

THE SOLE PALLADIUM

An Apologia for Free Speech in the United States

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To my family, who always encouraged me to speak my mind

“It is not possible for man to sever the wheat from the tares, the good fish from the other fry; that must be the Angels’ ministry at the end of mortal things. Yet if all cannot be of one mind—of who looks they should be?—this doubtless is more wholesome, more prudent, and more Christian, that many be tolerated, rather than all compelled.”

—John Milton, *AREOPAGITICA*

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1. Introduction: Libertate Loquendi

We are at a moment in our shared national history when the freedom of speech has become a subject of controversy. On the left, college students demand the rescission of invitations to speakers whose ideas they disfavor.¹ On the right, President Trump has repeatedly threatened to censor the press for publishing journalism critical of his administration.² The only thing that seems to unite the left and right in our polarized society appears to be their unanimous distain for the freedom of speech.

This is a dangerous condition for a democratic government, which relies on the free exchange and debate of ideas to function properly. Even worse, many of those who hold strong views on the freedom of speech are alarmingly benighted about current and historical legal doctrines of free speech, with increasing levels of moral sanctimony correlating positively with constitutional and philosophical illiteracy.

The purpose of these remarks is to supply the inquisitive reader with a basic primer on the political philosophy, intellectual history, and present legal status of freedom of speech in the United States; to articulate an argument in support of a robust right to free speech; and to acknowledge and respond to some contemporary objections to unfettered free speech.

¹ This trend predates our present era (Laura Bush was disinivited from speaking at UCLA in 2002), but it has recently become a regular tactic used to stifle speech that students disagree with. A full database of rescinded invitations can be found at the Foundation for Individual Rights in Education's database. *Disinvitation Attempts Database*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <https://www.thefire.org/resources/disinvitation-database/> (last visited Nov. 5, 2017)

² In mid-October of 2017, President Trump Tweeted "Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked." President Trump was responding to an NBC report that Trump's Secretary of State, Rex Tillerson, had called him "a moron." Allison Michaels, *Can President Trump Really Revoke Broadcast Licenses?*, WASH. POST, Oct. 13, 2017.

The author makes no representations that these remarks are disinterested or sterilized of the author's own sentiments. Although they express an opinion, these remarks are not meant to be acutely controversialist or contrarian. They are meant to supply the minimally necessary quantum of information to enable the reader to meaningfully participate in rational conversations on free speech, with friends, their communities, and the American polity at large. Whether you agree with the conclusions they reach will be a matter of personal judgment on your part.

Upon the expansive ideological map of modernity, this author situates his views on free speech in the province of *liberalism*. In recognition of the ideological confusion surrounding political labels in the modern era, the author will attempt to clarify the purlieu of the intellectual position with which he is identifying. *Liberalism*, sometimes preceded by the modifier *classical*, can perhaps be traced as far back as the *polis* of Athens, but its modern origins can be found primarily in the works of John Locke and John Stuart Mill (both of whom we will discuss in detail). According to Oxford, liberalism means “[s]upport for or advocacy of individual rights, civil liberties, and reform tending towards individual freedom, democracy, or social equality; a political and social philosophy based on these principles.”³ This meaning is very close to our sense of the word. Mill’s formulation of the principle of liberalism may be viewed, for our purposes, as definitive: “the burden of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition...The *a priori* assumption is in favour of freedom.”⁴ It is used in contradistinction to its opposite, *illiberal*, which means “not generous in respect to the opinions, rights, or liberty of others...opposed to liberal principles in ecclesiastical, political, or commercial relations.”⁵

³ *Liberalism*, OXFORD ENGLISH DICTIONARY, www.OED.com (2017).

⁴ 21 JOHN STUART MILL, THE COLLECTED WORKS OF JOHN STUART MILL, 262 (ed. J. M. Robson, 1963).

⁵ *Illiberal*, OXFORD ENGLISH DICTIONARY, www.OED.com (2017).

In America during the 20th century, *liberalism* used to approximately define the ideas that animated the Democratic Party, but in our current politics, *liberalism* is neither coextensive nor coterminous with the Democratic agenda, and in fact finds itself in direct opposition in many instances. The word *liberalism* today carries with it, undeservedly, heavy-handed associations of multiculturalism, identity politics, and the dubious intellectual commodity its opponents refer to as “political correctness.” *Liberalism*, in its original sense, embraced multiculturalism and pluralism of all sorts in general, but rejected collectivist identity politics in favour of individual rights, and would have been entirely opposed to the concept of “political correctness” on the grounds that it amounts to censorship, authoritarian thought-policing, and cultural Marxism (Marx was not a liberal in any educated person’s conception of the term).

In the United States in 2018, old-fashioned *liberalism* is an intellectual pariah, claimed by neither the mainstream right nor the mainstream left. The libertarians are probably the truest to the spirit of *liberalism* in modern America, though their aversion to *positive liberties*⁶ disqualifies them as true liberals. The American Civil Liberties Union (ACLU) also approximates the ideal of *liberalism*, although some of their recent policy shifts call their commitment to liberalism into question.⁷ *The fact is, there is no true institutional representative of liberalism in contemporary America.* It is for that reason that this author feels compelled to offer an apology⁸ for its virtues.

⁶ See, *Positive and Negative Liberties*, STAMFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/liberty-positive-negative/>, (last visited Nov. 5, 2017). See also, generally, Isaiah Berlin, *Two Concepts of Liberty*, FOUR ESSAYS ON LIBERTY (2002) (1969) (explaining the difference between positive and negative liberties).

⁷ For example, in 2008 when the *Heller* decision was handed down, the ACLU offered a muddled and tepid statement about the right to bear arms. Furthermore, after the violence in Charlottesville, Virginia on August 12, 2017, the ACLU expressed regret for supporting the First Amendment rights of neo-Nazi groups to demonstrate.

⁸ The author is using this word, like *liberalism*, in the classical, not the contemporary sense. An *apology* is “defence of a person, or vindication of an institution, etc., from accusation or aspersion.” *Apology*, OXFORD ENGLISH DICTIONARY, www.OED.com (2017).

Freedom of speech and democratic governance are inextricably intertwined and mutually interdependent. As a nation, we appear to be on the cusp of forgetting or abandoning this fundamental principle, which has been our moral lodestar since the birth of this country. As a nation, we appear to be on the cusp of forgetting or abandoning this fundamental principle, which has been our moral lodestar since the birth of this country. We do so at our own peril. Eras inhospitable to free speech, such as the anti-communist crusade of Joseph McCarthy, have been ensconced in history as blemishes and defects upon the body of our otherwise vigorous and robust constitutional democratic republic. These remarks are intended to be the author's humble contribution to the national common weal; an attempt to inject a measure of intellectual rigour into the coarsened and debased debate presently occurring in American public squares, where words have given way to violence,⁹ and "civil blood makes civil hands unclean."¹⁰

If infusing a measure of dignity, history, empiricism, and reason into our shared political life is a project you consider worthwhile, perhaps you will find some small scintilla of succour in these remarks. That is my hope for this manuscript, and more consequently, that is my hope for the future of our country.

2. "What's Past Is Prologue" - A Brief History of Free Speech

One of the primary defects of modern American political discourse is that most of its participants wear intellectual blinders. When these political partisans agitate for or against a policy, they do so as if the only relevant context for the debate is *that particular moment*. These partisans are often quick to dismiss or condemn ideas that seem unacceptable to them according

⁹ Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence*, N. Y. TIMES, Aug. 12, 2017 (detailing the murder of a counter-protester at the junction of a neo-Nazi protest and a social justice counter-protest).

¹⁰ WILLIAM SHAKESPEARE, ROMEO & JULIET, act I, pro. (1597).

to the modes, fashions, and voguish dogmas of *today*. Their myopia and self-regard blind them to Burke's admonition that political society, is "a contract... a partnership... not only between those who are living, but between those who are living, those who are dead, and those who are to be born."¹¹ Consideration of those latter two constituencies is absent from most contemporary policy debates. Today's myopic partisan views the world only in terms of his own immediate, evanescent exigencies.

The problem with this view is that the *partisan of today* does not have a coherent grasp on the histories and provenances of the policies he wishes to alter or repudiate. He takes no measure of the political and social ills which gave rise to a policy, nor does he tend to follow the thread of his self-assured vituperations to their logical termini, which may play out a century or more hence. This is particularly the case with those who argue that free speech should be restricted, curtailed, circumscribed, or otherwise limited.

Freedom of speech is an idea with a very long and complex history, and when zealous fanatics come for it, their raiment of "social justice" or "respect for the Presidency" make feeble effort to disguise the butcher's knives they clutch in hand. Only we stand between them and their target. To that end, let us engage in a brief intellectual history of free speech, in order to understand where it came from, what needs it fulfils, and how it has functioned upon societies; so that when the zealots arrive, we may confront their hubris and sanctimony with facts and arguments.

a. **The Marketplace of Ideas (The Instrumentalist Argument)**

In the early Socratic dialogue *Crito*, Plato makes an important point about democracy. Socrates has been charged with corrupting the youth of Athens, and has been found guilty by the

¹¹ 3 EDMUND BURKE, *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE IN TWELVE VOLUMES, REFLECTIONS ON THE REVOLUTION IN FRANCE*, 359 (ed. John c. Nimmo, 2005) (1790).

jury. He is sentenced to death. In prison, awaiting his execution, he is visited by his friend, Crito, who urges him to escape prison, and flee to another *polis* to save himself. Socrates's response to this proposal is instructive. He argues that citizens of a democracy have a duty to the law. The lawmakers must "either...be persuaded, or if not persuaded...be obeyed."¹² The principle here is significant. In a democracy, what properly moves the levers of power is *persuasion*. If one desires the government to do something (or refrain from doing something), one must *persuade* the legislature or the polity with *ideas*.

Plato expands on this concept in his later works. Although he generally disapproved of democracy as a regime of government,¹³ he nevertheless described the democratic *polis* as being "full of...freedom of speech."¹⁴ During Plato's lifetime, the most prominent democratic *polis* in the Greek-speaking world was Athens. Athens was "where there is more freedom of speech than anywhere in Greece...."¹⁵ Plato was not the only Greek observer to recognize a fundamental correlation between democracies and free speech. Euripides, in *Hippolytus*, has Phaedra express her wish that her children live in "glorious Athens, as free men, free of speech and flourishing...."¹⁶ Pericles, according to Thucydides, declared "[t]he great impediment to [political] action is, in our opinion, not discussion, but the want of knowledge which is gained by

¹² PLATO, CRITO, 51e-52a (trans. Benjamin Jowett, 1892) (350 B.C.). Xenophon presented an account of Pericles also articulating the Socratic principle that persuasion is the proper instrumentality of power in a democracy: "anything which any one forces another to do without persuasion, whether by enactment or not, is violence rather than law." XENOPHON, MEMORABILIA, RECOLLECTIONS OF SOCRATES, 1.2.41 (trans. H. G. Dakyns, 2008) (371 B.C.). It was therefore not a fringe position in Athens, held only by social outcasts and gadflies like Socrates, but also by the foremost Athenian statesman of the aristocratic Alcmaeonid lineage. *See also, generally*, FORNARA & SAMONS, ATHENS FROM CLEISTHENES TO PERICLES (1991); DAVID STOCKTON, THE CLASSICAL ATHENIAN DEMOCRACY (1990) (on Athenian Democracy in the age of Pericles); PHILIP SMITH, DICTIONARY OF GREEK AND ROMAN BIOGRAPHY AND MYTHOLOGY, 105-06 (1867) (on the Alcmaeonidæ).

¹³ *See, e.g.*, 6 PLATO, PLATO IN TWELVE VOLUMES, REPUBLIC, 557a-558b (trans. Paul Shorey, 1969) (375 B.C.) (democracies "establish their government by terrorization" and "superbly...trample[] under foot all such ideals" of the "fair and good.") [hereinafter: REPUBLIC].

¹⁴ *Id.* at 557b; *see also* Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 1 SUPREME COURT REV. 293 (2008).

¹⁵ 3 PLATO, PLATO IN TWELVE VOLUMES, GORGIAS, 461e (trans. W.R.M. Lamb, 1967) (375 B.C.).

¹⁶ EURIPIDES, HIPPOLYTUS, 423-24 (trans. David Kovacs, forthcoming).

discussion preparatory to [political] action.”¹⁷ The great Athenian orator Demosthenes, famous for his *Phillipics* against the dangers of Macedonian hegemony, went as far as to say the entire Athenian “political system is based upon speeches [*poliiteia en logois*].”¹⁸

As the locus of political and intellectual activity migrated west from the Greek-speaking world to Latium, so too did the principle of free speech. While the last Roman king, Lucius Tarquinius Superbus, was overthrown in 509 B.C., before Socrates was born, the nascent Republic embraced the freedom of speech only with trepidation. Political power during the early Republic rested with the aristocratic Consulship, which was traditionally hostile to literary satires of public figures. Nævius’s outrageous *Palliata Comœdia* irritated the Consul Metellus so greatly that he twice imposed formal punishment upon Nævius. Although the Tribunes successfully invoked *habeas corpus* in the first instance, in the second he was permanently exiled to Tunisia, where he committed suicide.

It was not until the Hortensian Law of 287 B.C. that the elected Senate became the dominant policy-making organ of the Roman Republic.¹⁹ Under the Senate, even during its periodic flirtations with dictatorship, free speech was respected as a component of the *libertas* of citizenship:

A common Roman citizen understood that because he formed part of a *Respublica* (and so he was not the subject of a monarchy or tyranny), he enjoyed *libertas*, that is, a general freedom provided for the political system, which covered his right to speak his mind.²⁰

¹⁷ THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR, PERICLES’S FUNERAL ORATION*, II.40.2 (trans. Benjamin Jowett, 1881) (c. 400 B.C.); see also *id.* at III.42.2-5 (in the Mitylene debate, Diodotus states “[w]hen a man insists that words ought not to be our guides in action he is either wanting in sense or wanting in honesty...The good citizen should prove his superiority as a speaker...by fair argument”); note 12, *supra* (more on Pericles’s views regarding democracy).

¹⁸ DEMOSTHENES, *ON THE FALSE EMBASSY*, 19.184 (trans. C.A. Vince, 1926) (343 B.C.).

¹⁹ FRANK FROST ABBOT, *A HISTORY AND DESCRIPTION OF ROMAN POLITICAL INSTITUTIONS*, 63 (1901).

²⁰ José Manuel Diaz de Valdes, *Freedom of Speech in Rome*, 31 *REVISTA DE ESTUDIOS HISTORICO-JURIDICOS* 125, 127 (2009).

The Senate protected the freedom of speech, especially as it applied to poets and satirists mocking the powerful. “Indeed, throughout the last century of the Republic, liberty of attack and insinuation upon personal reputation were permitted to an extent that astonishes us.”²¹ Lucilius mercilessly parodied and lampooned in burlesque verse and was met by no censure, and Cicero became famous for his boldly critical speeches defending Sextus Roscius from proscription, which were permitted even under the austere dictatorship of Sulla.²² Cicero makes explicit reference, in his 56 B.C. defence of Publius Sestius, to the “freedom of expression [*vocis libertate*].”²³

As the Republic lapsed into civil war in the 1st century B.C., free speech as a component of *libertas* nevertheless endured:

[w]hat else did Caesar the dictator do to counter a book by Marcus Cicero praising Cato to the skies than to reply to it by a written speech of his own as if he were in court before the judges?²⁴

Even as Caesar undid the *Respublica* by arrogating political power to himself, he nevertheless paid honour to republican virtues and practices, such as free speech. While Caesar’s protestations that he was merely preserving the Republic were moot the moment he crossed the Rubicon, there is nothing in the historical record to suggest that his professed respect for free speech was insincere or Machiavellian.

As the Republic gave way to Empire, imperial restrictions on free speech gradually increased.²⁵ During the reign of Augustus, the first laws against *famosi libelli* were introduced, and by the end of Augustus’s reign in 14 A.D., book-burning was an established legal form of

²¹ M. P. Charlesworth, *Freedom of Speech in Republican Rome*, 57:1 THE CLASSICAL REVIEW 49, 49 (Mar. 1943)

²² Clarence A. Forbes, *Freedom of Speech in the Roman Republic*, 37:2 CLASSICAL PHILOLOGY 233, 233 (Apr. 1942).

²³ M. TULLIUS CICERO, ORATIONS OF CICERO, PRO PUBLIO SESTIO (trans. C. D. Yonge, 1891) (56 B.C.)

²⁴ Frederick H. Cramer, *Bookburning and Censorship in Ancient Rome*, 6:2 J. OF THE HISTORY OF IDEAS 157, 159 (Apr. 1945).

²⁵ Charlesworth, *supra* note 21 at 49.

punishment.²⁶ The *pari passu* decline of free speech and republicanism in Rome represented the end of Antiquity's influence on the development of proto-liberalism,²⁷ and inaugurated an era of long dormancy for liberal political thought.

The Classical notion that the proper animating impulses of government are *speech* and *ideas* was left in abeyance for a millennium and a half which were not hospitable to democracies. It would not re-emerge until the 17th century. The first recorded use of the English expression "freedom of speech" occurs in jurist Sir Edward Coke's speech to Parliament of February 5, 1621, in which he made the modest argument that Members of Parliament should be entitled to speak freely in their official capacities.²⁸

When democracy's modern iteration was born, during the English Civil War, the idea of free speech for all was revived and refined by John Milton, in his pamphlet *Areopagitica*. Although Milton was writing specifically in response to the Licensing Order of 1643 in Parliament, which proposed the licensure of printing presses, he articulated a timeless rationale for free speech that would echo through the modern era.

The core of Milton's argument is the concept of the *marketplace of ideas* (though he did not use that locution). He writes:

[a]nd though all the windes of doctrine were let loofe to play upon the earth, fo Truth be in the field, we do injurioufly by licencing and prohibiting to mifdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.²⁹

²⁶ Cramer, *supra* note 24 at 160.

²⁷ *But see* MARCUS AURELIUS ANTONINUS AUGUSTUS, IMPERATOR AD SE IPSUM, I.6 (180 A.D.) ("From Diognetus...[I learned]...to endure freedom of speech...."). It is unclear the extent of free speech that was permitted during the period of the Five Good Emperors (96-180 A.D.), but here the last of the so-called Good Emperors himself appears to support it. IMPERATOR AD SE IPSUM, often erroneously but enduringly mistitled "Meditations" was meant as a record of personal thoughts, and was never published during Aurelius's lifetime.

²⁸ 3 SIR EDWARD COKE, THE SELECTED WRITINGS OF SIR EDWARD COKE, 1195 (ed. Steve Sheppard, 2003) (1621).

²⁹ JOHN MILTON, AREOPAGITICA, 166-67 (ed. Neill H. Alford et al., 1992) (1644).

In the *marketplace of ideas*, every citizen is free to sell his ideological wares, no matter what they may be, and like an efficient market, popular opinion will gravitate towards those ideas that are true. Furthermore, as in an economic market, competition plays a salutary role. Ideological competition, according to Milton, *even competition from false ideas*, has value. The value is that it causes a democratic polity to question its conventional wisdom and received truths, and in so questioning, deepen its understanding of them if they be true, and discard them if they cannot withstand the rigour of cross-examination. Milton describes the value of even false ideas: “all known opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is trueft.”³⁰ He explains:

I cannot praise a fugitive and cloister'd vertue, unexercis'd & unbreath'd, that never fallies out and fees her adversary, but flinks out of the race, where that immortall garland is to be run for, not without duft and heat.³¹

In other words, the marketplace functions as a sort of crucible. In this crucible, truth is put to the test of fire, and if it survives, it emerges tempered and hardened all the more for the encounter; and if it breaks in the heat, it was never truth to begin with, and an imposter has been halted. Either outcome improves our understanding. Milton, revealing himself as a true liberal, before that word had come into the common parlance, concluded by exhorting, “[g]ive me the liberty to know, to utter, and to argue freely according to the conscience, above all liberties.”³²

The end of the English Civil War and the consummation of Glorious Revolution that followed inaugurated an auspicious and consequent new era in Western thought known as The

³⁰ *Id.* at 51. For a modern iteration of this concept, see GREG WEINER, *AMERICAN BURKE: THE UNCOMMON LIBERALISM OF DANIEL PATRICK MOYNIHAN*, 42 (2015) (quoting then-Senator Moynihan on the need for “opponents who will do us the service of forcing us to become more intelligent, who will require us to keep our ideas from becoming stale and inert.”).

³¹ *Id.* at 56-57. Milton’s great admirer, Blake, would later write, on this idea: “[w]ithout contraries there is no progression. Attraction and repulsion, reason and energy, love and hate are necessary to human existence.” WILLIAM BLAKE, *THE MARRIAGE OF HEAVEN & HELL*, ln. 2 (1790).

³² *Id.* at 163.

Enlightenment. One of the first significant philosophers of the Enlightenment was John Locke. In *Two Treatises on Government*, Locke asserts fundamental rights to “life, health, liberty, [and] possessions,”³³ which arise from natural law. Locke is somewhat elliptical about what the particular characteristics of “liberty” are; he is concerned much more with a thorough articulation of a theory of property.

Locke does revisit the notion of natural liberty, and its implications for free speech, in *A Letter Concerning Toleration*. Written at the twilight of a century characterized by perpetual, violent conflict between the various Christian sects and denominations active in England, the *Letter* makes the case for religious toleration and accommodation. Locke introduces his subject:

The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light.³⁴

Several elements of this passage are notable. Firstly, Locke begins by justifying religious liberty on the ground that the logic of Christianity itself compels it. Locke also asserts that, Christian precepts aside, “genuine reason” also supports a policy of religious liberty. Finally, Locke asserts that such liberty is not only *advantageous*, but also *necessary* in a civil society.

Though Locke is framing his argument in terms specific to religious liberty, the underlying logic has implications for the freedom of belief, speech, and expression in general. Why must a sovereign refrain from compelling religious belief? Locke might answer that it is essentially impossible to compel religious *belief*; the most a sovereign could compel is religious *observance*. Locke explains, “[i]t is only light and evidence that can work a change in men's opinions; which light can in no manner proceed from corporal sufferings, or any other outward

³³ JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT*, II.6 (1689) [hereinafter *SECOND TREATISE*].

³⁴ JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (1689) [hereinafter: *LETTER*].

penalties.” Though he is referring in context to religious opinions, the legitimacy of Locke’s underlying reasoning remains sound, no matter the type of opinion in question. After Virgil, *ab uno disce omnes*.³⁵ The fundamental idea Locke is expressing is that it is futile for a sovereign to legislate orthodoxy in matters of belief or conscience, because they are not susceptible to the influence of force; only *persuasion* can truly change someone’s mind (recall our discussion of the *Crito*). Though history is populated with an overwhelming rogue’s gallery of cruel tyrants who built entire regimes on the principle of belief compelled by the sword, Locke’s articulation of the propositional error they attempted to rule by was considered positively novitious in 1689, and divine-right monarchy would endure for another hundred years (though not in England) after the point was made. Locke emphasizes this point a second time, writing “no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing.”³⁶ Again, although he is employing the vocabulary of religion, examine the essential underlying claim: matters of opinion recognize only the authority of persuasion, not compulsion.

