby knows that "I'm hungry," or "My ear hurts," are wonderfully efficient sentences that far outstrip other means of communicating those ideas.

This observation leads to an objection. Even if one accepts that speech is distinctive enough in its communicative power to be singled out from other activities, does that not lead right back to the all-inclusive approach? My argument is not limited to abstract ideas. It also includes interior attitudes and feelings and many other potentially mundane communications. In saying that "speech," as a category, is different from other activities, am I saying that all "speech" deserves the protection of the "freedom of speech"? No.

An argument about phenomenological distinctiveness is not, in itself, a claim about normative distinctiveness. It still remains to consider why the communicative power of speech might have normative significance. And depending on the theory one endorses—truth seeking, democratic self-governance, or autonomy—some instances of speech will have normative significance and some will not. The next Part discusses this further.[134] The point here, however, is simply that the skeptics cannot claim that normative significance for speech is an impossibility because speech cannot be distinguished from other phenomena in the first place.

A final objection is that I have been discussing languages: complex systems of communication. Our everyday term "speech" might include more than that, and certainly "speech" in "the freedom of speech" includes much

133. This line of thinking relates to Aristotle's claim that "man is a political animal," as evidenced by his possession of speech. Aristotle, Politics 1.1253a. I thank Fred Schauer for the parallel.

134. *See infra* Section V.C.

more. It includes nonrepresentational art, instrumental music, dance.[135] It includes flag burning,[136] cross burning,[137] draft-card burning,[138] and so on. Don't we want these activities included in the scope of freedom of speech?

Perhaps we do, and perhaps they can be. The decision whether to include these activities, and more, is a normative one. It depends on what reason one endorses for thinking "speech" is important enough to merit a "freedom of speech."[139] Someone who thinks the communicative function of speech is particularly important in its relation to deliberative democracy will draw lines differently from someone who thinks the communicative function of speech is particularly important in its relation to self-expression. The proponent of deliberative democracy may leave out some speech that the First Amendment currently protects. The proponent of self-expression may include all that and more. The proponent of self-expression will have a problem if it turns out that she thinks all activity equally implicates self-expression—in that case, the particular communicative properties of speech are doing no work in her theory, and it is open to the skeptical criticism that it is just a general liberty principle in disguise. So the details of the normative theory matter, and they will determine the scope of the freedom of speech. In this regard, the skeptics may be right that certain theories fail to distinguish speech from other activities. The point here is that they are wrong to say that *all* theories cannot possibly distinguish speech from other activities.

Thus speech, as a phenomenon, is sufficiently distinctive from other phenomena to consider whether it might form the basis of a special right. Skeptical arguments to the contrary engage in a performative contradiction. They advance the view that speech is not special in the only possible way that such views can be communicated: through speech.

## V. Speech and Normative Distinctiveness

The skeptics argue that (1) speech is not distinctive as a phenomenon, and (2) speech does not bear a sufficiently distinctive relationship to any particular normative value.[140] I have already argued that speech is distinctive as a phenomenon.[141] I will now argue that its distinctiveness as a phenomenon makes it highly likely to be distinctive in the relation it bears to the relevant normative values.

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135. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995) (discussing First Amendment status of various art forms).

136. Texas v. Johnson, 491 U.S. 397, 399 (1989) (protecting flag burning).

137. Virginia v. Black, 538 U.S. 343, 347–48 (2003) (protecting cross burning).

138. United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (applying First Amendment scrutiny on the stipulation that draft-card burning communicated a message).

139. *See infra* Section V.C.

140. *See generally supra* Section IV.A.

141. *See generally supra* Section IV.B.

### A. *Normative Distinctiveness*

As already noted, free speech theories always refer to some value that speech furthers.[142] Speech communicates more accurately, precisely, completely, and efficiently than other activities. Because of this, it can facilitate an overriding value in a particular way: speech makes it possible to communicate effectively, and this furthers any number of potential larger values.[143] This is not likely to be true for *all* values. If your overriding value is burning calories, speech is not likely to bear a special relationship to that goal. If your overriding value is maximizing physical violence, speech may or may not have something special to offer you.[144] Speech does not bear a special relationship to every potential value. But it is likely to bear a special relationship to any value that is likely to turn up at the bottom of a free speech theory.

