CORRECTING THE GENERALLY ACCEPTED BUT UNJUSTIFIED INTERPRETATION OF THE FREE SPEECH CLAUSE

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I. INTRODUCTION

Many jurists as well as legal scholars subscribe to a "political speech theory" of the First Amendment. According to this theory, speech concerned with politics receives full constitutional protection while speech that has literary, commercial, scientific, or other value gets something less than that.[1] However, this Essay contends that the political speech theory does not actually deserve the broad currency it has. First Amendment doctrine should not specially privilege political speech but rather recognize a general speech protection.

In demonstrating that the political speech theory lacks justification, this Essay first examines the theory as described by its most prominent proponents.[2] Although the Free Speech Clause, on its face, gives no special protection to political speech, these proponents usually describe the historical evidence as nonetheless indicating that such was the Framers' intent.[3] However, this Essay considers the evidence and finds that it is far from clear that the Framers were trying to create a special protection for political speech—and, indeed, the evidence suggests otherwise.[4]

On the other hand, a few prominent proponents endorse the political speech theory, even if supporting evidence of intent is lacking, based on what they see as logical inference.[5] In their view, there must be something special about speech that explains its unique constitutional protection, and that something must be the essentiality of unfettered political speech to self-government, which indicates that the Free Speech Clause itself is about protecting political speech.[6] Or they take the view

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[1] *See infra* Section II.

[2] *Id.*

[3] *Id.*

[4] *See infra* Section III.

[5] *See infra* Section IV.

[6] *Id.*

that its constitutional context supports the idea that the First Amendment serves a public purpose, and thus that the Free Speech Clause must be about political speech.[7] This Essay points out critical shortcomings in these alternative bases for the political speech theory.[8]

The Essay then proposes that the Framers were more likely motivated to give speech special constitutional protection because they recognized that speech is different in an important respect from virtually all other behaviors.[9] Speech, unlike most other behaviors, usually does not impinge upon other persons' autonomy in any significant way, in the sense that it does not impede them from taking whatever actions they would prefer to take. This aspect of speech, which was appreciated by the Framers, would better explain why they gave speech special protection, and indeed justifies treating it differently from other behaviors. Further, as this Essay demonstrates, such an understanding of the Free Speech Clause is also more workable in practice than the political speech theory as well as providing a better vision for our society.[10]

II. THE POLITICAL SPEECH THEORY

Prominent First Amendment scholars have often taken the position that the First Amendment is primarily, or even exclusively, intended to protect political speech. Laurence Tribe describes "political advocacy" as the "kind of speech that the First Amendment is meant to protect most vigorously."[11] Alexander Meiklejohn goes further and explains that, in his view, "[t]he First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility."[12] Cass Sunstein reiterates this theme when he remarks that "political speech . . . belongs at the First Amendment core."[13] He contends that "the distinction between political and nonpolitical speech is well-established, and properly so," because it "protects speech that serves a central

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[7] *Id.*
[8] *See infra* Sections III–IV.
[9] *See infra* Section V.
[10] *See infra* Section VI.
[11] Laurence H. Tribe, *Dividing Citizens United: The Case v. The Controversy*, 30 CONST. COMMENT. 463, 467 (2015).
[12] Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.
[13] CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 146 (Free Press, 1st ed. 1993).

function of the [F]irst [A]mendment . . . ."[14] Floyd Abrams agrees that it is "well-established . . . that political speech . . . is at the core of the First Amendment."[15] Robert Bork even takes the position that the Constitution protects *only* explicitly political speech.[16]

The Supreme Court's decisions have at times promoted and relied upon some version of the political speech theory. For example, the Court recently stated that political speech is "at the core of what the First Amendment is designed to protect"[17] and that "speech on public issues occupies the highest rung on the hierarchy of First Amendment values."[18] The Court has emphasized that political speech "is entitled to the most exacting degree of First Amendment protection,"[19] and is the form of speech to which "the First Amendment 'has its fullest and most urgent application.'"[20] The Court has also made decisions in which it has explicitly approved of governmental regulation of speech that is not in its view political or sufficiently political.[21]

Justices have often attributed their endorsement of the political speech theory to the intention of the Framers. Justice Black remarked that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment

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[14] Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 606 (footnote omitted).
[15] Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77, 81 (2010).
[16] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.").
[17] Morse v. Frederick, 551 U.S. 393, 403 (2007) (citing Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion)).
[18] Snyder v. Phelps, 562 U.S. 443, 444 (2011) (citing Connick v. Myers, 461 U.S. 138, 145 (1983)).
[19] FCC v. League of Women Voters, 468 U.S. 364, 375–76 (1984).
[20] McCutcheon v. FEC, 572 U.S. 185, 191 (2014) (plurality opinion) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).
[21] *See, e.g.*, *Connick*, 461 U.S. at 148 (finding that a survey about office transfer policies, developed and administered by an assistant district attorney and distributed to co-workers, involved speech unprotected by the First Amendment because it was not "of public import in evaluating the performance of the District Attorney as an elected official"). This case is discussed in further detail *infra* Section VI. More recent cases emphasizing the special protection given to political speech include McCullen v. Coakley, 134 S. Ct. 2518, 2536 (2014) ("Advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression; no form of speech is entitled to greater constitutional protection.") (internal citations and quotations omitted); Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (finding that the First Amendment is especially protective of "debate on public issues" and "less rigorous" where matters of public concern are not involved); Citizens United v. FEC, 558 U.S. 310, 329 (2010) ("Political speech . . . is central to the meaning and purpose of the First Amendment.").