To the evolution of free speech, Locke adds three principal ideas. Firstly, that men are, by natural law, entitled to liberty. Secondly, that a case for free speech can be made from either principles of natural law and reason; or equally well from principles of Christian theology. Like Milton, Locke lived during an era of perpetual conflict between those who sought to establish a Christian fundamentalist regime in England (*e.g.* Cromwell), and those who argued for a secular regime of natural law (*e.g.* Hobbes); the *Letter* was a double-edged sword meant to appeal to both factions. Finally, Locke emphasized the self-evident but contemporaneously foreign notion that it is metaphysically impossible to compel a person to *believe* something, and therefore the

³⁵ VIRGIL, *AENEID*, II.65-66 (trans. John Dryden, 1697) (19 B.C.) (“from the one, learn all”)

³⁶ LETTER, *supra* note 34.

state should not attempt to legislate orthodoxy in matters of opinion.³⁷

In 1689, the very same year that Locke published *A Letter Concerning Toleration* and *Two Treatises on Government*, the nascent English government of William of Orange and his Whig supporters in Parliament enacted *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, commonly known as the “1689 Bill of Rights.” The 1689 Bill reflected the profound influence of Locke’s political philosophy. Notably for our enquiry, it guaranteed several rights related to free speech in England. For example, the Bill states that “it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.”³⁸ It also provided that “freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.”³⁹ While the right to petition the king and free speech for members of Parliament exclusively may not ring very impressively in modern American ears, they were for their time progressive ideas, and the 1689 Bill, taking the form of an iterative list of “rights and liberties,”⁴⁰ would be the conceptual, and perhaps even “spiritual,” model for the far more ambitious American Bill of Rights in 1791.⁴¹

In the next century, Milton’s conception of a marketplace of ideas and Locke’s natural law theory would be embraced across the Atlantic by Thomas Jefferson. Jefferson was a bibliophile;

³⁷ The notion that *belief* cannot be compelled was challenged by observers of totalitarian governments of the 20th century. Perhaps most famously, Orwell’s account of Winston coming to *love* Big Brother suggests that human psychology may be more manipulable than Locke presumed. See GEORGE ORWELL, *NINETEEN EIGHTY-FOUR*, 290 (1950) (“Almost unconsciously he traced with his finger in the dust on the table: 2 + 2 = 5. ‘They can’t get inside you,’ she had said. But they could get inside you.”).

³⁸ *An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown*, 1689, 1689-1702 Wm. III.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Compare, for example “it is the right of the subjects to petition the king...” *Id.* to “Congress shall make no law...abridging...the right of the people...to petition the Government for redress of grievances.” U.S. Const. amend. 1.

by 1814 his library consisted of over 6,500 books.⁴² He was a keen student of history, philosophy and law. Although free speech receives no mention in Jefferson's most famous writing, the Declaration of Independence (other than a nebulous reference to "liberty," used most likely in the same recondite sense as Locke), it was a cause to which Jefferson was thoroughly committed.

In 1780, while serving as the governor of Virginia, Jefferson received a letter from French diplomat François Barbé-Marbois, containing a number of general enquiries about the geography, history, and government of Virginia.⁴³ Jefferson compiled his responses into a book, *Notes on the State of Virginia*, published in 1785. In it, Jefferson invoked the Lockean argument (and predicted the Millian argument) against laws that compelled belief: "[t]he legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."⁴⁴ Note, here, that Jefferson pushes Locke's argument perhaps farther than Locke himself was willing to go with it. Whereas Locke defended the freedom of "opinions," Jefferson was now defending "acts." Per Locke, a man could "believe" in any god, but in Jefferson's formulation, a man can "say" there are twenty gods. Jefferson was well read, especially conversant in Locke's work; he knew he was proposing a more radical iteration of liberty of conscience, one that now encompassed the liberty of *speech* as well.

In Jefferson's first inaugural address as president, in 1801, he famously sought to heal the bitter political divisions of the country following the acrimonious election of 1800 by declaring

⁴² JOHN FERLING, *SETTING THE WORLD ABLAZE: WASHINGTON, ADAMS, JEFFERSON, AND THE AMERICAN REVOLUTION*, 43 (2000).

⁴³ GEORGE TUCKER, *THE LIFE OF THOMAS JEFFERSON*, 165 (2017) (1837).

⁴⁴ THOMAS JEFFERSON, *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA*, 221 (eds. Adrienne Koch & William Peden, 1982) (1795).

“[w]e are all Republicans, we are all Federalists.”⁴⁵ However, what is usually omitted from glosses of the speech in history books is the immediately subsequent passage: “[i]f there be any among us who would wish to dissolve this Union or to change its republican form, *let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.*”⁴⁶ Here, one can see Jefferson growing ever bolder in his belief in free speech. His political rise to fame can be attributed to the Declaration of Independence, which offered rhetorical support for an inchoate right to “liberty.” As governor of Virginia, he educated Locke’s theory of uncoerced belief into an affirmative right of freedom of speech. As president, in his first public address, Jefferson rested the tenuous security of the American Republic on the adamant belief that the marketplace of ideas will ineluctably make paupers and pariahs of undemocratic insurrectionists instead of handing them the instruments of political power.

In fact, Jefferson went even further in his advocacy of free speech. He firmly believed in the right to a *free press*. In a letter to Charles Yancey, he wrote “Where the press is free, and every man able to read, all is safe.”⁴⁷ In another letter to his old friend Lafayette, Jefferson wrote, “[t]he only security of all is in a free press. The force of public opinion cannot be resisted when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure.”⁴⁸ As President, Jefferson refused to charge newspapers for postage, “to facilitate the progress of information.”⁴⁹ In the beginning of his political career, Jefferson was willing to enlarge the ambit of Locke’s freedom of belief to encompass speech by private

⁴⁵ *Id.* at 261.

⁴⁶ *Id.* at 261-62 (emphasis added).

⁴⁷ *Id.*, Letter to Charles Yancey at 528

⁴⁸ *Id.*, Letter to the Marquis de Lafayette at 571

⁴⁹ *Id.*, 1st Annual Message, 1801, at 264.

individuals; as his stature and authority grew, he pushed Locke's premise even farther, to encompass public speech by newspapers with mass circulation and national audiences.

Jefferson's support for a free press echoed Milton's argument against licensure of the press; but a free press is a far bolder proposition in a democratic republic, where popular opinion determines the course of government, than it was for Milton, whose England was a divine-right monarchy.

The above excerpts from Jefferson's correspondences hint at the rationale for Jefferson's support of a free press. Although he recognized that a free press produced an undesirable level of "agitation," he believed that foible was eclipsed by the free press's ability to effectively put popular public opinion to work upon the levers of governmental power, thereby guaranteeing the democratic character of governance. The press must also be free, according to Jefferson, to effectively serve its function as an external check on the abuse of governmental power. Jefferson was perhaps the first political philosopher to observe and articulate the critical synergism between a participatory democracy and an unfettered press.

Jefferson's affinities with Milton do not stop at licensure of the press. Jefferson subscribed to the Miltonian epistemological notion of the marketplace of ideas. Recall again his exhortation in his inaugural address to permit error to stand, beclowning its proponents in the marketplace. He wrote, in nearly identical language, in a letter to William Roscoe about the principles which the University of Virginia would embody:

[t]his institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.⁵⁰

⁵⁰ *Id.*, Letter to William Roscoe at 563 (Jefferson would probably be pleased that the University of Virginia continues to champion the freedom of speech, especially during the present inhospitable political and academic climate. The University's current mission statement affirms: "The University of Virginia is a community of scholars in which the ideals of freedom of inquiry, freedom of thought, freedom of expression, and freedom of the individual are sustained. The University is committed to supporting the exercise of any right guaranteed to individuals by the Constitution and the Code of Virginia and to educating students relative to their responsibilities").

Like Milton, Jefferson was willing to tolerate even the most pernicious false ideas, because he believed the marketplace would sift the wheat from the chaff at the end of the day, and that even erroneous notions had a part to play in the systemic advancement of knowledge.

Jefferson's faith in this principle was further affirmed by his continuous, vehement support of a free press, despite the vicious libels many newspapers printed against him during the election of 1800. Jefferson was called by political newspapers, *inter alia*, "a Jacobin, a shameless southern libertine, and a 'howling' atheist."⁵¹ Nevertheless, Jefferson believed in maximizing the press's ability to disseminate any and all information, because he believed that the marketplace of ideas would dialectically arrive at the truth in the final analysis.

b. The Dignity of the Individual (The Individualist Argument)

Contemporaneously with Jefferson, Prussian philosopher Immanuel Kant was also working out a theory of free speech, but with a very different set of assumptions. Kant was for the most part a metaphysician, not a political philosopher like Jefferson, but he did make a foray into the field of political theory in his essay *Perpetual Peace*, in 1795. In it, he frames the problem facing a heterogeneous society, and his proposed solution:

[g]iven a multitude of rational beings who, in a [political] body, require general laws for their own preservation, but each of whom, as an individual, is secretly inclined to exempt himself from this [general law], how are we to order their affairs and how establish for them a constitution such that, although their private dispositions may be really antagonistic, they may yet so act as a check upon one another, that, in their public relations, the effect is the same as if they had no such evil sentiments."⁵²

The problem, per Kant, is that a country may be filled with base, petty citizens who are forever at each other's throats. The solution is to create a political regime in which the various and sundry

⁵¹ DAVID McCULLOUGH, JOHN ADAMS, 544 (2002).

⁵² IMMANUEL KANT, PERPETUAL PEACE, 154 (trans. M. Campbell Smith, 1903) (1795).

“evil sentiments” of individuals oppose and thereby cancel each other out in the public square. This is not quite the model Milton and Jefferson developed, in which erroneous ideas were welcome because they served to refine and develop true ideas. Instead, Kant is proposing a model based on *equilibrium*, in which erroneous ideas are benign so long as someone else is arguing the *opposite* of any particular erroneous idea. Kant frames this as a matter of political *praxis*; a pragmatic approach to governance for the hopelessly chaotic German principalities of the late 18th century.

This may seem less idealistic than Milton’s heroic image of truth as “vertue...fallying out” to win her immortal garland, but we must keep in mind that In *Perpetual Peace*, Kant is engaged in political realism to harmonize the perpetually-warring German principalities of his era. This is not to say that he does not have an idealistic conception of free speech. He was primarily an idealistic philosopher, and free speech appears in his metaphysics as well.

The foundation of all of Kant’s moral philosophy is the principle known as the Categorical Imperative. This can be formulated several ways, for example, that one should “act only on that maxim through which you can at the same time will that it should become universal law,”⁵³ or “[a]ct in such a way as to treat humanity, whether in your own person or in that of anyone else, always as an end and never merely as a means;”⁵⁴ or “the idea of the will of every rational being as a will laying down universal law.”⁵⁵ The unifying concept is “the *dignity* of [every] rational being.”⁵⁶ People are never to be treated as means to an end, and all human actions should be conducted as if they set forth maxims which can fairly be universalized to all

⁵³ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSIC OF MORALS*, 24 (trans. Jonathan Bennet, 2008) (1785) [hereinafter: *GROUNDWORK*].

⁵⁴ *Id.* at 29.

⁵⁵ *Id.* at 30.

⁵⁶ *Id.* at 33 (emphasis in original).

human behaviour. This ability to act in ways that define universal principles is at the very core of one's humanity, because "[a]utonomy is... the basis for the dignity of human nature and of every rational nature."⁵⁷ So, although not apparent from the pragmatic *realpolitik* rule he lays out in *Perpetual Peace*, Kant does have an idealistic conception of human dignity and worth, based on the faculty of rational autonomy.

In fact, Kant's moral philosophy was considered in its day to be so idealistic that it was criticized as practically unworkable in the real world. In response to these charges, Kant replied with an essay, titled quite literally, *On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice*, in 1793. In it, Kant discusses the practical application of his moral philosophy. On the freedom of speech, he writes:

[t]hus freedom of the pen... is the sole palladium⁵⁸ of the people's rights. For to want to deny them this freedom is not only tantamount to taking from them any claim to a right with respect to the supreme commander (according to Hobbes), but is also to withhold from the latter - whose will gives order to the subjects as citizens only by representing the general will of the people - all knowledge of matters that he himself would change if he knew about them and to put him in contradiction with himself. But to instill in a head of state concern that unrest in the state might be aroused by [the subjects'] thinking independently and aloud is tantamount to awakening in him mistrust of his own power or even hatred of his people.⁵⁹

In this passage, Kant advances two important arguments in favour of free speech: 1). its function as a defence of the people against an unjust sovereign, and 2). that the application of the Categorical Imperative to the sovereign himself requires a regime of free speech.

⁵⁷ *Id.* at 34.

⁵⁸ A *Palladium* refers to the mythical statue of Pallas (Athena) in ancient Troy. It was believed that Troy would never fall to an enemy so long as the Palladium stood. Odysseus and Diomedes managed to steal the Palladium during the Trojan war, allowing the Achaeans to defeat Troy. PARVA ILLIAS, frag. 1 (trans. H.G. Evelyn-White, 1914) (c. 625 B.C.). Aeneas recovered the Palladium after the fall of Troy, and brought it with him to Rome, where Romans subscribed similar beliefs about its divine protection of their city. VIRGIL, *AENEID*, II.145-II.195 (trans. John Dryden, 1697) (19 B.C.).

⁵⁹ IMMANUEL KANT, THEORY & PRACTICE, 8:318, <https://hesperusisbosphorus.files.wordpress.com/2015/02/theory-and-practice.pdf> (last visited Nov. 16, 2017).

Firstly, Kant argues that governmental suppression of free speech is tantamount to taking from the people “any claim to a right” whatsoever against the sovereign. In other words, free speech is the political *sine qua non*: a right so fundamental and foundational that for a government to deny it is for a government to deny *all* rights and liberties. Regimes without liberal policies of free speech are *necessarily* tyrannies. Often, the only defence or recourse a citizenry has against an unjust government is the freedom to denounce the government. To take away this right is to leave citizens wholly at the mercy of unjust governments.

Secondly, Kant makes a more complex argument about the moral duty of the sovereign to respect free speech. Recall that the Categorical Imperative, in one formulation, states “act only on that maxim through which you can at the same time will that it should become universal law.”⁶⁰ Now consider this principle, applied against the sovereign. The sovereign must act according to maxims that he would will to become universal law, for all people in all times. If the sovereign were to suppress speech, he would be endorsing arbitrary censorship as a *universal* principle, which would apply to *him* as well. Therefore, a censorious sovereign “put[s] him in contradiction with himself.”⁶¹

Both of these arguments implicate the principle that free speech is demanded by the “*dignity* of human nature and of every rational nature.”⁶² Recall again the first formulation of the Categorical Imperative: “[a]ct in such a way as to treat humanity, whether in your own person or in that of anyone else, always as an end and never merely as a means.”⁶³ This is essentially a moral command to respect the *dignity* of individual people. In his essay *What Is Enlightenment?* Kant directly connects this *dignity* that arises from *rational autonomy* to free

⁶⁰ GROUNDWORK, *supra* note 53 at 24.

⁶¹ THEORY & PRACTICE, *supra* note 59 at 8:318

⁶² GROUNDWORK, *supra* note 53 at 34 (emphasis added).

⁶³ *Id.* at 29.

speech. “Enlightenment,” according to Kant “is a man’s release from his self-incurred tutelage...[i.e.]...to make use of his understanding without direction from another [person].”⁶⁴ Here Kant directly identifies the philosophical ideal of his age as the ability to engage in free speech and thought *without direction, i.e.* without any governmental censorship. Engaging in free speech represents a man’s emancipation from “minority [childhood],”⁶⁵ and the realization of his full dignity as an autonomous rational actor. For this emancipation, “nothing is required but *freedom...the freedom to make public use of one’s reason at every point...[i.e.]...the use which a person makes of it as a scholar before the reading public.*”⁶⁶

In this way, Kant represents a divergent strain of thought from the school of Milton and Jefferson. Whereas the latter justified freedom of speech on the grounds that even erroneous ideas help alter and refine our conception of true ideas, Kant is grounding his defence of free speech in the fundamental dignity of the individual, treating speech as a manifestation of rational autonomy. Whereas Milton and Jefferson couched their arguments in the collective good, Kant is primarily concerned with the individual good. Both are served by robust legal and social regimes of untrammelled free speech.

Kant was not the only one to make the connection between free speech and inherent human dignity. In England, a generation after Kant, the concept of free speech came into a similar articulation in the philosophy of John Stuart Mill. In *On Liberty*, Mill begins with an invocation of the importance of individual dignity and autonomy. He writes “there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of

⁶⁴ IMMANUEL KANT, WHAT IS ENLIGHTENMENT? (trans. Lewis White Beck, 1963) (1784) [hereinafter: WHAT IS ENLIGHTENMENT?].

⁶⁵ Immanuel Kant, *What Is Enlightenment?*, THE CAMBRIDGE EDITION OF THE COMPLETE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY, 8:35 (trans. M. Gregor, 1999) (1784).

⁶⁶ WHAT IS ENLIGHTENMENT? *supra* note 63 (emphasis added).

society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them” because to do so would “fetter the development...of any individuality.”⁶⁷ Mill posits that, as an axiomatic principle of political philosophy, “the only purpose for which [governmental] power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁶⁸ In all personal matters, a person’s “independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”⁶⁹

Mill argues that a liberal regime of free speech must necessarily follow from a recognition of the dignity of the individual. He writes “there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.”⁷⁰ This is a bold statement, but Mill does not relent:

[i]f all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.

This is the near-*absolutist* position on free speech, and the one to which this author subscribes and agitates in favour of in these remarks.

Mill’s articulation of free speech may seem unlimited; however we must properly call it *near-absolute*. Mill places only one limit on this freedom, his famous “harm principle.” Free expression of an idea may be proscribed only if it causes harm to another person. Now, we must be very clear what Mill meant by “harm.” Harm, does *not* mean: offended sensibilities, injured pride, wounded self-esteem, fomented prejudice, or any other variety of psycho-social harm, as it is understood by today’s would-be censors; harm means *affirmatively* infringing on the *negative*

⁶⁷ JOHN STUART MILL, ON LIBERTY, 13 (4th ed.) (1859).

⁶⁸ *Id.* at 21-22.

⁶⁹ *Id.* at 22.

⁷⁰ *Id.* at 15.

liberties of another, *in the first instance*. In other words, for speech to be punished, it must directly and proximately (“in the first instance”) cause a cognizable injury to another’s life, liberty, or property (the “negative liberties”). This is an extremely high threshold to meet in order to censor or punish speech.

Under Mill’s harm principle, we might find justification for some of the forms of speech that are currently regulated in the United States. Slander and libel directly harm the ability of their target to make a living (meaning “slander” in its legal, not colloquial sense—a *factually false* statement; no statement of opinion can be slanderous). “Fighting words” directly invite violence. Incitements to imminent criminality injure the liberty and property of others. But these exceptions are few and far between, and they are intellectually coherent, insofar as they are motivated by the same principle that confers the right to free speech in the first place: the nearly absolute right to negative liberty of the individual.

In summation, we can see the intellectual provenance of the freedom of speech, from Antiquity to the modern era. We can see in Plato the concept that ideas are the operational currency of democracies. The history of classical Athens establishes the original affinity between democratic government and free speech. In Milton, we see the freedom of speech as an affirmative epistemological good, because it helps eliminate error and refine truth. Locke lays out both secular and theological arguments against compelled belief. Jefferson also subscribed to the idea that free speech was a collective good for society at large, especially when it takes the form of a free press in a democracy, which can serve as an extra-constitutional check on governmental power. Kant made both a practical and an idealistic argument for free speech. Mill extended the case for free speech as a matter of individual dignity and autonomy to its

outermost potency. We have examined instrumentalist arguments that liberal regimes of free speech serve the collective good and common weal, and we have examined individualist arguments that free speech is an inherent human right and a necessary component of fully-realized human dignity and autonomy. Our understanding of the basic history of the ideology of free speech can now conclude, as we move on to examine the constitutional and legal doctrines applicable to free speech in the United States.

3. The Constitutional and Legal Doctrines of Free Speech in the United States

The United States is famous throughout the world for being a “free” country. The framers of our constitution were acutely aware of the importance of crafting a regime that protected the liberty of the citizenry. Tens of millions of immigrants flocked to this country because it offered them the promise of freedom.

“Liberty” and “freedom” are nebulous words; Marx and Lenin believed that they too were operating in the service of “freedom.” It is therefore important, at this point, to understand what exactly is meant by “free speech” in the United States. We will follow two strains of thought on American free speech: the social contract theory, which will present broad principles of political philosophy; and the development of First Amendment constitutional doctrines by the United States Supreme Court, which will refine our understanding of what the Free Speech Clause means in American political life.

a. There Is No Constitutional Basis for Governmental Limitation on Free Speech.

To properly understand the legal position of free speech in the American constitutional regime, we must begin at first principles, which is to say political philosophy. A good point of

departure is the philosophy the Founders had in mind as they framed our nascent political system, Locke's *Two Treatises on Government*.

In pre-history, before the inception of any government whatever, men existed in what John Locke referred to as "the state of nature."⁷¹ The state of nature is a state characterized by a "state of perfect freedom" among all men, to do whatever they please.⁷² The state of nature is a "*state of liberty*," in which the only limiting principle is that a man may not interfere with the liberty of his neighbour.⁷³ All men are possessed with "title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the laws of nature,"⁷⁴ and are "restrained from invading others' rights."⁷⁵ What are these rights and privileges of the state of nature? "[L]ife, health, liberty, [and] possessions."⁷⁶

But what if a man trammels the liberty of his neighbour? In the state of nature, "all the power and jurisdiction is reciprocal, no one having more than another."⁷⁷ This means that what is called the *executive power*, the power to punish those who violate others' liberty, resides equally in every person:

the *execution* of the law of nature is, in that state, put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation: for the *law of nature* would, as all other laws that concern men in this world 'be in vain, if there were no body that in the state of nature had a *power to execute* that law, and thereby preserve the innocent and restrain offenders. And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that *state of perfect equality*, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.⁷⁸

⁷¹ See, SECOND TREATISE, *supra* note 33 at II.4.

⁷² *Id.*

⁷³ *Id.* at II.6.

⁷⁴ *Id.* at VII.87.

⁷⁵ *Id.* at II.7.

⁷⁶ *Id.* at II.6.

⁷⁷ *Id.* at II.4.

⁷⁸ *Id.* at II.7.

In the state of nature, executive power inheres in every man, as every man has the right to punish offences against “life, health, liberty, or possessions.”⁷⁹

This arrangement changes with the inception of government. Government is a social contract, formed voluntarily between autonomous, rational men. Its purpose is that of a *bargain*: men “quitteth this natural power” of each man to punish transgressions against his liberty, and “[resign] it up into the hands of the community” of “political society,” *in exchange for* “protection...[of]...the law established by it.”⁸⁰ As Locke puts it:

IF man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? why will he give up this empire, and subject himself to the dominion and controul of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.⁸¹

In other words, the terms of the social contract are that men surrender some natural rights, in exchange for a government that protects and secures the rest of their natural rights.

