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## A Reverent Reflection of the Splendid Scholarship of Martin Redish—Does Reexamining Commercial Speech Shed Light on the Regrettable Reliance Upon Lie & Insult in Political Campaigns?

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**A REVERENT REFLECTION OF THE SPLENDID  
SCHOLARSHIP OF MARTIN REDISH—DOES REEXAMINING  
COMMERCIAL SPEECH SHED LIGHT ON THE REGRETTABLE  
RELIANCE UPON LIE & INSULT IN POLITICAL CAMPAIGNS?**

Douglas W. Kmiec\*

INTRODUCTION

Anyone in Professor Martin Redish's company for even a brief time would perceive a brilliance moderated by humility and an ever-inquiring mind anchored firmly in principled, syllogistic reasoning. These personal qualities have yielded a scholar of the first rank at one of America's elite institutions; a scholar noted for his inspiring commitment to preserving and advancing human freedom under law. Having first met Professor Redish in preparation for a congressional hearing into a matter that brought into conflict the freedom of speech and human health, it is fair to say that many confronting this puzzle might quickly attempt to solve it by the sacrifice of principled freedom. Indeed, at the time of the hearing as well as this Symposium honoring him, Professor Redish was asked whether a consideration of consequences might not allow him to loosen his grip upon freedom if only just this once. "No," was the unequivocal response from Professor Redish, not delivered dogmatically, but only after the most generous consideration of opposing views.

There is abundant wisdom to be found in the Redish body of work, but it is his defense of what is called here "the major axiom of freedom" that supplies the most persuasive justification for not leaving commercial speech outside the boundaries of constitutional protection. The axiom is the idea that:

*It is better for a government to make an activity unlawful than  
it is to restrict speech about a lawful activity.<sup>1</sup>*

From this major axiom or premise, the benefits of the protection of commercial speech can be readily deduced: The encouragement of the creative expression of speakers; the supply of important information to hearers; and by facilitating the essence of contract—the mutual receipt of consideration by seller and buyer—producing a level of certainty and material comfort to permit the emergence of the strong middle class

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<sup>1</sup> See generally Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007) (analyzing and rejecting claims to limit freedom of commercial speech).

which Aristotle observed is a necessary element for a successful democracy.<sup>2</sup> But as with all matters of individual right, the protection of right is not absolute, and the Court has distilled its Redishian-supported judgments in the commercial speech area with an embrace of an intermediate standard of review.<sup>3</sup> Good, but could be better, responds Professor Redish. According to Professor Redish, to protect commercial speech only with intermediate scrutiny overlooks implicit content-based choices.<sup>4</sup>

Even though the Redish argument is well motivated by a desire to once again enhance human freedom, his major proof—the different treatment of advertising (speech promoting an economic transaction) from that of product evaluation like *Consumer Reports*—ultimately fails to support the obliteration of the commercial and noncommercial distinction because there are qualitatively different speech purposes served by advertising and evaluative reporting.<sup>5</sup> The *Consumer Reports* model is intended to be fact; the other is merely allowance for a fiction that is part and parcel of the human condition—namely, that while one is permitted to dream of material satisfaction in a human circumstance, it cannot really be achieved.<sup>6</sup> The continuing dissatisfaction, however, is not a fault of any one seller, but an intrinsic aspect of the imperfection of all consumers as human beings. There may be a case for a better human understanding of how things acquired can never be fully expected to satisfy our restless spirit, but it is not a case facilitated by merging commercial and noncommercial/political speech under a single strict scrutiny standard.

Nor is it tenable to claim that the judicial elaboration or specification of the subordinate purposes of the freedom of speech protected by the First Amendment, as discussed above, impermissibly implicates subject matter or viewpoint censorship, as it is merely giving definition to the general phraseology of the Constitution—i.e., what it means not to “abridge” the freedom of speech. Identifying the historical and contemporary meanings of constitutional provisions cannot be the basis for strict scrutiny<sup>7</sup> premised upon viewpoint favoritism, or else the Constitution would lack

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<sup>2</sup> 1 ARISTOTLE, *THE POLITICS OF ARISTOTLE* 130–31 (B. Jowett trans., Oxford, Clarendon Press 1885).

<sup>3</sup> *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>4</sup> Redish, *supra* note 1, at 72–73.

<sup>5</sup> *See infra* notes 52–53 and accompanying text.

<sup>6</sup> Tocqueville writes:

The short space of threescore years can never content the imagination of man; nor can the imperfect joys of this world satisfy his heart. Man alone, of all created beings, displays a natural contempt of existence, and yet a boundless desire to exist; he scorns life, but he dreads annihilation. These different feelings incessantly urge his soul to the contemplation of a future state, and religion directs his musings thither. Religion, then, is simply another form of hope; and it is no less natural to the human heart than hope itself.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290–91 (Henry Reeve trans., New York, George Dearborn & Co. 1838).

<sup>7</sup> When the government seeks to restrict the content of speech, it is subject to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226–27 (2015). Under this level of review,

meaning and all of the Court's jurisprudence would be impossible. Intermediate scrutiny of commercial speech does not render it a low-value or a lesser speech interest, like obscenity, defamation, etc. Indeed, the four-part *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>8</sup> inquiry facilitates commercial transaction by keeping expectations within reason—excluding from protection altogether false, fraudulent, and unlawful activity while still supplying helpful breathing space for sales pitches, puffery, and other expected exaggerations that fall short of that which is false, fraudulent, or unlawful.<sup>9</sup> In conclusion, this inquiry into the appropriate standard of review for commercial speech confirms the wisdom of Professor Redish's initial advocacy in favor of constitutional protection, but not his subsequent argument for strict scrutiny, even as merging the categories of commercial and noncommercial speech would make the need for a uniform definition of commercial speech unnecessary.

Had the Court not followed the wise counsel of Professor Redish, it is likely that the commerce of the United States, domestically and abroad, would have been impeded. Excluding the fraudulent and the misleading while keeping open channels of communication for sometimes embellished consumer information is a pattern of judicial review that helpfully splits the wholesale deference to regulatory interference that was signaled by Justice Holmes in his *Lochner v. New York*<sup>10</sup> dissent,<sup>11</sup> without embracing the paternalism of the Justice Peckham majority.<sup>12</sup>

Making inquiry into how well the intermediate standard protecting commercial speech works also highlights how the less well-calibrated *New York Times Co. v. Sullivan*<sup>13</sup> standard advances (or impedes) political speech.<sup>14</sup> Without a serious inquiry into the truth or falsity of political claim, politics is infused with lie and insult.<sup>15</sup> *Sullivan*'s absence of malice formulation as a form of libel extended helpful invitation to the voices of civil rights to not be so litigation risk averse as to be declared by judges in libel judgments as non-participants.<sup>16</sup> That said, the absence of any meaningful judicial inquiry into campaign fabrications and disparagement—by means of something akin to the multipart *Central Hudson* test in the commercial area<sup>17</sup>—leaves politics at the Wild West level of development. There are reasons for this: Elections are much fewer in number than commercial transactions so there is less judicial

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the government has the burden to prove a restriction on speech is necessary to serve a compelling interest and that it has employed the least restrictive means of achieving that purpose. *Id.*

<sup>8</sup> *Cent. Hudson*, 447 U.S. at 566.

<sup>9</sup> *Id.* at 562–64.

<sup>10</sup> 198 U.S. 45 (1905).

<sup>11</sup> *Id.* at 75–76 (Holmes, J., dissenting).

<sup>12</sup> *See id.* at 57–58 (majority opinion) (dismissing the validity of the labor law at issue, and remarking on the power of the people and power of the state being at odds).

<sup>13</sup> 376 U.S. 254 (1964).

<sup>14</sup> *See infra* Part VI.

<sup>15</sup> *See infra* Part IX.

<sup>16</sup> *See N.Y. Times Co.*, 376 U.S. at 300 (Goldberg, J., concurring in result).

<sup>17</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

opportunity to structure a possible check on political lie and insult. Fashioning such a check in the political context, of course, is more difficult since—unlike most commercial matters where ideology shapes little—in the political arena, ideology is almost always present, and especially so in an era like the present where concepts of common good are seldom mentioned, let alone understood. In brief, *Sullivan* has been assumed to keep regulatory conceptions of the common good at bay, even as that assumption was pressed for justification by the avalanche of lies and hate that infected the 2016 presidential contest.

Here, the Court's free speech jurisprudence from other contexts—including the commercial context—might be called upon. Redish helped disclose how judicial deference on the appropriateness of economic regulation did not necessarily beget deference on the regulation of speech associated with the economic or commercial matter.<sup>18</sup> The major Redish axiom again instructs that it may be correct policy to restrict bakers' hours—that is for the legislature to decide—but that does not mean the legislature controls the testimony, public speaking, and editorial writing that can contribute to the public mind on the overall policy concern. In a moment, we will look back at a Congress that, without Redishian insight, found it difficult to moderate its regulatory appetite in ways that distinguished oversight of conduct from constitutional limits on that oversight.<sup>19</sup> At the end of this brief Essay, we will explore whether there are not similar differentiations to be drawn with regard to lie and insult in political campaigns. Specifically, relying upon an analytical differentiation between the censorship of political expression from cases that articulate a compelling interest in the integrity of the electoral process holds some promise.<sup>20</sup> The promise is somewhat obscured by a strained acceptance of a claimed "search for truth" value of lying as well as methodical confusion of how the Court treats low value speech. As to the former, the Court's divided opinion in *United States v. Alvarez*<sup>21</sup> troublingly finds some remote protectable value in the lie—a value, if it exists, that is more fanciful than real.<sup>22</sup> Also in this low value or no value speech mix of considerations is whether the Roberts Court is really in support of "closed categories" of unprotected or low speech, or whether that is merely a rhetorical sleight of hand that hides the balancing of government and individual interest.

