THE FREEDOM TO SPEAK:

A SOCIOLEGAL AND HISTORICAL ANALYSIS OF INFORMATION GATEKEEPING AND SPEECH CENSORSHIP FOR THE DIGITAL ERA

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DEDICATION

To my family—

who taught me that repairing the world is necessary and possible

through meaningful practices of speech and law

ABSTRACT

This dissertation offers a philosophical and historical exploration of speech and content moderation to an interdisciplinary readership of students, scholars, corporate executives, policymakers, and thought leaders. Through critical textual analysis, it analyzes the sociolegal and historical objectives of protecting freedoms of expression, speech, and press. It challenges deep-seated legal premises, including the American "marketplace of ideas" and contextualizes the U.S. speech tradition within a global sociolegal framework.

This inquiry is pressing. Scholarship has not thoroughly examined the implications of what I label American "speech imperialization" or "über-right fetishization:" an exceptionalist, typically latent, tendency to export neoliberal free-speech ideology internationally. Without this understanding of First Amendment deification, Americans, especially Silicon-Valley based communications companies, will be poorly positioned to handle international speech-related disputes when their speech-regulatory frameworks clash with international jurisprudence and philosophy.

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Vidi, nunc, visionem magnam quare non comburatur rubus.

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INTRODUCTION

Organization and Background

This scholarly work is structured on five thematic blocs, each presented as stand-alone chapters and explored methodologically through historical, legal, and critical analyses. This approach broadens readership and provides a nuanced-type critique typically reserved for multidisciplinary scholarship.

Chapter One: The Anatomy of Free Speech Theory

This chapter offers a grounded philosophical introduction to First Amendment orthodoxy. It foreshadows the origins of U.S. free-speech absolutism, discussing the historical basis for why the American position is neither theoretically inevitable nor doctrinally sound. Drawing on classical political theory, the chapter explores the positive and negative aspects of free expression: free speech as a positive democratic construct encourages civic participation and egalitarianism, and free speech as a negative right emancipates the body politic from government interference or suppressive action.

Whereas the American free-speech framers understood the historical and philosophical objectives of protecting free expression both as a negative right and as a positive responsibility, the former has overshadowed the latter. The focus on negative rights is due in part to marketplace neoliberalism becoming an indispensable tenant of American free-speech orthodoxy. But in the digital era, where the "new governors" of Internet communications can escape First Amendment scrutiny because speech-related disputes cannot sustain state-action requirements, new recommendations for regulating online expressive conduct require reevaluation of classical political frameworks.

If stakeholders are to understand digital communications or proffer normative suggestions regarding their regulation, they must study the policy-based democratic constructs of classical political theory that underlie American legal precedent. And while our free-speech framers understood these concepts profoundly and intuitively, their understandings have been lost due to a lack of critical philosophical reevaluation.

Chapter Two: The History of Free Speech

Derived from my article published in the *International Journal for the Semiotics of Law*, Chapter Two explores the ancient ideological origins of the American free-speech tradition, identifying the sociopolitical aims and objectives of speech regulation. It analyzes the two principal categories of free speech in classical antiquity: *isegoria*, the right to voice one's opinion, and *parrhesia*, the license to say what one pleases, often through provocative discourse, thus grounding modern free-speech epistemology and jurisprudential philosophy in a sociohistorical context. The European free-speech tradition, which views the individual as the locus of power, favors the former. The American tradition, which "depersonizes" civil liberties such that the *collective* becomes the locus of control, favors the latter.

I review the First Amendment *corpus juris* and discuss how a progression of incrementally absolute judicial holdings came to promote *parrhesia* at *isegoria*'s expense. While Athenian democracy recognized the need for provocative speech, certain institutional and social constraints, such as political character and fitness examinations, established standards of truth and accountability. The chapter suggests a need to reexamine free-speech understandings in the context of new-media proliferation and digital content regulation. The dominance of U.S.-based social media companies injects the American speech tradition into cultures with disparate free-speech philosophies and practices.

Chapter Three: The Americanization and Digitization of Free Speech

Chapter Three positions free speech at the intersection of globalization and law. Beginning with Johannes Gutenberg's rediscovery of printing with movable metal type in the 1440s, I survey the developmental history of "mass media" and the utopian origins of Internet-mediated communications. I discuss how cyber-idealism became inextricably linked with cyber-libertarianism by the early philosophical influences of Marshall McLuhan's "global village" and John Perry Barlow's "Declaration of the Independence of Cyberspace." Early Internet pioneers invoked the anti-colonial and anti-majoritarian policies of Thomas Jefferson, George Washington, James Madison, Alexis De Tocqueville, and John Stuart Mill to create an Internet that was void of hierarchical regulation where freedom and self-determination could flourish. And yet, libertarianism begot libertarianism. Barlow's noble rejection of authority created an authority of rejection—where discrete and vulnerable populations were unable to secure legal protection or redress in service to preserving a puritanical fiction of cyberspace as a utopia. The Internet (with a capital "I") was, and continues to be, the principal medium for U.S. policymakers to project American *parrhesia* onto international communities with disparate sociocultural standards for civility.

I review the history of Section 230 of the Communications Decency Act and its history of strong bipartisan support to immunize interactive computer service providers from civil liability. The present-day Internet, especially crowd-sourced and participatory websites that define Web 2.0, could not have developed absent Section 230's abrogation of distributor liability. But the Internet embodied neither the Rawlsian original position nor Lockean state of Nature idealized by 1990s American culture. Online access was limited demographically and psychographically to people with requisite time and financial resources. Early users did not worry about protecting

dependent and vulnerable populations because most of them were not members of communities needing this protection. The Internet, with its relative anonymity and pseudonymity, facilitated hate-filled and inflammatory rhetoric, often directed at these minority groups, because people felt empowered to defy social norms.

If the Internet founders did not cultivate a climate of American neoliberalism, codified into law by Section 230, online interactions would have been mediated by a Hobbesian social contract. The natural tendency of citizens (or here, netizens) is not to be agents of chaos; it is to be agents of the public good. "The state of Nature," said John Locke, "has a law of Nature to govern it." Online citizenship is no exception. Digital networks of social production, like Wikipedia, naturally develop systems of collective governance that maximize individual and collective learning. If digital users and organizations were allowed to create these types of social contracts, a natural cyber-Leviathan would have emerged, overseen by nation-state positive law.

Chapter Four: The Reevaluation of Free Speech

Considering the classical political objectives of protecting free speech outlined in Chapter Two, and the extent to which those frames have been forgotten due to new-media proliferation discussed in Chapter Three, Chapter Four posits a reconceptualization of free speech for the digital era. The past hundred years of American jurisprudence are valuable to the extent they solidified the negative freedom-from-government attitude into the cultural conscience. But they are a hindrance to the extent they forestalled a positive respect for human dignity. The Supreme Court, as recently as 2011 in *Snyder v. Phelps*, has made clear that America's toleration for racist invective is intractably suffused within constitutional jurisprudence. Yet, participatory media—which operate as new public fora outside state-action requirements—offer the ideal vehicle for

reintroducing positive attributes of democratic maintenance back into American free-speech philosophy.

I begin by refuting the oft-quoted and -misattributed *ipse dixit* "I disagree with what you say, but I will defend to the death your right to say it." Overweening liberal confidence, combined with a neoliberal, counter-majoritarian, free-market mythos, has acculturated American society into believing that hate speech is a necessary evil of upholding freedom of speech. Tolerating hate speech breaches the social contract and undermines societal commitments to inclusivity and human dignity by corroding the basic social standing of citizens' self-worth and acceptance. I discuss Jeremy Waldron's philosophy that human dignity is not an abstract Kantian aura; it is an indistinguishable part of equal protection under law that every liberal democracy takes proactive measures to safeguard. European (and Canadian-Antipodean) jurisprudence gives the state dominion over speech regulation. American jurisprudence, meanwhile, relies exclusively upon the self-enforcement and -regulation of civil society. Given the private sector's negative latitude to prescribe normative standards of cyber conduct, the new governors of Internet-mediated communications ought to rethink the American regulatory paradigm in ways that rebalance positive aspects of free speech.

Chapter Five: The Future of Free Speech

Chapter Five offers normative directions for the future of free speech that prioritize human dignity and equal protection. I begin by reacknowledging law's humanistic standing reflective of prevailing sociopolitical attitudes. Those attitudes related to freedom of speech are shifting among younger generations who increasingly favor imposing limitations on offensive speech directed at minority populations. While shifting civility standards may disrupt First Amendment orthodoxy, they indicate successful pedagogical outcomes and a collective approach

toward John Dewey's Great Society. Through public education and other non-coercive state functions, citizens are being made to reevaluate critically the democratic purposes of free expression. They are in a process of demythologization, or what Mary Anne Franks calls "de-constitutionalization:" divesting mythical, sentimental, or otherwise romantic associations from black-letter law. This process becomes critically important given the social and judicial overreliance on the marketplace-of-ideas analogy. I propose a bifurcated approach to speech and content management: legal suggestions aimed at courts and legislatures and extra-legal suggestions aimed at civil society and social media organizations.

Legally, it is imprudent and dangerous to (re)enact federal hate-speech regulations. Experience going as far back as the Sedition Act of 1788 shows a clear pattern of political actors using criminal libel to suppress unpopular minority viewpoints. The same argument stands at the state level. Twenty-four states and the U.S. Virgin Islands have codified criminal defamation provisions, with penalties ranging from fines to imprisonment. While there is scholarly disagreement about whether these laws violate the First Amendment, there is consensus that they disproportionately target people who criticize public officials or government employees. Civil actions at defamation, on the other hand, allay these fears because government actors are not put in positions to silence unpopular expression. Thus, public policy favors tort action to redress the harms of hate speech. I will argue that this policy should encompass (1) expanding defamation to include statements made against groups and their fixed identity characteristics and (2) expanding intentional infliction of emotional distress to recognize how hate speech satisfies the element of extreme and outrageous conduct. I also suggest an amendment to Section 230 of the Communications Decency Act—not to impose civil liability on interactive computer services but

to require public transparency on how corporations identify and remove hate speech and misinformation on their platforms.

Extra-legally, civil society and media organizations have duties to reject marketplace neoliberalism and adopt civility standards that align with underlying values and moral objectives. Whereas the state has a moral and ethical duty to safeguard citizens' freedom of conscience, corporations, outside explicit self-decrees, owe no such duty to their users. If social media were to safeguard free speech to an extent tantamount to U.S. law (thereby protecting hate speech), users would protest, the brand would be damaged, and shareholders would demand accountability. I argue that participatory media should adopt a bottom-up, community-centered regulatory framework when policing speech on their platforms. This decentralized-power model, most famously embraced by Wikipedia, should be adopted by social networks because it properly situates these media at the intersection of law and economics, empowering individual users through an ability to ascend a cyber-social hierarchy based on the meaningfulness and accuracy of users' content contributions.

Taken together, these five chapters transcend a singular disciplinary focus, allowing the dissertation to offer normative suggestions upon which scholars of history, social science, new media, technology, communications, and law can build.

CHAPTER ONE: THE ANATOMY OF FREE SPEECH THEORY

Proposing normative changes challenging institutional-legal doctrine requires sufficient theoretical grounding. Advocating structural change absent a thorough philosophical analysis may seem unfounded or unjustified. Because law and policy are humanistic constructs, they must be approached synchronically *and* diachronically by way of establishing a thorough intellectual history.

The ideological origins of free speech, on which our modern law is built, require renewed scrutiny in a digital era where non-state corporate actors govern individual expression. Twentieth-century libertarian justifications for speech protections—which pit individual rights to express oneself freely against government powers to promote equal protection—may no longer apply when private corporate persons moderate the digital content of private natural persons.[1] When the "new governors"[2] of Internet-mediated communications escape First Amendment scrutiny merely because speech-related disputes cannot meet state-action requirements, new recommendations for regulating online expressive conduct require reevaluation of classical political frameworks. This chapter brings into focus the historical and intellectual justifications for protecting individual civil liberty.

Theoretical Grounding: Positive and Negative Aspects of Freedom

Lockean liberalism frames free speech through negative and positive legal perspectives.[3] In the traditional American jurisprudential perspective, free expression as a negative right precludes state actors from content-based regulations. An absence of state-sanctioned censorship, to a certain neoliberal extent, promotes freedom of information and thought. Free expression as a positive responsibility obligates the speaker to act in accordance with underlying social morals

and values. From antiquity to the Atlantic Revolutions, however, democratic freedom was conceptualized positively, *not* negatively.

Negative conceptions of freedom—i.e., limited government interference by way of written constitutions, bills of rights, and separations of power—only became popular in the late eighteenth and early nineteenth centuries.[4] Liberal notions of free speech since ancient Athens equated freedom with a democratic egalitarian responsibility to participate in self-governance. Conceptually, ancient Athenians had no need to "check" state power because there was no distinction between the *demos*, or "the people" (adult male citizens) and "the government" (etymologically derived from Latin, not Greek).[5] "Democracy" or *demos/kratia* literally translates to "people rule" or "rule by the people."[6] The people themselves, not their representatives, passed laws and directed foreign policy, including deciding whether to conduct war, kill women and children of colonies that resisted Athenian rule, or recall troops.[7] Administrative officers were not elected; they were chosen by lot. Any philosophical need to separate a theoretically maleficent leviathan from the people was illusory because the latter wholly constituted the former.

Freedom throughout most of recorded history emphasized equality over rights, participation over passivity. Liberty was understood as an egalitarian responsibility to engage with one's democratic duties, not as limited government interference. But for sociohistorical reasons rooted in colonialism and libertarianism, namely, growing sentiments of individualism and revolutionism accompanying Britain's political suppression of the Thirteen Colonies, the American public conscience began to promote negative liberty at positive liberty's expense. The negative understanding of a citizen's free speech *rights* eclipsed the positive understanding of a person's free speech *responsibilities*. And while those who created and expounded the American

justifications for protecting free expression doubtless understood these positive and negative legal taxonomies, the confluence of *stare decisis* and jurisprudential marketization (or what Michel Foucault calls "market veridiction"[8]) has carried the inherently negative marketplace-of-ideas metaphor to a point that proves too much and is beyond expert debate. I explicate these concepts fully in Chapter Four.

In the digital era, where dis- and misinformation have eclipsed governmental censorship as the predominate threat to democratic self-governance, civil society must reexamine the philosophical objectives of free expression. We should not presume marketplace infallibility or *laissez-faire* faultlessness. Industrial, academic, and political leaders should rebalance free-speech objectives through historical, international, and otherwise holistic lenses. This reevaluation becomes critical in an increasingly globalized and digitized speech marketplace. It is often un(der)performed, however, because judicial adherence to legal precedent has become the norm.

Lawyers, judges, and corporate executives are concerned with the *current state* of the law on a particular issue, not with what the law *should be*. But in our current social media technocracy, where First Amendment doctrine and marketplace veridiction may no longer apply, critical normative analysis of free-speech jurisprudence becomes necessary—especially because marketplace neoliberalism was not a constitutionally foregone conclusion, and the original American free-speech theorists engaged regularly in this type of classical theoretical explication. Whereas an invisible-hand approach[9] to regulating expression may well function appropriately in the context of government *versus* the people, it cannot withstand the paradigm shift to (corporate) people *versus* (natural) people. In other words, new media policy makers should

return to the classical understandings of free speech, both positive and negative, that underlie American legal philosophy and jurisprudential thought to better understand content moderation.

Classical Political Theory Underlies Current Free Speech Case Law and Jurisprudence

Ancient political philosophy is not *antiquated* political philosophy. The most influential American free-speech theorists understood the classical democratic objectives of promoting and protecting free speech and incorporated those understandings into their judicial decision-making processes. They understood the inherent dangers of government attempts to regulate citizen speech: the possibility that political dissent could be un- or intentionally suppressed. Judges and jurists created a marketplace framework to limit government interference, facilitating the right to speak and the right to be heard.

But in the digital era, private, not government, speech suppression has become commonplace. Social media companies are not government actors, so their users cannot meritoriously assert First Amendment causes of action. Yet, companies routinely write policies based in First Amendment marketplace philosophy because upper-level administrators, many of whom have American law degrees, have carried their neoliberal enculturation to private corporate settings. Here, I argue, the marketplace of ideas, as a matter of policy, should not and cannot apply in private corporate settings because it precludes the body politic (i.e., natural and corporate persons) from engaging in self-censorship practices necessary to promote the discovery of objective truth and to standardize normative sociopolitical values. This argument is fully developed in Chapters Four and Five.

A Return to Liberal Democratic Notions of Free Speech?

Whereas the American free-speech framers understood the historical objectives of protecting free expression both as a negative right and a positive responsibility, the former has

overshadowed the latter due to marketplace neoliberalism becoming an indispensable tenant of American free-speech orthodoxy. If technocratic actors are to craft values-based digital censorship policies based in proffered freedoms of expression, information, opportunity, or community[10]—or based in less-grandiose policies like Google's now-defunct "Don't Be Evil"[11]—they cannot rely solely on First Amendment principles because of issues related to state action and hate-speech toleration. They must return to the policy-based democratic constructs of classical political theory that underlie American legal precedent. But whereas the free-speech framers understood these concepts profoundly and intuitively, their understandings have been lost due to a lack of critical philosophical reevaluation.

Take, for example, Justice Louis Dembitz Brandeis, and the influence his classical education had on his watershed concurrence in *Whitney v. California* (1927):

> Those 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.[12]

Brandeis modeled this concurrence on Pericles's "Funeral Oration," and took the line "they believed liberty to be the secret of happiness and courage to be the secret of liberty" directly from the oration itself.[13] Brandeis likely acquired this perspective through his reading of Sir Alfred Eckhard Zimmern's *The Greek Commonwealth*[14]—which he not only quoted throughout his life, but goaded all members of his extended family into reading.[15] Additionally, Brandeis's footnoted reference to Thomas Jefferson's First Inaugural Address,[16] and by extension the Athenian justifications for protecting freedom of speech, demonstrate the justice's "romantic

view of the Greek (or Athenian) polis"[17] and the esteem in which he held fifth-century Athenian culture.[18]

Justice Oliver Wendell Holmes, Jr. also had more than a passing interest in classical studies. His mastery of Greek and Latin, and an unusual fascination with esoteric and antiquated Roman law, substantially shaped his positivist and scientific understandings of American free-speech philosophy and judicature.[19] Take, for example, Holmes's dissent in *Abrams v. United States* (1919) where he first introduced the marketplace-of-ideas metaphor for justifying his proto-libertarian rationales for protecting freedom of speech.

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Holmes's marketplace theory, the prevailing justification for present-day *laissez-faire* speech regulation, finds its roots in ancient Athenian public discourse. The Athenian *agora* (Greek for marketplace) was the central meeting place for exchanging goods and ideas. To a certain extent, the *agora* functioned as a type of public assembly, where hawkers, criers, buyers, and sellers could debate each other without the interference of abstract, truth-generating invisible hands.[20] Even so, there were certain social and institutional constraints (to be more fully discussed in Chapter Two), such as sociopolitical character examinations, serving to promote liberal democracy, modulating the extent to which expression was truly unbridled in ancient Greece.[21]

Justices Brandeis and Holmes, despite disparate socioeconomic and religious upbringings, contextualized their respective libertarian and progressive jurisprudential inclinations through classical political frames. So too did the most prominent free-speech

explicators. Zechariah Chafee grounded his First Amendment theory in classical political philosophy and transatlantic jurisprudence in his seminal 1920 book *Freedom of Speech*, writing that

> the legal meaning of freedom of speech cannot properly be determined without a knowledge of the political and philosophical basis of such freedom. Four writings on this problem may be mentioned as invaluable: Plato's *Apology of Socrates;* Milton's *Areopagitica;* the second chapter of Mill, *On Liberty;* and Walter Bagehot's essay, "The Metaphysical Basis of Toleration."[22]

Alexander Meiklejohn, who also cites Plato throughout his influential treatise *Free Speech and Its Relation to Self-Government,*[23] was the paradigmatic champion of classical studies. Best known as president of Amherst College from 1912 to 1923, Meiklejohn was forced to resign, in part, due to his innovative ideas regarding classical curricular programming and his general opposition to intercollegiate athletics.[24] In his inaugural address as president of Amherst, Meiklejohn advocated for a "radical reversal" of the college curriculum:

> I should like to see every freshman at once plunged into the problems of philosophy, into the difficulties and perplexities about our institutions, into the scientific accounts of the world especially as they bear on human life, into the portrayals of human experience which are given by the masters of literature…Let him once feel the problems of the present, and his historical studies will become significant; let him know what other men have discovered and thought about his problems, and he will be ready to deal with them himself.[25]

Meiklejohn's supposition that a liberal education was the *sine qua non* of understanding human existence was his catalyst for creating the Experimental College at the University of Wisconsin in 1928. Meiklejohn and his fellow UW "Advisers" (nominally distinct from "professors"), succeeded, for a short while, in their radical reformation of university education. They abrogated the separation between college life and academic study. Advisers placed all students in the same dormitory, alongside their university offices and a small library.[26] They abolished traditional examinations and didactic lectures, favoring the Oxford/Cambridge style of

small-group conferences so that students could be "wholly freed from that external influence" of grade assignments and focus on the "essential quality" of the instructor-student relationship, i.e., impersonal and dispassionate criticism.[27] Students were not assessed on their capacity to recall facts or explain concepts; they were instead evaluated on their analytical abilities to justify hypothetical propositions or to create new ideas or original work.

Although it lasted only four years, the Experimental College emphasized the study of ancient texts, particularly Greek—not because a classical education is an end in itself but because of its ability to inform the present. That is why after an intensive first-year study of Greek civilization, students were simultaneously assigned ancient and modern texts. Meiklejohn said that faculty and students "shall of course be interested in discovering whether the experiences of Athens and the suggestions of Plato throw any light on our contemporary situation."[28] In developing his "Athens-American Curriculum," Meiklejohn positioned classical political theory at the intersection of history and practice, believing that through a cultivation of democratic Athenian thought, the modern American student could understand sociopolitical issues endemic to any democratic society—ancient or modern.[29] He used this pedagogical theory to substantially shape his First Amendment philosophy, writing in his seminal treatise *Free Speech and Its Relation to Self-Government:*

> Present-day Americans who wish to understand the meaning, the human intention, expressed by the First Amendment, would do well to read and to ponder again Plato's *Apology*, written in Athens twenty-four centuries ago. It may well be argued that if the Apology had not been written—by Plato or by someone else—the First Amendment would not have been written. The relation here is one of trunk and branch.[30]

Only through critical (read: classical) self-education in the ways of freedom, Meiklejohn said, can "the positive purpose to which the negative words of the First Amendment g[i]ve a constitutional expression."[31]

Brandeis, Holmes, Chafee, and Meiklejohn, by way of catholic liberal educational upbringings, contextualized their ideological inclinations, whether neoclassical, neoliberal, ordoliberal, or progressive, through interdisciplinary philosophical taxonomies. They understood liberty through historically egalitarian frames and arrived at their philosophical conclusions dialectically. While socioeconomic predispositions doubtless influenced their jurisprudential thought, they understood the sociohistorical need to balance negative individual personal liberty against positive collective social protection. In other words, they knew that Fourteenth Amendment equal protection (akin to European human dignity) needed to counterbalance First Amendment freedom of expression. Otherwise, individuals, or their societies, would lose sight of the purposes for balancing legal negativist and positivist frames, pursuing one at the other's expense. It is no coincidence that the axiom "the right to swing my fist ends where the other man's nose begins" is usually attributed to Justice Holmes.[32]

But because of historical factors related to U.S. government speech suppression during periods of armed conflict, a libertarian preference for negative aspects of individual freedom superseded a liberal preference for positive aspects of democratic responsibility—despite these thinkers' abilities to conceptualize freedom as both. Freedom became accepted as the absence of state power and not as the presence of political self-efficacy. Freedom became understood as the "right to be let alone"[33] and not as the duty to participate in democratic maintenance or the formation of public opinion.[34] The negative understanding of free speech, as protection *from* a hypothetically tyrannical government, superseded the positive responsibility to *act in accordance* with the public good. And after a century of trumpeting negative free-speech justifications, the Supreme Court has deified neoliberal individualism to a point that approaches constitutional fundamentalism and arguable fanaticism.[35] Civil liberties, which negatively emphasize

individual rights and the need to protect them from government interference, have yielded to civil rights, which positively emphasize group rights and equal protection.[36] This imbalance, particularly with respect to First and Second Amendment civil libertarianism, flies in the face of democratic principles like social equality and political egalitarianism such that it has become antidemocratic.[37]

This dissertation does not argue for an erasure of legal or jurisprudential individualism in favor of social collectivism. It does, however, call for careful reexamination and clarification of American individualism in ways that promote participatory democracy and social utility. This appeal approaches John Dewey's philosophy in *Individualism Old and New*.[38] Judicial libertarians and neoconservatives, and their overuse of marketplace metaphors, have "impersonalized," using Dewey's terminology, commitments to collective self-determination such that democratic guarantees of liberty, equality, and inclusion are now subordinate to free market capitalism. Freedom is not tantamount to *laissez-faire* capitalism. The marketization of humanistic constructs jeopardizes legal equality because it treats the relationship between human rights and individual liberties as zero sum. I explicate this zero-sum relationship through Chapter Four's discussion of supply-and-demand economics and Chapter Five's discussion of corporate personhood. There should not be winners and losers, in a Keynesian sense, when it comes to equal protection under law. And yet, that is the trend.

Sociolegal economization has placed individual rights, particularly those within the First and Second Amendments, above Fourteenth Amendment equal protection, presuming a universality of market domains and market actors. But constitutional rights and civil liberties should not be economized because the process normalizes inequality. A democratic jurisprudence disproportionally favoring neoliberal philosophy features winners and losers at the

expense of equal treatment or equal protection.[39] This flavor of neoliberalism bastardizes liberal individualism, in a negative-liberty sense, diminishing the idea of citizenship and the personal duty to concern oneself with *res publica*. Put simply, the marketization of jurisprudence has created a reduced and negative individualism that incorrectly equates political autonomy with freedom. The state, including the judiciary, becomes subordinate to, and controlled by, an allegedly free market.

Free Speech Neoliberal Marketization Has Proved Too Much, Necessitating a Reevaluation of the Marketplace of Ideas

Positive conceptions of freedom have been replaced by negative understandings that are, by all counts, antidemocratic, as understood through a neoclassical taxonomy.[40] Classical-liberal heterodoxy has given way to market-based neoliberal orthodoxy. When the U.S. Supreme Court decided *Abrams* in 1919, the marketplace of ideas was merely a theoretical metaphor with no binding authority. But in the hundred years since its conception, the concept has become a doctrinal, and irrevocable, element of First Amendment jurisprudence and free-speech advocacy.

The marketplace of ideas—introduced in John Milton's *Areopagitica*,[41] explicated in John Stuart Mill's *On Liberty*,[42] and popularized by Justice Oliver Wendell Holmes Jr.'s dissent in *Abrams v. United States*[43]—suggests that objective truth is discovered through an intense competition of ideas. The best test of truth, said Justice Holmes, "is the power of the thought to get itself accepted in the competition of the market."[44] All ideas, even the odious ones, must be allowed to compete with one another so that the best among them may emerge. But the sticks-and-stones notion that expressive acts cannot cause real harm has been seriously questioned. Grounded critical scholarship from free-speech theorists Mari Matsuda, Charles Lawrence, Richard Delgado, and Kimberlè Crenshaw challenges neoliberal First Amendment orthodoxy

and the seemingly arbitrary exemption of certain categories from otherwise robust constitutional free-speech guarantees.[45]

American and British common law traditions have long understood, and redressed, harms generated by speech and other expressive acts. Defamation, privacy invasion, fraud, incitement, and subversion demonstrate clear jurisprudential demarcative tendencies to set aside legal protections for what Matsuda labels "assaultive speech."[46] Transatlantic jurisprudence has traditionally recognized the social and pecuniary repercussions of harmful speech and the need to protect a person's reputation, solitude, private facts, or misappropriation of name or likeness. Even speech that cannot sustain the requisite legal elements for tort action, e.g., bullying, leads to individual psychological damages and diminished corporate productivity.[47] But for reasons rooted in the marketplace-of-ideas theory and neoliberal First Amendment orthodoxy, American society, including its judicial system, does not extend those same protections to racist or sexist verbal assaults. To quote Chief Justice John Roberts's majority opinion in *Snyder v. Phelps*, "[a]s a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[48]

First Amendment jurisprudence, in which the marketplace metaphor has become a doctrinal element, holds that free-speech libertarianism is the *sine qua non* of democratic self-governance. This traditional approach insists that constitutional law cannot be upheld absent a categorical defense of individual personal liberty, including the use of extreme speech. This quasi-absolutist approach to speech protection, embraced both by the legal academy and prominent civil rights organizations,[49] is quickly losing traction among a new generation that no longer accepts the marketplace premise on which the theory is based.[50] Near-absolute freedom of speech ensures a full ideological marketplace by encouraging individual introspection and self-

expression.[51] Under this theory, protecting speech-market capitalism—even if that means allowing speakers to introduce hateful content destructive to individual self-actualization—leads to better democratic governance because the marketplace, not the government, sets the agenda for public discourse.

A new-wave approach, however, has emerged in the social-media era where disinformation has eclipsed censorship as the predominate threat to democratic self-governance. These new thinkers, like the traditionalists, reject the *government's* attempts to regulate free speech. Self-interested political actors will invariably use hate-speech legislation to suppress unpopular opinions. But unlike their libertarian progenitors, the new thinkers question, or flatly repudiate, the *marketplace's* ability to regulate extreme speech. In other words, they believe that the marketplace of ideas is broken.[52] Digital misinformation, under the new view, creates a market failure such that the marketplace-of-ideas analogy no longer applies. The marketplace approach is problematic because (1) an ideal Platonic Form does not exist; (2) access and participation are inequitable and financially determinative; and (3) a deluge of digital disinformation, combined with a dearth of new media editors, makes it difficult for members of the public to discern the truth. I address each of these problems in turn.

The Marketplace of Ideas Presumes Ideological Validity

It is "common ground" under First Amendment constitutional doctrine that "there is no such thing as a false idea."[53] The marketplace of ideas presupposes an equality of status such that no idea, regardless of absurdity, can be false.[54] This argument holds that all ideas—notwithstanding their tendencies to wound,[55] to undermine the public good,[56] or to pit First Amendment liberty against Fourteenth Amendment equal protection[57]—must be allowed to compete for public acceptance in an open marketplace. The rationale for this unconditional,

absolutist approach turns on the public's fundamental distrust of government actors to moderate speech dispassionately. Furthermore, even the most outrageous rhetoric may contain droplets of truth to be expounded. Thus, Holocaust denial/revisionism, rigged/stolen elections, 9/11 trutherism, Obama birtherism, and other demonstrably false notions are allowed to compete on equal footing because the truth of the matter is best determined by the marketplace.

The value of invisible-hand (non)regulation, according to Meiklejohn[58] and Chafee,[59] is in its ability to promote collective self-determination and democratic self-governance. Free speech fosters participatory democracy by allowing the public to raise the issues and set the agenda for expert debate. This is a fundamental tenant of Dewey's *The Public and Its Problems* (1927): "The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied."[60] Because "the government," which is constitutionally subservient to "the people," must entertain policy issues identified by the public, U.S. policy makers, including Supreme Court justices, have adopted an increasingly libertarian/light-touch model of speech regulation to encourage public debate. But this is perhaps the *only* context in which this type of *laissez-faire* regulation occurs.

Outside the marketplace metaphor, speech is tolerated only to the extent it adheres to, and promotes, objectives and values underlying specific institutions. Take the following examples: free speech in the medical community is tolerated to the extent it facilitates competent, compassionate, and respectful medical care. Free speech in the legal community is tolerated to the extent it maintains the respect due courts of justice. Free speech in the academic community is tolerated to the extent it facilitates knowledge production and dissemination. Thus, if speakers deviate substantially from axiological standards of the profession—e.g., doctors giving faulty diagnoses, attorneys giving bad advice, or professors teaching debunked content outside their

discipline's standards—they are de-licensed, disbarred, or not tenured. Even so, the Supreme Court's marketplace theory has begun to seep into professions where libertarian First-Amendment orthodoxy should not be tolerated. A recent National Public Radio investigation looked at censorship records for sixteen doctors with robust track records for promoting medical misinformation, finding all but one had licenses in good standing.[61]

Contribution

This dissertation explores how common law *stare decisis*—and the scientific, deductive reasoning which American legal education has come to adopt—precludes substantive critical reevaluation of institutionalized legal theories, namely, the marketplace of ideas. The judiciary cannot, and should not, be a space for socio-normative arguments based in philosophy because metaphysical discourse undermines predictability and certainty of law. But unlike the judiciary, *the academy* is a place for epistemological reevaluation. The purpose of philosophical inquiry, to paraphrase Dewey, is to analyze critically premises that are uncritically assumed in practice.[62] By discussing the past century of increasingly absolutist case law, and the classical origins from which the capitalist justifications come, this dissertation will show how the marketplace rationale has been slowly decontextualized and carried to a jurisprudential conclusion that proves too much—allowing individual expressive rights to overrun the coequal right to human dignity. But to understand what this dissertation asserts, it is important to understand what it does not.

This work should not be read as an appeal to legal neoclassicalism, against which Thomas Jefferson himself warned.[63] The classical understanding that only certain individuals possess the moral and intellectual virtue to determine the common good is profoundly misguided—namely, because of inequitable public access to institutions, particularly education, based on certain immutable characteristics. The marketplace of ideas has increased general civic

engagement such that political participation is no longer reserved for a socioeconomically select few. Putatively, all persons irrespective of age, gender, race, citizenship status, land ownership, and education have the right (and for Aristotle, the duty[64]) to participate in political discourse. But as Alcuin of York told Emperor Charlemagne in 798, *vox populi* is not *vox Dei*:[65] "And those people should not be listened to who keep saying the voice of the people is the voice of God, since the riotousness of the crowd is always very close to madness."[66] American popular sovereignty is valuable in its ability to promote sociopolitical equity and legal equality but destructive in its presumption that all citizens are politically competent. This is Alexis de Tocqueville's key argument in *Democracy in America*.[67] Majoritarianism is not necessarily aligned with the public good. Public opinion, sometimes perverted by marketplace failures, has the capacity to become omnipotent, tyrannizing unpopular minorities and marginalizing certain individuals.

Additionally, this work should not be read as a disestablishmentarian screed against First Amendment jurisprudence. I fear criticisms from civil libertarians who may view this dissertation as "First Amendment revisionism" or "thought-police advocacy." The value of free and shameless political discourse cannot be overstated. But the sociopolitical utility ascribed to protecting hate speech does not stand against equal protection under law. Criticizing powerful institutions subordinate to the polity is not the same as racist invectives aimed at society's vulnerable communities. Put simply, First Amendment absolutism flies in the face of liberty and equality. This argument is fully developed in Chapter Five.