The American social contract is embodied in the Constitution of the United States and its Bill of Rights. Some natural rights were surrendered by the people to the government, in exchange for the government’s promise not to interfere with others. Thus, for example, the unlimited and inviolable right to property that Locke recognized in the state of nature⁸² was surrendered in so

⁷⁹ *Id.* at II.6.

⁸⁰ *Id.* at VII.87.

⁸¹ *Id.* at IX.123.

⁸² *See id.* at V.25.

far as the government was given the right to collect taxes against it;⁸³ in exchange for the government's protection of other property rights.⁸⁴

It is important to understand that the legal concept behind the U.S. constitution (or any other institutive charter of government) is that of a *contract*. Contracts bind both parties equally to their respective obligations. When the American people ratified the constitution, they created a government, but that government's inception and continuing existence were *contingent on it adhering to its contractual obligations*. Americans are constitutionally entitled to "that safety and security in civil society, for which it was first instituted, and for which only they entered into it."⁸⁵

In the United States constitution, one area of natural rights which the people, before the inception of government, set aside for themselves is the right to free speech.⁸⁶ This understanding of the bargain is reduced to writing in the First Amendment. However, we are not correct when we say that we "get" the right to free speech "from" the First Amendment, nor is it correct to say that the First Amendment "gives" us the right to free speech. While the distinction may seem technical or semantic only, it is actually substantive and fundamental, because it speaks directly to the nature of government as *contract*. We do not *receive* the right to free speech *from* the government, because it is not theirs to possess, give, regulate, or ration. The right to free speech is a natural right, that all men possessed in the state of nature. It is one of the spheres in which the people said, *before the inception of government*, that the *government may not regulate*. The government's inception, and its existence in continuity, are *contingent* on its recognition that free speech is a natural right, outside of and above its power to legislate.

⁸³ See U.S. Const. art. I, § 2, cl. 3; *Id.* at art. I, § 8, cl. 1.

⁸⁴ See *id.* at amend. 5.

⁸⁵ SECOND TREATISE, *supra* note 32 at VII.94.

⁸⁶ U.S. Const. amend. 1.

A policy proposal that has become more popular recently has been legislation limiting or banning what is commonly referred to as “hate speech,” which we shall define as speech that expresses animus towards a group based on an immutable characteristic of their being.⁸⁷ There may be an interesting debate to be had on the merits or demerits of such a policy, but it would be *entirely moot*, because the government is incapable, by the terms of the constitutional contract that brought it into existence, of entertaining such legislation. The right to free speech was reserved, by the people, for themselves, as an area into which legislation may not encroach.

b. The Legal Doctrines of the Free Speech in Modern America

The evolutions of free speech in America does not simply end with the ratification of the First Amendment in 1791. That is in fact merely the starting point of an entirely new line of evolution, as free speech was transformed from an abstract principle of natural law into a practically functional blueprint for public discourse in a nascent democracy.

The First Amendment states, in salient part, that “[c]ongress shall make no law...abridging the freedom of speech....”⁸⁸ What does that mean? What is “speech?” Does it’s rule admit any exceptions? If so, what types of exceptions are permissible? These questions the framers left to the courts. “It is emphatically the province and duty of the judicial department to say what the law is.”⁸⁹ While all manner of courts (federal, state, trial, appellate) have been called upon to interpret the First Amendment, we will primarily concern our enquiry with the United States Supreme Court, as it is “supreme in the exposition of the law of the Constitution.”⁹⁰

⁸⁷ *e.g.* race, national origin, sex, sexual orientation, citizenship, etc.

⁸⁸ U.S. Const. amend. 1.

⁸⁹ *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803).

⁹⁰ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

Surprisingly, the Supreme Court was not called upon to interpret the Free Speech Clause of the First Amendment at all during the first century of American history. It declined to rule on the constitutionality of any federal law that implicated the Free Speech Clause until the early 20th century, when massive social and political changes forced free speech onto the Supreme Court's docket.

i. Justice Holmes, the Espionage Act Cases, and the “Great Dissent”

In 1917, three factors forced the Court to consider the meaning of the Free Speech Clause: the United States joined World War I; Congress passed the Espionage Act; and following the Bolshevik revolution in Russia, paranoia over communist subversives set off the first Red Scare. The confluence of these events generated several early Free Speech Clause cases for which the Court granted certiorari.⁹¹

In *Schenk*, the Court considered the case of a defendant who was convicted under the Espionage Act for distributing pamphlets encouraging young men to resist the draft. Schenk argued that his conviction was unconstitutional because it violated the Free Speech Clause. The Court upheld the conviction, reasoning that the Free Speech Clause must be subject to some rational limitations. The first limitation that Justice Holmes⁹² observed in his opinion was that during times of war, speech that could not ordinarily be punished may become punishable due to the exigencies of national emergency: “[w]hen a nation is at war many things that might be said

⁹¹ *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); and *Abrams v. United States*, 250 U.S. 616 (1919).

⁹² Holmes may be the most interesting man in the history of the Supreme Court. His friend, William James, remarked that Holmes was “composed of at least two and a half different people rolled into one....”. ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES*, 15 (2000).

in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”⁹³

Holmes then sets out his famous test for what speech may be limited, the terms of which are familiar to almost every American adult:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create *a clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.⁹⁴

The test that justice Holmes proposes then is that free speech may be limited when 1) it is an incitement or inducement to a crime; and 2) that there is a “clear and present danger” that such a crime will occur as a result of the speech.

In *Debs*, the Court upheld the Espionage Act conviction of socialist activist Eugene V. Debs, on a set of facts functionally identical to those in *Schenk*.⁹⁵ In *Frohwerk*, the Court also upheld the conviction of a newspaperman for publishing editorials “attempt[ing] to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States.”⁹⁶ Justice Holmes again observed that the speech became punishable not because of the ideas that it expressed, but because of its exhortation to illegal acts.⁹⁷

Finally, in *Abrams*, the defendants were also convicted under the Espionage Act, for throwing Yiddish anti-war leaflets out of their windows.⁹⁸ The Court upheld the conviction, with Justice Clarke writing for the majority. Notably, however, Justice Holmes dissented. He found

⁹³ *Schenck*, 249 U.S. at 52.

⁹⁴ *Id.*

⁹⁵ *Debs*, 249 U.S. 211.

⁹⁶ *Frohwerks*, 249 U.S. at 205.

⁹⁷ *Id.* at 208 (“all this might be said or written even in time of war in circumstances that would not make it a crime”).

⁹⁸ *Abrams*, 250 U.S. at 618.

that the defendants lacked the legal “intent” to interfere with the wartime operation of the government, and therefore did not satisfy the *mens rea* requirement of the Espionage Act.⁹⁹ His dissent then lapsed into a general appreciation of the value of the Free Speech Clause:

[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...but when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely may be carried out.”¹⁰⁰

This portion of the dissent (which was also joined by Justice Brandeis), is remarkable for several reasons. Firstly, it is the first articulation of a Free Speech Clause defence to a criminal law conviction to come from the Supreme Court bench (although in dissent). Secondly, with this dissent, Holmes becomes the first Supreme Court Justice to make an argument for a liberal conception of free speech on policy grounds. And finally, from Holmes, in 1919, we get our first explicit reference to the *marketplace of ideas* that had animated the writing of Milton and Jefferson. Holmes’s “Great Dissent” would prove hugely influential, and would set the standard for Free Speech Clause jurisprudence in the 20th century.¹⁰¹

ii. Justice Brandeis, Incorporation, and *Whitney*

Justice Brandeis, on the Court only three years when he joined Holmes’s dissent in *Abrams*, evolved into one of the greatest Supreme Court jurists on the subject of free speech in the Court’s history. Brandeis was the first justice to reach the Supreme Court who was a product of, and leader in, the Progressive movement of the early 20th century, and his liberal views on

⁹⁹ *Id.* at 626-27 (Holmes, J., dissenting).

¹⁰⁰ *Id.* at, 630 (Holmes, J., dissenting).

¹⁰¹ *See generally*, THOMAS HEALY, THE GREAT DISSENT (2013) (Summarizing the influence of Holmes’s dissent for First Amendment jurisprudence).

civil liberties helped shift a largely conservative Court marginally leftward.

In *Gitlow v. New York*, Benjamin Gitlow was convicted under a New York law that banned the advocacy of “criminal anarchy.”¹⁰² The Supreme Court upheld his conviction, but at the same time greatly expanded the protections of the Free Speech Clause. As you will recall, the First Amendment states that “Congress” shall make no laws abridging the freedom of speech, but it says nothing of state and municipal governments. At issue in *Gitlow* was a New York state law, which under the current jurisprudential rule of *Barron v. Baltimore*, was not subject to the constitutional limitations of the First Amendment.¹⁰³ Through the legal mechanism of “incorporation,” the Court held that the Fourteenth Amendment’s Due Process Clause, which *did* bind the states, “incorporated” the First Amendment into its fundamental guarantee of “liberty.”¹⁰⁴ As a result, after *Gitlow*, every state agency and actor, at every level of government, was bound by the First Amendment’s Free Speech Clause, from the lowliest village alderman to the governors and legislatures of the largest and most populous states. The Court undoubtedly diminished the cause of free speech by upholding Gitlow’s conviction, but its error must be weighed against the tremendous, systemic value of incorporation.

Holmes and Brandeis again dissented. Holmes reiterated his “clear and present danger” test, and argued that Gitlow’s pamphleteering presented no such danger: “[e]loquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.”¹⁰⁵

In *Whitney v. California*, Charlotte Anita Whitney was convicted of “criminal

¹⁰² *Gitlow v. People of the State of New York*, 268 U.S. 652, 654 (1925).

¹⁰³ *See Barron v. Baltimore*, 32 U.S. 243 (1833) (holding that the Bill of Rights did not apply to the states).

¹⁰⁴ *Gitlow*, 268 U.S. at 666

¹⁰⁵ *Id.* at 673 (Holmes, J., dissenting).

syndicalism” for organizing for the Communist Party.¹⁰⁶ Again, the Court upheld her conviction, but Brandeis took up Holmes’s mantle as the champion of the First Amendment, and penned an eloquent and expansive defence of free speech in concurrence. He wrote:

[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.¹⁰⁷

Brandeis advances several important ideas here. First, he hearkens back to the intentions of the framers of our constitution, and of Pericles before them. He points out that the goal of the First Amendment was that “the deliberative forces should prevail over the arbitrary.”¹⁰⁸ Recall Pericles’s Funeral Oration: “[t]he great impediment to [political] action is, in our opinion, not discussion, but the want of knowledge which is gained by discussion preparatory to [political] action.”¹⁰⁹ Brandeis understood that the basis for sound decision-making in a democracy was discussion and deliberation. He continues: “discussion affords ordinarily adequate protection

¹⁰⁶ *Whitney v. California*, 274 U.S. 357, 360 (1927).

¹⁰⁷ *Id.* at 375–76 (1927) (Brandeis, J., concurring).

¹⁰⁸ *Id.*

¹⁰⁹ THUCYDIDES, *supra* note 17 at II.40.2.

against the dissemination of noxious doctrine.”¹¹⁰ This is Milton’s idea, that we should “[l]et [Truth] and Falshood grapple” because “who ever knew Truth put to the wors, in a free and open encounter?”¹¹¹

Secondly, note Brandeis’s argument that free speech is “both...an end and...a means.”¹¹² It is a “means” to the “discovery and spread of political truth,” an argument that aligns with the Milton/Jefferson marketplace of ideas, what we have called the *instrumentalist* argument. It is also an “end” in and of itself, which alludes to the Kant/Mill position that there is *inherent, intrinsic* value in being able to speak one’s mind, as a component of fundamental human dignity, which we have called the *individualist* argument. Brandeis embraces both the instrumentalist and the individualist views of free speech.

Brandeis also touches on Locke. He writes, “order cannot be secured merely through fear of punishment for its infraction.”¹¹³ Is this not drawn directly from Locke’s argument that it is metaphysically impossible to compel someone, through the threat of sanctions, to *believe* something? Say, profess, observe, or recite; surely all of these can be compelled by an illiberal government, but Brandeis understands that matters of conscience exist in a sphere of influence which no worldly magistrate may touch.

Finally, after a rousing idealistic and metaphysical defence of free speech, Brandeis offers a pragmatic argument. Brandeis posits: when citizens, perceiving an unjust public policy, are moved to anger against the government, the government has two options. It may, on the one hand, fearing criticism, engage in the “repression” of speech. This leads to “hate that menaces stable government.” On the other hand, it may allow critical speech, and by so doing, allow

¹¹⁰ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

¹¹¹ MILTON, *supra* note 29 at 166-67.

¹¹² *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

¹¹³ *Id.*

“discuss[ion] freely [of] supposed grievances and proposed remedies.” This discussion, in a popular democracy, has the same function as an emergency release governor on a steam turbine: it allows a system to safely dissipate powerful and potentially destructive forces. Citizens who are free to criticize the government without limitation tend to expend and exhaust their power in so doing, instead of applying it to works of violence, crime, or insurrection.

iii. The Modern Approach: *Brandenburg* and Beyond

Though Brandeis’s eloquent defence of free speech is given in concurrence to a judgment that affirmed Whitney’s conviction, his ideas ended up carrying the day. In *Brandenburg v. Ohio*, Clarence Brandenburg, a Ku Klux Klan leader was charged with “criminal syndicalism” (the same charge Whitney faced) for a lengthy and distasteful racial tirade he made on local television.¹¹⁴ Brandenburg was convicted in an Ohio court trial, on appeal his conviction was affirmed, and the Supreme Court of Ohio dismissed his appeal without issuing an opinion. Brandenburg finally appealed to the United States Supreme Court, which granted certiorari in 1969.¹¹⁵

The Court issued its opinion *per curiam*, “by the court;” meaning that no one Justice wrote and signed the opinion. This usually (but not always) indicates a unanimous court. The *per curiam* opinion overturned Brandenburg’s conviction, and overruled the Ohio Criminal Syndicalism statute and *Whitney*; effectively wiping the Supreme Court’s previous 50 years of Free Speech Clause jurisprudence into a *tabula rasa*. The Court replaced all of this with a new test for Free Speech Clause cases: the “imminent lawless action” test. In the Court’s words:

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy

¹¹⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (Brandenburg made comments “derogatory of negroes and, in one instance, of Jews” and accused the President, Congress and the Supreme Court of “suppress[ing] the white, Caucasian race” and threatening “revengeance [sic]”).

¹¹⁵ *Id.* at 444.

is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.... the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹¹⁶

This test has three parts: *intent* (the charged party must have acted with an ‘intentional’ *mens rea*); *imminence* (the charged party’s incitement to lawbreaking must be imminent as opposed to hypothetical or abstract); and *likelihood* (the charged party’s speech must have a substantial likelihood of inciting others to actually engage in criminality). The “mere advocacy” of lawbreaking in the abstract is insufficient to overcome the protections of the Free Speech Clause.¹¹⁷

Justice William O. Douglas, the greatest champion of free speech on the Court since Brandeis retired in 1939, issued a concurrence, which Justice Hugo Black joined. In it, the two of them articulated the most liberal iteration of free speech doctrine ever heard from the Court. Douglas begins by dismissing as erroneous and obsolete all of the Court’s Free Speech Clause jurisprudence from *Schenck* on down, writing that “Congress certainly cannot forbid all effort to change the mind of the country.”¹¹⁸ In repudiating the “clear and present danger” test and all of the cases that relied on it, Douglas inveighs,

[w]hen one reads the opinions closely and sees when and how the ‘clear and present danger’ test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment. Action is often a method of expression and within the protection of the First Amendment. Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted? Suppose one rips his own Bible to shreds

¹¹⁶ *Id.* at 447.

¹¹⁷ *Id.* at 449.

¹¹⁸ *Id.* at 451 (Douglas, J., concurring).

to celebrate his departure from one ‘faith’ and his embrace of atheism. May he be indicted?¹¹⁹

Douglas’s rhetoric reaches fever-pitch as he discusses the previous decade’s McCarthyism:

One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an ‘active’ Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.¹²⁰

Here, Douglas and Black are laying out the principles of their interpretation of the Free Speech Clause, to which they clove for the duration of their tenures on the Court. Free speech, to Douglas and Black, is an *absolute* right. When the First Amendment says Congress shall make “no law,” they take that to mean quite literally, *no law whatever*. Douglas would reiterate his literalist view in other cases throughout his career,¹²¹ as would Black, who wrote on another occasion:

[c]ertainly the First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that ‘Congress shall make no law * * * abridging the freedom of speech, or of the press.’ I read ‘no law * * * abridging’ to mean no law abridging. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly ‘beyond the reach’ of federal power to abridge. No other provision of the Constitution purports to dilute the scope of these unequivocal commands of the First Amendment. Consequently, I do not believe that any federal agencies, including Congress and this Court, have power

¹¹⁹ *Id.* at 454-55.

¹²⁰ *Id.* at 456.

¹²¹ *See, e.g., Terminello v. City of Chicago* 337 U.S. 1 (1949); *Dennis v. United States*, 341 U.S. 494 (1951) (Douglas, J., dissenting).

or authority to subordinate free speech and press to what they think are ‘more important interests.’¹²²

This First Amendment absolutism would make allies out of Douglas and Black: the Western cowboy Justice and the Dixiecrat southerner, on every subsequent Free Speech Clause case that came before them on the Court.

So in *Brandenburg*, we arrive at the modern constitutional doctrine of free speech. The “imminent lawless action” test is still the benchmark for any attempt to curtail Free Speech Clause rights with regard to speech critical of the government.¹²³ However, not all potentially harmful speech is directed against the government; it may be directed against individuals, groups or institutions. We will proceed to examine whether attempts to limit this sort of speech can survive constitutional scrutiny.

iv. Exceptions to the *Brandenburg* Rule

Magisterial and sweeping as the *Brandenburg* decision was, it did not hold that no speech may ever be regulated. We must now examine these specific exceptions to fully understand Free Speech Clause doctrine. Keep in mind as we proceed the question of whether or not, in each of these examples, what is being regulated is truly speech *qua* speech; or is rather something else, incidental to speech, but not itself speech.

1. Time, Place and Manner

The government may, without offending the constitution, place restrictions on the *conditions* under which speech may occur, so long as they are applicable equally to *all* forms of speech, and do not have the purpose or the effect of completely obstructing speech. These types

¹²² *Smith v. California*, 361 U.S. 147, 157-59 (1959) (Black, J., concurring).

¹²³ On Westlaw, 541 cases cite to the “imminent lawless action” test, the most recent being *Phelps-Roper v. Ricketts*, 867 F.3d 883, 901 (8th Cir. 2017).

of restrictions are known as “time, place and manner” restrictions. For example, a city may ban the use of amplified megaphones after 10 P.M. in residential neighbourhoods, in the interest of public tranquillity; so long as the prohibition serves an important, legitimate government interest, applies equally to *any* megaphone speech, and so long as our hypothetical megaphone speaker has some reasonable alternative forum in which he is able to speak with his megaphone. The Court explains:

[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.¹²⁴

The Court notes three conditions under which time place and manner restrictions may be constitutionally implemented: 1) they must be content-neutral, meaning that they cannot proscribe the time place and manner of a particular *type* of speech, they must apply to *all* speech, 2) they must be narrowly tailored, meaning that they are the least restrictive way for the government to accomplish its stated purpose, and 3) there must be alternative channels through which the speaker may speak. Because time place and manner regulations, when they meet these three criteria, tend to merely *channel*, not suppress, speech, they do not generally have the effect of preventing a speaker from saying whatever he wishes. Because they are content-neutral and do not completely foreclose all avenues to speech, these restrictions are mostly found to be constitutional.

This type of limitation on speech is not offensive to liberalism when employed reasonably. It does not work the evil of banning ideas from the marketplace; it merely states that the marketplace may not be conducted anywhere and everywhere. For this reason, it is

¹²⁴ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, (1984).

compatible with the *instrumentalist* argument. Likewise, it does not serve as an absolute bar against any person expressing their beliefs as a means of self-actualization, so it is compatible with the *individualist* argument as well.

2. Slander & Libel

Slander and libel are torts, and do not enjoy free speech protection. Slander is spoken, while libel is printed, but both fall under the category of “defamation,” which is not protected speech.¹²⁵ Defamation consists of 1) a defamatory statement, 2) publication to a third party, 3) fault,¹²⁶ 4) falsity of the statement, and 5) injury.¹²⁷ This is a narrowly circumscribed category of speech exempted from First Amendment protection. The defamatory speech must satisfy all five elements to lose its constitutional protections. Therefore, for example, for a statement to lose its constitutional protection, it must be *factually false*. Truth is an absolute defence in all defamation actions.¹²⁸ Additionally, injury must be demonstrated; a defamed plaintiff who can show no legally cognizable harm has no case.¹²⁹ The important idea behind this rule is that *opinions* are always protected speech, because they cut to the core of the First Amendment. Even a false defamatory statement of fact may be protected if it caused no harm. The courts are concerned only with negligent (or sometimes with “actual malice”) publication of factual falsehoods that impair a person’s ability to earn a living and/or maintain social relationships. In this sense, the defamation exception to free speech is a coherent one, because the same respect

¹²⁵ *Beauharnais v. People of State of Illinois*, 343 U.S. 250, 266 (1952) (“Libelous utterances not being within the area of constitutionally protected speech”).

¹²⁶ This standard varies. For defamation of private citizens, negligence is the required level of *mens rea*. For public figures, however, the standard is “actual malice.” See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

¹²⁷ *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 176 (2d Cir. 2000) (establishing the elements of common law defamation in New York).

¹²⁸ *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 151 (1967).

¹²⁹ See, e.g., *Cweklinsky v. Mobil Chem. Co.*, 297 F.3d 154, 159 (2d Cir. 2000), *certified question answered*, 267 Conn. 210, 837 A.2d 759 (2004).

for the negative liberties that vivify a liberal rule of free speech also animate the exception.

3. Fighting Words

Since before the *Brandenburg* rule, the Court has declined to protect the class of speech known as “fighting words.” In *Chaplinsky v. New Hampshire*, Chaplinsky, while evangelizing for the Jehovah’s Witnesses, got into an altercation with a police officer. He called the officer, *inter alia*, “a God damned racketeer” and “a damned fascist.”¹³⁰ The Court held that Chaplinsky’s insults were “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,”¹³¹ and upheld his conviction. Fighting words are also a narrowly-drawn category, however, and only include words that “have this characteristic of plainly tending to excite the addressee to a breach of the peace.”¹³² Importantly, the Court here is creating an exception to the general doctrine of free speech not on the grounds that the *ideas* contained in the speech are intrinsically impermissible, but rather restricting the speech’s ineluctable *effect of inciting a crime*. Such regulations may be considered proper, in so far as they aim at acts, not speech itself. Had Chaplinsky framed the basic ideational content he was attempting to convey in a way less prone to arouse passions and incite lawlessness, the Court would most likely have held in his favour.

4. True Threats

The type of speech known as “true threats” does not receive First Amendment protection. While we know from *Brandenburg* that advocacy of violence in the abstract is not proscribable,

¹³⁰ 315 U.S. 568, 569 (1942).

