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Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech

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FREEDOM OF COMMUNICATIVE ACTION: A THEORY OF THE FIRST AMENDMENT FREEDOM OF SPEECH

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Words are deeds.[1]

I. INTRODUCTION

We are still searching for an adequate theory of the first amendment freedom of speech. Despite a plethora of judicial opinions and scholarly articles, there are fundamental conflicts over the meaning of the words "Congress shall make no law . . . abridging the freedom of speech."[2] This Article examines the possibility that recent developments in social theory can aid our understanding of the freedom of speech. My thesis is that Jürgen Habermas' theory of communicative action can serve as the basis for an interpretation of the first amendment that fits the general contours of existing first amendment doctrine and provides a coherent justification for the freedom of speech.

Habermas' theory takes as its point of departure the speech act theory developed through contemporary analytic philosophy and linguistics. The central theme of speech act theory is that speech is action; communication coordinates individual behavior through achieving rational understanding. An important corollary is the proposition that communication is intersubjective; speech acts involve both speakers and listeners. In addition, the theory of communicative action makes a distinction between communicative action—oriented to the coordination of behavior through rational agreement—and strategic behavior—the use of speech to manip-

[1] L. WITTGENSTEIN, CULTURE AND VALUE 46e (P. Winch trans. 1980) ("*Worte sind Taten.*" *Id.* at 46.).

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

ulate, coerce, or deceive. I argue that a theory of free speech can incorporate this distinction to mark the boundaries of the right to free speech: freedom of speech is freedom to engage in communicative action, not strategic action. Another component of Habermas' theory is the ideal speech situation, in which rational agreement may be reached because distorting factors are excluded; this ideal situation serves as the basis of a principle of equality of communicative opportunity that can give the freedom of speech its fundamental content. Habermas' theory of communicative action provides the basis for my reinterpretation of the first amendment freedom of speech as the freedom of communicative action.

This Article has two aims. My first aim is to develop a theory of the meaning of the first amendment from the theory of communicative action. In pursuit of this first goal, the Article assumes a perspective that is internal to the practice of American constitutional law.[3] I argue that Habermas' theory has substantial power to explain and justify first amendment doctrine. Indeed, it is my view that a theory of freedom of speech based on the theory of communicative action, more so than any other theory, provides the best justification for the first amendment while simultaneously providing the best fit with the existing case law.

In addition to the development of a theory of the first amendment, this Article has a second aim: From the point of view of the practice of social theory,[4] the current Article is a "thought experiment" designed to test and elaborate Habermas' theory of communicative action. I explore various objections to and ambiguities in the theory of communicative action by taking up the attitude of a participant in the practice of legal interpretation who adopts the theory of communicative action as a practical principle for institutionalization of discourse in the public sphere. It is my hope that this thought experiment will have value in the enterprise of understanding, clarifying, and extending the theory of communicative action. For example, this Article responds to the suggestion that the theory of communicative action should be reformulated as a theory of institutionalized discourse "in the public sphere of a participatory

[3] Thus, I take the point of view of judges, lawyers, and scholars engaged in the common enterprise of interpreting and applying the Constitution to actual legal disputes. Because the Article assumes the stance of a participant in the practice of law, it focuses on a particular legal text—the first amendment to the Constitution of the United States of America. Of course, the same stance could be taken with respect to other legal texts that embody a principle of freedom of speech. *See, e.g.*, CAL. CONST. art. 1, § 2(a); CANADIAN CHARTER OF RIGHTS AND FREEDOMS, SCHEDULE B, CANADA ACT 1982 (U.K.), ch. 11; EUROPEAN CONVENTION ON HUMAN RIGHTS art. V; GRUNDGESETZ [G.G.] art. 5. For a comparativist analysis of some of these provisions, see E. BARENDT, FREEDOM OF SPEECH (1987).

[4] The perspective of social theory is potentially external to the practice of law. The social theorist may bracket the normative claims of the legal system and assume the stance of an observer. Social theory may, however, incorporate the internal perspective. The social theorist may assume the stance of a participant who understands a given social practice through participation in it.

democracy."[5]

Part II of this Article begins with a hermeneutic approach to the problem of interpreting the first amendment. Part III explores and criticizes existing theories of the freedom of expression. The theory of communicative action is explicated in Part IV; the implications of that theory for the freedom of speech are explored in Part V. Finally, Part VI applies the results to specific problems in first amendment doctrine, and Part VII draws some conclusions about the implications of this exercise for both first amendment doctrine and the theory of communicative action.[6]

II. The First Amendment Freedom of Speech: A Hermeneutic Approach

This Part explores the problems associated with interpreting the first amendment to the Constitution of the United States. These problems in legal hermeneutics[7] serve as a dual introduction to the relationship between the first amendment and the theory of communicative action. The discussion of legal interpretation both (1) establishes the need for a new theory of the freedom of speech and (2) introduces an important line of development in social theory that has its origins in theories of scriptural interpretation and runs through Hans-Georg Gadamer's philosophical hermeneutics to Habermas' theory of communicative action.

The major theme of this Article is the development of a theory of the first amendment freedom of speech from the theory of communicative action; in relationship to that theme, the aim of Part II is to counter three possible arguments for the proposition that no theory of the freedom of speech is required, or even legitimate.[8] The first argument is that

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[5] *See* Ferrara, *A Critique of Habermas's* Diskursethik, 18 Telos 45, 74 (1985).

[6] This Article is addressed to a diverse audience, including social theorists and first amendment scholars; hence the essay does not assume that the reader has expert knowledge of either legal doctrine or of Habermas' theory. Readers familiar with the literature on the theory of the first amendment may wish to omit Part III on a first reading. Likewise, readers already familiar with Habermas' theory may wish to omit Part IV. Readers anxious for the core of my theory may wish to begin with Part V before returning to Part II.

[7] As I use the term, legal hermeneutics is the enterprise of self-conscious reflection on the process of interpreting legal texts that is undertaken by adjudicators, lawyers, and legal scholars. The term "hermeneutics" has a variety of uses. *See* R. Palmer, Hermeneutics ch. 3 (1969) (discussing six modern definitions of "hermeneutics"). I have drawn on a variety of sources for my account of philosophical hermeneutics. *See generally* J. Bleicher, Contemporary Hermeneutics (1980); H.-G. Gadamer, Truth and Method 154 (1975); R. Palmer, *supra*; G. Warnke, Gadamer: Hermeneutics, Tradition & Reason (1987); Understanding and Social Inquiry (F. Dallmayr & T. McCarthy eds. 1977). I owe special thanks to Eckart Förster, now of Stanford University, for his course, Hermeneutics and Critical Theory, given through the Department of Philosophy of Harvard University in the Spring of 1983.

[8] Of course, even if a theory of the freedom of speech is not required for judicial interpretation of the first amendment, it does not follow that such a theory is not valuable. If it turned out that the first amendment does not institutionalize our best theory of the freedom of speech, we would still be

the first amendment has a plain meaning that does not require a theory for its interpretation; I deal with this view in Section A of this Part. The second argument is that the first amendment should be interpreted in accord with the specific intent of its framers; I deal with this view in Section B. The third argument is that because the meaning of the first amendment is relative to the many particular interpretive traditions in our pluralistic culture, there can be no single true theory of the first amendment; I deal with this final objection in Section D. Section C presents an affirmative argument from hermeneutic theory for the proposition that a theory of free speech is required for the practice of judicial interpretation of the first amendment.

The account of hermeneutic theory that follows is, of course, much condensed. I present only portions of the history and contemporary development of hermeneutics that illuminate the theory of legal interpretation and Habermas' theory of communicative action.

A. Justice Black and Protestant Theology

The first amendment to the United States Constitution provides that "Congress shall make no law . . . 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."[9] The problem of interpretation can be expressed as follows: what does this constitutional text providing "freedom of speech" *mean*, and how is it to be *applied*? In this Section of the Article, I argue that the plain meaning of the constitutional text alone cannot serve as an adequate basis for understanding and applying the first amendment freedom of speech.

Justice Black sometimes spoke as if there was no problem associated with interpretation of the first amendment freedom of speech.[10] The constitutional text is self-interpreting, the Justice apparently maintained,[11] when he said:

> The beginning of the First Amendment is that 'Congress shall make no law.' I understand that it is rather old-fashioned and shows a slight naiveté to say that 'no law' means no law. It is one of the most amazing things about the ingeniousness of the times that strong arguments are made, which *almost* convince me, that it is very foolish of me to think 'no law' means no

interested in such a theory both as a proposal for constitutional reform and as a guide to voluntary self-restraint by executive officers, legislators, and judges in their common lawmaking capacity.

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

[10] For a discussion of Justice Black's position, see Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967).

[11] Black was not speaking directly to the role of interpretation in constitutional adjudication. His insistence that the amendment "means what is says" reflects his belief that the freedom of speech is "absolute" within its domain. "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.' " Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960). His position, however, assumes a "plain meaning" view of interpretation.

> law. But what it *says* is 'Congress shall make no law . . . .' I believe that [the Amendment] means what it says.[12]

The first amendment, apparently, is no more difficult to interpret than the clause requiring that the President be at least 35 years old.[13] If the first amendment guarantee of the freedom of speech has a plain meaning that can be read off the constitutional text and applied to concrete cases with determinate results, then lawyers and judges would have no need for a *theory* of free speech; theories simply would not answer any relevant questions.

Justice Black's "plain meaning" view of the free speech clause is analogous to Martin Luther's theory of biblical interpretation. "Luther's position is more or less the following: scripture is sui ipsius interpres. . . . The text of the scripture has a clear sense that can be derived from itself, the sensus literalis."[14] Both Black and Luther were challenging accepted traditions of interpretation: in Black's case, the Supreme Court's authoritative interpretations of the first amendment; in Luther's case, the Roman Catholic Church's authoritative interpretation of scripture. Both Black and Luther attacked the existing interpretations by appealing to the plain meaning of the text.

Not even Martin Luther, however, would have supported the theory that each individual passage from the Bible has a plain meaning that can be gleaned without the aid of some interpretive method. Some passages, if considered in isolation, are ambiguous or obscure. Likewise, the text of the first amendment may be too indeterminate to be understood in isolation. What does speech mean? Are movies, radio programs, picketing, or campaign expenditures speech? The text refers only to Congress, but the first amendment has been interpreted to apply to state legislatures as well as executive and judicial action.[15] Justice Black says that "no law" means "no law," but no one seriously maintains that the Constitution invalidates a law forbidding incitement to mutiny on a naval vessel[16] or falsely shouting "fire" in a crowded theater.[17] These problems cannot be resolved by an appeal to a self-interpreting constitutional text.[18]

Protestant theological hermeneutics resolves the analogous problem

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12 Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553, 563 (1962).

13 *See* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 743 (1982); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 474 (1987).

14 H.-G. GADAMER, *supra* note 7, at 154.

15 *See generally* Denbeaux, *The First Word of the First Amendment*, 80 NW. U.L. REV. 1156 (1987) (arguing that limitation of the first amendment to "Congress" requires wholesale revision of first amendment doctrine regarding judicial prior restraints, but suggesting that other provisions of the Constitution may fill resulting gap).

16 *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21 (1971).

17 *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

18 *See* Fiss, *supra* note 13, at 743; Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1108 (1979) ("The freedom of speech, of course, is not a self-defining phrase . . . .").

of biblical interpretation with the device of the hermeneutic circle:[19] the meaning of each individual passage of scripture is gleaned in light of the meaning of the Bible as a whole. "For it is the whole of scripture that guides the understanding of the individual passage: and again this whole can be reached only through the cumulative understanding of individual passages."[20]

As applied to interpretation of the first amendment, the appeal to the hermeneutic circle is only partially satisfactory. When the first amendment is read in light of the Constitution as a whole, some ambiguities may be resolved, but others surely remain. The Constitution as a whole, encompassing a broad spectrum of provisions ranging from the minimum age requirements for federal officials to the vote for eighteen year olds, does not seem to possess a single theme or consistent message that provides precise answers to the central questions of first amendment interpretation: what does freedom of speech mean, and how is it to be applied?

Thus, the plain meaning account does not obviate the need for a theory of the freedom of speech. Indeed, Luther's appeal to the hermeneutic circle as the method for preserving the autonomy of scripture in biblical exegesis was based on the assumption that there is a coherent principle that unifies the text and thus permits ambiguities in individual passages to be clarified. Such a coherent principle is precisely what a theory of the freedom of speech attempts to provide for the first amendment. An alternative or supplement to the plain meaning account of the meaning of a text—be it scripture or constitution—is to look to the intentions of its authors. This approach is examined in the next Section.

B. Originalism and Schleiermacher's Hermeneutics

Protestant theology challenged the authority of Catholic dogma by positing that scripture had a plain meaning and that ambiguities could be resolved by reading a problematic part in light of the meaning of the whole. The difficulty with this approach is that it too makes a dogmatic assumption; it assumes that scripture constitutes a unity, that is, that there is a meaning of the whole which illuminates the meaning of each part.[21] This assumption was challenged by Friedrich Schleiermacher.

In contrast to Protestant theology, which held that comprehension

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[19] The structure of the hermeneutic circle may also be expressed by the more familiar language employed in John Rawls' notion of reflective equilibrium. The method of reflective equilibrium, for Rawls a method for political philosophy, begins with our prereflective intuitions about particular cases and general principles. Rawls argues that we adjust our theories of justice and our judgments about particular cases until we reach a sort of balance, which he calls reflective equilibrium. *See* J. RAWLS, A THEORY OF JUSTICE 48-51 (1971). David Hoy has made the comparison between reflective equilibrium and the hermeneutic circle. *See* Hoy, *Hermeneutics*, 47 SOC. RES. 649, 666 (1980).

[20] H.-G. GADAMER, *supra* note 7, at 154.

[21] *See* H.-G. GADAMER, *supra* note 7, at 155.

of plain meaning is the norm, Schleiermacher begins with the premise that misunderstanding is the usual state of affairs, not only in scriptural interpretation, but in everyday conversation.[22] For Schleiermacher, understanding a text or speech requires an understanding of the intentions of the author or speaker. The text must be placed in the context of the author's life and the history of the time in which it was written. Because we lack direct access to the intentions of those with whom we converse or whose works we read, understanding is always problematic.

Schleiermacher's theory has its constitutional counterpart in originalism, the theory that the Constitution ought to be interpreted in accord with the intentions of the framers.[23] Originalism has been criticized in a number of ways.[24] I do not attempt to recapitulate the scholarly debate; rather, my approach is to relate Gadamer's criticisms of historical intentionalism as a hermeneutic theory to some criticisms of originalism in constitutional theory.

Gadamer does not criticize Schleiermacher on the ground that intentions are irrelevant to interpretation. Rather, Gadamer observes that our understanding of original intent is necessarily conditioned by our own situation and concerns. Thus, our description of an author's original intent necessarily reflects our perspective.[25] Gadamer's point can be illustrated by recalling some of the many difficulties that scholars have raised with originalist attempts to reconstruct the original intentions of the framers of the Constitution.

First, as a historical matter, the intentions of the framers were at the least ambiguous and complex. Historical research has revealed a complicated set of intentions animating the first amendment.[26] Indeed, one purpose of the authors of the constitutional text may have been to frame a

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22 *See* G. WARNKE, *supra* note 7, at 11. For other accounts of Schleiermacher's hermeneutics, see H.-G. GADAMER, *supra* note 7, at 162-73; R. PALMER, *supra* note 7, at 84-97; J. BLEICHER, *supra* note 7, at 14-16. For Schleiermacher's own work, see F. SCHLEIERMACHER, HERMENEUTIK (1959); F. SCHLEIERMACHER, HERMENEUTIK UND KRITIK: MIT BESONDERER BEZIEHUNG AUF DAS NEUE TESTAMENT (1838).

23 *See generally* R. BERGER, GOVERNMENT BY JUDICIARY (1977) (espousing an originalist approach to constitutional interpretation); Bork, *supra* note 16 (same); Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (discussing originalism).

24 *See, e.g.*, R. DWORKIN, *The Forum of Principle*, in A MATTER OF PRINCIPLE (1985); L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); M. PERRY, MORALITY, POLITICS AND LAW 122-31 (1988); M. TUSHNET, RED, WHITE, & BLUE 23-69 (1988); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985). For a thorough catalog of the literature, see Clinton, *Original Understanding, Legal Realism and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1179 n.3 (1987).

25 *See* G. WARNKE, *supra* note 7, at 25.

26 *See, e.g.*, L. LEVY, THE EMERGENCE OF A FREE PRESS (1985).

document that is capable of growth through interpretation.[27] Jefferson Powell, for example, has forcefully argued that the founding fathers did not plan that their intentions should control constitutional interpretation.[28] In the case of the first amendment, the generality of the constitutional language makes it especially difficult to believe that the founders intended to freeze any particular intentions as the meaning of the constitutional text.

Second, the notion that constitutional meaning can be constructed out of intentions is problematic for more general reasons. The difficulties can be illustrated in a series of questions: (1) Whose intentions are to count? This question suggests a host of possible answers: (a) the intentions of the drafters of the first amendment itself, (b) the intentions of the members of Congress who voted to propose it to the states, or (c) the intentions of the members of the state legislatures that ratified the Bill of Rights. Given the many different possible "authors" of the first amendment, subsidiary questions arise: What if there were conflicting intentions? How should the conflicts be resolved? (2) What sort of intentions should be used? Again there are many possibilities: (a) abstract intentions about the principles underlying the first amendment, or (b) concrete intentions about the application in particular cases. What if more general intentions conflict with more specific ones? (3) What psychological states count as intentions? Are hopes, predictions, or convictions intentions?[29]

The difficulty of answering these questions supports the conclusion that the original intentions of the framers of the Constitution are more accurately described as "constructed" than as "discovered." This point illuminates the cogency of Gadamer's objection to Schleiermacher's intentionalist hermeneutics. The complex series of choices that must be made in order to construct an "original intention" behind the first amendment underscores the impossibility of entering the minds of the framers and understanding the first amendment precisely as they understood it. To understand, says Gadamer, is to understand differently.[30] We necessarily understand the first amendment differently than did its framers, because we have a different set of experiences and concerns.

C. Gadamer's Hermeneutics and Law as Interpretation

To appreciate Gadamer's own position and its implications for legal interpretation, I explicate two ideas that are central to Gadamer's hermeneutics: first, the priority of truth over method, and second, the role of tradition. After these notions are developed, I explore the relationship

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27 *See* R. DWORKIN, *supra* note 24, at 52-55.

28 *See* Powell, *The Original Understanding of Original Intent*, *supra* note 24. For criticism of Powell's reading of the historical record, see Clinton, *supra* note 24, at 1186-1220.

29 *See, e.g.*, R. DWORKIN, *supra* note 24, at 38-55.

30 *See* H.-G. GADAMER, *supra* note 7, at 264.

between Gadamer's hermeneutics and Dworkin's theory of legal interpretation. The results of this effort are used to explain the role of theory in the interpretation of the first amendment.

1. *Gadamer on Truth and Method.*—Thus far, my account has not included the point of Gadamer's criticism of Schleiermacher's intentionalist hermeneutics. Gadamer believes that Schleiermacher went fundamentally wrong by elevating a particular method of interpreting a text over the attempt to grasp the truth of the text. Thus, Gadamer believes that both traditional Catholic dogmatics and Protestant theology shared a fundamental assumption that is a prerequisite to real understanding. Both assumed that the Bible communicated a truth that was to be applied in contemporary situations.[31] Schleiermacher turned to historical intentions because he rejected this assumption. Similarly, an originalist who rejects the assumption that the first amendment reflects true principles of freedom of speech turns to the intentions of its framers as a substitute.

The case of legal interpretation illustrates Gadamer's point even more clearly than does theological hermeneutics. Although it may be plausible to treat scripture as an object of purely historical study with no claim to truth and no applicability to our contemporary situation, it is much more difficult to marginalize the first amendment in this fashion. The judge who interprets the first amendment must apply it; a judge is required to operate on the assumption that it conveys a truth with contemporary relevance. Gadamer believes that this explicit requirement of application in legal interpretation exemplifies an implicit feature of all interpretation: understanding a text requires one to apply the text to one's own situation. This is what Gadamer means when he says that legal hermeneutics has exemplary significance.[32]

2. *Gadamer on Tradition.*—Tradition plays a crucial role in Gadamer's account of hermeneutics. For Gadamer, tradition both conditions and enables understanding. He develops this point through a critique of what he calls "the enlightenment prejudice against prejudice." Against the enlightenment notion that prejudice is a barrier to understanding, Gadamer maintains that prejudices, literally "pre-judgments," are productive of understanding. Without prejudgments about meaning, interpretation could never get started. Gadamer maintains that there is no neutral vantage point from which a text can be understood independently of any tradition or prejudice. We always read a text from a historically situated vantage point that consists of prejudgments constituted by our tradition, our cumulative heritage of interpretations. Such prejudgments can be confirmed or contradicted by the text. The process of

31 *See id.* at 155. *See generally* G. WARNKE, *supra* note 7, at 5-41 (discussing Gadamer).

32 *See* H.-G. GADAMER, *supra* note 7, at 289-305.

checking one's prejudgments against the text is captured by the hermeneutic circle as reinterpreted by Gadamer: readers project a meaning for the whole of the text and understand each part in light of that projection, revising the interpretation of the whole in light of each bit of evidence, and so on.[33]

Gadamer's hermeneutic theory provides more than a basis for rejecting the plain meaning or originalist arguments against the need for a theory of the freedom of speech. As applied to legal interpretation, hermeneutics can provide a positive account of the nature of a theory of freedom of speech in the interpretation of the first amendment. This point can be made by examining Ronald Dworkin's theory of law as interpretation in light of Gadamer's hermeneutics.

3. *Dworkin's Theory of Law as Interpretation.*—Dworkin's theory of law as interpretation is implicitly premised on the notion that the structure of legal interpretation as practiced by judges as lawyers is captured by the hermeneutic circle.[34] Thus, judges approaching the first amendment must construct a theory of its meaning. In Dworkin's terminology, the principle of freedom of speech is a "contested concept" of which there can be many "conceptions." A theory of the first amendment specifies a conception of the freedom of speech; the theory is then deployed to give content to the first amendment as it is interpreted and applied in specific cases.[35] The choice between available theories can be made by appealing to two criteria: fit and justification.

The first dimension is the dimension of fit.[36] A good theory of the first amendment must fit the existing practice, that is, it must be consistent with the text of the first amendment, the structure of the Constitution as a whole, and judicial decisions interpreting the amendment. Of course, no theory is likely to fit perfectly. Some cases may turn out to be mistakes, that is, wrongly decided. The Constitution is the result of political compromise and a long series of amendments. Some provisions, like the provisions protecting the institution of slavery, may also be mistaken. Given this caveat, however, a theory does not qualify as a sound specification of the concept of the principle of freedom of speech of the first amendment if it does not adequately account for a very substantial

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33 *See id.* at 235-53.