In sum, the marketplace of ideas is valuable in its capacity to preclude self-interested political actors from censoring unpopular viewpoints. But it is flawed in its capacity to bestow epistemological equality among all ideas, especially those that are assultative and destructive to

equal protection and democratic maintenance. The marketplace concept has become so ingrained in the American *volksgeist* as to forestall substantive critical reevaluation of its philosophical premises, particularly related to hate speech. Yet, the presence and proliferation of new media offer the ideal time for this re-interpretation. Private entities not bound by state action requirements, be they institutions, professions, corporations, or civil society organizations, have duties partially to reject the marketplace metaphor and preclude harmful ideological discourse. The public generally, and the cognoscenti specifically, have moral and philosophical imperatives, in a Kantian sense, to make epistemological judgments and separate justified belief from unjustified opinion.

In this dissertation, I contextualize free speech in its liberal tradition of democratic self-governance and argue against equating freedom with restraints on state power. I recognize freedom of expression as a positive responsibility, not just as a negative neoliberal right to be free from government suppressive action. I analyze law and policy humanistically and through an Aristotelian doctrinal mean.[68] I scrutinize free-speech absolutism as an ahistorical construct un- and intentionally weaponized to weaken the sole constitutional protection against hatred and bigotry: the Fourteenth Amendment's guarantee of equal protection under law. Through this legal meditation, I invite readers to envision a more perfect Union—one that banishes hatred and bigotry; safeguards our democratic ideals and free institutions; and promotes peace and security, happiness and prosperity, and justice and freedom for all. I invite you to join me on this quest.

Notes

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[2] Kate Klonick, "The New Governors: The People, Rules, and Processes Governing Online Speech," *Harvard Law Review*, no. 6 (2018): 1598–1670, https://heinonline.org/HOL/P?h=hein.journals/hlr131&i=1626.

[3] *See* John Locke, *Two Treatises of Government and a Letter Concerning Toleration*, ed. Ian Shapiro (New Haven: Yale University Press, 2003), 136, http://ebookcentral.proquest.com/lib/ku/detail.action?docID=3420119.

[4] Annelien De Dijn, *Freedom: An Unruly History* (Harvard University Press, 2020), 19.

[5] Arlene W. Saxonhouse, *Free Speech and Democracy in Ancient Athens* (Cambridge University Press, 2005), 29.

[6] Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Princeton University Press, 2015), 19.

[7] Saxonhouse, *Free Speech and Democracy in Ancient Athens*, 23.

[8] Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, ed. Michel Senellart, trans. Graham Burchell (Springer, 2008).

[9] *See* Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Edinburgh: Thomas Nelson, 1843), 184.

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[11] Tanya Basu, "Google Parent Company Alphabet Drops 'Don't Be Evil' Motto," *Time*, October 4, 2015, https://time.com/4060575/alphabet-google-dont-be-evil/.

[12] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[13] David L. Faigman, *Laboratory of Justice: The Supreme Court's 200-Year Struggle to Integrate Science and the Law* (Macmillan, 2004), 104.

[14] *The Greek Commonwealth*, First Edition (Clarendon Press, 1911).

[15] Philippa Strum, *Louis D. Brandeis: Justice for the People* (Harvard University Press, 1984), 237.

[16] Whitney v. California, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J., concurring) ("Compare Thomas Jefferson: 'We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.' Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address: 'If there be any among us who would wish to dissolve this union or 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.'").

[17] Robert Cover, "Nomos and Narrative," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat, New edition (Ann Arbor: University of Michigan Press, 1995), 149.

[18] Strum, *Louis D. Brandeis*, 237; Saxonhouse, *Free Speech and Democracy in Ancient Athens*, 12–13.
[19] Michael H. Hoffheimer, "The Early Critical and Philosophical Writings of Justice Holmes," *Boston College Law Review* 30, no. 5 (1989 1988): 1226, https://heinonline.org/HOL/P?h=hein.journals/bclr30&i=1227.
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[23] *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948).
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[25] Alexander Meiklejohn, *Freedom and the College* (Century, 1923), 188.
[26] Alexander Meiklejohn, *The Experimental College* (Univ of Wisconsin Press, 2001), xa.
[27] Meiklejohn, 131.
[28] Meiklejohn, 376.
[29] Meiklejohn, 74.
[30] Meiklejohn, *Free Speech*, 20.
[31] Alexander Meiklejohn, "The First Amendment Is an Absolute," *Supreme Court Review*, 1961, 263, https://heinonline.org/HOL/P?h=hein.journals/suprev1961&i=249.
[32] Jessica Malekos Smith, "Swinging a Fist in Cyberspace," *HLRe: Off the Record* 9 (2018): 1, https://heinonline.org/HOL/P?h=hein.journals/hlreoffrec9&i=1.
[33] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
[34] Robert Post, "Participatory Democracy and Free Speech," *Virginia Law Review* 97, no. 3 (2011): 482, https://heinonline.org/HOL/P?h=hein.journals/valr97&i=487; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (John Wiley & Sons, 2015), 472–77, 486–90.
[35] Mary Anne Franks, *The Cult of the Constitution* (Stanford University Press, 2019), 10–11.
[36] Franks, 12.
[3737] Dijn, *Freedom*.
[38] John Dewey, *Individualism Old and New* (Prometheus Books, 2009).
[39] Brown, *Undoing the Demos*, 38.
[40] Dijn, *Freedom*.
[41] John Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England* (Grolier Club, 1890).
[42] John Stuart Mill, *On Liberty* (J. W. Parker and Son, 1859).
[43] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[44] *Id.*

[45] Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, And The First Amendment* (Routledge, 2018).
[46] Matsuda et al.
[47] Harrison M. Rosenthal and Genelle I. Belmas, "(Non)Existent Laws of Workplace Cyberbullying: Limitations of Legal Redress in a Digitized Market," in *Handbook of Research on Cyberbullying and Online Harassment in the Workplace* (IGI Global, 2021), 425–46, https://doi.org/10.4018/978-1-7998-4912-4.ch020.
[48] Snyder v. Phelps, 562 U.S. 443, 460-61 (2011) (noting that "[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro [Baptist Church] from tort liability for its picketing in this case.").
[49] Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press, 2018); David Goldberger, "The Skokie Case: How I Came to Represent the Free Speech Rights of Nazis," American Civil Liberties Union, March 2, 2020, https://www.aclu.org/issues/free-speech/rights-protesters/skokie-case-how-i-came-represent-free-speech-rights-nazis.
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[51] Meiklejohn, "The First Amendment Is an Absolute."
[52] Dawn Carla Nunziato, "The Marketplace of Ideas Online," *Notre Dame Law Review* 94, no. 4 (2019): 1519–84, https://heinonline.org/HOL/P?h=hein.journals/tndl94&i=1567.
[53] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). For context, the relevant portion of the Court's opinion, authored by Justice Lewis F. Powell, Jr., reads as follows with internal citations omitted: "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'
[54] Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, *Democracy, Expertise, and Academic Freedom* (Yale University Press, 2012), https://doi.org/10.12987/9780300148640; Robert C. Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence," in *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press, 2018), 153–74, https://doi.org/10.7208/9780226484679-007.
[55] Matsuda et al., *Words That Wound*.
[56] Jeremy Waldron, *The Harm in Hate Speech*, *The Harm in Hate Speech* (Cambridge, Massachusetts: Harvard University Press, 2012), https://doi.org/10.4159/harvard.9780674065086.

[57] Owen Fiss, *The Irony of Free Speech* (Cambridge, Massachusetts: Harvard University Press, 2009).
[58] Meiklejohn, *Free Speech*.
[59] Chafee, *Freedom of Speech*.
[60] John Dewey, *The Public and Its Problems: An Essay in Political Inquiry* (Ohio University Press, 2016), 224.
[61] Geoff Brumfiel, "This Doctor Spread False Information about COVID. She Still Kept Her Medical License," *National Public Radio*, September 14, 2021, sec. Untangling Disinformation, https://www.npr.org/sections/health-shots/2021/09/14/1035915598/doctors-covid-misinformation-medical-license.
[62] John Dewey, *The Sources of a Science of Education* (Read Books, 1929).
[63] Saxonhouse, *Free Speech and Democracy in Ancient Athens*, 13.
[64] Aristotle, *Nicomachean Ethics*, trans. Roger Crisp (Cambridge University Press, 2000); Aristotle, *Politics*, trans. Ernest Barker (Oxford University Press, 2009).
[65] George Boas, *Vox Populi: Essays in the History of an Idea* (JHU Press, 2020).
[66] Rolph Barlow Page, *The Letters of Alcuin* (Forest Press, 1909), 61; Susan Ratcliffe, ed., *Oxford Essential Quotations*, *Oxford Essential Quotations* (Oxford University Press, 2016), https://www.oxfordreference.com/view/10.1093/acref/9780191826719.001.0001/acref-9780191826719.
[67] Alexis de Tocqueville, *Democracy in America*, ed. Francis Bowen, trans. Henry Reeve (Sever and Francis, 1863).
[68] Aristotle, *Nicomachean Ethics*.

CHAPTER TWO: THE HISTORY OF FREE SPEECH

"More speech, not enforced silence."[1] This axiom has become the polestar for First Amendment jurisprudence and American free speech philosophy. In the ninety-three years since Louis Dembitz Brandeis penned these words in his *Whitney v. California* concurrence, they have come to embody the American *volksgeist* and the tumult of what 20th century rhetorician Kenneth Burke memorably called "the Scramble, the Wrangle of the Market Place, the flurries and flare-ups of the Human Barnyard, the Give and Take, the wavering line of pressure and counterpressure, the Logomachy, the onus of ownership, the Wars of Nerves, the War."[2] After all, the U.S. Supreme Court has adopted the notion that "free trade in ideas," is the exclusive means by which society achieves Truth and Justice.[3] When speakers bid "for the minds of men in the market place of ideas," regardless of intentions or absurdity of content, they engage in time-honored practices of good citizenship and community building.[4]

Indeed, the philosophical origins of American governance champion ideological heterodoxy as a focal mechanism to achieve a more perfect union.[5] British authorities' attempt to maintain social hegemony in the colonies by suppressing speech was the underlying catalyst for the American revolution.[6] Because of its storied past, American jurisprudence has honored "the *right* to provoke, offend, and shock."[7] As Judge Alex Kozinski opined in 2010 "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause."[8]

American notions of free-speech protection are rooted in western ideals of social, moral, and ethical governance. At the individual level, free speech facilitates self-actualization. As the noted copyright expert, and winning attorney for Paul Robert Cohen's "Fuck the Draft" lawsuit,[9] Professor Melville Nimmer suggests, "freedom of speech is an end in itself because the very nature of man is such that he can realize self-fulfillment only if he is free to express himself."[10]

Building on Hegelian and Kantian ethics,[11] Nimmer suggests that expressive freedom is part of the Kingdom of Ends.[12] Moral deliberation, ideological development, and the pursuit of happiness presuppose and necessitate free speech. In support of his proposition, Nimmer points to Justice Brandeis's second justification for free speech mentioned in *Whitney v. California*: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties…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."[13] A person's capacity to reach his full potential—or more precisely, his capacity to perceive his ability to reach full potential—rests on the ability to access, reflect, and build upon current knowledge. Freedom of expression, which encompasses the right to listen,[14] facilitates interpersonal communications such that we become "fully ourselves" only when allowed to speak freely.[15]

At the institutional level, free speech supports healthy democracy by encouraging the body politic to consume, digest, and debate civic issues. This understanding is quintessentially utilitarian and very American. If man is a "political animal,"[16] then free speech is the vehicle through which society extrapolates right from wrong, truth from falsehood, and justice from injustice.[17] Under this view, free speech becomes an instrument, albeit a powerful one, to safeguard democratic institutions, political processes, and the rule of law. Harry Kalven, Jr. and Karl Llewellyn categorize this as the American free-speech tradition.[18] Unlike European free-speech models, which view the *individual* as the locus of power, the American tradition 'depersonizes' civil liberties such that the *collective* becomes the locus of control.[19] As First Amendment jurisprudence matured, from *Schenck*[20] to *Gitlow*[21] to *Brandenburg*,[22] the Court began emphasizing teleology at the expense of ontology.[23] Opinions and dissents began to champion concepts of political and ideological speech—not because they themselves are

sufficient ends but because of their utility for democratic maximization via civic participation.[24] Even Justice Brandeis, who understood better than most the importance of vesting rights in the individual, fell prey to America's utilitarian-centered collective conscience in his *Whitney v. California* concurrence:

> [The founders] 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.[25]

Free-speech, post *Whitney*, became valued not as a form of self-expression or self-actualization; it became valued for its ability to promote collective self-determination.[26] That is to say, speech became valued as a matter of social interest instead of as an individual right.[27] This style of Benthamite, Millian, and Humean philosophy, which highlights utility maximization, pervades much of the American First Amendment free-speech corpus. Indeed, the nexus between free speech and robust democracy is the foundation upon which Professor Alexander Meiklejohn built his namesake theory.[28] "I am thinking of a self-governing body politic, whose freedom of individual expression should be cultivated, not merely because it serves to prevent outbursts of violence which would result from suppression, but for the positive purpose of bringing every citizen into active and intelligent sharing in the government of his country."[29] But the evolution of First Amendment jurisprudence in favor of collective self-governance (by way of the Court establishing an implicit free-speech hierarchy with political speech on top,[30] commercial speech in the middle,[31] and symbolic speech below[32]) substantially undercuts Justice Brandeis's, and by extension the founders', desire to respect free speech as an end *ipso facto*.

This chapter, derived from my article first published in the *International Journal for the Semiotics of Law*, explores the ideological foundations of American free-speech philosophy. It analyzes the two dominant understandings of free speech in classical antiquity, *isegoria* and *parrhesia*, and situates them within the context of present-day jurisprudential epistemology. I suggest that sociohistorical factors, in combination with incrementally absolute case law, extended freedom of speech beyond underlying policy rationales set forth in ancient Greece. This article contrasts American free-speech philosophy to its European corollary. The former favors *parrhesia* as a vehicle for truth-seeking and government-building, while the latter favors *isegoria* as an instrument for self-actualization and personal protection. Eastern philosophy and jurisprudence is outside this dissertation's scope. I argue that *parrhesia* is historically misunderstood as unbounded, provocative speech. While it is correctly characterized as a catalyst for social and political change, *parrhesia* necessitates social, institutional, and political constraints which condition speakers into normative modes of factuality and accountability.

Free Speech in Classical Antiquity

Isegoria

Ancient Greek political philosophers divided free speech into two competing but equally important categories: *isegoria* (*ἰσηγορία*) and *parrhesia* (*παρρησία*).[33] *Isegoria* is older, dating back to the fifth century BCE.[34] It is defined as equality of speech, or as peoples' legal right to speak their own opinions.[35] The term derives from the verb *agoreuein* (to speak publicly), which, in turn, contains the morpheme *agora* (marketplace).[36] In fact, the connection between the ideological marketplace and the literal marketplace is not mere hyperbole. Free speech in antiquity occurred in public places where citizens, including philosophers such as Socrates and Aristotle, could gather to debate issues of academic and political importance.[37] Over time,

isegoria developed connotations of "equal rights of speech" and "political equality,"[38] making the term a requisite feature of Athenian democracy.[39]

If free speech is conceptualized as a hierarchy, *isegoria* is the foundation on which the taxonomy rests.[40] Etymologically, the term is tied to notions of equality—not freedom.[41] Afterall, the remarkability of Athenian free speech practices was not related to egalitarianism. As discussed below, entire categories of persons including slaves and women were precluded from citizenship and necessarily estopped from making public statements. Rather, *isegoria* is historically significant because it ideologically enfranchised the poor, allowing members of disparate social classes the opportunity to speak and to be heard.[42] Because freedom *of* speech presumes the equal right *to* speak, *isegoria* is a fundamental principle of equality before the law.[43] According to Oxford Professor Teresa Bejan, the Athenian government "even took positive steps to render this equality of public speech effective by introducing pay for the poorest citizens to attend the assembly and serve as jurors in the courts."[44]

Isegoria served two key purposes in ancient Greece. First, it framed free speech as an individual right.[45] Unlike other ancient systems of governance, Athenian democracy made freedom of speech an attribute of citizenship.[46] "[E]ach full citizen was equally entitled to address the political institutions of the *polis* and to say everything he wanted to say when making such an address."[47] By vesting free-speech rights in the citizenry, *isegoria* empowered marginalized people with sociopolitical agency and autonomy such that they could become self-actualized in ways uncommon throughout the fourth and fifth centuries. This democratic self-fulfillment led to *isegoria*'s second key function: promoting effective self-governance by encouraging ideological diversity.[48]

An idea should be judged on its merits alone, not on its purveyor's socioeconomic station. The marketplace, both literal and metaphoric, provides a forum to display and scrutinize the full panoply of individual perceptions. When people feel belittled (socially, politically, or economically), they become disincentivized from proffering their sincerely held beliefs. Without *isegoria*, the marketplace is deprived of viewpoint diversity, policy makers have fewer ideas to consider, and deliberative democracy does not reach its full capacity.[49] Indeed, scholars consider ideological heterodoxy to be the cause-in-fact of Athenian geopolitical dominance.[50] And Greek citizenship, to a limited extent, acted like a proto-Rawlsian veil of ignorance,[51] allowing citizens to interact and exchange ideas without social encumbrances.

The symbiotic objectives of *isegoria*, i.e., promoting individual self-actualization and effective democratic governance, underlie the international policy rationales of free speech. It is interesting to note that the European model emphasizes the former, while the American model emphasizes the latter. The European Convention on Human Rights' Article 10;[52] the European Court of Justice's "right to be forgotten;"[53] the German Bundestag's *Strafgesetzbuch* § 86a (outlawing the use of symbolism from "unconstitutional organizations" like the Third Reich or the Islamic State),[54] or its recently passed *Netzwerkdurchsetzungsgesetz* or NetzDG (extending civil liability to Internet providers and digital media companies that fail to remove "manifestly unlawful" speech within twenty-four hours of being reported);[55] and the sixteen nations with laws against Holocaust denial (all of which, but Israel, are European) demonstrate how European nations vest the locus of power in individuals by protecting their rights not to be offended or criticized.[56]

Under the European model, when a corporate, private, or state actor interferes with an individual's right to become self-actualized through practices of free speech (a theory which

John Locke explicates in his *Two Treatises of Government*[57]), a legal cause of action *automatically* arises; state action need not precipitate legal intervention. Protecting a person's right to self-actualization—even if that means limiting the content or viewpoints of other marketplace speakers—leads to better democratic governance because, like in ancient Greece, individuals feel empowered to share their beliefs and perceptions. Present-day German Jews, for example, are blocked from pursuing happiness if forced to exert mental and financial resources combating Holocaust deniers and neo-Nazis. Germany's willingness to promote free-speech self-actualization, however, ends at the point where that speech infringes upon another's right to become self-actualized. By nullifying these issues and precluding this type of low-value speech, the German government frees up human and economic capital, allowing its citizens to pursue higher-level causes related to democratic advancement. Thus, Europeans, to a degree, believe that individual protectionism by way of governmental paternalism presupposes good governance.

The American model, on the other hand, holds the opposite to be true: Full ideological expression via light-touch governmental regulation emancipates the citizenry such that the people, not the government, determine the issues and causes worthy of their time. Near-absolute freedom of speech ensures a full ideological marketplace. Protecting speech-market capitalism—even if that means allowing speakers to introduce content destructive to individual self-actualization (like Holocaust denial)—leads to better democratic governance because the marketplace, not the government, determines the final outcome. The state-action doctrine demonstrates the American preference for this economic theory of free speech. Whereas a European citizen's free speech rights can be offended by *any* corporate, private, or state entity, an American citizen's free speech rights can be abridged only by the government. This means that speech-related injuries do *not automatically* give rise to legal causes of action; there must be

a showing of *state* action. By vesting the locus of power in the Constitution, American free-speech jurisprudence precludes automatic causes of action, empowers corporate entities, and gives voice to ideologues operating outside the norms of social acceptability. Thus, Americans, to a degree, believe that individual autonomy by way of democratic noninterference presupposes good governance, and by extension, self-actualization.

Thus far, I have demonstrated two key purposes of maintaining *isegoria* in the modern age: (1) promoting self-actualization via freedom of conscience and (2) bolstering good democratic governance. There is, however, a third interknit purpose which has become a focal point of American First Amendment philosophy: free speech as an instrument for finding truth. This chapter does not explore the philosophical dimensions of ontology, epistemology, axiology, or other *schöne Wissenschaften*[58] necessary to discover objective truth—which probably does not exist. In fact, scholars have summarized Justice Holmes's entire free-speech jurisprudence by saying "There is no truth—but only a competition of ideas. The only thing we call truth is that one idea is more accepted by the public than another."[59] Rather, I draw attention to this uniquely American aspect of free speech, which jurists have inextricably tied to the marketplace of ideas.

Scholars generally begin their discussions relating free speech and truth with British philosopher John Stuart Mill. While at the end of transatlantic free speech chronology, Mill so beautifully encapsulates the underlying policies of free-speech permissiveness and maintaining the marketplace of ideas,[60] it is necessary to quote him substantively:

> If 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…[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error…We can never be sure that the

> opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.[61]

For sociohistorical factors related to Great Britain's treatment of colonial America, Mill's policy rationale resonates deeply with wide swaths of American society. From civil libertarians[62] to U.S. Supreme Court justices, both conservative and liberal,[63] the American *laissez-faire* model of speech regulation serves "the ultimate good…that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[64] And to the extent that free speech and objective truth have become intertwined with the marketplace of ideas, (*see* Justice Holmes's above-quoted dissent in *Abrams v. U.S.*), sociolegal history shows a clear chronological lineage:

English poet and polemicist John Milton (1608–1674), in *Areopagitica*, discusses the need to "Let her and Falfhood [sic] grapple; who ever knew Truth put to the wors, in a free and open encounter."[65] President Thomas Jefferson (1743–1826), evoking Milton in his First Inaugural Address,[66] warns of political polarization as a threat to both personal autonomy, democratic governance, and truth. "If there be any among us who would wish to dissolve this union or 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."[67] John Stuart Mill (1806–1873), Oliver Wendell Holmes, Jr. (1841–1935), and Louis Brandeis (1856–1941), all of whom are discussed above, carried on this progression of ideological marketplace capitalism until Alexander Meiklejohn (1872–1964) cemented this American free-speech philosophy in his treatise *Free Speech and its Relation to Self-Government*:

> We need the truth as a basis for our actions. But the truth is better attained if men trade ideas freely than it is if each man stays within the limits of his own discoveries. A man's ideas must, therefore, be subjected to the competition of the market. His own self-interest requires of him that his right and natural disposition toward suppression must give way

> before the clear necessity of trading ideas with anyone else who is studying the same problems.[68]

However incremental, this chronology has reduced *isegoria*—and its underlying connection between a robust marketplace (*agora*) and truth—*ad absurdum*. The American preference for *laissez-faire* economics and light-touch regulation has led to an unregulated ideological marketplace. First Amendment jurisprudence has slowly carried John Stuart Mill's argument to a point that proves too much. In the name of promoting the marketplace, Americans allow dangerously and demonstrably false ideas (Holocaust denial being among the most salient) to compete on equal footing with those grounded in fact. Indeed, American freedom of speech does not even require the speaker to believe in the truth of the matter asserted—a notion that, for reasons discussed below, would be rare in classical antiquity. Thus, the skepticism in top-down government censorship (rooted in fears of suppressing the one true opinion) and trust in marketplace self-regulation has led to institutionalized free-speech absolutism, most famously expounded by Justices William Douglas (1898–1980) and Hugo Black (1886–1971)—the latter being, uncoincidentally, a former Ku Klux Klansman:[69]

> [T]he First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field. The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence.[70]

In sum, certain social and cultural factors, some of which are pervasive and mainstream, blind citizens to notions of objective truth. There is, therefore, an interest to hear from all speakers, regardless of how offensive a viewpoint may be. But as demonstrated above, the historically strengthened nexus between the marketplace of ideas and the pursuit of truth has

extended *isegoria* to a point of free-speech absolutism. While the ancient Greeks recognized the need for provocative and pointed speech, a category they called *parrhesia*, there were institutional and social constraints that conditioned provocateurs into normative standards of truth and accountability. Although *isegoria* and *parrhesia* are two sides of the same free-speech coin, American jurisprudential philosophy has overemphasized the latter in ways repugnant to classical understandings.

Parrhesia

Parrhesia is commonly defined as "the license to say what one pleased."[71] The term derives from *pan-rhêsia* or "the ability to say all."[72] Despite its translation, classicists reject the notion of *parrhesia* as unlimited speech.[73] *Parrhesiastes* spoke with openness, honesty, and courageousness to express their factually grounded opinions, however unpopular. Indeed, the term presupposes contextual truthfulness and persuasive goodwill. "The *parrhêsiast* must necessarily believe in the truth of what he is saying, or at least in the fact that to the best of his knowledge what he is saying is true."[74] Speaking to advance truth and community wellbeing is a necessary prerequisite such that policy rationales underlying *parrhesia* necessarily fail when speakers do not believe in their message's truthfulness. Fourth-century Greek thinkers became concerned with the relationship between political power structures and self-censorship. Isocrates, among the most influential Greek rhetoricians, wrote a letter to Macedonian general and statesman Antipater in which he outlines the importance of *parrhesia* in democratic maintenance:

> For it stands to reason that it is because of those who always and by choice speak to please [*τοὺς ἀεὶ πρὸς ἡδονὴν λέγειν προαιρουμένους*] that not only monarchies cannot endure—since monarchies are liable to numerous inevitable dangers—but even constitutional governments [*πολιτείας*] as well, though they enjoy greater security: whereas it is owing to those who speak with absolute frankness in favour of what is best

> [*τοὺς ἐπὶ τῷ βελτίστῳ παρρησιαζομένους*] that many things are preserved even of those which seemed doomed to destruction.[75]

Isocrates cared deeply about promoting ideological heterodoxy as a tool for good governance. He writes about political leaders' propensities to surround themselves with agreeable or acquiescent advisors in a type of proto-confirmation bias: the tendency to consume or interpret new evidence as confirming existing beliefs or theories.[76] These advisors, in turn, are inclined to flatter the leader for two reasons. First, they have been acculturated into this type of behavior as a viable means of elevating their social or political status. If a counselor is able to achieve political power or social acclaim by way of leveling undue praise, it is in his best interests to do so. Second, the fear of losing the political appointment, or being otherwise punished for airing an unpopular opinion, pressures advisors to articulate homogenous viewpoints. As Professor Matthew Landauer notes, advisors become inclined to tell a leader "what they think he wants to hear, rather than run the risk of giving him what they think is the best advice."[77] Landauer characterizes this asymmetrical power dynamic as a "vicious cycle," where counselors self-censor their remarks to keep their jobs, and leaders reward agreeable advisors thereby reinforcing incentives to flatter.[78]

Isocrates used *parrhesia* as a device to break this revolving glass door. Through his correspondence with Antipater and Nicocles, the Greek king of Salamis, Isocrates implored leaders to foster political environments in which *parrhesia* is rewarded. Specifically, he urged monarchs to "[g]rant freedom of speech [*parrhesia*] to those who have good judgment" such that they are allowed and encouraged to communicate honestly.[79] Frank communication between a ruler and his advisors allows him to distinguish artful flatters (*τοὺς τέχνῃ κολακεύοντας*) from those who serve with loyalty and goodwill (*τοὺς μετ' εὐνοίας θεραπεύοντας*).[80] By encouraging policy debates, autocrats become exposed to a diversity of viewpoints which they can

subsequently analyze and evaluate. Therefore, "more speech," in the sense of frank and unadulterated communication between a ruler and his advisors, leads to better political outcomes. But there is a distinct difference between *parrhesia* in autocracies and *parrhesia* in democracies; namely, the potential for abuse is far greater in the latter.[81]

Isocrates himself warned against, and outright criticized, unfettered *parrhesia* in the democratic Assembly.[82] Whereas the other higher-ordered forms of Platonic governance, viz., aristocracy and timocracy, center around ideals of moral leaders who rule through wisdom and reason, democratic governance is corruptible.[83] It is sensible to praise *parrhesia*'s shamelessness and frankness when employed by philosopher kings—whose principal aim is selfless and ethical leadership.[84] But once aristocracy, Plato's preferred system of governance, devolves into democracy, where political leaders capitulate to unrighteous or unethical motivations, *parrhesia* becomes "reckless speech, hardly tied to any commitment to the exposure of truth and practice of intelligent criticism, or to the project of discerning good from bad choices."[85] Thus, *parrhesia*'s rhetorical appropriateness turns on the context in which it is deployed. It is effective in aristocracy because it is counterbalanced by accountability. If an advisor makes a statement completely void of factual grounding, he is dismissed. In democracy, where citizens pursue political autonomy and personal freedom in conjunction with money-making and material-accumulation,[86] individuals become rewarded for unrestrained persuasive communications. Thus, there is an inverse relationship between accountability and reckless speech such that when the former ebbs, the following flows.

Scholars who study Isocratic correspondence point to his speech *On the Peace* in support of the proposition that institutional standards and social norms, to an extent, moderate a

speaker's content and preclude obstreperous communications.[87] Isocrates warns of *parrhesia*'s danger and recklessness when used without safeguards like liability or answerability:

> But I know that it is hazardous to oppose your views and that, although this is a free government, there exists no 'freedom of speech' [*parrhesia*] except that which is enjoyed in this Assembly by the most reckless orators, who care nothing for your welfare, and in the theater by the comic poets. And, what is most outrageous of all, you show greater favor to those who publish the failings of Athens to the rest of the Hellenes than you show even to those who benefit the city, while you are as ill-disposed to those who rebuke and admonish you as you are to men who work injury to the state.[88]

Too much freedom, combined with too little ethical and moral accountability, makes *parrhesia* dangerous when employed by the corrupt or unscrupulous. Therefore, Isocrates explicitly warns against combining *parrhesia* with political freedom.[89]

On the other hand, Socrates, through Plato's authorship, noticeably forgoes attacking *parrhesia* throughout Book VIII of the *Republic*. Socrates is quick to criticize freedom and equality in democratic regimes where the body politic treats all individual desires as deserving equal attention and pursuit—recalling the inherent skepticism of democratic governance.[90] But his lack of criticizing *parrhesia* is striking.[91] Indeed, some scholars suggest that this omission allows Plato to lay the rhetorical groundwork for celebrating freedom of speech and making it a requisite feature of democratic rule.[92] If Plato were to carry *parrhesia* to its logical conclusion of democratic abuse in the *Republic*, it would undercut his earlier characterization of Socrates as the free-speech savior of Athenian democracy in the *Apology*.[93] This may be, in part, why political philosophers tend to overstate or glorify the extent to which speech was truly unrestrained in ancient Greece.[94] Professor Arlene Saxonhouse suggests that Socrates's "shameless" exercise of *parrhesia* is both the precursor to the ideological origins of American constitutional jurisprudence and the foundations on which Alexander Meiklejohn build our modern

philosophical understanding.[95] This line of scholarship holds that "shameless" and "unbridled" speech is what facilitates a healthy democracy.[96]

There is, however, a key distinction between Plato's understanding of democracy and Athenian governance: The Assembly operated with underlying systems of accountability such that citizens, or their representatives, were precluded from engaging in what French philosopher Michel Foucault calls "real *parrhesia*."[97] By claiming that parrhesia is enjoyed only by the most "reckless orators,"[98] Isocrates asserts that latent socio-normative expectations condition speakers into expressing only acceptable viewpoints. And the most evident of these accountability mechanisms was *dokimasia*: the Athenian process of ascertaining the capacity of a citizen to exercise his public rights and duties.[99]

Dokimasia (*δοκιμασία*) occurred prior to an adolescent male's nineteenth birthday. His father would present him for enrollment in the *deme*, a county unit of local government. Translated as "scrutiny," *Dokimasia* consisted of a character and fitness examination which, upon successful completion, entitled adolescents to the rights, responsibilities, and privileges of full citizenship.[100] Among the most important rights was the ability to address the Assembly at Athens.[101] Prior to each legislative session, some 6,000 people convened around the Pnyx, near the Acropolis.[102] The herald (*keryx*) would then famously cry out, "who wishes to speak?"[103] at which point, any citizen could approach the *bema*, address the Assembly, and discuss principled arguments for policy adoption.[104]

This process of Athenian *parrhesia*, while sociohistorically remarkable, has become unduly glorified and misunderstood by popular audiences. Regarding the former, Professor Elizabeth Markovits suggests that *parrhesia*'s glorification lies in the definitional requirement that a citizen's speech must criticize someone with the power to injure the speaker.[105] In an era

where literary or oral criticism was punished by fine, exile, or death,[106] this type of bottom-up citizen accountability was the hallmark and touchstone of effective democratic governance.[107] And in the context of censorial governments coexisting with Athens, the *parrhesia*-centered style of Athenian debate was progressive in terms of its truth-seeking and political accountability. As Foucault summarizes,

> *parrhesia* is a kind of verbal activity where the speaker has a specific relation to truth through frankness, a certain relationship to his own life through danger, a certain type of relation to himself or other people through criticism (self-criticism or criticism of other people), and a specific relation to moral law through freedom and duty. More precisely, *parrhesia* is a verbal activity in which a speaker expresses his personal relationship to truth, and risks his life because he recognizes truth-telling as a duty to improve or help other people (as well as himself).[108]

Regarding the latter misinterpretation, *parrhesiastes*, while important to Athenian democratic identity[109] and western civilization generally,[110] were contextually moderated and ideologically restrained such that their notions of 'free' speech do not correspond with contemporary American standards of *parrhesia*-based rhetoric. Foucault, for example, proffers several key ways in which an Athenian *parrhesiast* was repressed.[111] First, a speaker must meet certain sociodemographic requirements. Women, aliens, slaves, and children were necessarily precluded.[112] So too were male prostitutes.[113] Impeached public officials and noncitizens, including those who failed *dokimasia*, were also forbidden from using frank speech.[114]

Second, rhetoric must be grounded in veracity such that the speaker believes in his message's authenticity.[115] *Pan-rhesia*, or the ability "to say everything," was never associated with the unbridled right to say anything.[116] There was a deep-seated, twofold understanding that the *parrhesiast* (1) believed in the truth of his assertions and (2) spoke with goodwill for purposes of community building.[117] For example, the Greek statesman Demosthenes, in his fourth Philippic oration, calls for "truth spoken with all freedom (*παρρησία*), simply in goodwill

and for the best—no speech packed through flattery with mischief and deceit, and intended to put money into the speaker's pocket and the control of the State into our enemies' hands."[118]

Third, an authentic *parrhesiast* speaks only when his truth-telling represents a risk of danger or censure.[119] Akin to the previous discussion of the ruler-advisor dichotomy, Foucault asserts that *parrhesia* presupposes a hierarchical power dynamic. When an adolescent criticizes his teacher, he speaks with *parrhesia*; when a teacher criticizes his pupil, he does not.[120] Because *parrhesia* requires the potential for reputational or bodily harm, it becomes inextricably tied to moral courage and sincerity.[121] These requisite qualities create a self-imposed duty to criticize to sovereign blind to his wrongdoing "insofar as it is a duty towards the city to help the king to better himself as a sovereign. *Parrhesia* is thus related to freedom and to duty."[122] But even with Foucault's philosophical duty to speak, and citizens' guaranteed right to address the Assembly, the practice would have been limited to relatively few.[123] Without a requisite amount of education, knowledge, and rhetorical prowess, citizens would be unable to overcome their fears of reputational injury or social disapproval—thereby being unable to deliver public arguments before the Assembly.[124] In sum, *parrhesia* was a groundbreaking instrumentality in the development of modern democratic governance. But, the demographic, moral, and social constraints—which have been largely abrogated in modern practice—moderated Athenian speech in ways that certain non-scholarly audiences overlook. The evidence, therefore, suggests Plato as a proponent for restricting *parrhesia*: an idea which Isocrates seems to approach in *Areopagiticus* and *On the Peace.*

This chapter discussed the ideological origins of free speech as a mechanism for sociopolitical accountability. In common parlance, *parrhesia* is characterized as the license to say anything.[125] As demonstrated above, however, this understanding is not entirely accurate. In

the context of democratic Athens, demographic, institutional, and moral constraints moderated the manner in which a speaker communicated his 'frank' and 'shameless' message. Even *parrhesia*-based comedy[126] and satire,[127] with their "special license[s]" to critique and offend,[128] operated against a backdrop of social and cultural accountability.[129] And for social reasons rooted in antebellum colonial history, Americans have become acculturated into extreme philosophies of free-speech permissiveness that have corrupted the original understanding and purpose of *parrhesia* rooted in antiquity.