¹³¹ *Id.* at 572.

¹³² *Id.* at 573.

specific threats of violence directed against *particular* people are. True threats

encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.¹³³

The first context in which the doctrine of true threats came before the Court was a constitutional challenge to a federal statute that criminalized threatening the life of the President of the United States.¹³⁴ In *Watts v. United States*, the Court held, *per curiam*, that the statute was constitutional. While recognizing our

profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials¹³⁵

nevertheless a threat that crosses the border from abstract advocacy of violence to a specific threat against a specific person may be regulated. A true threatener must “voluntarily and intelligently [write] the words with the actual and present intention to carry out the threat.”¹³⁶ In other words, the speech must satisfy three elements to be subject to government regulation as a true threat. It must be 1) voluntary and intentional, 2) it must make a specific threat of violence, and 3) made with the *present* intention of carrying out the threat. Like “fighting words,” the state’s ability to regulate arises not from the ideational content of the speaker’s message, but from the crime to which it is an almost certain prelude.

5. Obscenity

The court struggled for nearly a century to formulate a workable rule on obscene speech.

¹³³ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

¹³⁴ *Watts v. United States*, 394 U.S. 705 (1969).

¹³⁵ *Id.* at 708.

¹³⁶ *United States v. Manning*, 923 F.2d 83, 85 (8th Cir. 1991)

Famously, in 1955, Beat poet Allen Ginsberg wrote the poem *Howl*. When *Howl* was published, Ginsberg's friend, fellow poet, and publisher Lawrence Ferlinghetti was arrested for distributing obscene material. In *The People of California v. Ferlinghetti*, a San Francisco municipal court found that *Howl* was not obscene because it had "redeeming social importance."¹³⁷ As a result of this ruling, Henry Miller's *Tropic of Cancer* and D.H. Lawrence's *Lady Chatterly's Lover* were permitted to be published in the United States for the first time.

Two years later, the Supreme Court attempted to lay down a rule for obscenity in *Roth v. United States*.¹³⁸ The Court noted that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."¹³⁹ The Court held that "obscene material is material which deals with sex in a manner appealing to prurient interest."¹⁴⁰ From *Roth* emerged the "prurient¹⁴¹ interest" test.

The Court revisited this definition of obscenity in *Jacobellis v. Ohio*.¹⁴² While affirming the "prurient interest" test described in *Roth*, it is perhaps most famous for Justice Potter Stewart's one sentence definition of obscenity from his concurrence: "I know it when I see it...."¹⁴³ While this has become perhaps the most famous quotation from a Supreme Court opinion to make its way into popular culture and language,¹⁴⁴ it is manifestly deficient as a workable rule of law for lower courts to apply.

¹³⁷ Unreported; https://en.wikisource.org/wiki/The_People_of_the_State_of_California_vs._Lawrence_Ferlinghetti

¹³⁸ 354 U.S. 476 (1957)

¹³⁹ *Id.* at 484.

¹⁴⁰ *Id.* at 487.

¹⁴¹ *Prurient*, OXFORD ENGLISH DICTIONARY, WWW.OED.COM (2017) ("Lascivious, lewd; exhibiting or characterized by an excessive or inappropriate concern with sexual matters; encouraging such a concern").

¹⁴² 378 U.S. 184 (1964).

¹⁴³ *Id.* at 197.

¹⁴⁴ See Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023 (1996).

The Court finally settled on the modern test for obscenity in *Miller v. California*.¹⁴⁵ The Court established a three-part test to determine if speech is obscene: 1) whether "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,"¹⁴⁶ 2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,"¹⁴⁷ and 3) whether the work, "taken as a whole, do[es] not have serious literary, artistic, political, or scientific value."¹⁴⁸ This is a *conjunctive* test, meaning that all three elements must be met for speech to be deemed obscene; failure to satisfy any one of the three criteria means the speech is not obscene, and receives First Amendment protection. Significantly, the first two prongs of the test use "contemporary community standards," which obviously may be different in Manhattan, Kansas than in Manhattan, New York. The last prong is to be evaluated from the viewpoint of a reasonable person of no particular community.¹⁴⁹ The last prong is particularly important, because even one iota of merit in any of the enumerated areas will save a work from an obscenity ban. This category of restriction, while technically illiberal in essence, casts such a broad cloak of protection by ways of its third prong that its illiberalism is *de minimis*; a violation so marginal it cannot fairly be said to affect either the proper functioning of the marketplace of ideas, or inhibit the dignity of any speaker other than the pure vulgarian, who is incapable of adding to his obscenity even one scintilla of ideational content.

¹⁴⁵ 413 U.S. 15 (1973).

¹⁴⁶ *Id.* at 24.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 34 ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.") The third prong's *nusquam aspectu* element provides an important check on the first two prongs, and ensures that a work like Ginsberg's *Howl* are not deemed obscene even it is introduced into a community with particularly conservative local standards.

v. Areas of Speech Not Excepted from *Brandenburg*

Some areas of speech are considered to have a quantum of ideational importance too great to permit any constitutional government regulation, short of creating the probability of “immanent lawless action.” While many legislatures have passed laws attempting to limit these types of speech, the courts have routinely struck down laws that regulate speech in the following areas.

1. Content, Generally

As a general principle, flowing forth from the holding of *Brandenburg*, the government may never regulate speech on the basis of its content or viewpoint. The Court offered a clear articulation of this principle in the case of *Police Dep't of City of Chicago v. Mosley*.¹⁵⁰ In *Mosley*, a city ordinance prohibited all picketing within 150 feet of a school, except picketing connected with a labour dispute.¹⁵¹ The Court struck down the ordinance as unconstitutional:

[t]he central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.¹⁵²

Justice Marshall, writing for the Court, continues:

[t]o permit the continued building of our politics and culture, and to assure self-fulfilment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.¹⁵³

Justice Marshall is formulating his defence of free speech in terms of several arguments with

¹⁵⁰ 408 U.S. 92 (1972).

¹⁵¹ *Id.* at 92.

¹⁵² *Id.* at 95.

¹⁵³ *Id.* at 95-96.

which we are already familiar. Firstly, he argues that censorship would inhibit the “building” of our “politics and culture.” We have seen this argument before, in *Areopagitica*, and in Jefferson’s statement of principles for the University of Virginia. Our politics, like those of Demosthenes’s Athens *consists of speech*, and inhibiting speech would have the deleterious effect of retarding our political development. Furthermore, it would also retard the growth of our “culture,” which, given the historical timeframe of *Mosley* may have been a reference to free speech’s contribution to the widespread mainstream acceptance of the principles of the Civil Rights Movement.¹⁵⁴ This line of reasoning relies on the instrumentalist, marketplace of ideas argument in favour of free speech that we have discussed previously, which has well-established pedigree in American legal culture that runs all the way back to Justice Holmes’s “Great Dissent” of the *Abrams* case in 1919.¹⁵⁵

Secondly, Justice Marshall inveighs against censorship on the grounds that it would deny “self-fulfilment for each individual.” This is a reflection of the arguments of Kant and Mill, who believed that free speech was a necessary component of fundamental human dignity. This is the individualist argument, that posits free speech as an *intrinsic* good for the speaker.

The conclusion Justice Marshall arrives at is that any sort of government regulation of the “content” of speech is incompatible with our constitution. This principle would be put to the test in the Court’s decision in *R.A.V. v. City of St. Paul, Minn.*¹⁵⁶, which we will discuss next.

2. Hate Speech

The Supreme Court has held that “hate speech” is protected by the First Amendment.¹⁵⁷

¹⁵⁴ See section 5(v)(2) *infra* for a discussion of how free speech served the cause of the Civil Rights Movement.

¹⁵⁵ See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

¹⁵⁶ 505 U.S. 377 (1992).

¹⁵⁷ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992).

In the late 1980s, states began to pass laws criminalizing hate speech targeted against minority groups. The first challenge to one of these laws was brought in *R.A.V. v. City of St. Paul, Minnesota*. In *R.A.V.*, an individual, identified only by his initials, was accused of burning a cross made of broken chair legs. He was charged under St. Paul, Minnesota Bias Motivated Crime Ordinance.¹⁵⁸ The court held that Minnesota’s law was facially invalid because it violated the Free Speech Clause:

[t]he ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of “race, color, creed, religion or gender.” At the same time, it permits displays containing abusive invective if they are not addressed to those topics. Moreover, in its practical operation the ordinance goes beyond mere content, to actual viewpoint, discrimination. Displays containing “fighting words” that do not invoke the disfavored subjects would seemingly be useable *ad libitum* by those arguing in favor of racial, color, etc., tolerance and equality, but not by their opponents. St. Paul’s desire to communicate to minority groups that it does not condone the “group hatred” of bias-motivated speech does not justify selectively silencing speech on the basis of its content.¹⁵⁹

As we have already learned, statutes that curtail free speech by engaging in *content discrimination* are as a general rule presumptively unconstitutional. St. Paul’s statute, though almost certainly motivated by benign legislative impulses, nevertheless amounted to a state preference for one viewpoint over another, which is constitutionally impermissible.

This is a dangerous idea to toy with, because “content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”¹⁶⁰ Even if we decide that the prohibited ideas are of low truth value, “[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on

¹⁵⁸ *Id.* at 377.

¹⁵⁹ *Id.* at 378.

¹⁶⁰ *Id.* at 387.

disfavored subjects.”¹⁶¹ Recall Milton’s argument that even if ideas have low truth values, they may have positive overall systemic value, by forcing us to refine our understanding of true ideas.

Many readers may find the conclusion of the Court in *R.A.V.* to be morally insensitive, bad policy, or warranting of a specific exception to the general ban on content- and viewpoint-discrimination Free Speech Clause doctrine. Such objections, while surely animated by beneficent motives, would nevertheless misapprehend the basic freedom protected by the First Amendment. Readers who believe that it is morally erroneous to make a stand on abstract principle here will find replies to their concerns in the last section of these remarks, *Objections of the Censors*.

3. Flag “Desecration”

The defacing or destruction of the American flag in a disrespectful fashion is protected speech under the First Amendment. In *Street v. New York*, Sidney Street received (incorrect) news that civil rights activist James Meredith had been murdered, and responded by publicly burning an American flag.¹⁶² He was convicted under a New York statute that made it a crime to “mutilate, deface, defile, or defy, trample upon, or cast contempt upon” any flag of the United States.¹⁶³ The Court overturned his conviction on statutory grounds, but declined to “pass upon the validity of this conviction insofar as it was sustained by the state courts on the basis that Street could be punished for his burning of the flag.”¹⁶⁴

The court was forced to confront the issue of flag destruction again in the 1989 case *Johnson v. Texas*.¹⁶⁵ Gregory Lee Johnson burned an American flag as an act of symbolic

¹⁶¹ *Id.* at 391.

¹⁶² *Street v. New York*, 394 U.S. 576, 578 (1969).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 594.

¹⁶⁵ 491 U.S. 397 (1989).

protest at the 1984 Republican National Convention in Dallas, and was arrested for violating a Texas statute that prohibited flag burning.¹⁶⁶ On appeal, the Supreme Court reversed his conviction, and found that defacing the American flag was protected expressive conduct.¹⁶⁷

The Court first decided that flag burning, although not speech *per se*, was “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”¹⁶⁸ The Court then addressed the question of whether the Texas statute penalizing flag burning was compatible with the Free Speech Clause. Because Texas’s statute engaged in content-discrimination, it is subject to “the most exacting scrutiny” of the Court, meaning the “strict scrutiny” analysis we have examined above.¹⁶⁹ The Court concluded that Texas’s proffered interest in preserving the dignity and honour of the flag could not survive such an analysis.¹⁷⁰

The court begins with the fundamental proposition that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁷¹ Even though the maltreatment of the American flag is an issue that tends to give rise to great passions, the Court held that “a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”¹⁷²

The Court concludes with a speculative attempt to ascertain a coherent limiting principle to criminalizing flag disrespect, but comes up empty:

¹⁶⁶ *Id.* at 397.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 404.

¹⁶⁹ *Id.* at 412.

¹⁷⁰ *Id.* at 414.

¹⁷¹ *Id.*

¹⁷² *Id.* at 408-09.

[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.¹⁷³

Because there is no intelligible limit to this sort of state censorship, the Court will countenance no censorship in the first instance.

4. Compelled Speech

Justice Brandeis, in his prescient opinion in *Whitney*, noted the abhorrence of “silence coerced by law.”¹⁷⁴ What the Court did not consider until twenty years later, is whether the opposite evil, *speech* coerced by law, offends the constitution.

In 1942, at the height of World War II patriotic fervour, the West Virginia Board of Education adopted a resolution that mandated that all West Virginia public school students salute the flag, under penalty of punishment.

The Jehovah’s Witnesses, a sect of Christianity, believe in a strict and literal interpretation of Exodus 20:4, which commands believers not to supplicate themselves before any “graven image.”¹⁷⁵ Marie and Gathie Barnett, students in the West Virginia public school system and Jehovah’s Witnesses, refused to salute the flag or pledge allegiance to the same. The Barnett children were expelled, and brought suit in federal district court, claiming that their First Amendment rights had been violated. The Barnetts won an injunction against enforcing the mandatory salute policy at trial, and the school district appealed.

¹⁷³ *Id.* at 417.

¹⁷⁴ *Whitney*, 274 U.S. at 376.

¹⁷⁵ *See Exodus* 20:4-5.

In 1943, the case reached the Supreme Court. Justice Jackson wrote for the majority, which concluded that the policy of mandatory salutes violated the First Amendment. Jackson began by observing that

[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁷⁶

Note how Justice Jackson's formulation reflects the understanding we developed of constitutional social contract theory in section 3(a) of these remarks. The Bill of Rights represents a sphere of natural rights which the people reserved for themselves before the inception of government, with government's inception and continued existence is contingent on it refraining for legislating within that sphere.

Justice Jackson then goes on to note the profound democratic insecurity that underlies any regime of mandatory displays of patriotism: “[t]o believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”¹⁷⁷ Jackson then goes on to write one of the most famous and wise passages in all our Supreme Court jurisprudence:

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁷⁸

The principle is clear: the state may not compel speech, under any set of circumstances that Justice Jackson and the majority could imagine. Justice Brandeis established that compelled

¹⁷⁶ *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

¹⁷⁷ *Id.* at 641.

¹⁷⁸ *Id.* at 642.

silence is odious to our constitution; *Barnett* established that the same is true of compelled speech.

This, then concludes our brief overview of the state of free speech law in the United States. It is not meant to be comprehensive; it is only meant to offer a general guide to the contours of what the government may and may not proscribe. What we may fairly conclude is that the limitations of free speech that the Supreme Court has sanctioned have been limitations that primarily target conduct and only incidentally limit speech, limitations that tend to unfairly infringe upon the negative liberties of third parties, or limitations that are *de minimis*. With an understanding of the limitations on government-imposed censorship, we may now examine any limitations that may, and should, be placed upon private institutions which serve a special function in our republic: the universities.

4. The University, Though Not Constrained by the First Amendment, Should Nevertheless Support a Liberal Policy of Free Speech.

It is impossible to discuss free speech in contemporary America without discussing the university. It is from the universities that the loudest cries for censorship come, and it is there that their students' illiberalism is indulged and cultivated, by faculty and administrators who view their jobs primarily as facilitating their students' psychic safety and emotional growth, rather than as educating them to be responsible and sober-minded participants in a democracy.

In 2015, at Yale University, the Intercultural Affairs Committee sent out a campus-wide email warning students not to dress up in Halloween costumes that could be considered "cultural

appropriations.”¹⁷⁹ Erika Christakis, a lecturer and associate dorm master with the college, responded to the email with one of her own, expressing her faith in the student body to exercise appropriate discretion when selecting costumes, and objecting to the dictatorial tone of the Intercultural Affairs Committee’s initial email. The student response was staggering. Students angrily confronted Christakis’s husband, also a lecturer and dorm master, with one student shrieking “it is not about creating intellectual space! It is not! Do you understand that? It is about creating a home here! Who the fuck hired you?!”¹⁸⁰ Erika Christakis resigned her job at Yale, and her husband Nicholas took a sabbatical following intense public pressure from student groups to fire them both.

On March 2, 2016, sociologist Charles Murray was scheduled to speak at Middlebury College.¹⁸¹ He was greeted by a rabid mob of enraged students who accused him of supporting racism and eugenics, and shouted down his attempt to speak. His talk was moved to a private room, and relayed by video feed. When he and his host, Professor Allison Stranger attempted to leave after the conclusion of the talk, students physically attacked them, threw debris at their car, and gave Stranger a concussion which required hospitalization.¹⁸²

In April of 2017, at Evergreen State College, the First Peoples Multicultural Advising office organized a symbolic “Day of Absence,” on which white professors and students were asked to leave campus. Bret Weinstein, a professor of biology, wrote an email objecting to the Day of Absence. In response, students protested, demanded Weinstein’s resignation, and openly rioted. Campus police told Weinstein it was not safe for him to be on campus. Students marauded

¹⁷⁹ See Bari Weiss, *Three Cheers for Cultural Appropriation*, N.Y. TIMES, Aug. 30, 2017.

¹⁸⁰ Anemona Hartocollis, *Yale Lecturer Resigns After Email on Halloween Costumes*, N.Y. TIMES, Dec. 7, 2015; Video of students shouting down Nicolas Christakis, https://www.youtube.com/watch?v=9IEFD_JVYd0&feature=youtu.be

¹⁸¹ Full disclosure: the author is an alumnus of that school.

¹⁸² Katharine Q. Seelye, *Protesters Disrupt Speech by ‘Bell Curve’ Author at Vermont College*, N.Y. TIMES, Mar. 3, 2017.

around campus, wielding baseball bats and other weapons, and forcibly occupied an administration building.¹⁸³ Two months later, graduation had to be held off campus, and attendees had to pass through metal detectors, due to the public safety concerns of campus security.¹⁸⁴

This list of recent illiberal hostilities on university campuses could easily be expanded to exceed the reader's attention span. What seems clear, from the specific incidents discussed, and also readily apparent in universally popular censorious campus concepts such as "trigger warnings," "safe spaces," and restrictive speech codes,¹⁸⁵ is that instead of fostering rational dialogue, responsible citizenship, and intellectual pluralism, American universities are breeding a new generation of illiberal, intolerant, fascistically-oriented students.

Does the university have an obligation to respect and defend the value of free speech when so many of its students seem so violently opposed to it? If the university is a public school, like Evergreen State, the only acceptable answer is "yes." Public universities, funded and operated by the government, are clearly 'state actors' and thereby subject to all of the First Amendment (via incorporation through the Fourteenth Amendment) doctrines elaborated upon in the previous section.¹⁸⁶

But what about the private university, like Yale or Middlebury? They are not 'state actors,' so they are not bound by the First or Fourteenth Amendments. Even if such schools receive

¹⁸³ Katie Reilly, *Evergreen State College Resumes Classes After Violent Threat and \$10,000 in Damage*, TIME, Jun. 6, 2017 (reporting students "walking around with sticks and baseball bats late at night causing property damage" during the riots following the Day of Absence controversy).

¹⁸⁴ Anemona Hartocollis, *A Campus Argument Goes Viral. Now the College is Under Siege*, N.Y. TIMES, Jun. 16, 2017

¹⁸⁵ According to the Foundation for Individual Rights in Education, at least 149 colleges and universities have speech codes rated by FIRE as "red," meaning the speech code "has at least one policy that both clearly and substantially restricts freedom of speech." FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, https://www.thefire.org/spotlight/?x=&y=&speech_code=Red&submit=GO (last visited Nov. 16, 2017).

¹⁸⁶ See, e.g., *Gitlow*, 268 U.S. at 666.

substantial amounts of money in federal funding, that does not transform them into ‘state actors.’¹⁸⁷ Do private schools like this owe a moral, if not a legal, duty to uphold the principle of free speech? The answer is clearly that they do. Private universities should hold themselves to the most rigorous standards of free speech, because free speech is critical to their ability to perform their primary objectives of educating students, and preparing them to be responsible citizens in a democracy.

a. The University Has a Moral Duty to Educate Its Students in a Marketplace of Ideas

Let us take the example of Yale University for the beginnings of our investigations of the responsibility of private universities to respect the freedom of speech. Yale’s case is in many ways particularly instructive.

In 1951, after his four years as an Eli, William F. Buckley published *God and Man at Yale*. Buckley lambasted the Yale faculty for disfavoring capitalism and Christianity, and attempting to indoctrinate their students with the dogmas of collectivism, secularism, and communism. One can agree or disagree with Buckley’s criticisms, but Buckley’s book was, in a sense, the metaphoric canary in the coalmine for ideological pluralism and free speech at Yale.

In 1963, the Yale Political Union extended an invitation to George Wallace, then the governor of Alabama, to speak on campus. Alabama at the time was still in the throes of a dying regime of Jim Crow segregation, and Wallace was the figurehead of that movement. After the terrorist bombing of a black Birmingham church, Yale Provost Kingman Brewster asked the Political Union to withdraw its invitation to Wallace. Brewster was especially sensitive to the “town-gown” relationship between Yale and New Haven, and was fearful that Wallace’s

¹⁸⁷ See, *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

speaking engagement would worsen the college's relationship with New Haven's large African-American community. Brewster's request was widely criticised by students at the time.

In 1974, the Yale Political Union made another controversial speaking invitation, this time to Stanford physicist and noted eugenicist William Shockley. The Political Union eventually withdrew its invitation over the controversy, but Shockley's invitation was renewed by several other student organizations. Brewster was incensed by this, and denounced "the use of free speech as a game."¹⁸⁸ Shockley did end up coming to Yale, but was unable to speak because the bulk of his audience consisted of protesters trying to shout him down.

Brewster, embarrassed by these two *contretemps*, convened a committee to produce an official university policy on the invitation of controversial speakers, and on free speech generally. The committee was chaired by eminent historian C. Vann Woodward. Woodward was a *liberal* in the old-fashioned, classical sense. His early career was defined by his defence of Angelo Herndon, and African-American Communist Party organizer. He did sympathetic academic work on W.E.B. DuBois and Eugene V. Debs, but as President of the American Historical Association, rejected the influence of the New Left of the late 1960s. His most notable book, *The Strange Career of Jim Crow*, was declared by Martin Luther King to be "the historical bible of the civil rights movement."¹⁸⁹

Woodward delivered his report and letter to the Fellows of Yale in the winter of 1974. It was magisterial, statesmanlike encomium to the indispensable intellectual value of free speech to a university. Woodward opens:

¹⁸⁸ Eleanor Womack, *Let's Talk About Speech*, THE NEW JOURNAL, Apr. 23, 2016, <http://www.thenewjournalat Yale.com/2016/04/lets-talk-about-speech/>, (last visited Nov. 16, 2017). To Provost Brewster, we might reply: "[s]trange it is that men should admit the validity of the arguments for free speech but object to their being 'pushed to the extreme,' not seeing that unless the reasons are good for an extreme case, they are not good for any case." MILL, *supra* note 67 at 108.

¹⁸⁹ SOUTH TO THE FUTURE: AN AMERICAN REGION IN THE TWENTY-FIRST CENTURY, 17 (ed. Fred C. Hobson, 2002).

