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Words are deeds.1

I. INTRODUCTION

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

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

1 L. WITTGENSTEIN, CULTURE AND VALUE 466 (P. Winch trans. 1980) ("Worte und Taten.")
2 U.S. CONST. amend. 1.
ulate, coerce, or deceive. I argue that a theory of free speech can incorporate this distinction to mark the boundaries of the right to free speech: freedom of speech is freedom to engage in communicative action, not strategic action. Another component of Habermas' theory is the inclusion of distorting factors that can give the freedom of speech its fundamental content. Habermas' theory of communicative action provides the basis for my reinterpretation of the first amendment freedom of speech as the freedom of communicative action.

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

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

II. THE FIRST AMENDMENT FREEDOM OF SPEECH: A HERMENEUTIC APPROACH

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

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

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6 This Article is addressed to a diverse audience, including social theorists and first amendment scholars; hence the essay does not assume that the reader has expert knowledge of either legal doctrine or of Habermas theory. Readers familiar with the literature on the theory of the first amendment may wish to omit Part III on a first reading. Likewise, readers already familiar with Habermas' theory may wish to omit Part IV. Readers anxious for the core of my theory may wish to turn to Part V before returning to Part II.
7 As I use the term, legal hermeneutics is the enterprise of self-conscious reflection on the process of interpreting legal texts that is undertaken by adjudicators, lawyers, and legal scholars. The term "hermeneutics" has a variety of uses. See R. Palmer, HERMENEUTICS CH. 3 (1985) (discussing modern definitions of "hermeneutics"); I have drawn on a variety of sources for my account, including: H.-G. Gadamer, Truth and Method 154 (1975); R. Palmer, supra, G. Warnke, HABERMAS, HERMENEUTICS, TRADITION & REASON (1983); UNDERSTANDING AND SOCIAL INSTRUMENTATION, supra, 171 (f. 1911, 1913). For a special thanks to Eckart Förster, now of the Harvard University, for his course, Hermeneutics and Critical Theory, given through the Department of Germanic Studies.
8 Of course, even if a theory of the freedom of speech is not required for judicial interpretation of the first amendment, it does not follow that such a theory is not valuable. If it turns out that the first amendment does not institutionalize our best theory of the freedom of speech, we would still be
tics. This critique provides the metatheoretical foundation for my effort to develop a theory of free speech. This Section also has a secondary purpose: it recapitulates an important line of development in Habermas' thought which led to his theory of communicative action.

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

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

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

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


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

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

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

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

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

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

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

IV. THE THEORY OF COMMUNICATIVE ACTION

In this Part, I outline Habermas' theory of communicative action. Habermas' theory ranges over a wide range of topics from philosophy of language to sociology. My presentation of Habermas' theory, which relies to some extent on Habermas' terminology, may be difficult for readers unfamiliar with the German philosophical and sociological tradition within which Habermas works. Moreover, because of the sheer breadth of Habermas' work, my presentation of his views is necessarily incomplete, emphasizing those aspects of the theory which are most relevant to the theory of free speech which I present in Part V. Habermas' theory has generated an enormous secondary literature criticizing, defending and elaborating on his themes. In this Article, I can only touch on this debate. Again, I limit my discussion to those criticisms of the theory of communicative action which are most relevant to the freedom of speech or which resonate with current debates in Anglo-American legal theory. My sketch begins with a brief exploration of 121 A great deal of Habermas' work touches on the theory of communicative action. For the central texts in English, see J. Habermas, THE THEORY OF COMMUNICATIVE ACTION (T. McCarthy trans. 1984 & 1987) (two volumes) [hereinafter two volumes] (hereinafter volume one will be cited after its subtitle as REASON AND THE RATIONALIZATION OF SOCIETY, and volume two as LIFEWORLD AND SYSTEM); J. Habermas, COMMUNICATION AND THE EVOLUTION OF SOCIETY (T. McCarthy trans. 1979). A number of Habermas' other texts touch on aspects of the theory. See J. Habermas, THE PHILOSOPHICAL DISCUSSION OF MODERNITY (F. Lawrence trans. 1987); J. Habermas, LEGITIMATION CRISIS (T. McCarthy trans. 1973); J. Habermas, THEORY AND PRACTICE (D. Tietel trans. 1973); J. Habermas, KNOWLEDGE AND HUMAN INTERESTS (J. Shapiro trans. 1971). Two important texts are not yet available in English. See J. Habermas, Moralbewusstsein und Kommunikativer Handeln (1981); Habermas, Wirklichkeit und Reflexion (M. Fehrenbach ed. 1973).