Without giving away too much of the story too early, the inquiry of the Symposium into the Redish achievement with respect to commercial speech protection is less

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<sup>18</sup> See generally Redish, *supra* note 1 (discussing those views that would allow for lesser rights to commercial speech under the First Amendment, and rejecting each view).

<sup>19</sup> See *infra* Part I.

<sup>20</sup> For an interesting comment on the revival of a long dormant statute to address false campaign speech in the context of an initiative, see William A. Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 S.D. L. REV. 321 (2007).

<sup>21</sup> 132 S. Ct. 2537 (2012) (plurality opinion).

<sup>22</sup> *Id.* at 2546–47.

instructive as to how to handle the corrupting influences of truly low value speech—lie and insult—in political campaigns. Nevertheless, while the Court divides the speech referenced in the First Amendment into categories to allow for more efficient and consistent judicial monitoring of what Madison called the “bulwarks of liberty,”<sup>23</sup> and while I am persuaded that the categories of commercial and noncommercial speech ought usefully remain separate, no category of speech can be entirely isolated from all others. The evolution of the protectibility of commercial speech is worthy of canvass for that reason alone. With political discourse at the historical core of the First Amendment, it is too glib and self-defeating to simply allow the flood of the false and the insulting to dissuade citizens from participation. In the near term, recalling the greater latitude the government has as speaker or subsidizer of speech may support a shaming or labeling regime familiar to human rights practice where the judicial enforcement is in its infancy. Nominally, at least, shaming would be more consistent with First Amendment values and the desire for an informed, civil discourse in the consideration of political candidates. Yet, the inherent difficulty of distinguishing legitimate government program condition from unconstitutional condition suggests that relying on government speech to fairly and neutrally evaluate the lie/hate/attack side of the human personality that seems attracted to political campaigns is to expect the fox to dispassionately comment on the well-being of the chickens in the hen house. At the very least, perhaps the Symposium will encourage Professor Redish or one of his many acolytes to take up the quandary of how political speech can be immunized from content censorship without the acceptance of the corrupting and democracy-destroying lie and insult. But before launching into these present considerations, a reexamination of commercial speech history from a participant’s view is relevant.

#### I. COMMERCIAL SPEECH IN THE DOCK OF CONGRESS

In 1986, a decade and a half after the important scholarly work of Professor Martin Redish<sup>24</sup> provided—on several cited occasions—the intellectual support for the Supreme Court to bring commercial speech under the protection of the First Amendment,<sup>25</sup> members of Congress were pressing hard to push back on that protection—at

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<sup>23</sup> James Madison, Adding a Bill of Rights to the Constitution, Speech in Congress (June 8, 1789), in *SELECTED WRITINGS OF JAMES MADISON* 164, 167 (Ralph Ketcham ed., 2006).

<sup>24</sup> Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *GEO. WASH. L. REV.* 429 (1971) (advocating for freedom of speech within commercial speech under the First Amendment).

<sup>25</sup> Prior to the work of Professor Redish, the Supreme Court had opined that the Constitution imposed no restraint on the government’s regulation of commercial advertising. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (stating there are no restraints on government regulation of purely commercial speech), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976) (rejecting the idea that commercial speech has no protection).

least with respect to tobacco advertising.<sup>26</sup> The legislative effort was partially characterized as pitting the health of millions of children against the cold-hearted, crass profit-maximizing of Madison Avenue.<sup>27</sup> Congress was being asked not whether it should be lawful to sell tobacco products to children (and for that matter adults), but whether saying things to make the practice attractive to those children (or adults) could be censored.<sup>28</sup> In more prosaic terms, it was argued that the advertising of tobacco companies was attracting new and, in many cases, young recruits to a product with addictive and possibly fatal effects.<sup>29</sup>

The Congressional action to censor tobacco speech was strongly supported by President Reagan's Surgeon General, C. Everett Koop, who could point to multiple medical studies detailing the risk of emphysema, lung diseases of all types, and of course, cancer.<sup>30</sup> Dr. Koop was not a reticent man, and, insofar as Congress was petitioning his testimony, he was anxious to provide it.<sup>31</sup> There was a strong rumor (denied by Koop) that the White House Chief of Staff, Donald T. Regan, had sought to block or temper Koop's testimony.<sup>32</sup> Part of the Chief of Staff's concern, maybe all of it, was aimed at assisting corporate interests who had supported President Reagan in his campaign.<sup>33</sup> Tobacco money had a history of supporting many presidents, but here there was something more. In particular, the news reporting and journalistic efforts of every publication from the *New York Times* to the now defunct *Newsweek* were heavily dependent upon tobacco advertising money.<sup>34</sup> In those pre-Internet days, which in just a few short years would challenge the hardcopy press in even greater ways, the lack of commercial money to support a robust news gathering and reporting enterprise raised real and inescapable concerns for free speech in plain and bottom line ways.

Koop testified nonetheless, and so did I. A photo appearing in *Advertising Age* caught Dr. Koop scowling during my testimony explaining the legal objection that

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<sup>26</sup> Jef I. Richards, *Politicizing Cigarette Advertising*, 45 CATH. U. L. REV. 1147, 1178–79 (1996).

<sup>27</sup> See generally *Advertising of Tobacco Products: Hearings Before the Subcomm. on Health & the Env't of the Comm. on Energy & Commerce*, 99th Cong. (1986) (discussing the competing issues on regulation of tobacco advertisements).

<sup>28</sup> *Id.* at 2 (statement of Henry A. Waxman, Subcommittee Chairman).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 333–41 (testimony of Dr. C. Everett Koop, Surgeon General of the United States).

<sup>31</sup> See Laralyn Sasaki, *Blocked from One Hearing, He'll Appear Aug. 1: Surgeon General to Testify on Tobacco*, L.A. TIMES, July 19, 1986, at 25 (discussing Koop's call for a "smokeless society" and his role in testifying before Congress).

<sup>32</sup> *Id.* (discussing Donald T. Regan's role in blocking Koop's testimony at a House meeting, and Koop's claim it was a mutual decision).

<sup>33</sup> See Letter from Ronald Reagan to J.C. Galloway, Tobacco Farmer (Sept. 24, 1980), <http://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/#id=rxky0146> [https://perma.cc/3XJN-7ZBH].

<sup>34</sup> Elizabeth M. Whelan, *When Newsweek and Time Filtered Cigarette Copy*, WALL ST. J., Nov. 1, 1984, at 1.

gave preference to the First Amendment over the health concerns. The photo might as well have been labeled “if looks could kill,” with Dr. Koop’s stare requiring its own surgeon general’s warning. The White House was only too delighted to learn that contrary to Dr. Koop, the Office of Legal Counsel (OLC) saw “constitutional problems” with the proposed tobacco advertising ban.<sup>35</sup> Those familiar with OLC-speak knew that meant a possible veto recommendation. In this case, a veto recommendation aligning the President of the United States with the forward-thinking Martin Redish view of the First Amendment.

The Redish view was on the ascendancy, and judicial decisions extending constitutional protection in commercial speech contexts were multiple in number. At some length at the hearing, I gave a Redish-informed case-by-case recitation of how prior to the late 1970s any rational basis for regulation could curtail commercial speech within the usual deferential framework that the Court brings to economic regulation.<sup>36</sup> Because of the influential writing of Professor Redish, the standard of review for restrictions like the advertising ban being considered was higher, but how much higher? The proponents of the legislation could arguably show a rational basis between a ban on advertising and some reduction in use (a contested point since the industry had its own experts who saw advertising as principally having intra-product brand effects).<sup>37</sup> Any curtailment of tobacco product use, and in particular the discouragement of new young users, could both hypothetically be substantial governmental interests; but would banning advertisement of tobacco products directly advance those interests? And was a ban the least restrictive way to advance those interests?

As we prepared for the congressional hearing, the answers to these questions were clouded by the Court’s decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.<sup>38</sup> The *Posadas* decision, which has today been all but formally overruled,<sup>39</sup> accepted the regulatory effort to keep casino advertising from encouraging local gaming while promoting it to tourists.<sup>40</sup> Notwithstanding the major Redish axiom that the power to ban the activity is not de facto greater than the power to manipulate the speech concerning lawful activity, the *Posadas* Court accepted the “fit” of the regulation as construed in the lower court even as it did not address other forms of gaming or apply to all people evenhandedly.<sup>41</sup> In brief, the Court in *Posadas* sustained the selective regulation of protected speech about a lawful activity.<sup>42</sup>

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<sup>35</sup> *Advertising of Tobacco Products: Hearings Before the Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 99th Cong. 348 (1986) (testimony of Douglas W. Kmiec, Deputy Assistant Att’y Gen.).

<sup>36</sup> *Id.* at 345–47.

<sup>37</sup> *Id.* at 708–09 (statement of Roger D. Blackwell, PhD) (stating that tobacco advertisements affected current smokers, but did not convince new people to begin smoking—including children).

