
**SUBSTANTIVE DUE PROCESS AS A SOURCE OF
CONSTITUTIONAL PROTECTION FOR
NONPOLITICAL SPEECH**

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*Present First Amendment doctrine presumptively protects anything within the descriptive category “expression” from government regulation, subject to balancing against countervailing government interests. As government actions during the present “war on terrorism” have made all too clear, that doctrine allows intolerable suppression of political debate and dissent – the expressive activity most integral to our constitutional design. At the same time, present doctrine fails to give a clear account of why the Constitution protects expressive autonomy and when that protection properly should yield to government interests, leading to an inconsistent and unsatisfying free speech regime. In this article, Professor Magarian advocates a bifurcation of free speech doctrine: protect only political speech under the First Amendment, subject to no countervailing interest but the interest in sustaining political discourse itself; meanwhile, protect nonpolitical speech as a matter of substantive due process. This substantive due process proposal draws on the Supreme Court’s recent decision in *Lawrence v. Texas*, whose two principal contributions to the doctrine – firmly grounding due process protection in the value of personal autonomy and discrediting purely moral government regulations – provide a reliable basis for protecting nonpolitical speech alongside other behavior whose primary value lies in fostering personal autonomy. Shielding nonpolitical speech under the Due Process Clause rather than the First Amendment would allow courts to deepen the First Amendment’s protection of political speech while providing a more coherent and consistent rationale for protecting nonpolitical speech.*

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As the present war in Iraq and the campaign against international terrorism have dragged on, the federal and state governments as well as nongovernmental institutions have grown increasingly bold in their efforts to suppress political debate and dissent in the United States. Law enforcement officers infiltrate and bully peaceful dissident groups; police crack down brutally on mass demonstrations; cities confine protesters at major political events to ironically designated “free speech zones.”² These abuses buttress a contention, familiar from the work of several prominent First Amendment theorists, that the Supreme Court can afford political debate and dissent sufficient constitutional protection only by aiming First Amendment jurisprudence exclusively at protecting political speech: expression whose primary value lies in its contribution to political discourse.³ Narrowing the First Amendment’s scope to encompass only political speech would allow the Court to deepen the force of First Amendment protection, properly acknowledging the unique importance of political speech for the health of our democratic system.

The democracy-focused approach to expressive freedom, however, has long struggled against the far more influential idea that the Free Speech Clause exists to guarantee individual autonomy.⁴ On this view, all speech deserves the same degree of constitutional protection, because all speech entails the same exercise of autonomous will. Accordingly, present First Amendment doctrine privileges breadth over depth of constitutional protection, giving all behavior that fits the descriptive category “speech” the same presumption of protection against government regulation but balancing all expressive interests against countervailing regulatory interests.⁵ The Court’s substantial embrace of autonomy as the basis for First Amendment doctrine reflects the widespread appeal of autonomy-based conceptions of individual rights. The choice of autonomy over democracy as the dominant First Amendment value also reflects the cost a democracy-focused approach to the First Amendment could exact in suppression of nonpolitical speech. Deepening protection for political speech by narrowing the First Amendment’s scope would compromise protection of nonpolitical expression, including much art, sexually explicit speech, and commercial advertising. The problem with the autonomy-focused approach to expressive freedom is that it dilutes the First Amendment’s protection of political speech by allowing even trivial government interests to trump

² For a discussion of these and related tactics, see *infra* notes 31-87 and accompanying text.

³ For a discussion of this democracy-focused approach to the First Amendment, see *infra* notes 20-30 and accompanying text. For further discussion about defining the category of political speech, see *infra* notes 90-115 and accompanying text.

⁴ For a discussion of this autonomy-focused approach to the First Amendment, see *infra* notes 9-13 and accompanying text.

⁵ For further discussion of undifferentiated balancing of interests as a central element in present First Amendment doctrine, see *infra* notes 14-19 and accompanying text.

the expressive interest in advancing political debate. In addition, present First Amendment doctrine, by treating expressive freedom as a negative right rather than a substantive value, fails to establish why autonomy matters in speech controversies and when autonomy values should yield to government regulatory interests.

An ideal regime of expressive freedom would protect political debate with the depth of the democracy-focused First Amendment paradigm while simultaneously casting a broad enough net to safeguard speech that advances autonomy rather than democracy. The Supreme Court recently opened a path toward such an ideal regime – a path that would expand constitutional speech protection beyond the First Amendment, into a distinct source of constitutional rights. In 2003, the Court held in the landmark case of *Lawrence v. Texas*⁶ that state bans on “sodomy” violate the Fourteenth Amendment’s substantive due process guarantee. *Lawrence* has potential importance for speech protection because of the decision’s two boldest elements: its emphatic identification of substantive due process with the normative value of personal autonomy and its prohibition of state regulations that rest purely on moral disapproval of behavior. By establishing that the Due Process Clause safeguards behavior integral to personal autonomy, the Court created an alternative repository for the idea that nonpolitical speech essential to personal autonomy deserves constitutional protection.⁷ By interposing the Due Process Clause against moral regulations, the Court replicated in the substantive due process setting the First Amendment’s antipathy toward official attacks on socially undesirable ideas.⁸ Substantive due process doctrine after *Lawrence* allows for appropriate balancing of expressive autonomy interests against government interests in preventing tangible harms.

This article proposes that the Court fulfill the speech-protective potential of *Lawrence* by transplanting the Constitution’s protection for nonpolitical speech – speech that primarily serves the interest in personal autonomy as distinct from the interest in democratic debate – from the First Amendment to the Due Process Clause. Invoking substantive due process to protect nonpolitical speech creates an unprecedented opportunity to deepen the First Amendment’s protection of political speech while improving over present First Amendment doctrine in effectuating the broad consensus for protecting speech that primarily serves personal autonomy. The First Amendment’s Free Speech Clause would assume a coherent focus based on the importance of political debate for a healthy democratic system. At the same time, the Constitution would protect nonpolitical expression based not on the arid premise that such expression is formally “speech” but on the crucial

⁶ 539 U.S. 558 (2003)

⁷ See *infra* notes 163-186 and accompanying text.

⁸ See *infra* notes 187-209 and accompanying text.

understanding that nonpolitical expression, to the extent it advances personal autonomy, benefits society as surely as political expression does, although in a materially different way.

The article proceeds in three parts. The first part establishes both the wisdom and the difficulty of focusing First Amendment doctrine on political speech. It reprises the theoretical case for a democracy-focused First Amendment and substantiates that case by describing the government's campaign against political dissent since the 2001 terrorist attacks. It then discusses the cost for nonpolitical expression of a First Amendment limited to protecting political speech. Finally, it describes and criticizes First Amendment theorists' prior attempts to minimize that cost. The article's second part examines *Lawrence v. Texas* in the context of the Court's previous substantive due process jurisprudence and explains how the *Lawrence* Court's innovations facilitate shifting constitutional protection of nonpolitical speech from the First Amendment to the Due Process Clause. The final part examines what difference a shift to due process protection would make for constitutional doctrine in three important, controversial areas of substantially nonpolitical speech: artistic and cultural expression, pornography, and commercial advertising. Shielding nonpolitical expression behind the Due Process Clause rather than the First Amendment would expand some aspects of constitutional speech protection beyond their present scope while diminishing others, and the shift would strengthen the theoretical bases for constitutionally shielding both political and nonpolitical speech.

I. THE PUBLIC RIGHTS THEORY OF EXPRESSIVE FREEDOM AND THE PROBLEM OF NONPOLITICAL SPEECH

A. *Why Limit the First Amendment to Protecting Only Political Speech?*

1. *Private Rights vs. Public Rights in Free Speech Theory*

The dominant influence on the Supreme Court's First Amendment jurisprudence over the past three decades has been the private rights theory of expressive freedom.⁹ The private rights theory treats the First Amendment as a guarantor of individual autonomy.¹⁰ That emphasis on autonomy generates a formal vision of expressive freedom.¹¹ A regulation or action raises a First Amendment concern whenever the government abridges expressive opportunities that individuals or entities

⁹ For a detailed portrayal of the private rights theory, see Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1947-59 (2003) (hereinafter Magarian, *Public Rights*).

¹⁰ For further discussion of the idea of autonomy that animates the private rights theory, see *infra* notes 118-121 and accompanying text.

¹¹ See Magarian, *Public Rights*, *supra* note 9, at 1954-56.

secure in the private marketplace.¹² Although present free speech doctrine rests on a concern with personal autonomy, the doctrine says little about what autonomy is or why autonomy matters; rather, it simply presumes that speaking reflects an important exercise of autonomous will. The private rights theory requires negative protection against government action rather than identifying any affirmative purpose of expressive freedom. Accordingly, it extends First Amendment protection to all expression without regard to category. Because such broad protection threatens to limit a wide range of government authority, the private rights theory employs a balancing methodology, manifest in the Supreme Court's familiar framework of tiered means-ends scrutiny, which allows many government restrictions on speech to survive First Amendment review.¹³

The Supreme Court frequently mouths the platitude that political expression has special significance under the First Amendment.¹⁴ Its decisions, however, have paved the way for the present governmental assault on political dissent¹⁵ by demonstrating how the private rights theory's balancing methodology serves to validate restrictions on political speech. Most such decisions have turned on the Court's subjecting speech restrictions deemed content-neutral and restrictions that apply to speech on ordinary government property to more lenient judicial review than it imposes on content-based regulations of speech on private property or in "public forums." Illustrative is *Clark v. Community for Creative Nonviolence*,¹⁶ in which advocates for increased government attention to the problem of homelessness sought to dramatize their agenda by sleeping in tents erected in Lafayette Square Park, in view of the White House. The Court, ignoring the distinctive impact of this form of political advocacy, allowed the government to suppress it under a regulation that restricted sleeping in national parks.¹⁷ The private rights

¹² See *id.* at 1957-58.

¹³ See *id.* at 1958-59.

¹⁴ Recent examples include *Virginia v. Black*, 538 U.S. 343, 365 (2003) (emphasizing need for First Amendment protection of cross burning that constitutes "core political speech"); *Republican Party v. White*, 536 U.S. 765, 775 (2002) (claiming that "speech about the qualifications of candidates for public office" is "a category of speech that is 'at the core of our First Amendment freedoms'" (quoting *Republican Party v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001)); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (echoing statement in *Buckley v. Valeo*, 424 U.S. 1, 16 (1976), that "the constitutional [First Amendment] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186 (1999) (characterizing First Amendment protection as at its "zenith" for "core political speech").

¹⁵ For a detailed discussion of recent government suppression of political debate, some of it sanctioned by federal courts, see *infra* notes 31-87 and accompanying text.

¹⁶ 468 U.S. 288 (1984).

¹⁷ See *id.* at 293-99. For a similar ruling in a different setting, see *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (upholding restriction on political groups' access to public employee charity campaign on ground that campaign was government property and "nonpublic forum").

theory has allowed the Court to uphold restrictions on political expression in other cases by deeming a speaker's invocation of regulatory mandates to allow expression, and not a government-facilitated decision to restrict speech, as the "public" action subject to constitutional sanction. In *CBS v. Democratic Nat'l Comm.*,¹⁸ for example, the Court rejected antiwar advertisers' First Amendment challenge to the major broadcast networks' refusal to sell them advertising time. A plurality dismissed out of hand the idea that the networks' public licenses imbued them with quasi-governmental authority and thus First Amendment obligations.¹⁹

A series of First Amendment theorists beginning with Alexander Meiklejohn²⁰ has developed the public rights theory of expressive freedom,²¹ an alternative vision of the Free Speech Clause that contrasts sharply with the private rights theory. The public rights theory views the free speech guarantee of the First Amendment not as a negative protection against government interference with personal autonomy but rather as a Madisonian means to the end of democratic government.²² Under the public rights theory, the central purpose of the Free Speech Clause is to ensure that members of the political community receive the information they need to make informed decisions about matters of public policy.²³ That purpose is both narrow and critically important. Accordingly, the public rights theory rejects the balancing methodology of the private rights theory in favor of a categorical approach that would give the First Amendment virtually absolute force against threats to political discourse.²⁴ The practical consequence of the public rights theory is that the government may restrict access to political expression – in Meiklejohn's phrase, "the consideration of matters of public interest"²⁵ – only where necessary to safeguard political debate itself.²⁶ Writing in

¹⁸ 412 U.S. 94 (1973).

¹⁹ See *id.* at 121 ("Application of [First Amendment] standards to broadcast licensees would be antithetical to the very idea of vigorous, challenging debate on issues of public interest.").

²⁰ See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965).

²¹ For a detailed portrayal of the public rights theory, see Magarian, *Public Rights*, *supra* note 9, at 1972-90. The most important contributors to the public rights tradition after Meiklejohn are Owen Fiss and Cass Sunstein. See Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) (hereinafter Fiss, *Why the State?*); Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

²² See Magarian, *Public Rights*, *supra* note 9, at 1983-84. Vicki Jackson has recently pointed out that a politically focused theory of expressive freedom draws support from the ascent, after the First Amendment's enactment, of equal citizenship and popular election of representatives as central features in our constitutional order. See Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 295 & n.119 (2003).

²³ See Magarian, *Public Rights*, *supra* note 9, at 1983-85.

²⁴ See *id.* at 1987-88.

²⁵ MEIKLEJOHN, *supra* note 20, at 79.

²⁶ See *id.* at 48-49. Meiklejohn drew this idea from Justice Brandeis' concurrence in *Whitney v. California*, 274 U.S. 357 (1927), from which he approvingly quoted the

the late 1940s and early 1950s, he saw pressing national challenges that made pluralistic, participatory democracy critically important, even as governmental and societal pressures strangled the political dissent necessary for democratic engagement.²⁷ Treating political speech as the central object of expressive freedom ensures that the First Amendment will not fail in its essential purpose of fostering and facilitating self-government.

Focusing the First Amendment on political speech, however, requires a critical tradeoff. If the First Amendment is to provide virtually absolute protection for political discourse, then courts must categorically distinguish political from nonpolitical speech. For Meiklejohn, nonpolitical expression – art, entertainment, scientific inquiry – is “private speech,” outside the logical boundaries of First Amendment protection.²⁸ Like a sailor who throws excess weight off a sinking ship, Meiklejohn calls for sacrificing what he considers less essential categories of speech in order to ensure thorough protection of the one category – political speech – most integral to the nation’s democratic fortunes. Only a tradeoff of broad protection, which encompasses a wide range of speech but subjects it to judicial balancing against countervailing regulatory priorities, for deep protection, limited to political speech but virtually absolute in its resistance to suppression, will lead to a First Amendment regime sufficient to protect vigorous political debate and dissent.

No less distinguished a pair of strange bedfellows than Robert Bork and Cass Sunstein has elaborated the case for limiting the First Amendment’s scope to encompass only political speech, although their arguments follow widely divergent courses of reasoning. According to Bork, courts must focus the First Amendment on political expression in order to avoid the judicial activism that protecting any less constitutionally grounded categories of expression would entail.²⁹ For Sunstein, reserving the First Amendment’s core for political speech would both effectuate the Constitution’s central purpose of fostering public deliberation and leave speech that hinders the development of

proposition that “no danger flowing from speech can be judged clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.” *Id.* at 377 (Brandeis, J., concurring).

²⁷ For a detailed account of Meiklejohn’s intellectual process in developing his First Amendment theory, with particular attention to the influence of anticommunism run amok, see ADAM R. NELSON, *EDUCATION AND DEMOCRACY: THE MEANING OF ALEXANDER MEIKLEJOHN 1872-1964*, at 263-295 (2001).

²⁸ See MEIKLEJOHN, *supra* note 20, at 79-80 (discussing private speech generally); *id.* at 83-84 (characterizing scholarly pursuits, particularly in the sciences, as partially private); *id.* at 86-66 (criticizing commercial radio as reflecting private rather than public interests).

²⁹ See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20 (1971). Even as Bork advocates the centrality of political expression, he departs significantly from the public rights theory by endorsing criminalization of speech that advocates forcible overthrow of the government. See *id.*

popular sovereignty open to certain kinds of regulation.³⁰ Although Bork and Sunstein make forceful arguments for elevating political speech to First Amendment primacy, neither put a dent in the Court's commitment to the private rights theory. One reason for their lack of influence is their inability to match the historical urgency of Meiklejohn's McCarthy-era plea for political openness: Bork's article appeared in 1971, during a golden age of judicial support for political dissent,³¹ while Sunstein wrote in 1992, amid an era of relative national calm.

2. *The Current Surge in Suppression of Political Speech*

The terrorist attacks of September 11, 2001, set events into motion that have revived with a vengeance the historical urgency of the public rights theory's call to circle the First Amendment's wagons around political speech. Our government's war on terrorism has fostered a climate of hostility toward political dissent in the United States unseen since Meiklejohn's time. Elsewhere I have documented the recent increase in nongovernmental institutions' suppression of political debate and dissent.³² In the more traditional zone of First Amendment concern, federal and state law enforcement officials since 2001 have dramatically increased their efforts to intimidate, marginalize, and silence political dissenters. These efforts have chilled dissent and exerted enormous pressure toward political conformity. A spokesman for the California Anti-Terrorism Information Center exemplifies the present atmosphere: "If you have a protest group protesting a war where the cause that's being fought against is international terrorism, you might have terrorism at that protest. You can almost argue that a protest against that is a terrorist act."³³ In the few instances when federal courts have entertained First Amendment challenges to the government's recent attacks on political dissent, they have employed the balancing methodology of the private rights theory to justify those attacks. Most muffled dissenters have never even gone to court, many certainly because of the costs of litigation but others, no doubt, because they have concluded from the shape of present free speech doctrine that a court would only validate government censorship.

The new wave of official aggression against political protestors first stirred in November 1999, when Seattle police greeted protestors against

³⁰ See Sunstein, *supra* note 21, at 305.

³¹ That year brought the most profound and farthest reaching majority opinion the Supreme Court has ever delivered about the value of speech generally and political dissent in particular. See *Cohen v. California*, 403 U.S. 15 (1971).

³² See Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 G.W.U. L. REV. 101, 115-27 (2004) (hereinafter Magarian, *Wartime Debate*).