34 In my view Dworkin's early work, especially the essay *Hard Cases*, is best understood in this light. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). His more recent work is explicitly hermeneutic. *See* R. DWORKIN, LAW'S EMPIRE 65-66, 87, 419 & n. 2 (1986); R. DWORKIN, *supra* note 23, at 33-71, 119-77; Dworkin, *Law as Interpretation* and *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, in THE POLITICS OF INTERPRETATION (W. Mitchell ed. 1982).

35 *See* R. DWORKIN, LAW'S EMPIRE, *supra* note 34, at 382-83; R. DWORKIN, *supra* note 24, at 49; R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 34, at 106-07.

36 *See* R. DWORKIN, LAW'S EMPIRE, *supra* note 34, at 230.

portion of the cases and constitutional text. The more cases and text which the theory "fits," the better the theory is as an interpretation.

The second dimension might be called "justificatory power." Dworkin's explanation might be that the second dimension evaluates the ability of the theory to make of the first amendment the best that it can be.[37] Thus, the more powerful the justification a theory provides for the first amendment, the better it is as an interpretation. In a sense, justificatory power is an extension of the concept of fit, but in a much wider or more general sense than simply fitting the cases and text. The better the theory fits our general convictions about political or moral matters, the greater is its ability to justify the freedom of speech as a constitutional guarantee.[38]

The notions of fit and justification are illuminated by comparison with Gadamer's theory of hermeneutics. The dimension of fit is related to Gadamer's observations about the role of tradition in interpretation. We necessarily understand the first amendment from within a tradition of interpretation; that tradition is embodied in the opinions rendered in first amendment cases.[39] The dimension of justification is related to Gadamer's account of the role of truth in interpretation. We understand the first amendment as conveying a truth about how we ought to conduct our affairs. A theory of free speech is an attempt to make explicit the truth (or principle) communicated by the first amendment.

Although there are many objections to Dworkin's theory of judging,[40] I accept his core notions that judicial decisions must rely on a theory that fits and justifies the existing law as an approximation of the perspective internal to legal practice.

D. Theory and Tradition: Habermas' Critique of Gadamer's Hermeneutics

This Section begins with a final objection to the idea of a theory of the first amendment—the objection from relativism. In order to answer that objection, I introduce Habermas' critique of Gadamer's hermeneu-

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37 *See id.* at 231.

38 Habermas' recent work on the relationship between law and morality draws on Dworkin's theory. As Habermas puts it, "the legally institutionalized mode of justification remains pervious to moral argumentation." Habermas, *Law and Morality*, in TANNER LECTURES ON HUMAN VALUES VIII 215, 279 (S. McMurrin ed. 1988).

39 Of course, the cases do not exhaust the tradition. In the broadest sense, our entire culture constitutes the tradition that gives rise to the prejudgments that enable our understanding of the Constitution. For a view of the Constitution from a wider cultural perspective, see M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF (1986). More specifically, the history of the first amendment has been shaped by a number of political events that are not reflected in the cases. *See generally* L. LEVY, *supra* note 26; Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L. J. 514 (1980).

40 *See, e.g.*, M. TUSHNET, *supra* note 24, at 108-46; RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (M. Cohen ed. 1983).

tics. This critique provides the metatheoretical foundation for my effort to develop a theory of free speech. This Section also has a secondary purpose: it recapitulates an important line of development in Habermas' thought which led to his theory of communicative action.

Gadamer argues that we always understand from within a tradition. There is no transcendental viewpoint (outside of any interpretive tradition) from which an interpretation can be seen as *the* correct and final interpretation. Gadamer's argument could be used as the basis for a metatheoretical objection to any claim to have produced *the* theory of the first amendment. There is no such entity as *the* theory that is true to the exclusion of all other theories, it might be argued. Instead, the argument continues, there are a plurality of theories, each of which is true for the tradition within which it was formed. Indeed, in our pluralistic culture, which is constituted by a multiplicity of traditions, there are a plurality of theories of free speech. Because there is no Archimedean standpoint outside of this plurality of interpretive traditions, there is no basis for forming a judgment that any one of the many theories is better than any other.

Habermas and Gadamer engaged in an extended debate over the implications of hermeneutics for social theory.[41] In the course of this debate, Habermas developed a critique of Gadamer's hermeneutics.[42] The brief summary which follows uses this critique as the basis for an answer to the metatheoretical argument against the very possibility of developing a single correct theory of free speech which was sketched above.

Habermas acknowledges the validity of much of Gadamer's theory of hermeneutics. He argues, however, that Gadamer's view of the role of tradition in producing understanding has a conservative bias. While Gadamer is correct to see understanding as arising from a traditional consensus on meaning, he overlooks the possibility that the traditional consensus is the irrational product of systematically distorted communication.[43] The argument that all traditions stand on an equal footing because no person stands outside of a tradition ignores the real difference between a tradition which achieves consensus through manipulation,

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[41] Social theories (such as neoclassical economics, Marxism, or critical theory) can be viewed as interpretations. Habermas' critique of Gadamer's hermeneutics is motivated by the implications of hermeneutics for social theory and not by Habermas' concern with the problem of textual exegesis.

[42] For the primary texts in the debate available in English, see Habermas, *A Review of Gadamer's Truth and Method*, in UNDERSTANDING AND SOCIAL INQUIRY, *supra* note 7; H.-G. GADAMER, *On the Scope and Function of Hermeneutical Reflection*, in PHILOSOPHICAL HERMENEUTICS (1987); Habermas, *The Hermeneutic Claim to Universality*, in J. BLEICHER, *supra* note 7. For commentary, see J. BLEICHER, *supra* note 7, at 152-64; T. MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 162-93 (1981); G. WARNKE, *supra* note 7; McCarthy, *Rationality and Relativism: Habermas' Overcoming of Hermeneutics*, in HABERMAS: CRITICAL DEBATES (J. Thompson & D. Held eds. 1982).

[43] *See* G. WARNKE, *supra* note 7, at 112-13.

force, or coercion, and a tradition in which consensus is based on reasoned discourse. Not all traditions can make equal claims to truth and right.

In order to make good on this criticism of Gadamer's relativism, Habermas is required to offer a theory of rational consensus. The theory of communicative action which Habermas produced to fulfill this requirement is explored in depth in Part IV of this Article and is adumbrated in the following passage:

> A critically enlightened hermeneutics that differentiates between insight and blindness incorporates metahermeneutic knowledge of the conditions of systematically distorted communication. It connects understanding to the principle of rational discourse, according to which truth would be guaranteed only by that consensus which was produced under idealized conditions of unconstrained communication free from domination and which could be maintained over time.[44]

It is important to note that Habermas' notion that rational consensus can be achieved under conditions of unconstrained communication does not assume an Archimedean standpoint that is outside of any tradition. We begin the effort to forge a rational consensus from within our tradition and attempt to achieve a consensus with others who begin from within their traditions.[45] The point is that an agreement is rational only if it is not the product of force or deception.

In the context of my effort to develop a theory of the freedom of speech, the point is that rational discourse offers a method for differentiating between better and worse theories. If I can demonstrate through rational argument that existing theories are inadequate and that a superior theory exists, then the enterprise of theory construction is not doomed to failure by metatheoretical relativism. The relativist does not have an a priori argument that demonstrates the impossibility of producing the best theory of free speech.[46] Rather, theoretical relativists can prove their point only by entering into discourse about the various theories.

My effort to develop a theory of the first amendment begins with existing theories of the freedom of speech. Some of the theories that follow have played a direct role in the interpretation of the first amendment by the courts. Other theories have had a less direct influence on the judicial process or appear indirectly as implicit assumptions. Together the theories form an essential part of the legal tradition that is productive of

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[44] Habermas, *The Hermeneutic Claim to Universality*, *supra* note 42, at 205.

[45] Gadamer refers to such a consensus between traditions as a "fusion of horizons." H.-G. GADAMER, *supra* note 7, at 271-73.

[46] Nor could such an argument be developed. The relativist is limited to arguments which are true relative to a particular tradition. An a priori relativist argument against all possible theories of the first amendment would be contradictory.

our understanding of free speech. My attempt to build a new theory of the freedom of speech starts from within this tradition.

III. The Quest for a Theory of Free Speech

This Part examines four prominent theories of the first amendment. There have been other attempts to explain and justify the freedom of speech,[47] but these theories—the marketplace of ideas, the view that free speech is essential for self-government, the theory that free expression is essential for listener autonomy, and the contention that self-realization requires freedom of speech—have been most central to our understanding of the first amendment.

My aim in this Part is not to provide a comprehensive critique of all existing theories of free speech; rather, my more limited goal is to demonstrate that there is sufficient doubt about each of the major theories to motivate my examination of the theory of communicative action as an alternative. In the course of my exploration, I emphasize those strengths and weaknesses of existing theories that illuminate the theory of communicative action as a theory of free speech.

A. The Search for Truth

1. *The Marketplace of Ideas Metaphor.*—Perhaps the most influential theory of the freedom of expression is captured by Justice Holmes' language in *Abrams v. United States*:[48]

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[49]

This view—freedom of expression is valuable because it leads to the dis-

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[47] *See, e.g.*, L. Bollinger, The Tolerant Society (1986); D. Tucker, Law, Liberalism and Free Speech (1985); Blasi, *The Checking Value in First Amendment Theory*, 1977 Am. B. Found. Res. J. 523.

[48] 250 U.S. 616 (1919).

[49] *Id.* at 630 (Holmes, J., dissenting); *see* Gitlow v. New York, 268 U.S. 652, 673 (1925). Other prominent judges have presented justifications for the freedom of speech that resonate with that of Holmes. For a similar view by Justice Brandeis, see Whitney v. California, 274 U.S. 357, 375-78 (1927) (Brandeis, J., concurring). Justice Frankfurter's formulation can be found in Dennis v.

covery of truth—was a theme in the early defense of free speech by John Milton[50] and played a prominent role in the account offered by John Stuart Mill.[51]

The marketplace of ideas metaphor suggests that truth is most likely to emerge when all opinions are expressed openly and competing opinions are juxtaposed in debate evaluated by large audiences. The test of this open marketplace, according to the metaphor, is a better mechanism for sorting truth from falsehood than would be the evaluation of a single individual or government.[52]

Holmes' argument that freedom of speech advances the search for truth is ambiguous and can be interpreted in a number of ways. Two interpretations, corresponding to two theories of truth, are the most plausible.[53] The first interpretation is based on a correspondence theory of truth; the second is based on a consensus theory of truth. In the remainder of this Section, I argue that the conventional articulations of the two interpretations both fail to provide a satisfactory account of the freedom of expression.[54]

2. *Interpreting the Metaphor: A Correspondence Theory of Truth.*—According to a correspondence theory of truth, a proposition is true if and only if the content of the proposition corresponds to an existing state of affairs.[55] If an adversary process facilitates the sorting of those propositions that do correspond with reality from those which do

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United States, 341 U.S. 494, 546-53 (1951) (Frankfurter, J., concurring). The approach of Judge Learned Hand also emphasizes the role of free speech in seeking truth, see United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); International Brotherhood of Elec. Workers v. NLRB, 181 F.2d 34 (2d Cir. 1950).

50 J. MILTON, *A Speech for the Liberty of Unlicensed Printing, To the Parliament of England*, in PROSE WRITINGS 23-38 (1927).

51 J.S. MILL, ON LIBERTY 75-118 (G. Himmelfarb ed. 1974) (1st ed. 1859).

52 *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 1.02 (1984); F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 16 (1982); Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967-90 (1978); Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1. Two provocative but highly idiosyncratic versions of the marketplace of ideas argument which rely on distinct law and economics positions have been advanced recently. *See* Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1 (1986); Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS. L. REV. 669 (1986).

53 There are other theories of truth, most prominently the coherence theory. *See* White, *The Coherence Theory of Truth*, 2 ENCY. PHIL. 130 (1967). In another vein, Stanley Ingber has argued that there is no "objective truth," because truth is relative to individuals. Ingber, *supra* note 52, at 25. If such a theory were philosophically plausible, it would not invalidate the search for truth theory; rather, relativism makes the "truth" of the "search for truth theory" of the freedom of speech relative to each individual. I discuss Habermas' response to a similar relativism above. *See* Part II(D) (text accompanying notes 41-46).

54 *Cf.* Wonnell, *supra* note 52, at 676 (exploring relationship between "marketplace of ideas" argument for free speech and theories of truth).

55 *See* B. RUSSELL, AN INQUIRY INTO MEANING AND TRUTH (1940); *see also* A. TARSKI, LOGIC, SEMANTICS, METAMATHEMATICS (1956); Wonnell, *supra* note 52, at 676.

not, then freedom of speech would be instrumentally valuable in the discovery of truth.[56] Conversely, if oversimplifying rhetoric triumphs over truth in open debate, then free speech might actually hinder the emergence of truth-as-correspondence. Thus, a crucial link in this first interpretation is the contention that truth prevails over falsehood in open debate.

On the correspondence view of truth, this link itself is an empirical hypothesis subject to verification. The question is whether it is the case that truth prevails more frequently in a society which respects a free speech principle than in one that does not. We might postulate that in academic and scientific discourse, the prevailing practice and historical experience tend to confirm the crucial link. But it is one thing to contend that open debate leads to truth among a select community of scientists and academicians, trained for rational discourse, and quite another thing to contend that this is also true among the general public.

It is not evident that, *given current conditions*, truth-as-correspondence prevails over falsehood more often in societies with freedom of speech than in societies without this freedom. History provides many examples of falsehood prevailing over truth.[57] Experience with the mass media and contemporary politics suggests that simplistic or comforting messages may be more likely to generate a consensus than complex or disturbing ones. Moreover, some points of view hardly seem represented in the national media and hence would seem not to have a chance to compete in the marketplace, whether they be true or false. A major difficulty with the argument for free speech from its instrumental value in promoting truth-as-correspondence is that it makes our continued commitment to freedom of expression dependent on an empirical proposition of doubtful validity.[58]

A second difficulty concerns the priority of truth as a social value. The strength of the freedom of expression depends, at least in part, on the strength of its justification. A strong version of the argument from truth-as-correspondence requires that the search for truth be at or near the top of the hierarchy of social values. But the quest for knowledge, important as it may be, is not clearly the top priority as measured by either existing institutional arrangements or individual preferences. If truth is only one value, competing with many others, then the freedom of expression may be nothing more than one of many generally observed principles, rather than an overriding principle. The truth-as-correspondence interpretation of the marketplace metaphor fails to justify a right

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[56] *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941) ("Truth can be sifted from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues . . . may be clearly defined . . . .").

[57] *See* L. BOLLINGER, *supra* note 47, at 74; F. SCHAUER, *supra* note 52, at 25-33; A. BICKEL, THE MORALITY OF CONSENT (1975).

[58] For empirical criticisms, see Ingber, *supra* note 52, at 31-47; Baker, *supra* note 52, at 974-81.

to freedom of speech as a trump that invalidates government action in the pursuit of other legitimate social goals.[59]

3. *Interpreting the Metaphor: A Consensus Theory of Truth.*— There is another interpretation of the marketplace metaphor grounded on the correspondence theory of truth. C.S. Peirce, the pragmatist philosopher, expressed the consensus theory as follows: "The opinion which is fated to be ultimately agreed upon by all who investigate is what we mean by truth."[60] This theory of truth avoids the empirical link in the argument for free speech—a link required in the truth-as-correspondence interpretation; truth is *defined* (or analyzed) in terms of the process of open debate. Truth is the consensus that emerges from a process of open discussion; falsehood is what is rejected by such a process.[61] The link between free discussion and truth becomes tautologous.

The truth-as-consensus interpretation of the marketplace of ideas metaphor may well have met approval from Holmes himself; he was much influenced by the pragmatists.[62] This view of truth can be seen as skeptical. We have no direct means of determining the correspondence between our propositions and what is *really* real; therefore, the best we can do is to define truth as a process.[63]

The truth-as-consensus interpretation is open to several objections. Initially, the consensus theory of truth may rest on a "category mistake"; the theory appears to confuse the meaning of truth with the methods for arriving at true statements.[64] No matter how universal the agreement about the truth of a proposition, a proposition is not true unless the correspondence condition is met. That this is a feature of our ordinary use of the concept of truth can be verified by the following thought experiment. Imagine that everyone agreed that the earth were flat. The proposition, "The earth is flat," would nevertheless not be true if the earth were really round.

In addition, the truth-as-consensus interpretation has a certain question-begging quality. If free speech is *defined* as a prerequisite for truth, then how can the role of free speech in promoting truth provide any justification for a right to free speech? Put another way, it is not clear, on the truth-as-consensus view, that free speech leads to more *desirable* results than does unfree discussion. My point is that if truth is nothing more than the result achieved through free speech, then there is no more reason to value truth than there was to value free speech in the first

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59 *See* F. SCHAUER, *supra* note 52, at 33.

60 C.S. PEIRCE, *How to Make Our Ideas Clear*, in THE PHILOSOPHICAL WRITINGS OF PEIRCE 38 (J. Buchler ed. 1955).

61 *See* F. SCHAUER, *supra* note 52, at 19-20.

62 *See id.* at 209 n.6; THE MIND AND FAITH OF JUSTICE HOLMES 290 (M. Lerner ed. 1943).

63 *See* F. SCHAUER, *supra* note 52, at 20.

64 *See* T. MCCARTHY, *supra* note 42, at 303.

place.[65]

Furthermore, the notion that the strongest opinion in the marketplace of ideas is true seems to conflict sharply with some of our particular judgments about truth. If a strong majority consensus on the propositions of Nazi ideology, including the opinion that Jews were subhuman, had emerged from conditions of relatively free speech during the late Weimar Republic, would that make those propositions true?[66] If the wealthy and powerful can propagate their opinions more effectively than the poor, does that make their views more likely to be true?[67] Our intuitive answer to these questions is no. We do not believe that the ability of powerful groups simply to achieve a consensus validates their claims to truth or right.

Thus, the truth-as-consensus interpretation of the marketplace of ideas theory of the first amendment also fails. This is not to say that there is no connection between truth and consensus on one hand and a viable theory of the freedom of expression on the other. Indeed, Part IV argues for a theory that maintains that there is a relationship between a legitimate consensus and truth and right. But the view that truth means nothing more than consensus is inadequate and cannot serve as the basis for a coherent theory of free speech.

B. Self-Government

1. *The Metaphor of the Town Meeting.*—A second theory of the freedom of expression emphasizes the special role of free speech in a democracy. The argument is associated with Alexander Meiklejohn,[68] whose intellectual influence on courts and theorists has been profound.[69] Meiklejohn's view is informed by the metaphor of the town meeting:

> [T]he traditional American town meeting . . . is commonly, and rightly, regarded as the model by which free political procedures may be measured. It is self-government in its simplest, most obvious form. . . . Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of

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65 *See* F. SCHAUER, *supra* note 52, at 20-21.

66 *See id.* at 21-22.

67 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 789 (2d ed. 1988).

68 *See* A. MEIKLEJOHN, *Free Speech and its Relation to Self-Government*, in POLITICAL FREEDOM 3 (1948); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245; Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CAL. L. REV. 4 (1961).

69 The self-government theory has received considerable attention from the commentators. *See* 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 16; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Morrow, *Speech, Expression, and the Constitution*, 85 ETHICS 235 (1974). The theory has also had a major influence on judicial decisions. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979); Young v. American Mini Theaters, Inc., 427 U.S. 50, 61 (1976); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976); Cohen v. California, 403 U.S. 15, 24 (1971); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

> others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened, unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." . . . His business on its negative side is to abridge speech. . . . [D]ebaters must confine their remarks to "the question before the house." If a speaker wanders from the point at issue . . . he may be and should be declared "out of order." He must then stop speaking . . . . The town meeting . . . is a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all. It is self-government.[70]

My investigation of the self-government theory of the first amendment emphasizes this crucial role that the metaphor of the town meeting plays in shaping the theory.

The fundamental conception of the self-government theory is that in a democracy the people are sovereign; the people are the rulers, not the ruled.[71] The theory maintains that the right to freedom of speech must encompass two essential prerequisites to effective democracy. First, participants in the process of self-government must have access to information relevant to their decisions.[72] If citizens are denied access to data, opinions, criticisms, or arguments that are relevant to a decision they must make, then the result may be a bad decision. Second, citizens must be able to communicate their desires and opinions to government officials.[73] If citizens are denied an opportunity to make their wishes known to their elected representatives, the majority is unable to govern effectively.

Both requirements of democracy—access to information necessary to inform decisionmaking and ability to communicate with elected representatives—lead to an emphasis on "political speech" in the interpretation of the first amendment. The freedom of speech should provide, Meiklejohn argues, absolute protection for speech relevant to political choices, but no protection for speech which is not connected to politics.[74] In addition, the self-government theory leads to special protection for speech that is critical of government officials. Criticism of government officials is highly relevant to the most common form of direct political participations—the election of representatives; such criticism also communicates the desires of the citizenry to elected officials.[75]

2. *The Problem of Fit.*—The first and most basic problem with the self-government theory is its lack of fit with existing first amendment

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70 A. MEIKLEJOHN, *supra* note 68, at 24-25.

71 *See id.* at 9-14; F. SCHAUER, *supra* note 52, at 38-39.

72 *See* A. MEIKLEJOHN, *supra* note 68, at 26-27; F. SCHAUER, *supra* note 52, at 38.

73 *See* F. SCHAUER, *supra* note 52, at 39.

74 *See* Meiklejohn, *The First Amendment is an Absolute*, *supra* note 68.

75 *See* F. SCHAUER, *supra* note 52, at 39.

doctrine. The first amendment has been held to protect expression that does not seem obviously necessary to self-government, including artistic expression in the form of poems and plays.[76] Indeed, the Supreme Court has announced, "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection."[77] Of course, the theory may be reformed by stipulating that all speech (or all speech which actually receives first amendment protection) is necessary for effective self-government. Indeed, some advocates of the theory make this move.[78] This expansion of the theory, however, seems ad hoc in nature. Moreover, as I argue below, the move to widen the bounds of political speech exacerbates other problems of the theory.

3. *The Paradox of Self-Government.*—The second problem with the theory has been called the paradox of self-government. A right to freedom of speech is a right against democratic majorities; because the right is a trump against majority decisions about what speech should be allowed, freedom of speech is seemingly antidemocratic and antimajoritarian. Exploring this objection allows us to clarify and criticize the self-government theory of free speech.