was to protect the free discussion of governmental affairs."[22] He further remarked: "There is nothing in the language of the First Amendment to indicate that it protects only political speech, although to provide such protection was no doubt a strong reason for the Amendment's passage."[23] Justice Thomas similarly concludes that "[p]olitical speech is the primary object of First Amendment protection, . . . a proposition that ought to be unassailable," and among the sources he cites for this conclusion is James Madison,[24] who proposed the amendment to the First Congress and authored its initial version.[25] There is, of course, a substantial difference between Thomas's position that political speech is "*the* primary object" of the First Amendment and Black's hedgier one that it is "*a* major purpose."[26] But these Justices share the sense that the First Amendment is particularly concerned with political speech and that such an interpretation vindicates the Framers' intention.

Many legal scholars have likewise attributed such a perspective to the Framers. Sunstein concludes that

> [t]he best view of the relevant history is that political speech was thought to form the core of the free speech principle. This does not mean that all other speech was entirely excluded; but it does mean that the framers' principal fear was government censorship of political

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[22] Mills v. Alabama, 384 U.S. 214, 218 (1966).
[23] HUGO BLACK, A CONSTITUTIONAL FAITH 46 (1969) (emphasis omitted).
[24] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting) (citing James Madison, Report on the Resolutions, *in* 6 THE WRITINGS OF JAMES MADISON 347, 397 (Gaillard Hunt ed., 1906)). The source identified by Thomas as justifying his conclusion consists of a letter written by Madison in response to the Sedition Act. Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), *in* 6 THE WRITINGS OF JAMES MADISON at 397. The part to which Thomas refers is presumably where Madison's letter says that "the right of electing the members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id.* Madison is certainly saying here that freedom to discuss candidates for office is essential to self-government. Given that he was responding specifically to the Sedition Act, which forbade certain kinds of statements *against the government*, it is not surprising that his letter would not discuss other uses of the First Amendment. However, Madison does not, in any event, say or imply here that "the primary object" of the First Amendment—in the words of Thomas—is protecting political speech.
[25] *See* 5 THE FOUNDERS' CONSTITUTION 20 (Philip B. Kurland & Ralph Lerner eds. 1987). Madison has been recognized as "the leader in the preparation of the First Amendment." Bridges v. California, 314 U.S. 252, 264 (1941).
[26] *Shrink*, 528 U.S. at 410–11; BLACK, *supra* note 23.

> speech. There can be little doubt that suppression by the government of political ideas of which it disapproved, or which it found threatening, was the central motivation for the clause.[27]

Similarly, other scholars have concurred that "[f]ree political speech . . . is the very core of what James Madison drafted and the Framers adopted when they guaranteed the people that 'Congress shall make no law . . . abridging the freedom of speech.'"[28] Accordingly, it has been argued that the sense of "a hierarchy in which political speech receives more protection than commercial or artistic speech . . . is consistent with the Founders' goals in drafting the First Amendment, as Madison's emphasis was on guaranteeing citizens the right to criticize and question the government."[29]

This sense that the Free Speech Clause is focused on political speech has led to varying theories of application. Some scholars have defined political speech narrowly to mean that which is directly related to government decision-making,[30] while others have defined it more broadly as any speech that contributes to public discourse.[31] For those who view it narrowly, constitutional protection is limited to speech that facilitates self-government.[32] For those who view it more broadly, constitutional protection differs in degree between

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[27] SUNSTEIN, *supra* note 13, at 132. The footnote supporting Sunstein's claim about the "best view of the relevant history" states that that view is derived from Leonard Levy's *Emergence of a Free Press* and "also from a reading of the materials collected in" the *Founders' Constitution*. *Id.* at 273 n.11; LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985); 5 FOUNDERS' CONSTITUTION, *supra* note 25. Some sources from *The Founders' Constitution* are discussed *infra*, Section III.

[28] James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers"*, 51 CATH. U. L. REV. 785, 837 (2002) (citing U.S. CONST. amend. I).

[29] Susan Hanley Kosse & Robert H. Wright, *How Best To Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL'Y 53, 78 (2005) (emphasis omitted).

[30] *See, e.g.*, Bork, *supra* note 16, at 27 ("The category of protected speech should consist of speech concerned with governmental behavior, policy, or personnel . . . .").

[31] *See, e.g.*, Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011). *See also* SUNSTEIN, *supra* note 13, at 130 (describing speech as political "when it is both intended and received as a contribution to public deliberation about some issue"). Sunstein describes it as "a broad standard" that includes "all speech that bears on potentially public issues as falling within the free speech core. It is unnecessary to show that the relevant speech specifically calls for some change in the law, or tells government to do something. Public deliberation can deal with social norms as well as legal requirements." *Id.* at 130–31.