Thus, for example, Robert Bork argues that speech about political matters is so essential to democratic self-governance that, if the First Amendment did not exist, it would be implied by the structure of the Constitution.[145] Without speech about candidates and policy questions, the people would have essentially no basis on which to exercise the right to vote.[146] I would go further to point out that a system of democracy is simply not possible without speech, because without speech it would be impossible to communicate the ground rules of the system. It is not an accident that constitutions are composed of words, because without words it would be impossible to devise a representative system of government. Even systems without a written constitution rely on words to state what the system of government is, whether in judicial decisions or in other communications. Perhaps more autocratic systems of government can exist without speech, but a system that involves the people will have to communicate with the people. It will require speech.

Similarly, one might argue that speech is particularly useful in the search for truth. If each of us were condemned to enjoy only the knowledge

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142. *See, e.g.*, Schauer, *supra* note 16, at 3–5.

143. *See id.* at 5.

144. On the one hand, some people argue that speech is generally less harmful than other activities. *See, e.g.*, EMERSON, *supra* note 57, at 9. On the other hand, some evidence suggests that speech is a particularly cheap, far-reaching, and persuasive way to inspire violence in other people. *See, e.g.*, S. Elizabeth Wilborn Malloy, *Taming Terrorists but Not "Natural Born Killers"*, 27 N. KY. L. REV. 81, 86–89 (2000) (collecting examples of violence-inspiring speech); L. Lin Wood & Corey Fleming Hirokawa, *Shot by the Messenger: Rethinking Media Liability for Violence Induced by Extremely Violent Publications and Broadcasts*, 27 N. KY. L. REV. 47, 48–49 (2000) (collecting cases); Michael Reynolds, Note, *Depictions of the Pig Roast: Restricting Violent Speech Without Burning the House*, 82 S. CAL. L. REV. 341, 341–42 (2009) (collecting instances of violent speech on the internet). I do not intend to take a position on this question here.

145. Bork, *supra* note 12, at 23.

146. In *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 CLR 106 (Austl.), the High Court of Australia held that a right of political communication was implied by the representative system of government provided by the Australian Constitution. I am grateful to Fred Schauer for this observation.

we could amass through personal experience and observation, we would not get very far.

Autonomy theories are more difficult, and much depends upon the details. Some of them make a special place for speech more easily than others. Seana Shiffrin has made the case that speech bears a special relationship to our status as thinkers because it is the best, and often the only, method for sharing the contents of our minds with each other.[147] On Shiffrin's view, the communicative power of speech has an obviously distinctive, indeed singular, role to play in our status and development as autonomous agents.[148]

By contrast, Bork criticizes the autonomy-related values of self-development and happiness for being equally facilitated by any number of activities. In Bork's view, speech does not bear a special relationship to either happiness or self-development.[149] Reasonable people could have a conversation about that proposition, though I will forgo it here. I merely raise self-development and happiness as values whose normative relation to speech is more difficult. Thus, when it comes to autonomy, the particular claims being made matter a great deal.

My point is that, for all the usual suspects of free speech theory, one can plausibly claim that the communicative efficacy of speech makes speech normatively distinctive and important. Speech allows people to articulate their inner thoughts with complexity and nuance, receive information that they did not gain from personal observation, consider abstract ideas, engage in discussion, and debate on complex subjects. Speech does these things more efficiently and thoroughly than other activities. Speech is therefore highly likely to serve various normative values in a distinctive way. What makes speech distinctive phenomenologically also makes it distinctive normatively.

### B. *Significance*

We began with the proposition that speech must be distinguishable from other activities. If it is not, then a free speech right does not exist, and what we call a free speech right is really something else, such as a general liberty principle. Our way of talking about free speech suggests that it is a special right that does not attach to everything, and our jurisprudence suggests the same. We therefore labor under a demand to distinguish speech from activity generally.

The distinctive communicative power of speech meets this demand. It provides a sound basis for arguing that speech serves a distinctive role within various normative frameworks. In particular, this distinctiveness is sufficient to reply to skeptical objections that speech is just like all other activities, and that free speech therefore collapses into a general liberty principle. The communicative power of speech ensures that it is not the same as all other activities in the way that it serves a particular value. And if speech

147. *See* Shiffrin, Speech Matters, *supra* note 20.

148. *Id.* at 88.

149. *See* Bork, *supra* note 12, at 25.

serves a particular value differently from other activities, then a free speech right is not just an indistinguishable subpart of a more general right.