One line of defense to the paradox objection would be to argue that the freedom of speech is an antidelegation doctrine, that meaningful self-government requires that the people as sovereigns not delegate the authority to sort true from false and right from wrong. The basis for this argument is unclear, though, especially if political speech is stretched to include such apparently nonpolitical matters as poems and commercials. Why shouldn't the majority delegate a power to censor if that is what the democratic process has chosen?[79] The answer to this question requires the development of a more complex political theory than the simple theory of self-government inspired by the metaphor of the town meeting.[80]

I explore two distinct strategies for developing or interpreting the self-government theory more fully: a consequentialist strategy and a de-

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[76] *See* L. TRIBE, *supra* note 67, at 787.

[77] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

[78] *See* Meiklejohn, *The First Amendment is an Absolute*, *supra* note 68, at 263. *But see* Bork, *supra* note 16, at 20-35.

[79] The choice whether or not to institute censorship could itself be made on the basis of open debate and discussion. As long as the people had full access to information when they voted for censorship, the argument against censorship from democracy seems difficult. For a very interesting discussion of this problem from another angle, see M. TUSHNET, *supra* note 24, at 89-94.

[80] *See id.* at 40-41; *cf.* Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1868 n.79 (1983) ("Rather than an intrusion upon the realm of individual autonomy . . . a community's regulation of its own expression is an exercise of social liberty that acts on community members internally and furthers the development of their own social nature and common action.").

ontological strategy. Both strategies ultimately fail to provide an adequate theory of the freedom of expression.

4. *The Instrumental Value of Informing Rational Individuals.*— One interpretation of the self-government theory is based on the argument that democratic decisionmaking by a more fully informed electorate is likely to produce better consequences than decisionmaking by a less informed electorate.[81] The basic premise is that a larger number of informed rational decisionmakers is more likely to accurately assess information and resolve conflicting arguments than a smaller number. This premise is especially plausible because each individual is likely to have the best information about his or her own preferences and circumstances. Thus, the delegation of a censorship power is undesirable because it would tend to produce social decisions that were based on the assessments of fewer individuals and hence less accurate judgments.[82]

Consider two objections to this elaboration of the self-government theory. First, the argument based on the instrumental value of informing rational individuals depends on strong assumptions about competence and rationality among the electorate.[83] If it could be demonstrated that there is some class of information and corresponding decisions on which the electorate is not well qualified to make decisions and that elite groups are better qualified, then utilitarian concerns would justify suppression of speech. Some might argue that information and decisions impacting national security constitute such a class.

Second, the instrumentalist defense of free speech itself assumes that the citizenry is irrational when it comes to making at least one class of decisions, that is, decisions whether to restrict the freedom of speech. Why can't the electorate rationally decide that certain sorts of political speech do more harm than good and then democratically choose not to allow these sorts of speech? As long as there is sufficient information about the costs and benefits of allowing certain categories of speech, there is no instrumentalist reason for not allowing censorship in such cases. Thus, even if the general tendency of free speech were to produce better consequences, the theory must allow particular restrictions (or classes of restrictions) on free speech that could be demonstrated to produce, on-balance, better consequences.[84] Indeed, a utilitarian theory

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[81] This interpretation of the self-government theory rests on the premise that democratic decisionmaking is more accurate if it is based on a true picture of the relevant facts, which in turn is more likely to emerge if various opinions compete in the marketplace of ideas.

[82] The instrumentalist argument for free speech is not clearly limited to democratic governments. If the argument is correct and if obligation is conceived in utilitarian terms, then autocratic governments should also allow freedom of speech in order to improve the accuracy of their decisions. *See* J.S. MILL, *supra* note 51, at 77; R. LADENSON, A PHILOSOPHY OF FREE EXPRESSION 32-33 (1983).

[83] *See* F. SCHAUER, *supra* note 52, at 41.

[84] The rationale for allowing exceptions to a general freedom of speech differs depending on

would not only allow but would require such restrictions on free speech.

Of course, self-government theorists could attempt to develop a very sophisticated utilitarian justification for democracy with a free speech constraint which dealt with the rationality objection. Such a theory would need to explain why democratic decisionmaking was rational in general, why it would lead to irrational results if decisions concerning what speech is to be allowed were made democratically, and why precommitment to a free speech guarantee is rational. This sort of utilitarian argument is woefully underdeveloped as of now.[85]

Thus, in the end, the instrumentalist interpretation of the self-government theory is unsatisfactory because it fails to explain why democratic decisionmaking is rational in general, but irrational when it comes to making decisions that limit freedom of speech.[86]

5. *A Deontological Concern for Equality and Autonomy.*—There is a second interpretation of the self-government theory that rejects consequentialism and instead relies on a deontological concern for equality and autonomy. The argument would begin with the observation that democracy is more than a system for making rational decisions; rather, democracy is founded on the principle that each citizen deserves equal respect as an autonomous individual. Majority rule is to be valued, not because it promotes accuracy in decisionmaking, but because it provides political equality; each person's vote counts for one and only one.[87] Thus, the self-government argument is subtly transformed; the focus is shifted from majoritarian sovereignty to respect for individual citizens.

Freedom of speech reflects both the values of autonomy and equality. Autonomy requires the freedom of citizens to judge for themselves the speech of others; this freedom is primarily a freedom of listeners to receive information.[88] Equality requires that every citizen have an equal voice in the debates and deliberation that inform the process of democratic decisionmaking; this freedom is primarily a freedom of speakers to

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whether an "act utilitarian" or "rule utilitarian" interpretation of the instrumentalist justification for democracy is chosen. On an act utilitarian account, the desirability of each individual proposed act of censorship is evaluated. On a rule utilitarian account, classes of acts of censorship, that is general rules allowing censorship, are evaluated. This distinction presumes that act utilitarianism and rule utilitarianism are not extensionally equivalent, that is, that the two theories do not require the same actions in particular cases. *Compare* D. LYONS, FORMS AND LIMITS OF UTILITARIANISM (1964) (arguing that act and rule utilitarianism are extensionally equivalent) *with* T. REGAN, UTILITARIAN COOPERATION (1984) (denying extensional equivalence).

85 Jon Elster's work on irrationality provides some interesting suggestions for the development of such a strategy. *See* J. ELSTER, ULYSSES AND THE SIRENS (rev. ed. 1984); CONSTITUTIONALISM AND DEMOCRACY (J. Elster & R. Slagstad eds. 1988). For an exploration in the context of constitutional law, see Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571 (1988).

86 *See* F. SCHAUER, *supra* note 52, at 41-45.

87 *See* J. RAWLS, *supra* note 19, at 221-28.

88 *See infra* Part III(C) (text accompanying notes 90-102).

speak.[89]

The deontological interpretation of the self-government theory points us in the direction of a more adequate theory of the freedom of expression, but at the same time this interpretation shifts our attention from self-government to other concerns. Self-government no longer serves as an independent justification and explanation of the freedom of speech, but instead serves to focus our attention on other explanations of the first amendment.[90] The relationship of equality to free speech is explored in Part IV of this Article. The autonomy strand of the deontological argument is the subject of the next Section.

C. Autonomy

1. *The Millian Principle.*—Free speech can also be justified and explained by our respect for the autonomy of listeners. This third theory of the freedom of expression was proposed by Thomas Scanlon.[91] Although Scanlon has revised his views,[92] his original formulation of the autonomy theory provides insight into an important view. Scanlon argued that the freedom of expression is justified and explained by what he calls the Millian principle:[93]

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[94]

Scanlon argued that the Millian principle is required by the view that the powers of the state should be limited to "those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents."[95]

For Scanlon, autonomy required the individual to regard herself as independent and free in deciding what to believe and in weighing competing reasons for action. An autonomous agent could not accept the judgment of others as authoritatively deciding what the agent ought to believe or how the agent should act; the autonomous agent was required

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89 *See* J. RAWLS, *supra* note 19, at 221-28.

90 *See* F. SCHAUER, *supra* note 52, at 41-42; L. TRIBE, *supra* note 67, at 787.

91 *See* Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. AND PUB. AFF. 204 (1972), *reprinted in* THE PHILOSOPHY OF LAW 153 (R. Dworkin ed. 1977) [hereinafter page references are to the reprinted essay].

92 Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).

93 Scanlon appeals to the political philosophy of John Stuart Mill. *See* J.S. MILL, *supra* note 51.

94 Scanlon, *supra* note 91, at 160-61.

95 *Id.* at 162.

to have her own reasons for her beliefs and actions.[96]

Thus, an autonomous individual would accept the Millian principle. An autonomous individual could not consent to the state protecting her from harms that would result from expression leading her to have false beliefs. Such consent would allow the state to authoritatively determine for the individual what was false, without the individual making an investigation of the reasonableness of the belief. Allowing the state to outlaw the advocacy of harmful and illegal actions would also violate the autonomy of the citizen, because an autonomous individual must decide for herself whether the law should be obeyed.[97]

Scanlon acknowledged that under limited circumstances the Millian principle may be suspended. A law against shouting fire in a crowded theater is justified because under the condition of panic likely to result there is diminished capacity for rational deliberation. The limited period of diminished capacity and our relative certainty that (absent restriction) harm would result combine to enable an autonomous citizen to consent to this sort of limited paternalism.[98]

2. *The Problem of Fit for a Justification Focused Theory.*—One distinctive characteristic of the theory is Scanlon's belief that his theory of the freedom of expression is an important advance over theories which focus on the categories of expression that should be protected. Acts of expression can be violent and destructive and hence should not be privileged as a class. The proper question, says Scanlon, is not whether a given act is expression or action, but whether the justification for the restriction on expression is ruled out by the Millian principle. Scanlon's theory, thus, focuses on the characteristics of the potential violation of the freedom of expression rather than on the characteristics of the protected expression.[99]

The Millian principle's focus on justification as the basis for invalidating a restriction on speech also grounds one line of critique. As Scanlon recognizes, the Millian principle does not rule out the banning of all demonstrations (if justified by a concern with traffic), the banning of all political meetings (if justified by a fear of disorder), or a ban on all newspapers (if justified by a desire to conserve trees).[100] A theory of freedom of expression limited to evaluation of the justifications offered for a restriction on communication pays inadequate attention to the positive value of expression for social and political communities. A society that legislated to forbid an open and robust discussion of moral, political, cul-

96 *Id.* at 162-64.

97 *Id.* at 164-65.

98 *Id.* at 166.

99 *Id.* at 155-57.

100 *Id.* at 168.

tural, or scientific issues would be impoverished even if the restrictions on expression all conformed to the Millian principle.

Perhaps more troublesome than the censorship which the Millian principle would allow is the speech it would protect. Because the Millian principle rules out regulation of speech based on the falsity of the view communicated, it would appear to rule out the regulation of libel, which receives some first amendment protection, and even fraud, which is noncontroversially outside of first amendment protection.

3. *The Difficulties of an Audience-Centered Theory.*—A second feature of Scanlon's view is that it is audience- rather than speaker-centered. For Scanlon, the freedom of expression is primarily a right of audiences to make autonomous decisions whether to believe in or act on the content of speech; the freedom is not one of speakers to speak. Thus, Scanlon's theory suggests that the audience may consent not to hear opinions it detests. In addition, on this view the freedom of expression provides no grounds for protecting a speaker who merely wishes to bear witness that she holds a view and not to provide new arguments or grounds for her opinion.[101] Those whose opinions are well known or have been adequately presented could be denied the opportunity to communicate without a violation of freedom of expression, if Scanlon's theory is correct.[102]

Listener autonomy thus fails as a complete account of the freedom of expression. The theory's exclusive focus on listeners fails to capture the dialogic nature of communication.[103] Communication situations necessarily involve both speakers and audiences. The constitutional guarantee of free speech is impoverished by excluding consideration of the interests of the speaker from a theory of the right. The critique of the listener autonomy theory leads naturally to a consideration of the speaker; the interests of speakers in expressing themselves is the focus of the next Section.

D. Self-Realization

1. *An Aristotelian View of Communication as Essential to Happiness.*—Free expression may be an indispensable means to the good life; free speech may be necessary to human flourishing or happiness. The self-realization theory of the freedom of speech is most plausibly based

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101 *See* Dworkin, *Introduction* in THE PHILOSOPHY OF LAW 1, 14-15 (R. Dworkin ed. 1977).

102 Skillen, *Freedom of Speech* in CONTEMPORARY POLITICAL PHILOSOPHY: RADICAL STUDIES 139, 153 (K. Graham ed. 1982).

103 Scanlon has recognized this point. His more recent work does emphasize the intersubjectivity of communication. Scanlon, *supra* note 91, at 520-28 (identifying participant, audience, and bystander interests in free speech); *cf.* K. BACH & R. HARNISH, LINGUISTIC COMMUNICATION AND SPEECH ACTS 3 (1979) (noting that speech acts include the speaker, hearer, and the context of utterance).

on an Aristotelian conception of happiness as the fulfillment of the uniquely human potential for "personal growth, self-fulfillment, and the development of rational faculties."[104] Speech (or more precisely, communication) is a prerequisite for the development of this potential. Man is a social animal;[105] communication is required for individuals to grow, to become fulfilled, and to develop their rational faculties. Thus, the status of self-realization as an essential part of the good life requires the freedom to communicate.[106]

I want to focus on two ways in which freedom of speech may promote self-realization. The first is the development of the rational faculties. Thus, for the speaker communication serves as a means of expressing her intellectual growth and as the means for clarification of her own thoughts. For the listener, communication stimulates the development of reason and provides an opportunity for the exercise of the powers of judgment and choice. In dialogue, both speaker and listener develop their rational faculties through a mutual process of expression, clarification, and criticism.[107] Moreover, the development of the rational faculties is, at least to some extent, dependent on the intersubjectivity of communication. Although one could develop one's rational faculties to some extent by talking to one's self, intellectual growth is far more rapid and perhaps more extensive if accomplished through interaction with others.

Moreover, expression may promote human flourishing in ways other than developing the rational faculties. Freedom of speech may allow the expression of powerful emotions and provide an outlet for the creative impulse in a variety of forms, including literature, drama, and the visual arts. Listeners or audiences may also be enriched by exposure to emotive or artistic expression. The affective and artistic dimensions of communication provide further support for a dialogic or intersubjective interpretation of the freedom of speech. Although some of the benefits of emotive or aesthetic expression might be realized by a solitary writer making an entry in a private diary, the self-realization value of free speech would surely be injured if the government were to forbid plays to be performed or pictures exhibited. The value of emotive and aesthetic communication, at least in its primary mode, is a result of its intersubjectivity. The self-realization theory seems to correct one shortcoming of the self-gov-

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104 F. SCHAUER, *supra* note 52, at 49.

105 ARISTOTLE, POLITICS, in 2 THE COMPLETE WORKS OF ARISTOTLE 1253a1 (J. Barnes ed. 1984).

106 *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970); R. LADENSON, *supra* note 82, at 33-39; J.S. MILL, *supra* note 51, at 97-100, 119-40; M. NIMMER, *supra* note 52; F. SCHAUER, *supra* note 52, at 55; Baker, *supra* note 52; Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

107 *See* F. SCHAUER, *supra* note 52, at 54-55.

ernment theory: it accounts for the protection of a wide variety of expression, not simply political speech.

2. *Problems of Fit.*—The self-realization theory, however, fails to explain or justify the freedom of speech. One method of expressing the difficulty in the self-realization theory is to draw a distinction between a justification for freedom *of* speech and a justification for mandatory communicative education. The self-realization argument justifies requiring individuals to engage in communication that maximizes their growth and flourishing, but it does not justify freedom of speech—the freedom of individuals to determine for themselves the subjects worth discussing and the viewpoints worth taking. Communicative education might be realized consistently with a scheme that limited public speech to a narrow range of topics that government officials determined would have the greatest potential for enhancing self-realization.[108] Indeed, this is precisely what does go on (at least to some extent) in formal education.

A related strategy for explicating this difficulty with the self-realization theory is to explore the implications of that theory for the area of legal doctrine expressed under the rubric of "content regulation." In *Police Department v. Mosley*,[109] the Supreme Court declared that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, or its content."[110] The view that freedom of speech serves self-realization does not support the requirement of "content-neutrality." Rather, the self-realization theory calls for the protection *only* of that communication which enhances personal growth; indeed, if the theory is correct, then the suppression of speech which impedes personal growth is not only consistent with the freedom of speech, but is actually mandated by the values that animate the first amendment.[111] Such an interpretation would represent a strong break from the interpretive tradition of judicial decision.[112]

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108 The self-realization theory must respond to the following questions: why wouldn't communicative education shaped by government serve the self-realization function as well as individually-chosen communication? If the answer has to do with the development of an individual's capacity to choose, then why won't a circumscribed set of choices serve as well as an unlimited set? If an unlimited set is necessary, then how can any limitations on speech be justified? If a limited set will do, does this set fit our intuitions about what speech should be protected and the existing law?

109 408 U.S. 92 (1972).

110 *Id.* at 95. Many cases follow the content neutrality principle. *See* Widmar v. Vincent, 454 U.S. 263 (1981); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Carey v. Brown, 447 U.S. 455 (1980); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

111 *See* Note, *supra* note 80, at 1870.

112 Of course, the validity of the content neutrality principle is itself at stake. My point is simply that there is a problem of fit between the self-realization view and the many cases which adhere to the neutrality principle. *See* cases cited *supra* note 110. Advocates of the self-realization view may

E. A Plurality of Principles

Several commentators have suggested that the freedom of speech cannot be explained or justified by any one theory;[113] they maintain that the freedom of expression is best understood in light of a plurality of principles.[114] I explore four justifications for the plurality of principles approach.

I call the first justification "the argument from preferred results." This justification might start with the observation that the criticisms leveled against each of the individual theories of free speech make reliance on any one principle untenable. In order to salvage a justification for the freedom of expression, the theorist may be driven to rely on a plurality of principles in the hope that the weaknesses of each is buttressed by the strengths of the others.[115]

This explanation for reliance on a plurality of principles is intellectually unsatisfying. None of the commentators has provided a convincing explanation of how the several principles fit together into a "metatheory" of free speech that reconciles the various theories and thereby resolves the difficulties with each theory. Rather, one is left with the suspicion that the reliance on a plurality of principles is instrumental—a strategic maneuver in the battle for an expansive interpretation of the first amendment. One prominent commentator's prose could be taken to suggest that just such instrumental concerns inform the decision to rely on a plurality of principles:

> No satisfactory jurisprudence of free speech can be built upon such partial or compromised notions of the bases for expressional protection or the boundaries of the conduct to be protected. However tempting it may be to resist governmental claims for restricting speech by retreating to an artificially narrowed zone and then defending it without limit, any such course is likely in the end to sacrifice too much to strategic maneuver: the claims for suppression will persist, and the defense will be no stronger for having withdrawn to arbitrarily constricted territory. Any adequate conception of freedom of speech must instead draw upon several strands of theory *in order to protect* a rich variety of expressional modes.[116]

Laurence Tribe's remarks are undoubtedly founded on his belief that free speech is an end in itself, but without further argument this account of

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argue that these cases are mistaken, and indeed such arguments have been made. *See* Note, *supra* note 80.

113 *See* T. EMERSON, *supra* note 106, at 6-9; F. SCHAUER, *supra* note 52, at 85-86; L. TRIBE, *supra* note 67, at 789; Alexander, *Low Value Speech*, 83 NW. U.L. REV. (forthcoming); Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U.L. REV. 1319 (1983); Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983).

114 The specific list of principles varies from author to author as one would expect. *See, e.g.*, T. EMERSON, *supra* note 106, at 6-8; F. SCHAUER, *supra* note 52; L. TRIBE, *supra* note 67.

115 *See* L. TRIBE, *supra* note 67, at 789; F. SCHAUER, *supra* note 52, at 85-86.

116 *See* L. TRIBE, *supra* note 67, at 789 (emphasis added).

the plurality of principles is incapable of explaining or justifying the freedom of speech. An adequate theory must answer the questions why expression is protected and what expression is protected. A theory consisting of an ad hoc collection of principles selected in order to protect the greatest amount of expression is no theory at all.

I call the second explanation for the plurality of principles approach "the argument from the functional diversity of speech." The self-governance theory justifies protection of political speech. The search for truth theory justifies protection of debate about scientific, social, or moral theory. The self-realization theory justifies protection of speech which is expressive of the inner self. No one theory can justify a general freedom of speech, because speech serves such a wide variety of functions for human beings and their societies.[117] Rather, the various theories cumulatively provide a justification for what is conceived as a unitary freedom of speech only because of the historically-contingent fact that our Constitution contains a single provision that has been interpreted as embodying these diverse principles.

There is much that is right in this argument. Initially, it is at least possible that the best theory of the first amendment requires the conjunction of several principles; it is even possible that the best theory contains principles that yield conflicting results in particular cases or that are inconsistent in conception. Moreover, the observation that speech serves a very wide variety of particular functions is accurate. A general theory of freedom of speech must tell us what these diverse functions have in common.

But these concessions do not deny the superiority of a unified theory of free speech. The power of the argument that functional diversity serves as an adequate defense of the plurality of principles approach depends on the unavailability of an adequate alternative which accounts for functional diversity. Part VI argues that Habermas' theory of communicative action can provide such an alternative.

In addition, there is no guarantee that the various principles produce consistent results. Of course, it is possible that the various principles justify the protection of different sorts of expression, and that the potential conflict will not be realized in practice. Many of the theories examined so far appear to provide affirmative reasons to allow censorship in certain cases. Thus, the self-government theory's emphasis on majoritarian sovereignty would appear positively to mandate censorship that the majority approves and does not interfere with the process of self-government. The self-development theory would appear to support the censorship of expression that inhibits growth or stifles the development of human potential. Hence, there is a clear potential for true conflict

117 Alexander and Horton seem to make something like this argument, although it is not the main focus of their essay. Alexander & Horton, *supra* note 113, at 1357.

between theories. In the absence of a metatheory that structures or ranks the various principles, there would appear to be no method for application of the plurality of principles in the cases of true conflict.

I call the third argument for the plurality of principles approach the argument from implicit knowledge.[118] One might argue that our convictions about the freedom of speech, although strongly held, are based on implicit rather than explicit knowledge. We have a collection of intuitions that particular sorts of speech deserve protection, and the attempt to develop a theory that places these intuitions into reflective equilibrium with one another is both unnecessary and potentially harmful. A theory is unnecessary because our intuitive knowledge of what speech should and should not be protected provides all the guidance that judges need to decide cases.[119] The attempt to construct a general theory is potentially harmful because the process of transforming implicit knowledge into explicit knowledge may go awry. If we develop the wrong theory of free speech, our concern for theoretical niceness may lead us to allow censorship that is harmful or protect speech that is undeserving.

Again, there is something that is clearly right about the implicit knowledge defense. We do have strong intuitions about the first amendment and we are reluctant to abandon those intuitions even in the face of free speech theories of substantial power and elegance. When I criticized the truth, self-government, and self-realization theories on the grounds of fit, I was appealing in part to the priority of our considered judgments about free speech over a concern for theoretical simplicity.