[32] *See, e.g.*, Bork, *supra* note 16; Meiklejohn, *supra* note 12.

political and nonpolitical speech.[33] In either situation, the scope of the speech covered by the Clause is narrower than it would be if the Clause was seen as protecting speech in general. For example, in Sunstein's view, political speech cannot usually be regulated, while nonpolitical speech can be regulated whenever the government can show a "strong" and "legitimate" reason for doing so.[34]

A significant trend in First Amendment jurisprudence and legal theory is that the Framers intended the Free Speech Clause to give special protection to political speech and to give less or even no protection to nonpolitical speech. If that is not actually an accurate understanding of the Framers' intent, then the First Amendment decisions that depend upon such an understanding may be inadequately justified.

III. THE HISTORICAL EVIDENCE

Despite confident assertions from both jurists and scholars, the idea that Madison and the Framers intended the Free Speech Clause to be particularly concerned with political speech is subject to serious doubt. It is not even clear what has led to such confidence among the proponents of the political speech theory, since support for their assertions is often left nonspecific.[35]

Indeed, the historical evidence for the political speech theory is, at best, equivocal. In presenting the Bill of Rights to the First Congress, Madison gave no specific explanation of the meaning of the Free Speech Clause.[36] He described the amendments more generally as involving rights both designed to promote the formation of government and to protect persons against government.[37] That does not rule out the possibility that the Free Speech Clause, like many of the provisions of the Bill of Rights, was intended to preserve a fundamentally private right (and thus was not oriented toward political speech).

Further, Madison's initial wording of the provision was not designed to specially protect political speech. It stated: "The

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[33] *See, e.g.*, SUNSTEIN, *infra* note 59 and accompanying text.

[34] SUNSTEIN, *supra* note 13, at 123. According to Sunstein, nonpolitical speech can be regulated when the government makes "a persuasive demonstration that a strong and legitimate government interest is promoted by the regulation at issue." *Id.*

[35] *See* SUNSTEIN, *supra* notes 13, 27; *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting).

[36] 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

[37] *Id.* at 454 ("In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact.").

people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[38] Nothing in this language indicates that the Free Speech Clause was meant to privilege political speech, just as the final version of the First Amendment gives no hint of such an intention.[39]

Although the Framers could nonetheless have assumed a special protection for political speech, some of those involved took great pains to emphasize the broad scope of what they had in mind. For example, a pseudonymous letter published in a Boston paper the year before Madison presented his version of the First Amendment to Congress opined that Americans felt themselves entitled to "speak, write and publish their sentiments with decency and independency *on every subject* . . ."[40] Thomas Jefferson's preferred language for the First Amendment was similarly broad, calling for the freedom to speak, write, or publish "*any thing* but false facts affecting injuriously the life, property, or reputation of others or affecting the peace of the confederacy with foreign nations."[41] The Kentucky Constitution of 1799 legislated in the same vein: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print *on any subject*, being responsible for the abuse of that liberty."[42] These conceptions of free speech account for long-standing exceptions such as libel, but they are capacious rather than evincing a particular concern for speech about politics. Such examples do not prove that the Constitution's version of free speech was intended to be similarly broad. But they do indicate that the context in which the Framers operated was hardly one in which we can see any shared sense that free speech meant political speech. Thus, it is harder to understand the language of Madison's version of the First Amendment, and of the version ultimately adopted, as imbued with such an implicit concern.

Further, sources with which the Framers were likely familiar conceived of free speech more broadly. John Milton's *Areopagitica*, published in 1644, defends the freedom not simply

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[38] *Id.* at 451.
[39] *See* U.S. CONST. amend. I.
[40] Philalethes, HERALD OF FREEDOM (Bos.), Sept. 15, 1788, *quoted in* JEFFREY A. SMITH, PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM 19 (1988) (emphasis added).
[41] Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 5 FOUNDERS' CONSTITUTION, *supra* note 25, at 130 (emphasis added).
[42] Art. 10, Sec. 7, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 141 (emphasis added).

of the people to challenge their governors, including religious authorities, but also the freedom of playwrights and poets (such as Homer and Aristophanes) to create their works without prior restraint, and scientists like Galileo to present their views without censorship.[43] Milton described free speech as beneficial to art and erudition generally, referring to it as "the nurse of all great wits," and attributed to it an enlargement of the human capacity.[44] Cato's Letter No. 15 of 1720, which is known to have influenced the Framers,[45] also made a case for such general protection.[46] It is true that Cato describes freedom of speech as important to "publick liberty" and "essential to free government."[47] Moreover, he gives a number of examples of how the ability to criticize leaders had benefitted the governed throughout history, and remarks that freedom of speech "is the terror of traitors and oppressors."[48] However, Cato also points out that having such freedom "produces excellent writers, and encourages men of fine genius," such that when it was denied "those great wits were no more."[49] These sources describe freedom of speech as desirable because it produces an environment generally fit for artistic and intellectual endeavors and do not describe it as having a "central" or "core" political value.