Notes

[1] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
[2] Kenneth Burke, *A Rhetoric of Motives* (University of California Press, 1969), 23.
[3] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[4] United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas and Black, JJ., concurring). See also John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), 21. Rawls notes that "[i]t is a serious error not to distinguish between the idea of a democratic political society and the idea of community." Instead, he argues for "reasonable pluralism" within public debates.
[5] Michael Kent Curtis, *Free Speech, The People's Darling Privilege: Struggles for Freedom of Expression in American History* (Duke University Press, 2000).
[6] Larry Eldridge, *A Distant Heritage: The Growth of Free Speech in Early America* (NYU Press, 1994).
[7] Rodriguez v. Maricopa Cty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010).
[8] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).
[9] Cohen v. California, 403 U.S. 15 (1971).
[10] Melville B. Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press," *UCLA Law Review* 17, no. 6 (1970 1969): 1188, https://heinonline.org/HOL/P?h=hein.journals/uclalr17&i=1222.
[11] Allen W. Wood, *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990), 37.
[12] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, trans. Allen W. Wood (New Haven: Yale University Press, 2002).
[13] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
[14] In Kleindienst v. Mandel, 408 U.S. 753, 775 (1972), Justice Marshall dissents, explaining that "[t]he freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin."
[15] Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (Yale University Press, 2016), 74.
[16] Aristotle, *Politics*, trans. C.D.C. Reeve (Hackett Publishing, 1997).
[17] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13, no. 1 (1993): 27, https://heinonline.org/HOL/P?h=hein.journals/oxfjls13&i=32.
[18] Harry Kalven, *A Worthy Tradition: Freedom of Speech in America* (Harper and Row, 1989); Karl Nickerson Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, 1960).
[19] Llewellyn, *The Common Law Tradition*.
[20] Schenck v. United States, 249 U.S. 47 (1919).
[21] Gitlow v. New York, 268 U.S. 652 (1925).
[22] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[23] Kalven, *A Worthy Tradition*.
[24] Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property," *Chicago-Kent Law Review* 68, no. 2 (1993 1992): 858, https://heinonline.org/HOL/P?h=hein.journals/chknt68&i=855.
[25] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[26] Fiss, *The Irony of Free Speech*, 3. See James Madison, "The Report of 1800," in *The Papers of James Madison*, ed. David B. Mattern et al., vol. 17 (Charlottesville: University Press of Virginia, 1800), 303–51. Madison describes the Alien and Sedition Acts of 1798 as denying "the people" the ability to deliberate.
[27] Waldron, "From Authors to Copiers," 858.
[28] Meiklejohn, *Free Speech*.
[29] Meiklejohn, "The First Amendment Is an Absolute," 260–61.
[30] Buckley v. Valeo, 424 U.S. 1 (1976).
[31] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of NY, 447 U.S. 557 (1980).
[32] United States v. O'Brien, 391 U.S. 367 (1968).
[33] Teresa M Bejan, "Two Concepts of Freedom (of Speech)," in *Proceedings of the American Philosophical Society*, vol. 163, 2019, 13.
[34] Bejan, 98.
[35] Michel Foucault, *Fearless Speech*, ed. Joseph Pearson (Los Angeles: Semiotext(e), 2001), 72.
[36] Bejan, "Two Concepts of Freedom (of Speech)," 98; Foucault, *Fearless Speech*.
[37] Bejan, "Two Concepts of Freedom (of Speech)," 98–99.
[38] J. D. Lewis, "Isegoria at Athens: When Did It Begin?," *Historia: Zeitschrift Für Alte Geschichte* 20, no. 2/3 (1971): 129, https://www.jstor.org/stable/4435186.
[39] Teresa M. Bejan, "The Two Clashing Meanings of 'Free Speech,'" *The Atlantic*, December 2, 2017, https://www.theatlantic.com/politics/archive/2017/12/two-concepts-of-freedom-of-speech/546791/.
[40] Pekka Hallberg and Janne Virkkunen, "Chapter 4: From the Origins of Freedom of Speech to the Modern Information Society," in *Freedom of Speech and Information in Global Perspective* (Helsinki: Springer, 2017), 62.
[41] Bejan, "Two Concepts of Freedom (of Speech)," 99.
[42] Bejan, 99.
[43] Hallberg and Virkkunen, "Chapter 4: From the Origins of Freedom of Speech to the Modern Information Society," 62.
[44] Bejan, "Two Concepts of Freedom (of Speech)," 99.
[45] Bejan, "Two Concepts of Freedom (of Speech)"; Hallberg and Virkkunen, "Chapter 4: From the Origins of Freedom of Speech to the Modern Information Society."
[46] Keith Werhan, "The Classical Athenian Ancestry of American Freedom of Speech," *The Supreme Court Review* 2008 (January 1, 2008): 293–347, https://doi.org/10.1086/655121; D. M. Carter, "Citizen Attribute, Negative Right: A Conceptual Difference Between Ancient and Modern Ideas of Freedom of Speech," in *Free Speech in Classical Antiquity*, ed. Ineke Sluiter and Ralph Rosen (BRILL, 2004), 197–220, http://brill.com/view/book/edcoll/9789047405689/B9789047405689-s010.xml.
[47] Werhan, "The Classical Athenian Ancestry of American Freedom of Speech," 298.
[48] Werhan, "The Classical Athenian Ancestry of American Freedom of Speech."
[49] Josiah Ober, *Political Dissent in Democratic Athens: Intellectual Critics of Popular Rule*, Martin Classical Lectures (Unnumbered). New Series (Princeton, N.J.: Princeton University Press, 1998).

[50] Josiah Ober, *The Athenian Revolution: Essays on Ancient Greek Democracy and Political Theory* (Princeton University Press, 1996).
[51] John Rawls, *A Theory of Justice* (Harvard University Press, 2009).
[52] Council of Europe, European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 221. "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."
[53] Case C-131/12, Spain v. AEPD, ECLI:EU:C:2014:317, ¶ 20.3 (May 13, 2014).
[54] § 86a. StGB. Dissemination of Means of Propaganda of Unconstitutional Organizations. "(1) Whoever 1. disseminates the symbols of one of the political parties or organizations designated in section 86 (1) nos. 1, 2 and 4 in Germany or uses them publicly, in a meeting or in material (section 11 (3)) disseminated by themselves or 2. produces, stocks, imports or exports objects which depict or contain such symbols for dissemination or use in Germany or abroad in a manner referred to in no. 1 incurs a penalty of imprisonment for a term not exceeding three years or a fine. (2) Symbols within the meaning of subsection (1) are, in particular, flags, insignia, uniforms and their parts, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those referred to in sentence 1 are deemed to be equivalent to them. (3) Section 86 (3) and (4) applies accordingly."
[55] Netzwerfurchestungsgestz, or NetzDG, extends civil liability to internet providers and digital media companies that fail to remove "offensichtlich rechtswidrig [manifestly unlawful]" speech within twenty-four hours of being reported. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], Sept. 1, 2017, BGBL I at 3352, § 3, para. (2)2 (Ger.), http://www. gesetze-im-internet.de/netzdg/ [https://perma.cc/GPE4-B7XR].
[56] Pekka Hallberg and Janne Virkkunen, "Chapter 5: Freedom of Speech in Books and in Action," in *Freedom of Speech and Information in Global Perspective* (Helsinki: Springer, 2017).
[57] John Locke illudes to the self-transcendent power of free speech in his theological discussion of the Tower of Babel in Sections 145-48, Chapter XI of his *Two Treatises of Government.* Locke, *Two Treatises of Government and a Letter Concerning Toleration*, 87–90. In his *Letters on Toleration*, Locke lays out the contemporary liberal defense for freedom of speech, thought, and conscience—and necessary limits on the former: "And, first, I hold that no church is bound, by the duty of toleration, to retain any such person in her bosom as, after admonition, continues obstinately to offend against the laws of the society. For, these being the condition of communion and the bond of the society, if the breach of them were permitted without any animadversion the society would im- mediately be thereby dissolved. But, nevertheless, in all such cases care is to be taken that the sentence of excommunication, and the execution thereof,

carry with it no rough usage of word or action whereby the ejected person may any wise be damnified in body or estate. For all force (as has often been said) belongs only to the magistrate, nor ought any private persons at any time to use force, unless it be in self-defence against unjust violence." Locke, 223. *See also* Locke, 273–74.
[58] John H. Zammito, *Kant, Herder, and the Birth of Anthropology* (University of Chicago Press, 2002).
[59] Uladzislau Belavusau, "Judicial Epistemology of Free Speech Through Ancient Lenses," *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 23, no. 2 (June 1, 2010): 173, https://doi.org/10.1007/s11196-010-9147-z.
[60] Ash, *Free Speech*, 75.
[61] Mill, *On Liberty*, 33–34.
[62] Eric Heinze, "Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, Incorporated, 2009), 195, http://ebookcentral.proquest.com/lib/ku/detail.action?docID=4700863.
[63] *See* Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech'—The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, Incorporated, 2009), 237–63. Molnar discusses the history of free-speech jurisprudence in post-Holocaust, post-communist Hungary, noting on page 254 that "[i]n the United States, although the Holmes and Brandeis dissenting and concurring opinions reflected the minority view on the Supreme Court at the time, they inaugurated the modern understanding of the First Amendment."
[64] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[65] Milton, *Areopagitica*, 167.
[66] Melanne Andromecca Civic, "Right to Freedom of Expression as the Principal Component of the Preservation of Personal Dignity: An Arguement for International Protection within All Nations and across All Borders," *Hybrid: The University of Pennsylvania Journal of Law and Social Change* 4 (1997): 117–46, https://heinonline.org/HOL/P?h=hein.journals/hybrid4&i=123.
[67] Thomas Jefferson, The First Inaugural Address, *cited in* Whitney v. California, 274 U.S. 357, 375, n. 2 (1927) (Brandeis, J., concurring).
[68] Meiklejohn, *Free Speech*, 88.
[69] Howard Ball, *Hugo L. Black: Cold Steel Warrior* (Oxford University Press, 1996).
[70] Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., with whom Warren, CJ., and Douglas, J., concur, dissenting).
[71] Bejan, "The Two Clashing Meanings of 'Free Speech,'" 97.
[72] Kurt A. Raaflaub, "Aristocracy and Freedom of Speech in the Greco-Roman World," in *Free Speech in Classical Antiquity*, ed. Ineke Sluiter and Ralph Rosen (BRILL, 2004), 49.
[73] Ineke Sluiter and Ralph Rosen, *Free Speech in Classical Antiquity* (BRILL, 2004), 6.
[74] Sluiter and Rosen, 7.
[75] Isocrates, *Isocrates*, trans. George Norlin, Loeb Classical Library Edition, vol. 3 (Cambridge, MA: Harvard University Press, 1928), 415, 417. For the original Greek quotation, *see* correspondence *To Antipater* at 416: "εἰκὸς γὰρ διὰ μὲν τοὺς ἀεὶ πρὸς ἡδονὴν λέγειν προαιρουμένους οὐχ ὅπως τὰς μοναρχίας δύνασθαι διαμένειν, αἳ πολλοὺς τοὺς ἀναγκαίους

ἐφέλκονται κινδύνους, ἀλλ᾽ οὐδὲ τὰς πολιτείας, αἳ μετὰ πλείονος ἀσφαλείας εἰσί, διὰ δὲ τοὺς ἐπὶ τῷ βελτίστῳ παρρησιαζομένους πολλὰ σῴζεσθαι καὶ τῶν ἐπιδόξων διαφθαρήσεσθαι πραγμάτων."

[76] Isocrates, *Isocrates*, ed. Jeffrey Henderson, trans. George Norlin, Loeb Classical Library Edition, vol. 1 (Cambridge, MA: Harvard University Press, 1928), 43. In *To Nicocles*, Isocrates suggests that because king's counsel "consort with them to gain their favour," monarchs are not exposed to *parrhesia*-based critiques and unlikely to engage in processes of cognitive dissonance): "τοῖς δὲ τυράννοις οὐδὲν ὑπάρχει τοιοῦτον, ἀλλ᾽ οὓς ἔδει παιδεύεσθαι μᾶλλον τῶν ἄλλων, ἐπειδὰν εἰς τὴν ἀρχὴν καταστῶσιν, ἀνουθέτητοι διατελοῦσιν· οἱ μὲν γὰρ πλεῖστοι τῶν ἀνθρώπων αὐτοῖς οὐ πλησιάζουσιν, οἱ δὲ συνόντες πρὸς χάριν ὁμιλοῦσι." Ibid., 42.

[77] Matthew Landauer, "Parrhesia and the Demos Tyrannos: Frank Speech, Flattery and Accountability in Democratic Athens," *History of Political Thought* 33, no. 2 (2012): 190, https://dialnet.unirioja.es/servlet/articulo?codigo=4233170.

[78] Landauer, 191.

[79] Isocrates, *Isocrates*, 1928, 1:57. For the original quotation from *To Nicocles*, *see* ibid., 56. "δίδου παρρησίαν τοῖς εὖ φρονοῦσιν, ἵνα περὶ ὧν ἂν ἀμφιγνοῇς, ἔχῃς τοὺς συνδοκιμάσοντας."

[80] Isocrates, 1:56, 57.

[81] Landauer, "Parrhesia and the Demos Tyrannos."

[82] S. Sara Monoson, *Plato's Democratic Entanglements: Athenian Politics and the Practice of Philosophy* (Princeton University Press, 2000).

[83] Plato, in Book VIII of *The Republic*, identifies five regimes of government ordered from best to worst: (1) aristocracy—where a philosopher king motivated by reason and moral judgment rules to pursue social and political happiness; (2) timocracy—where the philosopher king's immediate subordinates become corrupted by way of cultivating personal wealth alongside ethical virtues; (3) oligarchy—where timocracy devolves into a classist system of rich and poor people, where the former govern the latter; (4) democracy—where oligarchy further deteriorates by empowering lower classes of poor people to become autonomous and free such that they pursue unnecessary desires void of higher-level principles; and (5) tyranny—where democratic governors lose sociopolitical control by empowering the body politic with excess freedom. See Plato, *The Republic of Plato*, trans. Benjamin Jowett (Oxford at the Clarendon Press, 1888), 247–79.

[84] Plato, 245.

[85] Monoson, *Plato's Democratic Entanglements*, 165–66.

[86] Plato, *The Republic of Plato*, 261–73.

[87] Monoson, *Plato's Democratic Entanglements*; Landauer, "Parrhesia and the Demos Tyrannos."

[88] Isocrates, *Isocrates*, trans. George Norlin, Loeb Classical Library Edition, vol. 2 (Cambridge, MA: Harvard University Press, 1928), 15. "Ἐγὼ δ᾽ οἶδα μὲν ὅτι πρόσαντές ἐστιν ἐναντιοῦσθαι ταῖς ὑμετέραις διανοίαις, καὶ ὅτι δημοκρατίας οὔσης οὐκ ἔστι παρρησία, πλὴν ἐνθάδε μὲν τοῖς ἀφρονεστάτοις καὶ μηδὲν ὑμῶν φροντίζουσιν, ἐν δὲ τῷ θεάτρῳ τοῖς κωμῳδοδιδασκάλοις· ὃ καὶ πάντων ἐστὶ δεινότατον, ὅτι τοῖς μὲν ἐκφέρουσιν εἰς τοὺς ἄλλους Ἕλληνας τὰ τῆς πόλεως ἁμαρτήματα τοσαύτην ἔχετε χάριν ὅσην οὐδὲ τοῖς εὖ ποιοῦσι, πρὸς δὲ τοὺς ἐπιπλήττοντας καὶ

νουθετοῦντας ὑμᾶς οὕτω διατίθεσθε δυσκόλως ὥσπερ πρὸς τοὺς κακόν τι τὴν πόλιν ἐργαζομένους." Ibid., 14.
[89] For additional evidence of acculturative practices related to content moderation, *see* *Areopagiticus*, where Isocrates argues for returning to the restricted democracy of Athenian lawmakers Solon and Cleisthenes as a means of holding elected leaders to account: "For those who directed the state in the time of Solon and Cleisthenes did not establish a polity which in name merely was hailed as the most impartial and the mildest of governments, while in practice showing itself the opposite to those who lived under it, nor one which trained the citizens in such fashion that they looked upon insolence as democracy, lawlessness as liberty, impudence of speech as equality [τὴν δὲ παρρησίαν ἰσονομίαν] and licence [sic] to do what they pleased as happiness [τὴν δ᾽ ἐξουσίαν τοῦ πάντα ποιεῖν εὐδαιμονίαν], but rather a polity which detested and punished such men and by so doing made all the citizens better and wiser." Isocrates, 2:115, 117.
[90] Bejan, "Two Concepts of Freedom (of Speech)."
[91] Monoson, *Plato's Democratic Entanglements*, 165.
[92] Monoson, 165. But see Book X in*,* where Plato bans all poets from his Republic. Socrates condemns the oral "spell" that poets weave because it bewitches listeners. Plato, *The Republic of Plato*, 367.
[93] Saxonhouse, *Free Speech and Democracy in Ancient Athens*.
[94] Saxonhouse suggests that the paradigmatic example is the trial and death of Socrates. Plato, who recounts the narrative in *Apología Sokrátous* (Ἀπολογία Σωκράτους) characterizes Socrates as the free-speech savior of Athenian democracy. Through his "bold affirmation and shameless articulation" of what he held to be true, Socrates embodies the archetypal *parrhesiast* culminating in his famous axiom about the unexamined life as not worth living. Saxonhouse, 212.
[95] Saxonhouse, 112.
[96] Saxonhouse, i.
[97] Foucault, *Fearless Speech*, 83.
[98] Isocrates, *Isocrates*, 1928, 2:15.
[99] Elizabeth Markovits, *The Politics of Sincerity: Plato, Frank Speech, and Democratic Judgment* (Penn State Press, 2010), 54–61.
[100] David Phillips, *The Law of Ancient Athens* (University of Michigan Press, 2013), 32, 189.
[101] Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology* (University of Oklahoma Press, 1999), 81–85.
[102] Hansen, 142.
[103] Sluiter and Rosen, *Free Speech in Classical Antiquity*, 21, 199, 200, 221, 233.
[104] Lewis, "Isegoria at Athens," 129.
[105] Markovits, *The Politics of Sincerity*, 66.
[106] For a discussion of key cases of Roman political censorship—and a chronological table listing key defendants, alleged offenses, punishments, and historical sources—*see* Mary R. McHugh, "Historiography and Freedom of Speech: The Case of Cremutius Cordus," in *Free Speech in Classical Antiquity*, ed. Ineke Sluiter and Ralph Rosen (BRILL, 2004), 406–7.
[107] Markovits, *The Politics of Sincerity*.
[108] Foucault, *Fearless Speech*, 19.

[109] Markovits, *The Politics of Sincerity*, 66.
[110] David Gress, *From Plato to NATO: The Idea of the West and Its Opponents* (Simon and Schuster, 2010).
[111] Foucault, *Fearless Speech*. Within the table of contents, *see* "1. The Word *Parrhesia* / The Meaning of the Word / Frankness / Truth / Danger / Criticism / Duty."
[112] Foucault, 12.
[113] Lewis, "Isegoria at Athens," 134.
[114] Markovits, *The Politics of Sincerity*, 32–43; Phillips, *The Law of Ancient Athens*, 51–65.
[115] Foucault outlines the limits of *parrhesia*: "*Parrheriazesthai* means 'to tell the truth.' But does the *parrhesiastes* say what he *thinks* is true, or does he say what is really true? To my mind, the *parrhesiastes* says what is true because he *knows* that it *is* true; and he *knows* that it is true because it is really true. The *parrhesiastes* is not only sincere and says what is his opinion, but his opinion is also the truth. He says what he *knows* to be true. The second characteristic of *parrhesia,* then, is that there is always an exact coincidence between belief and truth." Foucault, *Fearless Speech*, 14.
[116] Ash, *Free Speech*.
[117] Ash, 77.
[118] Sluiter and Rosen, *Free Speech in Classical Antiquity*, 7.
[119] Foucault, *Fearless Speech*, 15–16.
[120] Foucault, 18.
[121] Foucault, 16.
[122] Foucault, 19. *See also On the Peace*: "I may give the impression to some of you of having chosen to denounce our city….[T]hose who admonish and those who denounce cannot avoid using similar words, although their purposes are as opposite as they can be….[Y]ou ought to commend those who admonish you for your good and to esteem them as the best of your fellow-citizens…." Isocrates, *Isocrates*, 1928, 2:51, 53.
[123] Landauer, "Parrhesia and the Demos Tyrannos," 193.
[124] This approaches Plato's idea, in *Phaedrus*, of limiting rhetoric to philosophers who have ascertained absolute truth. Plato, *Plato: Euthyphro; Apology; Crito; Phaedo; Phaedrus*, trans. Harold North Fowler, Reprint of 1904 edition (Cambridge, Mass: Harvard University Press, 1999).
[125] Bejan, "The Two Clashing Meanings of 'Free Speech.'"
[126] Stephen Halliwell, "Comic Satire and Freedom of Speech in Classical Athens," *The Journal of Hellenic Studies* 111 (November 1991): 48–70, https://doi.org/10.2307/631887.
[127] Alan H. Sommerstein, "Harassing the Satirist: The Alleged Attempts to Prosecute Aristophanes," in *Free Speech in Classical Antiquity*, ed. Ineke Sluiter and Ralph Rosen (BRILL, 2004), 145–74.
[128] Ash, *Free Speech*, 77.
[129] Markovits, *The Politics of Sincerity*, 61. *See also* Euripides who notes "Next there stood up a man with no shutters on his mouth, strong on audacity, an Argive but not a true one—pressurized—reliant on hectoring and ignorant outspokenness [*παρρησία*], plausible enough to pitch them on some disaster yet; for when a man attractive in speech but wrong-headed is persuasive to the majority, it is a calamity for the city." R. B. Rutherford, *Greek Tragic Style: Form, Language and Interpretation* (Cambridge University Press, 2012), 209.

CHAPTER THREE: THE AMERICANIZATION AND DIGITIZATION OF FREE SPEECH

Colonial Developments of American Free-Speech Permissiveness

American free-speech philosophy was born from British imperialism.[1] In the context of American colonial governance, Great Britain worried about the spread of insurrection by way of print media. To maintain sociopolitical order across its transatlantic empire, Britain suppressed "dangerous utterances" by way of licensing, constructive treason, seditious libel, and Star-Chamber prosecutions.[2] After the Revolution, the founders, mindful of British speech regulation, codified speech protections into the Constitution. In drafting the First Amendment, the framers ingrained a philosophy of speech permissiveness into American social consciousness. This history helps explain why the U.S. currently exists on the permissive end of the international free-speech continuum and why global Internet companies, many of which are domiciled in California, subscribe to a *laissez-faire*, American model of speech regulation.[3]

American Free-Speech History is Grounded in Ancient Political Theory

Despite American socialization into free speech nonregulation by reason of colonial resentment, an ideological division arose between Thomas Jefferson and the Federalists that substantially shaped modern-day jurisprudence.[4] Jefferson, who was keenly mindful of the speech-related dynamics of colonial separation, and the leader of the opposition party in the new republic, favored a robust, *parrhesia*-centered approach to free speech that championed democratic governance. Viewing free speech through a Miltonian/Lockean lens, Jefferson was concerned about ceding powers of censorship to government officials (possibly unelected), and the potential for censorial abuse.[5] The Federalists developed an *isegoria*-based understanding of free speech as a means to promote good governance through an individual's self-actualization,

liberty of thought, and freedom of conscience. By protecting an individual's right to be let alone from religious or political interference, a practice commonplace in feudal Europe, the body politic was intellectually free to hear and consider competing viewpoints. Thus, Federalism became equated with *isegoria*-based paternalism, while Jeffersonianism became equated with *parrhesia*-based individual autonomy and governmental noninterference.

This American ideological division intensified with the onset of the French revolution in 1789. The Jeffersonians were sympathetic to the left-wing Jacobins in their plight for socioeconomic freedom and political rebellion. The Federalists sympathized with the French aristocracy and, by extension, the British political establishment that sought to maintain French aristocratic rule.[6] Fearing a Jacobin-inspired Jeffersonian revolution in the U.S., the Federalist majority in Congress enacted the Alien and Sedition Acts of 1798 which criminalized the publication of "'false, scandalous and malicious [content]' that might bring the federal government or federal government officials into 'contempt or disrepute' or excite against them 'the hatred of the good people of the United States.'"[7] As Keith Whittington notes, it is a noncoincidence that the statute's plain language does not protect the vice president—who happened to be Thomas Jefferson.[8] And while the abrogated Sedition Act has come to stand for the proposition that hate speech should be outside the realm of legally protected free speech, Whittington asserts that the act expanded American free speech philosophy in two important ways.

First, the Sedition Act reiterates the continuum fallacy (i.e., the slippery slope) against which Isocrates, Milton, Mill, Holmes, Brandeis, and Meiklejohn explicitly warn. This argument is rooted in *parrhesia*. Although the Federalists intended to circumscribe their censorship by prosecuting only "fake news," Jefferson knew this to be shortsighted. The Jeffersonians

understood that a suppressed viewpoint may be the one true opinion or contain droplets of truth such that its value lies in the matter which can be expounded.[9] If laws against sedition or *lèse-majesté* stand, a society is unable to maintain the separation between law and politics, and bureaucrats would use these legal instruments in unintended and self-serving ways. And considering the newfound meaning and politization the term "fake news" has acquired in recent years,[10] the Jeffersonians should feel validated.[11]

Second, the Sedition Act highlights the idea that no person or entity can be trusted to analyze and censor contested speech.[12] This argument is rooted in *isegoria*. All democratic political actors, whether elected or appointed, operate with degrees of implied selfishness based on interests of reelection or career advancement (recalling Chapter Two's discussion of why democracy ranks fourth out of Plato's five regimes of government). The Jeffersonians even disputed the idea that "an 'honest jury' or judge could distinguish between protected speech and speech that caused harm."[13] If no one can be trusted to regulate speech, censorship must be left to the citizens, who compete in an open ideological marketplace and are controlled by social norms and customs. There is, however, a key distinction between modern-American and classical-Greek citizenship. Athenians, through *dokimasia*, had a robust process to ensure that citizens possessed a requisite level of character and fitness. A person became entitled to the full rights of citizenship, including the use of *parrhesia* at meetings of the assembly, only *after* passing *dokimasia*. And even then, a *parrhesiast*'s pointed, shameless, and sometimes provocative message was necessarily grounded in truth and aspects of community building. American citizenship has no such requirement. Anyone, even a noncitizen, has the right to use provocative, offensive, or disrespectful speech void of truth. In sum, the Jeffersonians'

ideological victory over the Federalists' paternalism paved the way for free-speech nonregulation and a cultural preference for *parrhesia*-based individual autonomy.

For sociohistorical reasons based in colonial resentment, Americans favor the *parrhesia*-side of the free-speech coin more than their European counterparts. But without social or legal methods to ensure moral or ethical accountability, the Isocratic risks of unfettered free speech have become too great. In the modern era, neither Americans nor Europeans have a comparable *dokimasia*-like process of ideological or moral homogenization. There is no political character and fitness examination. An American becomes entitled to the rights of full citizenship through a combination of age, *jus sanguinis*, and/or *jus soli*.[14] For all practical purposes, any person, of any age, for any reason—beneficent or otherwise—has the right to express his opinion and persuade others of its veracity: even if the opinion impinges upon another's right to become self-actualized or -fulfilled, the opinion subverts democratic governance, or the speaker does not believe in the truth of the matter asserted.

I draw attention to these issues not to criticize First Amendment jurisprudence. American free-speech philosophy, after all, has substantially advanced international understandings for freedoms of press, religion, and conscience. Rather, I suggest a need to reevaluate and reexamine attitudes of free speech through sociohistorical and international lenses. This process of reflexivity becomes critically important when evaluating globalized relationships among digital speech, Internet content regulation, and legal semiotics. Dimensions of lingual expressivity have garnered newfound relevance in the era of emojis, selfies, and computer-mediated phatic interpretations.[15] These types of visual language, in the context of Internet communications and media law, are highly contextualized.[16] Normative standards of cyber civility vary by culture and require different applications and operations of law.[17] Yet, "acceptable" modes of speech-based

cyber conduct—defined by how closely an interpretant's decoded message aligns with those normative localized customs[18]—are promulgated by upper-level social media policymakers located in California. The fact that (1) most major international social media companies are located in America, (2) staffed with American-trained lawyers who write regulatory policy based in First Amendment law, and (3) operate with purposes of "moving fast and breaking things"[19] or becoming "the free speech wing[s] of the free speech party"[20] means that semiotic and sociolegal conflict become inevitable as American *parrhesia* clashes with European and Eastern *isegoria.* And until Americans can appreciate the irony of present-day ideological imperialism, they, especially Silicon-Valley based communication companies, will be ill-equipped and poorly positioned to handle international speech-related disputes. The next section examines the origins of American media philosophy, with its *parrhesia-isegoria* underpinnings, as a means to broadcast expert knowledge and facilitate civic engagement.

The American Philosophy of Media and Free Expression

Two sociocultural outlooks accompany each new advancement in communications technology: idealistic optimism for freedom of information and bearish pessimism for the public's perceived inability to use its newfound knowledge. This dichotomy is the crux of the Lippmann-Dewey debate underpinning modern American communications theory—and arguably the most important philosophical deliberation to situate press and media freedom.[21] To understand the relationship among new media, news, knowledge advancement, individual-fulfillment, and democratic self-governance, and the extent to which Internet media became an Americanized instrument to promote *parrhesia*-based democratic philosophy internationally, a brief discussion of these philosophies is warranted here.

The Lippmann-Dewey Debate

Liberal democracy, according to American journalist and social commentator Walter Lippmann, necessitates rule by an intellectual elite. Classical political theory presupposes a natural endowment for self-governance unattainable to the public, which lacks the requisite expertise to separate emotion from logic.[22] Throughout Book VI of Plato's *Republic*, Socrates advocates for rule by a "guardian" class of citizens trained in philosophy and warfare.[23] According to Lippmann, the public lives in a biased and subjective "pseudo-environment" with a deficient understanding of global events.[24] He references Plato's Cave,[25] suggesting that the public processes information through flawed media representations that are burlesqued, shadowy portrayals of world events designed to maximize communication industry profit.

> [T]he news is not a mirror of social conditions, but the report of an aspect that has obtruded itself. The news does not tell you how the seed is germinating in the ground, but it may tell you when the first sprout breaks through the surface. It may even tell you what somebody says is happening to the seed under the ground. It may tell you that the sprout did not come up at the time it was expected. The more points, then, at which any happening can be fixed, objectified, measured, named, the more points there are at which news can occur.[26]

If the nature of media is one of portrait and not of mirror, public opinion is fabricated and not organic. This "manufacture of consent,"[27] results in a zero-sum relationship between news and truth. Whereas the "function of news is to signalize an event, the function of truth is to bring to light the hidden facts, to set them into relation with each other, and make a picture of reality on which men can act."[28] The processes of aggregating and consuming information, under Lippmann's view, do not lead to a better-informed public because journalists misrepresent events and consumers increasingly seek information that confirm preexisting biases.[29] The purpose of media, therefore, is not "to carry the whole burden of popular sovereignty"[30] but rather to "signal"[31] events, or sow the seeds (continuing Lippmann's above-quoted metaphor) that

establish public opinion. According to Lippmann, news is not tantamount to truth; corporate financial motivations become increasingly apparent with media fragmentation/proliferation; and society requires a "specialized class" of experts to shape public opinion.[32] And considering the current hyper-commercialized and -partisan media environment, for which public support and confidence is at a near-record low,[33] Lippmann's pessimism was not necessarily misplaced.

Columbia University philosopher John Dewey, on the other hand, rejects advocating for a technocratic governing elite, calling Lippmann's *Public Opinion* "perhaps the most effective indictment of democracy as currently conceived ever penned."[34] He accepts Lippmann's majoritarian-centered concerns related to public-opinion formation noting "every issue is hopelessly entangled in a snarl of emotions, stereotypes and irrelevant memories and associations" such that the public may be incapable of separating fact from fiction.[35] This understanding corresponds with Jean-Jacques Rousseau's notion that "the general will is always right, but the judgment guiding it is not always enlightened."[36] Walter Lippmann, to a degree, believed the public is incapable of enlightenment and should be precluded from self-governance.[37] Because the "manufacture of consent"[38] perpetually flaws public opinion, the common person cannot acquire a correct representation of the world and must be precluded from governance.