There are, however, objections to the implicit knowledge argument, if it is taken as the very strong claim that there can or should be no general theory of the first amendment, independent of the merits of the particular theory proposed. First, implicit knowledge can be made explicit. For example, linguistics makes our implicit knowledge of the rules which govern the formulation of well-formed expressions in language explicit, by formulating theories of syntax. Second, theories do not necessarily result in a loss of valuable implicit knowledge. Each theory must be assessed on its own merits to determine whether it conflicts with our considered judgments about particular cases in a way that would constitute the loss of valuable implicit knowledge. Third, there are positive values in making our implicit knowledge explicit. We may decide, after reflection, that some of our considered judgments about particular cases are incorrect. Moreover, in a pluralistic culture we ought to be on guard

118 The remarks which follow were inspired in part by some recent remarks by Joseph Raz. The Role of Philosophy in the Law School Curriculum, Address by Joseph Raz to the Faculty of Loyola Law School, Los Angeles, California (March 23, 1988) (unpublished address); *see also* Shiffrin, *supra* note 113, at 1254-55 (making arguments suggestive of the argument from implicit knowledge).

119 This implicit or intuitive knowledge is, of course, strongly connected to Gadamer's account of the role of tradition and prejudgment in interpretation. *See supra* Part II(C)(2) (text accompanying note 33).

against the possibility that the considered judgments or intuitions reflected in judicial opinions reflect implicit knowledge biased in favor of a particular group or social class. This point about pluralism leads naturally to the last defense of the plurality of principles approach.

I call the fourth argument for the pluralistic approach the argument from relativism. A relativist might argue that there can be no general theory of the first amendment because the truth of such theories is relative to a particular culture (or interpretive tradition). Given the pluralistic nature of American culture (and western culture in general), there can be no single theory. I have already examined this argument in connection with Habermas' critique of Gadamer's hermeneutics.[120] At this point, I simply remind the reader that Habermas' argument against relativism depends on his theory of communicative action, the subject of the next Part of this Article. Before turning to that subject, I conclude this Part with some brief reflections on the import of my critique of existing theory for the attempt to develop a new theory of free speech.

F. Some Lessons for a New Theory

The first lesson that can be drawn from existing theory is the importance of intersubjectivity. The listener autonomy theory fails in part because it pays inadequate attention to the role of speakers in communication. By way of contrast, one of the strengths of the self-realization view is that it does offer an account for the intuition that freedom of speech is tied to the dialogic relationship between speakers and listeners. One of the strengths of the town meeting metaphor is that it places the first amendment in a context where the intersubjective nature of communication is clear. An adequate theory of the first amendment must make the transition from individualism to intersubjectivity.

A second lesson begins with the realization that existing theories of the freedom of speech have revealed that communication serves a variety of functions. The marketplace of ideas theory, the self-government view, and the self-realization approach examine the role of speech in a variety of contexts. Dialogues advance the search for truth. Speeches are indispensable to the political process. Communication is necessary to the development of the person. A unified theory of the freedom of speech must account for these various functions in a coherent manner. An adequate theory of the first amendment must make the transition from an account of the value of speech in particular contexts to a comprehensive theory of communication.

With these lessons in mind, the examination of existing theory is concluded. The next Part of the Article attempts to provide the foundations of a new theory of the first amendment by paying close attention to

120 *See supra* Part II(D) (text accompanying notes 41-46).

the subjects of the right to freedom of speech, speech acts in particular and communicative action in general.

IV. THE THEORY OF COMMUNICATIVE ACTION

In this Part, I outline Habermas' theory of communicative action.[121] Habermas' theory ranges over a wide range of topics from philosophy of language to sociology. My presentation of Habermas' theory, which relies to some extent on Habermas' terminology, may be difficult for readers unfamiliar with the German philosophical and sociological tradition within which Habermas works.[122] Moreover, because of the sheer breadth of Habermas' work, my presentation of his views is necessarily incomplete, emphasizing those aspects of the theory which are most relevant to the theory of free speech which I present in Part V. Habermas' theory has generated an enormous secondary literature criticizing, defending and elaborating on his themes.[123] In this Article, I can only touch on this debate. Again, I limit my discussion to those criticisms of the theory of communicative action which are most relevant to the freedom of speech or which resonate with current debates in Anglo-American legal theory. My sketch begins with a brief exploration of

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121 A great deal of Habermas' work touches on the theory of communicative action. For the central texts in English, see J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (T. McCarthy trans. 1984 & 1987) (two volumes) [hereinafter volume one will be cited after its subtitle as REASON AND THE RATIONALIZATION OF SOCIETY, and volume two as LIFEWORLD AND SYSTEM]; J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (T. McCarthy trans. 1979). A number of Habermas' other texts touch on aspects of the theory. *See* J. HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY (F. Lawrence trans. 1987); J. HABERMAS, LEGITIMATION CRISIS (T. McCarthy trans. 1975); J. HABERMAS, THEORY AND PRACTICE (J. Viertel trans. 1973); J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (J. Shapiro trans. 1971). Two important texts are not yet available in English. *See* J. HABERMAS, MORALBEWUSSTSEIN UND KOMMUNIKATIVES HANDELN (1983); Habermas, *Wahrheitstheorien* in WIRKLICHEIT UND REFLEXION (H. Fahrenbach ed. 1973).

122 For a word on the problem of understanding Habermas' language, see M. PUSEY, JÜRGEN HABERMAS 11 (1986). For a study plan for approaching the corpus of his work in a systematic fashion, see *id.* at 124-25. For a brief and lucid introduction, see Bernstein, *Introduction*, in HABERMAS AND MODERNITY 1 (R. Bernstein ed. 1985).

123 Thomas McCarthy's commentary, THE CRITICAL THEORY OF JÜRGEN HABERMAS, is the best and most accurate introduction and guide to Habermas' thought, and I have relied on it substantially for my exposition of Habermas' theory. T. MCCARTHY, *supra* note 42. A lucid summary of Habermas' more recent work is found in S. WHITE, THE RECENT WORK OF JÜRGEN HABERMAS (1988). A short introduction to Habermas' theory, including the theory of communicative action, is provided by M. PUSEY, *supra* note 122. A representative sampling of the critical literature is contained in HABERMAS: CRITICAL DEBATES, *supra* note 42; *see also* D. INGRAM, HABERMAS AND THE DIALECTIC OF REASON (1987); S. BENHABIB, CRITIQUE, NORM AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY (1986); R. GEUSS, THE IDEA OF A CRITICAL THEORY (1981); G. KORTIAN, METACRITIQUE: THE PHILOSOPHICAL ARGUMENT OF JÜRGEN HABERMAS (1980); HABERMAS AND MODERNITY, *supra* note 121. In addition, some periodicals have devoted special issues to Habermas. *See Special Issue on Jürgen Habermas*, NEW GERMAN CRITIQUE, Spring/Summer 1985; *Special Issue in Honor of Jürgen Habermas on the Occasion of His 50th Birthday*, TELOS, Spring 1979.

contemporary speech act theory; I then turn to the theory of communicative action.

A. Speech and Communicative Action: The Theory of Speech Acts

There are a number of possible starting points for an exploration of Habermas' theory of communicative action. I begin with speech act theory, one of Habermas' points of departure. I start with speech act theory because it provides some essential background for the application of the theory of communicative action to the theory of freedom of speech.

My summary of speech act theory begins with a very brief look at the historical emergence and rejection of message-centered theories of communication. The next move is to present the essential details of speech act theory as developed by J.L. Austin and John Searle. Speech act theory makes the crucial observation that speech acts can have illocutionary force, as actions, in addition to propositional content. This distinction serves to ground a further point, that speech acts can be divided among those that are strategic or manipulative and those that are based on the desire for consensual coordination of action. Finally, a typology of speech acts is presented, as an illustration of the variety of actions accomplished through speech and as the foundation for further analysis.

1. *Speech as Message.*—The first step toward an adequate theory of speech is the realization that speech is a form of communication. People rarely speak simply to exercise their vocal chords or to make interesting or pleasant sounds; rather, the speaker usually attempts to communicate with an audience.[124] One model of communication focuses on the transmission of messages. This view has been articulated as follows:

> A has in his mind some sort of message (or idea), and he wishes B to form in his head the same message. This message is transformed ultimately into a series of neural impulses that are sent to the muscles responsible for the actual production of speech, which follows immediately. . . . The listener, B, must decode A's message by converting the sounds into a semantic representation.[125]

The message centered model of communication is plausible, as far as it goes, but it is incomplete.[126] The most important omission stems from the assumption that communication is exclusively a matter of conveying information, based on the model of assertoric sentences (sentences that

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[124] *See* K. BACH & R. HARNISH, *supra* note 103, at 3.

[125] H. CAIRNS & C. CAIRNS, PSYCHOLINGUISTICS: A COGNITIVE VIEW OF LANGUAGE 17-18 (1976).

[126] *See* K. BACH & R. HARNISH, *supra* note 103, at xiv (The message centered model fails because: (1) It doesn't account for ambiguity; (2) The speaker may mean something other than what he literally says, hence listening may require more than decoding; (3) The model neglects the role of shared understandings in communication; (4) The model does not tell us what the messages are.); *see also* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 277 (critique of message centered approach).

make assertions about a state of affairs).[127] The message centered model of communication reduces meaning to its semantic dimension: for example, the meaning of a sentence is reduced to its semantic content. This reductionist feature of the message centered account of communication is remedied by supplementing a semantic theory of meaning with a pragmatic theory. Communication does much more than merely convey information; knowing the full meaning of a sentence requires the hearer or reader to know more than its truth conditions.

A pragmatic theory of meaning can be introduced through the notion of a speech act. Austin demonstrated the variety of ways in which language can be used.[128] Making promises, giving orders, thanking someone, betting on a race, apologizing to someone, greeting someone—these are all instances of communication that are not easily explained as messages conveying information.[129] All these uses of language are illuminated if they are understood as *speech acts*.[130]

2. *Speech as Action.*—Recognition that communication is a form of action is the basis for a more complete analysis of the speech act. Thus, the speech act can be viewed merely as an utterance, as the assertion of a proposition, as a purposive action, or as affecting the listener. Theorists following in the tradition of Austin and Searle have distinguished a number of constituent components of a speech act. One schema represents the components as follows:[131]

TABLE 1

Component of Speech Act	Description
Utterance Act	Speaker utters an expression to hearer in a given context
Propositional Act[132]	Speaker says something to hearer in a given context
Illocutionary Act	Speaker acts by speaking to hearer
Perlocutionary Act	Speaker affects hearer in a certain way

127 *See* K. BACH & R. HARNISH, *supra* note 103, at xiv; J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 277.

128 J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1975); *see* K. BACH & R. HARNISH, *supra* note 103, at xiv; J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 277.

129 *See, e.g.*, K. BACH & R. HARNISH, *supra* note 103, at 39-55.

130 *See* J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16 (1969) ("[A]ll linguistic communication involves linguistic acts. The unit of linguistic communication is not, as has generally been supposed, the symbol, word, or sentence, or even the token of the symbol, word or sentence, but rather the production or issuance of the symbol or word or sentence in the performance of the speech act.").

131 *See* K. BACH & R. HARNISH, *supra* note 103, at 3. These distinctions were first articulated by Austin. *See* J.L. AUSTIN, *supra* note 128, at 110; *see also* J. SEARLE, *supra* note 130, at 23-25.

132 The propositional act is also called the locutionary act.

These components are closely related. In uttering an expression, the speaker says something to a hearer; in saying something to a hearer, the speaker does something; in doing something, the speaker affects the hearer.[133]

The distinctions between the various components raise various difficulties. The utterance act is easiest to distinguish; the utterance refers to the sounds that are made or the words used, independent of their content. The propositional act refers to the propositional content or semantic meaning of the utterance. The illocutionary act is the action the speaker performs in saying something; for example, when I say, "I promise that I will return your car tomorrow," the illocutionary act is the making of the promise.[134]

Illocutionary and perlocutionary acts are the most difficult to distinguish precisely. Perlocutionary effects arise from the embeddedness of illocutionary acts in social contexts of interaction. Some perlocutionary effects are unintended; my promise to return your car may have the unintended perlocutionary effect of disturbing you, because you had not yet considered the possibility that I wouldn't return the car when I made the promise. Habermas' theory of communicative action is more concerned with intended perlocutionary effects. Perlocutionary effects can be intentional because speech acts may be instrumental to strategic action (at this point strategic action can loosely be understood as manipulative social interaction) only contingently related to their meaning.[135] One can intend to frighten, to amuse, or to anger.

One proposed means for distinguishing illocutionary acts from perlocutionary acts is to ask whether the purpose of the speech act is identifiable from the semantic content; the hypothesis is that the purpose of an illocutionary act is self-identifying whereas the purpose of a perlocutionary act is not. The illocutionary act of asking you for the time announces its purpose—to find out what time it is. The perlocutionary act—of attempting to humiliate you by asking the time when I know you are too poor to afford a watch—does not announce itself in the same way.[136]

Another related formulation of the criteria for distinguishing between illocutions and perlocutions has been proposed by Peter Strawson.[137] He contends that illocutionary acts can only be successful if expressed openly, whereas perlocutionary acts only succeed if their intentions are not announced. My attempt to embarrass you would be undermined if its purpose were revealed, but my attempt to find out what

133 *See* K. BACH & R. HARNISH, *supra* note 103, at 3.

134 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 288-89.

135 *See id.* at 289.

136 *See id.* at 290.

137 Strawson, *Intention and Convention in Speech Acts*, 73 PHIL. REV. 439 (1964).

time it is can succeed only if you know what I am driving at.[138]

3. *Classifying Speech Acts.*—The theory of speech acts is now almost complete. The final element to be added is a system of classifying the various types of speech acts. Austin,[139] Searle,[140] and their followers in linguistics[141] have produced a variety of classificatory schemes. Habermas proposes the following system of classification:

TABLE 2

Category of Speech Act	Description
Imperatives	Speaker refers to desired state in the objective world so as to get hearer to bring about this state.
Constatives	Speaker refers to something in the objective world so as to represent a state of affairs.
Regulatives	Speaker refers to something in a common social world so as to establish an interpersonal relationship recognized as legitimate.
Expressives	Speaker refers to something in his subjective world so as to reveal to a public an experience to which he has privileged access.
Communicatives	A subclass of regulatives that are in reflexive relation to the process of communication, either by organizing speech, (*e.g.*, questioning, answering, addressing) or by referring to validity claims (*e.g.*, affirming, denying, assuring).
Operatives	Speech acts, such as calculating, that signify the application of generative rules such as those of mathematics or logic.[142]

This classification scheme has two principal uses as a tool for understanding the theory of communicative action in the course of developing a theory of the freedom of speech. First, the identification of a wide range of classes of speech acts serves to illustrate the earlier distinction between locutionary content and illocutionary act by calling our attention to the wide variety of actions that are associated with speech. Second, the classifications can illuminate some of the confusions

138 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 292-94. I am not sure that either criterion for distinguishing illocutionary and perlocutionary acts is successful, but I do not believe that the failure to draw a precise distinction undermines Habermas' theory. Although Habermas does use the illocutionary/perlocutionary distinction in developing the crucial distinction between communicative action and strategic behavior, the latter distinction is not identical to the former and can stand on its own merits.

139 *See* J.L. AUSTIN, *supra* note 128, at 148-64.

140 *See* J. SEARLE, *A Taxonomy of Illocutionary Acts*, in EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS 1 (1979).

141 *See* K. BACH & R. HARNISH, *supra* note 103, at 39-59.

142 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 325-26.

in current doctrine; Part V of this Article utilizes the classification scheme in the critique of attempts to ground free speech doctrine on a distinction between expression or speech on one hand and action on the other.[143] Having explicated the basic concept of a speech act and explored the purposes that speech acts can serve, I now introduce Habermas' distinction between communicative action and strategic behavior.

B. The Distinction Between Communicative Action and Strategic Action

1. *The Basic Distinction.*—Habermas uses speech act theory as the basis for several important components of his theory of communicative action. Austin's distinction between illocution and perlocution can serve as the basis for introducing Habermas' related distinction between those speech acts which are communicative action and those speech acts which involve strategic action. Habermas defines communicative action as follows:

> I count as *communicative action* those linguistically mediated interactions in which all participants pursue illocutionary aims, and *only* illocutionary aims, with their mediating acts of communication. On the other hand, I regard as linguistically mediated *strategic action* those interactions in which at least one of the participants wants with his speech acts to produce perlocutionary effects on his opposite number.[144]

The essential difference between strategic action and communicative action involves the orientation of the participants in the communication situation. If the participants adopt the attitude that they will attempt to achieve success without the rational agreement of those persons whose actions they seek to influence, then they are engaged in strategic action. If they are oriented to reaching understanding, they are engaged in communicative action.[145] Through communicative action, the participants "pursue illocutionary aims without reservation in order to arrive at an agreement that will provide the basis for a consensual coordination of individually pursued plans of action."[146]

2. *Difficulties with the Distinction.*—The distinction between communicative action and strategic action is one of the most difficult elements of the theory of communicative action; critics have argued strongly against the viability of the distinction. I would like to consider the basic criticism that the distinction between communicative and strategic action cannot be made out and suggest a tentative answer.

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143 *See infra* Part V(A)(3) (text accompanying notes 206-08).

144 J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 295 (emphasis added to *communicative action* and *strategic action*, remaining emphasis in original).

145 *Id.* at 284-86.

146 *Id.* at 295-96.

The criticism is that actual speech is rarely, if ever, pure communicative action or pure strategic action; rather the nature of actual speech is a mixture of both. Let me call this the *mixed nature objection*. The usefulness of these "ideal types"[147] as tools for understanding actual human communication is questioned on the basis that in practice it may be impossible to classify particular actions as communicative or strategic. For example, if I try to convince you to accept the thesis of this Article, I may rely in part on illocutionary acts—that is, on rational argumentation—but in part I may hope to persuade by making emotional appeals and using rhetorical ploys. When the setting is less academic, an election for example, the role of persuasion, based on emotion and rhetoric, becomes even more apparent.

Habermas can reply to the *mixed nature objection* in several ways. First, he can and should admit the basic thrust of the objection—many speech acts do have a mixed nature. By itself, the existence of hard cases does not deny that the distinction between communicative action and strategic behavior is a meaningful one. It is only somewhat oversimplified to note that the existence of purple does not make the distinction between red and blue meaningless.

Second, in many cases, a given action will be predominately communicative or predominately strategic. Even in a political election, it is possible to distinguish deliberate lies from honest disagreement about fundamental principles. Alternatively, a given recurring type of action may be usefully classified as usually communicative or usually strategic. For example, commercial advertisements which associate a product with sexually charged images are likely to rely on perlocutionary effect, even though there may be some illocutionary aspect to the advertisement.

Third, and perhaps most importantly, Habermas should object to the notion that persuasion that uses rhetoric or emotional appeal is necessarily strategic in nature. Indeed, expressive speech acts,[148] which reveal the subjective world of the speaker, including his emotions, are a normal component of communicative action. For example, the simple expressive, "I feel angry," does not ordinarily involve force or deception, even though it is possible to feign anger or use anger to create fear. Reciprocal consideration of emotional states is not inconsistent with communicative rationality. To the contrary, the honest disclosure of emotion in communication is essential in order to avoid systematically distorted communication.[149]

In sum, Habermas can offer three responses to the *mixed nature*

147 The characterization of strategic action and communicative action as "ideal types" is resisted by Habermas himself. *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 286.

148 *See supra* Part IV(A)(3) (text accompanying notes 139-43).

149 Thus, it is the concealing of emotions, rather than their disclosure, which is typically associated with strategic action.

objection: first, the fact that speech acts have a mixed nature does not logically undermine that distinction; second, it may be possible to identify individual speech acts and certain classes of speech acts as predominantly strategic or predominantly communicative; third, much of the force of the objection stems from confusing emotional and rhetorical appeals with strategic action. These responses, especially the second response, will be developed in greater detail in Parts V and VI.[150]

C. Discursive Justification: The Ideal Speech Situation

1. *Validity Claims and Communicative Action.*—I begin my analysis with an examination of the conditions for success of communicative action. Recall that communicative action involves the coordination of individual action through acts that contribute to or that help create understanding.[151] Thus, the success of communicative action requires that an agreement be reached. A communicatively achieved agreement cannot be imposed by one of the parties to communication; it must have a rational basis. The claim that a potential agreement would have a rational basis is a claim to validity—in Habermas' parlance, a validity claim.

Habermas argues that all communicative action implicitly raises a number of distinct validity claims. In a simple dialogic model, the speaker engaging in communicative action raises validity claims that the hearer can accept or reject.[152] For example, consider the following exchanges between a speaker and a hearer:

TABLE 3

Speaker	Hearer
(1) I promise to come for dinner.	Yes, I'll count on it.
(2) Please open that window.	Yes, I'll open it.
(3) The road to San Diego is clear.	Yes, I'll go that way.

150 Thus, my answer to the argument that one cannot actually distinguish communicative action from strategic behavior will be developed in three stages. The first stage is in the text that immediately follows this note. The second stage is presented in Part V, in which I develop a theory of freedom of communicative action which incorporates this distinction. The third stage appears in Part VI when I consider the application of the distinction between communicative and strategic action to concrete problems in first amendment doctrine. This three-stage development of an answer to the *mixed nature objection* becomes progressively more concrete at each stage. As I observed in the introduction, one way of viewing this Article is as a thought experiment that tests and elaborates the theory of communicative action by applying the theory to problems in first amendment doctrine. The more concrete development of my answer to the *mixed nature objection* in Parts V and VI directly illustrates the value of the thought experiment.

151 *See supra* Part IV(B)(1) (text accompanying notes 139-41).

152 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 287-88.

In each case, the speaker makes an offer, raising certain validity claims, that the hearer accepts. The speech act is successful if an interpersonal relationship is established that effectuates coordination.[153]

Habermas contends that every communicative action implicitly raises three distinct validity claims. These claims can be illustrated by returning to exchange (2) in Table 3. We can imagine altering the exchange so that the communication action fails; that the speaker fails to gain agreement from the hearer. The hearer might offer any one of the following three reasons for failing to assent to the speaker's request:

TABLE 4

Speaker	Hearer
(2) Please open that window.	(2A) No, you have no right to ask me to open the window. (2B) No, you're not serious. It's too cold for anyone to want the window open. (2C) No, that window doesn't open.