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

123 Thomas McCarthy's commentary, THE CRITICAL THEORY OF JÖRGEN HABERMAS, is the best and most accurate introduction and guide to Habermas' thought, and I have relied on it substantially for my exposition of Habermas' theory. T. McCarthy, supra note 42. A solid summary of Habermas' most recent work is found in S. White, THE RECENT WORK OF JÖRGEN HABERMAS (1988). A short introduction to Habermas' theory, including the theory of communicative action, is provided by M. Pusey, supra note 122. A representative sampling of the critical literature is contained in HABERMAS: CRITICAL DEBATES, supra note 42, Intro by D. Inckm and Habermas and the Dialectic of Reason (1987); S. Bernhards, Critique, Norm and Utopia: A Study of the Foundations of Critical Theory (1988); R. Geurts, The Idea of a Critical Theory (1981); G. Kortman, Metacritique, in THE PHILOSOPHICAL ARGUMENT OF JÖRGEN HABERMAS (1983); HABERMAS AND MODERNITY, supra note 121. In addition, some periodicals have devoted special issues to Habermas. See Special Issue on Jürgen Habermas, New German Critique, Spring/Summer 1985; Special Issue in Honor of Jürgen Habermas on the Occasion of His 50th Birthday, Telos, Spring 1979.
Component of Speech

<table>
<thead>
<tr>
<th>Act</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utterance Act</td>
<td>Speaker utters an expression to hearer in a given context</td>
</tr>
<tr>
<td>Propositional Act</td>
<td>Speaker says something to hearer in a given context</td>
</tr>
<tr>
<td>Illocutionary Act</td>
<td>Speaker acts by speaking to hearer</td>
</tr>
<tr>
<td>Perlocutionary Act</td>
<td>Speaker affects hearer in a certain way</td>
</tr>
</tbody>
</table>

127 See K. Bach & R. Harnish, supra note 103, at 3; J. Habermas, Reason and the Rationalization of Society, supra note 121, at 277.
128 J.I. Austin, How to Do Things with Words (1975); see K. Bach & R. Harnish, supra note 103, at 3; J. Habermas, Reason and the Rationalization of Society, supra note 121, at 277.
130 See J. Searle, Speech Acts: An Essay in the Philosophy of Language 16 (1969) ("[A]ll linguistic communication involves linguistic acts. The act of linguistic communication is not, as has generally been supposed, the symbol, word, or sentence, but the sound or the utterance of the symbol or word in the performance of the speech act.")
131 See K. Bach & R. Harnish, supra note 103, at 3. These distinctions were first articulated by Austin. See J.I. Austin, supra note 128, at 110; see also J. Searle, supra note 130, at 23-25.
132 The propositional act is also called the locutionary act.
133 See K. Bach & R. Harnish, supra note 103, at 3.
134 See J. Habermas, Reason and the Rationalization of Society, supra note 121, at 288.
135 See id. at 289.
136 See id. at 290.
137 Strawson, Assertion and Convention in Speech Acts, 73 Phil. Rev. 439 (1964)
time it is can succeed only if you know what I am driving at.138

3. Classifying Speech Acts.—The theory of speech acts is now almost complete. The final element to be added is a system of classifying the various types of speech acts. Austin,139 Searle,140 and their followers in linguistics141 have produced a variety of classificatory schemes. Habermas proposes the following system of classification:

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

This classification scheme has two principal uses as a tool for understanding the theory of communicative action in the course of developing a theory of the freedom of speech. First, the identification of a wide range of classes of speech acts serves to illustrate the earlier distinction between locutionary content and illocutionary act by calling our attention to the wide variety of actions that are associated with speech. Second, the classifications can illuminate some of the confusions in current doctrine; Part V of this Article utilizes the classification scheme in the critique of attempts to ground free speech doctrine on a distinction between expression or speech on one hand and action on the other.143 Having explicated the basic concept of a speech act and explored the purposes that speech acts can serve, I now introduce Habermas’ distinction between communicative action and strategic behavior.

B. The Distinction Between Communicative Action and Strategic Action

1. The Basic Distinction.—Habermas uses speech act theory as the basis for several important components of his theory of communicative action. Austin’s distinction between illocution and perlocution can serve as the basis for introducing Habermas’ related distinction between those speech acts which are communicative action and those speech acts which involve strategic action. Habermas defines communicative action as follows: I count as communicative action those linguistically mediated interactions in which all participants pursue illocutionary aims, and only illocutionary aims, with their mediating acts of communication. On the other hand, I regard as linguistically mediated strategic action those interactions in which at least one of the participants wants with his speech acts to produce perlocutionary effects on his opposite number.144

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

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

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

139 See J. Austin, supra note 128, at 143-64.


143 See infra Part V(A)(1) (first accompanying notes 296-98).

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

145 Id. at 284-86.

146 Id. at 295-96.
The criticism is that actual speech is rarely, if ever, pure communicative action or pure strategic action; rather the nature of actual speech is a mixture of both. Let me call this the mixed nature objection. The usefulness of these "ideal types" as tools for understanding actual human communication is questioned on the basis that in practice it may be impossible to classify particular actions as communicative or strategic. For example, if I try to convince you to accept the thesis of this Article, I may rely in part on illocutionary acts—that is, on rational argumentation—but in part I may hope to persuade by making emotional appeals and using rhetorical ploys. When the setting is less academic, an election for example, the role of persuasion, based on emotion and rhetoric, becomes even more apparent.

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

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

Third, and perhaps most importantly, Habermas should object to the notion that persuasion that uses rhetoric or emotional appeal is necessarily strategic in nature. Indeed, expressive speech acts,\(^\text{148}\) which reveal the subjective world of the speaker, including his emotions, are a normal component of communicative action. For example, the simple expression, "I feel angry," does not ordinarily involve force or deception, even though it is possible to feign anger or use anger to create fear.

Reciprocation of emotional states is not inconsistent with communicative rationality. To the contrary, the honest disclosure of emotion in communication is essential in order to avoid systematically distorted communication.

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

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147 The characterisation of strategic action and communicative action as "ideal types" is rejected by Habermas himself. See J. Habermas, Reason and the Rationalization of Society, supra note 131, at 286.

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

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

C. Discursive Justification: The Ideal Speech Situation

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

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

<table>
<thead>
<tr>
<th>Speaker</th>
<th>Hearer</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) I promise to come for dinner.</td>
<td>Yes, I'll count on it.</td>
</tr>
<tr>
<td>(2) Please open that window.</td>
<td>Yes, I'll open it.</td>
</tr>
<tr>
<td>(3) The road to San Diego is clear.</td>
<td>Yes, I'll go that way.</td>
</tr>
</tbody>
</table>

\(^\text{151}\) Thus, my answer to the argument that one cannot actually distinguish communicative action from strategic behavior will be developed in three stages. The first stage is in the text that immediately follows this note. The second stage is presented in Part V, in which I develop a theory of freedom of communicative action which incorporates this distinction. The third stage appears in Part VI when I consider the application of the distinction between communicative and strategic action to concrete problems in first amendment doctrine. This three-stage development of an answer to the mixed nature objection becomes progressively more concrete at each stage. As I observe in the introduction, one way of viewing this Article is as a thought experiment that tests and elaborates the theory of communicative action by applying the theory to problems in first amendment doctrine.