³³ Michelle Goldberg, *Outlawing Dissent*, Salon.com (Feb. 11, 2004), at <http://archive.salon.com/news/feature/2004/02/11/cointelpro/print.html> (last visited Oct. 12, 2004) (quoting Mike Van Winkle).

a World Trade Organization meeting with pepper spray, concussion grenades, and rubber bullets, and the mayor created a “no protest zone” around the Seattle Convention Center.³⁴ In the wake of the Seattle debacle, cities that host high-profile public events have routinely invoked law enforcement necessity to restrict protestors within distant, cramped ghettos – dubbed, in an Orwellian flourish that swallows irony like a black hole, “free speech zones.” This tactic, which absurdly overreaches legitimate security needs, prevents dissenting voices from challenging the potent propaganda of major public spectacles and expanding public debate about important issues. During the 2000 Democratic National Convention, for example, the Los Angeles Police Department established a security perimeter around the Staples Center that kept protestors 260 yards away from convention delegates. In that case, however, a federal judge ruled the perimeter unconstitutional, finding its size and around-the-clock enforcement not narrowly tailored to the government’s interest in public safety.³⁵ That decision reflects what we usually assume to be the axiomatic First Amendment protection of political protest.³⁶

Unfortunately, the September 11th attacks eroded courts’ resolve against antiprotest measures. In July 2004, two protest groups requested a preliminary injunction to prevent the City of Boston from designating a 300-foot by 90-foot space under abandoned subway tracks as the “free speech zone” for the 2004 Democratic National Convention.³⁷ The zone was “surrounded by two rows of concrete barriers,” each topped with an eight-foot high chain link fence covered in tightly woven mesh fabric. Looser mesh netting attached the top of fence to the subway tracks above, which were wrapped in razor wire. A federal judge described the space as “a grim, mean, and oppressive space” that created an impression “of an internment camp” or “a holding pen where potentially dangerous persons are separated from others.”³⁸ He stressed that the design of the zone “is an offense to the spirit of the First Amendment . . . a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights.”³⁹ Nonetheless, he refused to enjoin the zone, citing the constraints of the physical location and law enforcement’s safety concerns as barriers to a solution that would “vindicate plaintiffs’ First Amendment rights.”⁴⁰ Less than a month later, another federal judge

³⁴ See Patrick F. Gillham & Gary T. Marx, *Complexity and Irony in Policing and Protesting: The World Trade Organization in Seattle*, 27 SOC. JUST. 212, 217 (2000).

³⁵ See *Service Employee Int’l Union et. al v. City of Los Angeles et. al*, 114 F. Supp. 2d 966, 971 (C.D. Cal. 2000) (holding that designated security zone unconstitutionally infringed protestors’ First Amendment rights).

³⁶ See *Cohen v. California*, 403 U.S. 15 (1971) (invoking First Amendment to overturn conviction of antidraft protestor for wearing “Fuck the Draft” t-shirt in courthouse).

³⁷ See *Coalition to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61 (D. Mass. 2004), *aff’d*, 378 F.3d 8 (1st Cir. 2004).

³⁸ *Id.* at 67, 74-75.

³⁹ *Id.* at 76.

⁴⁰ *Id.*

sustained the New York City Parks Department's decision to deny the National Council of Arab Americans a permit to protest on the Great Lawn during the 2004 Republican National Convention.⁴¹ Although the court acknowledged the site's symbolic value for the protestors, it held that the government's interest in maintaining the park outweighed their interest in symbolic expression.⁴²

When protestors have ventured outside their cages, they have learned firsthand about the power of law enforcement. In October 2003, federal agents arrested a retired steelworker and his sister after they refused to move their anti-Bush sign to a designated "free speech area" at a campaign rally in Pittsburgh.⁴³ Based on this and numerous similar incidents, the ACLU filed suit against the Secret Service, contending that segregating protestors violated their constitutional rights.⁴⁴ Although the Secret Service pledged to discontinue segregating protestors,⁴⁵ the practice continues. When President Bush appeared at the West Virginia Capitol for a July 4, 2004 campaign rally, police arrested a young couple wearing anti-Bush t-shirts and charged them with trespassing – on public property.⁴⁶ In September 2004, a woman wearing a t-shirt stenciled "President Bush You Killed My Son," to protest her son's death in Iraq, shouted questions at First Lady Laura Bush during a campaign speech. New Jersey police arrested her for defiant trespass even though she had a ticket to attend the rally.⁴⁷

Government officials have also used aggressive investigation and questioning to intimidate people who express dissenting political views. In November 2001, FBI and Secret Service agents appeared at a small

⁴¹ See *Nat'l Council of Arab Americans v. City of New York*, 2004 U.S. Dist. LEXIS 16628 (S.D.N.Y. Aug. 23, 2004) (characterizing defendants' interest in maintaining and managing public park as significant government interest).

⁴² See *id.* at *11, *41 (recognizing plaintiffs' belief that location was symbolic but denying plaintiffs' request for preliminary injunction due to doctrine of laches and plaintiffs' failure to show likelihood of success on merits).

⁴³ See Dave Lindorff, *Keeping Dissent Invisible*, Salon.com (Oct. 16, 2003) (documenting protestor's arrest for disorderly conduct when he refused to display sign "The Bushes must love the poor – they've made so many of us" in segregated area behind chain link fence). http://archive.salon.com/news/feature/2003/10/16/secret_service/print.html (last visited Aug. 16, 2004).

⁴⁴ See *id.* (describing ACLU's findings of at least 17 similar incidents in seven states and ACLU suit against Secret Service).

⁴⁵ See Jennifer Bundy, *Couple arrested for wearing anti-Bush T-shirts to W. Va. event sues federal officials*, BOSTON GLOBE (Sep. 14, 2004) (noting Secret Service agreed to discontinue segregation policy), available at http://www.boston.com/dailynews/258/nation/Couple_arrested_for_wearing_an:.shtml (last visited Sep. 15, 2004).

⁴⁶ See *id.* (describing couple's arrest for trespass at Bush appearance).

⁴⁷ See *Soldier's mom interrupts Laura Bush's speech*, CNN.com (Sep. 20, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/09/17/bush.protestor/index.html> (last visited Sep. 28, 2004). The Secret Service is currently deciding whether the woman, Sue Niederer, violated a federal law banning threats to kill the president when she told an online magazine that "she wanted to 'rip the president's head off'". *Secret Service Reviews Comments By Dead Soldier's Mom*, WNBC.com (Sep. 22, 2004), at <http://www.wnbc.com/print/3751305/detail.html> (last visited Sep. 28, 2004).

Houston art museum and interrogated a curator for over an hour about a new exhibit called “Secret Wars,” which focused on covert government operations.⁴⁸ In November 2003, the U.S. Attorney’s Office in Iowa served Drake University with a subpoena demanding information about an on-campus anti-war demonstration sponsored by the University’s National Lawyers’ Guild chapter.⁴⁹ The government claimed the subpoena was necessary for the investigation of a single trespassing incident on nearby National Guard property. Only mounting public pressure led the U.S. Attorney to withdraw the subpoena in February 2004.⁵⁰ FBI officials have interrogated political demonstrators in advance of several public events, including the 2004 Democratic and Republican National Conventions.⁵¹ The Department of Justice has also investigated people associated with Internet sites the government deems subversive of U.S. interests. Relying extensively upon its powers under the U.S.A. Patriot Act,⁵² the Department has charged website owners whose sites contain incendiary information with “provid[ing] ‘expert advice or assistance’” to terrorists.⁵³ Other objects of FBI and Secret Service attention have included a middle-aged Californian who criticized President Bush’s ties to oil companies during a conversation at his gym⁵⁴ and a North Carolina college freshman who displayed a poster in her dorm room that criticized President Bush’s record on capital punishment as governor of Texas.⁵⁵

⁴⁸ See Kris Axtman, *Political Dissent Can Bring Federal Agents to the Door*, CHRISTIAN SCIENCE MONITOR, Jan. 8, 2002, at 1.

⁴⁹ See Monica Davey, *Subpoenas on Anti-War Protest Dropped*, N.Y. TIMES, Feb. 11, 2004, at A18 (discussing subpoena issued to Drake University for participant and content information about NLG-sponsored antiwar forum), available at <http://www.why-war.com/news/2004/02/11/subpoena.html> (last visited Oct. 12, 2004).

⁵⁰ See *id.*

⁵¹ See Eric Lichtblau, *F.B.I. Goes Knocking for Political Troublemakers*, N.Y. TIMES, Aug. 16, 2004, at A1 (discussing FBI interviews of “past protestors and their friends and family members” in six states in weeks prior to both 2004 political conventions) (hereinafter Lichtblau, *Knocking*).

⁵² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

⁵³ Eric Lipton & Eric Lichtblau, *Even Near Home, a New Front Is Opening in the Terror Battle*, N.Y. TIMES, Sep. 23, 2004, at A12. In 2003 the government leveled such charges against Sami Omar al-Hussayen, a recently emigrated PhD candidate, after he established websites devoted to Middle East news that cheered suicide attacks. A federal judge allowed the case to reach a jury. Despite scouring “files and files and files of evidence,” the jurors acquitted al-Hussayen because they could find no evidence that he was affiliated with a terrorist organization. *Id.* (quoting juror). Similar charges are pending against a British citizen, but British authorities so far have refused to extradite the defendant to the United States. See *id.* (discussing charges pending against Babar Ahmad in federal district court in Connecticut).

⁵⁴ See Matthew Rothschild, *The New McCarthyism*, PROGRESSIVE, Jan. 2002, at 18.

⁵⁵ See Axtman, *supra* note 48. For a discussion of other recent instances in which federal law enforcement officers have investigated or pressured people who displayed or created works that satirized the Bush Administration, see Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843,

Numerous people who have mounted peaceful protests against the present government have paid for their efforts in blood, liberty, or positions in government institutions. In November 2001, the School of the Americas, a controversial operation that trains foreign nationals in military tactics, cracked down on an annual, nonviolent demonstration at Fort Benning, claiming the protest “was not appropriate during the war on terrorism.”⁵⁶ Although the event remained nonviolent, law enforcement officials arrested and prosecuted dozens of protestors on trespassing charges.⁵⁷ A year later, Miami police attacked protestors who marched in opposition to a Free Trade Area of the Americas meeting.⁵⁸ When police announced over a bullhorn that the demonstration would continue only if it remained peaceful, a protestor responded, “Does that include police violence?” The police replied with batons, tear gas, rubber bullets, pepper spray, and concussion grenades.⁵⁹ The congressionally funded United States Institute of Peace forced a conflict resolution trainer to resign because of her public statements criticizing U.S. foreign policy.⁶⁰ The University of South Florida fired a tenured professor for harshly criticizing Israel.⁶¹ A West Virginia high school suspended a student for wearing a t-shirt that said “Racism, Sexism, Homophobia, I’m So Proud of People in the Land of the So-Called Free,” and the West Virginia Supreme Court upheld the suspension.⁶² Officials got away with these actions despite the First Amendment’s ostensible protection of political expression by public employees⁶³ and students.⁶⁴

Infiltration and monitoring of peaceful political groups violates political dissenters’ First Amendment right of political association,⁶⁵ and it also offends First Amendment principles by casting the very act of opposing the government as legally suspect, and – if the government strategically publicizes the monitoring – by chilling expression.

847-53 (2004).

⁵⁶ Father Roy Bourgeois, founder of Schools of the Americas Watch, *quoted in* Alisa Solomon, *Things We Lost in the Fire*, VILLAGE VOICE, September 17, 2002, at 32.

⁵⁷ Solomon, *supra* note 56.

⁵⁸ See Ben Manski, *Massacre in Miami? It Was a Defeat for Protestors*, CAPITAL TIMES, Nov. 27, 2003, at 13A. Miami police had prepared for the meeting by stockpiling riot gear, erecting “an 8-foot high security fence around the protest zone” and setting up a “rumor control” hotline to field calls about alleged protests. Tamara Lush, *Trade Talks Put Miami on Edge*, ST. PETERSBURG TIMES, Nov. 17, 2003, at 1A.

⁵⁹ See Manski, *supra* note 58, at 13A.

⁶⁰ See Rothschild, *supra* note 54.

⁶¹ See Solomon, *supra* note 56.

⁶² See Rothschild, *supra* note 54.

⁶³ See *Pickering v. Board of Educ.*, 390 U.S. 986 (1968) (holding that First Amendment barred Board of Education from firing teacher for making public statements critical of board’s policies).

⁶⁴ See *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969) (holding that First Amendment barred public school from suspending students for wearing black armbands to protest Vietnam War).

⁶⁵ Cf. *NAACP v. Alabama*, 357 U.S. 449 (1958) (rejecting on First Amendment grounds state’s demand for civil rights group’s membership list).

Nonetheless, government infiltration and monitoring of dissenters, so infamous from the days of McCarthyism and COINTELPRO,⁶⁶ has reemerged during the present campaign against terrorism. After the September 11 attacks, Attorney General John Ashcroft loosened guidelines for federal investigations, in order to ensure that “if there is a rally of people who are criticizing the United States and its policies and saying that the United States will someday perhaps be destroyed because of that, the FBI agent can go and listen to what’s being said.”⁶⁷ In 2003, the FBI encouraged local law enforcement officials to monitor antiwar groups and political protests for signs of terrorist activity,⁶⁸ and the federal government has poured funding into local “red squads.”⁶⁹ When an FBI employee argued that those mandates confused protected speech with illegal activity, the Department of Justice’s Office of Legal Counsel declared the activity constitutionally appropriate.⁷⁰ Since then groups across the nation, including the Colorado Coalition Against the War in Iraq, the American Friends Service Committee, and Peace Fresno have reported undercover officers’ infiltrating their organizations.⁷¹

In an effort to publicize government assaults on political dissent, the ACLU and the Center for National Security Studies filed Freedom of Information Act requests for statistics regarding the Justice Department’s post-September 11th activities. When the Department denied each request, the groups filed suit in federal district court; in each case, the court sided with the government. One federal judge upheld the Justice Department’s refusal to release general statistics regarding its use of various surveillance and investigatory tools authorized by the Patriot Act, holding that the Department’s interest in protecting national security justified secrecy.⁷² Another federal judge held that the Patriot Act’s national security exemption protected the Department’s refusal to turn over statistics regarding the frequency of its requests for “tangible things in an ‘authorized investigation.’”⁷³ The court cited longstanding deference to the Executive Branch regarding national security matters and asserted judicial incompetence to “second-guess the executive’s

⁶⁶ See Goldberg, *supra* note 33.

⁶⁷ *Id.* (quoting Attorney General Ashcroft in 2002 interview).

⁶⁸ See Lichtblau, *Knocking*, *supra* note 51 (discussing FBI mandates to local law enforcement agencies regarding monitoring of political dissenters and internal complaint filed by employee citing concerns about mandates’ infringement of constitutional free speech protections).

⁶⁹ See Solomon, *supra* note 56.

⁷⁰ See Lichtblau, *Knocking*, *supra* note 51 (quoting Department of Justice opinion as saying “given the limited nature of such public monitoring, any possible ‘chilling’ effect caused by the bulletins would be quite minimal and substantially outweighed by the public interest in maintaining safety and order during large-scale demonstrations”).

⁷¹ See Goldberg, *supra* note 33.

⁷² *American Civil Liberties Union v. United States Department of Justice*, 265 F. Supp. 2d 20 (D. D.C. 2003).

⁷³ *American Civil Liberties Union v. United States Department of Justice*, 321 F. Supp. 2d 24 (D. D.C. 2004).

judgment” on national security.⁷⁴ These decisions validated an unprecedented government effort to diminish the public’s access to information about the people’s business.⁷⁵

The First Amendment is supposed to ensure that the news media can vigorously pursue and report news about government actions and proceedings.⁷⁶ But the Bush administration, through control of access to information and occasional overt pressure, has eviscerated the news media’s traditional watchdog role, a process that media corporations’ frequent self-censorship has made shamefully easy.⁷⁷ One particularly important instance of heightened government secrecy is a federal policy, issued within days of the 2001 attacks and altering decades of past practice, of reflexively closing deportation hearings on national security grounds.⁷⁸ Under that policy, the Department of Justice holds unfettered discretion to designate any immigration proceeding a “special interest” matter, based on a belief that the immigrant “might have connections with, or possess information pertaining to, terrorist activities against the United States.”⁷⁹ A “special interest” designation requires courts to seal the case file; remove the case from the docket; and bar the detainee’s family, visitors, and reporters from the proceedings.⁸⁰ This policy has allowed the government to decide the fates of hundreds of immigrants

⁷⁴ *Id.* at 36.

⁷⁵ See Eric Lichtblau, *Government Shrinking Access to Information*, MILWAUKEE JOURNAL-SENTINEL, Nov. 22, 2001, at 28A (describing general increase in government secrecy in wake of September 11 attacks); *On the Public’s Right To Know: The Day Ashcroft Censored Freedom of Information*, S.F. CHRONICLE, Jan. 6, 2002, at D4 (discussing memorandum from Attorney General John Ashcroft that “vigorously urged federal agencies to resist most Freedom of Information Act requests made by American citizens”).

⁷⁶ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding that “the right [of the press and public] to attend criminal trials is implicit in the guarantees of the First Amendment”); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of the Pentagon Papers, leaked government documents related to national security).

⁷⁷ See Magarian, *Wartime Debate*, *supra* note 32, at 117-121 (documenting instances of misinformation and suppression of information by U.S. news media since 2001 terrorist attacks). The Bush Administration’s unprecedented promotion of its policies via Potemkin journalists – including secret payments to opinion commentators, production and distribution of fake television news segments, and issuance of White House press credentials to an incognito conservative activist – has exacerbated the failures of real media outlets. See Frank Rich, *The White House Stages Its “Daily Show,”* N.Y. TIMES, Feb. 20, 2005, at B1 (describing Bush Administration’s disinformation tactics).

⁷⁸ See Directive of Chief Immigration Judge Michael Creppy to All Immigration Judges, Court Administrators (Sept. 21, 2001) (detailing procedures for special interest deportation hearings), at <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf> (last visited Feb. 11, 2005) (hereinafter Creppy Directive). The Creppy Directive altered a longstanding policy that deportation proceedings were open to the public. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002) (“Since 1965 INS regulations have explicitly required deportation hearings to be presumptively open.”) (citing 8 C.F.R. § 3.27).