The three reasons given by the hearer for denying the speaker's request correspond to three possible grounds for contesting the validity of any communicative action. The rightness of the speech act can be questioned (2A in Table 4), the sincerity of the speaker can be challenged (2B), or the truth of the existential presuppositions of the speech act can be denied (2C). These three grounds for rejection of a communicative action correspond to the three validity claims that implicitly are raised by any speech act; the three claims are rightness, sincerity, and truth.[154]

Although every speech act implicitly raises all three validity claims, different classes of speech acts emphasize different validity claims. Thus, constative speech acts thematize[155] the claim to truth, regulative speech acts thematize the claim to rightness, and expressive speech acts thematize the claim to sincerity.[156] In everyday communication, participants may be unaware of one or more of the implicit validity claims, because one implicit validity claim may be overshadowed by another that is more explicit. For example, in Table 4, the speech act is a request to open the window. The claim to rightfulness may be most

153 *See id.* at 296.

154 *See id.* at 307-08.

155 By saying that constative speech acts *thematize* claims to truth, I mean that the propositional content of a constative speech act ordinarily will take a truth value and that the truth of the proposition will depend on the state of the world. The truth claim is the theme of the speech act in the sense that it is both apparent and central.

156 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 308-09, 325-26; *see also supra* Part IV(A)(3) (text accompanying notes 135-38).

apparent on the surface; the claim to truth—that the window can be opened—is not immediately apparent.

2. *Discursive Justification of Contested Validity Claims.*—Speech acts make claims to rightness, sincerity, and truth. What happens when such claims are not accepted? Take the example illustrated in Table 4: what happens after the listener responds to the request to open the window with the reply, "No, that window doesn't open." In Habermas' terminology, this response constitutes a rejection of a validity claim to truth. If the conversation goes no further, then this rejection halts the process of communication. As Habermas might put it: The rejection of one or more validity claims thwarts the achievement of a rationally motivated agreement—an agreement that is the end (*telos*) of communicative actions.

When such disagreement occurs, the participants in communication are presented with a number of options. First, communication may break off; the participants may simply abandon their attempt to coordinate their individual actions through communicative action. Thus, the speaker of Table 4 might say, "Oh, I'll do it myself." Second, one or more participants may switch from communicative to strategic action, attempting to gain agreement through force or manipulation where the attempt to achieve rational consensus has failed. Thus, our speaker might crudely threaten, "Open the window or I'll throw you out of it." In either case, the attempt to coordinate through communicative action is brought to an end.

There is a third possibility. The participants may attempt to reach agreement on a contested validity claim concerning truth or rightness by engaging in a debate or discussion—which Habermas calls rational discourse. We can imagine the following continuation of the dialogue in Table 4:

Speaker: Please open that window.
Listener: No, it doesn't open.
Speaker: Yes, it does. I opened it yesterday.
Listener: No, it doesn't. I tried this morning.
Speaker: Yes, but do you know the trick of thumping the latch?
Listener: No, I didn't. Let me try.

Under ordinary circumstances, the participants will share a common set of norms or facts to which appeal may be made in the course of argumentative discourse. Where there is disagreement about specific facts or norms, the participants may still agree on the appropriate standards or criteria by which controversial norms or facts may be judged. For example, in the continuation of the conversation begun in Table 4, the speaker and listener shared assumptions about the relationship between past experience with the window and the question whether it would open now.

In some situations, however, even the standards or criteria of truth and rightness are the subject of controversy; in such cases the continuation of the attempt to reach agreement demands a move to theoretic discourse.[157] Rational argumentation, thus, "can be conceived as a *reflective continuation, with different means, of* [*communicative*] *action oriented to reaching understanding*."[158]

The possibility that validity claims will be subject to discursive justification is essential if the agreement produced by communicative action is to retain its claim to rationality. If an agreement is rooted purely in contingent consensus, then the validity claims to truth or right—provisionally accepted in communicative interaction—are not capable of redemption through rational argumentation. But conscious acceptance of a claim to truth or right that is not capable of argumentative redemption is irrational and the agreement resulting from such acceptance is, thus, not rationally motivated.[159] By raising the possibility that agreement may not be rationally motivated, however, the investigation of discursive justification demands a theory that can distinguish a genuine consensus from a purely contingent one.

3. *The Ideal Speech Situation.*—Habermas argues that a genuine consensus is one that results purely from the force of the better arguments and not from constraints on communication. The absence of such a constraint can be elucidated in terms of the formal structure of the communicative situation. A communicative situation is structured without constraint only if it provides equal opportunity to engage in communication and only if the participants are motivated solely by a cooperative search for truth or right. These conditions are met in the ideal speech situation.[160]

The ideal speech situation can be defined more precisely by identifying three rules. In the ideal speech situation,

(1) *Rule of Participation.*—Each person capable of engaging in communication and action is allowed to participate;

(2) *Rule of Equality of Communicative Opportunity.*—Each participant is given equal opportunity to communicate with respect to the following:

a. Each is allowed to call into question any proposal;

b. Each is allowed to introduce any proposal into the discourse;

c. Each is allowed to express attitudes, sincere beliefs, wishes and needs;

(3) *Rule against Compulsion.*—No participant may be hindered by compulsion—whether arising from inside the discourse or outside of it—from

157 *See* T. MCCARTHY, *supra* note 42, at 289.

158 J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 25 (emphasis in original).

159 *See* T. MCCARTHY, *supra* note 42, at 305-06.

160 *See id.* at 306; J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 25.

making use of the rights secured under (1) and (2).[161]

Each component can be further elaborated. Thus, the *rule of participation* rules out the exclusion of any particular person or identifiable group of persons from the ideal speech situation. An agreement cannot count as rationally motivated if it can be demonstrated that it was only reached because someone who would have disagreed was excluded from the process of deliberation.

The *rule of equality of communicative opportunity* rules out communication where one participant or group of participants is not allowed to engage in the same quantity or quality of speech acts. Participants must have the same opportunities to initiate and perpetuate communication. They must have the same chance to employ each of the various classes of speech acts. Thus, each participant must have equal opportunity to assert or deny propositions about states of affairs (constative speech acts), to refer to the common social world so as to establish legitimate interpersonal relationships (regulative speech acts), to make public his private experiences (expressive speech acts), and to order the organizations of speech, through questioning, answering, and so forth (communicative speech acts). The discussion must provide adequate opportunity to subject every assertion, indeed every relevant speech act, to adequate scrutiny.[162]

Finally, the *rule against compulsion* insures that agreement will not be reached on the basis of threats of force or deception. The discussion must be solely motivated by a cooperative search for truth and right. The ideal speech situation must be free from distorting influences. Open domination through the employment of threats or offers of reward is forbidden. Attempts to achieve agreement through strategic action—the employment of perlocutionary effects to reach an agreement not solely motivated by rational inquiry—must not be allowed. The ideal speech situation also excludes self-deception, such as neuroses or ideological distortions.[163]

One immediate difficulty with the ideal speech situation is that its conditions are so stringent. Actual argumentative discourses are always limited in space and time. Perfect equality of opportunity is rare outside of formally-structured debates. In real speech situations, distorting influences are pervasive and self-deception is common. If the ideal speech situation is almost never realized, then what is its status?

Habermas conceives the ideal speech situation as the "pragmatic

161 This formulation is based on one suggested by Robert Alexy and adopted by Habermas. *See* J. HABERMAS, MORALBEWUSSTSEIN UND KOMMUNIKATIVES HANDELN, *supra* note 121, at 99; Alexy, *Eine Theorie des praktishen Diskurses*, in NORMENBEGRUDUNG UND NORMENDURCHSETZUNG 40-41 (W. Oelmüller ed. 1978). An English translation is found in S. WHITE, *supra* note 123, at 56. The names given the three rules are of my divising.

162 *See* T. MCCARTHY, *supra* note 42, at 306-07.

163 *See id.* at 306.

presuppositions of argumentation."[164] "In theoretical [and] practical discourse . . . the participants have to start from the (often counterfactual) presupposition that the conditions for an ideal speech situation are satisfied to a sufficient degree of approximation."[165] Evidence of this presupposition comes from the observation that if any feature of the ideal speech situation is absent, then doubt is cast on the rationality of the consensus, and hence on the truth or rightness of the agreed upon validity claims. Thus, the ideal speech situation can serve "as a guide for the institutionalization of discourse and as a critical standard against which every actually achieved consensus can be measured."[166]

Perhaps the status of the ideal speech situation can be made clearer still by a comparison with John Rawls' conception of the original position. Rawls uses a hypothetical choice situation—the original position—as the basis for specifying the content of justice as fairness. The original position plays a role in Rawls' theory that is analogous to the role played by the state of nature in classical social contract theories. In outline, the structure of the original position is as follows. First, representative parties are to deliberate and unanimously choose the conception of justice that will govern the basic social structure. Second, the parties make that choice from a list of alternative conceptions of justice that includes utilitarianism and Rawls' own two principles of justice—the equal liberty principle and the difference principle. Third, they choose from behind a veil of ignorance which conceals from them any knowledge of their ac-

164 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 25.

165 *See id.* at 42.

166 *See* T. MCCARTHY, *supra* note 42, at 309. The following passage provides further insight into Habermas' view of the status of the ideal speech situation:

> The ideal speech situation is neither an empirical phenomenon nor a mere construct, but rather an unavoidable supposition reciprocally made in discourse. This supposition can, but need not be, counterfactual; but even if it is made counterfactually, it is a fiction that is operatively effective in the process of communication. Therefore I prefer to speak of an anticipation of an ideal speech situation . . . . To this extent the concept of the ideal speech situation is not merely a regulative principle in Kant's sense; with the first step toward agreement . . . we must always in fact make this supposition. On the other hand, neither is it an existing concept in Hegel's sense; for no historical reality matches the form of life that we can in principle characterize by reference to the ideal speech situation. The ideal speech situation would best be compared with a transcendental illusion were it not for the fact that . . . [in contrast to] the application of the categories of the understanding beyond experience, this illusion is also the constitutive condition of rational speech. The anticipation of the ideal speech situation has . . . the significance of a constitutive illusion which is at the same time the appearance of a form of life. Of course, we cannot know a priori whether that appearance is a mere delusion—however unavoidable the suppositions from which it springs—or whether the empirical conditions for the realization (if only approximate) of the supposed form of life can practically be brought about. Viewed in this way, the fundamental norms of rational speech built into universal pragmatics contain a practical hypothesis.

Habermas, *Wahrheitstheorien*, *supra* note 121, *translated in* T. MCCARTHY, *supra* note 42, at 310. Thus, the ideal speech situation is a critical standard, a presupposition of discourse, the anticipation of a form of life, and a practical hypothesis. The ideal speech situation is like a Kantian ideal of reason in that an imagined construct is used to guide action, but it is more because as an anticipation, the ideal speech situation is foreseen as a real possibility that can ultimately be realized through action based upon its strictures.

tual station in life. The choice they make represents justice as fairness because the conditions of the original position exclude any unfair advantage.[167]

There are important similarities between the ideal speech situation and the original position. Both the ideal speech situation and the original position attempt to define the conditions under which participants can reach a fair and rational agreement. Both provide standards by which an actual state of affairs can be evaluated. Both rule out an agreement based on threats or deception.

There are, however, important differences between the two. First, the veil of ignorance, a much criticized feature of the original position, has no counterpart in the ideal speech situation. Participants in the ideal speech situation are fully aware of their own beliefs and desires; in Rawls' terminology, they are aware of their conceptions of the good.

Second, the ideal speech situation is an "anticipation"—its conditions represent a possibility[168] which can serve as a standard for judging institutions. In Part VI, I use the ideal speech situation as a standard for evaluating judicial decisions interpreting the right to freedom of speech. By way of contrast, Rawls would not advocate the realization of the conditions of the original position. Not only would it be impossible to attempt to recreate the veil of ignorance in society, there would also be no point in doing so. The ideal speech situation is used to evaluate actual discourses; the original position is used only to generate a hypothetical discourse.

4. *The Discourse Theory of Truth.*—Even with the status of the ideal speech situation clarified, problems remain. Habermas' theory seems to be some version of the consensus theory of truth, but as we have already noted,[169] such theories present serious difficulties. As a theory of meaning, the consensus theory of truth appears to rest on a category mistake, confusing the meaning of truth with the methods for arriving at truth.[170] Habermas responds to such charges by contending that he does not equate the meaning of truth with methods of discovering truth, but rather analyzes truth in terms of the "universal pragmatic conditions of

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167 J. RAWLS, *supra* note 19, at 118-94.

168 By possibility, I mean to say that the conditions of the ideal speech situation can be realized in the future. Expressed in the "possible worlds" talk of philosophers who investigate modal concepts such as possibility and necessity, my claim is that the ideal speech situation exists in a nomologically and historically accessible possible world. *See* D. LEWIS, ON THE PLURALITY OF WORLDS 20 (1986). A world in which conditions of the ideal speech situation exist is nomologically accessible in that it does not violate any of the laws of physical or social science; it is historically accessible in that a possible world in which the ideal speech situation exists could share the history of the actual world up to now.

169 *See supra* Part III(A)(3) (text accompanying notes 60-67).

170 *See* T. MCCARTHY, *supra* note 42, at 303.

discourse."[171] Thus, it may be useful to distinguish Habermas' "discourse theory of truth" from a "consensus theory of truth."[172] Thomas McCarthy elaborates Habermas' position:

> From a pragmatic viewpoint, the object of analysis is "true" not as a predicate of statements but as the [validity] claim that I raise when I assert statements. What is at issue, then, is not the semantic meaning of a word but the pragmatic meaning of an act, claiming to be true. And the meaning of a claim has to be analyzed in terms of the mode of its redemption, the way in which it can be made good.[173]

This interpretation of Habermas is still problematic. We lack an adequate account of what the "meaning" of a validity claim (as opposed to a word or a proposition) is, but McCarthy argues that Habermas' theory does not depend on this meaning-thesis. "One might grant that truth claims have to be justified discursively without granting that discursive justification is what is meant in claiming a statement to be true."[174]

The second objection to the consensus theory of truth as an interpretation of the marketplace of ideas metaphor was that the success of an idea in the marketplace had no necessary relationship to truth. For example, the success of the Nazis in gaining a social consensus of sorts did not prove the truth of their theories.[175] Habermas' theory of the ideal speech situation answers this objection. The reason that success in the marketplace of ideas cannot serve as an adequate explanation for the meaning of truth is that the marketplace often fails to approximate the ideal speech situation. Indeed, one reason we suspect that the Nazi ideology was false is because the Nazis suppressed speech that was critical of their program. Thus, our second criticism of the consensus theory of truth is both explained and corrected by the conception of the ideal speech situation.[176]

D. Communicative Ethics: Discursive Will Formation

The ideal speech situation has profound implications for ethics and politics. So far, my explication of the ideal speech situation has focused on the discursive redemption of truth claims—theoretical discourse. In

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171 The phrase "universal pragmatic conditions of discourse" may be difficult for some readers. One key to unpacking Habermas' concept is to recall the distinction between semantic meaning and pragmatic meaning which was introduced above. *See supra* Part IV(A)(1) (text accompanying notes 124-30). Rather than analyzing the semantic meaning of truth, Habermas is analyzing the conditions under which one can engage in the act of making truth claims (pragmatic conditions), and he is investigating those conditions in so far as they hold for all cases of making truth claims (universal pragmatic conditions).

172 *See* T. McCARTHY, *supra* note 42, at 303.

173 *Id.*

174 *Id.* at 304.

175 *See supra* Part III(A)(3) (text accompanying notes 60-67); T. McCARTHY, *supra* note 42, at 304.

176 *See* T. McCARTHY, *supra* note 42, at 304-06.

this Section, the emphasis shifts from truth to rightness—from theoretical discourse to practical discourse. In contrast to the noncognitivists, Habermas contends that normative questions have rational answers, but he attempts to avoid the naturalistic fallacy of conflating truth and rightness.[177] Thus, Habermas argues,

> [C]lassical natural law theory . . . says that normative statements admit of truth *in the same sense* as descriptive statements; . . . nominalism and empiricism . . . [contend] that normative statements do not admit of truth at all. In my view, the assumptions underlying both views are false. I suspect that the justification of the validity claims contained in the recommendation of norms of action and of evaluation can be just as discursively tested as the justification of the validity claims implied in assertions.[178]

Every speech act involves—at least implicitly—a validity claim to rightness;[179] this claim is explicitly thematized in regulative speech acts.[180] The aim of communicative action is to establish a rationally motivated agreement.[181] When a validity claim to rightness is challenged, one alternative open to the participants in communication is to attempt to justify the challenged validity claim. Normally, the appeal will be to generally accepted norms and standards, but when such standards are challenged, the participants may engage in "practical discourse" in which they attempt to discursively justify the problematic claims.[182]

Habermas contends that the argumentative support required for problematic norms is not the observational or experimental evidence used in theoretical discourse over problematic truth claims, but rather "the consequences and side-effects that the application of a proposed norm can be expected to have in regard to satisfaction or nonsatisfaction of generally accepted needs and wants."[183] The purpose of norms is to regulate the legitimate chances for satisfaction of wants and needs.[184] The principle of universalizability excludes from consideration those norms that are particular in nature, and hence cannot receive general recognition. Consensus in the ideal speech situation is a procedural realization of the principle of universalizability.[185]

Habermas must meet the objection that wants and needs are purely particularistic. If all needs consist of competing self-interests, then the best that agreement can provide is a contingent compromise. In re-

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177 *See id.* at 310-11.

178 Habermas, *Wahrheitstheorien*, *supra* note 121, at 226-27, *translated in* T. MCCARTHY, *supra* note 42, at 311.

179 *See supra* Part IV(C)(1) (text accompanying notes 151-56).

180 *See supra* Part IV(A)(3) (text accompanying notes 141-43).

181 *See supra* Part IV(B)(1) (text accompanying notes 144-46).

182 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 23; T. MCCARTHY, *supra* note 42, at 312-13.

183 *See* T. MCCARTHY, *supra* note 42, at 313.

184 Habermas, *Wahrheitstheorien*, *supra* note 121, at 251, *translated* in T. MCCARTHY, *supra* note 42, at 313.

185 *See* T. MCCARTHY, *supra* note 42, at 313-14.

sponse, Habermas argues that some interests are generalizable in that they can be "communicatively shared," as opposed to those interests that are particular in that they admit, at best, of a negotiated compromise. Generalizable interests are those that would be acknowledged by a "rationally motivated consensus." The view that wants and needs are purely particularistic seems to rest on the assumption that they are somehow inherently subjective and irrational. This view fails to account for the integration of needs into intersubjective structures of communication through the medium of language. Just as subjective perceptions can be expressed as objective assertions through the medium of languages, so too, desires and needs can be expressed as objective norms or evaluations. A consensus can be rationally motivated only if the language system makes possible a discourse in which needs and desires can be adequately expressed.[186]

Relativism poses another challenge to Habermas' theory. One relativist argument would be that because ethical and political norms, as well as wants and desires, vary across cultures and times, there is no evidence of a consensus on generalizable interests that can justify normative validity claims. This ethical relativism does not, however, directly conflict with Habermas' position. Habermas does not intend to claim that consensus has actually been achieved under all the varying historical and cultural conditions; rather, his claim is that consensus could be achieved under the conditions of the ideal speech situation, and that such a consensus would be rationally motivated. A more sophisticated relativist argument, however, would challenge the discursive standard of rationality as the product of just one historically and culturally situated community. A response to such an argument is that the very act of arguing for the relativist thesis adopts the discursive attitude toward rationality.[187] Indeed, Habermas believes that this rejoinder to the relativist—which he calls the transcendental *tu quoque* ("you too")—is of broader significance:

> The transcendental tu quoque argument attempts to convince anyone who inquires after the grounds for an argumentatively conceived principle of rationality that the intention behind his question, properly understood, is already based on this principle . . . . This argument can, I believe, be applied not only to someone who has (at least once) entered into argumentation, but to any subject capable of speech and action . . . by appealing to the intuitive knowledge which he, as a competent speaker, "already" has at his disposal . . . . Anyone who acts with an orientation toward reaching understanding, since he unavoidably raises truth and rightness claims, must have implicitly recognized that this action points to argumentation as the only way of continuing consensual action in case naively raised and factually recognized validity claims become problematic. As soon as we make ex-

186 *Id.* at 315; Habermas, *A Postscript to Knowledge and Human Interests*, 3 PHIL. OF SOC. SCI. 157, 170-71 (1973).

187 *See* T. MCCARTHY, *supra* note 42, at 317-24.

> plicit the meaning of discursively redeemable validity claims, we become aware that we presuppose the possibility of argumentation already in consensual action.[188]

The most plausible interpretation of this argument is that it is conceptual and not psychological. The transcendental *tu quoque* has at its ground a reconstructive enterprise; the argument brings to light conceptual commitments implicit in the practice of communication. Such claims—that the full meaning of a practice is not fully understood by the participants, but can be reconstructed—are not unique to Habermas. An analogy can be made to the relationship between elementary steps in arithmetic and their reconstruction in mathematical logic.[189]

Habermas argues that the theoretical understanding of communicative action has normative ramifications. "Communicative ethics" is based on the normative implications of the realization that communicative action aimed at producing rational agreement presupposes an ideal speech situation. An analogy can be made to Kantian ethics.[190] Kant's categorical imperative—"Act only according to that maxim through which you can at the same time will that it should become a universal law"[191]—provides a formal interpretation of morality. Habermas' theory of discursive justification can be seen as a modification of the categorical imperative. Wants and needs, as well as norms, are universally valid only insofar as they could be agreed upon under the conditions of the ideal speech situation:

> [C]ommunicative ethics guarantees the generality of admissible norms and the autonomy of acting subjects solely through the discursive redeemability of the validity claims with which norms appear. That is, generality is guaranteed in that the only norms that may claim generality are those on which everyone affected agrees (or would agree) without constraint if they enter into (or were to enter into) a process of discursive will-formation . . . . [C]ommunicative ethics guarantees autonomy (in that it carries on the process of the insertion of drive potentials into a communicative structure of action—the socialization process—"with will and consciousness.").[192]

Unlike Kant's theory, Habermas' theory does not exclude individual wants and needs, nor does it define morality in opposition to "interest" (*willkur*). Autonomy does not demand that the inclinations be suppressed, but rather that they be interjected into communication free of distortion.[193]

Consideration of the implications of the theory of communicative

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188 J. Habermas, *Zwei Bemerkungen zum praktishen Diskurs in Zur Reconstruction des Historischen Materialismus* 339-40 (1976), *translated in* T. McCarthy, *supra* note 42, at 323-24.

189 *See* T. McCarthy, *supra* note 42, at 323-24.

190 *Id.* at 325-26.