Madison did refer to freedom of the press in his original version of the First Amendment as "one of the great bulwarks of liberty,"[50] which may suggest that he at least saw that adjacent right as particularly important to self-government. Madison's fellow Virginian, George Mason, had described freedom of the press with the same wording in his Virginia Declaration of Rights.[51] Both may have gotten this language from Cato's letter, which had called freedom of speech "the great bulwark of liberty."[52] And both may have also been influenced by William Blackstone, who had written that "[t]he liberty of the [press] is indeed [essential] to the nature of a free

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[43] JOHN MILTON, AREOPAGITICA AND OTHER WRITINGS 98–142 (William Poole ed., Penguin Books 2014) (1644).
[44] *Id.* at 135.
[45] LEVY, supra note 27, at 113–14; *see also* CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953).
[46] JOHN TRENCHARD & THOMAS GORDON, *Cato's Letter No. 15: Of Freedom of Speech: That the Same is Inseparable from Publick Liberty* (Feb. 15, 1721), *in* CATO'S LETTERS 1720–23, https://www.constitution.org/cl/cato_015.htm.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *See* ANNALS, *supra* note 36, at 451.
[51] *The Virginia Declaration of Rights* § 12 (Va. 1776) ("That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments."), http://www.constitution.org/bcp/virg_dor.htm.
[52] TRENCHARD & GORDON, *supra* note 46.

[state] . . . ."[53] So when Madison included freedom of the press in his version of the First Amendment, and singled it out as a "great bulwark[ ] of liberty," that aspect of the wording could be seen as providing some support for the political speech theory.

Still, even freedom of the press was understood as having a broad rather than narrow meaning. Blackstone concluded that "[t]o subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."[54] Blackstone's invocation of freedom of the press as a resource for "all controverted points in learning, religion, and government"[55] evidently encompassed much more than matters of politics. Further, a letter from the Continental Congress to the Province of Quebec in 1774 extolled the freedom of the press not only for its value to self-government but also its contribution to "the advancement of truth, science, morality, and arts in general."[56] John Marshall described it as "signif[ying] a liberty to publish, free from previous restraint, any thing and every thing at the discretion of the printer only . . . ."[57] Thus, the "press" referred to in the First Amendment does not appear to have been a metonym intended to mean newspapers, as we are more likely to use it now, but rather appears to encompass all the materials produced by printing presses. Indeed, Madison's 1800 Report on the Virginia Resolutions treated "the press" as synonymous with "printed publications."[58] Given that even the Free Press Clause seems to embody a broad protection for all manner of publications, the Free Speech Clause that accompanies it is unlikely to have been dedicated to political speech.

The conclusion of political speech theory proponents that the Free Speech Clause is primarily intended to protect

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[53] 4 WILLIAM BLACKSTONE, COMMENTARIES *151.
[54] *Id.* at *152.
[55] *Id.*
[56] Letter from the Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774), *in* 1 FOUNDERS' CONSTITUTION, *supra* note 25, at 442.
[57] John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799), *in* 5 FOUNDERS' CONSTITUTION, *supra* note 25, at 136, 138.
[58] *Id.* at 142 ("The freedom of the press under the common law is, in the defences of the Sedition Act, made to consist in an exemption from all *previous* restraint on printed publications by persons authorized to inspect and prohibit them. It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.").

political speech is not justified by either the original version of the Amendment, the conceptions that likely influenced it, or its final language. At least some of its sources support the idea that the clause was meant to describe speech more generally. Thus, there is considerable historical evidence that calls the political speech theory into question, despite proponents' description of it as a matter of "little doubt" or even "unassailable."[59]

IV. THE "LOGIC" OF THE FREE SPEECH CLAUSE

Although it is not as clear as many claim,[60] that protection of political speech is the intended purpose of the Free Speech Clause, the political speech theory does at least provide a possible explanation for why speech is treated differently under the Constitution than other behaviors. There must indeed be something about speech that led the Framers to give it special protection from regulation. That something, in the view of some political speech theorists, is that self-government cannot happen unless persons are free to engage in political speech.

This aspect has led some proponents of the political speech theory to endorse it, even where they view the historical evidence of intent as insufficient. For example, Bork considers the idea that the Free Speech Clause protects only political speech to be dictated by logic rather than by evidence of legislative intent.[61] As he suggests, if there were no Free Speech Clause, freedom for political speech would still have to be inferred in order for self-government to function.[62] He reasons that this is the only plausible explanation for the special distinction given to speech in the Constitution.[63] And a corollary of this thinking is that speech that is not necessary to self-government is not constitutionally protected because it is not distinctive in this way from other behaviors that can be

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[59] *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting); SUNSTEIN, *supra* note 13, at 132.

[60] *See supra* Section II.

[61] Bork, *supra* note 16, at 22 (taking the position that "[t]he first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended").

[62] *Id.* at 23 ("The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.").

[63] *Id.* at 26 ("This function of speech, its ability to deal explicitly, specifically and directly with politics and government, is different from any other form of human activity. But the difference exists only with respect to one kind of speech: explicitly and predominantly political speech.").

regulated.[64] Although logic does indicate that political speech must be included in the category of constitutionally-protected free speech due to its essential role in self-government, it does not follow that the Free Speech Clause therefore only protects, or is only meant to protect, political speech.