⁷⁹ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002) (quoting declaration of Dale L. Watson, Executive Assistant Director for Counterterrorism and Counterintelligence at Federal Bureau of Investigation), *cert. denied*, 538 U.S. 1056 (2003).

⁸⁰ See Creppy Directive, *supra* note 78.

without the accountability that open proceedings ensure.⁸¹ The United States Court of Appeals for the Third Circuit has upheld the policy against constitutional challenge,⁸² although the Sixth Circuit has disagreed,⁸³ meanwhile, the D.C. Circuit has upheld the government's refusal even to provide a count of hearings closed under the policy.⁸⁴

The threat of unaccountable deportation does not, of course, represent our government's only recent assault on resident foreign nationals. The First Amendment supposedly protects the expressive rights of noncitizens,⁸⁵ and that protection should carry special importance to the extent citizens care about maximizing the presence of diverse viewpoints in domestic political debate.⁸⁶ Those considerations, however, have not stopped the government from using the exceptional leverage it holds over foreign nationals in the United States to suppress their political association and expression. Government actions, most prominently the broad and seemingly arbitrary practice of questioning and often detaining noncitizens for alleged associations with asserted terrorists, have effectively chilled immigrant communities from speaking out on political issues that strongly affect their interests.⁸⁷

Over the past four years, the First Amendment has failed in its essential task of protecting political dissent. That failure provides powerful support for the tradeoff urged by the public rights theory of

⁸¹ An estimated 600 detainees endured closed hearings through mid-2003. See Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95, 95–96 (2004) (citing figure provided by Solicitor General Theodore Olsen in brief opposing writ of certiorari in *North Jersey Media Group*). Despite evidence that almost none of the people subjected to closed deportation hearings have terrorist connections, the Department has continued to close hearings. See *id.* at 96 & n.8 (noting Department of Justice's acknowledgment that most detainees did not have information regarding terrorist activities). The Department has publicly suggested it may reconsider the Creppy Directive. See *Behind Closed Doors*, INT'L HERALD, May 31, 2003, at 6 (quoting Department as saying that procedures for closed hearings might "likely be revised"). At this time, however, the policy appears unchanged.

⁸² See *North Jersey Media Group*, *supra* (holding Creppy Directive constitutional under *Richmond Newspapers* analysis).

⁸³ See *Detroit Free Press*, *supra* (holding Creppy Directive unconstitutional under *Richmond Newspapers* analysis).

⁸⁴ See *Center for Nat'l Sec. Studies v. United States Department of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003) (sustaining Department of Justice's right to deny Freedom of Information Act request concerning INS detainees), *cert. denied*, 540 U.S. 1104 (2004).

⁸⁵ "Freedom of speech and of press is accorded aliens residing in this country." *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), *citing* *Bridges v. California*, 314 U.S. 252 (1941) (overturning contempt-of-court conviction of alien labor leader that rested on telegram to Secretary of Labor about pending case).

⁸⁶ See MEIKLEJOHN, *supra* note 20, at 118-19 (contending "that unhindered expression must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation").

⁸⁷ See Solomon, *supra* note 56 (discussing broad powers for Attorney General to identify and detain noncitizens suspected of "terrorist" ties under U.S.A. Patriot Act). Many Muslim Americans fear even appearing at community events. See, e.g., *id.* (discussing decreased attendance at Brooklyn Pakistani community festival).

expressive freedom: narrow the scope of the Free Speech Clause to cover only political expression, in order to deepen protection of that most essential category of speech by eliminating the balancing of political expression against government regulatory interests. That tradeoff would improve upon the present state of constitutional protection for political debate and dissent in numerous ways. First, the public rights theory would compel courts to extend political expression far greater protection against government regulation. Unless the government could justify a restraint on political debate as needed to protect political debate itself, the public rights theory would entail a rigorous presumption against the restraint. Second, more dissenters who faced government sanction would avail themselves of judicial process, because courts' adjudications of First Amendment cases necessarily would send a consistent message that our legal system took constitutional protection of political debate seriously. Third, the public rights theory's emphasis on robust political debate as the necessary bottom line of First Amendment doctrine would justify courts in blocking even some nongovernmental constraints on public political debate, at least in wartime.⁸⁸ Fourth, that same bottom-line view of expressive freedom would produce a more open and dynamic political process that would widen the variety of viewpoints present in public political debate.⁸⁹

Making political speech the exclusive object of First Amendment protection would bring impressive benefits. The public rights theory's problem, however, is that its proposed tradeoff of broadly protecting all speech for deeply protecting only political speech entails steep, arguably intolerable costs in exposure of nonpolitical speech to official suppression.

B. *Problems With Protecting Only Political Speech Under the First Amendment*

1. *Distinguishing Political Speech*

Although this article concentrates on the doctrinal consequences of limiting the First Amendment to protection of political speech,⁹⁰ the discussion will benefit from consideration of a logically prior problem: the need to distinguish political from nonpolitical speech. Meiklejohn acknowledged that “[t]he human relations involved in the distinction between the general welfare and individual advantage are deeply and permanently perplexing.”⁹¹ Is art political? Does the arguably transgressive character of pornography render it political? What about commercial information that affects important consumer decisions? Even

⁸⁸ I develop this contention in Magarian, *Public Rights*, *supra* note 9, at 2010-60.

⁸⁹ I develop this contention in Magarian, *Wartime Debate*, *supra* note 32, at 150-68.

⁹⁰ See *infra* notes 116-128 and accompanying text.

⁹¹ MEIKLEJOHN, *supra* note 20, at 81.

if any or all of these categories of speech are not inherently political, do they acquire political character whenever attempts at official censorship make them objects of political controversy?⁹²

Although we tend to experience the familiar as transparent, we should not make the mistake of treating the public rights theory's definitional challenge as a disadvantage in comparison with present First Amendment doctrine. Line-drawing problems inhere in the necessary task of providing a theoretical explanation for expressive freedom.⁹³ The dominant private rights theory of expressive freedom,⁹⁴ which rejects categorization of types of speech, nevertheless entails at least three problematic exercises in line-drawing. First, because some concept must bound the First Amendment's constraint on government authority, the private rights theory's disdain for categorical distinctions requires it to stake a great deal on the notoriously elusive distinction between speech and action.⁹⁵ Second, the private rights theory's balancing methodology requires identifying and comparing distinct regulatory and expressive values.⁹⁶ This balancing process impels courts both to assess the relative importance of different sorts of expressive conduct⁹⁷ and to determine whether a government regulatory interest somehow outweighs a conceptually incommensurable expressive interest.⁹⁸ Third, the private rights theory's negative model of expressive rights places defining emphasis on a rigid distinction between the ephemeral categories of "public" and "private."⁹⁹ Resolving any First Amendment theory's line-

⁹² Critics of the theory have repeatedly noted this problem. Objections to Meiklejohn's distinction between public and private speech immediately formed the leading attack on his First Amendment theory. See NELSON, *supra* note 27, at 270-74 (summarizing and discussing early criticisms). Leading examples include Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 COLO. L. REV. 1109, 1117 (1993) (arguing that Meiklejohn "violates th[e] necessary indeterminacy of public discourse" by limiting what can count as political); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596-97 (1982) (criticizing Meiklejohn's line-drawing); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 N.W.U. L. REV. 1212, 1225-39 (1983) (arguing against distinction between political and commercial speech).

⁹³ For the leading explanation of the need for some theory to ground free speech doctrine, see Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877-78 (1963).

⁹⁴ See *supra* notes 9-13 and accompanying text (describing private rights theory).

⁹⁵ See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (upholding penalty enhancement for racial motivation of crime because enhancement targeted "bias-inspired conduct" rather than expression).

⁹⁶ See *supra* notes 14-19 and accompanying text.

⁹⁷ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam) (concluding that political contributions have less expressive value than political expenditures).

⁹⁸ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-68 (1997) (assessing minor parties' expressive interest in having option to choose another party's nominee as its own "fusion" nominee, assessing state's asserted political stability interests in banning fusion candidacies, and concluding that the latter outweighed the former).

⁹⁹ See Magarian, *Public Rights*, *supra* note 9, at 1956-58 (explaining private rights theory's reliance on public-private distinction to vindicate negative right to expressive

drawing problems requires difficult judgments about whatever factors the theory emphasizes in defining expressive freedom.

Theorists in the public rights tradition have tried to generate a strict definition of political speech. Meiklejohn defines the proper class of protected expression as “speech which bears, directly or indirectly, upon issues with which voters have to deal . . . the consideration of matters of public interest.”¹⁰⁰ Sunstein “treat[s] speech as political when it is both intended and received as a contribution to public deliberation about some issue.”¹⁰¹ These attempts to define political speech share two problems. First, they fail to achieve any clear, satisfying delineation. Meiklejohn’s “directly or indirectly,” Sunstein’s reliance on subjective intent and perception, and their shared emphasis on the uncertain notion of public affairs seem to preclude a stable understanding of which speech counts as “political.” Second, even if we could arrive at a fixed, stable definition of “political speech,” judicial reliance on that definition might stunt growth over time in our understanding of what concerns should become subjects of collective societal deliberation and resolution. Such a definition, for example, might have interfered with our society’s emerging awareness over the past half century of the relationship between sexual identity and political change.¹⁰² Thus, a stable conception of “political speech” appears impossible at best and undesirable at worst.

Efforts to define political speech offer promise, however, if we resist the allure of stability and instead consider “politics” as a dynamic concept.¹⁰³ On this understanding, the category of “political speech” attains distinction not lexically but functionally. Meiklejohn wrote much less about what political speech is than about what it does: it presents “squarely and fearlessly everything that can be said in favor of [governing] institutions, everything that can be said against them.”¹⁰⁴ In his foundational explanation of expressive freedom as a public right, “[t]he principle of the freedom of speech springs from the necessities of the program of self-government.”¹⁰⁵ Accordingly, a practical distinction of political speech transcends any single, abstract inquiry, requiring instead an ongoing examination that encompasses both theoretical inquiry and concrete adjudication.

freedom). For a thorough critique of the public-private distinction in the context of First Amendment doctrine, see Magarian, *Wartime Debate*, *supra* note 32, at 127-55.

¹⁰⁰ MEIKLEJOHN, *supra* note 20, at 79.

¹⁰¹ Sunstein, *supra* note 21, at 304.

¹⁰² See generally WALTER L. WILLIAMS & YOLANDA RETTER EDS., *GAY AND LESBIAN RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY* (2003).

¹⁰³ I have previously advocated a similar distinction in the practice of partisan politics in the United States. See Magarian, *Public Rights*, *supra* note 9, at 1996-2002 (setting forth dynamic party politics theory of political parties’ role in elections).

¹⁰⁴ MEIKLEJOHN, *supra* note 20, at 77.

¹⁰⁵ *Id.* at 27. Professor Fiss, another leading architect of the public rights theory, similarly advocates a “public debate principle” of expressive freedom, under which “[state] action is judged by its impact on public debate, a social state of affairs.” Fiss, *Why the State?*, *supra* note 21, at 786.

Although the Supreme Court knows how to differentiate constitutional speech protection based on distinctions among explicit categories of speech,¹⁰⁶ it probably would implement the public rights theory most effectively not by attempting a rigid delineation of political speech but rather by examining in any given case whether a burden on speech undermined discourse best understood as concerning matters of public deliberation or, in contrast, undermined speech best understood as serving some individual's interest in personal autonomy. The Court has shown an understanding of how to draw exactly this sort of distinction in more limited First Amendment contexts. In a defamation case, the court will afford a defendant's allegedly defamatory statement heightened insulation from liability if the statement's object is a "public official"¹⁰⁷ or a "public figure."¹⁰⁸ The court has insulated public employees and publishers of sensitive information from adverse actions that targeted speech about matters of public concern.¹⁰⁹ In evaluating media regulations, the Court has permitted broadcast content requirements based at least in part on the idea that broadcasters, by virtue either of their public licenses¹¹⁰ or their control over communication bottlenecks,¹¹¹

¹⁰⁶ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (defining "commercial speech" as a category of expression entitled to less than full First Amendment protection); *Miller v. California*, 413 U.S. 15, 24 (1973) (defining "obscenity" as a category of unprotected speech); *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (defining incitement to imminent lawless action as a category of unprotected speech); *Watts v. United States*, 394 U.S. 705, 708 (1969) (defining "true threats" as a category of unprotected speech); *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (recognizing some defamation as a category of unprotected speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (defining "fighting words" as a category of unprotected speech).

¹⁰⁷ See *Sullivan*, 376 U.S. at 270 (emphasizing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" in applying more stringent standard of proof to defamation actions brought by "public officials").

¹⁰⁸ See *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 154 (1967) (extending *Sullivan* requirement for defamation judgments to cases brought by "public figures").

¹⁰⁹ See *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (rejecting application of wiretap statutes to republication of illegally obtained information because "privacy concerns give way when balanced against the interest in publishing matters of public importance"); *Pickering v. Board of Educ.*, 391 U.S. 563, 570 (1968) (overturning school board's firing of plaintiff for speaking about "a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive"). Eugene Volokh asserts that "it shouldn't be for courts to decide what is a matter of 'public concern' and what isn't," given that "[m]ost such matters of taste are left to individual speakers and listeners to determine." Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and *Bartnicki*, 40 *HOUS. L. REV.* 697, 747 (2003). Volokh's position exemplifies the logical consequences of the private rights theory's negative, purposeless conception of expressive freedom. See *supra* notes 9-13 and accompanying text.

¹¹⁰ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90 (1969) (upholding federal requirement of equal broadcast time for opposing political positions based on public need to allocate broadcast frequencies through public licenses).

¹¹¹ See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994) (applying lesser standard of First Amendment scrutiny to federal "must carry" requirement for cable systems based on cable operators' control over large population's access to important source

perform a special public function. All of these rules require functional assessments of the public importance of certain types or means of expression – the same sort of assessment a court would need to make if First Amendment jurisprudence shifted toward a focus on political expression.

The line between subjects of public and private concern disappears at some level of abstraction.¹¹² Certainly that line’s location is a necessary and proper subject for continual reassessment.¹¹³ Understood functionally, however, political speech has both value and vulnerability distinct from those that attach to other categories of expression.¹¹⁴ Some legal impediments to personal autonomy reflect political power differentials, but many do not, and the fact that democratic participation requires a measure of personal autonomy does not mean that all autonomy protections advance democratic deliberation. The public rights theory distinguishes the benefits of expression for democratic debate from its benefits for personal autonomy in order to ensure a functional, robust democratic system. The prospect of judicial determinations about the value of various forms of expression may appear troubling, but in this area as in so many others, judges cannot decide anything without assessing the values at stake.¹¹⁵ Better to embody such evaluations in

of information).

¹¹² Eminent constitutional thinkers have cast the Supreme Court’s commitment to personal autonomy in *Lawrence v. Texas*, 539 U.S. 558 (2003), discussed *infra* notes 152-209 and accompanying text, as a means of advancing democratic ideals. See Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RIGHTS L. REV. 733, 734 (2004) (situating *Lawrence* in a line of Fourteenth Amendment cases concerned with “the culture and conditions of democracy”); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dares Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004) (positing that “the commitments we make to our principles and to one another in the context of associations ranging from the most intimate to those with the polity as a whole [] constitute the essential core of constitutionalism”).

¹¹³ See Post, *supra* note 92, at 1117 (positing the “necessary indeterminacy of public discourse”). My understanding of expressive freedom owes much to Post’s rich account of the depth to which democratic principles require public contention to extend. See *id.* at 1116 (maintaining that “public discourse must be conceptualized as an area within which citizens are free continuously to reconcile their differences and to (re)construct a distinctive and ever-changing national identity”). My difference with Post goes to his complete trust in the economic marketplace as the sole conceivable mechanism for ensuring the freedom he extols. See *id.* at 1118-19 (rejecting involvement by public institutions in achieving democratic aims of a Meiklejohn-derived First Amendment theory as “[m]anagerial” interference with “the value of autonomy”). Post dismisses what he identifies, in a term that still had bite in 1993, as “collectivist” doubts about the public-private distinction and the autonomous character of individual decisions in our society on the circular basis that those doubts threaten the conception of democracy he wishes to sustain. See *id.* at 1125-33. That dismissal ignores real threats that nongovernmental actors pose to democracy. Far better to give courts a role in policing those actors than to let them police themselves.

¹¹⁴ See Magarian, *Wartime Debate*, *supra* note 32, at 105-15 (discussing distinctive value and vulnerability of political debate compared to other speech).

¹¹⁵ See, e.g., Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-13 (1979) (contending that judges are uniquely able to evaluate and balance competing constitutional values); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 711 (1931) (calling for a realist theory of values and recognizing many approaches

forthright, evolving doctrine than to pretend they need not occur.

2. *Defying the Consensus to Protect Nonpolitical Speech*

The definitional problem aside, this article addresses a deeper problem with confining expressive freedom under the First Amendment to political speech: the tension that pits the imperative to privilege politically valuable expression against ingrained judicial practice, social norms, and intellectual commitments that compel undifferentiated First Amendment protection for most categories of speech.

The public rights theory calls for privileging political speech under the First Amendment because political speech has unique value for democracy. People, however, tend to believe speech in general deserves a constitutional shield because speech in general advances personal autonomy. That belief, which animates the private rights theory's directive to protect expression without regard to category, comports with the most common conception of constitutional rights. The impetus to protect individuals' autonomous behavior against government intrusion, subject in appropriate cases to superseding government regulatory interests, has deep roots in our legal tradition and exerts a powerful hold on our understanding.¹¹⁶ Autonomy strikes most people as especially salient for expressive freedom, because the act of speaking manifests the moral agency that defines an individual in relation to other people and to the broader community.¹¹⁷

The present Supreme Court has proclaimed unanimously “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”¹¹⁸ Although the Court has done little to elaborate the positive value of expressive autonomy, numerous First Amendment theorists have built sophisticated accounts of expressive freedom around personal autonomy. Charles Fried states the essential claim: “Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others.”¹¹⁹ C. Edwin Baker maintains that courts should understand

to juristic truth).