<sup>38</sup> 478 U.S. 328 (1986).

<sup>39</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996) (plurality opinion).

<sup>40</sup> *Posadas*, 478 U.S. at 332–33, 344.

<sup>41</sup> *Id.* at 341–44.

<sup>42</sup> *Id.* at 344.

As noted, *Posadas* would prove to be an outlier and a misapplication of the four-part *Central Hudson* intermediate scrutiny standard,<sup>43</sup> but of course, we could not know that for certain at the time. It was unusual to ask the President to signal veto in any situation; it was doubly unusual for the OLC to place the President in the position of potentially vetoing congressional legislation on the basis of a constitutional theory not (yet) fully subscribed to by the Supreme Court. And while exercising a veto would—as a collateral consequence—help publishers meet their budgets, the beneficiaries of those budgets would be styling the veto as “President Signs Children’s Death Warrant,” or something equally hard for the President’s political advisors to accept casually. Of course, the President can veto legislation on any basis with the only relevant question then whether or not the President has a sufficient number of votes in Congress to sustain the veto. It was not the OLC’s role to pay attention to the President’s political popularity. Instead, if the President chose to be his own source of constitutional meaning, the OLC would naturally assume its special obligation to assist in Presidential explanation. The OLC placed considerable reliance upon Professor Redish’s scholarship.<sup>44</sup>

Because the subordinate inquiry of this Essay is the much regretted ubiquity of lie and insult in political campaign, let me pause to give emphasis to the far different level of civility in political discourse, including the respect held by all sides for each other’s differing points of view in the 1980s. In this regard, while recalling the Redish-OLC collaboration of years past is interesting for its academic perspective on free speech, it also illustrates the importance of having an office within the executive branch devoted to legal decision-making, not legal policy. An office, capable of reasoned judgment that respects both presidential direction and judicial interpretation, but does not see its judgment as wholly one or the other, helps to maintain a commitment to the rule of law that is much needed around the globe, and that is irreplaceable within our own system. The tobacco problem was a politically charged one, but the discussion stayed at a high level within the executive branch as well as between the executive and Congress (and indirectly the Court). In that way, this retelling is hoped to supply a tonic for the public mind that frankly is weary from the vacuity of what today passes for substance even at the presidential level. Finally, and relatedly, the entire episode illustrates the importance of accepting the knowability

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<sup>43</sup> *44 Liquormart, Inc.*, 517 U.S. at 509–10.

<sup>44</sup> Professor Koppelman assails the Redish axiom as a product of “tunnel constructivism.” Andrew Koppelman, *Veil of Ignorance: Tunnel Construction in Free Speech Theory*, 107 NW. U. L. REV. 647, 648–49, 729 (2013). In particular, Koppelman relies on Milton and Mill to bring into legal argumentation—even that rigorously applying syllogistic logic—the consequences of choosing one legal doctrine over another. *Id.* at 691–92, 695–96, 698, 730. That may sound unexceptional except that it is bound up with modern day controversies over interpretative theory and the separation of powers considerations that keep courts from becoming, as the late Justice Scalia remarked in a different context, “junior varsity Congress.” *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

of the law of the Constitution and not indulging the skeptical notion planted early in much of legal education that any position can be argued for, and what will prevail is not a matter of law, but persuasiveness, personality, or personal connection.<sup>45</sup>

## II. ABANDONING THE DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH?

Returning to the main inquiry, Professor Redish argues that it is time for the Court to take the next step and treat commercial and noncommercial speech alike. It is increasingly rare to find scholars who would treat commercial speech as it was pre-Redish: a subordinate aspect of economic regulation meriting minimal judicial oversight. That said, there is formidable opposition to extending freedom of expression to commercial entities.<sup>46</sup> Professor Tamara Piety is one of the strongest voices in opposition. Professor Piety subscribes to the view of the late Chief Justice Rehnquist that the metaphor of corporate personhood cannot endow corporations with the mind, will, and emotions of an actual person.<sup>47</sup> Professor Piety writes:

As a non-human entity, a corporation lacks the expressive interests related to self-actualization and freedom that human beings possess by virtue of being human. Human beings are moral subjects and ends in themselves. Corporations are not. And despite

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<sup>45</sup> Far more than a ban on tobacco advertising turns on the OLC treasuring and preserving that legal frame of mind. Just consider how essential the affirmation of legal truth's existence was to conveying to President Reagan that he had not made a timely report to Congress of a finding supporting the Iranian arms transaction that yielded revenue that ended up in the hands of the Contras, S. REP. NO. 100-216, at 9 (1987); or less dramatically, but equally important to the maintenance of the separation of powers, the ability to convey to the president that he lacked inherent authority to item veto provisions in omnibus legislation, Paul M. Johnson, *Line-Item Veto*, GLOSSARY POL. ECON. TERMS, [http://www.auburn.edu/~johnspm/gloss/line-item\\_veto](http://www.auburn.edu/~johnspm/gloss/line-item_veto) [<https://perma.cc/8UY5-SAUT>]; or the OLC's consistent defense of federalism even when the underlying state policy was contrary to one's point of view. Subsequently, and more consequential, for individuals, the determination that the OLC itself had incorrectly and unfairly written a legal opinion that excluded those diagnosed with AIDS from federal program participation, *Anti-Bias Law Extended for AIDS Sufferers*, L.A. TIMES (Oct. 6, 1988), [http://articles.latimes.com/1988-10-06/news/mn-4513\\_1\\_anti-discrimination-laws](http://articles.latimes.com/1988-10-06/news/mn-4513_1_anti-discrimination-laws) [<https://perma.cc/U2TF-7J66>]. In all of these cases, the OLC was seeking a legal conception of the truth of the law as it existed prior to the query submitted by the President, the Attorney General, or a cabinet secretary as in essence the executive department's general counsel for legal determination.

<sup>46</sup> See, e.g., Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008). Professor Piety identifies a number of colleagues who see things her way including C. Edwin Baker, Daniel Greenwood, Fred Schauer, Steve Shiffirin, Roger Schiner, Lawrence Soley, and Lawrence Mitchell. *Id.* at 2584 n.4.

<sup>47</sup> *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 822–23, 825, 828 (1978) (Rehnquist, J., dissenting); Piety, *supra* note 46, at 2585.

the extension to corporations of personhood, that personhood has not extended to courts concluding that they are entitled to all of the same protections applicable to human beings.<sup>48</sup>

Professor Redish makes a variety of arguments in favor of raising the category of commercial speech into a higher standard of review. He sees the application of strict scrutiny as the natural result of his axiom that regulation of speech is not a lesser included element of legislative authority to render the underlying activity unlawful.<sup>49</sup> The axiom has been mentioned several times already, but if its worthiness needs further witness, the reader might consider the accountability or transparency the axiom facilitates. For example, it may be reasonable to suppose that a proposal to ban the use of a product altogether can be counted upon to provoke a lively public debate on its own; whereas, the details of an advertising ban would often be evaluated at a far less visible, and often bureaucratic, level. Yet, the value of the Redish axiom accomplishes this objective of accountability, as well as its earlier stated importance of carrying out First Amendment purposes under the intermediate standard of review. What is missing from Professor Redish's argumentation is why the *Central Hudson* formulation fails to honor his axiom.<sup>50</sup>

A review of the literature suggests that virtually all of the participants in the standard of review debate with Professor Redish concede the commercial/noncommercial line as one that is not always easy to discern.<sup>51</sup> Nevertheless, Professor Redish claims that his objection is rooted in something more fundamental than uncertainty: Namely that in measuring regulatory fit, the Court misses the point that intermediate review, itself, is a disguised form of viewpoint discrimination.<sup>52</sup> Professor Redish attempts

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<sup>48</sup> Piety, *supra* note 46, at 2646 (footnote omitted). Professor Piety believes that corporate speech is one-sided advocacy and therefore the justification of wanting to deliver valuable information to consumers necessarily must be checked by an inquiry into the truth of the corporate statements made. *Id.* at 2623. The other purposes of free speech—speaker creativity and facilitating democratic self-participation, argues Piety—do not transfer to commercial speech. *See id.* at 2588. Might there not be a difference between the commercial speech engaged in by individuals and corporate commercial speech?

<sup>49</sup> *See* Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1440–42 (1980) (arguing against Justice Rehnquist's opinion in *Posadas* that claimed the ability to regulate an activity included the lesser ability to regulate the speech of that activity).

<sup>50</sup> The Court has declined arguments in favor of merging commercial and noncommercial speech and subjecting it all to strict scrutiny. *See generally, e.g.,* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (invalidating a Massachusetts regulation outlawing outdoor tobacco advertising of smokeless tobacco or cigars within 1,000 feet of schools or playgrounds. Rather than apply strict scrutiny, the Court applied the third and fourth prongs of the *Central Hudson* test and specifically rejected the tobacco company's arguments that exposure to advertising by the young does not increase underage use of tobacco products).

<sup>51</sup> *See, e.g.,* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 56 (1999).