[t]he primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views.¹⁹⁰

Woodward is making several important points here. Firstly, he notes the primary purpose of a university is to “discover and disseminate knowledge,” for which “a free exchange of ideas is necessary.” Woodward is here embracing Milton’s notion of the marketplace of ideas (in fact, he even opens the report with an epigraph from *Areopagitica*). We cannot discover knowledge or refine our conception of what the truth is, unless a free commerce in ideas of all sorts is permitted. Woodward explicitly mentions the “unthinkable,” and the “unmentionable” as the sort of ideas that are an integral part of the marketplace. Woodward is effectively endorsing the free speech position of Justice Brandeis’s *Whitney* opinion, and the position of Justices Black and Douglas in their free speech absolutism.

Fine, sneers the Yale student of 2015. Lofty quotations from long-dead authors do not move her, and “challenging the unchallengeable” has the ring of a meaningless platitude of institutional-speak. She is primarily concerned with fighting for social justice and stamping out hierarchies of oppression. But Woodward, in his prescience, foresaw this student, and chastised her for her illiberal values. He writes, “[w]ithout sacrificing its purpose, [Yale] cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect.”¹⁹¹ It is as if Woodward is speaking directly to this social justice warrior of 2015, and

¹⁹⁰ C. Vann Woodward, *The Woodward Report*, 1974, <http://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale>, (last visited Nov. 16, 2017).

¹⁹¹ *Id.*

explaining the fundamental errors of her *weltanschauung*. Where Woodward mentions “civility [and] mutual respect,” we could translate his elegant prose into the vocabulary of today by saying “microaggressions” instead of “civility” and “safe spaces” instead of “mutual respect.” The buzzwords may have evolved, but the concepts are crystal clear. Those values must be subordinated to free speech and free enquiry or the university will “sacrifice[e] its central purpose.”

Woodward then takes a political turn: “[f]ree speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.”¹⁹² We are immediately reminded of Jefferson, who wrote “[t]he only security of all [from tyranny] is in a free press.”¹⁹³ We also recall Kant, who adjured “*freedom of the pen...* is the sole palladium of the people's rights.”¹⁹⁴ We hear echoes of sage Justice Brandeis, whispering, perhaps, that the founders “[r]ecogniz[ed] the occasional tyrannies of governing majorities” and ratified the First Amendment as a bulwark against both literal political tyranny and its less menacing but equally evil cousin, the tyranny of the majority.¹⁹⁵ There is no doubt that Woodward had all three of those reference points in mind as he drafted his report.

So, what does this statement of academic first principles mean to our Yale student of 2015? Woodward explains, “[b]y voluntarily taking membership in a university and thereby asserting a claim to its rights and privileges, members must also acknowledge the existence of certain obligations upon themselves....”¹⁹⁶ What, according to Woodward, is the *chief* obligation a member of a university student body takes on? “[A]n obligation to permit free

¹⁹² *Id.*

¹⁹³ JEFFERSON, *supra* note 44, Letter to the Marquis de Lafayette at 571.

¹⁹⁴ THEORY & PRACTICE, *supra* note 59 at 8:318.

¹⁹⁵ *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring).

¹⁹⁶ Woodward, *supra* note 190.

expression.... No member [of the university] has a right to prevent such expression.”¹⁹⁷ Note the absolutist language, reminiscent of Justices Black and Douglas. The militant phalanx of Yale students screaming obscenity-laced invective at Nicholas Chistakis were in abject dereliction of their single, sole, obligation to the university’s mission of free enquiry and free expression, in other words.

But it would be wrong to lay all the blame for Yale’s woes at the feet of its students, because “[e]very official of the university...has a special obligation to foster free expression and to ensure that it is not obstructed.”¹⁹⁸ What part of this “special obligation” did the Intercultural Affairs Committee think it was discharging by proscribing certain Halloween costumes? More to the point, perhaps, what part of that “special obligation” does Yale President Peter Salovey think he is honouring by adopting a university-wide restrictive speech code? According to the Foundation for Individual Rights in Education, Yale’s speech code is rated “yellow,” meaning that it contains “at least one ambiguous policy that too easily encourages administrative abuse and arbitrary application.”¹⁹⁹ In fact, FIRE found that “despite [the Woodward Report], Yale maintains a number of policies that threaten students’ expressive rights” including an overbroad policy on racial harassment, an overbroad policy on technology use, and an Undergraduate Regulations power to discipline for “imperil[ing] the integrity and values of the Yale community” that is so overbroad that virtually any behaviour that displeases any administrator could be fit comfortably within it.²⁰⁰

Finally, Woodward gets down to brass tacks. He recommends “formal sanctions” for

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Yale University*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE), <https://www.thefire.org/schools/yale-university/> (Last visited Nov. 16, 2017).

²⁰⁰ *Speech Codes at Yale*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE), <https://www.thefire.org/spotlight/yale-university-school-feature/speech-codes/> (Last visited Nov. 16, 2017).

inhibiting free expression because “obstruction of such expression threatens the central function of the university.”²⁰¹ The sanctions should be “made explicit” for their deterrence effect, so that “violators will be aware of the consequences of their intended acts.”²⁰²

But, protests the Yale student of 2015, what about sanctions for those who perpetuate systematic racist oppression too? Woodward considers sanctions for “speech [Yale community members] might regard as offensive,” and concludes that “[o]ur conviction that the central purpose of the university is to foster the free access of knowledge compels us to reject [this policy].” Why? Because his hypothetical offended students “assert a right to prevent free expression,” which is to deny the only true Shibboleth of the university.²⁰³

Though the Woodward Report may be the greatest high-water-mark of free speech in a university context of our era, it has been stamped into the dirt by the jackboots of an army of modern Yale students and administrators, who must view it as a curious relic of antiquity, or just another example of lofty prose disguising an attempt to reinforce hierarchies of oppression and white supremacy. *Historia est vitae magistra* no more.

To return to our point of departure, does a private university owe a moral obligation to free speech? According to the most eminent work of academic philosophy on the subject, the *only* absolute moral obligation of the university is to free speech. Yet, at the very same university that produced that magisterial work, the administration has abandoned it as policy, and the student body is in open rebellion against its precepts. *Lux et veritas* has become *verum dum non offendatur*. At universities across the country, the marketplace of ideas has been censored into decrepitude, and the principles of liberalism rust and atrophy in disuse.

²⁰¹ Woodward, *supra* note 190.

²⁰² *Id.*

²⁰³ *Id.*

As the British philosopher and professor Michael Oakeshott observed, the fundamental activity of a university is a “conversation.”²⁰⁴ In this conversation, there must be room for every idea, with “each study appearing as a voice whose tone is neither tyrannous nor plangent, but humble and conversable”²⁰⁵ The modern university is nothing like this. It is not a conversation; it is frothing riot of Middlebury students screaming slurs and hurling bricks at a guest speaker; it would be precisely the “voice...tyrannous” Oakeshott believed had no place at a university.

Oakeshott identified the problem early on: “the pursuit of learning for the power it may bring has its roots in a covetous egoism which is not less egoistic or less covetous when it appears as a so-called social purpose...with this a university has nothing to do.”²⁰⁶ Self-righteous students, overcome with covetous egoism, wearing the diaphanous and threadbare cloak of whatever form social justice is fashionable at the moment, have abandoned all pretence of learning; and the faculty and administration are at best, encouraging this anti-intellectualism, and at worst, are “sacrificing [the university’s] central purpose.” With respect to Middlebury students, who believe their self-indulgent theology of hierarchical oppression carries with it the moral license to assault a professor for inviting a heretic to speak; Evergreen State students, who turned their campus into a militarized war zone at the first whiff of blasphemy; and the rest of the students at colleges across the country who believe that mere words may operate to legitimize violence, we would do well to remember that “*these violent delights have violent ends.*”²⁰⁷

b. The University Has a Civic Duty to Educate Future Citizens of a Democracy

In addition to their obligation to the pursuit of truth through the free exchange of ideas,

²⁰⁴ MICHAEL OAKESHOTT, THE VOICE OF LIBERAL LEARNING, 109 (2001) (1989).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 113.

²⁰⁷ SHAKESPEARE *supra* note 10 at act II sc. vi (1597).

universities also have a civic duty to teach their students how to properly participate as citizens in the great American experiment in self-government. Since Antiquity, the importance of civic education has been recognized as essential to the stability and vitality of government. In the early years of this country's existence, the advantageous qualities of its political life were attributed to its educational emphasis on republican virtue. In our present era, it is clear that universities, by and large, have neglected their responsibility to teach the importance of democratic political theory and values, to the detriment of the quality of our public life and institutions.

An ominous bellwether was sounded in 1980s at Stamford University. Stamford had historically required students to take a course on the foundational thinkers and ideas of Western civilization. In 1987, students objected to the requirement that they take this course, claiming that it reflected unacceptable "European-Western and male bias" and "sexist and racist stereotypes."²⁰⁸ Jesse Jackson visited the campus, and lead students in chants of "hey ho, ho ho, Western culture's got to go!"²⁰⁹ Stamford student Amanda Kemp, President of the Black Student Union, wrote in the *Stamford Daily* that the implicit message of the Western civilization course requirement was "nigger go home."²¹⁰ "Western civilization," (which includes science, philosophy, and democratic political institutions), viewed for five centuries as the most enlightened force in the world, had come to be regarded as indistinguishable from a burning cross or a lynching noose. Incidentally, one of the great achievements of Western civilization is *the university*, an irony to which Kemp is completely oblivious. The contempt these students had for the ideas and institutions of the West, particularly democratic governance, is dangerous

²⁰⁸ Richard Bernstein, *In Dispute on Bias, Stamford Is Likely to Alter Western Culture Program*, N.Y. TIMES, Jan. 19, 1988.

²⁰⁹ *Id.*

²¹⁰ *Id.* (quoting Amanda Kemp)

for the future of our constitutional regime.

This type of thinking has metastasized from Stamford and spread throughout the nation in the following years. “Trigger warnings,” “safe spaces” and speech codes that amount to censorship are deployed on virtually every modern college campus. What they, and the Stamford controversy, amount to is no less than an assault on the health of our democracy (“Western civilization”) emerging from within the universities. Universities have a civic duty to educate their students in a manner that prepares them for life as citizens of a democracy, and they are failing at that mission by allowing trendy social justice fads to undermine their fundamental obligation to introduce their students to the intellectual premise of democracy, and to inculcate an appreciation of its virtues as a form of governance.

Once more, let us return to the dawn of democracy. Aristotle believed that education served an important political function in the Greek *poleis*: “it will be found to be education and morals that are almost the whole which go to make a good man, and the same qualities will make a good citizen.”²¹¹ Aristotle believed that any democratic society’s common weal or woe depended upon the education of its youth. He admonished: “the most useful laws, and most approved by every statesman, will be of no service if the citizens are not accustomed to and brought up in the principles of the constitution; of a democracy, if that is [the form of government that is] by law established.”²¹² It is necessary that “those who are to be educated [must be educated] so as to become good citizens.”²¹³ Aristotle finally concludes that the proper education for good citizens includes not just vocational or trade instruction, but should also include the liberal arts: “[i]t is evident, then, that there is a certain education in which a child

²¹¹ ARISTOTLE, *POLITICS*, 1288a-1288b, (trans. William Ellis, 1912) (c. 345 B.C.).

²¹² *Id.* at 1310a

²¹³ *Id.* at 1340b

may be instructed, not as useful nor as necessary, but as noble and *liberal*.”²¹⁴ In other words, education must contain a liberal component. Aristotle pre-dates the definition of *liberal* that the author uses throughout these remarks, so we may define Aristotle’s meaning of the word as “such things as are proper for freemen,”²¹⁵ which, in a democracy, is to say everyone. Even at the incipient stage of democracy, astute observers understood that on education rested the success or failure of their government.

As the first intimations of democratic governance reemerged in Europe in the 17th century, the link between the education of a polity and the vitality of its government was also affirmed by Milton. Milton wrote during the English Civil War, a sanguinary struggle between reactionary fundamentalists and proto-liberal parliamentarians for control of the government. Milton wrote a treatise on education, in which he proposes a course of study that necessarily included political science:

the study of politics; to know the beginning, end, and reasons of political societies; that they may not in a dangerous fit of the commonwealth be such poor, shaken, uncertain reeds, of such a tottering conscience, as many of our great counselors have lately shown themselves, but steadfast pillars of the state.²¹⁶

And whom did Milton suggest his students study? “[T]hose extolled remains of Grecian [lawgiver]...Solon.”²¹⁷ If anyone in history can credibly assert claim to the mantle of “Father of Democracy,” Solon can.²¹⁸ Solon’s reforms as *archon* of Athens, in the 6th century B.C., are

²¹⁴ *Id.* at 1338a (emphasis added).

²¹⁵ *Id.* at 1335b (“liberal” in the ancient sense, meant befitting of a free man, as opposed to a slave; hence, the liberal arts are those areas of study which are appropriate for a man with liberty).

²¹⁶ JOHN MILTON, TRACTATE ON EDUCATION, 254-55 (ed. Charles William Eliot, 1916) (1673).

²¹⁷ *Id.* at 255.

²¹⁸ See LORD ACTON, THE HISTORY OF FREEDOM IN ANTIQUITY, 6-7 (eds. John Neville Figgis & Reginald Vere Laurence, 1907) (1877) (“Solon was not only the wisest man to be found in Athens, but the most profound political genius of antiquity...[Solon] introduced the idea that a man ought to have a voice in selecting those to whose rectitude and wisdom he is compelled to trust his fortune, his family, his life...Government by consent superseded government by compulsion...By making every citizen the guardian of his own interest *Solon admitted the element of democracy into the State.*”).

where any history of democracy must begin.²¹⁹ Students, following Milton’s rule, must learn democracy from its original source, for both their own education, *but also to be “pillars of the state.”*

Only through political education, focused on the origins of democracy in Athens, could the nascent English government, re-aligned along parliamentary and liberal principles, endure as a modern political regime. In France, which would have no apostle of liberalism for another century, the divine right of kings continued unabated until its revolution in 1789. More significantly, Milton’s liberalism was a cornerstone of the American political regime, which did away with monarchy for all time, and emerged as the first successful large republic on the world-stage since the Roman *Respublica* declared Caesar dictator for life in 48 B.C.

A century and a half after Milton, Kant also wrote a treatise on education, in 1803. Living amidst the chaotic turmoil of a pre-unified Germany, Kant subscribed to the proposition that students must be educated “as a preparation for the duties of a citizen.”²²⁰ Per Kant, “[e]ducation makes [a person] *valuable as a citizen*” because it “develop[s] the sense of *freedom*.”²²¹ Under a “free” (which is to say “liberal”) government, education properly prepares students to be citizens capable of meaningfully participating in their own governance, because “[w]ithout this, all education is merely mechanical, and the child, when his education is over, will never be able to make proper use of his freedom.”²²²

So said the European intellectuals, although their words take on a melancholy tenor, as none of them lived in a regime that practiced truly liberal, democratic government of the type

²¹⁹ See especially what the Greeks called *σεισάχθεια*, *Seisachtheia* (“the shaking off of burdens”), *Seisachtheia [Ancient Greek law]*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/seisachtheia>, (last visited Apr. 23, 2018).

²²⁰ IMMANUEL KANT, ÜBER PÄDAGOGIK, I.XX (trans. Annette Churton, 2016) (1803).

²²¹ *Id.* (emphasis added).

²²² *Id.*

instituted in the United States. The first great observer of how education formed an essential component of American democratic governance was Alexis de Tocqueville. Tocqueville travelled to America in 1831. His goal was initially to study the American penal system, but he took extensive notes on American government, institutions, and society to determine why our revolution had produced a stable democracy, but his native France's had arrived at a far more sanguinary result. He compiled his notes into a book, *Democracy in America*, the first volume published in 1835, the second in 1840.

Tocqueville came to understand, as only an outside observer looking in can, how inextricably intertwined American education and democracy were in the nascent republic. Tocqueville's conclusion is clear: "[i]t cannot be doubted that, in the United States, the instruction of the people powerfully contributes to the support of a democratic republic...."²²³

Tocqueville's basis for this conclusion derives firstly from a study of America's founding. He wrote, of America's origins:

[b]orn in a country which had been agitated for centuries by the struggles of faction, and in which all parties had been obliged in their turn to place themselves under the protection of the laws, their political education had been perfected in this rude school, and they were more conversant with the notions of right and the principles of true freedom than the greater part of their European contemporaries.²²⁴

Let us analyse Tocqueville's observation. America was founded principally by nonconforming religious sects seeking a country where they could worship according to the dictates of their own consciences.²²⁵ These religious factions were often in adversarial relationships, a problem that was compounded when they were all united under one political regime after the American

²²³ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, I.17 (trans. Henry Reeve, 2014) (1835) [hereinafter: *DEMOCRACY IN AMERICA*].

²²⁴ *Id.* at, I.2.

²²⁵ *See*, SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* (1965) (describing America's settlement by religious nonconformists).

Revolution. Competing sects “agitating for centuries” produced the result that all the various sects “had been obliged...to place themselves under the protection of the laws” to ensure that they all received the “rights” and “true freedom” which they were due.

Note the principle: an education in democratic rights and freedom is brought about by ways of an *adversarial* process of *agitation*. This is approximately the epistemology that Tocqueville’s contemporary Hegel was famous for articulating. To perhaps oversimplify, Hegel argued that we begin with an idea, or *thesis*; place it in conversation with its opposite, or *antithesis*; and the result is that the tension between the two is resolved, in *synthesis*.²²⁶ The educational value of a dialectical process is that it exposes all ideas to the rigours of cross-examination by their opposites, and thereby reveal any weaknesses or inconsistencies. The *synthesis* we are left with after a period of “agitation” between the *thesis* and *antithesis* contains elements of both, but is something different from either. This Hegelian model of historical education is what Tocqueville identifies as a source of strength of American democratic institutions.

Tocqueville was a realist; he recognized, as Aristotle did, that democratic government is not an unmitigated good. Tocqueville believed that the American system of education, however, had the effect of minimizing the problematic elements of democracy. He writes:

[g]ood sense may suffice to direct the ordinary course of society; and *amongst a people whose education has been provided for*, the advantages of democratic liberty in the internal affairs of the country may more than compensate for the evils inherent in a democratic government.²²⁷

An educated citizenry, therefore, is what enables a society to reap all the advantages of a democratic government while minimizing its evils. Tocqueville presses the point further,

²²⁶ See GEORG WILHELM FRIEDRICH HEGEL, *PHENOMENOLOGY OF SPIRIT*, 29-30 (trans. A.V. Miller, 1977) (1807).

²²⁷ I DEMOCRACY IN AMERICA, *supra* note 223 at I.XIII (emphasis added).

“freedom, public peace, and social order itself will not be able to exist without education.”²²⁸

Education is a *necessary* prerequisite to flourishing in a democratic society, and it is also *sufficient*: “[g]ive democratic nations education and freedom, and leave them alone.”²²⁹

Tocqueville’s American contemporary Ralph Waldo Emerson developed the Frenchman’s theory of civic education in America further. Emerson is the first great American man of letters, and his address at Harvard, “The American Scholar,” was pronounced by Oliver Wendell Holmes (Sr.) to be “America’s intellectual Declaration of Independence.”²³⁰ Let us consider what America’s intellectual founding father had to say on the subject of civic education.

Emerson understood the fundamental truth about education in a democracy that the Greeks were too timid—in their affection for aristocracy—to fully grasp. Emerson’s great insight is that the intellectual mechanism that powers education is the very same one that powers democracy. It is worth hearing him in full:

a new danger appears in the excess of influence of the great man. His attractions warp us from our place. We have become underlings and intellectual suicides. Ah! yonder in the horizon is our help;-- *other great men*, new qualities, *counterweights and checks on each other*. We cloy of the honey of each peculiar greatness. Every hero becomes a bore at last. Perhaps Voltaire was not bad--hearted, yet he said of the good Jesus, even, "I pray you, let me never hear that man's name again." They cry up the virtues of George Washington,-- "Damn George Washington!" is the poor Jacobin's whole speech and confutation. But it is human nature's indispensable defence. The centripetence augments the centrifugence. We balance one man with his opposite, and *the health of the state depends on the see-saw*.²³¹

Here is a vigorous defence of free speech. Great men, Emerson argues, make valuable contributions to our intellectual life. However, they also tend to generate sycophants and

²²⁸ 2 DEMOCRACY IN AMERICA, *supra* note 223 at II.II ((emphasis added).

²²⁹ *Id.*

²³⁰ 11 OLIVER WENDELL HOLMES, THE WORKS OF OLIVER WENDELL HOLMES, 88 (2007) (1884).

²³¹ 2 RALPH WALDO EMERSON, THE PROSE WORKS OF RALPH WALDO EMERSON, *The Uses of Great Men*, 17 (1870) (1849) (emphasis added).

adulators, who, ensorcelled with their great man, become myopic and monomaniacal. The remedy is “other great men,” who serve as intellectual “counterweights and checks” on our first great man, and prevent his teachings from ossifying into rote dogmas. Christ proclaimed a very great moral philosophy, but so too did Voltaire, who damned Christ. Blasphemy, to some; but a *competitive marketplace of ideas* to us. So we counterbalance Christianity with a ballast of Voltaire; set the weight of George Washington in opposition to the Jacobin who stands for the contrapositive of Washington; and the *equilibrium* we achieve (recall Kant’s equilibrium theory in *Perpetual Peace*) is our “indispensable defence” against intellectual demagoguery. As Justice Brandeis put it, almost a century later, “the fitting remedy for evil counsels is good ones.”²³² Emerson then makes the necessary logical leap, and concludes that the “see-saw” of intellectual pluralism in the *academy* is also the custodian of the “health of the *state*.”

Intellectual pluralism, and its prerequisite, free speech, ensure that intellectual endeavours in the university remain invigorated, in the same way that a multiplicity of political viewpoints in the democratic conversation, enabled by the same principle of free speech, ensure that our republic does not devolve into a tyranny, per Plato’s fears. Compare Emerson’s intellectual argument with the political reasoning of James Madison in Federalist No. 51:

[d]ifferent interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by *comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable.*²³³

The principle behind Emerson’s theory of education and Madison’s theory of democratic government are the obverse and reverse of the same philosophical coin. The idea is to introduce

²³² *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

²³³ THE FEDERALIST, No. 51 (James Madison) (1788) (emphasis added).

so many discrete ideas and interests that no one figure comes to dominate and thereby degrade our intellectual or political vitality. The indispensable principle, if both of these safeguards are to function properly, is a liberal regime of free speech, which allows all ideas a place in the market. That is the direct logical vinculum between free speech in education and free speech in democratic government. One prepares a citizen for participation in the other; and to censor speech in the university is to produce a class of citizens who find the political pluralism of democracy strange and unfamiliar, and are thereby susceptible to spurious notions about restricting free speech and endorsing its concomitant political repressions. Plato believed that this was ultimately the fate of every democracy,²³⁴ but Emerson and Madison were the authors of a new American ideology with the optimistic view that the Greeks may have been wrong, and that unfettered free speech was the missing fulcrum that would enable the United States to surpass Athens and Rome and even England in the strength of her political institutions.