Putting aside the racism and sexism that flows naturally from rule by an elite class, Dewey insists that citizens need not be subject-matter experts as a precondition of democratic self-rule. They need only acquire a minimal degree of civic competency—by way of education and media consumption—to select, or elect, experts well suited for political office. "No government by experts," says Dewey, "in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few."[39]

Although Dewey agrees with Lippman that experts, or modern-day philosopher kings, are best suited to govern, he does not disregard the value of public participation within democracy. "A class of experts," Dewey writes, "is inevitably so removed from common interests as to become a class with private interests and private knowledge, in which social matters is not knowledge at all."[40] The problem here is circular: experts are better positioned to governed because of their putatively superior morals, ethics, and intellects. But they are not elected because moral, ethical, and intellectual matters are generally not *public* matters, even though they ought to be.

Relation to Classical Political Theory

The Lippmann-Dewey debate is the twentieth-century iteration of Platonic-Aristotelian philosophy. If Walter Lippmann takes the Platonic approach to understanding relationships among media and democracy, John Dewey takes the Aristotelian. Neither Plato nor Aristotle admired democracy. But Plato was outright hostile, criticizing the system's tendency to devolve into lawlessness by reason of inept leadership indifferent to virtuous living and governance. After all, Athenian democracy was the proximate cause of the trial and execution of Socrates, Plato's teacher.[41] Plato asserts that only philosophers have the capacity to govern.[42] His strongest indictment comes in Book VI of the *Republic* where he lays out Socrates's Ship of State metaphor.[43] Socrates, in conversation with Plato's brother Adeimantus, asks his student to imagine a seafaring vessel. The crew becomes unhappy with its captain and desires a change in leadership. Who should determine the next pilot, Socrates asks, the crewmen or experts educated in the rules, demands, and "art of navigation?"[44] The latter, responds Adeimantus. So why should nation-state stewardship be different, Socrates says?

Whereas Socrates and Plato assert that only philosophers have the capacity to govern because of their unique abilities to achieve perfect virtue, Aristotle is more pragmatic. He does

not foreclose outrightly the idealistic possibility of a ruling class or philosopher king,[45] but favors participatory democracy, arguing that every "man is by nature a political animal" with an inherent desire to bring together their common interests in pursuit of community well-being and happiness.[46] Politics, therefore, is an innate attribute of human nature. If man is naturally endowed with political acumen, "all the citizens have a place in the government, through the great preponderance of the multitude; and they all, including the poor who receive pay, and therefore have leisure to exercise their rights, share in the administration."[47] For Aristotle, the duty of citizenship,[48] and ability to achieve political self-actualization, rests on public education.[49] And for John Dewey, public education is the principal object of institutional didactics and news-media consumption.

Dewey's philosophical contributions to journalism and mass communications, as the means to achieve public enlightenment and democratic engagement, cannot be overstated. "Of all affairs," Dewey writes in his book *Experience and Nature*, "communication is the most wonderful."[50] Throughout chapter five, he supports this opening proposition by acknowledging how communication and media portrayal underlie *Wissenschaft*, especially *schöne Wissenschaft*,[51] because all academic disciplines, particularly philosophy, turn on how ideas are developed, rationalized, and analyzed.

> When communication occurs, all natural events are subject to reconsideration and revision; they are re-adapted to meet the requirements of conversation, whether it be public discourse or that preliminary discourse termed thinking…They may be referred to when they do not exist, and thus be operative among things distant in space and time, through vicarious presence in a new medium.[52]

The "communicative turn"[53] in Dewey's scholarship, beginning with *Democracy and Education*[54] (1916) and solidified by *Experience and Nature*[55] (1925), was conspicuous throughout *The Public and Its Problems*[56] (1927): Dewey's primary rejoinder to Walter

Lippmann's *Public Opinion*[57] (1922) and *The Phantom Public*[58] (1925). At the time of these writings, the international community was facing a democratic crisis. The Progressive Era catalyzed public affirmation and admiration for scientific enquiry, which adversely affected American religiosity.[59] World War I, and government-sponsored information campaigns to boost public support for American involvement, brought to bear the extent to which humans are easily manipulated by media messaging and propaganda.[60]

Dewey conceived media, and advancements in communications technologies, as the solution to these problems in the American quest to become a "Great Community."[61] Whereas Lippmann operationalized the press as a mere conduit to relay expert-devised policy conclusions in an easily digestible manner to a politically apathetic and incompetent public, Dewey viewed journalism as the public's avenue toward participatory democracy. Misquoting Thomas Carlyle,[62] Dewey writes in *The Public and Its Problems*, "'Invent the printing press and democracy is inevitable.' Add to this: Invent the railway, the telegraph, mass manufacture and concentration of population in urban centers, and some form of democratic government is, humanly speaking, inevitable."[63] The symbiotic and mutually reinforcing relationships among media, technology, speech, and governance guide public opinion and "provide the cure for the ailments of democracy…[which is] more democracy."[64]

News and media educate the citizenry by facilitating shared experience such that the public acquires epistemological and political agency—to ascertain truthful information and participate in civic debate. Even so, Dewey was not quixotic. He recognized that new media technologies are only a partial cure for democratic ailments because a new type of American individualism has the propensity to distort public opinion in favor of negative freedom, which I explicate in below. Dewey writes, "[t]he belief that thought and its communication are now free

simply because legal restrictions which once obtained have been done away with is absurd…Removal of formal limitations is but a negative condition; positive freedom is not a state but an act which involves methods and instrumentalities for control of conditions."[65] In other words, media and technology are favorable to the extent that government, the press, and individuals use them collectively to uphold democratic responsibilities.[66] This viewpoint touches Jürgen Habermas's philosophy that "communicative action,"[67] and associated technological advancements, serve to foster cultural knowledge and mutual social understandings, what he labels *Lebenswelt* or "lifeworld."[68]

According to Habermas, communication is the *sine qua non* of freedom and equality because it facilitates "legitimation" of law among fractured and pluralistic social groups.[69] Social cohesion and moral uniformity towards the lifeworld necessitate robust civic discourse that, in turn, presuppose freedom of speech and advancements in communications technologies. But communication, while a necessary condition of freedom and equality, is not alone sufficient. Technological advancement has the capacity to impair self-determination and -actualization as media channels, and the social conscience, become increasingly fragmented and siloed. In the current digital era of media and expert skepticism, Lippmann's concerns related to participatory democracy, and Habermas's concerns regarding "technical rationality,"[70] may have become realized.

The Lippmann-Dewey debate underlies the censorship dilemma currently affecting Internet media. If Walter Lippmann was accurate that media's purpose is to relay expert knowledge to a non-expert public, the need for *parrhesia*-based discourse is nullified because deliberately offensive messages are not conditions predicate to knowledge advancement. Peer-reviewed scholarship is a primary example: non-normative provocative messages are not

generally publishable because they fall outside the realm of disciplinary orthodoxy that journal editors strive to reinforce.[71] If John Dewey, on the other hand, was correct that media serve to facilitate civic engagement, *parrhesia*-based dialogue becomes critically important because public opinion formation often turns on emotional appeal.[72] As discussed in my Chapter Two analysis of *Cohen v. California*, "I object to Vietnam-wartime conscription" carries different rhetorical power than "Fuck the Draft."[73] And recognizing Justice John Marshall Harlan's truth that "one man's vulgarity is another's lyric,"[74] protecting *parrhesia*'s boldness is equally important to facilitating *isegoria*'s thoughtfulness. But America's preference for the former carries new meaning in the digital era. The next section addresses how new media and American neoliberal free-speech theory created an information-epistemology crisis and a dereliction of gatekeeping duties among the new governors of Internet communications.

The Rise of New Media

For centuries, knowledge faced preservation and dissemination crises as Medieval scribes, despite valiant efforts, could not protect entirely the historicity or reproduced accuracy of hand-copied texts. This resulted in the corruption and fragmentation of historical documents that made information aggregation extremely difficult. Johann Gutenberg's rediscovery of printing with moveable metal type in the 1440s, however, had seismic implications for the history of information. The printing press could disseminate and preserve the historical record in ways that often affected and redirected the course of civilizations.[75] Scholars were no longer beholden to the time- and finance-dependent practices of locating the *Urtext* (earliest versions of a text deemed most accurate) because subsequent editions became increasingly verifiable and reliable.[76] The adoption of print culture standardized scholarship and science, laying foundations for fourteenth-century Western humanism and the ensuing disruption of feudal, religious, and

political institutional orthodoxy.[77] Media historian Elizabeth Eisenstein suggests that the Protestant Reformation, Renaissance, and Scientific Revolution could not have occurred absent printing with moveable type.[78]

The creation of print/mass media birthed what media theorist Marshall McLuhan called "the typographic man:"[79] a person enculturated into a post-Gutenberg society of competitive individualism and liberal nationalism whose agency and autonomy would be consumed by the tribalized structure of the "global village."[80] This approaches John Dewey's thesis in *Individualism, Old and New*, which asserts that newfound political bureaucratization, coupled with technological innovation and a mechanized culture of uniformity, will becloud western humanism and isolate man's soul.[81] The printing press, according to McLuhan, created uniformity and repeatability of typography, and by extension knowledge, that would homogenize political and social ideology in ways destructive to individual self-actualization and democratic maintenance. Politics would become "arithmetic" or Machiavellian,[82] business practices would become "hedonistic" and amoral,[83] and literature and written information would become a "portable commodity" void of humanistic body.[84]

The shift from scribal, to print, to electronic culture—and the broader sociological and philosophical implications thereof—led to McLuhan's central thesis: "the medium is the message."[85] As McLuhan stated, "All media work us over completely. They are so pervasive in their personal, political, economic, aesthetic, psychological, moral, ethical, and social consequences, they leave no part of us untouched, unaffected, unaltered."[86] The globalized production and consumption of mass media creates what geographer David Harvey later called the "time-space compression:"[87] temporal-spatial abrogation accelerating economic activity and commodity fetishism.[88] As communications technology continues to advance, and our global

village becomes increasingly uniform and homogenized, corporate actors will continue to use their media platforms to dominate, monopolize, or otherwise devalue human capital. Law professor Tim Wu chronicles this tendency in his book *The Master Switch*,[89] arguing that each new mass medium, from telephone to radio to film, grows from an open and lawless marketplace defined by a neo-Lockean idyllic natural state, much like the present-day Internet.

Over time, idealistic optimism, more accurately utopianism, surrenders to industrial consolidation and conglomeratization. "History shows a typical progression of information technologies," says Wu, "from somebody's hobby to somebody's industry; from jury-rigged contraption to slick production marvel; from a freely accessible channel to one strictly controlled by a single corporation or cartel."[90] As information industries inevitably transition from open/decentralized to closed/centralized systems, a phenomenon Wu calls "the Cycle,"[91] corporate leviathans come to control "the master switch." Competition-based capitalism devolves into cartel-like monopolism where industrial titans, who earned their statuses by dominating the *disruptive-innovation* period of value-network marketization,[92] undertake all actions necessary to perpetuate their *first-mover advantage*.[93] Drawing on his classical education, Wu labels this concept "the Kronos Effect,"[94] employing the Greek myth recorded in Hesiod's *Theogony*.[95] The Titan Kronos, son of Uranus (Heaven) and Gaea (Earth), swallowed his own children to forestall his mother's prophecy that one would dethrone him. Dominant telecommunications companies, correspondingly, tend to swallow their potential successors in their infancy to thwart future marketplace competition. First movers, with vastly superior resources, eliminate would-be competitors through a combination of merger-and-acquisition transactions and government lobbying efforts.

The Kronos effect provides an illusion that technological innovation is an orderly and natural byproduct of *laissez-faire*, free-market capitalism.[96] In reality, communication innovation creates profit-maximizing corporate leviathans that attempt to monopolize the marketplace. This results in a philosophical paradox: limited government interference, under Physiocratic[97] and Smithian classical growth theory,[98] will lower regulatory and tax burdens such that businesses will acquire resources to invest, spend, and thrive. But without a requisite amount of oversight, domineering actors will subjugate less-powerful competitors and end-users in ways that inhibit economic growth and technological advancement. Just as *laissez-faire* yielded to Keynesian (and eventually Friedmanite) economics, under the public's acknowledgement that market capitalism is an unruly process requiring some modicum of government intervention, the media-market landscape also requires regulation to protect consumers and smaller businesses from anticompetitive or exploitative behaviors. Without some government oversight, media corporations show a clear tendency to forestall viable competition and dominate the communications sector to the user's detriment, as seen by the unregulated-to-regulated histories of American Telephone and Telegraph (AT&T), the Radio Corporation of America (RCA), Paramount Pictures, and, to a limited extent, Apple.[99]

The antinomy between government regulation as an initially frustrating but eventually necessary factor in media regulation has become the focal issue for Internet information networks—who have largely escaped oversight despite their similar patterns of centralization, consolidation, and monopolization. Two reasons explain this successful circumvention. The first, discussed below, is Section 230 of the Communications Decency Act, which facilitated modern crowdsourced cyber-architecture. The second, discussed in Chapter Five, is the Supreme Court's rulings in *First National Bank of Boston v. Bellotti* (1978) and *Citizens United v. Federal*

Election Commission (2010), which gave corporations First Amendment free speech rights concomitant to natural persons.

Thus far, this chapter has discussed the ideological origins of American free-speech permissiveness rooted in personal freedom and forced government restraint. It analyzed the philosophical foundations of American communications theory and the doctrinal objectives of media creation, consumption, and freedom. It demonstrates how American media philosophy is grounded in classical political theory and the extent to which new media can be used to further democratic ends. To understand how the American *parrhesia*-model of free speech has become internationalized, and arguably imperialized, we now turn to Internet media and their genesis as a military and academic instrumentality.

American Origins of the Internet

The Internet is a world-wide broadcasting medium for information dissemination, collaboration, and interaction among individuals and their computers irrespective of spatial-temporal separation.[100] Independent computer networks have their origins in late-1950s and early-1960s America. Among the first was the joint American Airlines-International Business Machines Corporation (IBM) travel and reservation system called SABRE (Semi-Automatic Business Research Environment).[101] The origins of *interconnected* computer systems, however, began with geopolitical tensions arising from the Cold War.

Following the Soviet launch of Sputnik 1 in October 1957, the U.S. Department of Defense (DoD) created a host of agencies to facilitate and manage information-technology innovations with military capabilities. President Dwight D. Eisenhower created the Advanced Research Projects Agency (ARPA) in 1958, later renamed the Defense Advanced Research Projects Agency (DARPA), to streamline the traffic of classified information in times of national

crisis.[102] The Defense Communications Agency (CDA), under the auspices of the DoD and in partnership with IBM and Western Union, produced the Automatic Digital Network System (AUTODIN), in the early 1960s, to speed communications and logistics traffic among American military bases.[103] The Cuban Missile Crisis of 1962 exacerbated the strategic need for automated, high-speed, and classified digital command-and-control networks should a nuclear attack disable military communications.[104] To that end, AUTODIN gave way to ARPANET (the Advanced Research Projects Agency Network) in October 1969—which was the first host-to-host, general-purpose, time-sharing system capable of linking computers between the Pentagon and U.S.-supported research sites at ARPA-sponsored universities.[105]

ARPANET, while fundamentally an academic exercise among computer scientists and engineers, became a critical medium of the U.S. military because it decentralized communications such that the command structure was no longer susceptible to a single kinetic attack.[106] The system used "packet-switching" technology where messages traveled independent from dedicated circuitry.[107] Unlike telephony, which requires hardwired networks tethered by designated circuits, packet switching relays messages over any available circuit. A decentralized communications system mitigates "decapitation" efforts undertaken by nation-state adversaries such that the U.S. command structure could survive and respond to Soviet nuclear attacks on critical infrastructure.[108] ARPANET and packet switching, therefore, served to deter Soviet forces from initiating attacks on the U.S. and its European allies.

In 1974, DARPA's Robert Kahn alongside Stanford University's Vinton Cerf outlined, in an academic paper, a transmission control protocol (TCP) which enabled different machines on different networks on different continents to send and assemble data packets through a common internetwork protocol (IP).[109] This theoretical concept became TCP/IP adopted by the DoD, the

U.S. Department of Energy (DoE), and the National Aeronautics and Space Administration (NASA).[110] The U.S. National Science Foundation (NSF), in connection with a monetary grant awarded to DARPA, expanded access to scientific research and scholarship when it standardized TCP/IP by connecting the five preeminent American computer science programs in 1985: Cornell University, the University of Pittsburg, the University of Illinois, the University of California at San Diego, and Princeton University.[111] This so-called "NSFNET Backbone" made its academic priorities clear under its "acceptable use" policy, forbidding commercial usage "not in support of Research and Education."[112] But these puritanical regulations were short lived.

NSF understood the significant, and missed, economic advantages of commercialization and, in 1995, walked back its acceptable use policy to include commercial providers.[113] This policy shift, together with the introduction of personal computing,[114] integrated circuitry,[115] and local area networks (LANs),[116] facilitated wide-spread computer usage and the need for a simplified point-and-click interface to expedite information sharing to a non-coding public. The confluence of the World Wide Web, developed by Tim Berners-Lee while employed at the *Conseil Européen pour la Recherche Nucléaire* (CERN), and Mosaic, the first wide-spread Internet "browser" to display text and images simultaneously developed by the University of Illinois's Marc Andreessen and Eric Bina, heightened demand for personal computers and service providers to facilitate widespread connectivity.[117] And alongside developments in unilateral information acquisition (Web 1.0),[118] web designers began to realize the potential for bilateral Internet interactions (Web 2.0)[119] where companies could host and promote user-generated content as a means of virtual socialization and community building.[120] This paradigm shift from the Internet as a research-based information repository to a commercialized, interactive, and interoperable schema of user-generated content had profound implications for

internet service providers (ISPs) and the extent to which they should be held liable under U.S. copyright[121] or defamation law.[122]

Newfound Problems for Digital Publisher Liability

At traditional common law, a natural or legal person who published a third party's defamatory statement was liable commensurate to the defaming third party himself.[123] The first Restatement of Torts made that much clear:[124] every repetition of libel was considered a new publication such that republishers were liable to the same extent as original authors.[125] Outside narrow exceptions for news dealers and messengers, all persons who distributed defamatory materials—including bookshops and libraries—were strictly liable under the theory that most distributors have opportunity and ability to exercise editorial discretion over the material they traffic.[126] But this changed in 1959 when the Supreme Court, in *Smith v. California*, held unconstitutional a California criminal libel law that imposed strict liability for bookstores selling obscene material.[127] Justice Brennan, writing for a unanimous Court, reasoned that "[i]f the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they…would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."[128] The *Smith* decision began a slow erosion of publisher liability in American law,[129] reflected in the Second Restatement of Torts,[130] that would bring about two key legal challenges in the 1990s: *Cubby v. CompuServe, Inc.* (1991) and *Stratton Oakmont v. Prodigy* (1995).

Cubby v. CompuServe

Robert Blanchard and his company Cubby Inc. sued the ISP CompuServe, which hosted Don Fitzpatrick's "Rumorville:" a daily newsletter that published articles about broadcast journalism and journalists.[131] Blanchard developed a competing newsletter called "Skuttlebut,"

which published accounts of digital gossip in the television news and radio industries.[132] Blanchard alleged that Fitzpatrick published defamatory statements about Skuttlebut and brought suit in the U.S. District Court for the Southern District of New York against Fitzpatrick and CompuServe itself, arguing that CompuServe is liable in its capacity as publisher of the Rumorville statements.[133]

Rumorville argued that CompuServe was a distributor, not a publisher, because it had no opportunity to review content prior to posting. The court agreed with CompuServe and dismissed the case, holding that "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."[134] Because Cubby could not prove CompuServe had reason to know it was hosting allegedly defamatory statements, the court granted CompuServe's motion to dismiss.

Stratton Oakmont v. Prodigy

Four years after the *Cubby* case, a New York trial court heard a publisher-liability dispute arising from an anonymous posting to a digital bulletin board. In 1994, an unidentified user posted statements to the ISP Prodigy's forum "Money Talk" alleging that the Long Island brokerage firm Stratton Oakmont, Inc., and its president, committed criminal and fraudulent acts in connection with the initial public offering of a third-party's stock.[135] Stratton sued, arguing that Prodigy should be considered a publisher of the anonymous statements because it exercised editorial control over the messages appearing on its bulletin boards through its content guidelines and software screening program.[136] The court agreed, holding that Prodigy was a publisher, not a distributor, and distinguished the facts from the *Cubby* case: "The key distinction between

CompuServe and PRODIGY is two fold. First, PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce."[137] Whereas CompuServe's product was, "in essence, an electronic for-profit library,"[138] Prodigy was exercising editorial control by deleting bulletin board posts "on the basis of offensiveness and 'bad taste.'"[139] Unlike Prodigy, CompuServe did not review *any* user-generated content prior to posting. Without any knowledge of alleged defamation, CompuServe could not be held responsible—incentivizing website operators to be willfully ignorant of hosted content as a means to escape liability.

The technological paradigm shift from the Internet as a passive information repository to a crowdsourced interactive medium brought to light the massive legal implication surrounding digital publishing and distributing. Read together, *Cubby* and *Stratton Oakmont* stand for the proposition that ISPs are only liable for user-generated content if they make any attempt to moderate the content they host. This created a significant gatekeeping disincentive for website operators—for it was economically better to let noxious libels go unchecked than face publisher liability for attempting to exercise editorial control over an intractable flow of digital information. These two cases forced Congressional intervention to incentivize, not punish, corporations' good-faith efforts to moderate their platforms. The solution was Section 230 of the Communications Decency Act.

Communications Decency Act of 1996

On February 1, 1995, three months before the *Stratton Oakmont* decision, Senator James Exon (D–NE) introduced the Communications Decency Act (CDA)[140] in response to the vast amount of lewd and prurient images freely available online.[141] Enacted as Title V of the

Telecommunications Act of 1996,[142] the CDA was Congress's ultimately unsuccessful attempt to restrict minors' access to Internet pornography. Congress designed the CDA with objectives to ban the transmission of "obscene or indecent" messages, determined by local community standards, to a recipient under the age of 18.[143] The original bill also criminalized the "knowing" display of "patently offensive" material containing excretory or sexual activities or organs to a minor.[144] These requirements meant that content providers would need to institute age-verifying screening procedures to avoid criminal prosecution—a measure that would have been prohibitively expensive in the early days of Internet infrastructure. While the CDA contained a good-faith defense for platforms that took reasonable efforts to exclude children, violation penalties included fines and imprisonment.[145]

Section 230

Concerned about the bill's chilling effects on digital speech and Internet architecture, a bipartisan pair of lawmakers, Chris Cox (R–CA) and Ron Wyden (D–OR), introduced an amendment to the CDA that abrogated publisher liability for ISPs. The relevant portion, eventually codified at 47 U.S.C. § 230(c)(1), reads, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[146] The Cox-Wyden amendment had two key objectives: invalidating the *Stratton Oakmont* ruling, which the sponsors make clear in congressional debate,[147] and encouraging Internet companies to enforce their own standards of acceptable user-generated content.[148] The legislative text itself makes these twin aims clear:

> (b) Policy
> It is the policy of the United States—
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and]

> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation[.][149]

Despite these first two policy rationales rooted in market capitalism, Representatives Cox and Wyden could only garner sufficient bipartisan support if they couched their amendment in broader congressional objectives of shielding children from explicit content. Using the nascent danger highlighted by *Stratton Oakmont*, Cox and Wyden built an ideologically diverse coalition of lawmakers united around empowering ISPs to self-censor obscene content and, as a seemingly incidental process, shield them from tort liability.[150] Once again, the statute's plain language makes this clear:

> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.[151]

On August 4, 1995, the House voted 420–4 to add the amendment to the CDA.[152] In late January 1996, the full Congress passed the CDA as Title V of the Telecommunications Act, and President Bill Clinton signed it into law on February 8, 1996.[153]

The CDA, fundamentally, was a government attempt to restrict speech based on objectionable content. Members of Congress knew the backlash from "free-speech absolutists" would be swift and severe.[154] This is why Senator Exon, in his original proposal,[155] mimicked language from the Supreme Court's holding in *Miller v. California*—which upheld criminal prosecution for publishing obscene material that (1) an average person, applying contemporary community standards, would find on the whole appeals to prurient interests, (2) describes sexual conduct in a patently offensive way, and (3) lacks any serious literary, artistic, political, or

scientific value.[156] Even so, congressional attempts to inoculate the CDA against First Amendment challenges failed because of two structural, and ultimately catastrophic, flaws: First, digital speakers could not easily ascertain whether content hosts took reasonable good-faith efforts to exclude child audiences from their platforms, making the CDA's reach overbroad by failing explicitly to condition legal immunity on responsible practices.[157] Second, the law's "indecent" and "patently offensive" categorizations were too ambiguous to overcome the Supreme Court's vagueness doctrine. As Senator Exon anticipated, the American Civil Liberties Union (ACLU), joined by 20 plaintiffs, sued the U.S. Attorney General and Department of Justice,[158] immediately following President Clinton's signing ceremony, in a legal challenge that would eventually eviscerate the CDA but leave intact Section 230.

Reno v. ACLU

Civil society's disparate treatment of the CDA turns on the law's paradoxical capitalist and protectionist histories. In *American Civil Liberties Union v. Reno* (1996), a cadre of Internet, free speech, and civil rights organizations[159] led by the ACLU asked the U.S. District Court for the Eastern District of Pennsylvania for a preliminary injunction on grounds that the CDA's "indecent" and "patently offensive" provisions violated the vagueness and overbreadth principles of the First Amendment.[160] A three-judge panel ruled unanimously that the law violated the First Amendment's free-speech guarantee, with one panelist noting that "the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen"[161] and subsequently "deserves the highest protection from governmental intrusion."[162] After being enjoined from enforcing the "indecent" and "patently offensive" provisions, Attorney General Janet Reno appealed directly to the U.S. Supreme Court under the CDA's special review provisions.[163]

In a unanimous decision, the Supreme Court invalidated virtually all the CDA. Despite Congress's legitimate and important goals of protecting children from harmful materials online, the Court held that the act amounted to a content-based blanket restriction on free speech and, therefore, could not undergo traditional time, place, or manner analysis.[164] Justice John Paul Stevens, writing for the majority, differentiated the Court's decision from its previous ruling in *Federal Communications Commission v. Pacifica Foundation*.[165] Unlike the *Pacifica* case, which centered on George Carlin's "Filthy Words" radio monologue and his use of public airwaves,[166] the Internet "can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds."[167] The government's interest in denying minors access to potentially harmful speech comes at the expense of denying adults access to "indecent" speech—to which they have a constitutional right to send and receive on the world's most participatory medium.[168] The CDA's regulations are, therefore, underinclusive in protecting children and overinclusive in protecting adults, and the statute's protectionist provisions fall accordingly. And despite a 1998 congressional attempt to circumvent *Reno* by passing the *Child Online Protection Act* (COPA),[169] which criminalized the digital communication of "any material that is harmful to minors,"[170] the Court struck down the law when it ruled, 6-3, that COPA fails strict scrutiny.[171]

A subsequent parade of state and federal lawsuits involving issues at defamation (*Zeran v. America Online Inc*.[172]), product authentication (*Gentry v. eBay, Inc.*[173]), and sexual assault (*Doe v. MySpace Inc.*[174]) solidified the extent to which American law is willing to absolve ISPs of any moral responsibility, under Section 230, to police content on their websites. This remains true despite Congress's narrow exception created by the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Traffickers Act (SESTA).

FOSTA-SESTA

In April 2018, President Donald Trump signed into law a legislative package amending Section 230's blanket liability for ISPs. Known as FOSTA-SESTA,[175] the legislation made clear that the CDA "was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims."[176] The two bills' consolidation created a complex regulatory patchwork[177] that, among its objectives, criminalized the ownership, management, or operation of an ISP with the intent to promote or facilitate prostitution;[178] expanded federal sex crimes to include the knowing assistance, support, or facilitation of sex trafficking;[179] and created civil recovery for private causes of action brought under federal child sex trafficking statutes.[180] FOSTA-SESTA represents the one legislative exception to the U.S. invisible-hand approach to Internet content regulation.[181]

Substantively and as applied, FOSTA-SESTA has been largely unsuccessful. Aside from the law's devastating, down-stream effects on consensual sex workers—who, by virtue of being deplatformed,[182] are pushed back onto the streets[183]—it has only been used to prosecute *one criminal defendant*[184] since its passage.[185] Procedurally, however, the law is arguably a success, opening the door for similar Section 230 carveouts aimed at targeting pernicious social issues capable of garnering wide-spread bipartisan support.[186] In other words, FOSTA-SESTA's success is in its normative (perhaps performative) aspects as a procedural backstop against near-absolute ISP immunity. FOSTA-SESTA creates a legislative pathway for greater congressional control over digital content, but the path remains unclear.

A Muddy Path Forward for 'The Twenty-Six Words'

Throughout his 300-page history of Section 230, Jeff Kosseff labels the law, specifically § 230(c)(1), as *The Twenty-Six Words That Created the Internet*,[187] and he is not being hyperbolic. The crowd-sourced and participatory nature that defines modern-day travel, food-delivery, movie-review, home-rental, teleconferencing, and information-sharing websites could not exist, or continue to exist, without Section 230 immunity.

> Scaling back or eliminating Section 230 more than twenty years after its passage is like digging the basement after building the house. The modern Internet in the United States is built on the foundation of Section 230. To eliminate Section 230 would require radical changes to the Internet. These changes could cause the Internet to collapse on itself. The Internet without Section 230 would be an Internet in which litigation threats could silence the truth.[188]

For these reasons, bipartisan calls to repeal the law should be rejected.[189] Section 230's liability safe harbor directly facilitates digital innovation and entrepreneurship. The Electronic Frontier Foundation (EFF), arguably the nation's preeminent digital civil libertarian advocacy organization—and one of the most vociferous co-plaintiffs[190] in the ACLU's Supreme Court case challenging the CDA[191]—labels Section 230 as "the most important law protecting Internet speech" and "one of the most valuable tools for protecting freedom of expression and innovation on the Internet."[192] Web 2.0, the modern-day Internet defined by user-generated content and interoperability, could not come to pass absent the law's abrogation of distributor liability.

And yet, social and participatory media are not mere distributors of information. Aside from the epistemological and values-based criteria they employ to determine what content comports with their terms of service, Internet companies design complex—and proprietary—algorithms to filter the information end users see. The advertisement-based enterprise of Web 2.0 is the most important reason why digital media are mot passive information distributors. Meta (then Facebook[193]) CEO Mark Zuckerberg made this clear in his 2018 congressional hearing

when Senator Orrin Hatch (R-UT) asked whether Facebook would always remain free. Zuckerberg responded affirmatively, to which Senator Hatch, in spectacular unfamiliarity, asked, "Well, if so, how do you sustain a business model in which users do not pay for your services?" "Senator, we run ads" Zuckerberg replied.[194]

Targeted advertising based on algorithmically scraped demographic and psychographic data—a practice to which users willingly opt in—is the reason why Internet media are not mere information distributors entitled to blanket liability protection. Companies profit from user-generated content by selling "eyeballs" or "clicks" (i.e., impressions served) that they can manipulate by directing these non-paying customers to morally outrageous, intentionally provocative, or conspiratorial messaging.[195] Facebook, for example, vehemently denies benefiting from hateful content it incidentally hosts.[196] But because of opaque content algorithms that, by virtue of their proprietary nature, remain unknowable outside internal corporate use,[197] social media platforms operate without normal mechanisms of public transparency and accountability that may lead to abuse and discrimination.[198] There are, however, corporate-social mechanisms, such as advertiser boycotts, that modulate the extent to which participatory media can profit in this unscrupulous manner.[199] And the digital privacy revolution of the 2010s,[200] spawned by the 2016 Facebook–Cambridge Analytica data scandal,[201] renewed public scrutiny on, and disclosure of, immoral corporate profiteering.[202] But the question remains: whether and to what extent Big Tech companies should, in theory or practice, be allowed to profit from hosting provocative content—something to which they have a First Amendment right under *Bellotti*[203] and *Citizens-United*[204] theories of artificial corporate personhood[205] (discussed in Chapter Four) and freedom of technological design.[206] This is not a question Big Tech wants to answer. Zuckerberg's October 2020 congressional testimony made this plain:

> Section 230 made it possible for every major internet service to be built and ensured important values like free expression and openness were part of how platforms operate. Changing it is a significant decision. However, I believe Congress should update the law to make sure it's working as intended. We support the ideas around transparency and industry collaboration that are being discussed in some of the current bipartisan proposals, and I look forward to a meaningful dialogue about how we might update the law to deal with the problems we face today.[207]

In sum, Section 230 gives web hosts protection against lawsuits arising from hosting content written by third parties, granting near-blanket immunity from civil liability regardless of whether the internet host attempts to control objectionable content.[208] A twofold, underlying policy rationale exists for this indemnification: (1) "to encourage unfettered and unregulated development of free speech on the internet, and to promote the development of e-commerce"[209] and (2) "to encourage interactive computer services and users of such services to self-police the internet for obscenity and other offensive material."[210] These justifications are rooted in early cyber-libertarian theory first proclaimed in 1996 by EFF founder, and Grateful Dead lyricist, John Perry Barlow. In his address to the World Economic Forum at Davos, Switzerland, repudiating the recently passed CDA, Barlow proclaimed

> We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.[211]

According to critical legal feminist Mary Anne Franks, "If Barlow's manifesto can be thought of as the Internet's Declaration of Independence, Section 230 of the Communications Decency Act can be likened to its Constitution."[212] By protecting Internet media's First Amendment rights, including the freedom to design,[213] Congress empowers corporate self-determination such that platforms are free to promulgate and regulate community standards in ways that maximize economic efficiency.[214] However, while Section 230 sufficiently bulwarks corporate interests,[215] it does little to protect individual self-expression or privacy.[216] Indeed, this

lack of user free-speech protection, as it relates to conservative or right-wing ideology, has spurred newfound legislative interest to restrict internet media's independent First Amendment rights.[217] All of these issues surrounding Section 230, particularly the ways in which media (re)direct the flow of human traffic to boost profitability, give newfound meaning to Marshall McLuhan's argument that "the medium is the message."[218] In the digital era, the Supreme Court views media as legal persons, and advertisers view natural persons as the medium itself![219]

Reform Proposals

While Congress, for the above-mentioned economic and innovation-related reasons, should not repeal Section 230, it should amend the law to promote increased media transparency and accountability. Congress enacted the CDA with twin objectives of strengthening an incipient, fragile industry and protecting child audiences from potentially harmful digital content. Section 230 redressed the specific publisher-liability issue brought to bear by the *Cubby* and *Stratton Oakmont* decisions: Internet companies, following the CDA, could attempt to moderate their platforms without exposing themselves to liability for all third-party posted content. The law was an economic *and moral* incentive, encouraging companies to regulate objectionable online content in ways that would boost profitability. But the primitive Internet of 1996 is a far cry from what Jack Balkin labels today's algorithmic society.[220]

Highly developed technological algorithms facilitating the interconnectedness of users and their shared information may well have seemed inconceivable to early cyber-architects and theorists. Despite Lawrence Lessig's important scholarship, "code," or cyber-engineering, is no longer by itself a sufficient mechanism to regulate online interaction such that outside law need not be injected into virtual settings.[221] Software does not socially condition normative behavior by precluding users from engaging in certain actions, as Lessig suggested,[222] because the

software itself throttles certain content to promote corporate values, namely, profitability. This is not a criticism of Internet media. The social benefits of digital communication and commerce are fathomless. Meanwhile, courts have overexpanded Section 230 immunity in ways that deviate from the CDA's legislative intent; disincentivize Internet companies from moderating immoral or unlawful behavior; and allow them to operate without public transparency or accountability.