<sup>52</sup> Redish, *supra* note 49, at 1444–45.

to illustrate his point by drawing a comparison between how the Court would apply strict scrutiny to any legislated censorship of evaluative and comparative materials—like the pages of *Consumer Reports* (presenting arguably objective evaluations of products)—but not commercial advertising or marketing (which promotes a product without at the same time revealing imperfection or shortcoming).<sup>53</sup> In light of this, Professor Redish argues that maintaining the commercial/ noncommercial distinction “gives rise, ironically in the name of the First Amendment, to the most universally condemned threat to the foundations of free expression: suppression based on the regulators’ subjective disagreement with or disdain for the views being expressed.”<sup>54</sup>

Professor Redish’s point is a clever one, but is it persuasive? Is it of the same level of magnitude as his initial efforts to bring commercial speech within the First Amendment’s protection altogether? Frankly, it is not, since it mixes apples and oranges; a *Consumer Reports*-type magazine is not commercial speech—that is, speech promoting acquisition or sale of products or services, which is not what is going on within its pages. The publishers of the magazine are interested in selling the magazine, and advertisements for it would be commercial speech, but product tests and other evaluations of other products or services offered by others are not. This material is the equivalent of scientific studies done in a university research lab. A positive report may convince a purchaser to prefer one product over another, but unless the evaluation was bought, licitly or illicitly by the manufacturer or seller, its purpose is not the consummation of a sale of a given product. The fact that the pages contain information about goods or services that may become the subjects of commercial transactions no more makes them commercial speech than news coverage in the business pages of the *New York Times* or the *Wall Street Journal* reporting the news of, say, the latest Samsung phone fire. True, various courts, including the Supreme Court itself, have employed looser or variant definitions of commercial speech, but it has long been accepted that a key element of the definition is speech related to the proposal of an economic transaction.<sup>55</sup>

### III. INTERMEDIATE SCRUTINY: HOSTILE OR HELPFUL TO CAPITALISM?

Categorizing his opponents as rationalist, intuitionist, or ideological, Professor Redish sees all three as manifesting a hostility “to capitalism and its logical outgrowths or implications.”<sup>56</sup> There are numerous reasons to be both praiseworthy as

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<sup>53</sup> *Id.*

<sup>54</sup> MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* 77 (2013).

<sup>55</sup> *See, e.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (citations omitted).

<sup>56</sup> Redish, *supra* note 1, at 68–69. Professor Redish attempts to bolster his position in favor of strict scrutiny by putting legal scholars into two camps: Those who are not known as strong defenders of the First Amendment, and those scholars and jurists associated with a more protective approach toward free expression. *See id.* at 69, 110 (discussing the viewpoint-based regulation done by his opponents that he feels damages First Amendment protections).

well as skeptical of the capitalist enterprise. In comparison to the inefficiencies of command and control economies, the extended order of capitalism (as Hayek would put it) gets scarce resources into the hands that value them most.<sup>57</sup> On the opposing side, capitalism's major flaw is the subordination of the human person to the material. This is an important, if brief, reference to political divides that have been with us at least since the industrial revolution, if not before. But how opposing strict scrutiny for commercial speech coincides with that ideology is unclear. After all, to the extent that higher scrutiny would mean a greater need for regulatory justification on the part of government regulators, it would be reasonable to suppose that free marketers would join with Professor Redish since the likelihood of regulatory success would presumably be less in light of the greater justification required.

Moreover, the intermediate standard does have a practical business value; specifically, it allows for some important play in the joints in sale presentation. Unlawful or fraudulent products or services have no speech protection, but the intermediate standard allows for the sales pitch—that is, an admixture of useful, factual information describing the product along with performance anecdotes and other puffery that consumers expect, but usually taken with a grain of salt.<sup>58</sup> In other words, consumers count on not being defrauded, but also are mature enough to not have their expectations unduly raised by the sale person's personal testimonials or the word "sale," itself, which often means the seller has made a minor adjustment in mark-up.

Professor Redish does articulate a legitimate concern with what he describes as "indirect or furtive viewpoint-based discrimination."<sup>59</sup> Yet his examples and concerns are either easily met by the present jurisprudence of intermediate review, or they would be resolved by a limited application of strict scrutiny on argumentation akin to that of Justice Scalia applying heightened protection in *R. A. V. v. City of St. Paul*.<sup>60</sup> to nominally unprotected but not uniformly treated hate speech.<sup>61</sup> For example, Professor Redish poses a hypothetical ordinance in the city of Chicago limiting the distribution of anti-war literature on Michigan Avenue during rush hour.<sup>62</sup> The ordinance has obvious safety and traffic considerations beneath it, but of course its topical limitation to those against the war is wholly viewpoint-based as is, under recent precedent, the

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This categorization of jurists and scholars leaning for and against free speech is unhelpful, for without an agreed midpoint reliably separating what is progressive from what is conservative in each speech context, it is subjective labeling.

<sup>57</sup> 1 F. A. HAYEK, *The Fatal Conceit: The Errors of Socialism*, in THE COLLECTED WORKS OF F. A. HAYEK 6 (W.W. Bartley III ed., Univ. Chi. Press 1988); see, e.g., Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 351–53 (2008) (illustrating the principle in regards to laws against price gouging).

<sup>58</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562–64 (1980).

<sup>59</sup> Redish, *supra* note 1, at 71.

<sup>60</sup> 505 U.S. 377, 385–86 (1992).

<sup>61</sup> *Id.*

<sup>62</sup> Redish, *supra* note 1, at 71.

limitation to the subject of warfare.<sup>63</sup> The Court identifies subject matter discrimination and viewpoint censorship as two forms of potentially unconstitutional discriminations on speech.<sup>64</sup> In any case, that the regulation of commercial speech generally is the purview of intermediate review should not mean that the government can draw regulatory lines in a way that is calculated to censor the commercial speaker on viewpoint or subject matter grounds. If unprotected speech must nevertheless not be subject to viewpoint or subject matter favoritism or dis-favoritism,<sup>65</sup> commercial speech should be likewise evaluated. Thus, the under-inclusive distinctions would easily fail. Yet, the point being made is that such a poorly drawn commercial speech regulation would also fall to intermediate scrutiny. An ordinance that prohibits the distribution of a leaflet promoting the sale of oranges, but not apples (without some explanatory context), would hardly seem to be directly advancing a substantial governmental interest. The point is one does not need to elevate all of commercial speech to the most protected category in order to reach these impermissible distinctions.

#### IV. DEMOCRACY IN A PUBLIC OR PRIVATE SENSE?

Redish disagrees with the late Judge Bork's historical claim that limits protected freedom of speech to political discourse.<sup>66</sup> Sliding past the contentious arguments over original understanding, Redish posits that were political discourse to be seen as the only protected subject matter, then he would propose redefining the meaning of political discourse.<sup>67</sup> Substantively, the Redish insight here is quite astute recognizing that it is not just self-government in a collective or public sense that is relevant to political discussion, but also self-government in terms of self-determination in a private sense. Professor Redish writes:

I have concluded that it makes absolutely no sense to protect speech relevant to a situation where the individual has a minuscule fraction of the say in the outcome [(the quadrennial presidential election, for example)] while simultaneously refusing to protect speech that will facilitate choices by the private individual that are solely her own.<sup>68</sup>

The Redish insight recognizes that the individual exercises his or her freedom in the context of multiple communities, and some of the most important are very close at hand—e.g., public schools as well as land use and environmental proceedings

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<sup>63</sup> *Id.* at 71–72.

<sup>64</sup> *Id.* at 72–73.

<sup>65</sup> *Cf. R. A. V.*, 505 U.S. at 386.

<sup>66</sup> Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 592–93 (1982).

<sup>67</sup> *Id.* at 600.

<sup>68</sup> Redish, *supra* note 1, at 81.

conducted by thousands of local governments. The Redish reformulation is provocative, but it must be more than *ipse dixit* if it is to withstand the interpretive sniping of devoted originalists. In any case, the clever redefinition does not meaningfully advance the idea why commercial speech should be raised from the intermediate standard of review.

Professor Redish's response to Judge Bork is creative, in itself, and there is much to commend a wider conception of political discourse in the twenty-first century. However, if we accept Judge Bork's historical understanding of politics and political discourse, this would place all forms of advertising as well as *Consumer Reports*-type evaluations and considerably more currently protected speech outside the umbrella of constitutional protection. The narrow historical understanding of free speech would unite commercial and noncommercial speech together but in a way that Professor Redish would certainly regret—most all speech would then be subject to regulatory restriction.

#### V. LIE & INSULT IN POLITICAL CAMPAIGNS

At last, turning again as we did in the beginning to the topic of lie and insult in political campaigns, does the exploration of the treatment of commercial and non-commercial speech and the appropriate standard of review yield helpful insight? As a purely descriptive matter, the exploration underscores that lies about soap are easier to address than the lies of the proverbial soap box. The qualified, intermediate protection of commercial speech provides both for the exclusion of misleading, untruthful, and unlawful product claims; by contrast, the strict scrutiny applied to the protection of political speech has resulted in just the opposite: the facilitation of lie and insult as protected forms of speech. If we assume speech has its same orientation and purposes in the political arena as in the commercial, the protection of lie and insult is at best a facetious claim of speaker "creativity," which merely begs the question of its compatibility with both the misdirection of political consumers, and almost nonexistent consideration of the corrupting nature of lie and insult to the overall democratic process.