Indeed, the words chosen by legislators presumably tell us whether a law is intended to be specific to a particular concern or more generic. The unrestrictive language of the First Amendment suggests that it is more generally concerned.[65] It may be revealing to compare the First Amendment to the Fourteenth, about which we have more legislative history. Given the context of the Fourteenth Amendment, it can reasonably be inferred that it was intended to prevent discrimination against black Americans, who at the time of its adoption had been recently emancipated from slavery.[66] However, the drafters of that amendment, and the other Reconstruction amendments, chose more general language, and it makes sense to think they did so to address not only the specific example of racial discrimination before them but other instances of discrimination that might be recognized as analogous. (Indeed, the legislative history of that amendment indicates that that is so).[67] Thus, black Americans are certainly protected from discrimination by the Fourteenth Amendment, given that we know that its drafters were concerned about slavery and its aftermath.[68] However, the amendment must protect others as well, since the language chosen by the legislators is broader than necessary to accomplish only that particular purpose. Similarly, the Framers likely chose their wording for the First Amendment advisedly and intended the broader meaning that goes with the broader wording. They

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[64] *Id.* at 28 ("[T]he rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct.").

[65] *See, e.g.*, United States v. Price, 383 U.S. 787, 800–01 (1966) (stating that "plain and unlimited" language of law should be enforced and given "a sweep as broad as its language").

[66] *See, e.g.*, McLaughlin v. Florida, 379 U. S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

[67] *See* Speech of Hon. J. A. Bingham, *in* CONG. GLOBE, 42nd Cong., 1st Sess. (1871), at 83–86 (acknowledging the importance of the amendment to the freed slaves, but also mentioning that it would apply to Native Americans as well, and concluding that it would also benefit poor people settling the frontiers).

[68] *See, e.g.*, David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 337 (2003) ("The Fourteenth Amendment to the Constitution was adopted to deal with the aftermath of slavery and the racial discrimination that prevailed after the Civil War.").

presumably would have chosen narrower wording had they intended a narrower meaning.

In addition, there is no reason to believe that the Framers were particularly unimaginative, or so much the creatures of a moment, that they did not foresee other uses for free speech than to constitute government. Indeed, the political speech theorists must not only imagine that the Framers did not, but also that they understood there to be distinct categories of "political" and "nonpolitical" that speech can be sorted into. That is not something evidenced by the sources that influenced the Framers or the announced views of the Framers themselves. In fact, defining what does and does not constitute political speech is not something even political speech theorists have been able to agree upon.[69] Even if the Framers highly valued what we may conceive of as political speech, it might still be wrong to believe that they saw any meaningful distinction between political and nonpolitical speech or regarded such a distinction as a salubrious one to make.

For some proponents, contextual cues justify the conclusion that the Free Speech Clause is specifically about protecting political speech. Meiklejohn remarks that "the First Amendment, as seen in its constitutional setting, forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, *whenever those activities are utilized for the governing of the nation*."[70] Such an interpretation implies that it is logically discernable from context that the Free Speech Clause vindicates the public concern of self-government rather than a private right.[71] However, it is difficult to see how the "setting" of the Clause leads to such an interpretation. The First Amendment begins by referencing the Establishment and Free Exercise Clauses; then, after a semicolon, sets forth rights of speech and press; then, after another semicolon, concludes with peaceable assembly and petition of the government.[72] This formulation includes at least one indubitably private right—free exercise—that shows that the First Amendment cannot be described as preoccupied with the tools of self-government.[73] Further, as a matter of syntax, the amendment's semicolons merely serve to pair the rights of free speech and press with

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[69] Compare Bork's narrow definition, Bork, *supra* note 16, with the broader ones of Post, *supra* note 31, and SUNSTEIN, *supra* note 13.
[70] Meiklejohn, *supra* note 12, at 256 (emphasis added).
[71] *Id.* at 255.
[72] The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
[73] *See id.*

each other,[74] rather than to orient them toward the ultimate, unannounced objective that Meiklejohn proposes.

Moreover, the idea that the First Amendment must be focused on self-government is undermined by the Framers' avowed concern for people's private interests.[75] It is interesting in this regard to compare the Free Speech Clause with the Free Exercise Clause, which likely no one would argue was intended to protect religious exercise only to the extent that such exercise serves a public purpose. Free exercise is part of the Constitution because it is both a right people wanted protected for its own sake and one that is not inimical to the constitution of government.[76] It is side by side with an Establishment Clause that performs the valuable service to government of reducing sectarian conflict[77]—although even that clause can also be seen as having the private benefit of keeping government out of the religious sphere.[78] As with the Free Speech and Free Press Clauses, the private and public implications of the religion clauses are seemingly intermingled and complex rather than evincing any single logically-deducible "primary" purpose. Like most pieces of legislation, they represent a compromise between private interests and public needs, reflecting both, and, like most negotiated bargains, not solely defined by either.[79] The Free Speech Clause, likewise, does not seem something that can be logically reduced to whatever public benefits it may have, given that the ability to speak without governmental intervention has considerable private importance.

Even if it is true that political speech must be protected for self-government to function, it does not follow that only

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[74] *See, e.g.*, THE NEW FOWLER'S MODERN ENGLISH USAGE 699 (H.W. Fowler & R.W. Burchfield eds., 1996) (explaining that the semicolon indicates "a discontinuity of grammatical construction greater than that indicated by a comma but less than that indicated by a full stop" and "separates two or more clauses which are of more or less equal importance and are linked as a pair or series . . . .") (citations omitted).