FOSTA-SESTA, as a procedural matter, is performatively valuable because it has opened the door to other Section 230 reforms. Twenty-six bills were introduced during the 2019-2021 legislative session,[223] with proposals ranging from total abolition[224] to certain categorical exclusions—allowing claims to proceed based upon, for example, child sexual exploitation[225] or federal civil actions arising out of federal law violations.[226] These proposals are similar to U.S. Department of Justice (DOJ) recommendations. In a June 2020 report,[227] the DOJ recommended creating narrowly tailored Section 230 liability carveouts for platforms that host "particularly egregious content, including (1) child exploitation and sexual abuse, (2) terrorism, and (3) cyber-stalking."[228] According to the DOJ, "These targeted carve-outs would halt the over-expansion of Section 230 immunity and enable victims to seek civil redress in causes of action far afield from the original purpose of the statute."[229] Congress and the Supreme Court, however, have already made similar Section 230 exceptions for digital copyright infringement[230] and Fair Housing Act violations,[231] respectively.

The Digital Millennium Copyright Act of 1998 (DMCA)[232] gives safe harbor to Internet platforms that remove hosted content after being notified that the content may violate federal copyright law.[233] When an Internet company's designated DMCA agent acquires knowledge of infringing content, the law's notice-and-takedown procedures are automatically triggered. The platform must "'expeditiously' remove or disable access to infringing material"[234] and take

"reasonable steps to promptly notify the user;"[235] otherwise, the platform may be held liable for copyright infringement.

The U.S. Court of Appeals for the Ninth Circuit, in *Fair Housing Council v. Roommates.com, LLC*,[236] created a judicial carveout to the CDA when it held that Roommates could not claim Section 230 immunity when it required users, as a condition of use, to choose among set answers to questions that violated anti-discrimination laws.[237] The questions at issue asked users to identify their sex, sexual orientation, and whether they would bring children into the household[238]—which the plaintiffs alleged violated a Fair Housing Act provision prohibiting advertisements indicating sex- or familial-status based preferences.[239] Judge Alex Kozinski, writing for the majority, noted that

> "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not "creat[e] or develop[]" the information "in whole or in part." *See* 47 U.S.C. § 230(f)(3).[240]

Amending Section 230, however, should not be limited to imposing FOSTA-SESTA-style civil or criminal liability for injurious speech acts. There is a pressing need for increased transparency vis-à-vis how companies enforce their content screening policies: something almost entirely opaque by reason of proprietary algorithms. Congress should mandate the disclosure of moderation-related data so policymakers and civil society leaders can analyze claims related to enforcement (in)effectiveness, bias, and evenhandedness. These public data, which should not include the algorithms themselves, will foster digital equality by allowing for open information analysis. Continued secrecy will only exacerbate partisan claims of media favoritism and political interference.

In conclusion, Mark Zuckerberg is entirely correct: "Congress should update [Section 230] to make sure it's working as intended"—and he even "support[s] the ideas around transparency and industry collaboration that are being discussed."[241] This requires returning to the CDA's principal objectives discussed above, namely, balancing government protectionism against civil/economic libertarianism. The speed at which the CDA went from "a shadow over free speech, [that] threatens to torch a large segment of the Internet community"[242] to "the most important law protecting Internet speech"[243] is enough to spur whiplash. And yet, the dichotomy is often overlooked. This requires a philosophical reevaluation and return to the ideological purposes of protecting freedom of speech. This is the objective of Chapter Four.

Notes

[1] Rodney A. Smolla, *Free Speech in an Open Society* (Knopf Doubleday Publishing Group, 2011).

[2] Leonard Williams Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Belknap Press of Harvard University Press, 1960), 8.

[3] Klonick, "The New Governors."

[4] Keith E. Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton University Press, 2019).

[5] Whittington, 30.

[6] *See* Edmund Burke, *Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London, Relative to That Event* (Seeley, Jackson and Halliday, 1872). *Cf.* Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*, Seventh Edition (London: Jordan, 1791); Richard Price, *A Discourse on the Love of Our Country,: Delivered on Nov. 4, 1789, at the Meeting-House in the Old Jewry, to the Society for Commemorating the Revolution in Great Britain. : With an Appendix Containing the Report of the Committee of the Society; an Account of the Populace of France; And the Declaration of Rights by the National Assembly of France. ...*, Sixth Edition (London: George Stafford, 1790).

[7] Whittington, *Speak Freely*, 32.

[8] Whittington, 32–33.

[9] Whittington, 34.

[10] Andrew J. Schuyler, "Regulating Facts: A Procedural Framework for Identifying, Excluding, and Deterring the Intentional or Knowing Proliferation of Fake News Online," *University of Illinois Journal of Law, Technology & Policy* 2019, no. 1 (2019): 211–40, https://heinonline.org/HOL/P?h=hein.journals/jltp2019&i=217.

[11] Annie C. Hundley, "Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas," *Tulane Law Review* 92, no. 2 (2018 2017): 497–518, https://heinonline.org/HOL/P?h=hein.journals/tulr92&i=529.

[12] Whittington, *Speak Freely*, 35.

[13] Whittington, 35.

[14] *See* Dimitry Kochenov, *Citizenship* (MIT Press, 2019).

[15] Marcel Danesi, *The Semiotics of Emoji: The Rise of Visual Language in the Age of the Internet* (Bloomsbury Publishing, 2016).

[16] Anne Wagner, Sarah Marusek, and Wei Yu, "Emojis and Law: Contextualized Flexibility of Meaning in Cyber Communication," *Social Semiotics* 30, no. 3 (May 26, 2020): 396–414, https://doi.org/10.1080/10350330.2020.1731198.

[17] Anne Wagner and Sarah Marusek, "Rumors on the Net: A Brackish Suspension of Speech and Hate," *Law, Culture and the Humanities*, October 10, 2019, 1–15, https://doi.org/10.1177/1743872119880121.

[18] Umberto Eco, *A Theory of Semiotics* (Indiana University Press, 1979).

[19] Jonathan Taplin, *Move Fast and Break Things: How Facebook, Google, and Amazon Cornered Culture and Undermined Democracy* (Little, Brown, 2017).

[20] In 2012, Tony Wang, general manager at Twitter UK, called Twitter "the free speech wing of the free speech party. Josh Halliday, "Twitter's Tony Wang: 'We Are the Free Speech Wing of the Free Speech Party,'" *The Guardian*, March 22, 2012, sec. Media,

https://www.theguardian.com/media/2012/mar/22/twitter-tony-wang-free-speech. Although Twitter has since walked back its First-Amendment absolutist stance, the public uses social networks with expectations of free expression.
[21] James W. Carey, *Communication as Culture, Revised Edition: Essays on Media and Society*, 2nd ed. (New York: Routledge, 2008), https://doi.org/10.4324/9780203928912.
[22] *See* Socrates's discussion of the philosopher king whose absolute philosophical knowledge would facilitate widespread civic eudaimonia: "Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils,—nor the human race, as I believe,—and then only will this our State have a possibility of life and behold the light of day. Plato, *The Republic of Plato*, 170–71.
[23] Plato, 227.
[24] Walter Lippmann, *Public Opinion* (Harcourt, Brace, and Company, 1922), 15.
[25] Lippmann, 5.
[26] Lippmann, 341.
[27] Lippmann, 248.
[28] Lippmann, 358.
[29] Lippmann, 356–57.
[30] Lippmann, 362.
[31] Lippmann, 348, 349.
[32] Lippmann, 310.
[33] Marvin Kalb, *Enemy of the People: Trump's War on the Press, the New McCarthyism, and the Threat to American Democracy* (Brookings Institution Press, 2018).
[34] John Dewey, *The Middle Works of John Dewey: Journal Articles, Essays, and Miscellany Published in the 1921-1922 Period*, ed. Jo Ann Boydston, vol. 13 (Carbondale: Southern Illinois University Press, 2008), 337.
[35] Dewey, 13:342–43.
[36] Jean-Jacques Rousseau, *The Social Contract: Or, The Principles of Political Rights*, trans. Rose M. Harrington (New York: G. P. Putnam's Sons, 1893), 57.
[37] "My sympathies are with [the citizen], for I believe that he has been saddled with an impossible task and that he is asked to practice an unattainable ideal. I find it so myself for, although public business is my main interest and I give most of my time to watching it, I cannot find time to do what is expected of me in the theory of democracy; that is, to know what is going on and to have an opinion worth expressing on every question which confronts a self-governing community." Walter Lippmann, *The Phantom Public* (New York: Harcourt, Brace, and Company, 1925), 20.
[38] Lippmann, *Public Opinion*, 248.
[39] John Dewey, *The Political Writings*, ed. Debra Morris and Ian Shapiro (Indianapolis: Hackett Publishing Company, Inc., 1993), 187.
[40] Dewey, *The Public and Its Problems*, 224.
[41] "And is not their humanity to the condemned in some cases quite charming? Have you not observed how, in a democracy, many persons, although they have been sentenced to death or

exile, just stay where they are and walk about the world—the gentleman parades like a hero, and nobody sees or cares?" Plato, *The Republic of Plato*, 265.

[42] "Then will they still be angry at our saying, that, until philosophers bear rule, States and individuals will have no rest from evil, nor will this our imaginary State ever be realized?" Plato, 201.

[43] To contextualize my summary, I provide Socrates's full Ship of State metaphor here: "Imagine then a fleet or a ship in which there is a captain who is taller and stronger than any of the crew, but he is a little deaf and has a similar infirmity in sight, and his knowledge of navigation is not much better. The sailors are quarrelling with one another about the steering—every one is of opinion that he has a right to steer, though he has never learned the art of navigation and cannot tell who taught him or when he learned, and will further assert that it cannot be taught, and they are ready to cut in pieces any one who says the contrary. They throng about the captain, begging and praying him to commit the helm to them; and if at any time they do not prevail, but others are preferred to them, they kill the others or throw them overboard, and having first chained up the noble captain's senses with drink or some narcotic drug, they mutiny and take possession of the ship and make free with the stores; thus, eating and drinking, they proceed on their voyage in such manner as might be expected of them. Him who is their partisan and cleverly aids them in their plot for getting the ship out of the captain's hands into their own whether by force or persuasion, they compliment with the name of sailor, pilot, able seaman, and abuse the other sort of man, whom they call a good-for-nothing; but that the true pilot must pay attention to the year and seasons and sky and stars and winds, and whatever else belongs to his art, if he intends to be really qualified for the command of a ship, and that he must and will be the steerer, whether other people like or not—the possibility of this union of authority with the steerer's art has never seriously entered into their thoughts or been made part of their calling. Now in vessels which are in a state of mutiny and by sailors who are mutineers, how will the true pilot be regarded? Will he not be called by them a prater, a star-gazer, a good-for-nothing?" Plato, 185–86.

[44] Plato, 185.

[45] *See* Aristotle, *Aristotle's Politics*, trans. Benjamin Jowett (New York: The Modern library, 1943), 156. While Aristotle does not fully endorse Plato's philosopher king, he notes that exceptionally virtuous persons should be made "kings in their state for life."

[46] Aristotle, 137.

[47] Aristotle, 182.

[48] "He who has the power to take part in the deliberative or judicial administration of any state is said by us to be a citizen of that state; and, speaking generally, a state is a body of citizens sufficing for the purposes of life." Aristotle, 127.

[49] "The citizens should be educated to obey when young and to rule when they are older. Rule is their ultimate and highest function. Since the good ruler is the same as the good man, our education must be so framed as to produce the good man. It should develop all man's powers and fit him for all the activities of life; but the highest powers and the highest activities must be the supreme care of education. An education which is purely military, like the Laconian, neglects this principle." Aristotle, 47.

[50] John Dewey, *Experience and Nature* (Chicago: Open Court Publishing Company, 1925), 166.

[51] *Cf*. Immanuel Kant, *Critique of Judgment*, trans. Werner S. Pluhar, 1st edition (Indianapolis: Hackett Publishing Company, 1987).
[52] Dewey, *Experience and Nature*, 166.
[53] Gert Biesta, "'Of All Affairs, Communication Is the Most Wonderful:' The Communicative Turn in Dewey's Democracy and Education," in *John Dewey and Our Educational Prospect: A Critical Engagement with Dewey's Democracy and Education*, ed. David T. Hansen (State University of New York Press, 2006), 23–38.
[54] John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The MacMillan Company, 1916).
[55] Dewey, *Experience and Nature*.
[56] Dewey, *The Public and Its Problems*.
[57] Lippmann, *Public Opinion*.
[58] Lippmann, *The Phantom Public*.
[59] Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon and Schuster, 2000).
[60] James M. Fallows, *Breaking the News: How the Media Undermine American Democracy* (Vintage Books, 1996), 235–36.
[61] Dewey, *The Public and Its Problems*, 170.
[62] Carlyle's original quote is, "Printing, which comes necessary out of Writing, I say often, is equivalent to Democracy; invent Writing, Democracy is inevitable." Thomas Carlyle, *On Heroes, Hero-Worship, and the Heroic in History* (London: Chapman and Hall, 1897), 164.
[63] Dewey, *The Public and Its Problems*, 144.
[64] Dewey, 174.
[65] Dewey, 191.
[66] Fallows, *Breaking the News*, 237; Dewey, *Democracy and Education*, 101.
[67] Jürgen Habermas, *The Theory of Communicative Action: Volume 1: Reason and the Rationalization of Society*, trans. Thomas McCarthy, vol. 1, 2 vols. (Boston: Beacon Press, 1985).
[68] Habermas characterizes "lifeworld" as a sphere of social identities and normative behaviors established through processes of communication and social cohesion. Capitalism intrudes upon lifeworld and diminishes collective self-determination. Habermas writes, "I can introduce here the concept of the *Lebenswelt* or lifeworld, to begin with as the correlate of processes of reaching understanding. Subjects acting communicatively always come to an understanding in the horizon of a lifeworld. Their lifeworld is formed from more or less diffuse, always unproblematic, background convictions. This lifeworld background serves as a source of situation definitions that are presupposed by participants as unproblematic. In their interpretive accomplishments the members of a communication community demarcate the one objective world and their inter-subjectively shared social world from the subjective worlds of individuals and (other) collectives. The world-concepts and the corresponding validity claims provide the formal scaffolding with which those acting communicatively order problematic contexts of situations, that is, those requiring agreement, in their lifeworld, which is presupposed as unproblematic." Habermas, 1:70.
[69] Habermas, 1:264–66.

[70] Habermas, 1:169–76.
[71] "Research was done and results were published not for the benefit of those outside of academe, but to maintain old or establish new hierarchies *within* disciplinary structures and organizations. The institutional structure of scholarly journals serves to reinforce disciplinary hierarchies: at the lowest level, the evaluator, reader, or reviewer is implicitly considered to be qualified to make judgments about a contribution at a level above that of the contributor himself. From there the hierarchy extends to the editorship, and the selection process for filling the several intervening positions evidently reinforce the hierarchizing and orthodoxy of the discipline in question. Publication outside the prescribed means is to ignore and to circumvent this established disciplinary hierarchy. And in fact no publication is quite as suspect to academics as that by one of their colleagues which has the misfortune to catch the popular fancy." Wolfram W. Swoboda, "Disciplines and Interdisciplinarity: A Historical Perspective," in *Interdisciplinarity and Higher Education*, ed. Joseph J. Kockelmans (University Park: The Pennsylvania State University Press, 2010), 78–79.
[72] "In deliberative discussions before the assembly, examples are more persuasive than arguments; because deliberation respects the future, which is contingent, and of which we must judge by the past; but enthymemes or arguments are better suited to judicial pleadings, which, as they respect the past, have in them a sort of cogency and necessity, and are therefore more the objects of demonstration." Aristotle, *A New Translation of Aristotle's Rhetoric; with an Introduction and Appendix, Explaining Its Relation to His Exact Philosophy, and Vindicating That Philosophy, by Proofs That All Departures from It Have Been Deviations Into Errors.*, trans. John Gillies (London: T. Cadell, 1823), 411.
[73] Cohen v. California, 403 U.S. 15 (1971).
[74] Cohen v. California, 403 U.S. 15, 25 (1971). *See also* Texas v. Johnson 491 U.S. 397, 414 (1989) (noting that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").
[75] Robert Darnton, *The Case for Books: Past, Present, and Future* (New York: PublicAffairs, 2010).
[76] Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe*, 2nd ed., Canto Classics (Cambridge: Cambridge University Press, 2012), https://doi.org/10.1017/CBO9781139197038.
[77] Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change* (Cambridge University Press, 1980).
[78] Eisenstein.
[79] Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (University of Toronto Press, 1962), 175.
[80] McLuhan, 31.
[81] Dewey, *Individualism Old and New*, 11, 32, 37. Dewey argued for a socially reimagined individualism sensitive to technology and science: "The art which our times needs in order to create a new type of individuality is the art which, being sensitive to the technology and science that are the moving forces of our time, will envisage the expansive, the social, culture which they may be made to serve." Dewey, 49.

[82] McLuhan, *The Gutenberg Galaxy*, 208.
[83] McLuhan, 211.
[84] McLuhan, 161.
[85] Marshall McLuhan, *Understanding Media: The Extensions of Man*, Reprint edition (Cambridge, Mass: The MIT Press, 1994), 7.
[86] Marshall McLuhan and Quentin Fiore, *The Medium Is the Massage*, 1st edition (Berkeley, CA: Gingko Press, 2001), 26.
[87] David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Wiley, 1992).
[88] "Commodity fetishism" is a Marxist concept where producers and consumers perceive each other as the money and merchandise they exchange. Karl Marx, *Das Kapital: A Critique of Political Economy* (Simon and Schuster, 2012). David Harvey, and Marshall McLuhan, to an extent, draw on Marxist philosophy in their respective scholarship.
[89] Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (Atlantic Books, 2010).
[90] Wu, 6.
[91] Wu, 6–7.
[92] Business theory bifurcates innovation as "disruptive" and "sustaining." A disruptive innovation creates a new market and value network by introducing new technology that significantly alters a product or service. A sustaining innovation improves existing products but does not create new markets or values. As business theorist and economist Clayton Christensen explains, "A *sustaining innovation* targets demanding, high-end customers with better performance than what was previously available. Some sustaining innovations are the incremental year-by-year improvements that all good companies grind out. Other sustaining innovations are breakthrough, leapfrog-beyond-the-competition products. It doesn't matter how technologically difficult the innovation is, however: The established competitors almost always win the battles of sustaining technology. Because this strategy entails making a better product that they can sell for higher profit margins to their best customers, the established competitors have powerful motivations to fight sustaining battles. And they have the resources to win." Clayton M. Christensen and Michael E. Raynor, *The Innovator's Solution: Creating and Sustaining Successful Growth* (Harvard Business Review Press, 2013), 34. *See also* Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Harvard Business Review Press, 2013).
[93] The "first-mover advantage" refers to market leverage gained by the actor first to introduce a product or service into the marketplace, thereby establishing dominant brand recognition and consumer loyalty before competitors enter the field. *See* Roger A. Kerin, P. Rajan Varadarajan, and Robert A. Peterson, "First-Mover Advantage: A Synthesis, Conceptual Framework, and Research Propositions," *Journal of Marketing* 56, no. 4 (October 1, 1992): 33–52, https://doi.org/10.1177/002224299205600404.
[94] Wu, *The Master Switch*, 25.
[95] Hesiod, *Theogony*, trans. Richard S. Caldwell (Hackett Publishing, 2015).
[96] Wu, *The Master Switch*, 25.

[97] *See* François Quesnay, *Tableau Oeconomique* (Macmillan and Co., 1894); Anne Robert Jacques Turgot, *Reflections on the Formation and Distribution of Wealth* (London: E. Spragg, 1795).
[98] Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*.
[99] Wu, *The Master Switch*.
[100] Barry M. Leiner et al., "A Brief History of the Internet," *ACM SIGCOMM Computer Communication Review* 39, no. 5 (October 7, 2009): 22–31, https://doi.org/10.1145/1629607.1629613.
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[128] *Id*. at 153–54. The Court explained "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."
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[131] Cubby v. CompuServe, Inc., 776 F.Supp. 135, 137 (S.D.N.Y. 1991).
[132] *Id.* at 138.
[133] *Id.* at 139.
[134] *Id.* at 140.

[135] Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).
[136] *Id.* at *4.
[137] *Id.*
[138] *Cubby*, 776 F.Supp at 140.
[139] *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4.
[140] Communications Decency Act of 1996, Pub. L. No. 104-104, sec. 502, §§ 223(d)(1)-(B), (h)(2), 110 Stat. 133, 134-135 (codified at 47 U.S.C. § 223(d)(1)(B), (h)(2)).
[141] Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press, 2019), 61.
[142] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).
[143] Sec. 502 of S.652(enr.) (104th Cong.).
[144] *Id.*
[145] *Id.*
[146] 47 U.S.C. § 230(c)(1).
[147] "One of the specific purposes of [§ 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers…as publishers or speakers of content that is not their own because they have restricted access to objectionable material." H. Rep. No. 104-458, at 194 (1996) (Conf. Rep.).
[148] *See* H.R. Rep. No. 104-458, at 193-94 (1996) (Conf. Rep.); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (Statement of Rep. Cox) ("[O]ur amendment will ... protect [online service providers] from taking on liability such as occurred in the *Prodigy* case in New York.").
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[150] *See* Jonathan Zittrain, "A History of Online Gatekeeping," *Harvard Journal of Law & Technology* 19, no. 2 (2006): 261, https://heinonline.org/HOL/P?h=hein.journals/hjlt19&i=255; David S. Ardia, "Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act," *Loyola of Los Angeles Law Review* 43, no. 2 (2010): 410, https://heinonline.org/HOL/P?h=hein.journals/lla43&i=381.
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[156] Miller v. California, 413 U.S. 15, 24-25 (1973).
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[159] *See* "Complete List of ACLU v. Reno Plaintiffs and Their Affidavits," American Civil Liberties Union, accessed March 26, 2022, https://www.aclu.org/other/complete-list-aclu-v-reno-plaintiffs-and-their-affidavits.
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[161] *Id.* at 881. Judge Buckwalter goes on to say that "plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti–Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen."
[162] *Id.* at 883.
[163] Reno v. American Civil Liberties Union, 521 U.S. 844, 864 (1997).
[164] *Id.* at 868.
[165] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978).
[166] *Id.* at 729.
[167] Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997).
[168] *Id.* at 874.
[169] 47 U.S.C. § 231.
[170] 47 U.S.C. § 231(a)(1).
[171] Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 670 (2004).
[172] Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).
[173] Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703, 716 (Ct. App. 2002).
[174] Doe v. MySpace, Inc., 474 F.Supp.2d 843 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008), *cert. denied*, 555 U.S. 1031 (2008).
[175] 18 U.S.C. § 2421 (2018).
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https://heinonline.org/HOL/P?h=hein.journals/dlr124&i=227; Goldman, "The Complicated Story of FOSTA and Section 230," 291–92.
[184] United States v. Martono, No. 3:20-CR-00274-N-1, 2021 U.S. Dist. LEXIS 1340, at *2 (N.D. Tex. Jan. 5, 2021).
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[219] Jack Balkin makes a similar argument analogizing the 1973 ecological dystopian thriller film *Soylent Green*. In the same way that Soylent Green is made from people, Balkin says, "Big Data is not simply a vast new source of wealth, or the fuel that runs the Algorithmic Society. Big Data is Soylent Green. Big Data is people." Jack M. Balkin, "Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation," *U.C. Davis Law Review* 51, no. 3 (2018): 1157, https://heinonline.org/HOL/P?h=hein.journals/davlr51&i=1169.
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[225] *E.g.*, Holding Sexual Predators and Online Enablers Accountable Act, S. 5012, 116th Cong. § 5 (2020) (creating a new exception for civil actions and state criminal prosecutions that would violate new criminal offense, 18 U.S.C. § 2260B, relating to child sexual exploitation materials); EARN IT Act of 2020, S. 3398, 116th Cong. § 5 (2020) (creating new exceptions for certain civil actions and state criminal prosecutions related to specified child sexual exploitation offenses).
[226] PACT Act, S. 4066, 116th Cong. § 7 (2020) (providing that Section 230 does not apply to the enforcement of federal civil statutes or regulations); Stopping Big Tech's Censorship Act, S. 4062, 116th Cong. § 2 (2020).
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[228] "Section 230—Nurturing Innovation or Fostering Unaccountability?," 3.
[229] "Section 230—Nurturing Innovation or Fostering Unaccountability?," 3.
[230] Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998).
[231] Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).
[232] 17 U.S.C. § 512(c).
[233] Kevin J. Hickey, "Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview" (Congressional Research Service, March 30, 2020), 2, https://crsreports.congress.gov/product/pdf/IF/IF11478.
[234] "Section 512 of Title 17: A Report of the Register of Copyrights" (United States Copyright Office, May 2020), 6, https://www.copyright.gov/policy/section512/section-512-full-report.pdf.
[235] "Section 512 of Title 17: A Report of the Register of Copyrights," 25.
[236] Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).
[237] *Roommates*, 521 F.3d at 1164.
[238] *Id.* at 1161.
[239] 42 U.S.C. § 3604(c).
[240] *Roommates*, 521 F.3d at 1166.
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[242] Reno v. American Civil Liberties Union, 521 U.S. 844, 882 (1997).
[243] "CDA 230: The Most Important Law Protecting Internet Speech."

CHAPTER FOUR: THE REEVALUATION OF FREE SPEECH

The CDA, while structurally flawed by reasons of vagueness and overbreadth articulated in the previous chapter, attempted to balance the positive and negative attributes of free speech. Recalling Chapter One's preliminary discussion, freedom as a positive democratic construct encourages civic participation and egalitarianism by obligating the individual to act in accordance with underlying social morals and values—sometimes through government coercion. Freedom as a negative right emancipates individuals from government interference or suppressive action so they can check state power and become self-actualized. For sociohistorical reasons discussed below, negative libertarianism has eclipsed positive liberalism such that citizens understand their rights exclusively through a *laissez-faire* lens of government noninterference and near-absolute individual freedoms of choice and action.

Section 230, Isaiah Berlin, and Balancing Positive and Negative Rights

British philosopher Isaiah Berlin (1909–1997) is perhaps the most prominent authority on this conceptual duality. In 1958, as part of his inauguration when elected, by examination, Prize Fellow and Chichele Professor of Social and Political Theory at All Souls College, Oxford,[1] Berlin delivered his lecture "Two Concepts of Liberty," subsequently published as a fifty-seven-page standalone document.[2] Oxford University Press reprinted the work in *Four Essays on Liberty* (1969)[3] and again in *Liberty: Incorporating Four Essays on Liberty* (2002)[4]—which I use below for analytical purposes. According to Berlin, freedom, which he and I use interchangeably with "liberty," is a twofold combination of negative and positive elements.[5] Negative freedom is a lack of goverfnment interference. According to Berlin, it is the extent to which a person "is or should be left to do or be what he is able to do or be, without interference by other persons"[6]—or the degree to which people are not externally coerced into action or

inaction. Negative freedom is Justice Brandeis's "right to be let alone"[7] rooted in Lockean, Miltonian, and Blackstonian notions that the government needs to be separated, identified, and "checked" as a hypothetically dangerous domineering agent of the people.[8]

Positive freedom, rooted in self-direction, -mastery, and -actualization, is the extent to which people recognize sovereign authority such that they are willing to limit personal conduct to preserve standards of common morality and decency.[9] According to Berlin, it is the notion that "safeguards must be instituted to keep [people] in their places."[10] It is the Isocratean, Hobbesian, and Meiklejohnian ideas of political equality and participation among citizens—and the need proactively to defend individual rights of some by curtailing individual rights of others.[11] Positive freedom is Justice Holmes's aphorism "the right to swing my fist ends where the other man's nose begins"[12] or Professor Berlin's quote, "'Freedom for the pike is death for the minnows'; the liberty of some must depend on the restraint of others."[13]

As a general proposition, law and society strive to balance the negative and positive attributes of liberty in ways that approach Aristotle's doctrine of the mean—in which he defines virtue as a balance between excess and deficiency relative to individual circumstance and determined by reason.[14] Thomas Jefferson, Edmund Burke, Thomas Paine, and John Stuart Mill all recognized, to varying degrees, the need for negative-positive equanimity.[15] Berlin notes that while positive justifications of promoting liberty can be abused, "it is possible, and at times justifiable, to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt."[16] This balance between negative and positive liberty underpins the philosophy of legislation—including the CDA. Once again, the black-letter legislative text makes this clear. Section 230(b)(1)-(2), discussing the need to preserve the vibrant and

competitive free market unfettered by government regulation, is negative. Section 230(b)(3)-(5), discussing the need to protect children by vigorously enforcing federal obscenity laws, is positive.

The Supreme Court, by invalidating the positive-protectionist provisions of the CDA in its *Reno* holding, threw the law's positive-negative balance into disequilibrium. This was a strategic maneuver executed by civil libertarian organizations, which included the ACLU and EFF, that do not understand fully the paradoxical stasis that must exist between freedom to do and freedom to be ruled.[17] This is neither a criticism of the Supreme Court nor the *Reno* plaintiffs. Both were correct that the CDA was overbroad and would irreparably chill free speech. But the *Reno* case is not *sui generis*. Robert Post notes that "American courts are far more comfortable preventing government from regulating individuals than they are requiring government to act at the behest of individuals."[18] If Post is correct that the "distinction between affirmative and negative rights" is "analytically obscure,"[19] law and society should not reinforce the incorrect negative-neoliberal proposition that constitutionalism is only upheld through a categorical defense of individual liberties. And yet, that is the tendency.

A Philosophical Reconceptualization

Isaiah Berlin, in advancing a natural law theory of rights[20] and repudiating John Stuart Mill's free-speech absolutism,[21] discusses the need to achieve a '"higher' level of freedom"[22] by way of preserving negative and positive attributes of liberty. According to Berlin,

> it is assumed, especially by such libertarians as Locke and Mill in England, and Constant and Tocqueville in France, that there ought to exist a *certain minimum area of personal freedom* [emphasis added] which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority.[23]

Society preserves negative freedom by creating a bright line that separates the essential liberties that, if crossed, would offend and threaten humanity's very nature.[24] Positive freedom is preserved, on the other hand, by recognizing the limits of absolute personal liberty.[25] Civil libertarianism becomes counterproductive and self-destructive when a bad or ignorant actor's personal freedom impinges upon another actor's right to become self-actualized. This positive-liberty framework is the rationale, discussed in Chapter Two, for present-day Germany's ban on Holocaust denial and why, according to Berlin, "[w]e cannot remain absolutely free, and must give up some of our liberty to preserve the rest."[26]

The doctrinal non-zero mean between positive and negative absolutism—and the social need for positive government intervention—pervades First Amendment/free speech philosophical discourse. Zechariah Chafee discussed "whether such perplexing [Supreme Court] cases are within the First Amendment or cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection."[27] Alexander Meiklejohn, in his book *Political Freedom*, warns against "excessive individualism"[28]—in a manner strikingly similar to John Dewey[29]— and its tendency to supersede the underlying self-governing purposes of First Amendment protection.[30] Meiklejohn devoted an entire *Supreme Court Review* article discussing how free-speech absolutism, as he originally theorized, is profoundly misinterpreted by neoliberal individualists who believe the First Amendment provides "an unlimited license to talk."[31] Those "[w]ho interpret[] the words of the First Amendment without 'considering their origin or the line of their growth'? Who read[] the text as 'barren words found in a dictionary' rather than as 'symbols of historic experience'"[32] are just as epistemologically and jurisprudentially flawed as the "balancers"[33] who create legal exceptions that threaten to carve the First Amendment out of existence.

Chafee, Dewey, and Meiklejohn, read together, are making Isaiah Berlin's argument. Liberty, in this case freedom of speech, requires a "minimum area of *personal* freedom [emphasis added]"[34] that must be absolutely and unconditionally protected. The Supreme Court has drawn this bright line at pure political speech.[35] As Justice Hugo Black correctly noted in *Mills v. Alabama*,

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.[36]

But free-speech absolutism must be minimally limited to that critical area of *individual* liberty. For reasons discussed in the next chapter, the Supreme Court has recognized that *businesses* may also rely on heightened constitutional protection if they engage in political speech: such as releasing electioneering films[37] or soliciting charitable contributions.[38] And as the Court made plain in *Reno v. ACLU*, corporations will receive ordinary First Amendment protection even if they engage in *non*-political speech online.[39] The Court's, and society's, dogmatic protection beyond Berlin's minimal area of *personal*, not corporate, freedom threatens the government's ability, and Hobbesian duty, to prevent one person's exercise of individual rights from denying another's. This, once again, presumes that democratic maintenance requires positive government protection alongside negative individual agency.

The purpose of constitutional jurisprudence is to define the extent to which free action must be limited by law. When, using Berlin's language, does it become necessary and proper to "curtail freedom in the interest of other values…[including] freedom itself?"[40] This is no easy question, philosophically or jurisprudentially. When a fundamental liberty interest is at stake, or when a person's agentic autonomy is threatened, Fifth Amendment substantive due process

requires the state—not the plaintiff—to prove a compelling interest whereby some narrowly tailored government action is the only available means to accomplish that interest.[41] Fundamental rights such as speech,[42] religion,[43] association,[44] travel,[45] marriage,[46] procreation,[47] or child rearing[48] are so important to individual self-actualization and democratic maintenance that they can only be overcome upon the government showing a compelling purpose with no less-restrictive alternative for achieving that objective.

This "exacting" or "strict" standard is, by design, almost impossible to overcome because the government should only be allowed—in the rarest of circumstances—to interfere with personal freedoms that guarantee democratic self-governance.[49] Berlin warned against this type of "planned system," writing that citizens "must not submit to-authority because it is infallible but only for strictly and openly utilitarian reasons, as a necessary evil. Since no solution can be guaranteed against error, no disposition is final."[50] Channeling Plato,[51] Berlin notes that democratic self-governance "may, on the whole, provide a better guarantee of the preservation of civil liberties than other regimes."[52] But it is defective to the extent that unchecked "individual liberty" becomes the "ultimate end for human beings" because the individual is unwilling to sacrifice some of his liberty for weightier values like justice, equality, or love.[53] "Liberty," says Berlin, "is not the only goal of men…it remains true that the freedom of some must at times be curtailed to secure the freedom of others."[54] It stands to reason, therefore, that government should, and does, reserve the power positively to suppress individual freedom for the sake of collective equal protection.