The chances of being politically defrauded far exceed the commercial odds of falling victim to a commercial lie. Yet, in contrast to the commercial setting, there is no assurance of truth in political advertising or regulatory commitment to incentivize accountability at the federal level beyond the cumbersome and highly technical FEC regulation of campaign contributions.<sup>69</sup> At the state level, efforts to regulate false campaign speech is often defeated by the dicta in *New York Times Co. v. Sullivan*.<sup>70</sup> Not only does the existing positive law leave unregulated this type of bad behavior,

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<sup>69</sup> 52 U.S.C. §§ 30101–30146 (2012).

<sup>70</sup> See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 695 (Wash. 1998) (citing *N.Y. Times Co.* in its rejection to allow regulation of political speech based on claims of truthfulness).

but also, in some ways, it can be said to mandate it. In this regard, the Federal Communications Act<sup>71</sup> mandates that broadcasters accept political ads in an uncensored form even in cases where broadcasters believe that some of the claims are false or misstated. For example, in 1972, the FCC compelled acceptance of an advertisement from J.B. Stoner, a self-proclaimed white racist running for the United States Senate under the so-called National State Rights party.<sup>72</sup> Stoner's ad claimed that African Americans, specified therein by the N-word, were advocating integration out of the sexual desire for white women.<sup>73</sup> Under FCC rules, advertisements can be refused for technical reasons—their poor quality or lack of fit within an allotted time slot—but short of refusing all advertisements for all candidates for a given office, false political speech is without present or workable remedy.<sup>74</sup>

First-year law students are uniformly instructed in the venerable case of *New York Times Co. v. Sullivan*. *New York Times Co.* deployed the First Amendment to modify the common-law action of libel to create a judicially crafted exemption from liability for falsehoods regarding a public official<sup>75</sup>—widened later to false statements about private individuals caught up in a matter of public concern.<sup>76</sup> Henceforth, unless incorporation of inaccurate material could be shown to result from “actual malice” or “reckless disregard” for the facts, it would not give rise to remedy.<sup>77</sup> The Supreme Court articulated in 1971 that “it can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for public office.”<sup>78</sup>

## VI. PROSECUTING FALSE CAMPAIGN ADVERTISING?

Nevertheless, frustrated with the feckless ways for citizens to express their disappointment, if not outrage, that lies and insults have become commonplace in the modern political campaign, it has been argued that drafting a false campaign advertising statute is possible, provided it is limited to statements that are negligently made and proven to be false by clear and convincing evidence.<sup>79</sup> The negligence requirement reflects the fact that in an Internet-centered world it is too easy to find support even for false statements.<sup>80</sup> Arguably, candidates should be able to rely only upon sources that they have proven to be credible after reasonable investigation. Of course,

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<sup>71</sup> 47 U.S.C. § 315 (2012).

<sup>72</sup> *Atlanta NAACP*, 36 F.C.C.2d 635 (1972).

<sup>73</sup> *Id.* at 636.

<sup>74</sup> *See* 47 U.S.C. § 315.

<sup>75</sup> *New York Times Co.*, 376 U.S. at 279–80.

<sup>76</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 376–77, 390–91 (1967).

<sup>77</sup> *New York Times Co.*, 376 U.S. at 279–80.

<sup>78</sup> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

<sup>79</sup> Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 908 & n.146 (2008).

<sup>80</sup> *Id.* at 906.

even the negligence standard pulls back on *New York Times Co.*<sup>81</sup> There is a difference in context between a third party placement of an editorial advertisement, as in *New York Times Co.*, and lies and insults in a campaign, but it is far from clear that the contextual difference allows a greater likelihood for limiting political speech in a campaign. Indeed, even as the facts of *New York Times Co.* suggested a context of relative tranquility (the editorial offices of a newspaper), the rationale or aim of the Court was the rough and tumble of political campaign.

There is also the problematic nature of giving remedy. In most cases, there will be an inability to litigate a question to its conclusion during an election. An imperfect solution might be to provide financial sanctions and prominent publication of that liability in a long-term hope to rid politics of lie and insult, but obviously, the sanctions would have particular effect with respect to career politicians.

There have been a number of states that have flirted with statutes aimed at false political advertisements.<sup>82</sup> In a Minnesota case, the candidate argued that had his opponent not opposed a particular measure, a certain rape would not have occurred.<sup>83</sup> The rape was particularly offensive, involving a mother and two daughters who had been kidnapped and raped repeatedly over a period of two days.<sup>84</sup> The candidate's claim, however, was factually wrong because the legislative measure would not have applied to previous convictions.<sup>85</sup> The Minnesota law was interpreted as requiring a publisher to have "reason to believe" that an advertisement was false before the publisher could reject it.<sup>86</sup> The Minnesota standard was held inconsistent with *New York Times Co.*'s actual malice requirement.<sup>87</sup>

Another case from Washington State related to several misstatements concerning a state ballot proposition authorizing assisted suicide or "death with dignity."<sup>88</sup> The Washington State Supreme Court invalidated the law<sup>89</sup> authorizing the prosecution

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<sup>81</sup> See *New York Times Co.*, 376 U.S. at 279–80.

<sup>82</sup> Brooks Jackson, *False Ads: There Oughta Be a Law!—Or Maybe Not*, FACTCHECK.ORG (May 10, 2007), <http://www.factcheck.org/2004/06/false-ads-there-oughta-be-a-law-or-maybe-not/> [https://perma.cc/UD95-C3GD].

<sup>83</sup> *State v. Jude*, 554 N.W.2d 750, 751 (Minn. Ct. App. 1996).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 752.

<sup>86</sup> *Id.* at 753.

<sup>87</sup> *Id.* at 753–54.

<sup>88</sup> *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 693 (Wash. 1998).

<sup>89</sup> *Id.* at 699. Curiously, the Washington Supreme Court struck down the statute even though it facially complied with *New York Times Co.*'s requirements of both actual malice and clear and convincing burden of proof. See *id.*; see also *id.* (Guy, J., concurring). The court accurately found that a false campaign statute could be differentiated from a defamation law, insofar as defamation largely concerned statements made by one person against another, and is designed to protect the property of an individual or his good name. *Id.* at 697. Then, however, the court suggested that in the context of a campaign for an initiative or proposition, and perhaps political campaigns generally, "the grossest misstatements, deceptions, and

of false political advertising.<sup>90</sup> The majority of the court observed that the best remedy for false speech is more speech.<sup>91</sup> This has been the standard response, of course, even as it seems qualitatively anemic in light of the scope of the lies and insults that now pervade American politics. In the words of the concurring judge in the Washington State case, the majority had been “shockingly oblivious to the increasing nastiness of modern American political campaigns.”<sup>92</sup>

In *DeWine v. Ohio Elections Commission*,<sup>93</sup> an Ohio Court of Appeals upheld the Ohio false campaign speech law by applying strict scrutiny.<sup>94</sup> The court determined that “[t]here is indeed a compelling state interest in preventing the publication of false statements concerning candidates for election to office where such statements are purposely published with full knowledge of the falsity thereof and are designed to promote the election or defeat of a candidate for office.”<sup>95</sup>

#### VII. LIES & INSULTS—CATEGORICAL BALANCING?

In cases dealing with low value speech (of which, remember, commercial speech is not), the Supreme Court of the United States has alternated between declaring categories of low value speech to be altogether closed or opening them by engaging in the balancing of the individual and public interest. The categorization approach is most often associated with the mostly unapplied, but not formally overruled, “fighting words” doctrine in *Chaplinsky v. New Hampshire*<sup>96</sup> where the Court wrote:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth

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defamations are immune from legal sanction unless they violate private rights—that is, unless individuals are defamed.” *Id.* (quoting Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992)). The court rejected the need for an informed electorate, calling that “patronizing and paternalistic.” *Id.* at 698.

<sup>90</sup> *Id.* at 693.

<sup>91</sup> *Id.* at 696.

<sup>92</sup> *Id.* at 701 (Talmadge, J., concurring).

<sup>93</sup> 399 N.E.2d 99 (Ohio Ct. App. 1978).

<sup>94</sup> *Id.* at 103.

<sup>95</sup> *Id.*

<sup>96</sup> 315 U.S. 568 (1942).

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>97</sup>

The prospects for addressing political falsehood went down appreciably when the Supreme Court invalidated the Stolen Valor Act<sup>98</sup> in *United States v. Alvarez*.<sup>99</sup> Alvarez made a number of false claims in public meetings as a board member of the Three Valley Water District Board, including that he had been awarded the Congressional Medal of Honor.<sup>100</sup> Justice Kennedy, writing for a plurality that included the Chief Justice as well as Justices Ginsburg and Sotomayor, argued for a strong presumption against any restriction of speech or the widening of the prohibited categories.<sup>101</sup> Alvarez's protection of the low value speech—at best advances the license of the speaker—is without sensitivity to the misdirection of the listener and its debasing of democracy. Troublingly, *Alvarez* is consistent with other recent decisions, most particularly, *United States v. Stevens*,<sup>102</sup> an animal cruelty case, and *Snyder v. Phelps*,<sup>103</sup> upholding highly offensive protests at military funerals in brutal disregard of the emotions of surviving family.<sup>104</sup> The dissent in *Alvarez* and the related low-value speech decisions have been principally left to Justice Alito, who would have applied a balancing approach.<sup>105</sup> The dissent's view was unacceptable, said the plurality, because it relied upon “a free-floating test for First Amendment coverage” and in essence would empower judges to add to a prohibited category whenever the value of speech was outweighed by the harms that it caused.<sup>106</sup> Scholars dispute whether the Roberts Court is actually adhering to a categorical framework or is hiding within its categorical statements a balancing methodology.<sup>107</sup>

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<sup>97</sup> *Id.* at 571–72 (internal footnotes omitted).