¹¹⁶ See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122 n.4 (3d ed. 1884) (describing natural rights and the limited role of government in preserving liberty); JOHN LOCKE, TWO TREATISES ON GOVERNMENT 350 (Peter Laslett ed., 1988) (1690) (positing that the individual is willing yield some freedom to government in order to preserve “the enjoyment of the property he has in [the state of nature]”).

¹¹⁷ See C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 1014-15 (1997) (hereinafter Baker, *Harm*) (substantiating common intuition that recognition of individuals' moral agency is essential to formation of political community).

¹¹⁸ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995).

¹¹⁹ Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (footnote omitted).

the First Amendment to protect all speech that represents the autonomous exercise of the speaker's expressive capacity "because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."¹²⁰ Martin Redish posits that the Free Speech Clause serves entirely to advance the value of "individual self-realization," which encompasses and supersedes the interest in a healthy democratic process.¹²¹

Some sorts of speech that have substantially or primarily nonpolitical value, notably pornography¹²² and commercial speech,¹²³ defy consensus, leading to distinctly aberrant or incoherent lines of First Amendment doctrine. But the Supreme Court has enforced a broad societal consensus that artistic and literary works deserve constitutional insulation from government interference without regard to their contribution, or lack thereof, to political debate.¹²⁴ Similarly, the Court's decisions reflect a

¹²⁰ C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 966 (1978); *see also* Baker, *Harm*, *supra* note 117, at 982-87 (describing considerations of expressive autonomy that justify First Amendment protection of speech). Baker argues pointedly that the autonomy-based explanation for expressive freedom "is much more intertwined with our normative commitments" than the democracy-based explanation. *See id.* at 1014-17.

¹²¹ *See* Redish, *supra* note 92, at 601-605 (explaining "individual self-realization" value in relation to democratic process value); *see also* Post, *supra* note 92, at 1119 (conceptualizing autonomy as a value that dictates a sphere of expressive freedom "within which heterogeneous versions of collective identity can be free continuously to collide and reconcile").

¹²² The incoherence of the Supreme Court's jurisprudence on pornography begins with *Miller v. California*, 413 U.S. 15 (1973), which declares a broad category of "patently offensive" sexually explicit speech, defined by reference to "community standards," outside the protection the First Amendment is supposed to accord to speech that offends the community. In subsequent decisions, the Court, for example, allowed the FCC effectively to ban scatological language over the radio airwaves, then struck down a congressional requirement that cable television providers scramble sexually explicit programming. *Compare* *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) *with* *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). This article discusses a substantive due process approach to regulations of pornography *infra* notes 268-284 and accompanying text.

¹²³ The Supreme Court has had difficulty even defining commercial speech. *Compare* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (defining commercial speech as "speech which does 'no more than propose a commercial transaction,'" (quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 (1973)) *with* *Central Hudson Gas v. Public Service Commission*, 447 U.S. 557, 561 (1980) (defining commercial speech more broadly to include "expression related solely to the economic interests of the speaker and its audience"). The Court's approach to commercial speech protection remains unstable and unsettled. *Compare* *Central Hudson*, 447 U.S. at 566 (announcing four-part intermediate scrutiny standard for commercial speech cases) *with* *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion) (maintaining that "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them" and proposing more thorough protection for commercial speech in certain circumstances). This article discusses a substantive due process approach to regulations of commercial speech *infra* notes 285-308 and accompanying text.

¹²⁴ *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.* 502 U.S. 105, 115-116 (1991) (striking down state regulation that imposed financial burden on criminals who published books relating to their crimes as invalid under First

broadly shared belief that the Constitution should protect categories of nonpolitical speech as varied as scientific inquiry,¹²⁵ frank discussions about sex and sexuality,¹²⁶ and charitable appeals.¹²⁷ Thus, the Court has consistently extended full First Amendment protection to those categories of speech.¹²⁸

C. *Unsatisfactory Solutions to the Nonpolitical Speech Problem*

Prior advocates of the public rights theory have tried and failed to strike the delicate but necessary balance between preserving the theory's essence and honoring the societal consensus that nonpolitical speech deserves constitutional protection. These previous attempts have taken two principal forms: (1) expanding the category of political speech and (2) proposing alternative sources of constitutional protection for nonpolitical speech. The first approach, although useful to some extent, cannot fully address the autonomy concern without undermining the method and purpose of the public rights theory. Past attempts at the second approach have lacked force or coherence and have failed to address the affirmative reasons why people favor constitutional protection of much nonpolitical speech. That second approach, however, points toward the newly viable substantive due process solution proposed in Part II.

1. *Expanding the Category of Political Speech*

When a categorical method of distributing some benefit loses support because it excludes popular or sympathetic beneficiaries, a straightforward solution is available: expand the category. In party politics this is known as the “big tent” approach;¹²⁹ in the public policy

Amendment).

¹²⁵ See, e.g., *Miller*, 413 U.S. at 24 (including “scientific value” among safe harbors that bring otherwise unprotected “obscenity” within the First Amendment).

¹²⁶ See, e.g., *Reno v. American Civil Liberties Union*, 521 U.S. 844, 878 (1997) (partially explaining decision to invalidate broad-based restriction on Internet content on ground that ban might encompass “discussions about prison rape or safe sexual practices”).

¹²⁷ See *Meyer v. Grant*, 486 U.S. 414, 422 (1988) (holding solicitation of charitable appeals for funds within the protection of the First Amendment); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (holding that First Amendment protects solicitation of contributions by charitable organizations).

¹²⁸ I exclude religious expression from this list because the First Amendment specially protects religious expression, as well as action, through the Free Exercise Clause, at least in theory. See *Employment Division v. Smith*, 494 U.S. 872 (1990) (effectively limiting effect of Free Exercise Clause to regulations that deliberately or discriminatorily burden religion). In fact, the Free Exercise Clause, by defining a basis for constitutional protection without distinguishing between speech and conduct, provides the closest thing to an existing constitutional model for the extension of substantive due process this article advocates.

¹²⁹ See, e.g., KENNETH S. BAER, *REINVENTING DEMOCRATS* 120-121 (2000) (describing Democratic Party's attempt to maintain an ideologically wide range of elected officials as a “Big Tent” approach). For a brief account of major political parties' tendency to moderate

arena, including a vast range of middle-income beneficiaries in order to sell the Social Security Act in the 1930s illustrates the same principle.¹³⁰ In the First Amendment context, the more speech falls within a theory's privileged category of political speech, the broader the theory's appeal.

The most important example of this approach in the public rights tradition is Meiklejohn's treatment of artistic expression. Art appears to lie outside the range of Meiklejohn's First Amendment; at a minimum, his disdain for entertainment media suggests a refusal to attribute political value to artistic expression.¹³¹ However, in a later elaboration of his theory, Meiklejohn acknowledges that a "vast array of idea and fact, of science and fiction, of poetry and prose, of belief and doubt, of appreciation and purpose, of information and argument" legitimately contributes to citizens' decisions about matters of public policy and thus warrants First Amendment protection.¹³² Struggles with the conceptual limits of the public rights theory's coverage can generate important, constructive refinements. Much artistic expression reflects political convictions and/or informs political debate, and no doubt further examination and debate of the boundaries between political and nonpolitical speech will yield comparably sound insights about the political essence of other nominally nonpolitical expression.¹³³

As a strategy for making the public rights theory more palatable, however, expanding the category of political speech contains a fatal flaw. To whatever extent we broaden the class of protected speech, we simultaneously weaken the categorical methodology that defines the public rights theory. As Meiklejohn emphasizes, the First Amendment "remains forever confused and unintelligible unless we draw sharply and clearly the line which separates the public welfare of the community from the private goods of any individual citizen or group of citizens."¹³⁴ If we really believe, and can explain persuasively, that a given type of expression has political character, then admitting that expression to the scope of First Amendment protection genuinely serves the interest in ensuring robust political debate. But we cannot reasonably hope that the categorical boundary of political expression extends to or past the point necessary to allay a critical mass of concerns about the theory's costs. Comprehensively reconciling the theory's scope with autonomy values by expanding the category of protected expression would inevitably require

policy positions by building broad-based coalitions, see Magarian, *Public Rights*, *supra* note 9, at 1961-62.

¹³⁰ See, e.g., DANIEL NELSON, UNEMPLOYMENT INSURANCE 205 (1969) (explaining that securing political approval of Social Security Act required ensuring that Act would benefit broad group of constituencies).

¹³¹ See *supra* note 30 and accompanying text (discussing Meiklejohn's views on "private" speech). This disdain appears especially vivid in Meiklejohn's savage attack on the commercial radio. See MEIKLEJOHN, *supra* note 20, at 86-88.

¹³² *Id.* at 117.

¹³³ See *supra* notes 106-115 and accompanying text (discussing value of ongoing dispute about the boundaries of politics).

¹³⁴ MEIKLEJOHN, *supra* note 20, at 79-80.

either conceptual gerrymandering or elision of any categorical boundary. Such compromise would fatally undermine the goal of deep protection for political speech, increasing pressure toward retaining a balancing approach that reduces political expression to the same stature as speech less integral to a healthy democracy.

2. *Finding Alternative Constitutional Protection for Nonpolitical Speech*

The failure of attempts to improve the public rights theory by expanding the category of political expression demonstrates that any effort to cure the theory's coverage deficit must maintain a conceptual distinction between political and nonpolitical speech. The surest way to protect different categories of expression while keeping them separate is to assign different constitutional status to the respective categories. Leading public rights theorists, not surprisingly, have tried to do exactly that. Their ingenious efforts, while ultimately unsuccessful, provide a template for a more effective solution.

Meiklejohn's initial statement of the public rights theory appears to acknowledge the strategic risk of leaving substantial categories of speech unprotected. Even as he advocates limiting the scope of First Amendment protection to political speech and denigrates the importance of what he calls "private" speech, Meiklejohn offers an olive branch. Nonpolitical, "private" speech, while not entitled to the ironclad protection of the First Amendment, should still get constitutional protection as an aspect of the "liberty" secured by the procedural due process principles of the Fifth and Fourteenth Amendments.¹³⁵ In other words, the government should enjoy discretion to restrict or punish nonpolitical speech, but not without offering notice and the possibility of a hearing. This approach, Meiklejohn argues, properly treats nonpolitical speech like ordinary conduct, reflecting the insight that the First Amendment elevates political speech to a special position.¹³⁶ From a contemporary, strategic perspective, however, Meiklejohn's treatment of nonpolitical speech amounts to dooming with faint protection. No one who disdains the public rights theory for its failure to protect a substantial amount of nonpolitical speech will warm to the theory upon assurance that the censor's iron fist comes sheathed in a procedural velvet glove.

Sunstein's version of alternative constitutional protection for nonpolitical speech appears, upon first glance, far more promising. In one of two alternative proposals for revising free speech doctrine, he advocates a "two-tiered" First Amendment.¹³⁷ Under this approach, the

¹³⁵ See MEIKLEJOHN, *supra* note 20, at 79-80.

¹³⁶ See *id.* at 80.

¹³⁷ See Sunstein, *supra* note 21, at 301-315 (developing argument for "primacy of politics" in First Amendment theory). Sunstein's alternative proposal, which he calls "a

First Amendment would fully protect political speech; nonpolitical speech would get weaker First Amendment protection that would yield more readily to countervailing government interests.¹³⁸ Sunstein justifies this approach by maintaining that the Court already accords special protection to political speech while denying or limiting First Amendment protection as to several categories of nonpolitical expression: obscenity, commercial speech, and libel of private persons.¹³⁹ Moreover, he notes, the Court treats numerous other instances of nonpolitical speech – conspiracies, purely verbal workplace harassment, bribery, and threats – as if they are not speech at all for First Amendment purposes.¹⁴⁰ Given these existing doctrines, Sunstein argues, an explicit shift to a two-tiered First Amendment would merely ratify our active intuitions about the need to treat different categories of speech differently.

Although Sunstein appears to offer greater assurances to skeptics of the public rights theory who fear for the safety of nonpolitical speech, those assurances ultimately lack substance. First, nothing in the text, structure, or history of the Constitution provides a basis for bifurcating the First Amendment. Unlike Meiklejohn’s elaboration of the public rights theory, which anticipates and addresses originalist and textualist critiques,¹⁴¹ Sunstein’s two-tiered First Amendment is nothing more than a convenient invention. In relying on the claim that the Court has already moved toward a two-tiered First Amendment, Sunstein makes the mistake of building a doctrine on disparate rules that he concedes lack a “clear principle.”¹⁴² In addition, the argument from existing practice contradicts Sunstein’s own normative precept for advocating change in First Amendment theory: that the Court is insufficiently protecting political speech while overprotecting less deserving categories of expression.¹⁴³ Second, and accordingly, the substance of Sunstein’s two-tiered First Amendment derives from nothing more than his own normative priorities: the objection to giving such unworthies as the securities laws, pornography, 1-900 numbers, large political expenditures, and the

New Deal for Speech,” emphasizes the politically determined nature of expressive opportunities and advocates government regulation to improve the flow of ideas. *See id.* at 263-300. The public rights theory of expressive freedom contains elements in common with each of Sunstein’s approaches. *See supra* notes 20-30 and accompanying text (describing public rights theory).

¹³⁸ *See* Sunstein, *supra* note 21, at 306 (arguing that “government should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation”).

¹³⁹ *See id.* at 302.

¹⁴⁰ *See id.*

¹⁴¹ *See* Magarian, *Public Rights*, *supra* note 9, at 1972-73 (describing textual genesis of Meiklejohn’s First Amendment theory in paradox of First Amendment’s absolutist language but necessarily limited effect).

¹⁴² Sunstein, *supra* note 21, at 302.

¹⁴³ *See id.* at 258 (contrasting early First Amendment decisions that protected political dissenters’ rights with contemporary decisions that protect rights of various private and corporate interests).

autonomy of large broadcasters First Amendment pride of place.¹⁴⁴ Sunstein's bifurcation of the First Amendment creates a structural facade for his subjective preferences.

Beyond these problems, Meiklejohn's and Sunstein's attempts to relocate protection for nonpolitical speech share a final, essential flaw. Neither approach addresses the basic source of discomfort with the public rights theory: that the Constitution should protect nonpolitical speech as a matter of right, because people should be entitled to speak as their autonomous choices dictate.¹⁴⁵ This flaw follows naturally from each theorist's open rejection of autonomy as a justification for protecting speech. Meiklejohn sharply criticizes "an American Individualism whose excesses have weakened and riddled our understanding of the meaning of intellectual freedom."¹⁴⁶ Accordingly, his procedural due process approach manifestly treats nonpolitical speech like ordinary, unprivileged behavior and merely acknowledges the procedural limits the Constitution places on every government regulation. Sunstein maintains that "an approach rooted in the norm of autonomy makes it difficult to understand what is special about speech."¹⁴⁷ Accordingly, although he formally treats nonpolitical speech like a matter of right, he too fails to offer any affirmative explanation why nonpolitical speech deserves constitutional protection. Both Meiklejohn and Sunstein rhetorically diminish speech whose primary value goes to personal autonomy, treating such speech as a second-class constitutional citizen that can only try to squeeze under the edge of the protective umbrella that shields political speech.

These defects in previous attempts to locate alternative constitutional protection for nonpolitical speech appear inevitable, because until recently nothing in constitutional doctrine suggested any affirmative basis for meaningfully protecting nonpolitical expression without resort to a private rights account of the First Amendment. In 2003, however, the Supreme Court provided an opening for a robust alternative source of constitutional protection for nonpolitical expression: substantive due process. Understanding how substantive due process doctrine can accommodate nonpolitical speech protection requires an examination of how the Supreme Court's most recent statement on substantive due process departs from previous law.

II. THE SUBSTANTIVE DUE PROCESS SOLUTION TO THE NONPOLITICAL SPEECH PROBLEM

The substantive element of the Fifth and Fourteenth Amendments'

¹⁴⁴ *See id.*

¹⁴⁵ *See supra* notes 116-128 and accompanying text.

¹⁴⁶ MEIKLEJOHN, *supra* note 20, at 72.

¹⁴⁷ Sunstein, *supra* note 21, at 304.

Due Process Clauses¹⁴⁸ has provided the most important constitutional opportunity for the Supreme Court to adjust the uneasy balance between majoritarian preferences, as expressed in legislative choices, and deeply rooted minority interests.¹⁴⁹ Although substantive due process doctrine lacks a straightforward foundation in the constitutional text, its resilience over time testifies to our legal system's deeply rooted insight that a constitutional culture of individual rights must accommodate substantive protections of essential human activities. Even as the doctrine has taken root, however, the Supreme Court has made clear that the potentially sweeping character and necessarily uncertain judicial explication of substantive due process¹⁵⁰ require judges to balance scrupulously the importance for individuals of protected conduct against significant government grounds for regulating that conduct.¹⁵¹ Thus, the twin challenges of substantive due process jurisprudence have been to articulate a theoretical basis for substantive due process rights and to identify the nature of government interests that can properly trump those rights.

The Court's most recent substantive due process decision, *Lawrence v. Texas*,¹⁵² takes up both of those challenges, providing important guidelines for the further development of substantive due process. *Lawrence* earned its landmark status by striking down all state restrictions on "sodomy" between consenting adults as violations of substantive due process. The Court held that the Constitution precluded state efforts "to define the meaning of [a personal] relationship or to set its boundaries

¹⁴⁸ U.S. CONST. AMEND. XIV sec. 1 cl. 3. Substantive due process doctrine has developed primarily under the Fourteenth Amendment, which by its terms applies only to the states. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (striking down state's restrictions on abortion under Fourteenth Amendment Due Process Clause). The Supreme Court has extended substantive due process principles to the federal government through the Fifth Amendment Due Process Clause. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (noting availability of substantive due process claim under Fifth Amendment).

¹⁴⁹ The substantive due process doctrine has generated an enormous body of scholarship. For a useful recent discussion and taxonomy, see Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 841-49 (2003) (emphasizing distinctions among strands of substantive due process doctrine).