Civil libertarian organizations, including the ACLU and the EFF, are important to the extent they bulwark the minimum area of personal freedom that cannot—absent extraordinary circumstances—be violated through positive government regulation. But they are dangerous to

the extent they exacerbate the already flawed public notion that freedom is a negative phenomenon exclusively.[55] The categorical civil-libertarian frustration of any government attempts at regulating personal freedom—even when narrowly tailored to achieve compelling ends—results in negative liberty without positive responsibility. This unflinchingly absolutist perspective borders on dogmatic orthodoxy, which is a flavor of neoliberal fundamentalism that is, arguably, antidemocratic.[56] This argument, alongside Berlin's two concepts of liberty, closely tracks two philosophies worth discussing here.

Karl Popper's Paradoxes of Tolerance, Democracy, and Freedom

The first is Karl Popper's paradox of tolerance, which holds that unlimited tolerance is self-defeating—and destructive to democratic objectives of inclusivity and egalitarianism—because it conditions a tolerant society into tolerating hateful invective such that the tolerant majority becomes unprepared to defend democratic values and is, eventually, crowded out by an intolerant minority.[57] Unlimited tolerance, as a negative liberal phenomenon, philosophically proves too much because it becomes contradictory when carried to its logical conclusion. This rationale undercuts the so-called "safety-valve" argument[58] advanced by Nat Hentoff,[59] Nadine Strossen,[60] and Lee Bollinger[61]—the theory's leading proponent.[62] Racist calumny aimed at depriving a person's fundamental entitlement to be viewed as a good-standing community member deserving of equal protection has *no cathartic effect for the speaker*.[63] Putting aside any Mari Matsuda-type *listener* damages that flow from intolerance,[64] hate speech—especially invectives targeting "discrete and insular minorities" who do not enjoy normal access to, or protections of, the political process[65]—raises, not lowers, the social temperature by normalizing prejudice and encouraging imitation.

Richard Delgado and David Yun make this compounding effect clear in their article "Pressure Valves and Bloodied Chickens."[66] Drawing on Phillip Zimbardo's Stanford prison experiment[67] and Stanley Milgram's *Obedience to Authority*,[68] Delgado and Yun note that psychological evidence "suggests that allowing persons to stigmatize or revile others makes them more aggressive, not less so."[69] Polemicists categorize their opponents as "deserved-victim[s]" which justifies subsequent escalating acts like bullying and physical violence.[70] Intolerant action becomes generalizable in so far as it models unrecognized behavior and encourages people to do likewise.[71] Thus, according to Delgado and Yun, "Pressure valves may be safer after letting off steam; human beings are not."[72] As this relates to Karl Popper, enmity begets enmity such that tolerating hate speech frustrates democratic principles of equalitarianism and protectionism.[73] By permitting bigotry, a tolerant majority risks being crowded out and supplanted by an intolerant minority that, as the new majority, decides to elect a political tyrant. This is what Popper calls the "paradox of democracy,"[74] what Alexis de Tocqueville calls the "despotic action of a majority,"[75] or what Socrates and Plato describe through their Ship of State analogy.[76]

Popper, like Berlin, is quick to qualify his notion that suppressing intolerant thought is not always the correct action. "I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be most unwise."[77] Blindly adhering to this Kantian categorical imperative endangers society through unenlightened majoritarianism—in a Rousseauian sense.[78] Popper, rather, argues that society

> should claim the *right* even to suppress [intolerant philosophies], for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to anything as deceptive as rational argument, and teach them to answer arguments by the use of their fists. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant.[79]

In sum, a society that categorically forestalls suppressing intolerance for the sake of promoting tolerance (i.e., paradox of tolerance) may succumb to tyrannical majoritarianism (i.e., paradox of democracy) if bigoted views go unchallenged and become socially accepted. These paradoxes, in turn, flow from the "paradox of freedom"—which is Popper's identical precursor to Isaiah Berlin's "Two Concepts of Liberty."[80] According to Popper, "The paradox of freedom is the well-known idea that freedom in the sense of absence of any restraining control must lead to very great restraint, since it makes the bully free to enslave the meek."[81] Present-day civil liberties organizations, for reasons discussed below, have fallen victim to a type of negative-freedom fundamentalism. This is an inaccurate perception of liberty whereby any positive attempts at government regulation are met with fierce resistance, even if narrowly tailored to address compelling state interests. Civil libertarians, however, are not completely at fault. Their motivations to protect that minimum area of personal freedom are doubtless pure.[82] But they must accept some modicum of responsibility for lionizing negative freedom to the extent that the public fundamentally misunderstands its negative rights[83] and positive duties to preserve the general welfare.[84]

Mary Anne Franks and the Cult of the Constitution

The second argument which closely tracks Isaiah Berlin's "Two Concepts of Liberty," and the extent to which libertarian organizations have promoted negative liberty at positive's expense, is Mary Anne Franks's "The Cult of Free Speech," which is the third chapter of her critical legal feminism book *The Cult of the Constitution.*[85] Franks theorizes that constitutional deification, or idealization of the founding-fathers era,[86] has led to the fetishization of individual rights in ways the perforate the separation between positive Lockean constitutional fidelity and negative neoliberal constitutional fundamentalism[87]—serving to promote negative liberty at

positive's expense. Franks's philosophy is identical to Berlin's, except that she distinguishes negative civil liberties from positive civil rights.

> In recent decades, however, conservative and liberal constitutionalism have converged in many respects. This convergence can be expressed as the triumph of civil libertarianism, that is, the triumph of the *civil liberties* approach over the *civil rights* approach to constitutional rights. Though the terms are sometimes used interchangeably, they describe distinct and, in some cases, mutually exclusive concerns. The civil liberties approach to constitutional rights emphasizes individual rights and the need to protect them from the interference of the government; the civil rights approach emphasizes group rights and the need to ensure their equal protection by the government.[88]

According to Franks, civil libertarianism as a form of constitutional fundamentalism is particularly dangerous because of its bipartisan appeal.

The left-leaning ACLU believes constitutional law cannot be upheld without a categorical defense of free speech. The organization's decision to defend neo-Nazis in Skokie, Illinois,[89] solidified its unassailable First Amendment posture.[90] The ACLU's free-speech absolutism is rooted in pressure-valve and reverse-enforcement arguments[91] that are largely unsubstantiated and paternalistic.[92] Protecting society's most despicable ideologues promulgates a false neoliberal narrative that the collective conscience will correct morally erroneous arguments when more speech is allowed to compete in a free market. Franks believes this understanding is deeply flawed because (1) all markets, including "free" markets, require a degree of regulation for optimal operation, (2) markets do not produce objective truth but rather reflect consumer preferences that may be ideologically misguided, and (3) the marketplace of ideas presupposes a public willingness to become educated and epistemologically competent—which short attention spans, confirmation bias, and the "fake news" epidemic all undercut.[93]

Whereas the free marketplace of ideas may be useful in solving small, clearly bounded disputes,[94] its utility is drastically limited when redressing systemic afflictions like racism and sexism.[95] According to Franks, the ACLU couches its neoliberalism in highfalutin ideals of

freedom and liberty, while ignoring the positive aspects, in ways that allow its leadership to discursively dismiss critics as prudish or "incapable of understanding the civil libertarian wisdom that protecting the worst among us is the only way to protect the best."[96] Thus, she believes that the First Amendment need not be maintained inviolate and, quoting Delgado and Yun, "[s]ometimes, defending Nazis is simply defending Nazis."[97]

Civil libertarians on the political right, in the same vein, believe that constitutional law cannot be upheld absent a categorical defense of the right to bear arms. The National Rifle Association (NRA) has done to the Second Amendment what the ACLU has done to the First,[98] and their marketplace arguments mimic one another—the remedy to hate speech is more speech; the remedy to gun violence is more guns.[99] For reasons discussed in the next chapter, the ACLU, principally through its amicus brief in *Citizens United v. Federal Election Commission*,[100] has successfully manipulated public opinion into the belief that freedom is merely the absence of interventionism and not the presence of equalitarianism.

The ACLU and NRA have disproportionally emphasized negative personal rights of speech and gun ownership that, in addition to manipulating public opinion, created what Professor Mary Ann Glendon originally labeled a "superright,"[101] or what I call über-rights: tendencies for negative civil liberties to supersede positive civil rights (using Mary Anne Franks's above-mentioned framework) under the jurisprudential pretense that principled absolutism is the exclusive means to uphold constitutionalism.[102] This tendency to overweigh civil liberties encourages selective interpretations and applications of constitutional law. First and Second Amendment über-right ideologies—rooted in negative neoliberal individualism[103]—make those amendments more important than other constitutional provisions guaranteeing positive collectivism—like the Tenth Amendment's grant of state police power to impose

quarantine restrictions to safeguard public health[104] or the Fourteenth Amendment's guarantee of equal protection under law.[105]

American Constitutional Illiteracy and Postbellum Ahistoricism

Perhaps of greater concern is the über-right tendency to exacerbate what Mary Anne Franks labels "[t]he general public's constitutional illiteracy"[106] such that the public views *any* government regulations as violative of personal freedom and constitutional guarantees.[107] Recalling Chapter One's acknowledgement of law's underlying humanistic constructs that must be approached synchronically and diachronically, First and Second Amendment über-right fetishization, and founding-father deification, encourages unhistorical readings of constitutional law that minimize the reparative objectives of the Reconstruction Amendments. The Thirteenth, Fourteenth, and Fifteenth Amendments' guarantees of manumission, equal protection, and male suffrage, respectively, pale in public comparison to the individualized Bill of Rights despite their important attempts to balance positive and negative freedom. This type of ahistoricism is unique to the American public that is largely unable, or unwilling, to acknowledge institutional legal harms associated with chattel slavery.[108]

Certain paradigmatic, climactic events foster wide-spread social reckoning that reset practical operations and applications of law. The Germans call this *Zeitenwende*, which is an "epochal turning point" where historical and political lessons of power transfer are realized to shape collective transcendence, in a Kantian sense.[109] Individual philosophical metamorphosis preconditions collective social restructuring in ways similar to Friedrich Nietzsche's *Übermensch* ("superman/overman/beyond-man," depending upon the translation).[110] Personal mastery, discovery, and autonomy drive man to "overcome himself" in his "will to power"[111] such that individual self-actualization fosters public cohesion by promoting shared moral values

learned in isolation.[112] The Second World War, according to Jürgen Habermas, was the *Zeitenwende* that catalyzed the fundamental transformation of European law to promote human dignity as the supreme jurisprudential good:

> It is an interesting fact that it was only after the Second World War that the philosophical concept of human dignity, which had already existed in antiquity and acquired its current canonical expression in Kant, found its way into texts of international law and recent national constitutions. Only during the past few decades has it also played a central role in international jurisdiction.[113]

Until the Holocaust of the Jewish people, human dignity was predominately an abstract phenomenon confined to philosophical and theological circles.[114] Nazi Germany's state-sponsored systemic genocide, however, made human dignity *the focal issue* of European legal discourse. Aharon Barak notes that "the Second World War brought the human rights revolution, and it was in this framework that the human dignity revolution took place." Three legal documents, according to Barak, demonstrate human dignity's newfound importance in post-war Europe: the preamble to the Charter of the United Nations,[115] the Universal Declaration of Human Rights,[116] and Article 1 of the German *Grundgesetz*[117] ("Basic Law")—all three acknowledging the paradigmatic importance, and inalienable aspects, of human dignity, equality, and the absolute protection thereof.[118]

Under European leadership, the international community began to adopt the human-dignity legal framework through regional and continental American,[119] African,[120] and Arab conventions.[121] Importantly, this internationalization led to human dignity's constitutional application as both a negative and positive right.[122] German Basic Law, for example, stipulates that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[123] Israeli Basic Law has a similar proviso: "The purpose of this Basic Law is to protect human dignity and liberty…There shall be no violation of the life, body or dignity of any

person as such… All persons are entitled to protection of their life, body and dignity."[124] Human dignity is also paramount in the South African Constitution: "Everyone has inherent dignity and the right to have their dignity respected and protected."[125] Notable in these examples is the lack of state action as a necessary predicate to enforcement, which eases human dignity's positive application. And but for U.S. House of Representatives debates and amendments to James Madison's original free speech and press proposal, American jurisprudence would have come to mirror international law.

A Brief Return to June 1789

James Madison, the Virginia representative to the First U.S. Congress, was keenly mindful of Anti-Federalism concerns related to centralized-government overreach.[126] The Anti-Federalists believed that without a codified declaration of negative individual rights, congressional powers under Article I, Section 8's Necessary and Proper Clause would become unchecked[127]—with their criticisms focusing on the lack of protection for press freedom.[128] Madison, along with fellow Anti-Federalist/Democratic-Republican Thomas Jefferson, championed codified amendments to restrict state power. "I believe that the great mass of the people who opposed it [ratification],)" said Madison, "disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign over."[129] The first two paragraphs of Madison's Fourth Article require special attention:

> Fourthly. That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The *civil rights* of none shall be abridged [emphasis added] on account of religious belief or worship, nor shall any national religion be established, nor shall the full and *equal rights* of conscience [emphasis added] be in any manner, or on any pretext, infringed.

> *The people shall not be deprived or abridged of their right to speak, or to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable* [emphasis added]. The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, remonstrances, for redress of their grievances.[130]

Without doubt, Madison's principal objective was to protect negative personal liberty (through a proto-Berlinian[131] view) from governmental intrusion and, in so doing, ratify a constitution with a more robust central government, which was the underlying failure of the Articles of Confederation. Even so, Madison took great care not to abandon liberty's positive aspects by forestalling the sheer possibility of government intervention. Madison makes this clear himself while addressing the House floor:

> But whatever may be the form which the several States have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of Government by excepting out of the grant of power those cases in which the Government ought not to act, *or to act only in a particular mode* [emphasis added].[132]

According to Madison, the entity possessing "the highest prerogative of power" is where "the greatest danger lies," such that it requires government regulation.[133] In statements that could have been lifted from Book VIII of Plato's *Republic*,[134] Madison warns that this great danger "is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority."[135] These majoritarian concerns, which mimic Rousseau's,[136] (who was only 39-years Madison's senior) are likely the reasons why Madison wanted to reserve a modicum of government power to interfere paternalistically with individual freedom—in the event that negative freedom of the majority estops positive freedom of the minority. Other scholars have reached similar conclusions regarding Madison's understandings of freedom of expression,[137] Ninth Amendment reservation of rights,[138] and religious liberty.[139]

The mere presence of "civil" and "equal rights" language within his Fourth Article,[140] that sequentially supersedes the individual-rights language, suggests Madison's, and the Federalists', modest attempt to balance positive and negative freedom.[141] Thomas Jefferson, later in his life, went through a similar theoretical reconciliation when writing to his mentee Francis Walker Gilmer: "No man has a natural right to commit aggression on the equal rights of another…every man is under the natural duty of contributing to the necessities of the society."[142] As Professor Jud Campbell notes, "whether inherently limited by natural law or qualified by an imagined social contract, retained natural rights," in the Founding Era, "were circumscribed by political authority to pursue the general welfare."[143] This historical values-based compromise between negative and positive liberty (or natural rights and positive law, depending upon scholarly framing) is the cause of modern-day confusion regarding the First Amendment, the Bill of Rights, the Constitution, and American understandings of expressive freedom.[144]

The framers tasked "the People" with determining whether and to what extent natural rights could be abridged for the sake of collective equal protection—and these individual rights were not viewed as "absolute or presumptive barriers to governmental regulation."[145] Even if expressive rights were "not subject to legislative regulation for the public good,"[146] as some have suggested, natural rights were "nevertheless limited by the rights of others"[147] because of the Founders' recognition that "the inalienable right to speak was limited to those who spoke with decency and truth," according to Campbell.[148] Freedom of expression was "limited to *honest* statements—not efforts to deceive others."[149] In modernity, this positive-negative understanding of personal freedom has been lost, particularly as applied to gun ownership and speech.[150] This is likely a result of Americans forgetting, or not reading, their constitutional history. "Those who cannot remember the past," Santayana reminds us, "are condemned to repeat it."[151] But whereas

the American Civil War, and antebellum reconstruction, should have been the moral inflection point to reset public understandings of freedom, it failed to do so.

A Less-Potent Zeitenwende

If the Second World War was Europe's legal *Zeitenwende*, the Civil War was the United States'. For some scholars, including Howard Graham and Jacobus tenBroek, legal reconstructionism generally, and the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment specifically, *can only be understood* in postbellum contexts of antislavery constitutionalism.[152] Others, namely, Robert Cover, are less romantic with their analysis of reconstructionist legal theory,[153] but the point stands: America's bloody victory over slavery was the historical paradigm shift that elevated human dignity to the forefront of the social conscience. American society was forced to recognize that Locke's inalienable right to property, alongside life and liberty,[154] cannot include human chattel. The Thirteenth, Fourteenth, and Fifteenth Amendments were Congress's modest attempts at repairing and stabilizing the gross positive-negative freedom imbalance that ninety-two years of constitutionalized involuntary servitude cemented.

The Reconstruction Amendments were innovative jurisprudentially because they contained express authorizations for Congress to enforce positive freedoms of equal protection and due process through appropriate legislation.[155] Before the Thirteenth Amendment's ratification in 1865, constitutional rights focused on negative guarantees of freedom *from government*. Those guarantees either forbade congressional action outrightly (e.g., the First Amendment's decree that "Congress shall make no law…") or silently (e.g., the Second Amendment's "right of the people to keep and bear Arms, shall not be infringed [by Congress]." The Thirteenth, Fourteenth, and Fifteenth Amendments each contain novel and express language

granting Congress the power to enforce provisions within those amendments through positive law.[156] These "Enforcement Clauses" indicate Congress's explicit desire to extend Article I enforcement powers beyond those expressly enumerated in Section 8 and, in so doing, enable congressional redress of public *and private* constitutional invasions.[157] As of this writing, the Supreme Court does not allow congressional enforcement powers to go beyond state action remedies and regulate actions of private individuals.[158] Nonetheless, the Enforcement Clauses' mere language evinces an attempt to balance positive and negative liberty in the wake of America's greatest moral failure.

It is curious then, that the American chattel-slavery *Zeitenwende* has not rebalanced Berlin's two concepts of liberty in ways that its European World War II corollary has. Both events prompted widespread social reckonings that led to institutional changes, namely, legal protections for individual civil rights and collective human dignity. And yet, the immergence of a new type of American neoliberal individualism—which John Dewey defines as a denigration of collective responsibility favoring unrestrained personal freedom[159]—suggests that Americans may be ignoring the moral lessons of Civil War history. Negative freedom without a positive counterweight leads to social inequality and political subjugation because citizens are denied foundational tenants of self-worth and dignity such that they do not, or cannot, participate within the democratic process.

Jeremy Waldron makes a similar inquiry into this disparate European-American self-understanding of moral history in his book *The Harm in Hate Speech*.[160] Waldron asks rhetorically whether European countries are more receptive to restricting individual personal freedom, specifically group defamation, because of their spatial-temporal proximity to Nazism

and the Holocaust, which are still within living memory. He dispels this historical reasoning, noting that

> it is false—and egregiously so—if this is supposed to suggest that Americans have no such burden. Many Americans and the parents of many Americans suffered in the Holocaust. And even on its own shores, the United States has historical memory within the past two centuries of one of the most vicious regimes of chattel slavery based on race that the world has ever known, upheld by the very Constitution that purported then and still purports to guarantee individual rights; the United States has living memory of institutionalized racism, segregation, and the denial of civil rights in many of its states; living experience—here and now—of shameful patterns of discrimination and racial disadvantage; and above all, living memory of facial terrorism—lynchings, whippings, church-bombings, cross-burnings and all the paraphernalia of Klan symbolism—from 1867 to the present.[161]

Even so, the issue remains—why were European human-rights abuses able to catalyze wide-spread global support for human dignity protections in ways that American human-rights abuses never could? And why does the U.S. remain an international outlier as one of the only advanced democracies without hate-speech legislation?[162] An answer lies in the jurisprudential overestimation of *laissez-faire*, overapplication of the marketplace metaphor, and over-analogization of natural to corporate persons—particularly related to negative liberty and individual expressive rights, all of which are explored below.

A Neoliberal Jurisprudence

Lochner v. New York generally evades First Amendment scholarship because the freedom-of-contract issue at bar was resolved under Fourteenth Amendment substantive due process. But it catalyzed the neoliberalization of law and corporate power within the figurative and literal marketplace. Bakeshop owner Joseph Lochner was accused of violating a New York labor law, which forbade employees from working more than sixty hours a week.[163] Lochner argued that the law violated his personal liberty as an employer, protected by the Due Process Clause, and the Supreme Court agreed, writing "[i]t s a question of which of two powers or

rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."[164] The Court held the New York law unconstitutional as it failed to meet rational basis scrutiny.[165] The case, according to a later dissent published by Justice William Rehnquist, has become emblematic of a "bygone era…in which it was common practice for [the Supreme] Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."[166] In application, however, *Lochner* solidified the Court's willingness to give independent constitutional value to market efficiency as a means to restrict legislative choice.[167] Justice Holmes, in his dissent, makes this plain:

> This case is decided upon an economic theory [*laissez faire*] which a large part of the country does not entertain…It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. *The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same* [emphasis added], which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics [an 1851 publication arguing for *laissez-faire* economics].[168]

Lochner, in part, normalized a neoliberal notion of individualism that has conditioned the public into believing that freedom is merely the absence of regulation and not the presence of protection. The purpose of the Reconstruction Amendments, particularly the Fourteenth, is to rebalance liberty's positive and negative attributes by promoting collective values of fairness and equality. The Fuller Court, in *Lochner*, weaponizes the Fourteenth Amendment against professional bakers: a vulnerable and exploitable minority who deserved state protection at a time in American history when employers could abuse their workforce through unreasonable hours or unsafe working conditions.[169] This is the argument of Justice John Marshall Harlan,

joined by Justices Edward White and William Day, who delivered *Lochner*'s main dissent—noting that the states' general police powers "extends at least to the protection of the lives, the health and the safety of the public against the injurious exercise by any citizen of his own rights."[170] While states may not unduly interfere with citizens' right to freedom of contract, the exercise of that negative liberty must be subordinate to positive equal protection.[171]

The *Lochner* decision, and its ensuing judicial era, has found support among some civil and economic libertarians who attempt to rehabilitate the neoliberal justifications of *laissez-faire*, viewing *Lochner* as the juridical bulwark against New Deal government expansionism.[172] David Bernstein, for example, writes that "the basic motivation for *Lochner*ian jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and that the Fourteenth Amendment's Due Process Clause protected those rights."[173] This viewpoint fundamentally misinterprets the Fourteenth Amendment historically and as applied. Jack Balkin, in his article "'Wrong the Day It Was Decided': *Lochner* and Constitutional Historicism," notes that the Fourteenth and Fifteenth Amendments were ratified with objectives to guarantee African Americans civil and political equality, respectively.[174] Social equality, on the other hand, was unaffected by the Reconstruction Amendments because interracial marriage and cohabitation were still within the regulatory sphere of state action.[175] It was not until the Second Reconstruction and Rights Revolution of the mid-twentieth century that American society, including the judiciary, "discovered the joys of reshaping constitutional doctrine in response to social movement energy, and [lawyers and judges] discovered that they could turn the liberal rhetoric of the Civil Rights Movement and the Rights Revolution to new purposes."[176] In the same way that mid-century judges began to find, within the Constitution's Bill of Rights, penumbral rights that are textually absent,[177] most notably a constitutional "zone of privacy,"[178]

they also began to read aspects of social equality into the Fourteenth Amendment that were historically absent.[179]

This discussion highlights public perceptions of state power and the balance between neoliberal restraint and proactive protectionism. The Fourteenth Amendment has been used to further both ends. In *Lochner*, it established the danger of state interference with freedom of contract, justifying limited government. During the New Deal, it legitimized public acceptance of judicial and state activism.[180] This interpretative oscillation between libertarianism and authoritarianism (by which I mean the state exercising strong central power to preserve normative ideals) is good because it forces critical reevaluation of jurisprudential objectives and whether the law presently serves broad social interests. It is interesting that the First Amendment has almost entirely escaped similar jurisprudential reevaluation—particularly when it too rests on libertarian justifications. Owen Fiss makes this point in his *Harvard Law Review* article "Why the State?"[181]

Owen Fiss, First Amendment Libertarianism, and the Need for the "Activist State"

Owen M. Fiss, Sterling Professor Emeritus at Yale Law School, when chronicling the historical balance between positive and negative freedom, notes that until the twentieth century, liberty was understood as limited government interference.[182] The New Deal, Second World War, and Second Reconstruction garnered public support for the "activist state" and its exercise of central power as a means to achieve substantive equality.[183] Vietnam War-era counterculture catalyzed widespread opposition to big government, which led to Ronald Regan's style of neoliberalism/libertarianism.[184] And the contrast between 1960s hippieism and 1980s Reaganomics should not go unnoticed: Actors on both ends of the political spectrum learned how to bring their individual-liberty interests within constitutional protection. But unlike Fourteenth

Amendment substantive due process—which vacillated historically as an instrument for liberal government activism during the Reconstruction Era and conservative government restraint during the Lochner Era—the First Amendment has only been used as a vehicle to promote the latter:[185] negative liberty, neoliberal philosophy, and the abstract dangers of the Leviathan state.[186]

Fiss agrees with Jack Balkin's assessment of Fourteenth Amendment historicism. At the time of its 1868 ratification, the Fourteenth Amendment was meant to guarantee civil and political equality by "prohibiting discrimination and commanding color blindness."[187] Fiss labels this objective as the "antidiscrimination principle."[188] Second Reconstructionism and social amelioration of Jim Crow led to the amendment's application as an instrument to "confront more deeply entrenched forms of racism" and to "protect against the perpetuation or aggravation of caste structure."[189] Fiss calls this objective the "group disadvantaging principle,"[190] which the Supreme Court has read into the Fourteenth Amendment as a means of promoting social equality. And he sees a similar interpretive process within First Amendment jurisprudence. Whereas the Fourteenth Amendment covers antidiscrimination and group disadvantaging, the First Amendment centers around individual autonomy and public debate.[191]

The First Amendment's twin philosophical objectives of promoting autonomy and public deliberation, which is consistent with other scholarly analysis,[192] is fundamentally a process of balancing negative and positive liberty. Channeling, but not citing, Isaiah Berlin's "minimum area of personal freedom,"[193] Fiss notes that the negative aspect of First Amendment free speech, namely, promoting individual autonomy, requires a "zone of noninterference."[194]

> It is as though a zone of noninterference were placed around each individual, and the state (and the state alone) were prohibited from crossing the boundary. Even in this account, however, autonomy is not protected as an end in itself, nor as a means of individual self-actualization. Rather, it is seen as a way of furthering the larger political

> purposes attributed to the first amendment. It is assumed that the protection of autonomy will produce a debate on issues of public importance that is, to use Justice Brennan's now classic formula, "uninhibited, robust, and wide-open." [quoting *New York Times Co. v. Sullivan*] Of course, rich public debate will not itself ensure self-governance, because the electorate must still listen to what is said and act on the basis of what it learns, but free debate still remains an essential precondition for democratic government, and autonomy is seen as the method of bringing that debate into being.[195]

I introduce this seemingly controversial issue in Chapter Two. Free speech is not an end, in a Kantian sense, *ipso facto*. It is an instrumental mean, albeit a powerful one, to safeguard democratic institutions, political processes, and the rule of law. To treat freedom of speech as a self-actualizing end puts it beyond regulatory reach because the state, as a matter of Lockean philosophy,[196] should not interfere with individual ontological pursuits. In theory, where the individual acts as the dominant social unit and power is equally distributed, instrumental approaches to autonomy *could* enhance democratic maintenance by promoting collective self-determination.[197] But in practice, and in our post-Gutenberg society of corporate dominance, competitive individualism, and liberal nationalism (which approaches Marshall McLuhan's "typographic man" theory discussed in Chapter Three[198]), the instrumental approach, according to Fiss, fails:

> But in modern society, characterized by grossly unequal distributions of power and a limited capacity of people to learn all that they must to function effectively as citizens, this assumption appears more problematic. Protecting autonomy by placing a zone of noninterference around the individual or certain institutions is likely to produce a public debate that is dominated, and thus constrained, by the same forces that dominate social structure, not a debate that is "uninhibited, robust, and wide-open."[199]

Fiss uses the public debate principle as justification for why First Amendment theory should rely on an activist state and not on *laissez-faire*. If the underlying purpose of the First Amendment is to "protect the ability of people, as a collectivity, to decide their own fate,"[200] it may become necessary to limit the autonomy of some to preserve the autonomy of others.[201] This mirrors Isiah Berlin's "'[f]reedom for the pike is death for the minnows'; the liberty of

some must depend on the restraint of others."[202] Even so, limiting individual autonomy should be scrupulously avoided.[203] As a matter of philosophical perfectionism,[204] individuals must enjoy a certain "minimum area of personal freedom"[205] or "zone of noninterference"[206] that the state cannot breach—without a compelling purpose whereby no less-restrictive alternative exists. An individual's freedom of speech should *only* be curtailed when it "drowns out the voices of others or systematically distorts the public agenda" such that it categorically frustrates the First Amendment's objectives of facilitating public debate.[207]

Citing the public's tendency to view the state as a monolithic Leviathan,[208] Fiss observes the nonsensical, but historically understandable, reason why *state* intervention is thought to pose a greater danger to public debate than *private* intervention. All institutions, public and private, exercise speech-related distortion power.[209] There is no reason to assume that the state will use a heavier hand than private industry because it has no special incentive to do so.[210] The concern, says Fiss, is the state's exclusive power to use violence, which it could theoretically employ to assist in content-based regulation. But this is farfetched because "the state's monopoly over the lawful infliction of violence is not a true measure of its power and that the power of an agency, like the FCC, is no greater than that of CBS."[211] The principal issue is society overextending, and dogmatically accepting, the marketplace of ideas theory as the sole mechanism of "advancing knowledge and discovering truth."[212]

Neoliberal, free-market analogies to free speech regulation fail because the actual marketplace does not function according to Adam Smith's abstract invisible-hand.[213] Markets, even free ones, are regulated because access and participation are inequitable and financially determinative. Economic efficiency (dictated by the supply and demand of capital) does not equate to democratic competency (dictated by the supply, demand, and consumption of truthful

information). Attributes necessary to be a good *market* actor, such as ability to make profit, are not the same as attributes necessary to be a good *democratic* actor. Putting aside the will to become educated and epistemologically competent, citizens must be ready, on occasion, to act in self-injurious ways that promote the general welfare. This is the premise of Berlin's positive freedom and something the marketplace metaphor, which promotes competition over rights, cannot accommodate because *homo economicus*, with his perfect rationality, cannot choose action that will result in suboptimal outcomes.[214]

Broadly speaking, the market operates on zero-sum principles of victory and loss. Supply-and-demand economics require market competition that, in turn, presuppose success and failure. This is inherently non-equalitarian, and, in a capitalist setting, may well be fine and good. Competition, after all, is the polestar of market rationality. But there is a unique danger in economizing aspects of liberty because it normalizes marketplace inequality that cannot apply to individual rights and liberties. This was the problem with Fourteenth Amendment marketization in *Lochner.* There cannot be winners and losers when it comes to freedom, liberty, equality, and justice. Wendy Brown makes this clear in her book *Undoing the Demos: Neoliberalism's Stealth Revolution*.[215]

> Competition as the central principle of market rationality also means political subjects lose guarantees of protection by the liberal state. Competition yields winners and losers; capital succeeds by destroying or cannibalizing other capitals. Hence, when market competition becomes generalized as a social and political principle, some will triumph and some will die…as a matter of social and political principle.[216]

Free speech economization has put the First Amendment itself into direct competition with other constitutional guarantees, namely, Fourteenth Amendment equal protection. But the First Amendment, says Owen Fiss, "enjoys what substantive due process was never able to obtain, namely, a consensus—support from the entire political spectrum."[217] Mary Anne Franks

makes the same observation.[218] The Supreme Court and society's heavy bipartisan reliance on *laissez-faire* arguments for government noninterference related to free speech has allowed the marketplace-of-ideas metaphor to escape substantive critical reevaluation. Even more striking, bipartisan neoliberalism has made the First Amendment a competitor within a *constitutional marketplace*. And according to some commentators, the First Amendment is winning at the Fourteenth's expense.[219] This is why the First Amendment has acquired its über-right status: widespread, uncritical, and unconditional acceptance of neoliberal marketplace rationality as part of constitutional orthodoxy.

This First Amendment neoliberal approach is dangerous, according to Fiss, because of its bipartisan appeal.[220] Despite early-twentieth century pressure to increase state intervention, "a special place or exception was always reserved for speech. The progressives embraced Holmes's dissent in *Abrams v. United States* and its plea for 'free trade in ideas' just as fervently as they did his dissent in *Lochner*."[221] *Lochner*ian and free-speech libertarianism mirror each other. The only difference is that the latter continues to enjoy support from both the political left and right. But that is not to discount libertarianism's utility in certain jurisprudential and philosophical contexts.

The Need For, and Danger of, Civil Libertarianism

To summarize this Chapter's key points, civil libertarian organizations, and their philosophical absolutism, have conditioned the public into believing constitutional law cannot be upheld absent an inviolate defense of negative personal freedom. This is incorrect both philosophically and historically, promoting a type of constitutional illiteracy and ahistoricism difficult to rectify. *Public* acceptance of ideological absolutism has become, to a degree, *juridical* acceptance—demonstrated most acutely through the popularization of so-called "constitutional

originalism," which advocates a fixed approach to constitutional analysis where the document is only interpreted in late-eighteenth century social contexts.[222] This synchronic approach is a necessary but insufficient analytical method because it ignores the diachronic importance of the American Reconstruction, Second Reconstruction, and the Fourteenth Amendment's guarantee of equal protection. Absolute originalism is a form of constitutional fundamentalism because it seeks to preserve an idealized, mythic past that never existed due to early-American political inequality—something that subsequent positive law seeks to redress.[223]

Neoliberalized, increasingly absolute judicial holdings discussed in Chapter Two placed unwarranted emphasis on negative personalized rights that led to superright/über-right fetishization, where free speech and gun ownership are judged superior to equal protection in the court of public opinion. The First Amendment has eclipsed the Fourteenth vis-à-vis perceived public importance because it adheres to a romanticized mythos of American individualism—an anti-authority, negative freedom arising from British separation—in ways the Fourteenth Amendment never can.