191 I. Kant, Groundwork of the Metaphysics of Morals 88 (H. Paton trans. 1964).

192 J. Habermas, Legitimation Crisis, *supra* note 121, at 89.

193 *See* T. McCarthy, *supra* note 42, at 388.

action for the state raises the possibility of a "communicative politics" corresponding to "communicative ethics." Habermas writes:

> [*B*]*ourgeois formal law* . . . made it possible to release norm-contents from the dogmatism of mere tradition and to determine them intentionally. Positivized legal norms were, on the one hand, uncoupled from the body of privatized moral norms; on the other hand, they needed to be produced (and justified) according to principles . . . . Since morality based on principles . . . is sanctioned only through the inner authority of conscience, its conflict with the public morality, still tied to the concrete citizen, is embedded in its claim to universality; the conflict is between the cosmopolitanism of the "human being" and the loyalties of the citizen . . . . [R]esolution of this conflict is conceivable only if . . . the opposition between morally and legally regulated areas is relativized, and the validity of all norms is tied to discursive will formation.[194]

Not all interests, however, are generalizable; there will be some spheres where individuals pursue particular interests. The decision whether an interest belongs to the sphere of intersubjective validation or whether it belongs to the sphere of individual and particular interest itself can be made through discursive will formation.[195]

Discursive will formation structures political organization through the principle of democracy. Habermas does not associate the democratic principle with any one form of government. Discursive will formation may conflict with functional imperatives, *i.e.*, with the need to maintain physical security or provide basic physical needs.[196] Moreover, the principle of discursive will formation does not require the direct translation of the conditions of the ideal speech situation into rules of social organization. Such rules must acknowledge the empirical limitations on the ability to reach rational consensus:

> Because they are empirical processes, all discourses are subject to restrictions of space and time, psychological and social limitations . . . , etc. . . . These make regulations necessary . . . [as does] the need to organize a discussion, to secure and limit the flow of information, to separate themes and contributions, to order them, etc. . . . [R]egulations of this kind . . . are meant to make practical discourse possible under given empirical restrictions.[197]

E. Lifeworld and System

I want to briefly explore one final element of the theory of communicative action, the distinction between *lifeworld* and *system*.[198] The

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194 J. HABERMAS, LEGITIMATION CRISIS, *supra* note 121, at 86-87 (emphasis in original).

195 *Id.* at 89.

196 *See* T. MCCARTHY, *supra* note 42, at 331-32.

197 J. HABERMAS, *Die Utopie des guten Herrschers*, in KULTUR UND KRITIK 384-86 (1973), *translated* in T. MCCARTHY, *supra* note 42, at 332.

198 *See* J. HABERMAS, LIFEWORLD AND SYSTEM, *supra* note 121, at 119-98; *see also* S. WHITE, *supra* note 123, at 92-123.

lifeworld is the realm of communicative action; loosely, it is the background of tradition, culture, and language that makes communicative action possible. By way of contrast, the system is the realm of strategic action; in modern western societies it is constituted by the market and the bureaucratic state.

For Habermas, the lifeworld must be understood hermeneutically. The lifeworld consists of a set of factual and normative assumptions that are usually unquestioned; these assumptions are the unspoken agreements that make communicative action possible. To use an elementary example, within an extended family there are basic unspoken agreements about each member's roles and legitimate expectations. Family members accept certain basic norms as binding on them; they do not treat other members in a purely instrumental fashion. The set of shared expectations and understandings enable family members to successfully make requests, give instructions, and so forth. In order for observers to understand the lifeworld of the family, they would be required to participate in the family life and interpret actions and utterances.

The system, however, is thoroughly rationalized. The market, for example, operates on a purely instrumentalist principle of profit maximization. The market system has a functional logic; for example, prices are the unintended consequences of a series of individual decisions to buy or sell. In such a systematized market, there is no rational agreement between buyers and sellers as to price; rather impersonal market forces dictate a price over which individual market participants have no direct control.

In addition to the market, law is a primary domain of the system. The bureaucratic structure of modern legal systems subjects whole areas of human conduct to a system of rules. Individual actors in the system, such as law enforcement officials, judges, litigants, are not free to agree among themselves as to the outcome of legal disputes.[199] Instead, a complex system of rules establishes procedures and sets limits on permissible outcomes.

Habermas uses the distinction between system and lifeworld as the focus for his critique of contemporary society. He argues that the system is colonizing the lifeworld. The family provides an example. In western societies, family relationships are increasingly governed by legal rules and market forces. Marriage is assimilated to contract; relationships that formerly were governed by informal agreement are more frequently the subject of legal rules. The result, says Habermas, is a loss of meaning.[200] One result might be that members of society experience alienation, and lose the sense that their lives are meaningful.

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199 Habermas' theory assumes that the legal rules constrain legally acceptable outcomes, and, therefore, that the law is not radically indeterminate. *Cf.* Solum, *supra* note 13 (discussing indeterminacy).

200 *See* J. HABERMAS, SYSTEM AND LIFEWORLD, *supra* note 121, at 356-73.

Habermas has much more to say about the distinction between lifeworld and system. At this point, however, I close my discussion of the theory of communicative action and begin the task of applying that theory to the freedom of speech.

V. A THEORY OF FREEDOM OF COMMUNICATIVE ACTION

The theory of communicative action is rich with implications for interpretation of the freedom of speech.[201] In this Part, I outline the core of a theory of the freedom of speech that uses elements of Habermas' theory of communicative action. My basic strategy is to explore the notion that the freedom of speech should be and is best understood as the freedom to engage in communicative action, and the corollary notion that freedom of speech does not encompass the freedom to engage in strategic action. I develop this notion by using the rules which constitute the ideal speech situation as models for principles defining the freedom of speech. I argue that freedom of speech is best understood as an attempt to institutionalize the essential conditions of the ideal speech situation. Any society that wants to enable rational agreement through public discourse must provide for a right to free speech which allows all citizens the right to participate in communication on equal terms without the fear of compulsion.

Section A outlines the most basic implication of reconceptualizing the freedom of speech as the freedom of communicative action: communicative action is within the scope of protection; strategic action is not. Section B outlines the implication of considering the three rules that define the ideal speech situation[202] as a component principle of the right to freedom of speech. Section C explores two problems with applying the model of the ideal speech situation to the freedom of speech. The first problem stems from Habermas' distinction between pure discourse and normal communicative action. The second problem derives from the difficulty of precisely drawing the line between communicative action and strategic behavior. Section D reconsiders the question of justification by

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201 My approach to the development of a theory of the freedom of speech from Habermas' theory of communicative action has a number of precursors. Paul Chevigny's essay on the relationship between freedom of speech and philosophy of language undertakes a suggestive but brief exploration of Habermas' theory. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 192-94 (1980); *see also* P. CHEVIGNY, MORE SPEECH (1988). Judith Lictenberg's recent essay on the freedom of the press develops some implications of Habermas' position. Lictenberg, *Foundation and Limits of Freedom of the Press*, 16 PHIL. & PUB. AFF. 329, 351 n.40 (1987). Kenneth Karst's essay on equality and freedom of speech anticipates the theme of equality of communicative opportunity. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23-26 (1975). I have found C. Edwin Baker's work on the first amendment particularly suggestive. Baker, *supra* note 51. Kent Greenawalt's work on the application of speech act theory to the relationship between the first amendment and criminal law has been very helpful. Greenawalt, *Speech and Crime*, 1980 AM. BAR. FOUND. J. 645.

202 *See supra* Part IV(C)(3) (text accompanying notes 160-68).

comparing the theory offered here with traditional theories of the freedom of speech.

A. Scope of the Freedom: Communicative Action and Not Strategic Action

In this Section, I argue that my reconceptualization of the freedom of speech as the freedom of communicative action offers a persuasive account of the basic contours of the legal doctrines that surround the first amendment freedom of speech. I begin with the problem faced by traditional theories in accounting for the exclusion from the right to free speech of certain behavior that is undoubtedly speech, but which surely should not be protected.

1. *The Exclusion of Strategic Action.*—One of the persistent problems of free speech theory has been formulation of a basic principle defining the scope of the freedom. The principle ought to meet the criteria of fit and justification, which were discussed in Part II.[203] For example, many theories are unable to account for the existence of speech that is undeserving of protection. The classic example of the man who shouts "fire" in a crowded theater poses a challenge to theories of free expression: what principle allows government to control speech that is clearly undeserving of first amendment protection, but does not open the door to the suppression of expression that is deserving of protection? The problem is particularly acute for the "absolutist" who believes the constitutional text allows no government restriction on any "speech." The "clear and present danger" doctrine represents one response to this challenge.

Reconceptualizing the freedom of speech as freedom of communicative action offers a fresh approach to this persistent problem. The first step is the simple observation that not all speech acts involve communicative action. In Part IV, I noted that speech act theory distinguishes between illocutionary and perlocutionary acts. For an illocutionary act to be successful, the listener must understand the intention of the actor. Perlocutionary acts depend on the effect of speech and not on reaching understanding. The man who shouts "fire" in a crowded theater in order to induce panic depends on the perlocutionary effect of his speech and not on the illocutionary uptake. In Habermas' terms, shouting "fire" in a crowded theater is strategic action and is not communicative action. Of course, this analysis assumes a certain intention in shouting "fire." Indeed, if we vary the intention, as for example by assuming the man erroneously believed there was a fire, the justification for prohibition of this sort of speech act is no longer clear.[204]

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[203] *See supra* Part II(C)(3) (text accompanying notes 34-40).

[204] This is not to say that there could be no justification for such a prohibition. It could be that even sincere acts of shouting "fire" in an actually burning crowded theater are undesirable because of

Thus, if the freedom of speech is interpreted as a freedom of communicative action, the problem of the man who shouts "fire" in a crowded theater is dissolved. Strategic actions are not protected by the first amendment. A clear and present danger test would be unnecessary to account for the unprotected status of strategic actions that are implemented through speech acts. Strategic action is, in theory, beyond the protection of the first amendment, even if the danger it poses is fuzzy and remote.

The distinction between communicative and strategic action explains the exclusion from first amendment protection of a wide variety of strategic actions. The speech of the robber who shouts "stick 'em up" is unprotected, because it is strategic and not communicative action. Likewise, fraud is strategic action; if the intention of the confidence man is understood by the victims, the swindle will not be successful. The lack of first amendment protection for defamation can also be understood on this model. True defamation is strategic action, instrumental to the achievement of individual aims through perlocutionary effects and not through the achievement of understanding. Another example is the use of speech to frighten to death someone with a heart condition; such action is clearly strategic and hence excluded from the protection of free speech.

Of course, free speech doctrine has no problem reaching the conclusion that these strategic actions are excluded from protection—that conclusion is intuitively obvious. The difficulty with these examples rests at the level of theory. For example, the listener autonomy theory struggled with an elaborate conception of justified paternalism to account for the justifiable restriction on shouting fire in a crowded theater. The theory of communicative action provides an elegant and natural explanation for our intuitive conclusions that instances of strategic action are undeserving of first amendment protection.

2. *The Inclusion of Communicative Action.*—The rule of inclusion that defines the freedom of speech as freedom of communicative action provides another advantage over the traditional theories. These theories of the freedom of speech give widely varying accounts of the functions or purposes of the right. The marketplace of ideas approach maintained that the first amendment should be interpreted as a mechanism for facilitating the emergence of truth. The self-government perspective characterized free speech as a necessary corollary of democracy. The listener autonomy theory viewed freedom of speech as a protection for the freedom of audiences. The self-realization account postulated freedom of speech as the means for the growth and development of individuals. A consistent theme of Part III was that the existing theories are insuffi-

their unintended perlocutionary effects. A regulation based on such a rationale is arguably consistent with the conditions of the ideal speech situation.

ciently inclusive; indeed, the plurality of principles approach deems this flaw so serious that it purchases adequate inclusiveness at the cost of theoretical coherence. Reformulating freedom of speech as freedom of communicative action avoids this difficulty.

The theory of communicative action makes explicit the wide variety of human purposes that are accomplished through communicative action. Communicative action is the attempt by individuals to coordinate their behavior through acts of reaching understanding. The classification scheme, presented above, illustrates the range of communicative actions. Constative speech acts represent states of affairs; constatives are deployed in conversation to reach understanding about the objective world. The thematic validity claim of constative speech acts is to truth. Regulative speech acts establish interpersonal relationships; regulatives are deployed in normatively regulated action to reach understandings about the social world. The thematic validity claim of regulative speech acts is a claim to rightness. Expressive speech acts enable presentation of self; expressives are deployed in dramaturgical action to reach understandings about the subjective world. Their thematic validity claim is to sincerity.[205] The attempt to limit the freedom of speech so that any one of these functions is excluded must fail because such an attempt reflects an impoverished conception of the nature of speech itself.

The theory of communicative action can account for both the failures and successes of the rules of inclusion provided by existing theories. For example, the marketplace of ideas theory is implausible in part because it apparently limits the freedom of speech only to constative speech acts—those communicative actions that thematize a validity claim to truth. The self-government theory is similarly deficient. Under that theory, free speech encompasses only regulative speech acts—thematizing a claim to rightness—which are relevant to the exercise of governmental power. Both theories seem to arbitrarily restrict the scope of the freedom of speech because both fail to encompass the full range of communicative action. The theory of communicative action confirms, however, that both the marketplace of ideas and self-government theories do have some explanatory power. These theories do focus on important categories of communicative action: constative and regulative speech acts.

3. *Dissolving the Distinction Between Speech and Action.*—Existing free speech doctrine has long assumed a distinction between speech (or expression) and conduct (or action). The most influential articulation of this perspective comes from Thomas Emerson:

> [T]he theory [of free expression] rests upon a fundamental distinction between belief, opinion, and communication of ideas on the one hand, and different forms of conduct on the other. For shorthand purposes we refer to this distinction hereafter as one between "expression" and "action.". . . [I]n

205 *See* J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 329.

> order to achieve its desired goals, a society or the state is entitled to exercise control over action—whether by prohibiting or compelling it—on an entirely different and vastly more extensive basis. But expression occupies an especially protected position. In this sector of human conduct, the social right of suppression or compulsion is at its lowest point, in most respects it is nonexistent. A majority of one has the right to control action, but a minority of one has the right to talk.[206]

This distinction is not limited to the commentators, but has become a persistent feature of doctrine as revealed in judicial opinions.[207]

This attempt to distinguish between speech and conduct is doomed to failure. The distinction between speech and conduct fails at two interrelated levels. First, there can be no communication without a material basis. All communication involves physical conduct; there is no "pure speech" unmediated by action.[208] The advocate of distinction between speech and conduct has at least one rejoinder. It is possible to imagine speech that consists only of conduct that we might fairly call speaking. The fact that all speech requires the exercise of the vocal chords and jaw muscles does not negate the meaningfulness of a distinct category of conduct called speech.

The second level of criticism, however, is devastating. The theory of communicative action demonstrates that even such "pure speech" is best understood as a "speech act." Speech does more than merely transmit an abstract message or idea; it coordinates human conduct through understanding. When we speak, we make contracts and promises; we give directions; we incite; we urge. The fundamental insight of speech act theory is contained in the observations that "speech is conduct," "expression is action," and, as Ludwig Wittgenstein had it, "words are deeds." Thus, there is no meaningful basis for distinguishing speech and conduct as the fundamental principle of inclusion and exclusion which defines the first amendment freedom of speech.

4. *The Intersubjectivity of Communication.*—The reformulation of the scope of freedom of speech in terms of communicative action offers a final advantage over some of the existing theories; this reformulation emphasizes the intersubjectivity of communication and thus avoids the opposing fallacies of privileging the role of speaker, on one hand, and of privileging the role of listener on the other. For example, the listener

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206 T. EMERSON, *supra* note 106, at 8.

207 *See, e.g.*, Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493-96 (1975); Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973); Henkin, *The Supreme Court 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 76-82 (1968); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968). My treatment of this subject owes much to Laurence Tribe. The discussion here is based on the treatment in his treatise. *See* L. TRIBE, *supra* note 67, at 825-32.

208 L. TRIBE, *supra* note 67, at 827.

autonomy theory all but ignores the role of the speaker in speech. But a dialogic perspective is essential to an adequate understanding of communication. Communicative action aims at the coordination of action through reaching understanding. Absent consideration of both the speaker and the listener, the dialogic process of reaching understanding and the very idea of coordination is inexplicable. The listener autonomy theory does, however, capture one important dimension of communicative action. The emphasis on autonomy relates the freedom of speech to the actions of listeners; thus the listener autonomy view does reveal the importance of communication for action.

The self-realization view has strengths and weaknesses that are complementary to those of the listener autonomy theory. Emphasis on self-realization focuses attention on the speaker, but it de-emphasizes the listener. The self-realization view is sometimes praised because it provides a justification for the protection of acts of self-expression.[209] The theory of communicative action strengthens and deepens this insight by providing a theoretical foundation for understanding expressive speech acts. But the self-realization view fails to characterize adequately the social character of communicative action. On the self-realization theory, individuals engage in communication primarily to develop their own capacities; it is no accident that this theory is described as a "self"-realization view. The self-realization theory classifies communicative action as purely instrumental to the achievement of an essentially individual aim; the social aspect of communications is almost accidental. The theory of communicative action, however, highlights the social dimension of communication; communicative action is consensual and involves coordination.

B. Content of the Freedom: Three Principles

So far, I have given a sense of the general scope of the freedom of speech: communicative action is included; strategic action is not. The discussion that follows gives precision to the content of the right to freedom of communicative action. The content of the right can be defined by three principles derived from the three rules that constitute the ideal speech situation—the rule of participation, the rule of equality of communicative opportunity, and the rule against coercion.

1. *The Principle of Participation.*—The first component principle of the freedom of communicative action is the principle of participation. This principle requires that every person[210] within a political community

209 *See* L. TRIBE, *supra* note 67, at 787.

210 The right to freedom of communicative action should attach to all persons and not only to persons who also are formal members of the political community, *i.e.*, citizens. All persons within the physical confines of a political community are asked to engage in the voluntary coordination of behavior through communicative action and to comply with the legal obligations. No decision con-

be given the right to engage in communication with others in the society. The principle derives from the rule of participation in the ideal speech situation. The intuition behind the rule was that making a claim to the truth of a proposition or the rightness of a norm implicitly carries with it the promise that the claim could be agreed upon in a rational discussion. Such an agreement would not be rational, however, if it were reached only because someone had been excluded from the discussion. Reinterpreting the rule of participation as a component principle of a right to freedom of speech emphasizes that a society cannot redeem the claim that its set of social arrangements is just if some affected persons are not even allowed to participate in public debate and discussion.

As a practical matter, this principle rules out laws creating "banned persons," who are not allowed to write, to speak in public, or to be quoted—a technique of repression that is used in South Africa.[211] Likewise, the principle rules out laws that would prohibit public speech by all members of specific ethnic, racial, or socioeconomic groups.

2. *The Principle of Equality of Communicative Opportunity.*—The second principle of the freedom of communicative action is equality of communicative opportunity. This principle prohibits the state from imposing unequal restrictions on the communications of some persons or groups of persons. The principle derives from the rule of equality in the ideal speech situation. The rule of equality was included because an agreement does not satisfy the standard of communicative rationality if consensus was reached because one side in the discussion had opportunities to communicate which were not offered to the other side—for example, if agreement is reached because only one side is permitted to question the claims of the other side. The principle of equality of communicative opportunity prohibits the government from structuring public discourse so as to produce a social consensus that persists only because some groups have fewer opportunities to speak or some viewpoints are forbidden.

One practical implication is that the equality principle rules out laws which discriminate on the basis of content. The clearest example of a violation of the equality principle would be a law that prohibits the expression of certain viewpoints. Government cannot, for example, allow

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cerning noncitizens can be fully rational if the decision is made on the basis of an agreement that was reached only because noncitizens were not given the right to participate in discourses which affect them.

211 The authority to ban persons is created by South Africa's Internal Security Act. Banned persons may not be quoted, they may not write, their writings may not be published, and they may not meet with more than one person (other than immediate family members) at any time. *See* L.A. Times, November 6, 1987, § 6, at 1, col. 2. The law was recently applied to prevent the screening of the film *Cry Freedom* on the basis that the film quotes banned persons Steven Biko and Donald Woods. *See* L.A. Times, July 30, 1988, § 1, at 1, col. 3; *see generally* Christian Science Monitor, July 11, 1986, at 16 (discussing banning); N.Y. Times, July 8, 1986, § A, at 1, col. 3.

speech which supports official policy but criminalize speech which criticizes that policy without violating the principle of equality of communicative opportunity. More broadly, the law may not permit expression on some topics but rule out expression on other topics.

Another practical implication concerns access to the media of communication. In the ideal speech situation, the medium of communication is verbal, but this is only a simplifying assumption. Application of the principle of equality of communicative opportunity to a complex society requires recognition of the multiplicity of media and the variability of effectiveness among media. For this reason, in theory the equality principle would seem to require that the various media be open on equal terms to all viewpoints and persons. As a practical matter, however, it may not be possible to provide meaningful equality of access to the media. I consider this problem in Part VI.

3. *The Principle Against Compulsion of Belief.*—The third principle of the freedom of communicative action is the principle against compulsion. The ideal speech situation requires a rule against compulsion because no agreement can count as rational if it is based on force or deception. The principle against compulsion insures that no one will be compelled to believe or express belief in the truth of a particular proposition or the rightness of a given norm.

In practical terms, the principle against compulsion translates into a freedom of belief. Government may not punish those who fail to give assent freely. For example, government may not require the swearing of an oath affirming belief in the legitimacy of the existing form of government or disavowing belief in any disfavored creed. Likewise, government may not institute an inquisition into the beliefs of its citizens and punish those whose beliefs do not conform to some official standard.

The rule against coercion that defines the ideal speech situation encompasses more than coercion of assent through threats of force or violence. Deliberate deception or withholding of relevant information are also excluded. Thus, the principle against coercion prohibits government from engaging in a deliberate program of disinformation. For example, government control of the educational system cannot be used deliberately to inculcate false beliefs. This idea is illustrated by the recent reforms in the teaching of history in the Soviet Union; the repression of basic factual information about Stalin's purges was inconsistent with the principle against compulsion. Another example might be access to certain government proceedings; the freedom of communicative action requires that government not deliberately withhold information that is relevant to public discourse.

C. Problems Applying the Model of the Ideal Speech Situation

The basic outline of the freedom of communicative action is now

complete. The theory requires the protection of communicative action, but allows government to prohibit strategic action. Freedom of communicative action is given content by three principles: all persons may participate; all may participate on equal terms; belief may not be coerced by force or deception. At this point, I consider two problems with the theory. The first problem is posed by the difficulty of drawing the line between speech that is unprotected because it is strategic and speech that is protected because it is communicative. The second problem arises from Habermas' distinction between discourse and communicative action.