¹⁵⁰ The great cautionary tale of substantive due process, of course, is the Court's wholesale usurpation of the elected branches' regulatory prerogatives through the economic substantive due process doctrine of the *Lochner* era. *Compare* *Lochner v. New York*, 198 U.S. 45 (1905) (asserting broad judicial power to protect a laissez-faire right to contract against government regulation) *with* *Nebbia v. New York*, 291 U.S. 502 (1934) (disavowing *Lochner* doctrine as improperly invasive of majoritarian prerogatives).

¹⁵¹ The Court initially implemented this balance, in cases of "fundamental rights," through strict scrutiny. *See* *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) (subjecting state restrictions on access to abortion to strict scrutiny). More recently, the Court in the abortion context has adjusted the balance in the government's favor by replacing strict scrutiny with an inquiry into whether the challenged government action places an "undue burden" on the abortion right. *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (replacing strict scrutiny with undue burden standard) (plurality opinion). The Court to date has not applied the undue burden standard in any other substantive due process context.

¹⁵² 539 U.S. 558 (2003).

absent injury to a person or abuse of an institution the law protects.”¹⁵³ Two pillars of the *Lawrence* majority’s reasoning portend sweeping changes beyond the scope of sodomy laws or even regulations of sexual behavior generally. First, as to the basis of substantive due process rights, the Court articulated an expansive theory of personal autonomy as the essential value that substantive due process safeguards.¹⁵⁴ Second, as to the nature of superseding government interests, the Court discredited government restrictions on protected conduct that derive from purely moral justifications, unrelated to potential harms to unwilling third parties.¹⁵⁵

These two principles of *Lawrence* have great salience for a problem that no one has previously associated with substantive due process: the Constitution’s protection of nonpolitical speech.¹⁵⁶ *Lawrence* affords the Court an opportunity to transplant constitutional speech protection directed at preserving personal autonomy, rather than collective political decisionmaking, from the First Amendment to the Due Process Clause. Such a shift would satisfy our deep convictions about the importance of preserving a constitutional safeguard for nonpolitical expression that advances personal autonomy. It would also create a more coherent basis for assessing the social tradeoffs at stake in government regulation of nonpolitical speech. At the same time, it would enable the Court, consistent with the public rights theory, to preserve the First Amendment’s Free Speech Clause as a virtually absolute shield against regulations that undermine politically salient expression.

A. *Lawrence v. Texas and the New Dawn of Substantive Due Process Protection*

Prior to *Lawrence*, the Supreme Court’s enthusiasm for protecting substantive rights under the Due Process Clause appeared marginal at

¹⁵³ *Id.* at 567.

¹⁵⁴ See *infra* notes 163-186 and accompanying text.

¹⁵⁵ See *infra* notes 187-209 and accompanying text.

¹⁵⁶ Other accounts of *Lawrence* have noted in passing that the Court’s sense of substantive due process resonates with First Amendment rhetoric. See Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL OF RIGHTS J. 65, 78 (2003) (suggesting that *Lawrence* makes substantive due process more like First Amendment speech protection by transforming it into “a subjective, abstract principle”); Hunter, *supra* note 163, at 1107 (describing “associational freedom” as a predicate for “identity formation” within realm of substantive due process); Tribe, *supra* note 112, at 1932 (noting similarity between *Lawrence* analysis and First Amendment’s prohibition on certain grounds for government regulation). In addition, of course, the Due Process Clause has long protected a great deal of speech, through its incorporation of the First Amendment’s protections. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that “freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States”); Rubin, *supra* note 149, at 842 (discussing incorporation as a species of substantive due process doctrine).

best. Substantive due process doctrine had reached its recent high water marks in the Court's tepid reaffirmation of the right to abortion in *Planned Parenthood v. Casey*¹⁵⁷ and indications from a splintered majority of Justices in *Washington v. Glucksberg*¹⁵⁸ that the Due Process Clause might, in extreme circumstances, support a right to physician-assisted suicide.¹⁵⁹ But the Court had declined invitations to extend the substantive due process principle to new rights after *Roe v. Wade*,¹⁶⁰ harshly rejecting claims for due process rights to parental visitation rights in *Michael H. v. Gerald D.*,¹⁶¹ to sexual autonomy in *Bowers v. Hardwick*,¹⁶² and to a right to die with dignity in *Glucksberg*. *Lawrence* dramatically shifted the tide, reinvigorating substantive due process by sharpening both the doctrine's affirmative rationale and the restrictions it imposes on government regulation.

1. Substantive Due Process as a Guarantor of Personal Autonomy

First, Justice Kennedy's *Lawrence* opinion makes the Court's strongest statement to date on the roots of substantive due process doctrine in the personal right to live and behave autonomously.¹⁶³ The

¹⁵⁷ 505 U.S. 833 (1992); see also *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 759 (1986) (striking down provisions of state's abortion law because "they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make").

¹⁵⁸ 521 U.S. 702 (1997); see also *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) (upholding a state court decision that required family's discontinuation of daughter's life-sustaining treatment to be supported by clear and convincing evidence of her wishes).

¹⁵⁹ See *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring) (leaving open the question "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death"); *id.* at 738 (Stevens, J. concurring in the judgments) (finding "room for further debate about the limits that the Constitution places on the power of the States to punish" physician-assisted suicide); *id.* at 782 (Souter, J., concurring in the judgments) (stating that "the importance of the individual interest here, as within that class of 'certain interests' demanding careful scrutiny of the State's contrary claim cannot be gainsaid" but reserving judgment on the question "[w]hether that interest might in some circumstances, or at some time, be seen as 'fundamental' to the degree entitled to prevail") (citation omitted). Justices Breyer and Ginsburg joined Justice O'Connor's concurrence in substance.

¹⁶⁰ 410 U.S. 113 (1973) (recognizing women's reproductive freedom as part of privacy rights inherent in due process).

¹⁶¹ 491 U.S. 110 (1989) (rejecting claim of biological father to visit child in custody of biological mother and adoptive father).

¹⁶² 478 U.S. 186 (1986) (rejecting argument that Due Process Clause conferred fundamental right to engage in consensual gay sex), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶³ The *Lawrence* Court's concept of individual autonomy integrates strong concerns with both relative equality of treatment and interactions among different people and groups. See Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1134 (2004) (arguing that *Lawrence* reflects "an appreciation of the mutual reinforcement of equality and liberty principles"); Schacter, *supra* note 112, at 749-51 (suggesting that *Lawrence* combines notions of liberty and equality, with special emphasis on interpersonal relationships); David D. Meyer, *Domesticating Lawrence*, 2004 U. CHI. LEGAL F. 453, 480-

idea that substantive due process protects individuals' right to make autonomous decisions about matters central to their lives and identities is hardly novel. Beginning with *Griswold v. Connecticut*,¹⁶⁴ the Court rooted modern, noneconomic substantive due process in personal privacy,¹⁶⁵ a concept closely related to autonomy. *Griswold* linked substantive due process protection to the marital relationship,¹⁶⁶ but Justice Brennan in *Eisenstadt v. Baird*¹⁶⁷ moved toward an individualized notion of personal autonomy. "If the right of privacy means anything," he wrote for the Court, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁶⁸ The seeds of personal autonomy in *Eisenstadt* bore doctrinal fruit when the Court in *Roe v. Wade*¹⁶⁹ affirmed women's due process right to receive abortions. The *Roe* Court appeared to embrace the idea that the Due Process Clause protected people's right to make intimately personal decisions without governmental interference.¹⁷⁰

Eisenstadt, however, came to represent a road not taken. Beginning with its emphatic approval in *Bowers v. Hardwick*¹⁷¹ of state prohibitions on sodomy, the Court appeared to abandon the idea that substantive due process embodies broad constitutional protection for personal autonomy.¹⁷² The key substantive due process decisions that followed *Bowers* neither recanted its restrictive reasoning nor offered much hope that the Court would restore a robust concept of personal autonomy to the center of due process jurisprudence. In *Michael H. v. Gerald D.*,¹⁷³

85 (casting *Lawrence* as a "family privacy" decision); Tribe, *supra* note 112, at 1898 (arguing that *Lawrence* "both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty").

¹⁶⁴ 381 U.S. 479 (1965).

¹⁶⁵ *See id.* at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

¹⁶⁶ *See id.* at 485-86 (basing decision to strike down state contraceptive ban on "notions of privacy surrounding the marriage relationship"). In emphasizing the family relationship, the *Griswold* Court followed the pattern of two cases from the 1920s, often cited as precursors of noneconomic substantive due process, in which the Court struck down restrictions on parents' decisions about how to educate their children. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁶⁷ 405 U.S. 438 (1972).

¹⁶⁸ *Id.* at 453.

¹⁶⁹ 410 U.S. 113 (1973).

¹⁷⁰ *See id.* at 152-53; *see also* *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (invoking Due Process Clause to strike down state statute that banned sale of contraceptives to minors) (plurality opinion).

¹⁷¹ 478 U.S. 186 (1986).

¹⁷² *See id.* at 191 (complaining that "despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content" and declaring that many of the Court's noneconomic substantive due process decisions "have little or no textual support in the constitutional language").

¹⁷³ 491 U.S. 110 (1989).

Justice Scalia's opinion upholding a state presumption of legitimacy for children born in wedlock disdained any broad notion of liberty in favor of deference to traditions of state law.¹⁷⁴ Although the declaration of the plurality in *Planned Parenthood v. Casey*¹⁷⁵ that "the heart of liberty" harbored "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"¹⁷⁶ anticipated *Lawrence* rhetorically, the rhetoric rang hollow as the *Casey* plurality permitted states to restrict the abortion right through enforced waiting periods accompanied by mandatory information designed to discourage abortions¹⁷⁷ and parental consent schemes for minors who sought abortions.¹⁷⁸ Chief Justice Rehnquist's opinion for the Court in *Washington v. Glucksberg*¹⁷⁹ comes close to disdaining substantive due process altogether, emphasizing the supposed analytic perils of extending the doctrine and reiterating the *Michael H.* conception of tradition-bound due process jurisprudence.¹⁸⁰

Lawrence revitalizes the *Eisenstadt* idea of personal autonomy and makes it the basis of a momentous decision that boldly overrules *Bowers* and enshrines in constitutional law the sexual freedom of gay men and lesbians. Justice Kennedy begins his *Lawrence* analysis by defining liberty, the central value in substantive due process doctrine,¹⁸¹ in terms of autonomy: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."¹⁸² The majority rejects the proposition that substantive due process protection requires a specific basis in tradition.¹⁸³ In apprehending the issue before the Court, Justice Kennedy rebukes the view of *Bowers* that sodomy laws merely implicate "the right to engage in certain sexual

¹⁷⁴ *See id.*:

What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.

Id. at 126-27.

¹⁷⁵ 505 U.S. 833 (1992).

¹⁷⁶ *Id.* at 851.

¹⁷⁷ *See id.* at 882 (upholding Pennsylvania's "informed consent" requirement for abortions against due process challenge).

¹⁷⁸ *See id.* at 899 (upholding Pennsylvania's parental consent requirement for minors who seek abortions against due process challenge).

¹⁷⁹ 521 U.S. 702 (1997).

¹⁸⁰ *See id.* at 720-21 ("We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.") (internal quotation marks and citation omitted).

¹⁸¹ *See Hunter, supra* note 163, at 1106-07 (suggesting that *Lawrence* replaces privacy with liberty as the principle behind substantive due process).

¹⁸² *Lawrence*, 539 U.S. at 562.

¹⁸³ *See id.* at 571. The majority leaves dissenting Justice Scalia to wave the faded flag of his tradition-specific approach. *See id.* at 592-93 (Scalia, J., dissenting).

conduct.”¹⁸⁴ That formulation of the question, Justice Kennedy insists, trivializes the interest of people subject to liability for violating sodomy prohibitions. He posits a much broader interest at stake in substantive due process challenges to state restrictions on intimate behavior: “the autonomy of persons” in making “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁸⁵ A restriction on the sexual practices of consenting adults represents an effort by the state to “demean their existence [and] control their destiny.”¹⁸⁶ For the *Lawrence* Court, substantive due process protects not a mere descriptive activity but rather a normative value – that of personal autonomy.

2. *The Inadequacy of Purely Moral Justifications for Limits on Personal Autonomy*

A second defining feature of *Lawrence* is the Court’s willingness to embrace a logical implication of noneconomic substantive due process doctrine that it previously avoided: government may not restrict or punish personal decisions based purely on moral disapproval.¹⁸⁷ The Court’s rejection of the essentially moral regulations in *Griswold*,¹⁸⁸ *Eisenstadt*,¹⁸⁹ and *Roe*¹⁹⁰ appeared to reflect an understanding that the state’s imposing its moral judgments on individuals’ intimate personal decisions effectively negates personal autonomy. Subsequent decisions, however, gave substantial deference to states’ purely moral grounds for limiting personal autonomy. The *Bowers* Court insisted that “the law . . . is constantly based on notions of morality”¹⁹¹ and practically ridiculed the

¹⁸⁴ *Id.* at 567.

¹⁸⁵ *Id.* at 574.

¹⁸⁶ *Id.* at 578.

¹⁸⁷ Commentators have noted this feature of *Lawrence*. See Huhn, *supra* note 156, at 90-92; Hunter, *supra* note 163, at 1112; Schacter, *supra* note 112, at 740; but see Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171, 1175-76 (2004) (arguing that *Lawrence* Court simply found the state’s moral interest insufficient to outweigh the liberty interest at stake). Professor Tribe argues that the rejection of moral regulation in *Lawrence* extends only to regulations that burden associational rights. See Tribe, *supra* note 112, at 1935-36. The basis and scope of that asserted limit, however, remain unclear. Another potential limit on the decision’s rejection of moral regulation stems from the fact that the sodomy statutes at issue in *Lawrence* carried criminal penalties. Nothing in the opinion, however, limits the Court’s reasoning to criminal regulations, and *Lawrence* seems highly salient for noncriminal regulations that seriously burden personal autonomy.

¹⁸⁸ See *Griswold v. Conn.*, 381 U.S. 479, 505 498 (1965) (Goldberg, J., concurring) (“it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly . . .”).

¹⁸⁹ See *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (rejecting “deterrence of premarital sex” as reasonable justification for law that banned giving contraceptives to unmarried persons).

¹⁹⁰ See *Roe v. Wade*, 410 U.S. 113, 162 (1973) (“[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”).

¹⁹¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

notion of due process scrutiny for “all laws representing essentially moral choices.”¹⁹² The *Casey* plurality predicated its revision of the *Roe* abortion right on heightened solicitude for the government’s interest in “protection of potential life.”¹⁹³ In particular, the plurality compromised its emphasis on pregnant women’s decisional autonomy in deference to “the spouse, family, and society which must confront the knowledge that [abortion] procedures exist, procedures some deem nothing short of an act of violence against innocent human life.”¹⁹⁴ Although the plurality included this interest among “consequences” of abortion,¹⁹⁵ it made no effort to explain how purely moral disapproval of the procedure could carry anything more than a purely moral consequence. Likewise, the *Glucksberg* Court counted among the “important and legitimate” government interests that justified state bans on physician-assisted suicide the “symbolic and aspirational as well as practical” desire to preserve human life.¹⁹⁶

The *Lawrence* Court reverses the tendency to approve purely moral regulations by adopting perhaps the farthest-reaching language from Justice Stevens’ dissenting opinion in *Bowers*: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹⁹⁷ Justice Kennedy underscores this rejection of purely moral regulation in his justification for overruling *Bowers*. Contrasting this departure from *stare decisis* with the Court’s adherence to precedent in *Casey*,¹⁹⁸ he explains that “there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.”¹⁹⁹ As Justice Scalia correctly points out in dissent, many people relied extensively on *Bowers* if one treats “a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’” as a cognizable basis for a reliance interest.²⁰⁰ Justice Kennedy also contrasts the consensual activity that sodomy prohibitions restrict with conduct that

¹⁹² *Id.*

¹⁹³ *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992). Of course, the question whether the government’s interest in protecting potential life implicates harm to a third party defines the philosophical frontiers of the abortion debate, but a Court committed to prohibiting purely moral regulation would have needed, at a minimum, to acknowledge its inability to resolve that question.

¹⁹⁴ *Id.* at 852.

¹⁹⁵ *Id.*

¹⁹⁶ *See* *Washington v. Glucksberg*, 521 U.S. 702, 729 (1997) (describing state’s “unqualified interest in the preservation of human life”) (plurality opinion); *see also id.* at 746 (recognizing government interest in the “sanctity of life”).

¹⁹⁷ *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

¹⁹⁸ *See Casey*, 505 U.S. at 860-61 (explaining importance of adhering to precedent in abortion context).

¹⁹⁹ *Lawrence*, 539 U.S. at 577.

²⁰⁰ *Id.* at 589 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

involves “minors [or] persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused” and with “public conduct or prostitution.”²⁰¹ Those distinctions imply that the state legitimately may restrict personal autonomy only where the autonomous decision or conduct at issue harm third parties or the public.²⁰² Justice Scalia casts the majority’s distinctions into even sharper relief by insisting that *Lawrence* undermines all state prohibitions of “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” because such prohibitions are “sustainable only in light of *Bowers*’ validation of laws based on moral choices.”²⁰³

The *Lawrence* majority’s rejection of purely moral justifications for state restrictions on important decisions situates the Court in a long and distinguished line of critics of moral regulation. In John Stuart Mill’s famous formulation, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”²⁰⁴ This “harm principle” is a familiar, and much debated, idea in liberal democratic theory.²⁰⁵ In the substantive due process context, the principle mandates that only the potential for harm to unwilling third parties can justify restraints on intimate personal decisions.²⁰⁶ Justice Kennedy in *Lawrence* ties the harm principle to a fundamental idea about the meaning of due process, equating moral regulation with “legal classification . . . ‘drawn for the purpose of

²⁰¹ *Lawrence*, 539 U.S. at 578.

²⁰² Justice O’Connor’s opinion concurring in the judgment in *Lawrence*, which relies on the narrower ground of the Equal Protection Clause, echoes the majority’s criticism of purely moral regulation in the context of legal distinctions among groups of people. For Justice O’Connor, “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’” *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring in the judgment) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

²⁰³ *Id.* at 590 (Scalia, J., dissenting); see also *id.* at 599 (repeating charge). Wilson Huhn makes the interesting observation that Justice Scalia and the Court display clashing visions of morality, with Justice Scalia insisting on mandatory rules where the majority views decisional autonomy as a predicate for morally viable personal choices. See Huhn, *supra* note 156, at 91-93.