\(^\text{152}\) See supra Part IV(B)(6) (text accompanying notes 139-43).
In each case, the speaker makes an offer, raising certain validity claims, that the hearer accepts. The speech act is successful if an interpersonal relationship is established that effectuates coordination.\(^{153}\)

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

**Table 4**

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

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

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

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\(^{153}\) See id. at 296.

\(^{154}\) See id. at 307-08.

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

\(^{156}\) See J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, supra note 121, at 308-09, 325-26; see also supra Part IV(A)(3) (test accompanying notes 135-38).
In some situations, however, even the standards or criteria of truth and righteousness are the subject of controversy; in such cases the continuation of the attempt to reach agreement demands a move to theoretical discourse. Rational argumentation, thus, “can be conceived as a reflective continuation, with different means, of [communicative] action oriented to reaching understanding.”

The possibility that validity claims will be subject to discursive justification is essential if the agreement produced by communicative action is to retain its claim to rationality. If an agreement is rooted purely in contingent consensus, then the validity claims to truth or right—provisionally accepted in communicative interaction—are not capable of redemption through rational argumentation. But conscious acceptance of a claim to truth or right that is not capable of argumentative redemption is irrational and the agreement resulting from such acceptance is, thus, not rationally motivated. By raising the possibility that agreement may not be rationally motivated, however, the investigation of discursive justification demands a theory that thus, not rationally motivated. Each participant must have equal opportunity to assert or deny propositions about states of affairs (constative speech acts), to make public his private experiences (expressive speech acts), and to order the organizations of speech, through questioning, answering, and so forth (communicative speech acts). The discussion must provide adequate opportunity to subject every assertion, indeed every relevant speech act, to adequate scrutiny.

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

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

Habermas conceives the ideal speech situation as the "pragmatic making use of the rights secured under (1) and (2)."

157 See T. McCarthy, supra note 42, at 289.
158 J. Habermas, REASON AND THE RATIONALIZATION OF SOCIETY, supra note 121, at 25 (emphasis in original).
159 See T. McCarthy, supra note 42, at 305-06.
160 See id. at 306; J. Habermas, REASON AND THE RATIONALIZATION OF SOCIETY, supra note 121, at 25.
presuppositions of argumentation."164 "In theoretical [and] practical discourse the participants have to start from the (often counterfac-
tual) presupposition that the conditions for an ideal speech situation are satisfied to a sufficient degree of approximation."165 Evidence of this presupposition comes from the observation that if any feature of the ideal speech situation is absent, then doubt is cast on the rationality of the consensus, and hence on the truth or righteousness of the agreed upon valid-
ity claims. Thus, the ideal speech situation can serve as a guide for the institutionalization of discourse and as a critical standard against which every actually achieved consensus can be measured."166

Perhaps the status of the ideal speech situation can be made clearer still by a comparison with John Rawls' conception of the original position. Rawls uses a hypothetical choice situation—the original position—as the basis for specifying the content of justice as fairness. The original position plays a role in Rawls' theory that is analogous to the role played by a comparison with John Rawls' conception of the original posi-
tion. Thus, the rationality of the original position can be evaluated, and the participants make that choice from a list of alternative conceptions of justice that includes uti-
itarianism and Rawls' own two principles of justice—the equal liberty principle and the difference principle. Third, they choose from behind a veil of ignorance which conceals from them any knowledge of their ac-

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164 See J. HABERMAS, REASON AND THE RATIONALIZATION OF SOCIETY, supra note 121, at 25. 
165 See id. at 42. 
166 See T. MCCARTHY, supra note 42, at 309. The following passage provides further insight into Habermas' view of the status of the ideal speech situation:

The ideal speech situation is neither an empirical phenomenon nor a mere construct, but rather an unattainable hypothesis necessarily made in discourse. This presupposition can, but need not be, counterfactual, but even if it is made counterfactually, it is a fiction that is operationally effective in the process of communication. Therefore I prefer to speak of an anticipation of an ideal speech situation . . . To this extent the concept of the ideal speech situation is not merely a regulative principle in Kant's sense, with the first step toward agreement . . . we must therefore 

Habermas, Wahrheitsbegriffe, supra note 121, translated in T. MCCARTHY, supra note 42, at 110. Thus, the ideal speech situation is a critical standard, a presupposition of discourse, the anticipation of a form of life, and a practical hypothesis. The ideal speech situation is a Kantian ideal of reason in that an imagined construct is used to guide action, but it is more because as an antici-

pation, the ideal speech situation is a real possibility that can ultimately be realized through action based upon its structures.

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4. The Discourse Theory of Truth.—Even with the status of the ideal speech situation clarified, problems remain. Habermas' theory seems to be some version of the consensus theory of truth, but as we have already noted,167 such theories present serious difficulties. As a theory of meaning, the consensus theory of truth appears to rest on a category mistake, confusing the meaning of truth with the methods for arriving at truth.168 Habermas responds to such charges by contending that he does not equate the meaning of truth with methods of discovering truth, but rather analyzes truth in terms of the "universal pragmatic conditions of
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discourse.¹⁷¹ Thus, it may be useful to distinguish Habermas' "discourse theory of truth" from a "consensus theory of truth."¹⁷² Thomas McCarthy elaborates Habermas' position:

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

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

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

D. Communicative Ethics: Discursive Will Formation

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

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

¹⁷² See T. MCCARTHY, supra note 42, at 303.

¹⁷³ Id. at 304.

¹⁷⁴ Id. at 304.

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

¹⁷⁶ See T. MCCARTHY, supra note 42, at 304-06.
Generalizable interests are those that would be acknowledged by a "rarely particular in that they admit, at best, of a negotiated response, they are "rationally motivated consensus." The view that a consensus on generalizable interests that makes possible a discourse in which needs and desires can be adequately expressed.

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

The transcendental tu quoque argument attempts to convince anyone who inquires after the grounds for an argumentatively conceived principle of rationality that the intention behind his question, properly understood, is already based on this principle. This argument can, I believe, be applied not only to someone who has (at least once) entered into argumentation, but to any subject capable of speech and action... by appealing to the intuitive knowledge which he, as a competent speaker, "already" has at his disposal... Anyone who acts with an orientation toward reaching understanding, since he unavoidably raises truth and rightness claims, must have implicitly recognized that this action points to argumentation as the only way of continuing consensual action in case naively raised and factually recognized validity claims become problematic. As soon as we make explicit the meaning of discursively redeemable validity claims, we become aware that we presuppose the possibility of argumentation already in consensual action.188

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

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

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Unlike Kant's theory, Habermas' theory does not exclude individual wants and needs, nor does it define morality in opposition to "interest" (willkur). Autonomy does not demand that the inclinations be suppressed, but rather that they be interjected into communication free of distortion.192

Consideration of the implications of the theory of communicative action.

190 Id. at 325-26.
192 J. Habermas, Legitimation Crisis, supra note 121, at 89.
action for the state raises the possibility of a "communicative politics" corresponding to "communicative ethics." Habermas writes:

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

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

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

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

E. Lifeworld and System

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

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

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

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

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

197 Habermas' theory assumes that the legal rules constrain legally acceptable outcomes, and that the law is not radically indeterminate. Cf. Solum, supra note 13 (discussing determinacy).
Habermas has much more to say about the distinction between lifeworld and system. At this point, however, I close my discussion of theory to the freedom of speech. The theory of communicative action and begin the interpretation of the freedom of speech. My basic strategy is to explore the notion that the freedom of speech should be and is best understood as the freedom to engage in communicative action, and the corollary notion that freedom of speech does not encompass the freedom to engage in strategic action. I develop this notion by using the rules which constitute the ideal speech situation as models for principles defining the freedom of speech. I argue that freedom of speech is best understood as an attempt to institutionalize the essential conditions of the ideal speech situation. Any society that wants to enable rational agreement through public discourse must provide for a right to free speech which allows all citizens the right to participate in communication on equal terms without the fear of compulsion.