1. *Excursus: Drawing the Line Between Communicative Action and Strategic Action.*—So far my discussion has assumed that there is a clear line between communicative and strategic action. For example, I assumed that falsely shouting fire in a crowded theater constitutes a clear case of strategic action. I have assumed that criticism of apartheid in South Africa is a clear case of communicative action. At this point, I want to return to the problem of distinguishing the two posed by the mixed nature objection.[212] Recall that a critic of Habermas' distinction might suggest that most—if not all—actual communication partakes of the characteristics of both strategic and communicative action. The suggestion is that communicators are oriented to achieving success both through understanding and through manipulation. Here I take up the question whether the application of Habermas' distinction as a component of a theory of the freedom of speech sheds light on this objection.

One answer is that this question is suggested by the manner in which legal systems deal with similar questions. In order to determine whether the crime of fraud has been committed, for example, courts must make findings of fact regarding the intention of the defendant: did she intend to deceive or was her intention to consummate an honest business transaction? Of course, the mixed nature objection applies in such cases: it will be rare that even the most honest businessperson makes a complete disclosure and refrains from even the slightest puffing and exaggeration. This difficulty does not deter legal systems from making judgments about the dominant characteristics of a particular transaction: judges and juries frequently distinguish fraud from normal business practice without difficulty. I contend that this constitutes empirical evidence for Habermas' claim that competent communicators do have the ability to distinguish communicative action from strategic action, despite the mixed nature objection.

This is not to say that the distinction can always be made with confidence. I return to this problem in Part VI when I consider particular areas in first amendment doctrine where the difficulty in drawing the dis-

212 *See supra* Part IV(B)(2) (text accompanying notes 147-50).

tinction between communicative and strategic action explains both the shape of the existing law and the tensions within it.

2. *The Status of Discourse.*—In Part IV, I noted that Habermas distinguishes ordinary *communicative action*, in which the participants usually agree about basic facts and norms, and *discourse*, in which communicative action is temporarily suspended so that participants can reach rational agreement about disputed claims to truth or right. This distinction could be used to offer a theory of the freedom of speech that is different in important respects than the one which I am advancing. The freedom of speech could be reinterpreted as a freedom of *discourse* rather than as a freedom of *communicative action*. In this Section, I will consider this alternative approach to the application of Habermas' theory of communicative action to the freedom of speech, considering some of the advantages of the alternative reinterpretation and then presenting my reasons for rejecting it.

Reinterpreting the freedom of speech as freedom of discourse has a number of attractions. One way to understand the attractiveness of this alternative is to consider it as an interpretation of the absolutist approach to the first amendment.[213] For the absolutist, the freedom of speech is unqualified within its domain of application. This leads to the problem of devising a principle of exclusion: how does one deny protection to the shouting of fire in a crowded theater if the first amendment is an absolute?[214] One solution is to adopt the proposed distinction between speech and action (or conduct) which is described above.[215] "Pure speech" receives absolute first amendment protection; "pure action" receives no protection.[216] We have already noted the difficulty of creating a basis for the distinction. On the one hand, communication is accomplished through behavior, both verbal and nonverbal. On the other hand, communication is engaged in for the purpose of coordinating action.

Habermas' differentiation between ordinary communicative action and discourse might save the distinction. "Pure speech" could be defined as discourse. The theory of communicative action provides the means for marking the distinction between discourse and ordinary communicative action. Discourse occurs when the inability to agree on what is true or right interrupts ordinary communicative action; in discourse, the participants suspend judgment and attempt to reach a rational agreement.

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213 *See generally* Meiklejohn, *The First Amendment is An Absolute*, *supra* note 68.

214 *See supra* Part V(A)(1) (text accompanying notes 203-04).

215 *See supra* Part V(A)(3) (text accompanying notes 206-08).

216 The distinction is frequently used by the courts, including the United States Supreme Court. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 690 (1986) (Marshall, J., dissenting); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 495 (1985); New York v. Ferber, 458 U.S. 747, 766 (1982).

Freedom of discourse would both enhance the search for truth and promote legitimate democratic decisionmaking.

Absolute protection for discourse is appropriate precisely because discourse involves a suspension of action; the risks of allowing theoretical or abstract discussion are low indeed. Moreover, there are few legitimate social objectives that can be accomplished only by suspension of theoretical or normative discourse. By way of contrast, a freedom of communicative action would limit government's ability to regulate important aspects of action. It could be argued that this wider freedom entails a greater risk that important social objectives will be frustrated.[217]

Despite these attractions, the freedom of discourse interpretation is unsatisfactory. The basic problem is one of fit. The case law establishes that first amendment freedom of speech is broader than freedom of discourse. As Justice Rutledge, in describing the protection afforded by the first amendment, explained: "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."[218] Indeed, the theory of communicative action demonstrates that discourse makes up a relatively insignificant proportion of communicative activity. Most communication coordinates action; discourse begins when the consensual coordination of behavior through communication breaks down because of disagreements over facts or norms. A freedom of discourse would be far narrower than the freedom of speech provided by the first amendment.

Nonetheless, the freedom of discourse interpretation does lead to an important insight. Even if the freedom of speech encompasses more than discourse, it certainly does at least encompass discourse. Moreover, as a practical matter discourse may receive greater protection against government interference. Because of the difficulty in distinguishing communicative action and strategic action, courts may sometimes err and allow communicative action to be suppressed. The distinction between theoretical discourse and strategic action, however, is clearer cut, and for this reason, courts may be less likely to err and thus to allow government infringement on freedom of discourse.

D. Justification Revisited: Integrating Existing Theories

The reinterpretation of freedom of speech as freedom of communicative action allows for the integration of existing theories of the freedom

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217 Reasoning like this seems to be implicit in several judicial opinions. *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 705-06 (1959) (Harlan, J., concurring); Gitlow v. United States, 268 U.S. 652, 664-65 (1925).

218 Thomas v. Collins, 323 U.S. 516, 537 (1945); *see* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); NAACP v. Button, 371 U.S. 415, 429 (1963); Bridges v. California, 314 U.S. 252, 270 (1941).

of expression.[219] Both the search-for-truth and self-government theories rely on metaphors—the marketplace of ideas and the town meeting—that prefigure the ideal speech situation. The marketplace-of-ideas metaphor presupposes conditions of free and open competition; the ideal speech situation is even more closely modeled by the metaphor of the town meeting, an assembly of equal citizens that has rules of order allowing everyone to speak and is designed to elicit all relevant viewpoints and produce rational consensus. The marketplace of ideas suggests that the freedom of speech may be limited to theoretical discourse, and the metaphor of the town meeting suggests a limitation to practical discourse. The theory of communicative action encompasses both theoretical and practical discourse and justifies a norm of equality of communicative opportunity to encompass both.

The listener autonomy theory appeals to the powerful conception of autonomy rooted in Kantian ethics. The theory of communicative action provides the basis for the reinterpretation and elaboration of the conception of autonomy in a way that avoids some of the difficulties with the Kantian formulation. Kant's conception of autonomy required the exclusion of desires and inclinations from the determination of grounds of action. Autonomy is conceived as being opposed to the particular needs and desires of concrete subjects and is derived from the form of rationality. For Kant, "[t]he principle of autonomy is 'Never to choose except in such a way that in the same volition the maxims of your choice are also present as universal law.' "[220] Hegel's objection to Kant's conception of autonomy is that its formalism is hollow and cannot generate concrete norms of action. The formal principle of the categorical imperative—act so that you can will the maxim of your action as a universal law of nature—is empty of content.[221] Kantian ethics, according to Hegel, does not really tell us what is the right thing to do in particular cases, because the categorical imperative does not tell us what is good or bad and because it excludes consideration of our wants, needs, and desires.

Habermas' theory provides a way to preserve the concept of autonomy without running afoul of Hegel's objection. Communicative ethics does not exclude the consideration of individual wants, needs, and desires. Rather, communicative ethics seeks agreement on generalizable

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219 For a different account see Karst, *supra* note 201, at 23-26. Karst's interpretation of the role of equality in the first amendment follows a different line than the one suggested in this Article. Karst emphasizes the "principle of equal liberty of expression." His exploration of the self-government theory emphasizes a contractual view: "if equals consent to be governed, rational self-interest dictates that each can preserve his or her own liberty only by agreeing to the equal liberty of all." *Id.* at 23. When considering the marketplace of ideas theory, Karst apparently regards equality as little more than instrumental: "The widest freedom to contradict prevailing opinion is . . . implicit in any serious search for truth." *Id.* at 25. Karst's essay, however, is important as a pioneering effort to elucidate the role of equality in the freedom of expression.

220 I. KANT, *supra* note 191, at 108-33.

221 G. HEGEL, PHILOSOPHY OF RIGHT 89-90 (T. Knox trans. 1952).

interests that can be redeemed in unconstrained discourse. As McCarthy notes:

> Since . . . the generalizability of interests is what is at issue in practical discourse, rational consensus belongs to the very situation of discourse. What this content is, concretely, depends on the historical contours of that situation, on the conditions and potentials of social existence at that time and place. The principle that those affected by proposed norms should seek rational agreement among themselves precludes the possibility of legislating once and for all and for everyone. But it does indicate, admittedly at a very general level, the procedure to be followed in any rationally justifiable legislation at any time.[222]

Autonomy, thus, is reinterpreted by the theory of communicative action. The communicative conception of autonomy does not require the suppression of interests; rather, on this conception, autonomy requires that individual interests be expressed and shaped through undistorted communication. The listener-autonomy theory emphasizes self-determination and respect for the individual as sovereign and rational in making independent judgments about reasons for action. The communicative conception of autonomy reflects respect for the individual by requiring consensus among equal participants in the ideal speech situation. In addition, the communicative conception provides a foundation for the idea of rationality on which autonomy theory depends. Moreover, the reinterpretation of free speech as freedom of communicative action protects speech aimed at producing understanding and rationally motivated agreement, but excludes from protection manipulative action that would interfere with individual autonomy. The principle of equality of communicative opportunity is grounded in a plausible conception of autonomy. Thus, the reinterpretation of freedom of speech as freedom of communicative action incorporates and strengthens the core of the listener-autonomy theory.[223]

VI. Application to Problems in First Amendment Doctrine

In this Part, I apply the theory of communicative action to some persistent problems in the interpretation of the first amendment freedom

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222 T. McCarthy, *supra* note 42, at 328-29.

223 Communicative ethics also provides the basis for a reinterpretation of the self-realization theory. The line of argument is developed here only in bare outline and for the most part as a suggestion for further work, because the connection that I hypothesize is subtle and complex. Under the self-realization approach, freedom of speech is to be valued primarily because communication is essential to happiness, to the realization of human potential, and to the satisfaction of basic human needs for social interaction. The theory of communicative action does not deny the role of communication in self-realization. Although the development of this idea is outside the scope of this Article, Habermas does provide a theory of ego development in which the acquisition of interactive competence is central to personality development. *See* T. McCarthy, *supra* note 42, at 250-51. Habermas' theory of personality development provides the basis for a reinterpretation of the self-realization theory that is consistent with the views presented here.

of speech. Section A applies the distinction between communicative action and strategic action in three familiar first amendment contexts: the advocacy of illegal conduct, labor picketing, and commercial speech. Section B considers the implications of the principle of equality of communicative opportunity for three first amendment problems: the public forum, content discrimination, and access to the mass media. Finally, Section C considers the interaction between the principle that strategic action is not protected and the principle of equality of communicative opportunity in the context of libel of public figures.

The treatment of these issues is, of course, only preliminary. In this Article, I cannot hope to discuss fully the decisional law or the scholarly commentary on any of these specific doctrinal problems. Rather, the aim of this Article is to establish that the theory of communicative action provides a fruitful avenue of investigation, yielding new insight into familiar first amendment problems and providing a more coherent foundation for some conclusions now widely accepted by courts and commentators.

A. Distinguishing Communicative Action from Strategic Action

One of the most difficult tasks in developing the theory of communicative action is drawing the line between communicative action and strategic action. I have already considered this problem at two stages: first, as an objection to the theory of communicative action itself,[224] and second, as a difficulty in the reinterpretation of the freedom of speech as the freedom of communicative action.[225] This Section presents a third approach to the problem; this time at the very concrete level of particular legal doctrines for which the distinction is important.

1. *Advocacy of Unlawful Conduct.*—I begin with the question whether the first amendment protects the advocacy of violence or other unlawful conduct. This question has played a central role in the evolution of first amendment doctrine. The classic answer to the question is represented by the "clear and present danger" test.[226] The test emerged from a series of opinions arising out of cases in which radicals were prosecuted for various statements made in opposition to American participation in World War I. Justice Holmes first used the phrase in *Schenk v. United States*,[227] and it became the focus of his dissents in *Abrams v.*

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224 *See supra* Part IV(B)(2) (text accompanying notes 147-50).

225 *See supra* Part V(C)(1) (text accompanying note 212).

226 *See generally* L. TRIBE, *supra* note 67; Linde, *'Clear and Present Danger' Reexamined: Dissonance in the* Brandenberg *Concerto*, 22 STAN. L. REV. 1163 (1970).

227 249 U.S. 47, 52 (1919) ("The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has right to prevent.").

United States[228] and *Gitlow v. New York*.[229] The "clear and present danger" approach was refined by Justice Brandeis' concurrence in *Whitney v. California*[230] and assumed its modern form in *Brandenburg v. Ohio*.[231] The Holmes-Brandeis approach, as articulated in the Court's per curiam opinion in *Brandenburg*, is summarized as follows: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[232]

Despite the predominance of the "clear and present danger" formula, the courts have pursued a variety of alternative approaches to the question of first amendment protection for incitement to lawless action. Judge Learned Hand's opinion in *Masses Publishing Co. v. Patten*[233] focused on the question whether the speaker had expressly advocated lawless conduct.[234] Justice Sanford's opinion in *Gitlow* allowed the prohibition of utterances "advocating, advising, or teaching the overthrow of organized government by unlawful means," but not mere "abstract 'doctrine' or academic discussion."[235] In *Dennis v. United States*,[236] Justice Vinson adopted a test that balanced "the gravity of the 'evil,' discounted by its improbability" against the "invasion of free speech."[237]

Reformulation of the freedom of speech as freedom of communicative action provides some fresh perspective on this longstanding controversy. For the sake of clarity, I use the following brief example: the defendant is charged with advocacy of a violent revolution based on a speech in which he (1) urged his audience to join such a revolution and (2) sincerely stated his belief that they ought to do so because the government was illegitimate and repressive; the speech is made in social circumstances in which there is no significant danger of an imminent revolution, approximating those of the United States in 1989. Let me begin with two observations about the hypothetical speech. First, a violent revolution itself would be strategic action and not communicative action. Second,

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228 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).

229 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

230 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

231 395 U.S. 444 (1969) (per curiam).

232 *Id.* at 447.

233 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

234 *Id.* at 540.

235 *Gitlow*, 268 U.S. at 664-65.

236 341 U.S. 494 (1951).

237 *Id.* at 510 (quoting Judge Learned Hand's opinion for the Second Circuit, United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)); *see also* Richardson, *Freedom of Expression and the Function of the Courts*, 65 HARV. L. REV. 1 (1952); Mendelson, *Clear and Present Danger—From* Schenck *to* Dennis, 52 COLUM. L. REV. 313 (1951); Garfunkle & Mack, Dennis v. United States *and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475 (1951).

the hypothetical speech is communicative action; the speaker has not threatened his audience nor intentionally deceived it.

If the government can legitimately prohibit the strategic action, *i.e.*, the revolution itself, does it follow that government can also prohibit communicative action which is aimed at the voluntary coordination of behavior to accomplish the criminal act? If we lay aside the context of revolutionary speech, the answer to this question seems to be that communication in furtherance of a crime may be prohibited without running afoul of the first amendment. The most obvious example of communicative action in furtherance of a crime is conspiracy, which is precisely the voluntary coordination of behavior through communication in order to accomplish a criminal purpose.[238]

Indeed, it would be foolhardy to extend first amendment protection to conspiracy, solicitation, and other communicative crimes. Of course, some crimes, such as physical assault, may not involve speech at all, and other crimes, such as fraud, do involve speech but are strategic action. In many other crimes, however, some participants in the crime engage only in communicative action: the physical or strategic action is carried out by others. For this reason, if the first amendment protected all communicative action in furtherance of other crimes, the result would be to immunize a substantial number of criminals—especially high level criminals, such as organized crime leaders—from prosecution. For example, many high level participants in securities fraud or antitrust conspiracies themselves engage only in communicative action. I believe that the decisions which have not extended strong first amendment protection to unlawful speech are based on this insight. The right to engage in communicative action does not encompass a general right to prepare communicatively for the use of force or deception.

Nonetheless, it does not follow that government may punish the revolutionary speech described in the hypothetical above without running afoul of the freedom of communicative action. Recall the two utterances contained in the hypothetical speech. It is clear that the second utterance—a profession of belief in the rightness of revolutionary activity on the basis that the government is repressive and illegitimate—is protected by the freedom of communicative action. This speech act is not itself in furtherance of unlawful activity; indeed, considered in isolation, the second utterance would be pure political discourse and therefore within the core of the freedom of communicative action. The problematic issues are whether the first speech act—urging the audience to join a revolution—is also protected, and if so, under what circumstances.

My argument for protection of the first speech act under the freedom of communicative action begins with the observation that urging a revolution results from a breakdown in communicative action. Every

238 Greenawalt, *supra* note 201, at 743-46.

government directive, such as laws, regulations, and commands issued by officials, implicitly raises a validity claim to rightness. Under normal circumstances in a just society, such claims will be unquestioned. Citizens will adopt what H.L.A. Hart calls the "internal point of view,"[239] accepting the implicit normative claim that government makes to the rightness of its directives. As the theory of communicative action establishes, however, the government's implicit validity claim to rightness entails a promise to redeem that claim in rational discourse, if called upon to do so. The conditions of rational discourse in turn are specified by the rules constituting the ideal speech situation, including the rule of equality of communicative opportunity which requires that participants be allowed to advance and question claims. In the hypothetical revolutionary speech, the speaker has explicitly rejected the government's implicit claim to legitimacy. Government directives, however, are not pure communicative action; they are also explicitly backed by threats of force. Government claims a legitimate monopoly on the use of force. Any fundamental challenge to the legitimacy of this monopoly must include implicit justification or explicit advocacy of illegal action, either of nonviolent civil disobedience or of violent revolution.

The point I want to emphasize is that such fundamental challenges must be allowed if the government claims that the rightfulness of its monopoly on the use of force would be accepted in rational discourse. If government does not allow discourse which challenges its legitimacy, then it has explicitly violated the conditions of the ideal speech situation. Social consensus on governmental legitimacy might be maintained through force, but it could not be based on rational agreement. This provides a powerful reason for interpreting the freedom of communicative action to encompass a right to advocate violent revolution. We cannot achieve a rational consensus on the legitimacy of government use of force if we do not allow the advocacy of illegal conduct.

Thus, in our hypothetical example the freedom of communicative action should be interpreted to protect the speech advocating violent revolution. Allowing this sort of speech is required if the government is to make a rational claim to its own legitimacy. Under the social conditions assumed in the hypothetical, no great harm will flow from judicial enforcement of this right, because such a revolution is neither likely nor an imminent possibility.

This argument does not settle the question as to the extent of the right to advocate illegal conduct. Although we have very good reasons to prefer a government supported by a rational consensus that the government is legitimate, rather than by pure force, we might under certain circumstances subordinate those reasons to other concerns. For example, if a violent revolutionary movement were actually likely to succeed

239 H.L.A. HART, THE CONCEPT OF LAW 113-15 (1961).

in overthrowing the present government and if we had good reason to believe that the new regime would be worse than the present government, then we would have good reasons to temporarily suspend the right to question fundamental legitimacy in order to avoid this immediate and serious danger. The "clear and present danger" test operationalizes a qualification of the right to advocate illegal conduct. When communicative action by revolutionaries is likely to lead to harmful strategic action which cannot be prevented by other means, then government is justified in controlling revolutionary speech.

2. *Labor Picketing.*—My second example is derived from a line of Supreme Court decisions that deal with the right of labor unions to picket. Although many of these decisions have relied on statutory grounds as the technical basis for decision, the first amendment has had a guiding influence on the development of doctrine in this area. I develop two points by applying the theory of communicative action to the labor picketing cases. First, the labor cases illustrate the power of the theory of communicative action in dissolving the distinction between speech and conduct in first amendment doctrine. Second, these cases illustrate the difficulty in distinguishing strategic from communicative action in particular cases. I do not claim that my approach makes the labor picketing cases any easier; what I do claim is that the theory makes it clear why some of these cases are hard cases.

As doctrine, the distinction between speech and conduct originated in a series of labor picketing cases. In *Thornhill v. Alabama*,[240] the Supreme Court held that peaceful picketing, which publicized the facts of a labor dispute, was protected by the first amendment freedom of speech. From the perspective of the theory of freedom of communicative action, *Thornhill* is correct. Although the theory of communicative action grew out of a theory of speech acts that focuses on verbal communication, communicative action can be realized in a variety of forms, including, as Habermas puts it, "elliptically foreshortened, extraverbally supplemented, implicit utterances, for understanding which the hearer is thrown back upon the knowledge of nonstandardized, contingent contexts."[241] The fact that the communication in *Thornhill* involved picket signs and marching does not by itself throw doubt on the conclusion that these activities were communicative action.

Seventeen years later in *Teamsters Local 695 v. Vogt*,[242] the Court upheld a state law which banned peaceful labor picketing for illegal purposes. The Court distinguished the two cases on the ground that picketing involves more than speech, with the consequence that the state is

240 310 U.S. 88 (1940).

241 J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, *supra* note 121, at 330.

242 354 U.S. 284 (1957).

allowed to regulate the nonspeech element of picketing.[243] The number of categories was expanded in *Cox v. Louisiana*,[244] a decision not directly concerned with labor picketing. *Cox* involved an antisegregation demonstration on a sidewalk across the street from a Louisiana courthouse. The majority opinion characterized the demonstration as "speech plus"—a category that is less deserving of first amendment protection than is "pure speech."[245] Justice Black characterized the demonstration as "conduct" beyond the protection of the freedom of speech. The notion that picketing may be regulated *because* it is "speech plus" has been repeated in a number of Supreme Court decisions.[246]

As I argued in Part V,[247] the theory of communicative action explains why this attempt to distinguish between speech and conduct is doomed to failure. Speech act theory establishes the fundamental premise that speech is action, or in Justice Black's terminology, all speech is "speech plus" because all speech is part of conduct. This is not to say that there was nothing to Justice Black's attempt to make a distinction between picketing which should be protected by the first amendment and speech which should not. If we shift attention to the distinction between communicative action and strategic action, the problem comes into clearer focus.