[75] As Madison remarks, "[a] reform . . . which does not make provision for private rights, must be materially defective." Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 25, at 646.

[76] *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) ("[The] purpose [of the Free Exercise Clause] is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.").

[77] *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) ("[A] purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife . . . .").

[78] *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431–32 (1962) ("The Establishment Clause . . . stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.").

[79] Madison himself was sensitive to his role as representative: he proposed the amendments to the Constitution to, in his words, "fulfil the duty which I owe to myself and my constituents" and "to satisfy the public that we do not disregard their wishes." ANNALS, *supra* note 36, at 448.

political speech is protected, nor that what entitles speech to special protection must be its value to self-government. Further, there are reasons to suspect that something else accounts for the Framers' conclusion that speech is entitled to special protection, given their choice of broad rather than specific language, and the lack of evidence that they even distinguished between political and nonpolitical speech. There is, in addition, nothing about the context of the Free Speech Clause that indicates that the Framers saw it as specially focused on the goal of facilitating self-government.

V. GENERAL SPEECH PROTECTION: AN ALTERNATIVE THEORY OF WHAT THE FRAMERS MEANT BY FREE SPEECH

Although the Framers must indeed have seen something distinctive about speech that led them to provide it with a special constitutional exemption from regulation, the most plausible candidate for that something is not the essentiality of free speech to self-government, but the important natural difference that exists between speech and most other behaviors. Speech is different from most other behaviors in that it generally does not impinge upon other persons' autonomy in any significant way insofar as it does not prevent its hearers from taking whatever actions they would prefer to take. The general protection provided for speech in the First Amendment may thus be seen as reflecting a recognition of the naturally non-impinging quality that most speech has.

Speech can be seen as an extension of another behavior that has an exceptional non-impinging quality, and that is the act of *thinking*. Indeed, speech and thought are closely intertwined. Speech is the means by which we convey our thoughts to others and make them manifest—one can literally speak one's thoughts aloud—and it is the means by which we receive thoughts from others. Regulation of speech would be akin to regulation of thought, and speech may be specially exempt from regulation for much the same reason that thought is exempt (or would be, if government had the power to regulate thought).

Recognition of the close relationship between speech and thought was apparent in the early influences on the Framers. Blackstone considered thought to be beyond regulation, concluding that there could not be "any restraint . . . laid upon freedom of thought or [in]quiry" or the "liberty of private sentiment."[80] He contrasted the power that government

[80] BLACKSTONE, *supra* note 53, at *152.

had under common law to punish wrong exercises of freedom of the press, such as libel, with the saving grace that such a power could not reach these thought- and sentiment-based freedoms.[81]

Milton also drew a connection in his *Areopagitica* between thinking and speaking: "Give me the liberty to know, to utter and to argue freely according to conscience, above all liberties."[82] In this formulation, to "know" and to "utter" are kindred and adjacent faculties, similarly exceptional when it comes to government regulation.

Likewise, Cato began his influential letter endorsing free speech by remarking, "[w]ithout freedom of thought, there can be no such thing as wisdom; and no such thing as publick liberty, without freedom of speech . . . ."[83] Although thereby making an explicit connection between freedom of speech and general liberty, Cato's description also draws a parallel between freedom of thought and freedom of speech.[84] Freedom of thought is a given in this conceptualization, and freedom of speech its analogue.[85]

Madison himself was no stranger to such a concern for freedom of thought. Although making the point in the specific context of freedom of religion, he once remarked that he flattered himself that he had "in this country extinguished forever the ambitious hope of making laws for the human mind."[86] If regulation of thought is not a legitimate government activity, and if speech is akin to thought, then it makes sense to think of it as similarly exempt from regulation.

The Supreme Court has itself at times noted the connection between speech and thought. For example, Brandeis's concurrence in *Whitney v. California* remarked that the Framers believed in the "freedom to think as you will and to speak as you think."[87] The Court has also in other cases described the First Amendment as protecting "individual freedom of mind"[88] and "the right of freedom of thought."[89]

Restricting a person's speech, to the extent that the speech conveys thought, is similar in its intrusiveness to restricting a person's thought itself; it strikes close to the heart

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[81] *Id.*
[82] MILTON, *supra* note 43, at 136.
[83] TRENCHARD & GORDON, *supra* note 46.
[84] *Id.*
[85] *See id.*
[86] Letter from James Madison to Thomas Jefferson (Jan. 22, 1786), *in* 2 THE WRITINGS OF JAMES MADISON, 1783–87, at 216 (Gaillard Hunt ed., 1901).
[87] 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
[88] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
[89] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

of what it means to be a human being.[90] Of course, as a practical matter, government is largely impeded from regulating people's thoughts,[91] but if such regulation were practical—and it one day may be—it would likely be criticized as an unjustified intrusion, and not merely to the extent that it involved regulation of *political* thoughts.