<sup>98</sup> 18 U.S.C. § 704(b), (c) (2012) (amended 2013).

<sup>99</sup> 132 S. Ct. 2537, 2551 (2012) (plurality opinion).

<sup>100</sup> *Id.* at 2542.

<sup>101</sup> *Id.* at 2547.

<sup>102</sup> 559 U.S. 460 (2010).

<sup>103</sup> 562 U.S. 443 (2011).

<sup>104</sup> *Id.* at 460–61.

<sup>105</sup> See *Alvarez*, 132 S. Ct. at 2564–65 (Alito, J., dissenting).

<sup>106</sup> *Id.* at 2544 (plurality opinion) (quoting *Stevens*, 559 U.S. at 490).

<sup>107</sup> Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 496–97 (2015). Professor Tsesis argues that even though the Supreme Court appears to have adopted a more categorical approach, in fact, it is continuing to balance. *Id.* The author supports balancing but would like the Court to undertake a more comprehensive balancing effort that would meet its concern with ad hoc balancing but not eliminate the proper consideration of individual context. *Id.* at 497. Thus, employing rhetoric reminiscent of how commercial speech is treated under the four-part test in *Central Hudson*, the author argues that the Court should evaluate whether a particular restriction on speech arises from constitutional, statutory, or common law interests; “whether the restricted expression has historically and traditionally been constitutionally protected;” the nature, breadth, and strength of general welfare policies that lie behind the speech restriction; the fit between the objective and regulation; and whether there are other less restrictive means to achieve the goals. *Id.* at 529.

## VIII. LEARNING FROM EUROPE

Balancing is indeed the methodology prevalent in the European Court of Human Rights. Under Article 10 of the European Convention on Human Rights: “Everyone has the right to freedom of expression. . . . includ[ing the] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>108</sup> The capacious protection of Article 10 is balanced by Article 17 providing that no “State, group or person [has the] right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”<sup>109</sup> What Article 17 attempts to do according to the Council of Europe is: “guarantee[ ] the preservation of the system of democratic values underpinning the convention notably by preventing totalitarian groups from exercising the rights . . . set[ ] [by the convention] in a way to destroy the rights and liberties established by the convention itself.”<sup>110</sup>

The 2016 presidential campaign in the United States seems to have needed something akin to the Article 17 counterbalance built into the European Convention—namely, an understanding that rights correlate with duties if they are to continue to be protective of human freedoms. As Article 17 indicates, there must be an exercise of right in a manner that does not destroy the concept of rights and liberty, itself.

Professor Redish in informal colloquy at the Symposium revealed little affinity for the European approach.<sup>111</sup> In this regard, it is not surprising to find Professor Redish, in his role as free speech champion, generally to perceive the type of Article 17 balancing to be much desired in the abstract but much feared in application. The fear derives from the begged question: Namely, who will determine falsehood and, even more fundamentally, by what means and standard would such determination be made? “European countries historically have restricted hate speech through both criminal and civil law, and, pursuant to European Directive, all EU member states must criminalize ‘serious manifestations of racism and xenophobia’ and to make such expression punishable by ‘effective, proportionate and dissuasive penalties.’”<sup>112</sup>

<sup>108</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 2889.

<sup>109</sup> *Id.* at art. 17.

<sup>110</sup> COUNCIL OF EUR., FACTSHEET: HATE SPEECH 2 (2009), <http://wcd.coe.int/ViewDoc.jsp?p=&id=1477721&direct=true> [<https://perma.cc/9FGX-VDQW>].

<sup>111</sup> In presenting this Paper last after a long day of excellent, but exhausting, intellectual sparring, it is possible I mistook Professor Redish’s head movement as disapproval of the European counter-balance in Article 17 when he was merely nodding off, but it is unlikely. Certainly, the EU approach runs logically counter to Professor Redish’s advocacy of raising the standard of review for the legal evaluation of regulation of commercial speech to strict scrutiny which, unlike the import of Article 17, would narrow rather than broaden regulatory discretion.

<sup>112</sup> Robert Corn-Revere, *Hate Speech Laws: Ratifying the Assassin’s Veto*, 791 CATO INST. May 24, 2016, at 1, 7 (quoting Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, EUR-LEX (June 15, 2014),

The directive can be contrasted with the U.S. Supreme Court's reluctance to either liberally construe the categories of low value speech or engage in a more forthright balancing of competing interests that would sustain greater restriction.

May a governmental entity consistent with the First Amendment fairly limit or restrict lie and insult without appearing, or actually being, partisan? Again, the scholarly opinion is divided. Professor William Marshall writes, "[c]urrently, a number of legal sanctions are available, at least in theory, to redress excesses in campaign speech. These sanctions include individual defamation and privacy actions for damages and state unfair campaign practice restrictions that directly penalize the dissemination of false and misleading campaign speech."<sup>113</sup> Yet, Marshall's thoughtful research also indicates that the Supreme Court approach has been "erratic at best."<sup>114</sup>

#### IX. THE INTEGRITY OF THE POLITICAL PROCESS

What may seem "erratic" in the Court's jurisprudence may not be. In this respect, a judicial assessment of political lie and insult as negligible or low-value speech corrupting electioneering, arguably dovetails with deference to regulation of the electoral process to maintain its integrity. In *Burdick v. Takushi*,<sup>115</sup> for example, a restriction on write-in protest votes was upheld.<sup>116</sup> Although assailed as inconsistent with the protection of expression, it is not anomalous unless one assumes that all review of regulation affecting the area of political speech should be particularly

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<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3A133178> [<https://perma.cc/QY2J-JXJT>], and Council Framework Decision 2008/913, 2008 O.J. (L 328) 55, 55, respectively).

<sup>113</sup> William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 285 (2004).

<sup>114</sup> *Id.* For a particularly excellent consideration of the opinion in *Alvarez* and the impact of undisciplined decision-making in the area of content based regulation, see Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499 (2013). Professor Smolla writes:

Visible in the spread of the three opinions in *Alvarez* are (1) the view, represented by Justice Kennedy's plurality opinion, that freedom of speech occupies an exalted position, rarely trumped by other societal values, (2) the view, represented by Justice Breyer's concurrence, that freedom of speech deserves some elevated stature in the constitutional scheme, but not a stature so elevated that it cannot be overtaken by well-crafted laws vindicating other significant societal values, and (3) the view, represented by Justice Alito's dissent, that speech may be divided into that speech which serves some plausible positive purpose, which is deserving of constitutional protection, and that speech which advances no legitimate end worth crediting, yet is highly offensive to good order and morality, which is not deserving of any protection.

*Id.* at 499–500 (footnotes omitted).

<sup>115</sup> 504 U.S. 428 (1992).

<sup>116</sup> *Id.* at 441–42.

stringent.<sup>117</sup> Although one scholar commented that the activity of write-in votes had “obviously expressive dimensions [that should not] have been so easily dismissed under traditional First Amendment doctrine,”<sup>118</sup> she was arguably undervaluing the compelling interest of electoral integrity. The importance of electoral integrity is a necessary precondition to political discourse. Thus, the late Justice Scalia intimated that the state interest in having an informed electorate and in protecting the integrity of the political process was of such strength that the state would have greater power to regulate election speech than other forms of speech.<sup>119</sup> Writing in dissent in *McIntyre v. Ohio Elections Commission*,<sup>120</sup> Justice Scalia stated:

The . . . question is whether protection of the election process justifies limitations upon speech that cannot constitutionally be imposed generally. . . . Our cases plainly answer that question in the affirmative—indeed, they suggest that no justification for regulation is more compelling than protection of the electoral process. “Other rights, even the most basic, are illusory if the right to vote is undermined.” The State has a “compelling interest in preserving the integrity of its election process.” So significant have we found the interest in protecting the electoral process to be that we have approved the prohibition of political speech *entirely* in areas that would impede that process.<sup>121</sup>

So too, Justice Breyer has indicated First Amendment considerations lie on both sides of cases such as *Burdick*, and that the First Amendment presumption hostile to government regulation that lingers in the strict scrutiny standard is out of place in the context of elections.<sup>122</sup> Breyer’s insight reveals that the Court is beginning to grasp how intermediate scrutiny has allowed commerce to be secured by the four-part *Central Hudson* test, while on the political side placing false or insulting expression as reflexively off limits under strict scrutiny jeopardizes electoral integrity. Of course, confusion returns through the back door with the subsequent decision in *Alvarez* finding First Amendment value even in false statements of fact.<sup>123</sup> The lying accepted as improperly limited in *Alvarez* is increasingly blamed for startling outcomes from creating false democratic hope in the “Arab Spring,”<sup>124</sup> priming the pump against the

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<sup>117</sup> See generally *Brown v. Hartlage*, 456 U.S. 45 (1982) (reviewing regulation of speech regarding promise to lower office’s salary as a break to tax payers).

<sup>118</sup> Heather K. Gerken, *Election Law Exceptionalism? A Bird’s Eye View of the Symposium*, 82 B.U. L. REV. 737, 739–40 (2002).