Later generations of American thinkers identified this element of pluralism in democratic education as well. Herman Melville, the American Shakespeare, alluded to Emerson's philosophical approach in *Moby-Dick*. At the end of a highly technical discussion of how to properly ballast a ship when it has taken a pod of whales, Melville suddenly slips into metaphor: "[s]o, when on one side you hoist Locke's head, you go over that way; but now, on the other side, hoist in Kant's and you come back again;" so that "some minds for ever keep trimming boat."²³⁵ And what about those who do not intellectually trim boat? Melville, in his devotion to democracy, pokes a good deal of fun at Plato, and his devotees.²³⁶ He who reads only Plato, this "young Platonist will tow you ten wakes round the world, and never make you one pint of sperm

²³⁴ REPUBLIC, *supra* note 13 at 557a-558b.

²³⁵ HERMAN MELVILLE, *MOBY-DICK*, 326 (ed. Herschel Parker, 2002) (1851).

²³⁶ You will recall, Plato disliked democracy; *see* REPUBLIC, *supra* note 13.

[oil] the richer.”²³⁷ *Moby-Dick* itself is nothing if not a condemnation of “monomania”²³⁸ as incompatible with “democratic dignity.”²³⁹

Walt Whitman, the great bard of America, sang “I give the sign of democracy / By God! I will accept nothing which all cannot have their counterpart on the same terms.”²⁴⁰ Democracy is a regime in which “all” ideas and their opposite “counterpart” ideas must be accepted on the “same terms.” Whitman goes on, in the spirit of pluralism, “Do I contradict myself? / Very well then I contradict myself, / (I am large, I contain multitudes.)”²⁴¹ Whitman’s conception of the democratic man is characterized by “containing multitudes.” This is a pluralistic vision of free speech. Finally, Whitman instructs: “[y]ou shall listen to all sides and filter them from yourself.”²⁴² Not the orthodox side, not the government’s side, not social justice’s side; *all* sides. This is the spirit of democracy.

Consider also the views of Abraham Lincoln, who would prove to be the President most deeply respectful of the free institutions of the government with which he was entrusted. Lincoln had a career as a popular orator on matters of public concern during his prairie days. In the address announcing his candidacy for the Illinois State Legislature, he made these remarks:

[u]pon the subject of education, not presuming to dictate any plan or system respecting it, I can only say that I view it as the most important subject which we as a people can be engaged in. That every man may receive at least a moderate education, and thereby be enabled to read the histories of his own and other countries, by which he may duly appreciate the value of our free institutions, appears to be an object of vital importance, even on this account alone.²⁴³

²³⁷ MELVILLE, *supra* note 236 at 156.

²³⁸ *Id.* at 182.

²³⁹ *Id.* at, 114.

²⁴⁰ WALT WHITMAN, LEAVES OF GRASS, SONG OF MYSELF 24 (1892).

²⁴¹ *Id.* at 51.

²⁴² *Id.* at 2.

²⁴³ 1 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN, 8 (ed. Roy Basler, 1953) (quotation from speech of March 9, 1832).

Observe the familiar the connection being highlighted: *education* leads to “duly appreciate[ing] *the value of our free institutions.*” The duty of the educator is to present the history of humanity’s attempt to rise above a Hobbesian state of nature, by the democratic Greek *poleis*, by the Italian republics (from ancient Latin to modern Venetian), by the English monarchy (gentling from divine right to benign constitutional), and every other variety of less enlightened arrangement that men have tried. Students who have read about history’s catalogue of political systems, and are able to take the long view, will realize how fortunate they are in their present liberties. A proper education will help a student flourish into a citizen.

The educational theory of republican virtue in the university was ushered into the 20th century by the eminent philosopher of education John Dewey. Dewey attempted to reconcile the aristocratic educational philosophy of Plato with the naturalistic educational philosophy of Rousseau into a new, democratic theory of education for America.

Dewey begins with an examination of different political regimes. He writes that one can “measure the worth of a form of social life” by “the fullness and the freedom with which it interacts.”²⁴⁴ In other words, the value of a democracy is that it enables a “fullness and freedom” of discourse among its citizenry. Regimes other than democracies, which Dewey refers to as “undesirable societ[ies],” are those which are characterized by “internally and externally set[ting] up barriers to free intercourse and communication.”²⁴⁵

So democracy is the ideal form of governance because it enables full and free discourse between its citizens. But to Dewey, democracy was more than just a form of political organization; *living in a democracy itself was a perpetual learning experience:*

²⁴⁴ JOHN DEWEY, *DEMOCRACY AND EDUCATION*, 115 (1916).

²⁴⁵ *Id.* at 115.

[a] democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from realizing the full import of their activity. These more numerous and more varied points of contact denote a greater diversity of stimuli to which an individual has to respond; they consequently put a premium on variation in action.²⁴⁶

Dewey's critical point is that there is an inherent benefit to living in a society with "more numerous and more varied points of contact" because it "denote[s] a greater diversity of stimuli." In other words, the *marketplace of ideas* in a democracy has a "greater diversity" of intellectual wares for sale, which is why it flourishes.

The type of education practiced in a society like the United States must follow directly from this conception of the diverse marketplace. The United States has "forced the demand for an educational institution which shall provide something like a...*balanced* environment for the young."²⁴⁷ Balanced how? Balanced in the sense that "the centrifugal forces set up by the juxtaposition of different groups within one and the same political unit can be counteracted."²⁴⁸ Again, notice echoes of Kant's theory of *equilibrium* in *Perpetual Peace* which we discussed earlier, as well as our recent observation about Emerson's "see-saw." Dewey continues, "[t]he intermingling in the school of youth of different races, differing religions, and unlike customs creates for an all new and broader environment."²⁴⁹ Because of the importance of ideological "juxtaposition," Dewey explicitly cautions against any restriction on free speech in schools: "[l]ack of the free and equitable intercourse which springs from a variety of shared interests makes intellectual stimulation unbalanced. Diversity of stimulation means novelty, and novelty

²⁴⁶ *Id.* at 101.

²⁴⁷ *Id.* at 25.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

means challenge to thought.’²⁵⁰

Dewey concludes by reemphasizing the importance of education in a democracy, but also probes the long-term educational value of living in such a democracy:

a democratic community [is] more interested than other communities have cause to be in deliberate and systematic education. The devotion of democracy to education is a familiar fact. The superficial explanation is that a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated. Since a democratic society repudiates the principle of external authority, it must find a substitute in voluntary disposition and interest; these can be created only by education. But there is a deeper explanation. A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity. These more numerous and more varied points of contact denote a greater diversity of stimuli to which an individual has to respond; they consequently put a premium on variation in his action. They secure a liberation of powers which remain suppressed as long as the incitations to action are partial, as they must be in a group which in its exclusiveness shuts out many interests.²⁵¹

To unpack this fully, firstly, democracies tend to be more interested in effective education than other types of regimes. The basic reason why is that the notion that popular sovereignty will produce common weal is quixotic at best, unless the population composing the electorate is educated enough to make wise decisions for the nation. However, there is a deeper explanation for a democracy’s interest in education. Democracy is not just a system of political organization, it is a type of *community*, membership in which is *inherently meaningful*. Its inherent meaning comes from the exchange of diverse ideas and experiences between its community members, which has the salutary effect of encouraging bold and unique thinking among the citizenry, to the benefit of all. Dewey would probably not have seen any meaningful difference between the

²⁵⁰ *Id.* at 98.

²⁵¹ *Id.* at, 101.

statement by Emerson about how free speech and ideological pluralism keeps the university vital and Madison's argument from *The Federalist* on how free speech and ideological pluralism keeps a democracy safe. For Dewey, to be a citizen of a democracy was to be perpetually enrolled in the school of democratic discourse.

The ineluctable conclusion we are compelled to is that every intellectually serious commentator on American education has found that the strength of our democracy is only as great as the education of our citizenry. It may seem so at times, but we must remember that democracy does not simply arise out of nowhere, *sua sponte*. As Hobbes reminds us, the natural state of man is “*bellum omnium contra omnes*,”²⁵² and consequently, life is “poor, nasty, brutish, and short.”²⁵³ Only by socializing men into democracy are peace and the public welfare achieved.

The principal source of this democratic socialization is education. Popular sovereignty is an incoherent principle of political organization unless the citizenry that determines the course of political action understands how the system is supposed to work and what its rules are. As we have amply demonstrated in these remarks, in the United States, one of the most fundamental, foundational, *sine qua non* rules of our democracy is free speech. Recall Demosthenes, who asserted that Athenian democracy *was* speech. The theory of democracy is that the majority, when given a multiplicity of options, will more often than not, select the best one. The condition precedent for that process to function is that citizens must be able to articulate a multiplicity of options, free from governmental censorship.

The university has a civic obligation to inculcate in its students a respect for the democratic process, of which free speech is an indispensable component. When universities

²⁵² THOMAS HOBBS, *DE CIVE*, I.XII (ed. Bernard Gert, trans. Charles T. Wood et al., 1998) (1642).

²⁵³ THOMAS HOBBS, *LEVIATHAN*, I.XIII (ed. Edwin Curley, 1994) (1651) [hereinafter: *LEVIATHAN*].

abjure this responsibility by teaching students that it is morally legitimate to censor speech, in the name of modish but vaporous concepts such as “social justice” and “sensitivity” and “safe spaces,” they remove the lynchpin of our political system, and our constitutional regime is imperilled.²⁵⁴ Not today, perhaps, and not tomorrow; but when the present generation of college students come to wield the levers of political power, it is frightening to imagine to what ends they may use them.²⁵⁵

5. The Objections of the Censor

Here, then, is how they might use them. Having examined the philosophical provenance of free speech, and the legal doctrines that have grown up around it, and its place in the university, we may now turn to some of the common objections, proposed from time to time, by the would-be censors of society, to ban speech. For the sake of focus, we will narrow our consideration to one of the primary goals of the censor: the proscription of what is called “hate speech.” While a proscription against hate speech may appear on its surface to be benign, any such proscription ultimately works violence against the marketplace of ideas and the dignity of

²⁵⁴ See, e.g. Andrew Sullivan, *We All Live on Campus Now*, NEW YORK MAGAZINE, Feb. 9, 2018 (“... I believe ideas matter. When elite universities shift their entire worldview away from liberal education as we have long known it toward the imperatives of an identity-based ‘social justice’ movement, the broader culture is in danger of drifting away from liberal democracy as well. If elites believe that the core truth of our society is a system of interlocking and oppressive power structures based around immutable characteristics like race or sex or sexual orientation, then sooner rather than later, this will be reflected in our culture at large. What matters most of all in these colleges — your membership in a group that is embedded in a hierarchy of oppression — will soon enough be what matters in the society as a whole....And yes, I’m not talking about formal rules — but norms of liberal behavior. One of them is a robust public debate, free from intimidation. Liberals welcome dissent because it’s our surest way to avoid error. Cultural Marxists fear dissent because they believe it can do harm to others’ feelings and help sustain existing identity-based power structures. Yes, this is not about the First Amendment. The government is not preventing anyone from speaking. But it is about the spirit of the First Amendment. One of the reasons I defended Katie Roiphe against a campaign to preemptively suppress an essay of hers (even to the point of attempting to sabotage an entire issue of *Harper’s*) is because of this spirit. She may be wrong, but that does not make her a hobgoblin whose career needs to be ended. And the impulse to intimidate, vilify, ruin, and abuse a writer for her opinions chills open debate. This is a real-world echo of the campus habit of disrupting speakers, no-platforming conservatives, and shouting people down. But now this reflexive hostility to speech is actually endorsed by writers and editors.”).

²⁵⁵ “What they are, yet I know not; but they shall be / The terrors of the earth.” WILLIAM SHAKESPEARE, KING LEAR, act II, sc. iv (1606).

individuals, by artificially constraining the expression of certain ideas in the name of orthodoxy of “right” speech and thought. After Blake, in “every ban” are the “mind forg’d manacles”²⁵⁶ of a deeply illiberal ideological purism.

i. Objection the First: Hate Speech Is Not “True”

Hate speech, argues the censor, is not “true,” and therefore has no value in the marketplace of ideas. This argument fails because it relies on two faulty premises.

1. First Fallacy: Epistemological Hubris

Firstly, it fails because it commits the error of epistemological hubris. The body of knowledge that we consider “true” has changed radically since the age of Socrates, and radical changes can be observed even within our own lifetimes. When Aristotle concluded that the Sun revolved around the Earth, that idea endured as a foundational truth for almost two millennia before it was rejected by Copernicus and Galileo. Five hundred years ago, the notion that a black African’s life had the same moral value as a white Portuguese’s was inconceivable. When Newton declared that light was a particle, that remained the scientific consensus for the next three centuries. Even within our lifetimes, the idea that homosexuality is a psycho-sexual disorder has been thoroughly debunked and replaced with the idea that sexual orientation is an immutable characteristic of one’s being. The lesson of these shifts in what is “true” is that we must always maintain a threshold level of epistemological humility. As Judge Learned Hand wisely reflected, “[t]he spirit of liberty is the spirit which is not too sure that it is right.”²⁵⁷ No one living today, not even the most self-assured and prescient of the censors, knows what, of our body of present-day truth, will *remain* true in light of the next century of free enquiry,

²⁵⁶ WILLIAM BLAKE, SONGS OF INNOCENCE AND EXPERIENCE, 58 (2008) (1794).

²⁵⁷ LEARNED HAND, THE SPIRIT OF LIBERTY (1944), http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199 (last visited Nov. 8, 2017).

argumentation, philosophy, and science. While it seems a near-certainty to us today that some truths, such as the value of a multicultural, pluralistic society, are true for all time; who has the Delphic ability to know what another thousand years of moral and political philosophy will conclude?

Even if we admit that in a millennium, it is unlikely that we will view racial discrimination in a different moral light, there remain the problems of *concept-creep* and *demarcation*. In a thousand years, we may still view racial discrimination as wrong, but what are the outer boundaries of the concept of racial discrimination, within which our present moral ideas are sacrosanct? Is the concept that invidious Jim Crow-style racism is morally repugnant within that border? Does the outer boundary of eternal moral truth contain the idea that racial integration should be positively encouraged, by governmental intervention? Is the moral rectitude of affirmative action-style racial preferences beyond reproach for all time? Is the idea that there are statistically-significant correlations between genetic background and measurable I.Q. beyond all possibility of ever evincing one scintilla of truth?²⁵⁸ If one cannot answer all of those questions with the complete certainty of a bright-line test for determining whether they fall within or without the boundaries of eternal, immutable truth, then one is not qualified to be in the business of drawing such boundaries around even our most cherished ideas.

2. Second Fallacy: Equating Truth Value with

²⁵⁸ See, e.g. David Reich, "How Genetics Is Changing Our Understanding of 'Race,'" N.Y. TIMES, Mar. 23, 2018 ("I have deep sympathy for the concern that genetic discoveries could be misused to justify racism. But as a geneticist I also know that it is simply no longer possible to ignore average genetic differences among 'races.'"); see also DAVID REICH, WHO WE ARE AND HOW WE GOT HERE: ANCIENT DNA AND THE NEW SCIENCE OF THE HUMAN PAST (2018) (Affirming that there are scientifically quantifiable and statistically meaningful relationships between race and physical, behavioural, and cognitive faculties). Dr. Reich is a professor of genetics at Harvard Medical School and an associate at the Broad Institute of M.I.T. and Harvard.

Absolute Value

The second faulty premise that the censor's argument relies on is that false ideas have no value whatever if they have no truth value. This premise is the product of a puerile mind. As Milton noted, false ideas often have positive systemic value even if they have no truth value. "All known opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is trueft." In other words, false ideas do true ideas a backhanded service by forcing them to clarify, refine, and perfect themselves.

There are few modern assertions as disgusting as white supremacy. However, white supremacy serves an incidentally useful function in our epistemological system, by compelling the rest of us to achieve a more complete and thorough understanding of what race is and how it is constructed, if only to rebut the white supremacists. The result, an enhanced academic and scientific understanding of race, enriches the cause of truth and knowledge at the end of the day. What says more about the robustness of a truth: welcoming intellectual challenges to it confident that it will prevail, or fearing it too fragile to even be debated? As the fiery Second Great Awakening preacher Elias Magoon observed,

[w]hile the censorious man is most severe in judging others, he is invariably the most ready to repel any animadversions made upon himself; upon the principle well understood in medical circles, that the feeblest bodies are always the most sensitive.²⁵⁹

Those who would censor do so from a position that evinces profound epistemological insecurity, not the putative moral righteousness they proclaim.

ii. Objection the Second: Hate Speech Forces the Target

²⁵⁹ JOSIAH HOTCHKISS GILBERT, *DICTIONARY OF BURNING WORDS OF BRILLIANT WRITERS*, 357 (1895) (quoting Elias Lyman Magoon).

to Justify His Own Humanity

Now let us examine a more sophisticated objection of the would-be censor. He will take a disfavoured idea, and argue that the implicit premise of the idea violates the censor's personal dignity, and is therefore impermissible to express. He will take, for example, the idea of "white supremacy," and argue as follows:

the implicit premise of white supremacy is that black lives are inferior and without value.

I cannot be expected to respond rationally, in a marketplace of ideas, to an idea that requires me to first justify my own worth and right to participate in the conversation.

Let us examine this objection for coherence. Does it not fall prey to the fallacy of assuming the truth of the offending speaker's ideas *a priori*? What, exactly, *compels* a non-white objector to the idea of white supremacy to justify his own right to participate in the public debate, other than accepting the premise of white supremacy, namely that non-white speakers have no worth, as *prima facie* true? The marketplace of ideas is open to all, and no one is required to present their credentials in order to participate. Would not the more confident objector to white supremacy simply *ignore its unsupportable premise*, and proceed with whichever of the many substantive rebuttals on the merits that are available to him he feels is best? If our speaker feels his humanity has been somehow robbed from him, all he needs to do is reject this idea to reclaim it. Nothing about the marketplace of ideas compels anyone to acknowledge the validity of any ideological principle, nor precludes anyone from speaking who has something he wishes to say. As Mill pointed out, the first principle from which the freedom of speech ineluctably proceeds is every person's individual dignity. To assert one's dignity and humanity, all one needs to do is open one's mouth, say something rational, and the chimerical premise of white supremacy (or any other irrational prejudice) collapses.

iii. Objection the Third: Hate Speech Is Violence

Now here is another popular argument of the censor: hate speech is not merely *words*, it is *violence* against the disfavoured group, and we may surely prohibit *violence*. In an astonishing feat of cognitive dissonance, Toni Morrison articulated this view in her speech accepting the Nobel Prize for Literature in 1993: “oppressive language does more than represent violence; it *is* violence.”²⁶⁰ This view is so deeply unserious we need not spend much time with it. We might merely observe that children, barely nine or ten years old, are regularly impressed into service as slave-soldiers in vast swathes of the world. They are shot, maimed, tortured, and killed every day. They routinely face acts of actual, literal, horrific violence. Would Toni Morrison, if she were compelled to address a room full of these poor children, *dare* recite to *them* that noxious equivalency? Language has power; we all must admit that. But it is ontologically worlds apart from gunfire and land-mines. Anyone who cannot recognize that self-evident truth is either intellectually dishonest or morally insane. *Cadit quaestio*.

iv. Objection the Fourth: Hate Speech Is Not “Speech”

From the bench, U.S. Supreme Court Justice Byron White and three of his colleagues justified their support for criminalizing hate speech by ways of the idea that hate speech is not “speech” at all. It is merely an “inarticulate grunt,” which White argues, forms “no essential part of an exposition of ideas.”²⁶¹ This objection to hate speech is tautologically incoherent. By identifying certain types of speech as “hate speech,” the censor situates them within an

²⁶⁰ Toni Morrison, Nobel Prize Acceptance Speech (1993), https://www.nobelprize.org/nobel_prizes/literature/laureates/1993/morrison-lecture.html, (last visited Nov. 23, 2017).

²⁶¹ *R.A.V.*, 505 U.S. at 399 (White, J. concurring)

intellectual worldview, assigns them an ideological agenda, and categorizes them precisely by their ideational content. Hate speech is not hate speech unless it is intelligible as hateful. If there were no basis for comprehending this suppositional “inarticulate grunt,” there would, *ipso facto*, be no basis for identifying and prohibiting it. Like so many opponents of hate speech, the obsession of the censor who would criminalize it ends up elevating and dignifying it.

v. Objection the Fifth: Hate Speech Is Easy to Permit for Those with Privilege

With this argument, the censor finally abandons any effort to make an intellectual case from first principles, and instead invokes the fashionable but vapid doctrines of Critical Race Theory (or as we might more properly call it, Katapiesiology²⁶²) as a substitute for rigorous analysis. Some censors take this *argument saugrenu* so far as to indict the entire concept of free

²⁶² From the Greek *katapiesi* (καταπίεση) —“oppression,” and *logos* (λόγος) —“explanation; discourse”; hence, “oppression studies.” See, e.g., HERBERT MARCUSE, *ONE-DIMENSIONAL MAN*, 11 (1964) (“The efficiency of the [modern social] system blunts the individuals’ recognition that it contains no facts which do not communicate the repressive power of the whole.”); PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED*, 2 (trans. Myra Bergman Ramos, 2014) (1968) (“The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves.”). For a pithy rebuttal, see NAPOLEON BONAPARTE, *POLITICAL APHORISMS* (ed. G. De Liancourt, 1848) (“Parmi ceux qui n’aiment pas l’oppression, nombreux sont ceux qui aiment opprimer.”). For a more extensive critique, see Andrew Sullivan, *Putin’s First Year in Office*, *NEW YORK MAGAZINE*, Dec. 22, 2017 (“The logic behind all of this is deeply illiberal. On various subjects, it seems, only a certain segment of allegedly victimized citizens are allowed to voice opinions and be heard. Others must be silent. Only women can legitimately speak about sexual harassment; only African-Americans can have an opinion on ‘white supremacy’; only gays can talk about their wedding cakes and be taken seriously. Slate had a headline on the gay-cake case last week: ‘How Clueless Straight White Guys Excuse Religious Homophobia.’ Can you imagine this happening in reverse? Would there ever be a headline in Slate that said: ‘How Clueless Gay Latina Women Excuse Illegal Immigration’? Well, maybe in Breitbart, I guess. Which is precisely my point. Yes, an opinion can be judged on its context, on the experience and viewpoint of the speaker, but it is ultimately valid only if it is reasonable, cogent, and persuasive regardless of anyone’s actual identity. (In fact, of course, sometimes being very close to an issue can render one’s opinion more vulnerable to bias and epistemic closure than someone at a further distance.) Sure, reason can be complemented by an awareness of identity but never substituted for it. If identity really is all, then no white person can ever have an opinion on race, no man can have an opinion on feminism, no Gentile can have a position on Israel, no straight person can have an opinion about gays, and so on. Or, if they do, they’re simply displaying white supremacy, misogyny, anti-Semitism, and homophobia, which renders those opinions void before they have even been expressed. How much easier this is than refuting actual arguments, or judging an individual on the cogency of her arguments rather than the color of her skin, biological sex, or sexual orientation.”).

speech as morally putrified, and many will declare with staggering hubris and simplicity that the very concept of objective truth (the attainment of which is the aim of free speech), is itself nothing more than an instrument of oppression.