Nor is it a problem that speech contributes to a larger value to which other activities may also contribute. This objection occurs in two forms. One form holds that, in order to be significant, free speech must be a freestanding right, such that it bears a unique relationship to a unique value. On this account, if free speech contributes to democratic self-governance, then free speech is not sufficiently distinctive to constitute a right. "Democratic self-governance" is special, and free speech is just a component of that value. Indeed, democratic self-governance itself is probably premised on some deeper value, such as equal dignity and respect, and free speech is not a right because it is merely an instantiation of this deeper value.[150]

The other form of the objection holds that, if other activities also contribute to the larger value, then speech is not special, because it is not unique in contributing to the larger value. For example, if other activities contribute to democratic self-governance—such as education, economic opportunity, presumably voting rights—then speech is not special. Or, for another example, if other activities also contribute to the search for truth—say, experimentation through the scientific method—then speech is not special in relation to truth seeking.[151]

As I have suggested elsewhere, this is asking more than is necessary for something to constitute a special right.[152] It suggests that a free speech right can only be a right if it is essentially freestanding. But to require a special right to be freestanding is to doom it to triviality. Any special right worth talking about is likely to relate to some larger value. It seems perfectly permissible for a right to contribute to or instantiate a larger value, if it does so in a distinctive way. Similarly, it does not detract from the right if other activities relate to the same value in other ways. Various activities may be important for democratic self-governance, the search for truth, or autonomy, just as different systems of the human body are important for its functioning. We would not say that the cardiovascular system is not worth identifying as such because it is part of a larger thing called the body, or because other systems are also necessary for the body's functioning. The cardiovascular system serves the body in a particular way. Likewise, one may claim that the communicative mechanism of speech serves a larger value in a particular way. To do so is to claim sufficient distinctiveness for speech.

Indeed, I would go further and say that an activity need not be distinctive from all other activities—need not be singular—in order to be the proper subject of a special right.[153] It is enough that the distinctive characteristic of the trait not describe all activity and that every activity with the

150. *See* Alexander & Horton, *supra* note 12, at 1324.

151. Bork has been criticized for setting up such a standard. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 599 (1982).

152. Kendrick, *Free Speech as a Special Right*, *supra* note 101, at 20.

153. *See id.* at 11–15.

distinctive characteristic be treated the same way. Under some circumstances, it may be sensible to use the term "speech" to denote such a category, even if it includes more than just speech and every activity in the category fosters the activity in the same way.[154] This contention does not matter right now, because the proposition on the table is that the communicative power of speech is essentially singular. But it will matter in a moment, as we turn to limitations.

### C. *Limitations*

The communicative power of speech is thus sufficient to make it distinctive as a phenomenon and to offer a plausible basis for its normative distinctiveness. This is sufficient to refute certain important claims of the skeptics, and it is necessary to the propagation of a successful speech theory. But much work remains. Here are some important remaining questions.

#### 1. The Choice of a Normative Theory

Nothing here tells us anything about what normative value should underlie a free speech theory. The claim applies equally to democratic self-governance, the search for truth, a carefully constructed autonomy claim, and much else besides. Someone could endorse insulting other people as a larger value, and I would argue that the communicative power of speech puts it in special relation to that goal. Speech has distinctive normative potential, but it also has great normative flexibility. It still remains for theorists to decide upon a fundamental normative value (or values) and to work out the details of whether speech does in fact bear a special relation to that value.

#### 2. The Definition of "Speech" as a Normative Class

It follows that the distinctiveness of speech can tell you very little, on its own, about what types of speech should ultimately fall under the umbrella of "the freedom of speech."[155] This depends on the interaction between speech as a distinctive phenomenon and the particular value claimed for it. A theorist who endorses democratic self-governance will specify a certain class of speech as special, because its communicative power bears on that particular value. A theorist who endorses autonomy will have a different view, and one who endorses a search for truth will have yet another. Indeed,

154. For a very expansive account that takes this structural approach, see C. Edwin Baker, Human Liberty and Freedom of Speech (1989).

155. *See supra* Section IV.C.

different theorists with the same overarching value will disagree. This is apparent for political speech in the divergent conclusions of Harry Kalven and Robert Bork,[156] or early Meiklejohn and later Meiklejohn.[157]

But these disagreements do not undermine the point that these theorists could all claim that speech is distinctive as a phenomenon, such that the speech that falls within their preferred normative ambit is sufficiently normatively distinctive from other activities to deserve the label "special right." To use an autonomy example, Martin Redish, for instance, has argued that speech uniquely fosters self-realization, and *all* speech fosters self-realization.[158] In his view, speech is normatively distinctive, and all speech has the quality that makes it so. Seana Shiffrin, by contrast, has argued that speech uniquely allows people to engage in authentic communication with each other, but only some speech is authentic and thus protected.[159] The point is not to evaluate these particular theories, but to show that different theories will draw different lines about what speech is included and what is not.