Section A outlines the most basic implication of reconceptualizing the freedom of speech as the freedom of communicative action: communicative action is within the scope of protection; strategic action is not. Section B outlines the implication of considering the three rules that define the ideal speech situation as a component principle of the right to freedom of speech. Section C explores two problems with applying the model of the ideal speech situation to the freedom of speech. The first problem stems from Habermas' distinction between pure discourse and normal communicative action. The second problem derives from the difficulty of precisely drawing the line between communicative action and strategic behavior. Section D reconsiders the question of justification by applying that model of the ideal speech situation to the freedom of speech. The first step is the simple observation that not all speech acts involve communicative action. In Part IV, I noted that speech act theory distinguishes between illocutionary and perlocutionary acts. For an illocutionary act to be successful, the listener must understand the intention of the actor. Perlocutionary acts depend on the effect of speech and not on reaching understanding. The man who shouts "fire" in a crowded theater is strategic action and is not communicative action. Of course, this analysis assumes a certain intention in shouting "fire." Indeed, if we vary the intention, as for example by assuming the man erroneously believed there was a fire, the justification for prohibition of this sort of speech act is no longer clear.

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

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

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

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


202 See supra Part IV(C)(3) (text accompanying notes 160-68).
New York Times v. Sullivan itself, in Gertz the Court held that the stringent "actual malice" test is not applied. Instead the common law rule, which imposed strict liability for false statements, is tempered by a constitutional prohibition against the imposition of liability without "fault." The "fault" standard for the imposition of liability when the plaintiff is a private figure represents an attempt to approximate the conditions of the ideal speech situation when the threat to equality is minimal.

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

Although the decision in Dun & Bradstreet focused on the lack of public concern with the topic of the credit report, the decision may be illuminated by Habermas' distinction between the system and the lifeworld. The speech at issue was a product of market forces; the amount of care taken by credit reporting businesses before issuing reports will hinge on profit maximization concerns. Strict liability for erroneous reports will simply be one factor that will enter into the highly rationalized process of decision making. The point is that this sort of speech is outside of the lifeworld, the domain of communicative action; rather, such market-governed speech is squarely within the system, where strategic action predominates. This reinterpretation of the Dun & Bradstreet decision finds support in Justice Powell's plurality opinion, which states that "this type of credit reporting" is "like advertising" in that it is "hardly and unlikely to be deterred by incidental state regulation." Outside the market, a strict liability rule would penalize the expression of viewpoints which are sincerely held, but later turn out to be mistaken. Such a rule might chill the expression of some viewpoints, violating the conditions of the ideal speech situation. On the other hand, extending the stringent protections of New York Times to this situation would provide little incentive for communicators to comply with the requirement that participants in the ideal speech situation be motivated by the search for truth. The "fault" standard for communication in the lifeworld provides a compromise between these extremes. Those who engage in communicative action will usually be free from liability, those who engage in strategic action will usually be liable.

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

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

VII. CONCLUSION

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

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

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

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

283 Id. at 347.
285 Id. at 756-59.
286 Id. at 762.
B. Freedom of Communicative Action: The Tension Between Ideal Theory and Realization

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

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

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

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

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

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

Second, the imperfect realization of the conditions of the ideal speech situation in first amendment doctrine provides support for Habermas' view that the ideal can be both a yardstick against which practice can be measured and an "anticipation"—an ideal that is capable of progressive realization as practical constraints permit.

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