1. Free Speech Empowers the Marginalized

The censor will here begin by withdrawing to a higher level of abstraction and challenge the major premise of our syllogism. This censor will claim that the very concept of free speech itself is an instrument of oppression. For an example of a contemporary, typical example of this sort of nonsense, the Hampton Institute, which bills itself as “A Working-Class Think Tank” (an unclever euphemism for “Marxist”), argues that “‘free speech’ is often wielded by the privileged as a way to direct attention away from critiques of existing conditions and systems; particularly critiques of capitalism, imperialism, white supremacy, and patriarchy.”²⁶³

For anyone who possesses a passing familiarity with American history, this will be an absurd claim. Under the aegis of what legal principle did the Freedom Riders ride, the Selma marchers march, and Martin Luther King speak to a nation about racial equality at a time when all of these acts were widely condemned and reviled by the proponents of the Jim Crow South in which they occurred? By what constitutional mechanism were these demonstrations in the name of civil rights protected from the overwhelming public disapproval and opprobrium they faced in the South? The most singularly important aspect of free speech is that it protects *unpopular* views from censorship and suppression. Recall our discussion of Milton. Remember the metaphor of the crucible. The Civil Rights Movement of the 1950s and 1960s was just such a

²⁶³ Tariq Khan, *Masking Oppression as Free Speech*, THE HAMPTON INSTITUTE, Nov. 10, 2015, <http://www.hamptoninstitute.org/masking-oppression-as-free-speech.html#.WgpDsLbMyu4>, (last visited Nov. 16, 2017).

crucible, in which the racial truths upon which the majority of American society rested were put to the test of fire, which they failed spectacularly. Ideas that are widely viewed as pernicious often achieve just this sort of result, in societies that afford free speech moral and legal authority, and in turn, those societies advance down the road of social progress.

Many of those who agitate for censorship today invoke the cause of racial equality as a moral argument in favour of the censorship of speech. It is therefore worth examining how free speech was viewed by the Civil Rights Movement of the 1950s and 1960s, to determine the moral legitimacy of such claims. It is indisputable that the greatest figure of the Civil Rights Movement, Martin Luther King, strongly believed in a liberal policy of free speech and broad First Amendment protection in general. For example, take the speech King gave on Human Right Day, 1965, at Hunter College in New York City, about the Apartheid regime in South Africa:

Once more, we read of tortures in jails with electric devices, suicides among prisoners, forced confessions, while in the outside community ruthless persecution of editors, religious leaders, and political opponents suppress free speech—and a free press.²⁶⁴

Or, for an American example, take King's famous *I've Been to the Mountaintop* speech, delivered one day before his assassination:

Now about injunctions. We have an injunction and we're going into court tomorrow morning to fight this illegal, unconstitutional injunction. All we say to America is to be true to what you said on paper. If I lived in China or even Russia, or any totalitarian country, maybe I could understand some of these illegal injunctions. Maybe I could understand the denial of certain basic First Amendment privileges, because they haven't committed themselves to that over there. *But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of press. Somewhere I read that the greatness of America is the right to protest for right.* And so just as I say we aren't going to let any dogs or water hoses turn us around, we aren't going to let any injunction turn us around.²⁶⁵

²⁶⁴ Martin Luther King, Jr., *Hunter College Speech*, Dec. 10, 1965, <https://apicciano.commons.gc.cuny.edu/files/2016/01/MLK-typed-Hunter-speech.pdf>, (last visited Nov. 20, 2017).

²⁶⁵ MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR., I've Been to the Mountaintop*, 282 (ed. James M. Washington, 2003) (emphasis added).

King’s point is unmistakable: the Civil Rights Movement may not have been possible, and certainly could not claim the same legal protections, as it could in a country with a liberal regime of free speech.

Consider also how free speech was implicated in the events that gave rise to the Supreme Court case *New York Times Co. v. Sullivan*.²⁶⁶ In 1960, the *New York Times* ran a full-page editorial advertisement in support of the Civil Rights Movement, paid for by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South.” The advertisement solicited funds from the public to defray the legal costs of defending King against a perjury indictment in Alabama. The advertisement made several claims that Montgomery, Alabama Public Safety Commissioner L. B. Sullivan contested as false and libellous, even though Sullivan was not mentioned by name. Sullivan nevertheless sued for libel, and won in the Alabama trial court.²⁶⁷ The verdict for Sullivan was upheld by the Alabama Supreme Court.²⁶⁸

By early 1964, the case had reached the Supreme Court. The Court overruled the libel judgment for Sullivan unanimously. The Court held that

[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people....’²⁶⁹

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker....²⁷⁰

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with

²⁶⁶ 376 U.S. 254 (1964).

²⁶⁷ *Id.* at 256.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 269.

²⁷⁰ *Id.* at 271.

knowledge that it was false or with reckless disregard of whether it was false or not.²⁷¹

The Court roundly rejected the use of private libel suits as a backdoor to censoring the expression of opinions about public life and public policy in the United States. Here, once again, a liberal regime of free speech has defended a speaker's right to articulate an unpopular but important view, and one that was critical for our national moral development and progress.

Does free speech not also protect the bigot and the Klansman? asks our modern day social justice warrior. Yes, it does. It protects *everyone*; that is the fundamental premise of free speech. However, as Stanley Jay of the ACLU points out, "when you mess with First Amendment rights, it's ultimately the weak and powerless who lose out the most, even when those rights do sometimes protect the powerful."²⁷² That is because there is no coherent principle under which we could condemn the Klan's rhetoric about race in America that couldn't also have been used to silence the Civil Rights Movement's rhetoric about race in America. Any such hypothetical scheme would necessarily rely not on an objective principle,²⁷³ but on the judgment of a censor, who being human, is subject to the usual human host of biases, prejudices, and political and moral opinions; any of which may be erroneous or misguided. What a liberal policy of free speech represents is an acknowledgement that any quantum of censorship will necessarily be the product of fallible human judgment, bound inextricably to its moment in history, which never operates from a position of perfectly realized factual or moral knowledge. The *only* way to protect the voices of minorities is with a universal bar against all censorship.

Jonathan Rauch has made the case for a free speech regime that permits hate speech, on

²⁷¹ *Id.* at 279-80.

²⁷² Stanley Jay, ACLU, <https://www.aclu.org/blog/free-speech/civil-rights-movement-reminder-free-speech-there-protect-weak> (last visited Nov. 16, 2017).

²⁷³ For those who believe that objectivity itself is an oppressive concept, see section 5(v)(2) of these remarks.

the grounds *even hate speech itself* works in favour of marginalized minorities. Rauch, writing in 2013, begins with a question: “[l]ately, people have been asking me why so much has happened in America seemingly so suddenly, to advance gay equality generally and gay marriage specifically.”²⁷⁴ Rauch acknowledges the influence of “younger people who are more relaxed about homosexuality” and “more gay people com[ing] out of the closet,” but argues that these factors alone do not account for the precipitous shift in public opinion. The gay rights movement’s

great blessing was to live in a society that understands where knowledge comes from: not from political authority or personal revelation, but from a public process of open-ended debate and discussion, in which every day millions of people venture and test billions of hypotheses. All but a few of those theories are found wanting, but some survive and flourish over time, and those comprise our knowledge.... The critical factor in the elimination of error is not individuals’ commitment to the truth as they see it (if anything, most people are too confident they’re right); it is society’s commitment to the protection of criticism, however misguided, upsetting, or ungodly.²⁷⁵

Rauch notes Hannah Arendt’s observation that “truth carries within itself an element of coercion.”²⁷⁶ To argue for the equal rights of gay and lesbian Americans to marry has a tendency to compel the listener, because the argument presented is morally true. Rauch explains how this principle works in practice:

[m]ost fair-minded people who read [homophobe Orson Scott Card’s] screeds will see that they are not proper arguments at all, but merely ill-tempered reflexes. When Card puts his stuff out there, he makes us look good by comparison. The more he talks, and the more we talk, the better we sound.²⁷⁷

The truth carries within itself an element of coercion; There is an intimation of Kant in that notion. Kant’s moral philosophy proceeded from the application of *a priori* reason alone, which

²⁷⁴ Jonathan Rauch, *The Case for Hate Speech*, THE ATLANTIC, Nov. 2013.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

we can think of as functionally equivalent to “truth.”²⁷⁸ Truth derived from *a priori* reason creates moral “duty.”²⁷⁹ Therefore, in Kantian terms, fluency in *a priori* reason (“truth”) manifests itself as a “coercive” obligation: “[t]o have a [moral] duty is to be required to act in a certain way out of respect for the [moral] law.”²⁸⁰ The argument that Rauch presents (by ways of Arendt) is actually a very old one, that never ceased to be true.

Does this notion require a belief in epistemological optimism? Without a doubt. As the great jurist Learned Hand, wrote:

[t]he First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.²⁸¹

Abandoning free speech would mean abandoning the very notion of the United States, and the democratic heritage it traces back as far as Athens. There is no middle ground for compromise; “we have staked upon it our *all*.”

The entire aggregated weight of human history testifies to the verity of epistemological optimism. Do we possess more knowledge (of any sort; every sort) today than we did in 776 B.C.?²⁸² Who today can seriously embrace Rousseau’s notion that we were better off as uncivilized savages in the state of nature?²⁸³ No, the Bard had the right of it, “[t]ime’s glory is to . . . unmask falsehood, and bring truth to light.”²⁸⁴ “*Opinionis enim commenta delet dies*,

²⁷⁸ GROUNDWORK *supra* note 53 at 2.

²⁷⁹ *Id.* at 7.

²⁸⁰ *Id.* at 10.

²⁸¹ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1, 65 (1945).

²⁸² 776 B.C. is the date of the earliest recorded Greek alphabetic inscriptions, which mark the end of the “prehistoric” era and the dawn of “history.” Timothy Taylor, *Thracians, Scythians, and Dacians*, OXFORD HISTORY OF PREHISTORIC EUROPE, 373 (ed. Barry Cunliffe, 2001).

²⁸³ See JEAN-JACQUES ROUSSEAU, PRINCIPLES DU DROIT POLITIQUE, I.2 (1762).

²⁸⁴ WILLIAM SHAKESPEARE, THE RAPE OF LUCRECE, lns. 939-940 (ed. W. J. Craig, 1914) (1594).

naturae iudicia confirmat.”²⁸⁵ Only a dunderwhelp or a petty caviller could deny what one notable scholar of world history described as “the advances...[in] the development of science, the wisdom of philosophy, and the achievements of art”²⁸⁶ over the last three millennia. As Martin Luther King observed, “the arc of the moral universe is long, but it bends toward justice.”²⁸⁷ Free speech is the locomotive force that drives that progress, and even its putative faults have a salutary way of advancing its ultimate aims.

A liberal regime of free speech, far from compounding the oppression of minorities, is in fact the political condition most favourable to their equal treatment and social advancement. Perhaps free speech is a natural right, as Locke would have argued; perhaps it is a social construct that Locke himself helped to fashion; but whether it be a natural or a political right, what no serious person can entertain is the notion that it exclusively or primarily serves the ends of bigotry and prejudice. The proof is all around us. Compare political regimes with liberal free speech policies with those that practice state censorship. Where would a member of a generic minority be better off: in the United States, or in Saudi Arabia? Would one rather be a homosexual in England or in Somalia? A Jew in the Federal Republic of Germany, or the Third Reich? Rauch accurately observes that as we gain empirical evidence that women are just as intellectually capable as men this tends to reframe gender equality as a moral imperative.²⁸⁸ From our social experience we learn that robust religious liberty laws tend to make societies less tribalistic and easier to govern, which reframes religious liberty as another moral imperative.²⁸⁹ From critical argument, we learn that the institution of slavery is morally indefensible, and this

²⁸⁵ M. TULLIUS CICERO, *DE NATURA DEORUM*, II § 2, (ed. Francis Brooks, 1896) (45 B.C.). (“For time destroys the fictions of error and opinion, while it confirms the determinations of nature and of truth.”).

²⁸⁶ I WILLIAM DURANT, *THE STORY OF CIVILIZATION* (1993) (1935).

²⁸⁷ KING, *supra* note 264 at 230.

²⁸⁸ Rauch, *supra* note 274.

²⁸⁹ *Id.*

reframes human dignity as a moral imperative.²⁹⁰ Rauch concludes: “[t]o make social learning possible, we need to criticize our adversaries, of course. But no less do we need them to criticize us.”²⁹¹ Why? Because to deny the bigot his right to speak would undercut the rationale of every meaningful civil rights movement: affirming the right of *everyone* to individual autonomy and dignity.

It would undercut the real *raison d’être* of the gay-rights movement: not to win equality just for gay Americans but to advance the freedom of all Americans to live as who they really are and say what they really think.²⁹²

So Rauch ends up with an invocation of Mill, who associated the right to express one’s self freely with fundamental human dignity. Not dignity for right-thinking people, or “decent” folks, but the individual dignity of *everyone*.

In light of our explorations of this topic, it should now be evident to us why the idea that free speech is a tool of oppression cannot plausibly withstand any meaningful level of scrutiny. We examined how the Civil Rights Movement benefitted from a liberal regime of free speech, and we heard Dr. King extol its virtues. We have explored how even “hate speech” can work in the favour of the gay rights movement. And finally, we have realized that the only way to truly guarantee the rights of *any* minority is by denying the power to censor to any one person or committee of the state. In light of all this, the Hampton Institute’s glib dismissal of free speech cannot be taken seriously, nor can any similarly ideologically and historically debased and vapid critique of free speech be afforded any moral authority.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

2. *Objectivity Is Not a “Tool of Oppression”*

The turgid zenith of this Critical Race Theory line of argumentation, magnificent in its own way, is achieved when the would-be censor dismisses all of the arguments for free speech on the merits, from Socrates down through Skokie, as irrelevant or oppressive, because the master that free speech serves, the acquisition of truth, is itself *ignis fatuus* with no inherent value. Objective truth, they insist, not only does not exist *omnino*, but is a construct fashioned only to bolster the oppressive regime of white supremacy.

One might here fairly enquire whether we have overstated, hyperbolized, or rendered the censor’s argument into a straw-man caricature, thereby dishonouring the principle of charity. *Benignior sentential in verbis generalibus seu dublis est preferenda*. However, we might, in turn, respond to this charge with a quotation from a 2017 article by Chanda Prescod-Weinstein, entitled “*Stop Equating Science with Truth*”:

It is impossible to consider this field of science without grappling with the flaws of the institution—and of the deification—of science itself. For example: It was argued to me this week that the [James Dalmore] Google memo failed to constitute hostile behavior because it cited peer-reviewed articles that suggest women have different brains. The well-known scientist who made this comment to me is both a woman and someone who knows quite well that “peer-reviewed” and “correct” are not interchangeable terms. This brings us to the question that many have grappled with this week. It’s 2017, and to some extent scientific literature still supports a patriarchal view that ranks a man’s intellect above a woman’s. . . . Science’s greatest myth is that it doesn’t encode bias and is always self-correcting. In fact, science has often made its living from encoding and justifying bias, and refusing to do anything about the fact that the data says something’s wrong.²⁹³

There are multiple, critical errors in Prescod-Weinstein’s jeremiad. Firstly, as a scientist, Prescod-Weinstein should know that it is incorrect to characterize science as a *body of data*; it is

²⁹³ Chandra Prescod-Weinstein, *Stop Equating Science with Truth*, SLATE, http://www.slate.com/articles/health_and_science/science/2017/08/evolutionary_psychology_is_the_most_obvious_example_of_how_science_is_flawed.html (last visited Oct. 29, 2017).

in fact a *methodology* for producing and verifying data. The data that it uncovers is always provisional, in the sense that they are always subject to critical reevaluation. Light was a beam emitted from the eyes according to Euclid, a wave according to Descartes, a particle according to Newton, and a hybrid quantum entity according to modern scientists. What light “is” may be a *hypothesis* or perhaps a *theory*, but it is not “science;” science is the *method* by which we reach our conclusions.

And, of course, it is obvious that science can reflect the prejudices of its practitioners, but that is precisely why science employs peer review, statistics, and replication. Prescod-Weinstein is correct to note that peer-review alone is not synonymous with gospel truth, but it is part of a system (“science”) that represents the most reliable method we have discovered thus far for separating the accurate data from the engrained biases of individual scientists. Philosopher of science David Hull simply notes that “[o]ne of the strengths of science is that it does not require that scientists be unbiased, only that different scientists have different biases.”²⁹⁴ Recall our discussion of Kant’s *Perpetual Peace* essay; is this not the same principle at work? Chemist John Jay explains Hull’s premise with pithy eloquence, echoing Milton in the scientific context:

[t]he scientific method is a mechanism for the evolution of thought. Evolution depends on conflict and struggle as its motive engine. Conflict requires competitive personalities. Those personalities are not always the easiest to deal with. QED, most good scientists are jackasses.²⁹⁵

Therefore, we should properly be either 1) unalarmed by biased scientists, so long as many biases are represented, because they will cancel out and do no harm; or 2) grateful for the participation of biased scientists, because their conflicting biases are the animating impulse

²⁹⁴ DAVID L. HULL, *SCIENCE AS PROCESS: AN EVOLUTIONARY ACCOUNT OF THE SOCIAL AND CONCEPTUAL DEVELOPMENT OF SCIENCE*, 22 (2010).

²⁹⁵ John Jay, *Why We Need Jackasses in the Academy*, CHICAGOBOYZ, Aug. 7, 2007, <https://chicagoboyz.net/archives/5120.html>, (last visited Nov. 20, 2017).

behind scientific progress. Science has successfully ushered us out of our caves, showed us our place in the universe, put to rout disease, split the atom, and taken us to the moon; yet Prescod-Weinstein writes as if science is nothing more than a bumbling old bigot who has “made a living”²⁹⁶ by putting on minstrel shows and peddling copies of *Mein Kampf*.

It is impossible to understand what Prescod-Weinstein means when she writes that science “refuses to do anything about the fact that the data says [sic] that something’s wrong.”²⁹⁷ If she means that the abstract epistemological system known as “science” is idle in the face of social injustice, well, that is tantamount to condemning a microscope for failing to march with Dr. King. We might as well examine the gas chambers at Auschwitz and use their gristly past to indict both architecture and chemistry.

Yes, science can “encode” bias, and yes, sometimes it takes a substantial amount of time to root it out, but it is eminently untrue that the nature of the enterprise is not self-correcting over time. Why, does Prescod-Weinstein think, that phlogiston, the luminiferous ether, caloric, Larmarckism, Baraminology, Democritus’s indestructible atom, the geocentric universe, and alchemy are no longer footnoted in modern scientific papers? Do thoughts of Maxwell’s Dæmon keep her up at night because it violates the Second Law of Thermodynamics? Has science not self-corrected all of these errors? Has science not also roundly rejected eugenics, phrenology and physiognomy; examples of precisely the sort of “science with encoded bias” with which she is so concerned? Were these errors not dispelled with a combination of informed scepticism, replication, and constant questioning? In other words, with *science*?

More to the point, if Prescod-Weinstein does not think that science, conducted in an environment that maximizes freedom of speech, is capable of dispelling these pernicious errors,

²⁹⁶ Prescod-Weinstein, *supra* note 293.

²⁹⁷ *Id.*

what does she think can do so? In fact, ironically, Prescod-Weinstein seems to believe that the answer to bias encoded into science is—*more* bias encoded into science, *but bias directed against the correct political targets*:

our scientific educations almost never talk about the invention of whiteness and the invention of race in tandem with the early scientific method which placed a high value on taxonomies—which unsurprisingly and almost certainly not coincidentally supported prevailing social views. The standard history of science that is taught to budding scientists is that during the Enlightenment, Europe went from the dark ages to, well, being enlightened by a more progressive mindset characterized by objective “science.” It is the rare scientific education that includes a simultaneous conversation about the rise of violent, imperialist globalization during the same time period. Very few curricula acknowledge that some European scientific “discoveries” were in fact collations of borrowed indigenous knowledge.²⁹⁸ And far too many universally call technology *progress* while failing to acknowledge that it has left us in a dangerously warmed climate.²⁹⁹

This is formally known as the *quod licet Iovi non licet bovi* fallacy. Literally, Jove is permitted to do what cattle are not permitted to do. It occurs when the speaker criticizes a subject for reason X, and then offers in reply a proposition that is equally susceptible to criticism for reason X. Injecting Critical Race Theory arguments into a scientific education is to merely replace outmoded encoded bias with more fashionable encoded bias. While we can reassert that the biases of individual scientists are rendered benign, and possibly even an affirmative good, by the proper functioning of the scientific method; Prescod-Weinstein rejects this premise, and therefore may not coherently both lambaste encoded bias and at the same time demand that more bias be encoded. We might say, after Duke Vincentio, “*Shame to him, whose cruel striking /*

²⁹⁸ This concept has been around for years, yet none of its proponents have found it necessary to supply any proof of it. An example: in *BLACK ATHENA*, Martin Bernal makes the argument that Alexander the Great pillaged the library at Alexandria in Egypt and sent the texts it contained to his tutor, Aristotle, who in effect, plagiarized all of his philosophy from Africa. This argument conveniently elides over the fact that the Library at Alexandria was founded by Ptolemy I Soter, one of Alexander’s generals, in 297 B.C., 30 years *after Alexander and Aristotle’s deaths* in 323 B.C. and 322 B.C., respectively. Bonus example: Josef A. A. ben-Jochannan’s assertion that Socrates was black, made without one scintilla of proof that he was any different from any ordinary Athenian of his era.

²⁹⁹ Prescod-Weinstein, *supra* note 293.

*Kills for faults of his own liking!*³⁰⁰

Furthermore, all of the ideas Prescod-Weinstein introduces are all well and good things to discuss, but they are not properly a part of a scientific education. Everything Prescod-Weinstein cites to properly belong to the *history* of science, which contains terrifically interesting material, but it is a liberal art, and thus has nothing to do with the training of competent *scientists*. A knowledge of Hippocrates's four bodily humours does not help one correctly operate the Large Hadron Collider.

Prescod-Weinstein, and by extension her fellow *camarades dans les bras* of the Critical Race Theory left are actually, beneath all their sanctimony and moral outrage over science, making an astonishing claim. By denying the fundamental validity of the scientific method, they are *ipso facto* claiming that the Enlightenment, and all the philosophy and science that flowed forth from it, is invalid, fallacious, and downright inimical. Prescod-Weinstein explicitly states that things went wrong “during the Enlightenment.”³⁰¹

“Enlightenment,” you will recall from Kant, “is a man’s release from his self-incurred tutelage...[i.e.]...to make use of his understanding without direction from another [person].”³⁰² The foundational principle of Enlightenment is that “nothing is required but freedom...the freedom to make public use of one’s reason at every point...[i.e.]...the use which a person makes of it as a scholar before the reading public.”³⁰³ This idealistic and benign-sounding movement is what Prescod-Weinstein is claiming is the West’s original sin.