Labor picketing (like any form of speech) may be strategic action. The purpose of the picket is key to its characterization. A labor picket that is designed to bring economic pressure to bear on the employer is a form of strategic action. For example, the *Vogt* decision reasoned that the state was justified in enjoining the picketing at issue in that case because "the picketing was for the purpose of coercing the employer to coerce his employees."[248] Another example of picketing that is "strategic action" is the so-called "signal picket" intended to induce an economic boycott.[249]

On the other hand, labor picketing may be part of an attempt to challenge existing social norms and engage in public discourse on the rightness of current social arrangements—communicative action. The best example of communicative picketing is what is termed in the litera-

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243 *Id.* at 289-90, 292.

244 379 U.S. 559 (1965).

245 *Id.* at 563.

246 *See* American Radio Ass'n v. Mobile Steamship Ass'n, Inc., 419 U.S. 215, 231 n.12 (1974); *see also* Brandenburg v. Ohio, 395 U.S. 444, 455 (1969) (collecting cases).

247 *See supra* Part V(A)(3) (text accompanying notes 204-07).

248 354 U.S. at 295.

249 *See* NLRB v. Retail Store Employees Union 1001, 447 U.S. 607, 618 (1980) (Stevens, J. concurring); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Cox, *The Supreme Court 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 37-38 (1980) [hereinafter cited as Cox, *Foreword*]; Cox, *Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951).

ture "informational picketing."[250] Thus, the distinction between communicative action and strategic behavior grounds the construction of two categories of labor picketing—informational picketing protected by the first amendment and unprotected signal picketing.

This distinction will not always be easy to apply. Because speech acts deployed in strategic action are not self-announcing, applying the distinction will require subtle judgment about the characterization of the situation and inquiry into the motives and intentions of the participants. Moreover, the freedom of communicative action is not the only relevant factor in these cases. Employers engage in strategic action, applying economic pressure on employees or using force or deception. As a matter of labor policy, we might choose to allow unions to use strategic action in order to create a balance of power between labor and business. What is clear is that the distinction between communicative action and strategic behavior offers a more coherent foundation for first amendment doctrine than does the purported distinction between speech and conduct.

3. *Commercial Speech.*—The distinction between communicative and strategic action is also difficult to draw in the context of commercial speech.[251] The difficulty is illustrated by the historical development of doctrine in this area. Because commercial advertising is almost invariably the product of the profit motive in a market economy, we have reason to suspect that such advertising may be strategic and not communicative action. Habermas' distinction between the system and the lifeworld grounds this suspicion;[252] the highly rationalized decisionmaking procedures that are required by market forces will not be conducive to sincere communication aimed at generating a rational consensus.[253]

This view was strongly reflected in early Supreme Court decisions which suggested that commercial advertising should receive no first amendment protection.[254] On the other hand, the fact that newspaper publishers[255] or film distributors[256] operate for profit does not raise as strong a suspicion about the content of films and newspapers.

After several decisions questioning the unprotected status of com-

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250 *See* Cox, *Foreword*, *supra* note 249, at 38; *see also* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 336 (1968) (Harlan, J., dissenting); NAACP v. Button, 371 U.S. 415, 453 (1963) (Harlan, J., dissenting).

251 *See generally* L. TRIBE, *supra* note 67.

252 *See supra* Part IV(E) (text accompanying notes 198-200).

253 This view is anticipated by Professor Baker's provocative article. Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

254 *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding that ordinance banning distribution of commercial advertising matter in streets does not violate first amendment).

255 *See* New York Times v. Sullivan, 376 U.S. 254, 266 (1964).

256 *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1962).

mercial speech,[257] the Supreme Court extended qualified protection to commercial advertising in *Virginia State Board of Pharmacy v. Virginia Consumer Council*.[258] At issue was a statute that classified as unprofessional conduct the advertising of prices for prescription drugs. The Court's reasoning emphasized the value of allowing price competition: "Those whom the suppression of prescription drug information hits the hardest are the poor, the sick, and particularly the aged."[259] The subsequent cases have followed an erratic path,[260] prompting Laurence Tribe to observe that the doctrine rests on "a makeshift—and unsteady—foundation for the future."[261]

The cases reflect a confusion about the status of commercial speech. As a starting point, courts are forced to recognize that there is a substantial potential for strategic action through deceptive commercial advertising. Thus, even the opinion in *Virginia Board* allows regulation of false or deceptive advertising. Because the advertiser "knows more" about his product than anyone else, there is little "danger that governmental regulation of rules or misleading price of product advertising will chill accurate and nondeceptive commercial expression."[262] Sometimes the Court is inclined to an idealistic view of the market as a realm of communicative action, in which advertisers sincerely communicate information about products to consumers; the price advertising in *Virginia Board* fits this model.

In other cases, however, the Court has allowed very substantial restrictions, even on truthful commercial speech. For example, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*[263] the Court upheld a Puerto Rico statute that banned all advertising of casino gambling directed at Puerto Rican citizens. In this context, the idealized picture of undistorted communication between advertisers and consumers did not grip the Court. Although the letter of Justice Rehnquist's opinion rested on a dubious argument that the conceded power of the state to ban gambling altogether included the lesser power to ban advertising, in spirit *Posadas* harkens back to the view that commercial advertising is inherently prone to manipulation and deception that characterized the decisions made before *Virginia Board*.

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257 *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822 (1975); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973).

258 425 U.S. 748 (1976).

259 *Id.* at 763.

260 *See, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 326 (1986); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Hoffman Estates v. Flipside, 455 U.S. 489 (1982); Consolidated Edison Co. v. New York Pub. Serv. Comm'n, 447 U.S. 530 (1980).

261 L. TRIBE, *supra* note 67, at 904.

262 *Id.* at 777 (Stewart, J., concurring).

263 478 U.S. 328 (1986).

B. Realizing Equality of Communicative Opportunity

In this Section, I develop the implications of the principle of equality of communicative opportunity for three areas of first amendment doctrine: the public forum, content discrimination, and access to the mass media.

1. *The Public Forum.*—One of the clearest applications of the principle of equality of communicative opportunity in first amendment case law is the public forum doctrine. Under the public forum doctrine, government is obliged to open certain locations, such as parks, streets, and sidewalks, to communicative activity. This doctrine is closely connected to the principle of communicative opportunity, because the rationale for the doctrine is to allow expression by those who would otherwise lack the means to participate in public discourse. As the Ninth Circuit expressed the relationship,

> Because of "their vital role for people who lack access to more elaborate (and more costly) channels of communication," certain public places have special status under the First Amendment . . . . The doctrine of the public forum achieves a central purpose of the freedom of speech—the goal of equality of communicative opportunity—by opening avenues of expression for the "poorly financed causes of little people."[264]

The public forum doctrine constitutes an implicit recognition by the courts that the content of the freedom of speech is shaped, at least in part, by the principle of equality of communicative opportunity.

The public forum doctrine, however, represents at best a partial incorporation of the principle of equality in first amendment doctrine. For example, opening public forums may not create equality of communicative opportunity in public discourse as a whole, if more effective means of communication, such as the mass media, are closed to some groups, viewpoints, or topics; I take up this topic below.[265] In addition, opening public forums for use by all persons and groups will not create equality of communicative opportunity if such forums are closed to some viewpoints or messages but are open to others. This is my next topic.

2. *Content Discrimination.*—Perhaps the most important expression of the principle of equality of communicative opportunity is the Supreme Court's decision in *Police Department of the City of Chicago v. Mosley*.[266] *Mosley* invalidated an ordinance which prohibited picketing

264 Carreras v. City of Anaheim, 768 F.2d 1039, 1043 (9th Cir. 1985) (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 689 (1978) and Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).

265 *See infra* Part VI(B)(3) (text accompanying notes 269-72).

266 408 U.S. 92 (1972).

near schools, except for picketing related to a labor dispute. Writing for the majority, Justice Marshall opined:

> [The infirmity of the ordinance] is that it describes permissible picketing in terms of its subject matter. . . . [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of forbidden censorship, is thought control. . . . Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas" and government must afford all points of view an *equal opportunity to be heard*.[267]

Kenneth Karst has argued that the content discrimination doctrine announced in *Mosley* represents a commitment to equality as a fundamental principle of freedom of speech.[268] Translated into the terminology of the theory of communicative action, *Mosley* represents a partial incorporation of the principle of equality of communicative opportunity into first amendment doctrine.

Reinterpreting the first amendment as providing freedom of communicative action gives concrete shape to the equality norm announced in *Mosley*. The principle of equality of communicative opportunity—as given content by the conception of the ideal speech situation—explains and justifies the content discrimination doctrine. Content discrimination would inherently operate as a restraint on discourse in the ideal speech situation. The force of the better argument cannot be assured to prevail if some arguments are not even allowed to enter the discussion.

3. *Access to the Mass Media.*—The principle of equality of communicative opportunity is implicated in recent cases which consider whether the first amendment requires or allows government-imposed restrictions on the media in order to facilitate greater equality of access to modern communications technology. Two questions can be distinguished. The first question—does the Constitution allow government to impose access requirements?—is addressed in two cases, *Red Lion Broadcasting Co. v. FCC*[269] and *Miami Herald Publishing Co. v. Tornillo*.[270] The second question—does the Constitution require government to impose access?—is considered in *Columbia Broadcasting System, Inc. v. Democratic Na-*

267 *Id.* at 95-96 (emphasis added) (footnote omitted).

268 Karst, *supra* note 201, at 29.

269 395 U.S. 367 (1969).

270 418 U.S. 241 (1974).

tional Committee.[271]

Existing doctrine distinguishes between electronic and print media with respect to whether access requirements are constitutionally allowed. *Red Lion* upheld the fairness doctrine (a directive from the Federal Communications Commission to broadcasters to devote reasonable time to public issues and to present contrasting views[272]) in the context of an FCC order directing a broadcaster to provide a right of reply to an individual attacked in a broadcast. *Tornillo* struck down a right-of-reply statute directed at newspapers. Commentators have suggested that the distinction between broadcast and print media is untenable,[273] but for my purposes the question is how the principle of equality of communicative opportunity bears on the access question. The right-of-reply provisions considered in *Red Lion* and *Tornillo* are consistent with the principle. Those who control newspapers and broadcast stations have inherently greater opportunities to engage in communicative action. Indeed, they shape and dominate discourse on certain topics. Right-of-reply provisions afford those attacked by the media the opportunity to redress the imbalance. The principle of equality of communicative opportunity would appear not only to allow, but positively to require that access to the media be granted in such situations.

In practice, right-of-reply provisions and other measures to insure access to the mass media raise a host of practical difficulties. Who is to speak on behalf of underrepresented viewpoints? Who is to choose the speakers? How will time be allocated among the various points of view? In practice, we may find that government control over such decisions will actually result in inequality of communicative opportunity because government uses regulation of access to manipulate content. I cannot attempt to resolve these difficulties here, but I do claim that the theory of communicative action suggests which difficulties are the important ones, and provides a framework in which detailed solutions could be developed.

The question whether the first amendment requires equalization of access to the media was considered in *Columbia Broadcasting System*. In that case the Supreme Court rejected the claim of the Democratic National Committee that the first amendment required a television network to sell time to the Committee for editorial advertisements. The primary ground for the decision was that the first amendment freedoms of broad-

271 412 U.S. 94 (1973).

272 The FCC has rescinded the regulation that created the doctrine. In the Matter of: Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 2 FCC Rcd. 5272; 63 Rad. Reg. 2d (P&F) 488, August 4, 1987 Released; Adopted August 4, 1987. For a discussion of the place of the Fairness Doctrine in free speech theory, see Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

273 *See, e.g.*, L. TRIBE, *supra* note 67, at 1002-03.

casters required that they retain editorial control over the content of their broadcasts. This reasoning is inconsistent with the principle of equality of communicative opportunity. The loss of editorial control associated with a requirement that broadcasters sell some time for editorial advertisements would pose no threat of reducing the communicative opportunities of broadcasters below a level that provided them equality. Rather, the equality principle demands some reasonable access requirement. Without an access requirement, the domination of discourse by the owners and managers of large media corporations seems inevitable. The result of such domination is the denial of equality of communicative opportunity.

C. Tension Within the Theory: Libel of Public Figures

The interaction between the law of libel and the first amendment serves as the final illustration of my theory. In this area, the tension between the two components of the theory—the distinction between protected communicative action and unprotected strategic action, on the one hand, and the principle of equality of communicative opportunity, on the other—comes to the fore.

At first glance, intentional defamation would appear to be a paradigm case of strategic action and hence unprotected by the first amendment. Because intentional defamation constitutes an attempt to manipulate and not an attempt to reach rational agreement, it should not be protected by the freedom of communicative action. First amendment doctrine has reflected this intuition. Justice Murphy's famous opinion for the Supreme Court in *Chaplinsky v. New Hampshire*[274] classified libel as unprotected speech.[275]

The difficulty with this simplistic view becomes apparent when the crime of seditious libel is considered. If the government has the power to punish what it determines to be strategic communicative action by citizens, and the citizenry lacks a similar power vis-à-vis the government, then the principle of equality of communicative opportunity is threatened and the conditions of the ideal speech situation are not met. This intuition is reflected by the long-standing conviction, acknowledged in *New York Times v. Sullivan*,[276] that the Alien and Sedition Acts of 1798 were in violation of the first amendment.[277]

The challenge posed by the problem of defamation to the theory of

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274 315 U.S. 568 (1942).

275 *See id.* at 572 (dictum); *see also* Roth v. United States, 354 U.S. 476, 486-87 (1957) (dictum); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946) (dictum); Near v. Minnesota, 283 U.S. 697, 715 (1931) (dictum).

276 376 U.S. 254, 273 (1964).

277 *See generally* Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U. L. REV. 1 (1964); Z. CHAFEE, *supra* note 56, at 497-516; L. LEVY, *supra* note 26; J. SMITH, FREEDOM'S FETTERS 3-111 (1956); J. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951).

the freedom of communicative action is to fashion doctrine which will reconcile the need to limit the distorting influence of strategic action with the goal of achieving equality of communicative opportunity. The line of Supreme Court cases which begins with *New York Times v. Sullivan* is best understood as an attempt to achieve such a reconciliation.[278]

The *New York Times v. Sullivan* line recognizes the tension and attempts to resolve it by creating a doctrinal structure that provides strong protection for communicative action when the dangers of inequality of communicative opportunity are greatest, while allowing libel law more flexibility in the control of strategic action when such dangers are minimal. This resolution begins with the "actual malice" test. Justice Brennan's opinion in *New York Times* announced that the first amendment "prohibits a public official from recovering damages unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[279] The Court has required that actual malice in such cases be proved with "clear and convincing" evidence.[280] The actual-malice standard is, in substance and effect, a requirement that the plaintiff demonstrate that the defendant's expression is *not* communicative action and that it *is* strategic action. The clear-and-convincing-evidence component of the test insures that the risk of error will fall on the side of protecting communicative action.

The second component of the *New York Times* resolution is the "public-figure" test, which limits application of the actual malice requirement to cases in which the plaintiff is a public figure. As articulated by Justice Powell's opinion in *Gertz v. Robert Welch, Inc.*,[281] the purpose of affording defendants the protection of the "actual malice" test is to assure equality of communicative opportunity:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury and the state interest in protecting them is correspondingly greater.[282]

The third component of the *New York Times* doctrine provides the constitutional rule that governs cases in which the plaintiff is not a public figure, and hence in which the danger to equality of communicative opportunity is not as substantial. Although this issue was not addressed in

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278 For scholarly commentary, *see* Kalven, *The* New York Times *Case: A Note on The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 205; L. TRIBE, *supra* note 67; M. NIMMER, *supra* note 52. A very useful summary of recent developments is found in Comment, *The Supreme Court—Leading Cases*, 99 HARV. L. REV. 120, 212-23 (1985).

279 376 U.S. at 279-80.

280 *Id.* at 285-86; Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 (1971) (plurality opinion by Brennan, J.).

281 418 U.S. 323 (1974).

282 *Id.* at 344 (footnote omitted).

New York Times v. Sullivan itself, in *Gertz* the Court held that the stringent "actual malice" test is not applied. Instead the common law rule, which imposed strict liability for false statements, is tempered by a constitutional prohibition against the imposition of liability without "fault."[283] The "fault" standard for the imposition of liability when the plaintiff is a private figure represents an attempt to approximate the conditions of the ideal speech situation when the threat to equality is minimal.

The latest wrinkle in the *New York Times v. Sullivan* doctrine is *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[284] in which the Court held that a strict liability standard could be applied in cases in which the plaintiff was a private figure and the speech was not related to a matter of public concern.[285] The context of the *Dun & Bradstreet* decision was commercial; Dun & Bradstreet released a confidential report that Greenmoss had filed a voluntary petitition for bankruptcy to five subscribers. When Greenmoss informed Dun & Bradstreet of the error, the report was collected, but Greenmoss successfully brought an action for compensatory and punitive damages.

Although the decision in *Dun & Bradstreet* focused on the lack of public concern with the topic of the credit report, the decision may be illuminated by Habermas' distinction between the system and the lifeworld. The speech at issue was a product of market forces; the amount of care taken by credit reporting businesses before issuing reports will hinge on profit maximization concerns. Strict liability for erroneous reports will simply be one factor that will enter into the highly rationalized process of decisionmaking. The point is that this sort of speech is outside of the lifeworld, the domain of communicative action; rather, such market-governed speech is squarely within the system, where strategic action predominates. This reinterpretation of the *Dun & Bradstreet* decision finds support in Justice Powell's plurality opinion, which states that "this type of credit reporting" is "like advertising" in that it is "hardy and unlikely to be deterred by incidental state regulation."[286]

Outside the market, a strict liability rule would penalize the expression of viewpoints which are sincerely held, but later turn out to be mistaken. Such a rule might chill the expression of some viewpoints, violating the conditions of the ideal speech situation. On the other hand, extending the stringent protections of *New York Times* to this situation would provide little incentive for communicators to comply with the requirement that participants in the ideal speech situation be motivated by the search for truth. The "fault" standard for communication in the lifeworld provides a compromise between these extremes. Those who en-

283 *Id.* at 347.
284 472 U.S. 749 (1985).
285 *Id.* at 758-59.
286 *Id.* at 762.

gage in communicative action will usually be free from liability; those who engage in strategic action will usually be liable.

The most interesting point that emerges from reconsideration of the libel cases in light of the theory of communicative action is that there is a real tension underlying the shifts in doctrine in this area. The conditions of the ideal speech situation cannot be perfectly realized if the power to punish strategic action can also be used to deny equality of communicative opportunity. *New York Times* attempts to craft a careful balance between the legitimate interest of the state in protecting against the harms of deliberate deception and the danger that libel actions could be used to stifle criticism of government.

As this brief sketch indicates, the theory of communicative action does more than simply account for the broad contours of first amendment doctrine. The application of the theory to the defamation area demonstrates that the theory can serve as a powerful explanation of the tensions and instability of certain areas of first amendment doctrine.

VII. CONCLUSION

A. Explaining First Amendment Decisions: Reconstructive Science and Judicial Intuition

If I have succeeded in my attempt to demonstrate that the theory of communicative action can ground a theory of the first amendment that both fits the existing law and provides a powerful justification for it, a puzzle remains. How is it that American judges have decided cases for decades in accordance with a theory recently proposed by a German philosopher? Most, if not all, of these judges are unaware of the theory of communicative action and its implications for first amendment doctrine.

The answer to this puzzle is, I believe, contained in the theory of communicative action itself. Habermas views the theory as "reconstructive science."[287] That is, the elements of the theory of communicative action relied on in this Article are rational reconstructions of our actual communicative practice. Judges who decide first amendment cases in accord with precedent and their own intuitions of what justice requires in the particular case, as predicted by the theory, would produce doctrine which accords with the theory in light of the historical conditions that exist at the time the decision is made. Judges simply draw upon the knowledge of the ideal speech situation which is available to all competent speakers because it is built into the structure of communication.

Thus, the theory offered in this essay possesses (at least potentially) a sort of explanatory power that theories of legal doctrine rarely possess. The theory of communicative action can explain its own incorporation into legal doctrine.

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287 *See* T. MCCARTHY, *supra* note 42, at 276-79.

B. Freedom of Communicative Action: The Tension Between Ideal Theory and Realization

Reconceptualizing the first amendment as the freedom of communicative action yields a powerful theory of free speech. The speech act theory provides an understanding of the relationship between speech and action and of the diverse functions of speech. The distinction between communicative and strategic action grounds the line between protected and unprotected speech. The principle of equality of communicative opportunity gives the right its fundamental content.

The ideal speech situation, on which the theory is modeled, is, however, an *ideal* of rational communication and not a model which describes all *real* or empirical speech situations. Viewing the first amendment as embodying an ideal—the freedom of speech—which has not yet been fully realized due to practical constraints, yields the following insight: first amendment doctrine will of necessity be in a state of flux and tension so long as practical constraints create tradeoffs between realization of the various conditions of the ideal situation. This point has been illustrated in this essay in the tensions in first amendment defamation doctrine.

Thus, one of the greatest virtues of the theory of communicative action as a theory of the freedom of speech is that it explains the tensions and instability of first amendment doctrine; in other words, the theory explains why the persistent hard cases of first amendment doctrine are truly hard.

C. Legal Thought as Social Theory: Implications for the Theory of Communicative Action

Finally, I return to the second purpose of this Article. The juxtaposition of the theory of communicative action with free speech doctrine can be viewed as a thought experiment aimed at testing the theory itself. Viewed in this light, some tentative suggestions about Habermas' theory can be made.

First, although the distinction between strategic and communicative action is difficult to draw, the mixed-nature objection is not conclusive. Habermas' contention that competent speakers have the ability to make such a distinction is supported by the legal data. First amendment doctrine requires judges and juries to distinguish between communicative and strategic action; in the case of the "actual malice" test the distinction is explicitly and formally incorporated into the law. The seeming ability of participants in the legal system to make this distinction is strong evidence that it can be made.

Second, the imperfect realization of the conditions of the ideal speech situation in first amendment doctrine provides support for Habermas' view that the ideal can be both a yardstick against which

practice can be measured and an "anticipation"—an ideal that is capable of progressive realization as practical constraints permit.

This Article has examined the possible ramifications of Habermas' theory of communicative action for interpretation of the freedom of speech. Habermas' theory of communicative action provides an elegant and powerful framework for developing a theory of the freedom of communicative action. The distinction between communicative action and strategic behavior and the principle of equality of communicative opportunity go a long way toward explaining and justifying the core of first amendment doctrine, but they also enable a reinterpretation of the freedom of speech that can serve as the basis for a comprehensive critique of existing doctrine. At the same time, I have tried to illuminate some of the difficulties in the theory of communicative action by exploring them in the relatively concrete context of first amendment doctrine. I hope that the result is a clearer understanding of both the theory of communicative action and the freedom of speech.