### 3. The Inclusion of Nonspeech in the Normative Class of "Speech"

To go further, the distinctiveness of speech is not sufficient to determine how any given theory should treat nonspeech.[160] I have argued that speech is distinctive in its communicative power.[161] I have further argued that this is a basis on which a theory could assign speech normative distinctiveness.[162] But some theories may hold that communication as a whole is so important to a particular normative value that all communication should fall within the normative category of speech. This is a permissible approach, at least hypothetically. It is permissible to conclude that some other activities belong under the rubric of "free speech" and that "free speech" remains an appropriate label for those activities. But the more activities fall under this umbrella, the more vulnerable the position becomes—and if *all* activities come in, then the right described is no longer a special right.[163] Thus, the way in which a particular theory handles this question is a delicate one, and one that reopens the theory to criticism for not sufficiently distinguishing speech. The fact remains, however, that once a specific normative value is on the table, more work has to be done to determine whether any other activity should be placed under the same umbrella as speech.

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156. *Compare* Kalven, *supra* note 31, at 193–94, 205–08, *with* Bork, *supra* note 12. Kalven's approach was not a unified one, but in this particular article he addresses political speech, and his approach is much more expansive than Bork's.

157. *See supra* note 56.

158. Redish, *supra* note 151, at 594–95.

159. SHIFFRIN, SPEECH MATTERS, *supra* note 20, at 1–4.

160. *See supra* Section IV.C.

161. *See supra* Sections IV.B, IV.C.

162. *See supra* Section V.A.

163. *See supra* Part III.

The results will depend upon the normative theory. A theory could plausibly maintain the position that speech is sufficiently distinctive in its communicative power that it stands alone. But a theory could also take a more expansive view. This is one potential opening for various forms of art and music. Various forms of what we would colloquially call "action" or "conduct" may make their appearance here. A theory could hold that communication about a particular matter is so important that, while speech may be the paradigm case, other activities that communicate about this matter should fall within the speech right.

For example, one might advance this argument about activity that communicates about politics. I do not necessarily recommend this approach. As Martin Redish has pointed out, plenty of activities communicate about politics, including terrorism and assassinations, and anyone who takes the view that all political communication is presumptively protected is going to have to explain why these activities are not.[164] This stance has also generated arguments about pornography: it turns out to be hard to define when it is protected political speech and when it is just a recording of people having sex.[165]

A related strategy is to open up the definition not of what constitutes "speech," but of what types of governmental action are suspect. Thus, one might sidestep the question of whether any particular activity should fall under the rubric of free speech and ask instead whether the government is acting with the purpose of interfering with communication.[166] This will solve some problems, such as the problem of political assassinations and terrorism, which the state presumably prohibits for reasons unrelated to communication. It also tells you when the state can prohibit you from burning something and when it cannot.[167]

Its success in resolving other problems will depend upon the particular normative theory for which it is being deployed. As a general principle covering all communication, justified by human autonomy, it has problems.[168] It would suggest that all regulation of any communication—lies, fraud, falsely shouting fire in a crowded theater—implicates freedom of speech.[169]

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164. Redish, *supra* note 151, at 599.

165. *Compare* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 591, *with* Alexander, *supra* note 112, at 552–54; *see also* Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 562 (1989).

166. The discussion of the role of purpose in First Amendment doctrine and theory goes back at least to cases such as *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), and *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and articles such as Ely, *supra* note 113. *See also* ALEXANDER, IS THERE A RIGHT, *supra* note 12.

167. *Compare O'Brien*, 391 U.S. at 377–80 (upholding prohibition on the destruction of draft cards justified by administrative reasons), *with* Texas v. Johnson, 491 U.S. 397, 410–20 (1989) (striking down prohibition on flag burning justified on grounds of preserving the particular message of the flag as a symbol).

168. *See* Robert Amdur, *Scanlon on Freedom of Expression*, 9 PHIL. & PUB. AFF. 287, 289, 298–99 (1980) (criticizing T.M. Scanlon's autonomy-based claim that all regulation of communication on the basis of its persuasiveness was illegitimate).