Let us examine, then, the catalogue of crimes for which the Enlightenment must answer. The Enlightenment produced the Kantian philosophy of individual human dignity, which became

³⁰⁰ WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act III, sc. ii (1604).

³⁰¹ *Id.*

³⁰² WHAT IS ENLIGHTENMENT? *supra* note 66.

³⁰³ *Id.*

the cornerstone for international human rights, and even the legal basis for the prosecution of Nazi officers for crimes against humanity following the Holocaust.³⁰⁴ The Enlightenment produced the *Encyclopédie*, in which the French *Philosophes* spread scientific literacy to the growing middle class. The Enlightenment gave birth to the modern discipline of sociology (which provided the vocabulary of “social justice,” which Prescod-Weinstein and her fellow travellers embrace as gospel) with the work of James Burnett, Adam Ferguson, John Millar and William Robertson. Locke, Voltaire, and Montesquieu laid the philosophical foundation of liberalism, the very political philosophy of which Prescod-Weinstein and her peers would later proclaim themselves champions (though they would use the more fashionable word “progressive”). Cesare Beccaria’s work on criminology was the beginning of the criminal justice reform movement,³⁰⁵ which presently finds expression most prominently on the Critical Race Theory left. Political thinkers like Hobbes and Locke became the first proponents of the fundamental equality of all people since Jesus Christ.³⁰⁶ The Enlightenment produced the first systematic exposition of free market capitalism,³⁰⁷ which has done more to improve the material living conditions of the world’s population than any idea since the dawn of agriculture.³⁰⁸ The Enlightenment produced the first popular articulation of feminism to reach a global audience.³⁰⁹ And finally, the Enlightenment produced the Declaration of Independence and the American constitutional regime, under the legal sanction of which all were free to speak whatever truth they believe in (including Prescod-Weinstein), without any fear of governmental censor or

³⁰⁴ See generally, HANNAH ARENDT, *EICHMANN IN JERUSALEM* (1963) (providing an account of the trial of Nazi SS officer Adolf Eichmann).

³⁰⁵ See generally, CESARE BECCARIA, *OF CRIMES AND PUNISHMENTS* (1764).

³⁰⁶ See generally, *SECOND TREATISE*, *supra* note 32; *LEVIATHAN*, *supra* note 252.

³⁰⁷ See generally, ADAM SMITH, *THE WEALTH OF NATIONS* (ed. Edwin Cannan, 1994) (1776).

³⁰⁸ See generally, NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* (2011) (describing the role of capitalism in advancing human welfare); *Towards the End of Poverty*, *THE ECONOMIST*, Jun. 1, 2013 (describing the world-historical achievements of capitalism).

³⁰⁹ See generally, MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMEN* (1791).

censure. All of this, per Prescod-Weinstein, is merely “pseudoscience;” manifestations of white supremacy, “hid behind science as a shield.”³¹⁰ The factual errors alone are disqualifying; the sanctimony is unbearably cloying. Prescod-Weinstein’s screed, to borrow a familiar locution, amounts to “a tale / told by and idiot, full of sound and fury, / Signifying nothing.”³¹¹

The audacity of a fully-fledged assault on the Enlightenment tends to shock so thoroughly that we might miss the even more audacious claim Prescod-Weinstein and her fellows are implicitly but necessarily making. Ultimately, the logical and ineluctable terminus of their argument that even science is fatally tainted by “encoded bias” is that *there is no such thing as objective truth at all*.

Again, we may be accused of hyperbolizing, but even a cursory examination of the facts reveals the staggering solipsism, self-regard, and acute nescience to support the claim. A popular 2016 blog post on EverydayFeminism.com is entitled “4 Reasons Demanding ‘Objectivity’ in Social Justice Debates Can Be Oppressive.”³¹² In it, the author cites to Feminist scholar Patricia Hill Collins’s assertion that “objectivity and provable arguments...benefits white men the most.”³¹³ In *New York Magazine*, Shay Akil McLean asserted that: “[t]he idea of objectivity...perpetuates a particular kind of able bodied white cisgender male logic, a world where everything is measured in comparison to them as the ideal type of human that everyone else aberrates from.”³¹⁴ J. Christopher Hall declares, “I strongly maintain that acts of

³¹⁰ Prescod-Weinstein, *supra* note 293.

³¹¹ WILLIAM SHAKESPEARE, *MACBETH*, act V, sc. V.

³¹² Sian Ferguson, *4 Reasons Demanding Objectivity in Social Justice Debates Can Be Oppressive*, EVERYDAYFEMINISM, Mar. 27, 2016, <https://everydayfeminism.com/2016/03/objectivity-can-be-oppressive/>, (last visited Nov. 20, 2017).

³¹³ *Id.* (citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (2008)) (compare Collins’s “objectivity...benefits white men the most” with Mary Wollstonecraft, “[i]t would be an endless task to trace the variety of meannesses, cares, and sorrows, into which women are plunged by the prevailing opinion that they were created rather to *feel* than *reason*” WOLLSTONECRAFT, *supra* note 309 at ch. IV (emphasis added)).

³¹⁴ Jesse Singal, *The March for Science Has Kicked Off a Big, Important Conversation About Scientific ‘Objectivity,’* NEW YORK MAGAZINE, Apr. 17, 2017.

‘objectivity’ are acts of relational oppression.”³¹⁵ The superlative, however, for most ebullient expression of moral sanctimony coupled with philosophical obtuseness goes to the students of Pomona College. A social justice student group at Pomona responded to a letter, published by college President David Oxtoby defending free speech, with a manifesto of its own. It reads, in salient part:

[h]istorically, white supremacy has venerated the idea of objectivity, and wielded a dichotomy of ‘subjectivity vs. objectivity’ as a means of silencing oppressed peoples. The idea that there is a single truth—‘the Truth’—is a construct of the Euro-West that is deeply rooted in the Enlightenment, which was a movement that also described Black and Brown people as both subhuman and impervious to pain. This construction is a myth and white supremacy, imperialism, colonization, capitalism, and the United States of America are all of its progeny. The idea that the truth is an entity for which we must search, in matters that endanger our abilities to exist in open spaces, is an attempt to silence oppressed peoples.³¹⁶

Ne sutor ultra crepidam! This represents only a tiny sampling of actual opinions held and professed by those in the thrall of Critical Race Theory. Again, we must conclude that denying objectivity is not a marginal or fringe position; it is a central article of faith in certain ideological circles.

This absurd but seductive idea has always had its disciples, throughout history. The Sophists of Periclean Athens were maybe the first to openly endorse it. “Man is the measure of all things,” argued the Sophist Protagoras, meaning that there is no fixed truth, there is only what men *think* to be true.³¹⁷ The Peloponnesian War hero Lysander did “not judge[] truth to be better

³¹⁵ J. Christopher Hall, *Honoring Client Perspectives Through Collaborative Practice*, SOCIAL CONSTRUCTION AND SOCIAL WORK PRACTICE, 43 (ed. Stanley Witkin, 2011).

³¹⁶ POMONA STUDENT PETITION, Apr. 19, 2017, https://docs.google.com/document/d/1_y6NmXoIBLcZJxYkN9V1YfaPYzVSMKCA17PgBzz10wk/edit (last visited Oct. 31, 2017) (compare the Petition’s “The idea that truth is an entity for which we must search...is an attempt to silence oppressed peoples” to Pomona College’s motto, “Let only the eager, thoughtful and reverent enter here.”)

³¹⁷ 12 PLATO, PLATO IN TWELVE VOLUMES, THEAETETUS, 152a (trans. Harold N. Fowler, 1921) (c. 369 B.C.) (quoting Protagoras)

in nature than falsehood, but set[] a value upon both according to interest.”³¹⁸ Two millennia later, Hamlet wondered whether “[t]here is nothing either good or bad, but that thinking makes it so.”³¹⁹ Kierkegaard flirted with the subjectivity of truth, but could never fully commit himself to it.³²⁰ Nietzsche argued that “it is precisely facts that do not exist, only interpretations.”³²¹ Oh-so-modish Foucault rejected objective truth in favour of an incoherent hierarchy of “Regimes of Truth,” which are “able to make what does not exist...nonetheless become something.”³²²

Mad Danish princes and enablers of fascism³²³ are poor intellectual company to keep. To deny the existence of objective truth is to assert the subjectivity of truth, and the subjectivity of truth that this censor-cum-philosopher advocates refutes itself. Let the Critical Race Theorist who believes that objectivity is merely an instrument of oppression jump from the top of the Eiffel Tower, and see if gravity’s bias in favour of white supremacy denies him an abrupt death on the basis of his race. Let this Critical Race Theorist observe a black man and a white man both attempt to boil water at 212° Fahrenheit, and see if the laws of thermodynamics work for the white man, but deny the black man his tea. Let our Critical Race Theorist detonate an atomic bomb in New York City, and see if it only vaporizes members of historically marginalized groups. *Intolerabiles ineptiae sunt.*

Subjectivity, as a worldview, is not only erroneous; it is pernicious.³²⁴ To deny objective truth is also to deny, *a fortiori*, objective morality. The anthropologists have hoisted this banner

³¹⁸ PLUTARCH, LIVES OF THE EMINENT GREEKS, LYSANDER (ed. & trans. John Dryden, 1683) (125 A.D.).

³¹⁹ WILLIAM SHAKESPEARE, HAMLET, act II sc. ii (1602).

³²⁰ *Søren Kierkegaard*, STAMFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/kierkegaard/> (Last visited Oct. 29, 2017).

³²¹ FRIEDRICH NIETZSCHE, THE PORTABLE NIETZSCHE, 458 (trans. Walter Kaufmann, 1960).

³²² MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS, 19 (1978).

³²³ *See generally*, JACOB GOLOMB & ROBERT S. WISTRICH, NIETZSCHE: GODFATHER OF FASCISM (2007) (explaining the Nazis’ reliance on Nietzsche to develop their racial theory and regime).

³²⁴ *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM, 474 (1958) (“The ideal subject of totalitarian rule is not the convinced Nazi or the convinced Communist, but people for whom the distinction between fact and fiction

high long ago, and stand proudly by it.³²⁵ Surely, that which is *malum prohibitum* may vary from one culture to another, but on fundamental issues we must certainly be able to say there are some things which are ahistorically and aculturally *malum in se*. To deny this proposition is to deny the horrors of the Holocaust. To deny this is to make murder and rape matters of opinion and taste. To deny this is to say that the moral heft of whether we build statues of Martin Luther King or of Adolph Hitler is a matter of cultural mores, social conditioning, or personal preference; each option susceptible to neither praise nor blame because there is no objective moral standard to which we can appeal in assigning them. Moral and cultural subjectivity was the cornerstone of the Antebellum South, whose vicious and blood-stained proponents said *this system of social organization is right for us, and you have no superior (i.e. objective) right to pass judgment on it*. To claim that objectivity is no more than a construct of white supremacists is to cast the vilest of aspersions and slanders upon Kant, Wilberforce, Douglass, Gandhi, and King; all of whom embraced the *objective righteousness* of their particular crusades.³²⁶

(*i.e.* the reality of experience) and the distinction between true and false (*i.e.* the standards of thought) no longer exist.”).

³²⁵ See, e.g. MARY DOUGLAS & B. ISHERWOOD, *THE WORLD OF GOODS: TOWARDS AN ANTHROPOLOGY OF CONSUMPTION*, 63 (1979) (“Our ultimate task is to find interpretative procedures that will uncover each bias and discredit its claims to universality...No human exists except steeped in the culture of his time and place.”). Perhaps they, too, rely overmuch on Nietzsche, who asserted that truth can be “grasp[ed]...only as a highly subjective formation,” and ponders, “[w]hat then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms...Truths are illusions about which it has been forgotten that they are illusions.” FRIEDRICH NIETZSCHE, *ON RHETORIC & LANGUAGE*, 250-53 (ed. & trans. Gilman et al., 1989) (quotations 1873). John Piper has the right of it: “Relativism poses as humble by saying: ‘We are not smart enough to know what the truth is—or if there is any universal truth.’ It sounds humble. But look carefully at what is happening. It’s like a servant saying: I am not smart enough to know which person here is my master—or if I even have a master. The result is that I don’t have a master and I can be my own master. That is in reality what happens to relativists: In claiming to be too lowly to know the truth, they exalt themselves as supreme arbiter of what they can think and do. This is not humility. This is the essence of pride.” JOHN PIPER, *THINK*, 112 (2011).

³²⁶ For example: “[s]ome things are right and some things are wrong, no matter if everybody is doing the contrary. Some things in this universe are absolute. The God of the universe has made it so. And so long as we adopt this relative attitude toward right and wrong, we’re revolting against the very laws of God himself... My friends, that attitude is destroying the soul of our culture! It’s destroying our nation! The thing that we need in the world today is a group of men and women who will stand up for right and to be opposed to wrong, wherever it is. A group of people who have come to see that some things are wrong, whether they’re never caught up with. And some things are right, whether nobody sees you doing them or not.” Martin Luther King, Jr., *Rediscovering Lost Values*, Feb. 28, 1954,

The claim of the Katapiesiologist not only diminishes individual men; it annihilates entire swathes of human experience. “Truth is,” per Dryden’s gloss of Polybius, “the foundation of all knowledge, and the cement of all societies.”³²⁷ Without foundations, knowledge decays into mere opinion and dogma; without cement, civil society putrefies into autocracy or anarchy. Objective truth has delivered to us the mastery of science, the liberalisation of governance, and has largely worked to “tame the savageness of man and make gentle the life of this world.”³²⁸ The work of delegitimizing our greatest engine of progress operates to “build a hell in heaven’s despite.”³²⁹ To claim that objectivity is no more than a socio-cultural construct is to make the preposterous claim that the universe is inherently incomprehensible: “nor rhyme nor reason;”³³⁰ to it, and that *good* and *evil* and *true* and *false* and *cause* and *effect* are intrinsically futile and senseless concepts whose only function is to reinforce dismal kyriarchies of hierarchical oppression. This is error, ossified by dogma, magnified by stupidity, varnished by academic trendiness, and emboldened by unearned sanctimony. It is the road of vacuous high moral dudgeon, laid along the lineaments of ego and self-regard, ensorcelled in the sphalm of racial tribalism, which culminates in a postmodern Bonfire of the Vanities at which the Savonarolas of the hour dance with manic glee over the destruction of three thousand years of human wisdom, celebrate the insuperable barriers to intelligible dialogue they have erected, and sing hymns of praise to the incondite, parlatic, and incoherent universe they have created. *Vi veri universum vivus vici*, indeed.

http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/doc_rediscovering_lost_values/index.html (last visited Jan. 30, 2018).

³²⁷ JOHN DRYDEN, *THE WORKS OF JOHN DRYDEN*, 23 (eds. Guffey et al., 1990) (1691).

³²⁸ EDITH HAMILTON, *THE EVER-PRESENT PAST*, 34 (1964) (attributed to “[a]n old Greek inscription” and later rendered immortal by Robert F. Kennedy).

³²⁹ BLAKE, *supra* note 256 at 37.

³³⁰ I EDMUND SPENSER, *THE POETICAL WORKS OF EDMUND SPENSER*, xxix (ed. Francis J. Child, 1881) (1602).

j. Concluding Remarks: Torn Between *Isēgoria* and *Parrhēsia*

In these remarks, we have investigated and interrogated the idea of free speech. We have traced its historical path, from Athens to America. We have examined the accounts of free speech given by the great philosophers of the West. We have analysed both instrumentalist and individualist arguments for free speech. We have considered the concepts of the marketplace of ideas, the dignity that derives from autonomy, and natural law theory.

We then examined the status of free speech in the United States. We analysed the political and legal theory at work in the founding of the American republic, and concluded that the government, as a general principle, may not regulate speech. We then examined how the Supreme Court has defined the more subtle and nuanced contours of that general principle, and found them to be in harmony with the mandate of liberalism.

We examined the proper place of free speech in the university, and concluded that even though private universities are not bound by the First and Fourteenth Amendments, they should nevertheless embrace liberal policies of free speech. This obligation arises from the university's duty to educate in the marketplace of ideas, and the university's duty to foster responsible citizenship in a democracy.

Finally, we have examined several common arguments advanced by the would-be censor, applying the principle of charity as far as reason will allow, and nevertheless found them to be wholly unmeritorious and offensive to liberalism.

It would be well, however, to recognize that some of the conclusions these remarks arrive at, especially in the *Objections of the Censor* section, are controversial and unpopular. According to a 2015 Pew study, while the majority (67%) of Americans oppose restrictions on speech that is

offensive,³³¹ that encouraging number is belied by a much more pessimistic demographic reality. Among 70-87-year olds, 12% supported censorship; among 51-69-year olds, 24% supported censorship; among 35-50-year olds, 27% favoured censorship; and among 18-34-year olds, support for censorship reached 40%.³³² It appears that we are witnessing the coming-of-age of the most illiberal generation in American historical memory.³³³ Although demographic trends appear to be militating against the arguments expressed in these remarks, that does not discharge our duty to *persuade*.

In closing, we may fittingly hearken back to where we began: the *polis* of Athens in the Age of Pericles. In classical Athens, two related but discrete forms of free speech were recognized: *isēgoria* and *parrhēsia*.³³⁴ *Isēgoria* was the iteration of free speech that was concerned with the equal right of every citizen to address the Assembly and other political institutions. It was a purely political right, limited to citizens, subject to decorum and propriety, and emphasized the equality of all Athenians.³³⁵ It is approximately analogous to the anodyne, jejune variety of free speech that 40% of Millennials most likely support, in so far as it is narrowly defined, limited in scope, bound by propriety, and emphasizes the value of equality over individuality.

Parrhēsia, by contrast, is the wild, boisterous, untamed marketplace of ideas that animated Milton's pen and vivified Jefferson's republicanism. It is a difficult word to translate, but Keith Werhan gives it his best effort:

the language 'freedom of speech' is far too bland to capture the rich and nuanced meaning of Athenian *parrhēsia*...[it is] the freedom to speak one's mind frankly and with complete openness.... *parrhēsia* typically had a confrontative, critical bite....In the political context... *parrhēsia*...freed ordinary Athenians to challenge the policy preferences of *polis* leaders, as

³³¹ *Fact-Tank*, PEW RESEARCH CENTER, Nov. 20, 2015.

³³² *Id.*

³³³ "Those that can pity, here / May, if they think it well, let fall a tear; / The subject will deserve it." WILLIAM SHAKESPEARE, HENRY VIII, act I sc. i.

³³⁴ Werhan, *supra* note 14 at 300.

³³⁵ *Id.* at 300-04.

well as the ideas and beliefs of their fellow citizens...[even] to say things that traditional norms of respect and shamefulness decreed should be left unsaid.³³⁶

This is a vigorous, feral, red-blooded conception of free speech. It is dynamic, rather than static; chaotic rather than orderly. It gives primacy to the individual speaker's right to say, over society's collective interest in norms and decorum. It is a kind of free speech intended for adults; not a Bowdlerized, child-friendly version in which no one's feelings get hurt and everyone goes home with a participation trophy.

America appears to be on the brink of a great political and cultural civil war, over whether our conception of free speech will develop along the lines of *isēgoria* or *parrhēsia*. In this civil war, the traditional oppositions of political left and political right, Republicans and Democrats, have largely collapsed. The *parrhēsia* view finds support among a motley assortment of older, traditional, liberal Democrats; libertarians; classical liberals; and various fringe constituencies (anarchists, the ACLU, various white nationalists,³³⁷ the Modern Whig party). On the side of *isēgoria*, the social justice warriors of the left, and the fake-news-obsessed Trumpian crypto-fascists of the right find common cause in efforts to compel orthodoxy in thought and speech: nominal enemies, who have literally come to blows in the streets of American cities, united by the one thing stronger than their mutual hatred: their irrational, unmastered, boundless sense of *fear*.

The primary animating impulse behind the trammelled conception of free speech is not, as the various censors would claim, social justice, or the dignity of marginalized groups, or the suppression of hateful speech, or the elimination of "fake news," or the impropriety of criticizing the President. "*'Tis too much proved that with devotion's visage / And pious action we do sugar*

³³⁶ *Id.* at 316-17.

³³⁷ Despicable as they may be, white nationalists generally hold a liberal view of free speech. One may, after Eliot, do "the right deed, for the wrong reason." T.S. ELIOT, *MURDER IN THE CATHEDRAL*, 44 (2014) (1935).

o'er / The devil himself."³³⁸ No, the primary animating impulse behind a fettered free speech is *fear*. The fear that one's most cherished beliefs will be held up to ridicule, the fear that one's ideas will not endure the rigours of open public scrutiny, the fear that is an unavoidable side-effect of participating in the fundamentally unpredictable and fractious regime of *parrhēsia*.³³⁹ Auden had them to the letter, years ago: "*We would rather be ruined than changed / We would rather die in our dread / Than climb the cross of the moment / And let our illusions die.*"³⁴⁰ As the distinguished political science professor and Dean of both Amherst College and Brown University Alexander Meiklejohn wrote in the aftermath of McCarthyism, "to be afraid of ideas, *any idea*, is to be *unfit for self-government.*"³⁴¹ Professor Meiklejohn's pithy but amaranthine admonishment is perhaps even more relevant today than it was when he issued it. In 1960, there was a national moral consensus that the previous decade's witch-hunt for communists had gone too far, and betrayed our fundamental values. Today, instead of regretfully looking back on an ignominious era with the recovered courage of our convictions, we instead stand teetering at the precipitous cusp of a new constitutional apostasy. How we comport ourselves will determine whether we are still fit for self-government, or whether the American project will finally end in failure.

If we who support the *parrhēsia* view are incapable of making our arguments articulately, if our skills prove insufficient to exposit our values convincingly, if liberalism is abandoned by thoughtful but quiescent people like a sinking ship; then we know what awaits us. The Alien and Sedition Acts, the Congressional Gag Rules of the 1830s, the Red Scare, jailing

³³⁸ SHAKESPEARE, *supra* note 319, at act III sc. i.

³³⁹ "Our doubts are traitors / And make us lose the good we oft might win / By fearing to attempt." SHAKESPEARE, *supra* note 300 at act I, sc. iv.

³⁴⁰ W.H. AUDEN, THE COMPLETE W.H. AUDEN, THE AGE OF ANXIETY, 437 (ed. Edward Mendelson, 1976) (poem 1947).

³⁴¹ Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government*, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, 28 (1960) (emphasis added).

conscientious objectors, Bull Connor with fire hoses; we would dishonour and diminish ourselves and our country by adding to that catalogue of crime a fresh treason against liberty.

We are offered a consequent choice: *censorship* animated by *fear*; or *freedom* animated by *courage* (recall Justice Brandeis: the Founders “believed liberty to be the secret of happiness and *courage* to be the secret of liberty”). Freedom that plays no favourites, freedom that respects no taboos, freedom that encompasses both limitless pursuit of truth and limitless potential for offence and criticism, freedom that is accepted on its own terms or not at all. *Freedom absolute; or the censor’s postmodern Bonfire of the Vanities?* The stark choice is laid out before us, as repudiation and the hemlock were laid out before Socrates. May the better angels of our nature prevail.