However, it is not just the *importance* of speech to persons as a conveyance of thought that makes speech special and worthy of particular protection. Indeed, there are many cherished behaviors that government can regulate quite intrusively without running afoul of the Constitution. For example, physical liberty is vitally important to persons as well, but there are many situations in which they are required by the government to sacrifice it—as in arrest and detention under reasonable suspicion, imprisonment after conviction of a crime, and conscription into military service, (not to mention jury duty). Physical liberty is not treated by the Constitution as subject to special protection even though it is undoubtedly of great value to human beings.[92]

What makes speech special is rather the quality it shares with thought: it is usually the case that speech, like all thought, does not interfere with the liberty of others. Most of the time, speech that conveys the thoughts of another merely renders something conceived in a person's mind into a form that another person's mind can consider, and involves no more intrusion upon another's liberty than is involved in triggering the other's perception of the speech. And it is relatively easy for any person to escape this slight imposition placed on her by the speech of another: she can simply decide to stop listening to it.[93] Most other behaviors, by contrast, cannot be deprived of impact so easily: to live somewhere limits another's choices of where to live; to take a job deprives another person of an employment

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[90] *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting) ("Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity.").

[91] Though the technology to control thought has yet to be invented, that has not prevented totalitarian governments from making the effort. For example, Mao Zedong attempted to achieve oversight of people's thoughts by requiring them to write them down and share them with him for the purpose of "thought examinations." *See* JUNG CHANG & JON HALLIDAY, MAO: THE UNKNOWN STORY 241–42 (2005).

[92] *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 145 (1989) ("Because communication is so closely tied to our thoughts and feelings, suppression of communication is a more serious impingement on our personalities than many other restraints of liberty . . . .").

[93] *See, e.g.*, Cohen v. California, 403 U.S. 13, 21 (1971) (pointing out that those who were offended by a jacket that said "fuck the draft" "could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

opportunity; to consume resources reduces the resources available to others. Accordingly, it is necessary to regulate most behaviors in order to make collective society possible, but not so speech that simply conveys thought.

It is this non-impinging tendency that makes speech special and distinct from other behaviors in much the same way that thought is, and that likely influenced the Framers to endow it with a general protection from government regulation. If so, the only speech that should be regulated is the kind that does not have this non-impinging quality, that is, speech that directly interferes with the liberty of others. This view was originally promoted by Cato, who described free speech as "the right of every man, as far as by it he does not hurt and control the right of another; and this is the only check which it ought to suffer, the only bounds which it ought to know."[94]

Certainly, some speech does operate as a restraint upon others' liberty and therefore is not entitled to exemption from regulation. As Justice Holmes famously explained in *Schenck v. United States*: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force."[95] Holmes's remark hints at what makes such speech subject to regulation. It is speech that goes beyond merely persuading or urging others to act. Indeed, few people consider persuasive or even "pushy" speech constraining because it is well within the power of a competent adult to resist its encouragements. But shouting "fire!" in a crowded theater in effect "hijacks" the will of another, and thus does not resemble simple thought-conveying speech with its minimal effect on liberty. It is speech that is intended to, and does, deprive persons of their ability to choose the actions they otherwise would have chosen to engage in. It is therefore not the kind of speech the Free Speech Clause specially protects.

Speech that facilitates the commission of a crime likewise interferes with individuals' liberty. It is this impact that the Supreme Court was referring to in *Giboney v. Empire Storage & Ice Co.*,[96] where it observed that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[97] In crimes such as the solicitation

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[94] TRENCHARD & GORDON, *supra* note 46.
[95] 249 U.S. 47, 52 (1919) (citation omitted).
[96] 336 U.S. 490 (1949).
[97] *Id.* at 502.

of murder or extortion of money, or with the threat of violence that accompanies a robbery, the speaker is using speech as a means of bringing about an end that is itself criminal. In such instances, speech functions something like a weapon to reduce the freedom of another. Accordingly, such speech can be regulated because it does not have the non-impinging quality of the speech the First Amendment protects.

What made speech special to the Framers could very well have been its similarity to thought and the extent to which it often shares, with thought, a characteristic non-impinging quality. Certainly, this aspect of speech was—and is—well appreciated. And it is more plausible as a basis for the Clause's special protection of free speech than that proposed by the political speech theory, especially given the broad nature of the protection implied in the general language of the Clause itself.

VI. THE WORKABILITY OF THE RESULTING LEGAL STANDARD

The idea that the First Amendment protects all speech, except speech that interferes with the liberty of others, implies a fairly straightforward analysis for contested speech. The focus of such an analysis should be on whether the speech at issue interferes with the ability of persons to do what they would choose to do, and therefore should be susceptible to regulation. Such would be the case with speech that misleads persons into doing what they would otherwise prefer not to do (as would falsely yelling "fire!" in a crowded theater) or that forces them to act contrary to their actual desires (as extortionate speech does).

Such an approach contrasts with the complicated evaluation needed to political speech theory. In practice, political speech has proven difficult to identify, even when defined in the narrow sense of being about speech that directly facilitates self-government.[98] For example, in *Connick v. Myers*,[99] the Supreme Court parsed a survey, administered by an assistant district attorney to her colleagues about the functioning of that office, to determine whether it qualified as political speech.[100] The five Justices in the majority rejected the idea that the questions in the survey were sufficiently political to be protected, while the four Justices in dissent reached the opposite conclusion.[101] Whether speech has political impact or

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[98] *See, e.g.*, Bork, *supra* note 16, at 27 ("The category of protected speech should consist of speech concerned with governmental behavior, policy, or personnel . . . .").
[99] 461 U.S. 138 (1983).
[100] *Id.* at 141.
[101] *Id.* at 154, 163.

significance is evidently difficult to ascertain.[102] Furthermore, political speech theorists do not even agree on whether political speech should be defined as narrowly as the Court did in *Connick*.[103] Proponents often define speech in the broader sense of speech that contributes to public discourse and social norms.[104] However, such a definition gives even less guidance to a court as to what is and is not constitutionally-protected speech.