169. *See id.*

If deployed in the more limited realm of democratic self-governance, its implications will depend on the particular theory. If, for example, one believes that regulation of campaign spending has the purpose of altering political discourse, then one should conclude that such regulation falls under the free speech rubric. And if one also believes that regulation of obscenity, net neutrality, fair competition, insider trading, purely private libel, and so forth does not implicate one's political principle, then one could think all these are fine.[170] But if one thinks, like Justice Brennan, that pretty much everything is a matter of public concern, then such regulations should look suspect.[171]

In any case, speech may be normatively distinctive from other activities, but a particular normative theory may place such a high premium on communication about a certain subject, or some other feature of the process of communication, that it sees fit to include some other activities under the rubric of speech. This is permissible, but it is undoubtedly a point of vulnerability. Nevertheless, the persuasiveness of this move is a question about its particular deployment within a particular normative framework, not a structural problem about the impossibility of a free speech right. To that extent, I may disagree with some skeptics in how to describe the problem, though I may agree with them about the ultimate success of certain theories.

### 4. The Robustness of Protection for Speech

Finally, recognizing the distinctiveness of speech does not tell us how stringently it should be protected. This, too, will depend upon the particular normative theory endorsed. Often, theories of free speech begin with the proposition that a successful theory must justify immunity for speech, or speech of a certain kind.[172] In fact, little if any speech is completely immune from regulation.[173] Indeed, a theory need not generate immunity, or even highly robust protection, in order to produce something validly called a free speech right.[174] The important point for now, however, is that providing a phenomenological and normative basis for singling out speech in the abstract does not dictate a certain level of protection. The particulars of protection will depend on the normative value claimed for speech.

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170. For quite different views that both conclude that content-based regulation in certain large domains is permissible, see Bork, *supra* note 12, at 27–28, and Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1256–62 (1995).

171. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784–89 (1985) (Brennan, J., dissenting).

172. *See, e.g.*, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 9 (1989); Scanlon, *A Theory of Freedom of Expression*, *supra* note 20, at 204; *see also* Kendrick, *Free Speech as a Special Right*, *supra* note 101, at 95–96 (offering an overview of such claims).

173. *See* Scanlon, *A Theory of Freedom of Expression*, *supra* note 20, at 207.

174. Kendrick, *Free Speech as a Special Right*, *supra* note 101, at 93.

## Conclusion

The fundamental claim of this Article is that speech is sufficiently distinctive to form the potential basis of a special right of freedom of speech. Skeptics are incorrect to say that speech cannot be the basis of a special right because it cannot be distinguished from other phenomena in the world. It can be sufficiently distinguished. Moreover, the distinguishing characteristic of speech—its distinctive communicative power—provides a plausible basis for normative claims in support of a special right of freedom of speech. Indeed, all the classic theories of freedom of speech emphasize the communicative properties of speech. This is not a coincidence: it is a sign that those theories have been making the case for the distinctiveness of speech all along.

This Article leaves open what normative value best justifies the freedom of speech. That is the ultimate issue, and only a comprehensive theory can formulate answers to the questions now facing courts: when an activity implicates freedom of speech and how much protection it should get. Ultimately, then, the work we have just done cannot tell us whether tattoo parlors, bakeries, and internet service providers should get First Amendment protection. But it has clarified what is necessary to answer such questions: a view about what sets "freedom of speech" apart from the protection given to other activity, including economic activity. Such a view will tell us which activities implicate freedom of speech and which do not.

I have also recognized the deficiencies in the major responses to free speech problems by courts and scholars. The all-inclusive approach to speech protection does not tell us when to include activity and when to recognize a carve-out. Either unified or pluralistic accounts may offer some promise, but the skeptics are correct to point out that fuzzy, expansive pluralism of the midcentury variety has not effectively distinguished free speech from economic activity and thus far has failed to give courts enough direction in defining the freedom of speech against the backdrop of lower protection for other forms of activity.

At the same time, however, the skeptics are wrong to conclude that the freedom of speech is a conceptual impossibility. The fact that everything communicates is not, in and of itself, enough of a reason to conclude that a right of free speech cannot exist. There are still good reasons to single speech out as a phenomenon, and those reasons carry over into good reasons for singling it out in various normative frameworks. This does not mean that every single theory of free speech will successfully articulate a line between speech and other activity. Doing so may be extremely difficult. But it is not conceptually impossible in the way some skeptics have suggested.

Saying that speech is distinctive is at once extremely important and not nearly enough. It leaves unanswered the hard questions about speech and activity—including speech and economic activity—that opened this Article. It does, however, start to make progress on those questions, and it gives us an analytical framework for thinking about particular theories and how they

succeed or fail. This discussion will continue. And it will continue to be constituted of speech.