<sup>119</sup> *McIntyre v. Ohio Elec. Comm’n*, 514 U.S. 334, 378–79 (1995) (Scalia, J., dissenting).  
<sup>120</sup> 514 U.S. 334 (1995).

<sup>121</sup> *Id.* at 378–79 (Scalia, J., dissenting) (internal citations omitted).

<sup>122</sup> Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002).

<sup>123</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

<sup>124</sup> Thomas L. Friedman, *Social Media: Destroyer or Creator?*, N.Y. TIMES (Feb. 3, 2016),

EU and in favor of “Brexit,”<sup>125</sup> the election of Donald Trump pursuant to exaggerated claims of former Secretary Clinton’s indictability,<sup>126</sup> and the rejection of needed constitutional reform in Italy and the premature defeat of Italy’s Prime Minister. Even Pope Francis has chimed in to remind Catholics that lying on the Internet is a sin.<sup>127</sup> Sin it may well be, but Internet purveyors like Mark Zuckerberg have been slow to accept the causation or very much personal responsibility for the depths of deception.<sup>128</sup> These competing positions are an echo of the distant issue of whether tobacco advertising results in new tobacco users. Only the products or causes for alarm and protest have changed.

The pros and cons of regulating false and disparaging statements to secure electoral integrity is a topic more worthy of Professor Redish than continuing to press for the merger of commercial and noncommercial speech. Distortion and lie mislead the electorate and can become a “tool [that] is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”<sup>129</sup> Allowing false and disparaging campaigning to go unregulated results in the now all too familiar downward spiral of one spurious attack advertisement begetting another. Such campaigning not surprisingly results in an increasing number of voters being alienated from the political process. Moreover, to the extent reputational harms are inadequately compensated under *New York Times Co.*, there will be ever greater reluctance for the highly qualified to stand for public election. The overall corruption of lie and insult is insidious.<sup>130</sup> Robert Bellah puts the matter squarely:

To a considerable degree the reputation of a community is reflected in the reputation of its representative figures. Indeed, it is

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[http://www.nytimes.com/2016/02/03/opinion/social-media-destroyer-or-creator.html?\\_r=0](http://www.nytimes.com/2016/02/03/opinion/social-media-destroyer-or-creator.html?_r=0) [<https://perma.cc/EFW3-489S>].

<sup>125</sup> Mick Hume, *The Truth About Those ‘Brexit Lies,’* SPIKED (Sept. 22, 2016), <http://www.spiked-online.com/newsite/article/the-truth-about-those-brexit-lies-juncker-eu/18789#.WHQciHpVL6F> [<https://perma.cc/QB4A-6ZUU>].

<sup>126</sup> Sapna Maheshwari, *How Fake News Goes Viral: A Case Study*, N.Y. TIMES (Nov. 20, 2016), <http://www.nytimes.com/2016/11/20/business/media/how-fake-news-spreads.html> [<https://perma.cc/5H9L-KXRT>].

<sup>127</sup> *Pope Pontificates on “Fake News,” Calls It a Sin and Likens It to “Sexual Arousal from Excrement,”* DAILY SHEEPLE (Dec. 7, 2016), <http://www.thedailysheep.com/pope-pontificates-on-fake-news-calls-it-a-sin-and-likens-it-to-sexual-arousal-from-excrement-122016> [<https://perma.cc/E35U-F8VJ>].

<sup>128</sup> Zeynep Tufekci, Opinion, *Mark Zuckerberg Is in Denial*, N.Y. TIMES (Nov. 15, 2016), <http://www.nytimes.com/2016/11/15/opinion/mark-zuckerberg-is-in-denial.html> [<https://perma.cc/WT7H-AW9H>].

<sup>129</sup> *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

<sup>130</sup> For a particularly thoughtful example of the insidious harms caused by lies in the context of the campaign, see Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1087 (2012).

the founders and heroes of a community that to a considerable extent give it its identity, and it is the memory of the sufferings and achievements of exemplary figures that constitutes a community as a community of memory and keeps that community alive.<sup>131</sup>

This is not to say addressing lie and insult in campaigns is without practical problems. These challenges could, in theory, be made somewhat less daunting by a voluntary application of editorial standards to Internet postings. Freedom is always paired with responsibility; freedom of the press included. There's one major difficulty: The Internet since its inception is a public good with a commons from which virtually no one and nothing is excluded altogether. There are a myriad of ways to limit access to given content from bomb-making to the latest recording by Lady Gaga, but keeping people from fabricated stories and spreading them on a self-created blog or Facebook page is a different order of ideological censorship, let alone technological difficulty, which has thus far been avoided except in places not well known for human rights protection (viz. North Korea, China, Cuba). Nevertheless, any discussion of remedy for political lie and/or insult must always bear in mind that freedom can be lost to both external oppressors as well as those who are internally reckless or complacent. While Newton Minow once called television "a vast wasteland," seldom is the Internet condemned as sweepingly. In particular, there are valuable collections online that take justifiable pride in their self-creation and maintenance, such as Wikipedia, and which, while not perfect, is darn impressive in terms of the observance of editorial and ethical standard. Moreover, the online magazines and websites, such as the Huffington Post, Politico, and the Hill, for example, are all privately maintained platforms to which the general public is not ordinarily invited to submit content beyond short responses to articles written by online "journalists." Just as newsprint is guided by self-imposed standards of editorial quality or accreditation, from the hiring of staff with journalistic talent and training, to adequate sourcing, to pre-publication libel assessment, to the copy-editing tasks from typeface to spelling, so too online publications could adopt and apply to itself like standards of quality.

Yet, assume voluntary standard setting insufficient to dampen lie and insult, what public avenues might be explored? Within the constitutional boundaries set by *New York Times Co.*, it is possible to envision more generous causes of action for political defamation to some degree. While familiar, pursuing a more muscular defamation cause of action has noticeable costs. To some degree, this adjustment of common law liability will remove the conversation of matters of public concern from the public square into the courthouse, a move that may leave the public less well-informed. There is also the practical difficulty that no judicial or administrative action is likely to be able to keep up with the swift and dynamic nature of a political

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<sup>131</sup> Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 745 (1986).

campaign and produce in real time an effective remedy for the impact of a false or disparaging statement. Bringing in the judiciary or an administrative agency also allows both entities to become an auxiliary attack device for the mean-spirited candidate desiring to ratchet up political disagreement into an allegation of unlawful behavior. Mr. Trump obviously thought he was gaining a political advantage by announcing during the second debate that he would appoint a special prosecutor to look into the activities of former Secretary Clinton.<sup>132</sup>

In *Republican Party of Minnesota v. White*,<sup>133</sup> the Court observed that “[D]ebate on the qualifications of candidates’ is ‘at the core of our electoral process and of the First Amendment freedoms,’ not at the edges.”<sup>134</sup> This is why this area, again, more than the tweaking of review standards for commercial speech, warrants the wise study and exposition of Martin Redish. Fashioning a remedy for lie and insult that sensitively balances the First Amendment’s protection of disquieting and disturbing speech with the electoral integrity is no easy task, as the multiple attempts to deal with flag-burning reveal.

One public remedial avenue is conceivably a greater dependence upon government speech. President Obama repeatedly deployed government speech to “correct” what he perceived were the erroneous statements of Mr. Trump, and even to render an overall pronouncement of Mr. Trump’s unfitness.<sup>135</sup> The Court’s jurisprudence has not fully limned what limits there are on government speech beyond the assurance that the government cannot impose its view upon a dissenting citizen on pain of loss of constitutional rights. But government can promote its point of view and it need not justify its own expression with any level of heightened scrutiny. Moreover, the government can condition the use of public money (but not money held by a prospective government program participant derived from other sources).

The appropriateness of looking to government speech theory as a possible antidote to lie and insult is indirectly strengthened by precedent which limits government speech where such limitation threatens the integrity of a government proceeding. By parity of reasoning, government speech should not be looked to as a counterpoint to lie and insult where the cure (overly didactic specification of “appropriate” speech) would be worse than the disease (lie and insult). Just as a legal aid lawyer should not have his private discussion with his client artificially limited in a manner that would threaten the integrity of the judicial proceeding,<sup>136</sup> it must be asked which would be

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<sup>132</sup> Patrick Healy & Jonathan Martin, *In Second Debate, Donald Trump and Hillary Clinton Spar in Bitter, Personal Terms*, N.Y. TIMES (Oct. 9, 2016), [http://www.nytimes.com/2016/10/10/us/politics/presidential-debate.html?\\_r=0](http://www.nytimes.com/2016/10/10/us/politics/presidential-debate.html?_r=0) [<https://perma.cc/2K4N-5YU8>].

<sup>133</sup> 536 U.S. 765 (2002).

<sup>134</sup> *Id.* at 781 (quoting *EU v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989) (alterations in original)).

<sup>135</sup> Michael D. Shear, *Trump as Champion of Working Class? ‘Come On,’ Obama Says*, N.Y. TIMES (Oct. 14, 2016), <http://www.nytimes.com/2016/10/15/us/politics/obama-donald-trump-ohio.html> [<https://perma.cc/9ZAH-94FQ>].

<sup>136</sup> *See generally* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

worse: unchecked campaign lie and insult, or speech activity which is too meticulously fly-specked in the course of a political campaign?<sup>137</sup> President Obama could, and did, mount his presidential government speech platform to denounce what Obama saw as behavior and prevarications disqualifying of the presidency. However, President Obama made no argument (and had he made one it surely would have required a compelling interest) that Mr. Trump was somehow obligated to stop what Obama saw as base, lying, and insulting ways.