For example, Sunstein proposes that nonpolitical speech may not be regulated unless there is "a persuasive demonstration that a strong and legitimate government interest is promoted by the regulation at issue."[105] However, what constitutes the showing of a "strong" and "legitimate" government interest is seemingly subjective. Advertising for unhealthful products, pornography that demeans women, video games that exalt violence, electrical wiring instructions for amateurs, and music and fiction valorizing recreational use of narcotics are a few among many examples of expression that government could be said to show a "strong" and "legitimate" interest in regulating, in the interest of people's health and safety. It would be a guess as to what paternalistic regulations of speech would and would not be permitted under such a standard.

On the other hand, these examples are readily recognizable as instances of speech that do not impinge upon the liberty of others—they do not prevent other persons from being able to choose to do what they would prefer to do. Of course, hard cases could still arise—say, whether graphically violent video games cause minors to become violent and therefore amount to a constraint on others' liberty—but such questions can be examined through an empirical lens to see if there is actual evidence of such an impact. But whether speech qualifies as "political"—or whether government can show a "strong" and "legitimate" interest in regulating it—is neither

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[102] Kent Greenawalt has observed that "distinguishing political speech from other kinds of speech is extremely difficult." KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 233 (1989).

[103] *See* Bork, *supra* note 16; Post, *supra* note 31.

[104] *See, e.g.*, Post, *supra* note 31, at 621; Weinstein, *supra* note 31, at 502. *See also* SUNSTEIN, *supra* note 13, at 130–31 ("For present purposes I mean to treat speech as political *when it is both intended and received as a contribution to public deliberation about some issue*. This is a broad standard. It categorizes all speech that bears on potentially public issues as falling within the free speech core. It is unnecessary to show that the relevant speech specifically calls for some change in the law, or tells government to do something. Public deliberation can deal with social norms as well as with legal requirements.") (emphasis added).

[105] SUNSTEIN, *supra* note 13, at 123.

capable of precise determination nor susceptible to empirical resolution.

Simply because the political speech theory does not provide for a very workable constitutional standard does not by itself disprove the notion that the Framers intended the Free Speech Clause to focus on political speech, but it is another factor that undermines the persuasiveness of that theory. Not only does the Free Speech Clause itself lack any indication that it is supposed to be focused on "political speech,"[106] but there is no reason to believe that the Framers would have necessarily seen such a concept as giving rise to a reasonably applicable standard.

A Free Speech Clause that protected speech unless that speech could be shown to interfere with the liberty of others would not only better adhere to the letter (and probable spirit) of the law, but would also be a more intelligible, more applicable standard.

VII. CONCLUSION

The First Amendment should be understood as protecting all speech and not as particularly addressing political speech. That prominent jurists and scholars have asserted that the Free Speech Clause is focused on protecting political speech has had a substantial impact on our understanding of the Free Speech Clause and has served to narrow its application in law. It is a theory that has largely rested on the premise that the Framers intended such a conception of the Clause. However, the historical evidence indicates that the Framers and those who influenced them were more ecumenical in their views, recognizing the importance of protecting nonpolitical as well as political speech, and perhaps not even making a conceptual distinction between these sorts of speech.

Some proponents have asserted nonetheless that the "logic" of constitutional construction leads to the conclusion that protection of political speech is the main or even sole object of the Free Speech Clause. But such logic requires a leap in the opposite direction of the general language of the Clause and the Framers' stated concern for the protection of private rights.

This Essay's alternative theory of what the Framers meant by free speech—that it was regarded as concomitant with thought and, in most instances, similarly non-impinging—is more consistent with the historical evidence, and proceeds from

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[106] U.S. CONST. amend. I.

more compelling logic. Further, this alternative theory of what speech is entitled to protection produces a more workable Free Speech Clause than does the political speech theory. In determining when regulation of speech is permitted, constitutional jurisprudence should not try to distinguish between political and nonpolitical speech but between speech that interferes with the liberty of others and speech that does not. Such an approach would more plausibly frame the issue, provide for more predictable application, and could promote the development of a more intelligible free speech doctrine. Supreme Court First Amendment jurisprudence that differentiates between political speech and other kinds of speech should be reconsidered, and the Free Speech Clause instead understood as creating a broad and general protection.

This conception of the Free Speech Clause also offers a better vision for our society. Under the political speech theory, it is quite possible to imagine a polity that allows the free exchange of political opinions, but that clamps down on whatever expressions in art, commerce, and science the majority of citizens happen to find objectionable. Such a conception fully achieves the aims of the Free Speech Clause as described by Meiklejohn as well as other political speech theorists, insofar as it fully protects those activities of thought and communication *by which we govern*.[107] But there is good reason to believe the Framers actually had in mind such a general speech protection because it creates a better environment for human flourishing.

[107] Meiklejohn, *supra* note 12, at 255.