Even so, civil libertarianism certainly has a place within constitutional philosophy. Organizations like the ACLU, EFF, and NRA are critically important to negative liberty because they buttress Berlin's "minimum area of personal freedom,"[224] Waldron's "inviolability of the individual,"[225] or Fiss's "zone of noninterference,"[226] which state action should not breach absent truly extraordinary circumstances. Even Aristotle in *Nicomachean Ethics* qualifies his golden mean noting that "not every action or feeling admits of a mean…spite, shamelessness, envy, and, among actions, adultery, theft, homicide."[227] Some actions are good or bad *ipso facto* and can neither be balanced nor qualified.[228] This includes certain aspects of speech, particularly political speech, which cannot be limited without offending the essence of individual human

nature. This is Alexander Meiklejohn's thesis in his article "The First Amendment is an Absolute."[229] But the chief difficulty, according to Berlin, is where to delineate that bright-line absolute. "What then must the minimum be? That which a man cannot give up without offending against the essence of his human nature. What is this essence? What are the standards which it entails? This has been, and perhaps always will be, a matter of infinite debate."[230]

The demarcation of government noninterference, as a categorical matter of natural rights, goes to the very essence of negative liberty. "Freedom for the pike" may well be "death for the minnows.'"[231] But despite its dominance, even the pike retains its own minimum area of free action. As demonstrated in the discussion of *Lochner v. New York*, the degree to which society perceives the pike's minimally necessary negative freedom will shift over time. This fluctuation is healthy democratically because it indicates societal reevaluation of positive and negative freedom and the extent to which government, on rare occasion, should interfere with the rights of some to safeguard the rights of others.[232] Even if public and juridical understandings remain fluid, that minimal area of personal freedom remains, nonetheless, "always recognisable [sic]."[233] The purpose of civil libertarian organizations is to hold the line, averting government encroachment upon those critical areas of noninterference. But the jurisprudential success of civil libertarianism particularly in the realm of First Amendment free speech, demonstrated through the progression of incrementally absolutist judicial holdings discussed in Chapter Two, has extended the critical area of personal freedom beyond the minimum necessary to preserve individual autonomy.[234] This is dangerous in the globalized context of digital communications and Internet speech.

The ACLU's free-speech advocacy has, in part, damaged the positive-negative liberty balance in three important ways. First, the organization has successfully reframed freedom as an

almost entirely negative phenomenon. Any government attempt to interfere with speech, including regulation of content that harms individual self-actualization or endangers a person's basic social standing, offends the entire constitutional corpus juris. This ignores the history of the Reconstruction Amendments and ascribes undue cachet to the First Amendment at the Fourteenth's expense. This flavor of constitutional fundamentalism is not limited to left-leaning organizations, shown through the above-mentioned NRA analogy. If Meiklejohn worried about "excessive individualism,"[235] and its tendency to eclipse collective democratic self-governance in the context of free speech, he would be horrified to read the 2008 *District of Columbia v. Heller* decision[236]—and the extent to which the NRA, as amicus, personalized and neoliberalized the Second Amendment:[237] an otherwise abstract grammatical disaster that does not explicitly mention guns or self-defense.[238] Put simply, bipartisan civil libertarianism has the same promotional effect on negative liberty, excessive individualism, constitutional deification, and über-right fetishization.

Second, the ACLU's absolutist free-speech advocacy recasts victimhood from the bullied to the bullies. Mary Anne Franks calls this "victim claiming,"[239] whereby verbal oppressors generate public or juridical sympathy by framing their plight as a protracted struggle against expression and censorship: Jews replacing White society,[240] Blacks erasing Southern heritage,[241] Big Tech censoring conservative ideology,[242] homosexuals killing U.S. soldiers through divine intervention,[243] *et cetera*. This is a type of reverse discrimination that John Stuart Mill's all-mankind-minus-one argument, discussed in Chapter Two, should not accommodate.[244] Victims, actual or self-perceived, seek scapegoats to blame for wrongdoings they did not themselves create. Scapegoats, as a general proposition, are discrete minorities who have limited resources to engage in this type of confrontation. Allowing self-perceived victims to bully minority

populations, and precluding the minority's ability to seek civil redress,[245] frustrates objectives of equal protection and tort liability.[246] I expand upon this concept in my analysis of *Snyder v. Phelps* below.

Third, the neoliberal *laissez-faire* theory of marketization that underlies ACLU free-speech advocacy, and its outlier status as a theoretical construct among the international community, presupposes a level of American exceptionalism that the global community rejects.[247] Kate Klonick, in her *Harvard Law Review* article "The New Governors," discusses how American social media companies, specifically YouTube, Facebook, and Twitter, have (un)intentionally spread this negative free-speech theory. "American lawyers trained and acculturated in American free speech norms and First Amendment law oversaw the development of company content-moderation policy. Though they might not have 'directly imported First Amendment doctrine,' the normative background in free speech had a direct impact on how they structured their policies."[248]

There is an implied understanding among Internet media executives that the neoliberal American free-speech philosophy is exceptional in a manner that necessitates preservation and exportation. I label this concept "American speech imperialization."[249] Mark Zuckerberg, for example, often speaks of his desire to empower world citizens through sociocultural free-speech manumission and international democratic expansionism.[250] In a 2019 address at Georgetown University, he envisioned Facebook as "a Fifth Estate alongside the other power structures of society [where p]eople no longer have to rely on traditional gatekeepers in politics or media to make their voices heard."[251] This is not to undercut the extent to which Facebook and social media have successfully catalyzed international free-speech movements in regions that routinely

suppress journalists and protesters.[252] But there is not inherent wisdom in the libertarian understanding that the only solution to hate speech is more speech.[253]

The U.S. remains a global outlier with respect to hate-speech regulation because of its fidelity to negative civil liberties at the expense of positive civil rights. Legislatively and jurisprudentially, American notions of free-speech libertarianism often conflict with international standards of individual protectionism. Zuckerberg's desire, for example, to promote individual freedom by circumnavigating gatekeepers and liberating the individual conscience does not always coincide with international preferences. The European Court of Justice's "right to be forgotten"[254] or the German Bundestag's *Netzwerkdurchsetzungsgesetz*[255] are two prominent examples of international pushback to American free-speech exceptionalism and expansionism. Philosophically, American free-speech neoliberalism is immature because it does not accommodate, or even consider, the positive aspects of free-speech liberty. A comparison between the U.S. Supreme Court Case *Snyder v. Phelps* (2011) and the Canadian Supreme Court Case *R. v. Keegstra* (1990) illustrates this point.

***Snyder v. Phelps* and *R. v. Keegstra*: A Necessary Comparison**

Snyder v. Phelps is a 2011 U.S. Supreme Court free-speech case involving a church's anti-homosexual demonstration near a military funeral and a plaintiff's inability to seek civil redress for intentional infliction of emotional distress.[256] The Westboro Baptist Church, based in Topeka, Kansas, routinely pickets military funerals to communicate its belief that God, by killing American service members, is punishing the United States for widespread toleration of homosexuality.[257] Pastor Fred Phelps, who founded the church, traveled in 2006 to Westminster, Maryland, to picket the funeral of Marine Lance Corporal Matthew Snyder. Standing approximately 1,000 feet from the funeral, Westboro parishioners held signs reading "God Hates

the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," and "Thank God for Dead Soldiers."[258] Albert Snyder, Matthew's father, sued in the U.S. District Court for the District of Maryland, which found Phelps liable for intentionally inflicting emotional injury on Snyder and his family.[259] Phelps appealed to the Fourth U.S. Circuit Court of Appeals, which reversed on First Amendment grounds. Snyder appealed to the U.S. Supreme Court, which granted *certiorari*.

The Court ruled in Phelps's favor holding, 8-1, that the church's homophobic speech was related to matters of legitimate public concern such that it is entitled to special First Amendment protection.[260] Recognizing that the boundaries of the public concern test are not well defined,[261] the Court said that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community…or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[262] Chief Justice John Roberts, writing for the majority, noted that the Westboro signs plainly relate to broad social issues. "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[263] Justice Robert's final paragraph has come to epitomize the American neoliberal approach to free-speech protection:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[264]

Justice Samuel Alito, in what has become one of his best-known and most powerful dissenting opinions,[265] argued that First Amendment protection cannot extend to tortious speech

merely because it occurs in a public forum or includes some discussion of public issues. "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[266] "In order to have a society in which public issues can be openly and vigorously debated," Alito writes, "it is not necessary to allow the brutalization of innocent victims."[267] This rationale approaches his dissent in the "crush videos" case of *United States v. Stevens*, in which Alito argued that a federal statute criminalizing the production of animal-cruelty videos was constitutional because aimed to prevent animal cruelty, not abridge free speech.[268]

Compare the *Snyder* case with the landmark Canadian Supreme Court hate-speech case *R. v. Keegstra*. James Keegstra was a high school teacher in Eckville, Alberta. Until his dismissal in 1982, he taught his students that Jews were "treacherous," "subversive," "sadistic," "money-loving," "power hungry" "child killers," seeking to destroy Christianity.[269] According to Keegstra, Jews "created the Holocaust to gain sympathy" and are responsible for international depressions, anarchy, wars, and chaos.[270] If students failed to reproduce his viewpoints in class and on exams, their grades suffered.[271] Keegstra was charged with criminal hate propaganda, under what is currently *Criminal Code* section 319(2), for unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements.[272] He applied to the Court of Queen's Bench in Alberta for an order quashing the charge, arguing that the criminal hate speech law violated his freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. The lower court denied his application, and Keegstra was tried and convicted. He appealed his conviction, and the Alberta Court of Appeal reversed on the grounds that section 319(2) unconstitutionally infringed his section 2(b) freedom of expression. The Crown appealed to the Supreme Court.

Chief Justice Brian Dickson, writing for the majority, held that section 319(2)'s hate-speech criminalization violated section 2(b)'s freedom of expression.[273] Section 2(b) cannot be limited by section 15's guarantee of equal rights[274] or section 27's recognition of multiculturalism.[275] Even so, the violation of individual free expression was justified under section 1 of the *Charter*—which allows the government to curtail individual rights and freedoms if those limitations are reasonable and demonstrably justified—because the violation was rationally connected to its objective, impaired the right as little as possible, and was proportional between the effects of the limitation and the identified objective,[276] namely, to prevent the promotion and spread of hatred toward identifiable groups within Canadian society.[277] Thus, the criminalization and violation of Keegstra's free expression was justified under section 1,[278] and the case was remitted to the Alberta Court of Appeal. The appellate court directed a new trial that resulted in Keegstra's reconviction.

To Philosophize, or Not to Philosophize

The U.S. Supreme Court, in *Snyder*, justifies protecting homophobic hate speech on a Meiklejohnian basis of democratic self-maintenance. To preserve the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[279] society must "tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[280] Toleration, according to the *Snyder* majority, must extend to vituperations against discrete minorities based upon their immutable characteristics if those invectives contain matters of public importance. This seems to abrogate, or at least severely undercut, the fighting-words principle established through *Chaplinsky v. New Hampshire*—which prevents and punishes words that, by their very utterance, inflict injury or tend to incite imminent lawlessness.[281] Fighting words, under

Chaplinsky, are punishable because their de minimis social value does not explicate matters of public importance, and any incidental benefit is outweighed by policy interests of societal order and morality. *Snyder*'s fighting-words doctrinal weakening is one of the key reasons for Justice Stephen Breyer's concurrence.[282] But outside the Court's argument of free speech as the necessary precondition for democracy, there is almost no discussion of the harm or injury associated with Fred Phelps's speech—aside from a cursorial mention of pain in the last paragraph.

Putting aside the possibility of outlier status, *Snyder* pales in comparison to *Keegstra* regarding the philosophical, moral, and historical complexity in which the Canadian Supreme Court justifies its decision. Beginning with John Stuart Mill's marketplace of ideas, which the lower court used to rationalize why unknowing falsehoods were protected by section 2(b),[283] Chief Justice Dickson articulates the American legal tradition for free speech and why the negative freedom from government intervention cannot be upheld inviolate. Citing several landmark First Amendment cases including *Garrison v. Louisiana*,[284] *Ashton v. Kentucky*,[285] *New York Times Co. v. Sullivan*,[286] *Brandenburg v. Ohio*,[287] *Cohen v. California*,[288] and *Collin v. Smith*,[289] Dickson discusses the American trend to protect "offensive, public invective as long as the speaker has not knowingly lied and there exists no clear and present danger of violence or insurrection" as a mechanism to safeguard political debate and democratic self-maintenance.[290] He then moves to a theoretical discussion, noting the scholarship of Richard Delgado, Mari Matsuda, Irving Horowitz and the "growing body of academic writing" that demonstrates how hate propaganda undermines the democratic values free speech is meant to protect.[291]

Justice Dickson cites Isaiah Berlin's "Two Concepts of Liberty" to demonstrate how notions of human dignity and community belonging are closely related to the respect accorded

the groups that individuals comprise.[292] Because racist invective may cause vulnerable minorities to "take drastic measures in reaction" including "avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority," there is a strong societal interest to foster and demand tolerance for racial, religious, and cultural minorities.[293] He references the "special role" of Section 1 of the *Canadian Charter of Rights and Freedoms* to justify governmental intrusion on individual rights and freedoms, noting that "Section 1 has no equivalent in the United States… for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be the absolute guarantee of constitutional rights."[294] While this is true in practice, it is not true in American theory or history.

Section 1 of the Canadian *Charter*'s American equivalent is the Fourteenth Amendment's Section 5 Enforcement Clause and Congress's vested power to enact "appropriate legislation" as a means to enforce other parts of the Amendment, namely, its guarantees of due process and equal protection. In other words, the issue is not a lacking jurisprudential instrumental equivalent; it is the U.S. Supreme Court misinterpreting the Enforcement Clause as narrowly empowering Congress to redress state action only. This is an incorrect, constitutional ahistoricism that the Court, on numerous occasions throughout its history, has tried and failed to redress. Justice John Marshall Harlan makes this clear in his dissent in the *Civil Rights Cases*:

> Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law… the court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted.
> The purpose of the first section of the act of Congress of March 1, 1875, was to prevent race discrimination in respect of the accommodations and facilities of inns, public conveyances, and places of public amusement. It does not assume to define the general

> conditions and limitations under which inns, public conveyances, and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied so as to work a discrimination solely because of race, color, or previous condition of servitude.[295]

Justice Thomas Clark makes this clear in his concurrence in *United States v. Guest*:

> The Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize, public facilities…it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.[296]

And Justice Stephen Breyer makes this clear in his dissent in *United States v. Morrison*.

> Given my conclusion on the Commerce Clause question, I need not consider Congress' authority under § 5 of the Fourteenth Amendment. Nonetheless, I doubt the Court's reasoning rejecting that source of authority…The Court responds directly to the relevant "state actor" claim by finding that the present law lacks "congruence and proportionality" to the state discrimination that it purports to remedy. That is because the law, unlike federal laws prohibiting literacy tests for voting, imposing voting rights requirements, or punishing state officials who intentionally discriminated in jury selection, is not "directed…at any State or state actor." But why can Congress not provide a remedy against private actors? [citations omitted][297]

Justices Harlan, Clark, and Breyer all recognize, to varying degrees, that the framers of the Fourteenth Amendment, through Section 5's Enforcement/Enabling Clause, intended to give Congress the authority to regulate purely private conduct that impinged fundamental rights. The historical record itself, principally, the Civil Rights Act of 1866, provides ample support for this conclusion.[298] But it remains unclear to many scholars, historically and jurisprudentially, why society should distinguish between state and private action when the Thirteenth Amendment applies to both, but the Fourteenth applies only to the latter.[299] In other words, why does the Thirteenth Amendment's Enabling Clause empower the government to regulate *private* conduct

and "pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States"[300] while the Fourteenth Amendment's Enabling Clause is limited to *state* action that deprives any person life, liberty, property, or equal protection of the laws? As related to freedom of speech and criminal libel, this was the issue in *Beauharnais v. Illinois* and the reason why the Supreme Court of Canada devoted five paragraphs of *R. v. Keegstra* to its discussion.[301]

Beauharnais v. Illinois

In January 1950, Joseph Beauharnais circulated a petition that called on Chicago government officials to "PRESERVE AND PROTECT WHITE NEIGHBORHOODS! [sic] FROM THE CONSTANT AND CONTINUOUS INVASION, HARASSMENT AND ENCROACHMENT BY THE NEGROES."[302] He was convicted under an Illinois state law that forbade the publication of anything that "portrays depravity, criminality, unchastity, or lack of virtue…of any race, color, creed or religion" or "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy."[303] The Illinois Supreme Court affirmed Beauharnais's conviction, and he appealed to the U.S. Supreme Court. Majority opinion author Justice Felix Frankfurter agreed with the state court and upheld the Illinois law.[304]

The "liberty" element of the Fourteenth Amendment's due process clause, said Frankfurter, did not forbid a state to pass the kind of law targeted, as this statute was, at criminal libel against defined groups. "[I]f an utterance directed at an individual may be the object of criminal sanctions," he wrote for a 5-4 majority, "we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State."[305] Pointing out that Illinois had recently suffered a spate of race-related violence, Frankfurter said that the state was within its rights to pass laws intended to curb racial unrest.[306] He acknowledged that laws of this

nature could be abused but reasoned that states should be allowed to continue with their experimentation.[307] He added that the Illinois statute was construed by state courts to avoid charges of vagueness.[308]

In his analysis, Justice Frankfurter used a theoretical framework approaching the European and Canadian right to human dignity.[309] It would be "arrant dogmatism," said Frankfurter, for the Court to deny the Illinois legislature's warrantable belief that

> a man's job and his educational opportunities and the *dignity* accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.[310]

Justice Frankfurter, in essence, appears to encourage states to experiment legislatively with enacting statutory prohibitions against group libel or hate speech.

The majority opinion drew dissents from Justices Hugo Black, William O. Douglas, Stanley Reed, and Robert Jackson. While Jackson's dissent focused on whether the Fourteenth Amendment appropriately incorporated the First (he believed it did not[311]), and Reed thought the definitions of terms such as "virtue," "derision," and "obloquy" were too vague for appropriate jury instruction,[312] Black and Douglas targeted the majority's First Amendment implications. Black, joined by Douglas, derided the Court's attempt to analogize the state's criminal libel law to group libel, adding that this "sugar-coating does not make the censorship less deadly."[313] He also disdained Justice Frankfurter's Brandeisian laboratories-of-democracy argument:

> [N]o legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people.[314]

Black accused Illinois of creating "a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights."[315] He concluded with a note that if minority groups took this outcome as a win, they might do well to keep another adage in mind: "Another such victory and I am undone."[316] Douglas, writing only for himself, took an absolutist position: while he would grant that a conspiracy of race "derision" and "obloquy" such as that undertaken by Hitler and the Nazis would be punishable,[317] in other, less dramatic situations, "the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster."[318] Warning against putting a right as important as freedom of expression "under the legislative thumb,"[319] he bemoaned what he saw as an increasing trend toward expansive regulation of expression by legislative bodies.

In sum, *Beauharnais* stands for the proposition that state statutes criminalizing group defamation based on race or religion can be constitutional and consistent with First Amendment jurisprudence. While *Beauharnais* has never been explicitly overturned, it has been substantially weakened by subsequent decisions. In *Garrison v. Louisiana*,[320] for example, Justice Douglas, in concurrence, wrote that *Beauharnais* "should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment."[321] The dissenting opinions from Black and Douglas differentiate between the impacts of hateful expression on individuals and those on the public. Under current theory, libel and fighting words[322] do not enjoy constitutional protection—not because of their tendencies to harm, but because their regulation is unlikely to have a significant impact on public debate.[323] Group libel, on the other hand, principally concerns public issues, and its prohibition would hinder the public's involvement in civic debate and democratic self-governance, says the theory. Individuals, however, are closely

connected to the groups to which they belong, whether by choice or not. This was also Chief Justice Dickson's philosophical conclusion in *R. v. Keegstra*.[324]

The question then becomes whether traditional First Amendment orthodoxy that invalidates speech regulations because they chill public debate should be instead reconceptualized under a Fourteenth Amendment equal-protection framework that considers a more international human dignity approach, as suggested by both Frankfurter and current constitutional scholars.[325] The answer, in large part, depends upon cultural understandings of civil libertarianism and its relation to constitutionalism.

Snyder v. Phelps, *Beauharnais v. Illinois*, and *R. v. Keegstra* all involve attempts by civil liberties associations to expand Isaiah Berlin's minimum area of personal freedom.[326] The American Civil Liberties Union (ACLU), as amicus in *Snyder*, was successful in persuading the U.S. Supreme Court that speech, on public property and of public concern, cannot sustain the elements required for intentional infliction of emotional distress—even if the expressed content is sufficiently offensive or outrageous.[327] The ACLU, as and of counsel in *Beauharnais*, was *not* successful in persuading the U.S. Supreme Court that group libel laws are unconstitutional.[328] This is particularly interesting because Justice Frankfurter, who wrote the Court's majority opinion that Fourteenth Amendment due process permits states to experiment with censorship laws,[329] was one of the ACLU's original founders.[330] (However, Frankfurter's status as a Jewish immigrant active in Zionist advocacy,[331] and his longstanding college friendship with Walter Lippmann,[332] may help explain his protectionist tendencies.) The Canadian Civil Liberties Association (CCLA), as an intervener in *Keegstra*, took a less-than-absolutist position on free speech, noting that individual expression can be justified under section 1 of the *Charter*.[333] But because of free expression's "vital and fundamental importance to a free and democratic

society," there must be a "strong presumption" favoring free expression and generally opposing section 1. Because of this presumption, according to the CCLA, "it is only where the freedom of expression of an individual or individuals collides with a freedom or right of equal import to society that the freedom of expression should be cut back to any extent."[334]

Where to Go?

Civil libertarianism generally, and related to speech specifically, is important to democratic maintenance because it defines the Berlinian minimum area of personal freedom[335] necessary for self-governance, -fulfillment, and knowledge advancement. The natural state of man, according to John Locke, is "perfect freedom" and "uncontrolled enjoyment" of individual rights.[336] Deference, therefore, is due humanity's natural state legally and legislatively. Judicial or congressional interference with personal freedoms of thought, conscience, or expression could lead to arbitrary despotism in which society becomes compelled to dissolve the political bands holding it together.[337] But even Locke was not absolute in his convictions. "Man being born, as has been proved, with a title to perfect freedom, and uncontrolled enjoyment of all the rights and privileges of the law of nature, *equally with any other man, or number of men in the world*…[emphasis added]."[338] The exercise of personal freedom is inviolable to the point it precludes another person's exercise of personal freedom. This is the essence of balancing positive and negative liberty.

Traditional First Amendment orthodoxy should be reconceptualized under a Fourteenth Amendment equal-protection framework because doing so would properly balance the historical, philosophical, and legal objectives of safeguarding negative and positive attributes of freedom. Constitutional law is not merely the absolute defense of negative personal liberties; it is the protection of collective civil rights. Legal absolutism becomes dangerous when it escapes

substantive critical reevaluation. Civil libertarianism becomes dangerous to the extent it categorically frustrates an injured party's ability to seek redress because negative liberty without positive responsibility results in dogmatic orthodoxy, which is neoliberal fundamentalism.

Ratified through U.S. Supreme Court judicial holdings, civil libertarianism has conditioned the public into believing that freedom and liberty are only found through negative protections of individual rights. This has created the type of "excessive"[339] or "rugged"[340] individualism against which Meiklejohn and Dewey explicitly warned, respectively. It is not overly hyperbolic to assert that the injection of libertarianism and individualism into constitutionalism has thrown American society into positive-negative disequilibrium—where the latter has so substantially overshadowed the former that current American notions of freedom are anti-democratic. Government regulation—if positively-negatively balanced—is not *ipso facto* bad. Civil redress, which keeps government actors out of ideological gatekeeping, is even better. The next chapter will offer normative suggestions for the American future of free speech that prioritize human dignity and constitutional history.

Notes

[1] Alan Ryan, "Isaiah Berlin: The History of Ideas as Psychodrama," *European Journal of Political Theory* 12, no. 1 (January 1, 2013): 61–73, https://doi.org/10.1177/1474885112463651; Raphael Loewe, "In Memoriam: Sir Isaiah Berlin, OM, CBE, MA, FBA (1909—1997)," *Jewish Historical Studies* 35 (1996): xvi–ii, https://www.jstor.org/stable/29779974; Isaiah Berlin, *Flourishing: Letters 1928-1946*, ed. Henry Hardy (Random House, 2012).

[2] Isaiah Berlin, "Two Concepts of Liberty: An Inaugural Lecture Delivered Before the University of Oxford on 31 October 1958" (Clarendon Press, January 1, 1966).

[3] Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969).

[4] Isaiah Berlin, "Two Concepts of Liberty," in *Liberty: Incorporating Four Essays on Liberty*, ed. Henry Hardy, 2nd Edition (Oxford: Oxford University Press, 2002), 166–217.

[5] Berlin, 169.

[6] Berlin, 169.

[7] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[8] *See* Saxonhouse, *Free Speech and Democracy in Ancient Athens*, 21–26.

[9] Berlin, "Two Concepts of Liberty," 178–79.

[10] Berlin, 173.

[11] "Yet it remains true that the freedom of some must at times be curtailed to secure the freedom of others." Berlin, 173.

[12] Malekos Smith, "Swinging a Fist in Cyberspace," 1.

[13] Berlin, "Two Concepts of Liberty," 171. Berlin also notes that "[f]reedom for an Oxford don, others have been known to add, is a very different thing from freedom for an Egyptian peasant." Berlin, 171.

[14] "Virtue, then, is a state involving rational choice, consisting in a mean relative to us and determined by reason—the reason, that is, by reference to which the practically wise person would determine it. It is a mean between two vices, one of excess, the other of deficiency. It is a mean also in that some vices fall short of what is right in feelings and actions, and others exceed it, while virtue both attains and chooses the mean. So, in respect of its essence and the definition of its substance, virtue is a mean, while with regard to what is best and good it is an extreme." Aristotle, *Nicomachean Ethics*, 31.

[15] Berlin, "Two Concepts of Liberty," 173.

[16] Berlin, 179.

[17] "For the 'positive' sense of liberty comes to light if we try to answer the question, not 'What am I free to do or be?', but 'By whom am I ruled?' or 'Who is to say what I am, and what I am not, to be or do?' The connection between democracy and individual liberty is a good deal more tenuous than it seemed to many advocates of both." Berlin, 177–78.

[18] Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*, *Democracy, Expertise, and Academic Freedom* (Yale University Press, 2012), 38, https://doi.org/10.12987/9780300148640.

[19] Post, 38.

[20] Berlin, "Two Concepts of Liberty," 173–74.

[21] Berlin, 175.

[22] Berlin, 179.

[23] Berlin, 171.

[24] "We must preserve a minimum area of personal freedom if we are not to 'degrade or deny our nature'." Berlin, 173. Berlin is quoting from Benjamin Constant's *Principes de Politique*, Chapter 1.
[25] "We cannot remain absolutely free, and must give up some of our liberty to preserve the rest." Berlin, 173.
[26] Berlin, 173.
[27] Chafee, *Freedom of Speech*, 16.
[28] Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965), 61.
[29] John Dewey explicates a new type of American individualism that, unlike the old, denigrates collective responsibility in favor of personal freedom. "It was not long ago that it was fashionable for both American and foreign observers of our national scene to sum up the phenomena of our social life under the title of 'individualism.' Some treated this alleged individualism as our distinctive achievement; some critics held that it was the source of our backwardness, the mark of a relatively uncivilized estate. To-day both interpretations seem equally inept and outmoded. Individualism is still carried on our banners and attempts are made to use it as a war-cry, especially when it is desired to defeat governmental regulation of any form of industry previously exempt from legal control. Even in high quarters, rugged individualism is praised as the glory of American life. But such words have little relation to the moving facts of that life." Dewey, *Individualism Old and New*, 18.
[30] Saxonhouse, *Free Speech and Democracy in Ancient Athens*, 32.
[31] Meiklejohn, "The First Amendment Is an Absolute," 249–50. Meiklejohn quotes Justice Harlan's majority decision in Konigsberg v. State Bar, 366 U.S. 36, 49-50 (1961).
[32] Meiklejohn, 250.
[33] Meiklejohn, 250.
[34] Berlin, "Two Concepts of Liberty," 171, 173.
[35] *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government."); Brown v. Hartlage, 456 U.S. 45, 53 (1982) (striking down a Kentucky court's decision invalidating the election of a county commissioner, noting that a "political candidate does not lose the protection of the First Amendment when he declares himself for public office."); Burson v. Freeman, 504 U.S. 191, 198 (1992) (upholding a Tennessee regulation that did not allow campaigning with 100 feet of the entrance to polling places because, "[a]s a facially content-based restriction on political speech in a public forum," the law could not survive strict scrutiny.").
[36] Mills v. Alabama, 384 U.S. 214, 218-19 (1966).
[37] Citizens United v. FEC, 558 U.S. 310, 341 (2010).
[38] Riley v. National Federation of the Blind, 487 U.S. 781, 796 (1988).
[39] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this [Internet] medium.").
[40] Berlin, "Two Concepts of Liberty," 171.
[41] Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

[42] *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (noting that "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.").
[43] *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (noting that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children…").
[44] *See* Roberts v. United States Jaycees 468 U.S. 609, 618 (1984) (noting that "freedom of association receives protection as a fundamental element of personal liberty.").
[45] *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("'The constitutional right to travel from one State to another…occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.'" (quoting United States v. Guest, 383 U.S. 745, 757-58 (1966))).
[46] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (noting that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))).
[47] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (noting that "[m]arriage and procreation are fundamental to the very existence and survival of the race.").
[48] *See* Carey v. Population Services International 431 U.S. 678, 684-85 (1977) (noting that "[w]hile the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" (citations omitted)).
[49] By way of judicial inconsistency, there is scholarly discrepancy as to whether "strict scrutiny" differs from "exacting scrutiny." Strict scrutiny, however, appears more demanding, requiring the government to prove a compelling interest through the least restrictive means available. Exacting scrutiny, on the other hand, requires government action to be narrowly tailored but not necessarily least restrictive. R. George Wright, "A Hard Look at Exacting Scrutiny," *UMKC Law Review* 85, no. 1 (2016): 213–16, https://heinonline.org/HOL/P?h=hein.journals/umkc85&i=215. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 117 (1973) (Marshall, J., dissenting) (noting that "[t]his Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny."); Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (per curiam) (noting that the constitutionality of a provision of the Finance Election Campaign Act of 1971 "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."); Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373, 2383 (2021) (noting that "[w]hile exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.").
[50] Isaiah Berlin, "Political Ideas in the Twentieth Century," *Foreign Affairs* 28 (1950 1949): 385, https://heinonline.org/HOL/P?h=hein.journals/fora28&i=361.

[51] *See* Book VIII of *The Republic*, where Plato portrays democracy, despite its majoritarian shortcomings, as the system that contains the greatest variety of leaders and governing mechanisms. "And then democracy comes into being after the poor have conquered their opponents, slaughtering some and banishing some, while to the remainder they give an equal share of freedom and power; and this is the form of government in which the magistrates are commonly elected by lot… are they not free; and is not the city full of freedom and frankness—a man may say and do what he likes?…And where freedom is, the individual is clearly able to order for himself his own life as he pleases?…Then in this kind of State there will be the greatest variety of human natures?…This, then, seems likely to be the fairest of States, being like an embroidered robe which is spangled with every sort of flower. And just as women and children think a variety of colours to be of all things most charming, so there are many men to whom this State, which is spangled with the manners and characters of mankind, will appear to be the fairest of States." Plato, *The Republic of Plato*, 263–64.
[52] Berlin, "Two Concepts of Liberty," 177.
[53] Berlin, 172.
[54] Berlin, 172–73.
[55] *See* Isaiah Berlin, *Political Ideas in the Romantic Age: Their Rise and Influence on Modern Thought*, *Political Ideas in the Romantic Age* (Princeton University Press, 2014), 114, https://doi.org/10.1515/9781400852819. "Freedom is thus in its primary sense a negative concept; to demand freedom is to demand the absence of human activities which cross my own; and the general discussion of this topic has always consciously or unconsciously presupposed this [negative] meaning of the term."
[56] Dijn, *Freedom*, 12, 307–8.
[57] In footnote four, chapter seven of *The Open Society and Its Enemies*, Austrian-British philosopher Karl Popper (1902-1994) delivers one of the most persuasive arguments for limiting hateful rhetoric known as the paradox of tolerance: "Unlimited tolerance must lead to the disappearance of tolerance. If we extent unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them. Karl R. Popper, *The Open Society and Its Enemies*, vol. Volume 1: The Spell of Plato (London: George Routledge & Sons, Ltd., 1945), 226, https://antilogicalism.com/wp-content/uploads/2018/04/open-society-1.pdf.
[58] In *Cohen v. California*, discussed in Chapter Two, the "safety-valve" concept was Attorney Melville Nimmer's third theoretical argument for why Paul Robert Cohen's "Fuck the Draft" jacket should be protected speech under the First Amendment—following democratic self-governance and individuals self-fulfillment and -realization. Brief for Appellant at 31-45, Cohen v. California, 403 U.S. 15 (1971) (No. 70-299). *See also* Clay Calvert, "Revisiting the Right to Offend Forty Years after Cohen v. California: One Case's Legacy on First Amendment Jurisprudence," *First Amendment Law Review* 10, no. 1 (2011): 7, https://heinonline.org/HOL/P?h=hein.journals/falr10&i=3.
[59] Nat Hentoff, *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (Harper Collins Publishers, 1992), 134. Hentoff quotes Yale University President Benno Schmidt, "I fear, ignorance, and bigotry exist on our campuses, it is far better that they be exposed and answered, that that they be bottled up."