²⁰⁴ JOHN STUART MILL, ON LIBERTY 13 (1859).

²⁰⁵ The classic exchange in the past half-century about the legitimacy of purely moral justifications for constraints on autonomy is the Hart-Devlin debate. Compare H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963) (advocating harm principle) with PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1975) (defending morality-based regulation).

²⁰⁶ David Meyer argues that reading *Lawrence* as having embraced the harm principle threatens to undermine the ways in which moral conceptions of family relationships have contributed to socially beneficial family relationships. See Meyer, *supra* note 163, at 477. Although Meyer identifies values worth protecting, his concern rests on an unduly positive presumption about the effects of majoritarian morality on human flourishing; overestimates the ability of substantive due process doctrine to constrain affirmative government initiatives designed to accomplish social policy goals, such as spending programs and public information campaigns; and underestimates the scope of legally cognizable harm within the meaning of the harm principle.

disadvantaging the group burdened by the law.”²⁰⁷ Although Justice Kennedy portrays this equation as unremarkable,²⁰⁸ it departs dramatically from the positions of *Bowers*, *Casey*, and *Glucksberg*.²⁰⁹ The *Lawrence* majority’s embrace of the harm principle follows naturally from its positive emphasis on personal autonomy. If the Constitution protects people’s prerogatives to live their lives as they see fit, then government interference with an individual’s decisions about matters central to personal autonomy can only be just if necessary to protect some other person’s concrete interest.

B. *Substantive Due Process and Nonpolitical Speech*

The Court’s reasoning in *Lawrence* enables a fundamental revision of constitutional free speech doctrine. The *Lawrence* account of substantive due process does not merely echo the private rights theory’s call to protect speech in the name of personal autonomy;²¹⁰ rather, *Lawrence* gives that imperative a more comfortable home in substantive due process than it presently enjoys in the First Amendment. The Court should take this opportunity to shift the basis for constitutional protection of speech whose primary value goes to personal autonomy from the First Amendment to the Due Process Clause. Under this approach, the Court in nonpolitical speech cases would balance the value of the burdened speech for some person’s or persons’ autonomy against the concrete harm the speech threatened to third parties. Complementing that change, the Court should limit the scope of First Amendment expressive freedom to speech whose primary value goes to political discourse.

These two doctrinal moves would bring several related benefits. Judicial analysis of nonpolitical speech regulations would gain coherence and force through explicit focus on the personal autonomy value of speech claims and the credibility of government submissions about harm from expression. Nonpolitical speech would enjoy substantial constitutional protection, with the strongest protection attaching to the speech claims that most forcefully served the societal consensus to protect personal autonomy. Meanwhile, political speech would gain the deep First Amendment protection Meiklejohn envisioned, free from the balancing against government regulatory interests appropriate for speech claims less salient to our Constitution’s central democratic aspirations.²¹¹

²⁰⁷ *Lawrence*, 539 U.S. at 583 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

²⁰⁸ *See id.* at 582 (“We have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”).

²⁰⁹ *See supra* notes 191-196 and accompanying text.

²¹⁰ *See supra* notes 9-13 (discussing private rights theory’s emphasis on personal autonomy as basis for constitutional protection of speech).

²¹¹ *See supra* notes 24-26 and accompanying text (discussing public rights theory’s advocacy of categorical protection, rather than balancing, for political speech).

The two key features of the *Lawrence* opinion discussed in the previous section – emphasis on personal autonomy as the driving force behind substantive due process²¹² and rejection of pure moral regulation in favor of the harm principle²¹³ – make the Due Process Clause a viable source of constitutional protection for nonpolitical speech.

First, the *Lawrence* Court’s emphasis on personal autonomy’s centrality to constitutional rights resonates strongly with the private rights theory of expressive freedom and thus with much contemporary free speech doctrine. Under the private rights theory, the Constitution ensures expressive freedom because expression is an essential vehicle through which individuals advance their interests, and government interference with expression accordingly cuts to the heart of personal autonomy. Substantive due process, as conceptualized in *Lawrence*, elaborates and deepens that understanding, expanded to encompass all manner of self-actualizing behavior. Moreover, the idea of autonomy revived and strengthened in *Lawrence* reflects particular concern with personal freedom to conduct intimate interpersonal relationships, a concern that parallels the necessary emphasis of speech protection on communication and association between and among people.²¹⁴

Prior to *Lawrence*, the Court’s tentative, contingent linkage of personal autonomy with substantive due process was too weak to provide a bridge between due process and free speech doctrines.²¹⁵ In contrast, the *Lawrence* Court’s account of personal autonomy’s centrality to substantive due process echoes and sharpens the reasoning of decisions that protect expression because of its value for personal autonomy. Just as *Lawrence* emphasizes “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,”²¹⁶ the Court’s free speech jurisprudence emphasizes the contribution speech makes to personal autonomy.²¹⁷ Justice Kennedy’s libertarian rhetoric in *Lawrence* echoes his First Amendment opinions, which strongly reflect the private rights theory of expressive freedom.²¹⁸ He has even noted affinities between substantive due process and the autonomy concerns that undergird the private rights theory of expressive freedom, suggesting that early 20th Century due process decisions that protect parents’ decisions about child-rearing, “had they been decided in recent times, may well

²¹² See *supra* notes 163-186 and accompanying text.

²¹³ See *supra* notes 187-209 and accompanying text.

²¹⁴ See Tribe, *supra* note 112, at 1939-40 (identifying “speech and the peaceful commingling of separate selves” as “facets of the eternal quest for . . . exchanging emotions, values, and ideas”).

²¹⁵ See *supra* notes 171-180 and accompanying text.

²¹⁶ See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

²¹⁷ See *supra* notes 9-19 and accompanying text.

²¹⁸ See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”) (Kennedy, J.) (plurality opinion).

have been grounded upon First Amendment principles.”²¹⁹

Second, the *Lawrence* Court’s embrace of the harm principle closely parallels free speech doctrine’s emphasis on the impermissibility of viewpoint-based regulation. Disdain for purely moral regulation features prominently in First Amendment doctrine, generating free speech law’s core directive against viewpoint-based regulations of expression.²²⁰ Judges and scholars who disagree about other elements of First Amendment theory generally agree that the worst affront to expressive freedom is regulation that censors or punishes a particular viewpoint.²²¹ The Supreme Court’s rejection of viewpoint-based regulation even within the boundaries of speech unprotected by the First Amendment indicates the fundamental incompatibility of constitutional speech protection with majoritarian judgments about the quality of competing ideas.²²² Whereas prohibiting purely moral regulation marks a bold step for regulations of sexual behavior, that prohibition already pervades the law applied to restrictions on speech and expressive conduct.

Prior to *Lawrence*, the Court’s substantive due process doctrine too easily tolerated purely moral regulation, precluding a bridge between due process and free speech principles.²²³ Invoking substantive due process as a ground for protecting expression would have permitted many government regulations of speech based on majoritarian preferences, a notion intolerable to First Amendment doctrine. But *Lawrence*, as in its focus on personal autonomy, harmonizes substantive due process with deep principles of expressive freedom.²²⁴ The harm principle of

²¹⁹ *Troxel v. Glanville*, 530 U.S. 57, 65 (2000) (discussing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), and *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923)).

²²⁰ Prominent statements of this principle include *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-829 (1995) (“It is axiomatic that the government may not regulate speech based on the substantive content or the message it conveys . . . Viewpoint discrimination is thus an egregious form of content discrimination.”); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (“The general principle . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[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.”).

²²¹ Compare MEIKLEJOHN, *supra* note 20, at 26 (positing as “the vital point” of free speech theory “that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another”) with Fried, *supra* note 119, at 225 (“Government may not suppress or regulate speech because it does not like its content If government regulates the time, place or manner of speech, it must regulate in a way that does not take sides between competing ideas.”).

²²² See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (accepting assumption that municipal penalty for display of objects intended to arouse anger or alarm restricted only unprotected “fighting words” but nonetheless striking down penalty under the First Amendment). For a discussion of *R.A.V.* as an exemplar of rights doctrines’ focus on preventing improperly motivated regulations, see Tribe, *supra* note 112, at 1932-33; see also Hunter, *supra* note 163, at 1115-16 (similarly noting *Lawrence* Court’s emphasis on the legitimacy of the government’s ground for regulation).

²²³ See *supra* notes 191-196 and accompanying text.

²²⁴ Professor Baker advances a distinctively robust autonomy-centered theory of

Lawrence replicates the most substantial reason for limiting speech protection in some instances: that the speech in question will cause concrete harm.²²⁵ One of the public rights theory's core principles is that fear of harm has no salience in political speech cases, except in circumstances where the speech at issue threatens to render debate itself impossible.²²⁶ *Lawrence* allows that principle to stand under the First Amendment while providing a sensible guideline for balancing in nonpolitical speech cases.

Enlisting substantive due process to protect nonpolitical speech would improve upon present free speech doctrine by employing a different, more theoretically coherent constitutional principle to trigger searching judicial review of burdens on speech that primarily advances personal autonomy rather than political discourse. Under present First Amendment doctrine, which encompasses political and nonpolitical speech, a court will subject a regulation to heightened scrutiny simply because the regulation targets or burdens an activity classified as expressive. In contrast, a *Lawrence*-derived substantive due process shield for nonpolitical speech would subject a regulation of such speech to searching judicial review because the speech advanced personal autonomy. This linkage does not imply that all expression is entitled to substantive due process protection, nor does it obscure the Court's established commitment to protecting various kinds of nonexpressive conduct under the Due Process Clause.²²⁷ Rather, in light of *Lawrence*,

expressive freedom, arguing that harm should not justify regulation of speech because the autonomy values he views as justifying speech protection supersede society's interest in preventing harm. See Baker, *Harm*, *supra* note 117, at 992. Baker's argument appears to depend on the idea that speech is a distinctive exercise of "liberty," a notion that further depends on his conception of speech as operating nonviolently and noncoercively. See *id.* at 986 (defining protected expression). Baker fails to distinguish speech from action that similarly advances liberty without resort to coercion and violence or, in the alternative, distinguish "harmful" effects of speech from coercive or violent effects.

²²⁵ The harm principle stands behind most of the present doctrines by which the Supreme Court excludes certain categories of speech, such as incitement and true threats, from First Amendment protection. See *supra* note 106 (listing categories of unprotected speech). The glaring exception is the obscenity doctrine. See *infra* notes 274-278 and accompanying text (contending that acceptance of harm principle as barometer of justifiable speech restrictions requires rejection of Supreme Court's present basis for permitting obscenity regulations). Concerns about harm also explain Supreme Court decisions that uphold speech restrictions under balancing analysis. See, e.g., *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (upholding state's restriction on corporate political expenditures under strict scrutiny because state had compelling interest in preventing "a danger of real or apparent corruption").

²²⁶ See *supra* notes 24-26 and accompanying text. This position compels, among other things, full protection for political statements that insult or deride specified groups of people. An aspiration of the public rights theory is that its affirmative First Amendment commitment to robust public debate would increase real opportunities to answer such hateful expression, which often targets people and groups for whom a merely formal right to respond with "more speech" rings hollow. See Magarian, *Public Rights*, *supra* note 9, at 1983-85 (describing public rights theory's substantive conception of expressive freedom).

²²⁷ See *supra* notes 164-169 and accompanying text (describing present substantive due process protections for various nonexpressive activities).

the Due Process Clause should protect behavior that advances personal autonomy, whether or not the behavior has the descriptive characteristics of “speech.”²²⁸ As a practical matter, however, expression is a category of behavior especially likely to serve and reflect a person’s autonomy and individuality. Moreover, in classic substantive due process terms, the Free Speech Clause generates penumbras²²⁹ or implications²³⁰ that make expression the First Amendment does not protect an especially logical object of substantive due process protection.

Applying *Lawrence* to nonpolitical speech claims would avoid the pitfalls of previous attempts in the public rights tradition to differentiate constitutional protections of political and nonpolitical speech.²³¹ Unlike Meiklejohn’s procedural due process salve,²³² substantive due process would provide meaningful protection to speech that advances personal autonomy, reflecting the insight that nonpolitical speech, to the extent it serves the interest of personal autonomy, deserves a substantially greater constitutional shield than ordinary behavior. Unlike Sunstein’s two-tiered First Amendment,²³³ the substantive due process approach would, thanks to *Lawrence*, enjoy a textually sound foundation and embody a principled basis for extending strong constitutional protection to important instances of nonpolitical expression. Unlike both previous proposals, the substantive due process solution would advance the positive value of the public rights theory – maximizing protection for political speech – while also effectuating the insight of the private rights theory – that personal autonomy occupies a central place in our conception of constitutional rights – which leads society to favor constitutional protection of nonpolitical speech.

²²⁸ By making nonpolitical speech claims turn on the importance of the speech in question for personal autonomy, this due process approach would circumvent the speech-action distinction that Robert Bork emphasized to undermine the logic of protecting nonpolitical speech under the First Amendment. See Bork, *supra* note 29, at 25 (contending that First Amendment cannot protect merely self-gratifying speech because no principle permits distinction between self-gratifying speech and self-gratifying action). Of course, shifting nonpolitical speech protection to the Due Process Clause would also require judges to elaborate and implement legal values, an approach that could hardly have less affinity with Bork’s jurisprudence. See *id.* at 28 (arguing that commitment to neutral principles requires leaving disputes about nonpolitical speech to “the enlightenment of society and its elected representatives”).

²²⁹ See *Griswold v. Conn.*, 381 U.S. 479, 484 (1965) (noting that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

²³⁰ See *id.* at 500 (Harlan, J., concurring in the judgment) (presenting issue as whether law “infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values ‘implicit in the concept of ordered liberty’”) (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)).

²³¹ See *supra* notes 135-147 and accompanying text.

²³² See *supra* notes 135-136 and accompanying text (discussing Meiklejohn’s proposal to protect nonpolitical speech under procedural due process principles).

²³³ See *supra* notes 137-140 and accompanying text (discussing Sunstein’s proposal to accord nonpolitical speech a lower level of First Amendment protection than political speech would receive).

Indeed, by concentrating constitutional analysis of nonpolitical speech claims on the personal autonomy values at stake, this substantive due process approach would far more accurately reflect the principal reason for protecting nonpolitical speech than present First Amendment doctrine does. Under my proposal, the Constitution should not protect speech, nonpolitical or political, merely because it is formally “speech,” but rather because it advances either personal autonomy or political discourse. Focusing on the reason that nonpolitical speech deserves strong constitutional protection would give the Court a firm basis for keeping that protection robust. Just as the public rights theory of expressive freedom requires emphasis on the bottom line of healthy political discourse, the *Lawrence* doctrine’s application to nonpolitical speech would require emphasis on the bottom line of protecting personal autonomy.

Some may object to extending substantive due process doctrine to encompass nonpolitical speech due to the queasiness that reflexively greets any proposal to extend substantive due process. Those critics assert that courts should avoid substantive due process because the Due Process Clause provides no clear standards for judicial decision and thus invites judicial activism.²³⁴ Even if one accepts the argument’s questionable premises – that any constitutional text provides more than a broad outline for a complex and sophisticated doctrine of rights, that personal freedom should be a stingy exception to the rule of government power, that judicial innovation contradicts the constitutional design – it does not withstand scrutiny. First, the *Lawrence* personal autonomy principle clarifies substantive due process doctrine by providing a conceptually specific value capable of channeling judicial discretion. Second, present First Amendment doctrine already requires judges to make all manner of subjective, discretionary decisions in balancing nonpolitical (as well as political) expressive interests against

²³⁴ See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115 (1992):

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Id. at 125 (citation omitted). Critics might also point out that the Supreme Court has barred substantive due process claims where a specific constitutional guarantee is available to challenge the conduct at issue. See *Graham v. Connor*, 490 U.S. 386 (1989) (barring substantive due process claim against police for excessive force because plaintiff could have raised claim under Fourth Amendment). Lower courts have invoked *Graham* to bar substantive due process claims because the plaintiffs could have sued under the First Amendment. See *Hufford v. McEnaney*, 249 F.3d 1142 (9th Cir. 2001) (firefighter’s claim that department fired him for reporting coworkers’ misconduct); *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc) (prisoners’ claim of retaliation for filing lawsuits). Peter Rubin has argued persuasively that only a narrow reading of *Graham*, limited to using specific rights guarantees to define the ceilings of substantive due process claims, comports with established rights jurisprudence. See Rubin, *supra* note 149, at 865. In any event, my proposal would obviate the *Graham* problem for nonpolitical speech claims, because those claims would not properly arise under the First Amendment.

government regulatory interests.²³⁵ Framing nonpolitical speech claims in personal autonomy terms, far from increasing judicial subjectivity, would anchor free speech jurisprudence by injecting the defining concept of personal autonomy into the balancing of the speaker's and the government's interests.

The final part of this article considers how a substantive due process approach to protecting nonpolitical speech would work in practice.

III. APPLYING SUBSTANTIVE DUE PROCESS TO NONPOLITICAL SPEECH

Shifting constitutional protection for nonpolitical speech from the First Amendment to the Due Process Clause would work a substantial change in the law. On the First Amendment side of the fence, political speech would enjoy stronger protection than it now does, because no other categories of speech would complicate the public rights theory's elevation of political speech to the highest constitutional priority.²³⁶ This section briefly explores the practical implications of my proposed shift for several controversies involving nonpolitical speech. Courts would allow government to regulate speech not substantially related to personal autonomy based on credible showings of potential harm. Speech integral to personal autonomy, however, would receive protection comparable to, and in some cases stronger than, the protection the First Amendment presently provides.