Of course, government speech is not limited to presidential statements. Indeed, given the logical assumption the incumbent president will naturally side with a fellow party member, it might well be more effective if government speech addressing the corrosive aspects of political lie and insult might be assigned to the equivalent of an independent agency, such as the FCC. Alternatively, and far less problematically from the standpoint of the First Amendment, a non-governmental, nonprofit entity might be encouraged to take the issue up in the way that “fact-checking” associations have arisen domestically, and truth commissions have long been relied upon to publicize human rights violations in foreign venues.

Yet, given the harm of campaign lie and insult, can more be done than merely calling it out for shame? Might legislation be enacted, partially premised upon the strength of government speech precedent as well as the spending power, that could sanction a candidate found to engage in a consistent pattern of lying sufficient to mislead a reasonable person? In answering, assume the sanction not to be draconian, but nevertheless meaningful, as in, say, denial of the public monies raised via the check-off box on individual income tax forms. One can readily anticipate the challenges to the proposed standard. What counts as a consistent pattern of lying? Does the reasonable man signify a subjective or objective standard? Is the proposal consistent with *New York Times Co.*? Need it be? These are unresolved questions, but the damage of political lie and insult, if capable of identification,<sup>138</sup> to the body politic is real. The remedial possibilities—from self-imposed journalistic standard to common law modification to greater use of government speech to a possible statutory enactment aimed at securing the integrity of the electoral process—is a discussion that is just beginning. While the sensitivities are many, the task of addressing lie in real time is not impossible. Professor Hasen indicates that the Sixth Circuit Court upheld just such a state truth commission.<sup>139</sup> The commission was empowered to reprimand candidates for false campaign speech statements made with actual malice.<sup>140</sup> The Court of Appeals reasoned that “false speech . . . does not

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<sup>137</sup> *Id.* Like the enacted, but ultimately invalidated, limits on legal aid advocacy in *Velazquez*.

<sup>138</sup> Admittedly, it will be more difficult to monitor and check insult than lie. Nevertheless, the inquiry could conceivably identify expressions of hate and exclusion, especially exclusion based on religion, race, ethnicity, gender, and sexual orientation.

<sup>139</sup> Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 61–62 (2013).

<sup>140</sup> *Pestak v. Ohio Elections Comm’n*, 926 F.2d 573, 575–76 (6th Cir. 1991).

merit constitutional protection if the speaker recklessly disregards the truth.”<sup>141</sup> The court summarized:

What is happening in this case, with regard to the “truth declaring” function of the Commission, is that the Commission is making judgments, and publicly announcing those judgments to the world, as to the truth or falsity of the actions and statements of candidates and others intimately involved in the political process. These activities are closely comparable to those now carried on by many agencies of government.<sup>142</sup>

Would such truth declaring or labeling have any meaningful corrective effect? There is evidence that private fact-checking has modestly improved the accuracy of political discussion and lessened unwarranted attacks on character.<sup>143</sup>

#### CONCLUSION

It may be tempting to write lie and insult off as just part of the rough edges of political life. “Politics,” after all, said the late Tip O’Neill, “ain’t beanbag.”<sup>144</sup> Yet, something is lost in the general acceptance of the false and the denigrating. For a good many years, and perhaps still, schoolchildren were taught how a youthful George Washington admitted to cutting down the cherry tree because he could not tell a lie.<sup>145</sup> The low standard of the 2016 presidential campaign would have resulted in the unexplained disappearance of entire cherry orchards. Given the pervasiveness of recent lie and distortion, would the general public even grasp the wry comment of Mark Twain

<sup>141</sup> *Id.* at 577.

<sup>142</sup> *Id.* at 579. Professor Hasen is not in favor of such commissions. *See generally* Hasen, *supra* note 139. Professor Hasen views most of the mechanisms that previously were available to address false campaign advertising to be diminished by the *Alvarez* case. *Id.* at 56. With respect to the truth commission he writes, “it is not clear that it is a desirable approach to the problem of false campaign speech. A government truth-declaring function is subject to selective enforcement and political manipulation.” *Id.* at 76.

<sup>143</sup> Alexios Mantzarlis, Opinion, *Fact Check: This Is Not Really a Post-Fact Election*, WASH. POST (Oct. 7, 2016), [https://www.washingtonpost.com/opinions/fact-check-this-is-not-really-a-post-fact-election/2016/10/07/7ef5f8fa-85c0-11e6-92c2-14b64f3d453f\\_story.html?utm\\_term=.19741721fd28](https://www.washingtonpost.com/opinions/fact-check-this-is-not-really-a-post-fact-election/2016/10/07/7ef5f8fa-85c0-11e6-92c2-14b64f3d453f_story.html?utm_term=.19741721fd28) [<https://perma.cc/G6Z3-X98D>].

<sup>144</sup> Editorial, *Walker Right: GOP Sending Wrong Message to Voters*, READING EAGLE (Sept. 28, 2015), <http://www.readingeagle.com/news/article/editorial-walker-right-gop-sending-wrong-message-to-voters> [<https://perma.cc/LK8N-WN3W>] (also noting that the original quote is attributed to a fictional character from an 1895 newspaper column by Finley Peter Dunne).

<sup>145</sup> Jay Richardson, *Cherry Tree Myth*, MOUNT VERNON, <http://www.mountvernon.org/digital-encyclopedia/article/cherry-tree-myth/> [<https://perma.cc/8ECK-RKE7>] (also noting that this story is actually a myth).

that he was unimpressed by the young Washington since he (Twain) could tell a lie, but chose not to?<sup>146</sup> In 2016, it is not clear any candidate was capable of such restraint.

Jurisprudentially, there is some common cause to be located in considerations of the proper standard of review for commercial or noncommercial speech, and the present problem of lie and insult. Any theory that seeks to explain why protection is extended to some speech but not others depends upon a claim that truth exists, that it can be known, and that knowing it, it is better to have one's behavior coincide with what actually is true. To be at war with one's own nature or to live in an alternative reality is often foolish or irrational or both. These are large thoughts, and millennia of philosophers have sought to definitively accept or disprove the self-evidence of moral reality. It will not be a discussion concluded until the world as we know it will also be concluded. None of us know whether that "day of judgment" is centuries into the future or before the reader finishes this sentence.

In the twenty-first century, learned men and women are still drawn to the knowability of human nature, but we too quickly retreat from what seems logical, but interpersonally unprovable. Nevertheless, it is rather generally hoped that men and women do view their natures in a sufficiently similar way to treat each other with dignity, and in so doing, sustain community, including the community of a nation. Libertarian claims for human freedom in America, and worldwide, have depended upon a good deal of restraint when it comes to proclaimed truth, and especially when its acceptance depends not on provable reason, but enforcement by law, regulation, or other aphorism for coercion. Such restraint or prudence manifests itself in different ways, and among them are endless philosophical musings over matters of natural law, which no philosophical system premised upon reason has ever escaped.

When lawyers of the brilliance and welcoming nature of Martin Redish come upon the stage, they do not ignore these large questions, but inspire both progress and greater agreement by a sensible refinement of the philosophical scope of the quandaries. Knowing that the nation, itself, began modestly with truth declared self-evident—that is, asserted without proof—scholars of the high quality of Professor Redish give us something a bit more manageable to resolve<sup>147</sup> such as arguments about the status of commercial speech, and more to the interest of this Essay, whether what is concluded about the status of commercial speech gives us any useful clue as to the constitutional status of lie or insult in political campaign.

Whether commercial speech is accepted as of high or intermediate value; whether there is greater faith in arguments in favor of categorical exception than balancing; and whether lie and insult are necessary to the pliability for democracy, someone's

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<sup>146</sup> *George Washington*, TWAINQUOTES.COM, [http://www.twainquotes.com/Washington\\_George.html](http://www.twainquotes.com/Washington_George.html) [<https://perma.cc/D9YY-7F9L>].

<sup>147</sup> Professor Koppelman would dissent, finding such manageability to be merely tunnel vision that results when a syllogistic discovery of the purposes of the speech leads to protection of commercial speech without a full consideration of consequences. Koppelman, *supra* note 44, at 718–19.

view of these matters will be treated, if not true, then as worthy of respect. Who makes that call may be a theocrat, an ayatollah, a democratic legislature, a minority-protecting judge, or ourselves. The competence claimed for one over the other of those “authorities” is itself a never-ending debate which can often be softened—and softened it must be—if we are to live in a peace greater than the mere absence of war, which, given present-day Syria, Libya, and Iraq, would be great enough.

In the near term, a good start would be to explore whether the search for truth is furthered by judicial decisions that find value in intentional lies, and, as one author put it, “[t]his remains true even if we take account of indirect effects, slippery slopes, vague boundaries, chilling effects, breathing spaces, imprecision of language, and the risks of judicial error.”<sup>148</sup> The legal enterprise is better equipped to meet these challenges because Martin Redish has not been timid in his effort to secure the freedom of speech.

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<sup>148</sup> R. George Wright, “*What Is That Honor?*”: *Rethinking Free Speech in the “Stolen Valor” Case*, 60 CLEV. ST. L. REV. 847, 853 (2013).