One preliminary problem is determining whose personal autonomy should matter in the substantive due process speech balance. The subjects of the personal autonomy claim in *Lawrence* were direct participants in the legally proscribed behavior. Courts would face greater challenges in determining the locus of due process claims involving speech. First Amendment theorists frequently have acknowledged the parallel autonomy interests of speakers and people who receive information.²³⁷ Given the plurality of autonomy interests in expression, courts that applied the Due Process Clause to nonpolitical speech claims properly could consider the interests of receivers as well as speakers, according due process protection both to speech that advanced the speaker's autonomy interest and to speech that advanced the autonomy interests of individual listeners. Notwithstanding the vagaries of standing doctrine,²³⁸ the autonomy interests of receivers would provide grounds for

²³⁵ See *supra* notes 93-99 and accompanying text (discussing judicial line-drawing necessary under present First Amendment doctrine).

²³⁶ See *supra* notes 88-89 and accompanying text (describing benefits for political speech of judicial shift to public rights theory).

²³⁷ See, e.g., Redish, *supra* note 92, at 620-21 (arguing that expressive freedom serves value of individual self-realization both by protecting speech and by protecting right to receive information).

²³⁸ See, e.g., *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (denying standing to raise injuries to third parties). An approach to constitutional speech protection that emphasized

institutional speakers to raise free speech claims under the Due Process Clause in appropriate circumstances.

The discussion that follows requires two additional caveats. First, the *Lawrence* Court left unclear its precise standard of review and the relationship of its analysis to doctrinal elements of previous substantive due process cases.²³⁹ Considering how free speech controversies would play out under a *Lawrence*-derived regime therefore involve a necessary element of conjecture. Second, my proposal would not completely divide all speech claims into First Amendment and substantive due process cases. Claimants who challenged government interference with their putatively nonpolitical expression would, under my proposal, retain the opportunity to contend that their burdened expression had sufficient political character to warrant First Amendment protection. Moreover, the First Amendment could support claims that restrictions on particular nonpolitical expression would have chilling effects on political speech. These sorts of contentions presumably would figure prominently in adjudication of free speech cases, but my discussion presumes scenarios in which they would not be available, in order to focus on how the Due Process Clause would work distinctly to protect speech.

The following discussion briefly examines my proposal's potential effects on three important categories of speech that frequently lack political salience: artistic and cultural expression, pornography, and commercial advertising.

A. *Artistic and Cultural Expression*

The imperative to protect nonpolitical artistic and cultural expression against censorship has traditionally formed the most intuitive basis for challenging proposals to extend First Amendment protection only to political speech.²⁴⁰ Advocates of the private rights theory have made a powerful case for constitutional protection of artistic speech based on its deeply personal importance to the artist.²⁴¹ Although public rights

the consequences of protecting or regulating expression would require reevaluation of the Court's present standing doctrine. See Magarian, *Public Rights*, *supra* note 9, at 1988 & n.211.

²³⁹ The indeterminate standard of review may simply reflect tiered scrutiny's limited analytic value. See Tribe, *supra* note 112, at 1916-17 (arguing that *Lawrence*, despite avoiding the ordinary rhetorical formulations of tiered scrutiny, obviously subjected the Texas sodomy prohibition to a rigorous standard of review). More deeply, the *Lawrence* Court may have viewed the prior substantive due process decisions' emphasis on identifying "fundamental rights" as a rhetorical trap inclined to limit the doctrine's protective scope. See Hunter, *supra* note 163, at 1119 (arguing that Court's conservative wing "has fought to enshrine the category of fundamental rights as a containment device").

²⁴⁰ See *supra* notes 118-128 and accompanying text (describing consensus in favor of constitutional protection for nonpolitical speech).

²⁴¹ A very effective recent example is Anne S. Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. CIV. R.-CIV. L. L. REV. 437, 439-40 (1999).

theorists have finessed the issue by reference to art's often indirect political messages, maintaining the singular constitutional status of political speech requires treating a significant portion of artistic expression as nonpolitical.²⁴² Under present First Amendment doctrine, courts emphasize the value of artistic and cultural expression for personal autonomy and, in terms redolent of *Lawrence*, extend constitutional protection on that basis. In the words of one recent opinion: "The Constitution exists precisely so that the opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree."²⁴³

Courts, however, have failed to develop a fully coherent justification for protecting artistic and cultural expression under the First Amendment,²⁴⁴ a deficit that has sometimes led to unsatisfactory constitutional protection for important speech. Artistic and cultural expression is especially vulnerable when it explores themes of sexuality, thereby blurring some officials' and courts' perception of the boundary between art and pornography.²⁴⁵ Some decisions have blithely tolerated morally based regulation of art, particularly in the familiar circumstance where government patronage underwrites censorship. In *National Endowment for the Arts v. Finley*,²⁴⁶ the Supreme Court upheld a statutory requirement that federal decisions to fund art "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."²⁴⁷ Although the Court tried to downplay the "decency and respect" requirement as merely advisory,²⁴⁸ it substantively defended the requirement as an appropriate element of the discretion necessarily exercised in a competitive funding process.²⁴⁹ Similarly, in *Hopper v. City of Pasco*,²⁵⁰ the Ninth Circuit recognized a prerogative of municipalities to exclude "controversial" art from public forums. In sustaining a First Amendment challenge by artists whose work the city had refused to display, the court concluded only that the

²⁴² See *supra* notes 131-133 and accompanying text.

²⁴³ *United States v. Playboy Entertainment Group*, 529 U.S. 803, 818 (2000); see also *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002) ("Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach.").

²⁴⁴ See Kurzweg, *supra* note 241, at 438 (noting absence of coherent theory and criticizing Supreme Court's medium-specific approach to First Amendment protection of art).

²⁴⁵ For a discussion of pornography regulation, see *infra* notes 268-284 and accompanying text.

²⁴⁶ 524 U.S. 569 (1998).

²⁴⁷ 20 U.S.C. § 954(d)(1).

²⁴⁸ *Finley*, 524 U.S. at 581.

²⁴⁹ *Id.* at 585-86 (justifying "decency" requirement as an appropriate component of discretionary allocation of limited funds).

²⁵⁰ 241 F.3d 1067 (9th Cir. 2001).

city had failed to define and enforce its prohibition on “controversial” art, not that such a prohibition violated the Constitution.²⁵¹

More prevalent than manifest judicial allowance for moral censorship of artistic and cultural expression has been preemptive or reactive self-censorship by sponsoring institutions. The Smithsonian Institution endured a barrage of such actions during the 1990s. First, objections by western senators to the explanatory texts of an exhibit, *The West as America*, which forthrightly dealt with such issues as the ideological nature of the United States’ western expansion and white settlers’ massacres of Native Americans, led the National Museum of American Art to sanitize the offending texts.²⁵² Just weeks later, the Smithsonian’s director temporarily removed a work by artist Sol LeWitt from a tribute to photographic pioneer Eadweard Muybridge because she deemed the work, a box with apertures through which viewers observed an approaching nude female, “degrading to women.”²⁵³ In 1996 the National Air and Space Museum cancelled a long-planned exhibit commemorating the *Enola Gay*’s atomic bombings of Japan because of controversy about the exhibit’s questioning the justifications for the bombings.²⁵⁴ Nongovernmental beneficiaries of government cultural subsidies face similar pressures. In recent years, fear of controversy within the National Endowment for the Arts “has resulted in a kind of self-censorship among arts groups, officials of several organizations say, in which applicants try to second guess what the endowment will approve.”²⁵⁵

Although public patronage looms large in any discussion of artistic and cultural censorship, governments also use their police powers to suppress provocative or offensive art. Cities shut down exhibitions due to complaints about offensive content.²⁵⁶ The FCC fines performers for expressing controversial or arguably immoral viewpoints over broadcast media.²⁵⁷ States prosecute artists or museums for fine-art photography that incorporates images of unclothed children.²⁵⁸ Even worse, fear of

²⁵¹ See *id.* at 1078.

²⁵² See Michael Kimmelman, *Old West, New Twist at the Smithsonian*, N.Y. TIMES, May 26, 1991, at §2, p.1.

²⁵³ See Michael Kimmelman, *Peering into Peepholes and Finding Politics*, N.Y. TIMES, July 21, 1991, at §2, p.1.

²⁵⁴ See Paul Goldberger, *Historical Shows on Trial: Who Judges?*, N.Y. TIMES, Feb. 11, 1996, at §2, p.1.

²⁵⁵ Robin Pogrebin, *A New Chief Steps in at a Changed National Endowment for the Arts*, N.Y. TIMES, Dec. 22, 2001, at A19.

²⁵⁶ See, e.g., Joe Lewis, *Watts Towers Show Nixed*, ART IN AMERICA, Dec. 1, 2001, at 25 (describing Los Angeles officials’ decision to shut down exhibit that included images of “same-sex dancing partners” and “renderings of police officers and local gang members in what many deemed to be homoerotic poses”).

²⁵⁷ See, e.g., *Jones v. FCC*, 2002 U.S. Dist. Lexis 16396 (S.D.N.Y. Sep. 4, 2002) (denying on jurisdictional grounds poet’s complaint against FCC for branding one of her works “indecent”).

²⁵⁸ See, e.g., Chuck Philips, *A War on Many Fronts; Censorship: 1990 Was the Year That “free Expression” Ran Head-on Into “Moral Concern.” But the Conflict May Only Be*

government action, as in the context of subsidies, often leads artistic and cultural institutions to engage in self-censorship²⁵⁹ In the wake of the September 11 terrorist attacks, numerous institutions suppressed expression that might have appeared offensive or provocative in light of the attacks.²⁶⁰ As in the controversies about government funding, sexual content has provided the most consistent source of concern. In one recent example, the Denver Civic Theatre pulled down a painting displayed in conjunction with a performance because the painting depicted two men kissing.²⁶¹ On a broader scale, the film, television, music, video game, and comic book industries, under heavy pressure from the federal government, have all imposed highly visible rating systems on creators.²⁶² The common denominator in all these episodes is fear that our legal system cannot or will not protect challenging, autonomous artistic or cultural expression from majoritarian censorship.

Unless we accept the unsavory premise that public patronage carries with it some special government prerogative to impose orthodoxy of viewpoint,²⁶³ considerations of “decency” and “controversy” should be out of bounds when government decides whether and how to sponsor artistic and cultural expression.²⁶⁴ Principles of expressive freedom even

Beginning, L.A. TIMES, Dec. 26, 1990, at F1 (discussing federal investigation of photographer Jock Sturges and indictment of Cincinnati Contemporary Arts Center and its director).

²⁵⁹ Investigations and harassment by government agencies certainly help explain private art institutions’ resort to self censorship as an alternative to adverse government action. See *supra* note 47 and accompanying text (describing aggressive federal investigation of politically charged art exhibit).

²⁶⁰ See Magarian, *Wartime Debate*, *supra* note 32, at 123-24 (describing instances of self-censorship by privately owned artistic and cultural institutions following 2001 terrorist attacks). Much of the art that raised concerns after September 11 has undeniable political content, which means it would receive First Amendment protection under this article’s approach to expressive freedom.

²⁶¹ See Penny Parker, *Kiss-Off of Gallery’s Artwork a Low for “Puppetry” Promoters*, ROCKY MOUNTAIN NEWS, Oct. 8, 2003, at 7A.

²⁶² See, e.g., Joanne Cantor, *Statement on the Need for a Universal Media Rating System to the United States Senate Governmental Affairs Committee*, July 25, 2001, available at http://www.joannecantor.com/senatrat_tst.htm (last visited Feb. 13, 2005) (describing present voluntary entertainment ratings and advocating government action to strengthen and standardize ratings). Dr. Cantor prepared her statement in connection with a Senate committee hearing entitled “Rating Entertainment Ratings: How Well Are They Working for Parents, and What Can Be Done To Improve Them?” See *id.*

²⁶³ See Finley, 524 U.S. at 599 (Scalia, J., concurring in the judgment) (“I regard the distinction between ‘abridging’ speech and funding it as a fundamental divide, on this side of which the First Amendment is inapplicable.”). Among many reasons to reject this doctrine, a few can be summarized briefly: the government should never develop a habit of drawing moral distinctions among citizens’ competing ideas; government funding has sufficient importance to make it a practical necessity for many artists; and discretionary government rejection of a particular moral perspective strongly implies government disapproval of that perspective, raising the danger of a chilling effect on other speech. The public rights theory may also compel a strong rule of government nondiscrimination in subsidizing expression as a protective condition on the theory’s heightened tolerance for government regulation to expand expressive freedom. See Sunstein, *supra* note 21, at 297-99 (advocating such a rule).

²⁶⁴ A conceivable objection to my contention that the Due Process Clause would

more obviously should preclude government censorship of private artistic and cultural speech. In both contexts, the Constitution should provide assurances sufficient to deter preemptive self-censorship. The holes in present First Amendment doctrine's protection of nonpolitical artistic and cultural expression derive from courts' failures to recognize the constitutional significance of personal autonomy and to reject morally based assaults on autonomous expression. The autonomy and harm principles articulated in *Lawrence* make substantive due process a more cogent and effective source of constitutional protection for nonpolitical artistic expression than the First Amendment has been. Under the reasoning of *Lawrence*, art's importance for furthering personal autonomy would elevate censorship of art to the height of substantive due process concern.²⁶⁵ Likewise, the *Lawrence* Court's firm rejection of moral grounds for restricting personal autonomy should place nearly all artistic and cultural censorship out of bounds.²⁶⁶ Justifying a restriction on artistic or cultural expression would require a persuasive showing that the expression caused concrete harm.²⁶⁷ Ideological biases and "decency" canards would not suffice.

B. Pornography

The Supreme Court purports to accord full First Amendment protection to nonobscene, sexually explicit speech.²⁶⁸ The Court, however, has shown unusual willingness to credit the government's grounds for regulating pornography. For example, in *Barnes v. Glen Theatre, Inc.*,²⁶⁹ which upheld certain state restrictions on nude dancing, the Court only grudgingly admitted that such performance was expressive

toughen the Court's protection of art in the particular context of government sponsorship is that the Court, in *DeShaney v. Winnebago County Soc. Serv's Dept.*, 489 U.S. 189 (1989), held that the Due Process Clause does not place affirmative obligations on the government. That objection lacks force. When the government establishes a public grant program, and then chooses one applicant over another on moral grounds, it is exercising its discretion within a course of action to which it has already committed. That commitment distinguishes the arts funding scenario from the *DeShaney* majority's account of the case before it, where the state agency had taken no actions that would have led it to remove a reportedly abused child from his father's custody. *See id.* at 192-93 (describing state's actions in case). Moreover, the Court decided *DeShaney* during a period when it generally disdained substantive due process doctrine, and *Lawrence* represents a clear break from that period.

²⁶⁵ *See supra* notes 163-186 and accompanying text (discussing *Lawrence* decision's commitment to personal autonomy as the basis for substantive due process doctrine).

²⁶⁶ *See supra* notes 187-209 and accompanying text (discussing *Lawrence* decision's rejection of purely moral grounds for government regulation of activity with value for personal autonomy).

²⁶⁷ One submission that might satisfy this standard would be a demonstrated public health risk from an artistic performance that exposed an audience to contaminated blood. *See Kurzweg, supra* note 241, at 483.

²⁶⁸ *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) (reiterating doctrine that, for adults, nonobscene sexually explicit speech receives constitutional protection).

²⁶⁹ 501 U.S. 560 (1991).

conduct at all²⁷⁰ and then subordinated the respondents' expressive interests to an amorphous "substantial government interest in protecting order and morality."²⁷¹ Similarly, the Court has upheld municipal zoning ordinances that restrict the locations of adult entertainment businesses by minimizing the expressive interests at issue while validating government prerogatives to combat posited but undocumented "secondary effects" of such businesses.²⁷² The Court has even placed a subset of pornography, labeled "obscenity," entirely outside the First Amendment's protection.²⁷³ These departures from First Amendment doctrine resist principled explanation and threaten to undermine the precepts of expressive freedom.

Moving nonpolitical speech protection from the First Amendment to the Due Process Clause would sharpen constitutional analysis of pornography regulation. First, pornographic material's entitlement to constitutional protection, rather than turning on the material's technically expressive character, would depend largely on the material's contribution to the personal autonomy of its creators and/or consumers. Pornography producers could not simply run to court, crying about lost profits. On the other hand, courts could not reflexively dismiss pornographic material's claims to constitutional protection based on abstractions about whether the material was "speech"; instead, they would need to examine the material's value for advancing personal autonomy. Second, courts would need to distinguish precisely between moral and harm-based justifications for restrictions on pornography, allowing only the latter to vindicate challenged regulations. Regulators would have the opportunity to prove that pornographic material caused concrete social harms. They could not, however, justify state pornography regulations simply by asserting the existence of unspecified harms, let alone by claiming an interest in upholding some notion of public morality.

A shift from First Amendment to substantive due process protection for pornography probably would produce mixed decisional results. On one hand, constitutional protection for sexually explicit speech would increase dramatically because, in light of *Lawrence*, the Supreme Court's obscenity doctrine is untenable. The Court's decision in *Miller v. California*²⁷⁴ permits criminal penalties for "obscene" speech, defined to encompass

works which depict or describe sexual conduct. That

²⁷⁰ See *id.* at 566 (holding that exotic dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so").

²⁷¹ *Id.* at 569.

²⁷² See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding Renton, Wash. ordinance that mandated distances between adult movie theatres and residential neighborhoods, churches, parks, and schools); *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) (upholding Detroit ordinances that prohibited concentrations of adult-oriented businesses).

²⁷³ See *infra* notes 274-278 and accompanying text.

²⁷⁴ 413 U.S. 15 (1973).

conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.²⁷⁵

First Amendment doctrine never should have tolerated such a blatant capitulation to majoritarian biases, but it has. In contrast, the *Miller* Court's categorical exemption from expressive freedom runs afoul of both aspects of *Lawrence* that would animate substantive due process protection for nonpolitical speech. First, the *Miller* test takes no account of the autonomy value of obscene material. The *Miller* safe harbor for "serious artistic value" provides some basis for considering autonomy arguments, but it speaks in cramped, impersonal terms, leaving the autonomy interests of creators and receivers of "obscene" material invisible. *Lawrence* compels correction of that defect in *Miller*, not least because *Lawrence* itself found autonomy value in what some consider "deviant" sexual behavior²⁷⁶ – exactly the sort of behavior whose mere portrayal *Miller* allows states to criminalize. Second, *Miller* carved out an exception to First Amendment protection based entirely on states' putative interests in moral regulation, defining the "prurient interest" prong of the obscenity test by reference to the perspective of "the average person, applying contemporary community standards."²⁷⁷ The Court made no effort to ground the exception in concrete harm to third parties. Under substantive due process as elaborated in *Lawrence*, the species of purely moral regulation enabled by *Miller* cannot survive.²⁷⁸

²⁷⁵ *Id.* at 24 (footnote omitted).

²⁷⁶ See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (explaining that "statutes that purport to do no more than prohibit a particular sexual act . . . touch[] upon the most private human conduct, sexual behavior").

²⁷⁷ *Miller*, 423 U.S. at 24. This factor distinguishes the Court's treatment of "obscenity" from its analysis of other categories of speech as to which it has denied or limited First Amendment protection, all of which threaten some degree of harm to third parties. See *supra* note 106 (identifying categories of unprotected and partially protected speech under present First Amendment doctrine).

²⁷⁸ One federal judge recently held an obscenity prosecution unconstitutional on the theory that *Stanley v. Georgia*, 394 U.S. 557 (1969), established a fundamental right to possess obscene material, which *Lawrence* must shield from morally based regulation. See *United States v. Extreme Associates, Inc.*, 2005 WL 121749 (W.D. Pa. Jan. 20, 2005). Another district judge has rejected that argument. See *United States v. Gartman*, 2005 U.S. Dist. Lexis 1501 (N.D. Tex. Feb. 2, 2005) (denying motion for reconsideration). Present First Amendment doctrine cannot coherently support the reasoning of *Extreme Associates*, because that doctrine has long and consistently accommodated the morally grounded *Miller* test despite *Stanley* and despite the otherwise prominent prohibition on viewpoint-based discrimination. Sharpening free speech jurisprudence by applying substantive due process categorically to nonpolitical speech, as this article proposes, would repair this longstanding anomaly more effectively than either trying to patch flawed First Amendment doctrine piecemeal with bits of *Lawrence* or imagining that *Lawrence* completely subsumed the First Amendment within the Due Process Clause.

On the other hand, a substantive due process analysis would decrease constitutional protection for pornography that had limited value for the autonomy of artists or consumers, to the extent regulators could show that the material likely would harm third parties. These were precisely the contentions advanced on behalf of the MacKinnon-Dworkin antipornography ordinance struck down in *American Booksellers Association v. Hudnut*.²⁷⁹ Because institutional profits do not advance personal autonomy in the sense of *Lawrence*, the only viable autonomy claims for pornography would lie with creators – a group that could include writers, photographers, and directors as well as models and performers – and consumers. In many cases, creators might face difficulty trying to parlay the creative content of commercial pornography into viable autonomy claims; moreover, the pornography industry’s exploitation of models and performers would likely yield, from their standpoint, negative autonomy values in many cases.²⁸⁰ Pornography consumers potentially could raise salient claims that various pornographic materials made significant contributions to their sexual autonomy. On the other hand, defenders of the MacKinnon-Dworkin ordinance in *Hudnut* maintained that pornography, far from advancing its consumers’ autonomy, undermined some consumers’ will, increasing their propensities toward misogyny and sexual violence.²⁸¹ Thus, the posited behavioral consequences of pornography provided the most powerful justification for the ordinance, which its defenders characterized as protecting women from rape and other forms of gendered violence and exploitation that shatter their autonomy.

In his *Hudnut* opinion, Judge Easterbrook offered no suggestion that any person’s autonomy was relevant to evaluating the ordinance, instead stressing the importance of preventing government from interfering with the descriptive category of “speech.”²⁸² Likewise, Judge Easterbrook turned the harm arguments advanced by the ordinance’s defenders against them, concluding that any rape or harassment that resulted from pornography demonstrated pornography’s rhetorical effectiveness.²⁸³ These elements of Easterbrook’s decision, while controversial even on conventional First Amendment terms, reflect the reality that the ordinance faced a strong First Amendment challenge simply because it restricted speech. A substantive due process analysis would proceed from more precise premises: the centrality of autonomy for nonpolitical speech protection and the requirement of harm to justify regulation. Had the

²⁷⁹ 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

²⁸⁰ *See, e.g.*, CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 127-33 (1987) (arguing that pornography industry materially exploits and demeans women who work in it).

²⁸¹ *See* *Hudnut*, 771 F.2d at 329 (accepting government’s premise that “[d]epictions of subordination tend to perpetuate subordination”).

²⁸² *See id.* at 327-28.

²⁸³ *See id.* at 329 (asserting that any harm caused by pornography “simply proves the power of pornography as speech”).

ordinance’s defenders succeeded in undermining autonomy arguments on behalf of pornography and in linking pornography to concrete harms, they might well have defeated a due process challenge.²⁸⁴

C. *Corporate and Commercial Speech*

The Supreme Court over the past three decades has developed an increasingly expansive doctrine of First Amendment protection for corporate speech. The Court generally treats corporations like individuals in First Amendment analysis, extending full protection to most types of corporate speech.²⁸⁵ The Court has distinguished from fully protected expression the category of “commercial speech,” a term of art that generally encompasses commercial advertising,²⁸⁶ but even that subset of corporate speech gets substantial First Amendment protection under a species of intermediate heightened scrutiny.²⁸⁷ Although the Court’s protection for “commercial speech” deviates from its prior deference to government regulation of advertising,²⁸⁸ several justices have advocated further diminishing the distinction between commercial speech and fully protected speech.²⁸⁹ In contrast to my proposal’s beneficial implications

²⁸⁴ I offer no view about the likelihood of making either showing, and my hesitation about predicting the result in the due process scenario reflects a doctrinal problem that adopting my proposal would require the Court to resolve. Whatever its other constitutional defects, the version of the MacKinnon-Dworkin ordinance struck down in *Hudnut* was drafted in a manner that, as the district court had concluded, almost certainly rendered it overbroad. See *American Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316, 1339-40 (S.D. Ind. 1984). The First Amendment overbreadth doctrine represents a singular exception to standing doctrine developed in the context of the present, inclusive First Amendment to protect against government action that chills expression. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (describing First Amendment overbreadth doctrine as an exception to ordinary standing rules). The First Amendment overbreadth doctrine should apply in substantive due process cases where challenged burdens on nonpolitical speech threatened to cross into the First Amendment’s domain by chilling political expression.

²⁸⁵ See *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (striking down state restriction on corporate expenditures to influence referendum proposals); see also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983) (distinguishing lesser First Amendment protection accorded commercial advertising from full protection accorded corporation’s “direct comments on public issues”).

²⁸⁶ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (defining special First Amendment category of “commercial speech” as connoting “speech that does no more than propose a commercial transaction”) (internal quotation marks and citation omitted).

²⁸⁷ See *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557 (1980):

If [commercial speech] is neither misleading nor related to unlawful activity . . . the State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal.

Id. at 564.

²⁸⁸ See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that constitutional speech protection did not extend to commercial advertising).

²⁸⁹ See, e.g., *44 Liquormart v. Rhode Island*, 517 U.S. 484, 504 (1996) (advocating more

for artistic and cultural expression²⁹⁰ and ambiguous implications for pornography,²⁹¹ shifting protection for nonpolitical speech from the First Amendment to the Due Process Clause would substantially diminish constitutional protection for commercial speech and for corporate speech generally.

The Supreme Court generally grants substantive due process protection only to natural persons. That limitation marks one of the strongest distinctions between the contemporary substantive due process doctrine that emerged from *Griswold v. Connecticut*²⁹² and the discredited doctrine of *Lochner v. New York*.²⁹³ The *Lawrence* Court's crystallization of personal autonomy as the basis for substantive due process protection strengthens the logic of limiting due process protection to individuals, because only individuals can experience personal autonomy. The limitation of substantive due process protection to natural persons also distinguishes due process doctrine from the Supreme Court's protection of commercial speech under the First Amendment, which reflects the Court's general tendency to extend constitutional rights guarantees to corporate "persons" without regard to any underlying interest of discrete individuals.²⁹⁴ Thus, one important consequence of shifting protection for nonpolitical speech from the First Amendment to the Due Process Clause would be that only natural persons' interests could form the basis for nonpolitical free speech claims. Those interests might be manifest in certain institutions, such as theater companies or publications' editorial boards, but a claim could prevail only if suppression of the speech at issue undermined some natural person's or persons' personal autonomy.²⁹⁵ This limitation would render corporate free speech claims presumptively untenable.

The logic of allowing only natural persons to raise nonpolitical speech claims under the Due Process Clause, and the resulting dearth of constitutional protection for corporate speech, underscores the *Lawrence* doctrine's affinity with previous autonomy-based theories of expressive freedom. Professor Baker, perhaps the most sophisticated proponent of

searching First Amendment review of commercial speech regulations that serve "end[s] unrelated to consumer protection" (plurality opinion); *id.* at 523 (Thomas, J. concurring in part and concurring in the judgment) (rejecting *Central Hudson* balancing test for commercial speech "at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark") (footnote omitted).

²⁹⁰ See *supra* notes 240-267 and accompanying text.

²⁹¹ See *supra* notes 268-284 and accompanying text.

²⁹² 381 U.S. 479 (1965) (striking down state ban on dispensing contraceptives as a violation of fundamental constitutional right to privacy).

²⁹³ 198 U.S. 45 (1905) (striking down state regulation of employees' hours as a violation of substantive due process right to contract).

²⁹⁴ See *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886) (extending equal protection doctrine to corporations).

²⁹⁵ For a related contention that only natural persons' autonomy interests should ground constitutional rights claims and insulate behavior from constitutional responsibility through the public-private distinction, see Magarian, *Wartime Debate*, *supra* note 32, at 146-50.

an autonomy-based approach to the First Amendment, has argued that an autonomy focus should preclude protection for corporate speech.²⁹⁶ Baker conceptualizes expressive freedom as a shield for “individual freedom and choice,” and he rejects constitutional protection for commercial speech, broadly defined to encompass corporate speech generally, because “commercial speech does not represent an attempt to create or affect the world in a way which can be expected to represent anyone’s private or personal wishes.”²⁹⁷ The present doctrine of forceful First Amendment protection for commercial speech has developed in spite of the Supreme Court’s substantial embrace of the autonomy-based private rights theory.²⁹⁸ Eliminating that anomaly would exemplify the increased clarity a substantive due process approach would bring to nonpolitical speech controversies.

In contrast to Baker’s single-minded emphasis on the speaker’s autonomy,²⁹⁹ the conception of personal autonomy this article has derived from *Lawrence* also encompasses the autonomy interests of people who receive information.³⁰⁰ Under conventional First Amendment analysis, the Supreme Court has maintained that consumers gain valuable insights, and thus increase their ability to make autonomous decisions in the economic marketplace, through exposure to commercial information.³⁰¹ Stripping away the rhetorical bunting of the First Amendment, however, would facilitate a fresh critique of receiver-focused arguments for protecting corporate and commercial speech. First, the due process setting would provide space that the First Amendment precludes for considering countervailing ways in which commercial speech diminishes personal autonomy by manipulating its audience. Just as pornography arguably can erode some of its consumers’ inhibitions against rape and sexual assault,³⁰² commercial advertising arguably can erode its receivers’ resistance to unfulfilling or even harmful consumption.³⁰³ Second, even

²⁹⁶ See C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (hereinafter Baker, *Commercial Speech*).

²⁹⁷ *Id.* at 3 (footnote omitted). Baker extends his limitation on First Amendment protection to exclude corporate speech generally, including corporate political speech, because profit incentives rather than individual value choices motivate corporate speech. See *id.* at 14-18.

²⁹⁸ See *supra* notes 9-19 and accompanying text.

²⁹⁹ See Baker, *Commercial Speech*, *supra* note 296, at 8 (arguing that First Amendment “does not give the listener any right other than to have the government not interfere with a willing speaker’s liberty”).

³⁰⁰ See *supra* notes 237-238 and accompanying text.

³⁰¹ See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (positing “that [commercial] information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them”).

³⁰² See *supra* notes 279-284 and accompanying text.

³⁰³ “The economic enterprise does not passively accept individual values as given. In order to increase profits, the enterprise attempts to create and manipulate values. It does this by stimulating particular desires.” Baker, *Commercial Speech*, *supra* note 296, at 19.

to the extent commercial speech increases consumers' autonomy, that effect falls short of the autonomy benefits enjoyed by receivers of art and even some pornography. Those forms of nonpolitical expression frequently connect with their audiences at deep levels of personal intimacy. In contrast, the principal argument for protecting commercial speech – that it assists consumers in making economic decisions – speaks to the less integral idea of economic autonomy. Corporations' advertisements surely facilitate consumer purchasing choices, but so do their manufacturing decisions, financial strategies, and distribution practices, all of which the Court's disavowal of *Lochner* long ago made clear the government may regulate without regard to due process concerns.

In addition, the Due Process Clause likely would protect commercial speech less forcefully than the First Amendment does because rationales offered for regulating commercial speech, as opposed to those offered for regulating art and pornography, tend to appeal much more to practicality than to morality.³⁰⁴ States tend to regulate commercial advertising because of concerns about consumer protection³⁰⁵ or public health.³⁰⁶ Present First Amendment doctrine gives courts a basis for dismissing even those interests as insufficient to justify regulations.³⁰⁷ In contrast, the Due Process Clause after *Lawrence* compels a pivotal distinction between merely moral reasons for regulating conduct and reasons that rely on a danger of concrete injury to third parties.³⁰⁸ Particular commercial speech regulations might fail due process review because

The Supreme Court has shown inconsistency in evaluating consumer manipulation arguments against protection of commercial advertising. *Compare* *Posadas de Puerto Rico Assoc's v. Tourism Company*, 478 U.S. 328 (1986) (upholding regulation of gambling advertising based on interest in not encouraging gambling) *with* *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking down regulation of liquor advertising despite state's interest in not encouraging alcohol abuse).

³⁰⁴ See *supra* notes 246-251, 274-278 and accompanying text (discussing moral bases of efforts to regulate art and pornography).

³⁰⁵ See, e.g., *Bates v. State Bar*, 433 U.S. 350, 378 (1977) (noting that state defended attorney advertising ban on ground that advertising would lead attorneys to provide clients with services not tailored to clients' particular needs).

³⁰⁶ See, e.g., *Virginia State Bd. of Pharmacy*, 425 U.S. at 767 (noting that state defended drug price advertising ban on ground that such advertising "will place in jeopardy the pharmacist's expertise and, with it, the customer's health"). Some commercial speech regulations arguably serve purely moral purposes. See, e.g., *Posadas de Puerto Rico Assoc's v. Tourism Co.*, 478 U.S. 328, 341 (1986) (upholding restriction on casino gambling advertising as advancing substantial government interest in "reduction of demand for casino gambling by the residents of Puerto Rico"). Assuming a state could not show that such a regulation prevented some cognizable injury within the meaning of the *Lawrence* harm principle, and assuming the regulated advertisement advanced personal autonomy in some meaningful sense, a substantive due process approach to protecting noncommercial speech would foreclose the regulation.

³⁰⁷ See *Bates*, 433 U.S. at 378-79 (rejecting consumer protection rationale on grounds of ineffectiveness); *Virginia State Bd. of Pharmacy*, 425 U.S. at 770 (rejecting public health justification on grounds of paternalism).

³⁰⁸ See *supra* notes 204-209 and accompanying text (discussing *Lawrence* Court's embrace of harm principle).

they rested on insufficiently forceful showings of potential for injury, but courts could not presumptively dismiss the justifications usually offered for regulating commercial speech.

CONCLUSION

Present First Amendment doctrine does not protect speech well enough. By treating political expression like any other kind of speech and balancing it against government regulatory interests, federal courts have allowed entrenched power and majoritarian pressure to stifle political debate and dissent. Conversely, by following the intuition that personal autonomy justifies expressive freedom but never explicating what personal autonomy means and what government interests can properly trump it, courts have created an often incoherent system of expressive freedom that underprotects artistic and cultural expression, overprotects corporate and commercial speech, and manages at turns to overprotect and underprotect pornography. Theorists who view expressive freedom as a positive public right rooted in the need for informed democratic discourse have long advocated a sensible solution to the political speech side of the problem: narrow the First Amendment's protection to political speech but deepen the force of that protection to make suppression of political expression virtually impossible.

The Supreme Court's substantive due process jurisprudence complements that solution by providing a way to protect nonpolitical speech outside the First Amendment. The Court has grounded substantive due Process protection in a rich and thorough account of personal autonomy. The Court also has declared that personal autonomy interests must yield to countervailing governmental regulatory interests only where the government regulates to prevent some tangible harm, as distinct from a purely moral affront to the majority's sensibilities. These two principles of substantive due process, which resonate deeply with the rhetoric of prevailing, autonomy-based First Amendment doctrine, allow for a revision of constitutional expressive freedom that would reflect the distinct reasons why the Constitution protects political and nonpolitical speech. Nonpolitical expression, which contributes powerfully but not uniquely to the personal autonomy of both speakers and listeners, should take its place in the pantheon of substantive due process rights, where the Court's prohibition against purely moral regulation provides strong assurance against government censorship of unpopular ideas.

This article's proposal for amending free speech doctrine may raise concerns in two camps. First, some civil libertarians may view it as a Trojan horse, designed to impose on the First Amendment a substantive preference for political speech while maneuvering nonpolitical speech into a weakened position. In fact, my proposal refines the public rights theory of expressive freedom by taking personal autonomy seriously and developing a basis for powerful nonpolitical speech protection that actually improves on the coherence of present First Amendment doctrine.

Second, judicial minimalists may fear assigning courts the conceptually difficult and important tasks of distinguishing political from nonpolitical speech and, in nonpolitical speech cases, striking a proper balance between personal autonomy values and government interests in preventing harms. The proposal, however, asks judges to draw no more difficult lines and strike no more challenging balances than any doctrine of expressive freedom inevitably must and present First Amendment doctrine already does. The proposal improves on present doctrine by compelling judges in free speech cases to articulate and apply the specific values that anchor our constitutional commitment to protecting both political and nonpolitical speech.