[60] *See* Nadine Strossen, "A Feminist Critique of 'The' Feminist Critique of Pornography," *Virginia Law Review* 79, no. 5 (1993): 1140–41, https://heinonline.org/HOL/P?h=hein.journals/valr79&i=1109.
[61] Lee C. Bollinger, *The Tolerant Society* (Oxford: Oxford University Press, 1988), 112.
[62] Vincent Blasi, "The Teaching Function of the First Amendment," *Columbia Law Review* 87, no. 2 (1987): 387–418, https://heinonline.org/HOL/P?h=hein.journals/clr87&i=401; Joanna Botha, "Towards a South African Free-Speech Model," *South African Law Journal* 134, no. 4 (2017): 810, https://heinonline.org/HOL/P?h=hein.journals/soaf134&i=800.
[63] Waldron, *The Harm in Hate Speech*.
[64] Matsuda et al., *Words That Wound*.
[65] United States v. Carolene Products Company, 304 U.S. 144, 152 n.4 (1938).
[66] Richard Delgado and David H. Yun, "Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation Symposium: Critical Race Theory: Essays on Hate Speech," *California Law Review* 82, no. 4 (1994): 871–92, https://heinonline.org/HOL/P?h=hein.journals/calr82&i=885.
[67] Craig Haney, Curtis Banks, and Philip Zimbardo, "Interpersonal Dynamics in a Simulated Prison," *International Journal of Criminology & Penology* 1, no. 1 (1973): 69–97.
[68] Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper & Row, 1974).
[69] Delgado and Yun, "Pressure Valves and Bloodied Chickens," 880.
[70] Delgado and Yun, 880.
[71] Delgado and Yun, 880.
[72] Delgado and Yun, 880.
[73] Popper, *The Open Society and Its Enemies*, Volume 1: The Spell of Plato:226.
[74] Popper, Volume 1: The Spell of Plato:226.
[75] de Tocqueville, *Democracy in America*, 129.
[76] Plato, *The Republic of Plato*, 185–86.
[77] Popper, *The Open Society and Its Enemies*, Volume 1: The Spell of Plato:226.
[78] Rousseau, *The Social Contract*, 57.
[79] Popper, *The Open Society and Its Enemies*, Volume 1: The Spell of Plato:226.
[80] Berlin, "Two Concepts of Liberty."
[81] Popper, *The Open Society and Its Enemies*, Volume 1: The Spell of Plato:226.
[82] Goldberger, "The Skokie Case."
[83] Helena Rosenblatt, "No, There Isn't a Constitutional Right to Not Wear Masks," *Washington Post*, August 20, 2020, https://www.washingtonpost.com/outlook/2020/08/20/no-there-isnt-constitutional-right-not-wear-masks/.
[84] Adrian Vermeule, "Beyond Originalism," *The Atlantic*, March 31, 2020, https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.
[85] Franks, *The Cult of the Constitution*.
[86] Franks, 11.
[87] Franks, 47.
[88] Franks, 12.
[89] National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).
[90] Franks, *The Cult of the Constitution*, 2.

[91] Strossen, "A Feminist Critique of 'The' Feminist Critique of Pornography"; Strossen, *HATE*.
[92] Delgado and Yun, "Pressure Valves and Bloodied Chickens."
[93] Franks, *The Cult of the Constitution*, 119.
[94] Richard Delgado and Jean Stefancic, "Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?," *Cornell Law Review* 77 (1992): 1259, https://heinonline.org/HOL/P?h=hein.journals/clqv77&i=1286.
[95] Delgado and Stefancic, "Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?"; Delgado and Yun, "Pressure Valves and Bloodied Chickens," 882.
[96] Franks, *The Cult of the Constitution*, 108.
[97] Richard Delgado and David Yun, "The Speech We Hate: First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics," *Arizona State Law Journal* 27, no. 4 (1995): 1300, https://heinonline.org/HOL/P?h=hein.journals/arzjl27&i=1291.
[98] Franks, *The Cult of the Constitution*, 109.
[99] Franks, 118.
[100] Brief of the American Civil Liberties Union as Amicus Curiae Supporting Appellant on Supplemental Question at 2, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205).
[101] Mary Ann Glendon used the term "superright" to refer to privacy's tendency to supersede other constitutional rights. "The privacy cases have generated political controversy and acrimony to the point where they overshadow many other important aspects of the Court's work. When Robert Bork, who had been highly critical of the reasoning of the privacy decisions, was nominated to replace Lewis Powell, a *Roe v. Wade* supporter, on the United States Supreme Court, his judicial confirmation hearings became the political event of the season. In the rhetoric of most opponents of Judge Bork's nomination, privacy was not just one right among many. Similar to property in its heyday, privacy was vaunted as a superright, a trump." Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Simon and Schuster, 2008), 60.
[102] Franks, *The Cult of the Constitution*, 48, 60.
[103] Dewey, *Individualism Old and New*.
[104] *See* Gibbons v. Ogden, 22 U.S. 1, 203 (1824) (noting that "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts" of state police powers). *See also* Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health, 186 U.S. 380 (1902) (upholding a Louisiana Supreme Court decision that the state could enforce quarantine laws under its police powers unless Congress decided to preempt them).
[105] Franks, *The Cult of the Constitution*, 202.
[106] Franks, 39.
[107] Scott Bomboy, "The Constitutional Issues Related To Covid-19 Mask Mandates," National Constitution Center, August 13, 2021, https://constitutioncenter.org/blog/the-constitutional-issues-related-to-covid-19-mask-mandates.
[108] *See generally* Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1975).

[109] Karl Dietrich Bracher, *Turning Points in Modern Times: Essays on German and European History*, trans. Thomas J. Dunlap (Harvard University Press, 1995), 66.
[110] Friedrich Nietzsche, *Thus Spoke Zarathustra*, ed. Robert Pippin and Adrian del Caro, trans. Adrian del Caro (Cambridge: Cambridge University Press, 2006), 5.
[111] Nietzsche discusses the relationship between self-transcendence (*Selbst-Überwindung*) and the "will to power" in *Zarathustra*: "That I must be struggle and becoming and purpose and the contradiction of purposes – alas, whoever guesses my will guesses also on what crooked paths it must walk! Whatever I may create and however I may love it – soon I must oppose it and my love, thus my will wants it." Nietzsche, xxvi, 89–90. He discusses the relationship between the will to power and individual and pluralistic society in chapter three, book three of *The Will to Power*. Friedrich Wilhelm Nietzsche, *The Will to Power*, ed. Walter Kaufmann, trans. Walter Kaufmann and R. J. Hollingdale, Vintage Books Edition (New York: Random House, 1968), 382–418.
[112] *See* Nietzsche, *The Will to Power*, 365–66. "The isolation of the individual ought not to deceive us: something flows on *underneath* individuals. That the individual feels himself isolated is itself the most powerful goad in the process towards the most distant goals: his search for *his* happiness is the means that holds together and moderates the form-giving forces, so they do not destroy themselves…We are *more* than the individuals: we are the whole chain as well, with the tasks of all the futures of that chain."
[113] Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy* 41, no. 4 (July 2010): 465, https://doi.org/10.1111/j.1467-9973.2010.01648.x.
[114] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), xvii, 4, https://doi.org/10.1017/CBO9781316106327.
[115] "…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained…" 1 UNTS XVI (October 24, 1945).
[116] "All human beings are born free and equal in dignity and in rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. AIRES/217(III), at Art. 1 (Dec. 10, 1948).
[117] "(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020 (Federal Law Gazette I p. 2048).
[118] Barak, *Human Dignity*, 35.
[119] Barak, 45.
[120] Barak, 47.

[121] Barak, 48.
[122] Barak, xx–xxii, 10–11, 64, 77, 143, 181, 186, 235–38.
[123] Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.
[124] Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 p. 150, § 1A, 2, 4.
[125] S. Afr. Const., 1996, § 10.
[126] Saxonhouse, *Free Speech and Democracy in Ancient Athens*, 17.
[127] Jud Campbell, "Natural Rights and the First Amendment," *Yale Law Journal* 127, no. 2 (2017): 295, https://heinonline.org/HOL/P?h=hein.journals/ylr127&i=268.
[128] Campbell, 296.
[129] 1 Annals of Cong. 450 (Joseph Gales ed., 1834) (June 8, 1789), http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=227.
[130] 1 Annals of Cong. 451.
[131] Berlin, "Two Concepts of Liberty."
[132] 1 Annals of Cong. 451.
[133] 1 Annals of Cong. 454-55.
[134] Plato, *The Republic of Plato*.
[135] 1 Annals of Cong. 455.
[136] Rousseau, *The Social Contract*, 57.
[137] William P. Marshall, "In Defense of the Search for Truth as a First Amendment Justification," *Georgia Law Review* 30, no. 1 (1995): 32–33, https://heinonline.org/HOL/P?h=hein.journals/geolr30&i=31. Marshall notes that Madison, while a defender of republicanism's substantive conception of the public interest, became a champion of liberalism the *Federalist No. 10*. Under this flavor of liberalism, "the role of law is to establish procedures that allow the pursuit of self-interest without regard to outcome. Thus, liberalism regards law negatively, limiting its function to guaranteeing government neutrality as to the individual pursuit of self-interest." It, therefore, stands to reason that Madison had both a positive and negative understanding of individual rights.
[138] Michael W. McConnell, "Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation," *New York University Journal of Law & Liberty* 5, no. 1 (2010): 1–29, https://heinonline.org/HOL/P?h=hein.journals/nyujlawlb5&i=3. McConnell shows that "[t]he historical evidence indicates that natural rights in the preconstitutional world did not have the status we now ascribe to constitutional rights-meaning supreme over positive law." McConnell, 21. Earlier in his article, McConnell discusses how "Madison did not believe that retained natural rights would operate on their own force if not carved out of the reach of the Necessary and Proper Clause. Natural but unenumerated rights would not trump contrary legislation if it were within the scope of delegated powers." McConnell, 18.
[139] Vincent Phillip Muñoz, "James Madison's Principle of Religious Liberty," *The American Political Science Review* 97, no. 1 (2003): 17–32, https://www.jstor.org/stable/3118218.
[140] 1 Annals of Cong. 451.
[141] Jud Campbell draws a similar conclusion. Instead of discussing Madison's attempt to balance negative and positive freedom, Campbell frames the issue as Madison attempting to protect "fundamental positive rights that furthered the natural right of expressive freedom." Campbell,

"Natural Rights and the First Amendment," 267, 301–4. Campbell further explains this distinction: "The notion that speech and press freedoms referred to natural rights, inalienable natural rights, and fundamental positive rights may appear confused or even contradictory. In the eighteenth century, however, these rights were closely intertwined. The fundamental positive rights embodied in common law informed understandings of natural rights, and vice versa…Though certainly not immune to change, the common law at least presumptively comported with the reciprocal obligations that individuals had assumed in the social contract. In short, customary positive law helped reveal the proper scope of natural liberty." Campbell, 290–92.

[142] Thomas Jefferson, *The Papers of Thomas Jefferson: 1 May 1816 to 18 January 1817*, ed. J. Jefferson Looney, Retirement Series, vol. 10 (Princeton: Princeton University Press, 2013), 154.

[143] Campbell, "Natural Rights and the First Amendment," 276.

[144] Campbell, 253. "Much of our modern confusion about the history of speech and press freedoms stems from the way that the Founders—immersed in their own constitutional language—silently shifted between these two dimensions of expressive freedom. Indeed, Founding Era rights discourse featured a symbiotic relationship be- tween natural rights and legal rules. In part, the common law indicated the scope of natural rights both because of a presumed harmony between the com- mon law and natural law and because common-law rules were presumptively based on popular consent and consistent with the public good. At the same time, the Founders sometimes used natural law-the law of reason-to help shape their understandings of positive law. To recognize a natural right, in other words, implied recognition of its customary legal protections, and vice versa."

[145] Campbell, 276.

[146] Steven J. Heyman, "Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression," *Boston University Law Review* 78, no. 5 (1998): 1282, https://heinonline.org/HOL/P?h=hein.journals/bulr78&i=1297.

[147] Heyman, 1282.

[148] Campbell, "Natural Rights and the First Amendment," 310.

[149] Campbell, 282.

[150] *See* Franks, *The Cult of the Constitution*, 51–104, 105–58.

[151] George Santayana, *The Life of Reason or the Phases of Human Progress: Reason in Common Sense* (London: Constable, 1910), 284.

[152] Howard J. Graham, "The Early Antislavery Backgrounds of the Fourteenth Amendment," *Wisconsin Law Review* 1950, no. 4 (1950): 610–61, https://heinonline.org/HOL/P?h=hein.journals/wlr1950&i=622; Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment*, Reprint 2020 (Berkeley: University of California Press, 1951).

[153] Cover, *Justice Accused*, 155.

[154] Locke, *Two Treatises of Government and a Letter Concerning Toleration*, 125, 136, 159.

[155] *See* William D. Araiza, *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law* (New York: New York University Press, 2015).

[156] *See* Columbia Law Review Association, Inc., "The Enabling Clause of the Fourteenth Amendment: A Reservoir of Congressional Power?," *Columbia Law Review* 33, no. 5 (1933):

854–68, https://doi.org/10.2307/1115986; William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Massachusetts: Harvard University Press, 1988).
[157] Wilson R. Huhn, "The State Action Doctrine and the Principle of Democratic Choice," *Hofstra Law Review* 34, no. 4 (2006): 1427, https://heinonline.org/HOL/P?h=hein.journals/hoflr34&i=1389.
[158] *See* Slaughterhouse Cases, 83 U.S. 36, 81 (1873) ("In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation."); *See also* Civil Rights Cases, 109 U.S. 3, 13-14 (1883) (noting that congress is only authorized to pass legislation directly related to civil rights violations) ("[T]he legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking."). *But see* Ex Parte Virginia, 100 U.S. 339, 345-46 (1879) (defining the Fourteenth Amendment's Section Five powers broadly) ("Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.").
[159] Dewey, *Individualism Old and New*, 18.
[160] Waldron, *The Harm in Hate Speech*.
[161] Waldron, 102.
[162] Waldron, 185.
[163] Lochner v. New York, 198 U.S. 45, 52 (1905).
[164] Lochner, 198 U.S. at 57.
[165] Lochner, 198 U.S. at 64.
[166] Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).
[167] Post, *Democracy, Expertise, and Academic Freedom*, 40.
[168] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
[169] Lochner v. New York, 198 U.S. 45, 70-71 (1905) (Harlan, White, Day, JJ., dissenting) ("'The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an

opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health."' (quoting Professor Hirt in his treatise on the "Diseases of the Workers")).
[170] Lochner v. New York, 198 U.S. 45, 65 (1905) (Harlan, White, Day, JJ., dissenting)
[171] Lochner v. New York, 198 U.S. 45, 65-66 (1905) (Harlan, White, Day, JJ., dissenting)
[172] *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, Reprint edition (Cambridge, Massachusetts: Harvard University Press, 1985); Bernard H. Siegan, *Economic Liberties and the Constitution*, 2nd ed. (New Brunswick, N.J.: Transaction Publishers, 2006); David E. Bernstein, "Lochner, Parity, and the Chinese Laundry Cases," *William and Mary Law Review* 41, no. 1 (1999): 211–94, https://heinonline.org/HOL/P?h=hein.journals/wmlr41&i=223.
[173] David E. Bernstein, "Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism," *Georgetown Law Journal* 92, no. 1 (2003): 12, https://heinonline.org/HOL/P?h=hein.journals/glj92&i=15.
[174] Jack M. Balkin, "Wrong the Day It Was Decided: Lochner and Constitutional Historicism Symposium: Lochner Centennial Conference," *Boston University Law Review* 85, no. 3 (2005): 707, https://heinonline.org/HOL/P?h=hein.journals/bulr85&i=693.
[175] Balkin, 707.
[176] Balkin, 690.
[177] R. H. Clark, "Constitutional Sources of the Penumbral Right to Privacy," *Villanova Law Review* 19, no. 6 (1974): 833–84, https://heinonline.org/HOL/P?h=hein.journals/vllalr19&i=851.
[178] Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).
[179] Balkin, "Wrong the Day It Was Decided," 707–8.
[180] Balkin, 686–88.
[181] Owen M. Fiss, "Why the State?," *Harvard Law Review* 100, no. 4 (1987): 782, https://doi.org/10.2307/1341094.
[182] Fiss, 781.
[183] Fiss, 781.
[184] Fiss, 782.
[185] Fiss, 782.
[186] Fiss, 787.
[187] Fiss, 784.
[188] Fiss, 784.
[189] Fiss, 784.
[190] Fiss, 784.
[191] Fiss, 784–85.
[192] *See*, e.g., Post, *Democracy, Expertise, and Academic Freedom*, 6. "Over the past decades, and speaking roughly, three major purposes for the First Amendment have been proposed. The first, embodied in the marketplace of ideas theory, is cognitive; the purpose of First Amendment protections for speech is said to be 'advancing knowledge and discovering truth.' The second is ethical; the purpose of the First Amendment is said to be 'assuring individual self-fulfillment' so that every person can realize his or her 'character and potentialities as a human being.' And the third is political; the purpose of the First Amendment is said to be facilitating the communicative processes necessary for successful democratic self-governance."

[193] Berlin, "Two Concepts of Liberty," 171, 173.
[194] Fiss, "Why the State?," 785.
[195] Fiss, 785.
[196] Locke, *Two Treatises of Government and a Letter Concerning Toleration*.
[197] Fiss, "Why the State?," 786. "In some social settings, the instrumental assumption underlying the protection of autonomy may be well founded. In a Jeffersonian democracy, for example, where the dominant social unit is the individual and power is distributed equally, autonomy might well enhance public debate and thus promote collective self-determination."
[198] McLuhan, *The Gutenberg Galaxy*, 175.
[199] Fiss, "Why the State?," 786.
[200] Fiss, 786.
[201] Fiss, 786. "The public debate principle, in contrast, acknowledges the problematic character of the instrumental assumption underlying the protection of autonomy and seeks to provide a foundation for the necessary corrective action. The purpose of the first amendment remains what it was under autonomy - to protect the ability of people, as a collectivity, to decide their own fate. Rich public debate also continues to appear as an essential precondition for the exercise of that sovereign prerogative. But now action is judged by its impact on public debate, a social state of affairs, rather than by whether it constrains or otherwise interferes with the autonomy of some individual or institution. The concern is not with the frustration of would- be speakers, but with the quality of public discourse. Autonomy may be protected, but only when it enriches public debate."
[202] Berlin, "Two Concepts of Liberty," 171. Berlin also notes that "[f]reedom for an Oxford don, others have been known to add, is a very different thing from freedom for an Egyptian peasant." Berlin, 171.
[203] Fiss, "Why the State?," 786. "Disfavoring state action is not the same as precluding such action altogether."
[204] Thomas Hurka, *Perfectionism* (Oxford: Oxford University Press, 1993).
[205] Berlin, "Two Concepts of Liberty," 171, 173.
[206] Fiss, "Why the State?," 785.
[207] Fiss, 786.
[208] Fiss, 787.
[209] I prefer to think of this as "censorship," but Fiss clearly views this as "distortion." "Autonomy may be protected, but only when it enriches public debate. It might well have to be sacrificed when, for example, the speech of some drowns out the voices of others or systematically distorts the public agenda." Fiss, 786. "We must always stand on guard against this danger, but we should do so mindful of the fact that this same danger is presented by all social institutions, private or public, and that there is no reason for presuming that the state will be more likely to exercise its power to distort public debate than would any other institution." Fiss, 787. "…I nonetheless feel compelled to respond, because it has captured the imagination of so many people I respect and admire, especially my students, and because it builds on the premises that justify state intervention in the first place—a rejection of autonomy, an acceptance of the public debate principle, and an acknowledgement of the distorting influence of the market on democratic politics." Fiss, 790.

[210] Fiss, "Why the State?," 787.
[211] Fiss, 787.
[212] Thomas Irwin Emerson, *The System of Freedom of Expression* (New York: Random House, 1970), 6.
[213] Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, 184. "But the annual revenue of every society is always precisely equal to the exchangeable value of the whole annual produce of its industry, or rather is precisely the same thing with that exchangeable value. As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value, every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an *invisible hand* [emphasis added] to promote an end which was no part of his intention. Nor is it always the worse for the society that it was not part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it."
[214] *See* John Stuart Mill, *Essays on Some Unsettled Questions of Political Economy*, Second Edition (London: Longmans, Green, Reader, and Dyer, 1874). "What is now commonly understood by the term "Political Economy" is not the science of speculative politics, but a branch of that science. It does not treat of the whole of man's nature as modified by the social state, nor of the whole conduct of man in society. It is concerned with him solely as a being who desires to possess wealth, and who is capable of judging of the comparative efficacy of means for obtaining that end. It predicts only such of the phenomena of the social state as take place in consequence of the pursuit of wealth." Mill, 137. *See also* Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*. "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity, but to their self-love, and never talk to them of our own necessities, but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow-citizens." Smith, 6–7.
[215] Brown, *Undoing the Demos*.
[216] Brown, 64–65.
[217] Fiss, "Why the State?," 782.
[218] *See* Franks, *The Cult of the Constitution*. Franks discusses the bipartisan nature of free speech absolutism throughout chapter three of her book.
[219] *See* Franks, 202.
[220] Fiss, "Why the State?," 782.
[221] Fiss, 782.
[222] *See generally* Mitchell N. Berman, "Originalism Is Bunk," *New York University Law Review* 84, no. 1 (2009): 1–96, https://heinonline.org/HOL/P?h=hein.journals/nylr84&i=3.

[223] Franks, *The Cult of the Constitution*, 10, 42.
[224] Berlin, "Two Concepts of Liberty," 171, 173.
[225] Waldron, *The Harm in Hate Speech*, 132.
[226] Fiss, "Why the State?," 785.
[227] Aristotle, *Nicomachean Ethics*, 31.
[228] "All these, and others like them, are so called because they themselves, and not their excesses or deficiencies, are bad. In their case, then, one can never hit the mark, but always misses. Nor is there a good or bad way to go about such things – committing adultery, say, with the right woman, at the right time, or in the right way. Rather, doing one of them, without qualification, is to miss the mark." Aristotle, 31.
[229] Meiklejohn, "The First Amendment Is an Absolute."
[230] Berlin, "Two Concepts of Liberty," 173.
[231] Berlin, 171.
[232] Berlin, 173–74. "But whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty from: absence of interference beyond the shifting, but always recognizable, frontier." *See also* Berlin, 171–72. "For freedom is not the mere absence of frustration of whatever kind; this would inflate the meaning of the word until it means too much or too little. The Egyptian peasant needs clothes or medicine before, and more than personal liberty, but the minimum freedom that he needs today, and the greater degree of freedom that he may need tomorrow, is not some species of freedom peculiar to him, but identical with that of professors, artists and millionaires."
[233] Berlin, "Two Concepts of Liberty," 174.
[234] This is how Owen Fiss frames his zone-of-noninterference argument. "Those who reduce the first amendment to a limit on state action tend to regard it as a protection of autonomy. The individual is allowed to say what he or she wishes, free from interference from the state. It is as though a zone of noninterference were placed around each individual, and the state (and the state alone) were prohibited from crossing the boundary." Fiss, "Why the State?," 785.
[235] Meiklejohn, *Political Freedom*, 61.
[236] District of Columbia *v.* Heller, 554 U.S. 570 (2008).
[237] Brief for the National Rifle Association and the NRA Civil Rights Defense Fund as Amici Curiae in Support of Respondent, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) ("In adopting the Second Amendment, the Framers guaranteed an individual right to keep and bear arms for private purposes, not a collective right to keep and bear arms only in connection with state militia service.").
[238] Franks, *The Cult of the Constitution*, 61.
[239] Franks, xii–xiii.
[240] Andrew S. Winston, "'Jews Will Not Replace Us!': Antisemitism, Interbreeding and Immigration in Historical Context," *American Jewish History* 105, no. 1 (2021): 1–24, https://muse.jhu.edu/article/804146. *See also* Dara Lind, "Why The ACLU Is Adjusting Its Approach To 'Free Speech' After Charlottesville," Vox, August 20, 2017, https://www.vox.com/2017/8/20/16167870/aclu-hate-speech-nazis-charlottesville.

[241] Kevin Thornton, "The Confederate Flag and the Meaning of Southern History," *Southern Cultures* 2, no. 2 (1996): 233–45, https://doi.org/10.1353/scu.1996.0018.
[242] Josh Hawley, *The Tyranny of Big Tech* (Washington, D.C.: Regnery Publishing, 2021).
[243] Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 1210 (2011) ("For the past 20 years, the congregation of the Westboro Baptist Church has picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military…The picketers peacefully displayed their signs—stating, *e.g.,* "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell").
[244] Mill, *On Liberty*, 33–34.
[245] *See, e.g.,* Snyder v. Phelps, 562 U.S. 443, 461 (2011).
[246] Snyder v. Phelps, 562 U.S. 443, 464-65 (2011) (Alito, J., dissenting).
[247] Waldron, *The Harm in Hate Speech*, 186. Rebutting Ronald Dworkin's argument that freedom for hate speech is the societal price for enforcing certain laws that hatemongers oppose, Jeremy Waldron notes that "[a]lmost all advanced democracies have hate speech laws, which, on Dworkin's account, undermine the legitimacy of all their anti-discrimination laws and their laws forbidding racial violence and attacks on churches, synagogues, and mosques. The only advanced democracy entitled to have and enforce such laws is the United States, because the U.S. Constitution bans the sort of speech restrictions that would otherwise deprive downstream laws of their legitimacy. This is American exceptionalism with a vengeance!"
[248] Klonick, "The New Governors," 1621.
[249] Harrison Michael Rosenthal, "Speech Imperialization? Situating American Parrhesia in an Isegoria World," *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 35, no. 2 (April 1, 2022): 583–603, https://doi.org/10.1007/s11196-020-09801-x.
[250] Andrew Marantz, "Facebook and the 'Free Speech' Excuse," *The New Yorker*, October 31, 2019, https://www.newyorker.com/news/daily-comment/facebook-and-the-free-speech-excuse.
[251] "Mark Zuckerberg Stands for Voice and Free Expression," *Meta Newsroom*, October 17, 2019, https://about.fb.com/news/2019/10/mark-zuckerberg-stands-for-voice-and-free-expression/.
[252] Gilad Lotan et al., "The Revolutions Were Tweeted: Information Flows during the 2011 Tunisian and Egyptian Revolutions," *International Journal of Communication* 5, no. 0 (September 2, 2011): 1375–77, https://ijoc.org/index.php/ijoc/article/view/1246; Habibul Haque Khondker, "Role of the New Media in the Arab Spring," *Globalizations* 8, no. 5 (October 1, 2011): 676–77, https://doi.org/10.1080/14747731.2011.621287.
[253] Franks, *The Cult of the Constitution*, 108.
[254] Case C-131/12, Spain v. AEPD, ECLI:EU:C:2014:317, ¶ 20.3 (May 13, 2014).
[255] Netzwerfurchestungsgestz, or NetzDG, extends civil liability to internet providers and digital media companies that fail to remove "offensichtlich rechtswidrig [manifestly unlawful]" speech within twenty-four hours of being reported. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], Sept. 1, 2017, BGBL I at 3352, § 3, para. (2)2 (Ger.), http://www. gesetze-im-internet.de/netzdg/.
[256] Snyder v. Phelps, 562 U.S. 443 (2011).

[257] Snyder, 562 U.S. at 448.
[258] *Id.* at 448-49.
[259] *Id.* at 450.
[260] *Id.* at 458.
[261] *Id*. at 452.
[262] *Id*. at 453 (citation omitted).
[263] *Id*. at 454.
[264] *Id*. at 460-61.
[265] Adrian Vermeule, "Reason and Fiat in the Jurisprudence of Justice Alito" (Rochester, NY: Social Science Research Network, 2022), 3, https://doi.org/10.2139/ssrn.4060925.
[266] Snyder, 562 U.S. at 463 (Alito, J., dissenting).
[267] *Id.* at 475 (Alito, J., dissenting)
[268] United States v. Stevens, 559 U.S. 460, 482-500 (2010) (Alito, J., dissenting).
[269] R. v. Keegstra [1990] 3 S.C.R. 697, para. 3 (Can.).
[270] R. v. Keegstra [1990] 3 S.C.R. 697, para. 3 (Can.).
[271] R. v. Keegstra [1990] 3 S.C.R. 697, para. 3 (Can.).
[272] R. v. Keegstra [1990] 3 S.C.R. 697, para. 2 (Can.).
[273] R. v. Keegstra [1990] 3 S.C.R. 697, para. 43 (Can.).
[274] R. v. Keegstra [1990] 3 S.C.R. 697, para. 79-81 (Can.).
[275] R. v. Keegstra [1990] 3 S.C.R. 697, para. 81-82 (Can.).
[276] R. v. Keegstra [1990] 3 S.C.R. 697, para. 151-52 (Can.).
[277] R. v. Keegstra [1990] 3 S.C.R. 697, para. 151-53 (Can.).
[278] R. v. Keegstra [1990] 3 S.C.R. 697, para. 96-99 (Can.).

"Is the limit on free expression effected by s. 319(2) of the *Criminal Code* reasonable and demonstrably justifiable in a free and democratic society? On all three criteria for proportionality laid down in *Oakes*—rational connection between the legislation with its objectives, infringement to the minimum extent possible, and the balance between the importance of the infringement of the right of free speech and the benefit conferred by the legislation—s. 319(2) of the *Criminal Code* emerges wanting. Accepting that the objectives of the legislation are valid and important and potentially capable of overriding the guarantee of freedom of expression, I cannot conclude that the means chosen to achieve them—the criminalization of the potential or foreseeable promotion of hatred—are proportionate to those ends."
[279] Snyder, 562 U.S. at 461 (Breyer, J., concurring) ("Moreover, suppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the end would not shield A's use of unlawful, unprotected means. And in some circumstances the use of certain words as means would be similarly unprotected. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) ("fighting words").").
[280] *Id.* at 458 (citation omitted).

[281] Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) ("The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile…Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.") (citations omitted).
[282] Snyder, 562 U.S. at 463 (Alito, J., dissenting).
[283] R. v. Keegstra [1990] 3 S.C.R. 697, para. 16 (Can.).
[284] Garrison v. Louisiana, 379 U.S. 64 (1964).
[285] Ashton v. Kentucky, 384 U.S. 195 (1966).
[286] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[287] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[288] Cohen v. California, 403 U.S. 15 (1971).
[289] Collin v. Smith, 578 F. 2d 1197 (7th Cir.), *cert. denied* 439 U.S. 916 (1978).
[290] R. v. Keegstra [1990] 3 S.C.R. 697, para. 53 (Can.).
[291] R. v. Keegstra [1990] 3 S.C.R. 697, para. 57 (Can.).
[292] R. v. Keegstra [1990] 3 S.C.R. 697, para. 65 (Can.).
[293] R. v. Keegstra [1990] 3 S.C.R. 697, para. 65 (Can.).
[294] R. v. Keegstra [1990] 3 S.C.R. 697, para. 60 (Can.).
[295] Civil Rights Cases, 109 U.S. 3, 26-27 (1883) (Harlan, J., dissenting).
[296] United States v. Guest, 383 U.S. 745, 762 (1996) (Clark, J., concurring).
[297] United States v. Morrison, 529 U.S. 598, 664-65 (2000) (Breyer, J., dissenting).
[298] Robert J. Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction," *New York University Law Review* 61, no. 5 (1986): 863–941, https://heinonline.org/HOL/P?h=hein.journals/nylr61&i=877; Barry Sullivan, "Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981," *Yale Law Journal* 98, no. 3 (1989): 545, https://heinonline.org/HOL/P?h=hein.journals/ylr98&i=559; Laurent B. Frantz, "Congressional Power to Enforce the Fourteenth Amendment against Private Acts," *The Yale Law Journal* 73, no. 8 (1964): 1353–84, https://doi.org/10.2307/794512.
[299] Jacobus tenBroek, "Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment," *California Law Review* 39, no. 2 (1951): 171–203, https://heinonline.org/HOL/P?h=hein.journals/calr39&i=187; Frantz, "Congressional Power to Enforce the Fourteenth Amendment against Private Acts"; Alexander Tsesis, "Freedom to Integrate: A Desegregationist Perspective on the Thirteenth Amendment Thirteenth Amendment Symposium," *University of Toledo Law Review* 38, no. 3 (2007): 791–808, https://heinonline.org/HOL/P?h=hein.journals/utol38&i=805; George Rutherglen, "State Action, Private Action, and the Thirteenth Amendment," *Virginia Law Review* 94, no. 6 (2008): 1367–1406, https://www.jstor.org/stable/25470591.
[300] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).
[301] R. v. Keegstra [1990] 3 S.C.R. 697, para. 53, 54, 56, 57, 67 (Can.).
[302] People v. Beauharnais, 408 Ill. 512, 513 (1951).
[303] *Id.* at 513-514 (citing Ill. Rev. Stat. 1949, chap. 38, par. 471).

[304] Beauharnais v. Illinois, 343 U.S. 250 (1952).
[305] *Id.* at 258 (suggesting a "rational basis with bite" level of scrutiny; the term originated in a 1972 article which suggested that some cases "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard.") Gerald Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," *Harvard Law Review* 86, no. 1 (1972): 18–19, https://heinonline.org/HOL/P?h=hein.journals/hlr86&i=19; Gayle Lynn Pettinga, "Rational Basis with Bite: Intermediate Scrutiny by Any Other Name," *Indiana Law Journal* 62, no. 3 (1987): 787, https://heinonline.org/HOL/P?h=hein.journals/indana62&i=803; Raphael Holoszyc-Pimentel, "Reconciling Rational-Basis Review: When Does Rational Basis Bite?," *New York University Law Review* 90, no. 6 (2015): 2073, https://heinonline.org/HOL/P?h=hein.journals/nylr90&i=2100.
[306] *Id.* at 261 ("In the face of this history … we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups…").
[307] *Id.* at 262 (noting that "[t]he science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." (quoting Anderson v. Dunn, 19 U.S. 204, 266 (1821))). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing his principle of "laboratories of democracy"). "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."
[308] *Id.* at 264 ("The scope of the statute before us, as construed by the Illinois court, disposes of the contention that the conduct prohibited by the law is so ill-defined that judges and juries in applying the statute and men in acting cannot draw from it adequate standards to guide them.").
[309] Erik Bleich, "The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies," *Journal of Ethnic and Migration Studies* 37, no. 6 (July 1, 2011): 917–34, 922, https://doi.org/10.1080/1369183X.2011.576195.
[310] Beauharnais, 343 U.S. at 263 (emphasis added).
[311] *Id.* at 288 ("The history of criminal libel in America convinces me that the Fourteenth Amendment did not 'incorporate' the First…").
[312] *Id.* at 284 ("A general and equal enforcement of this law would restrain the mildest expressions of opinion in all those areas where 'virtue' may be thought to have a role.").
[313] *Id.* at 271.

[314] *Id.* at 270.
[315] *Id.* at 274.
[316] *Id.* at 275.
[317] *Id.* at 284.
[318] *Id.* at 284-85.
[319] *Id.* at 287.
[320] Garrison v. Louisiana, 379 U.S. 64 (1964).
[321] *Id.* at 83 (Douglas, J. concurring).
[322] In Chaplinsky v. New Hampshire*,* 315 U.S. 568, 572 (1942), the Court held that insults with tendencies to outrage and elicit violent reactions—made to specified individuals—do not enjoy constitutional protection.
[323] Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," *Cardozo Law Review* 24, no. 4 (2003 2002): 1523–68, https://heinonline.org/HOL/P?h=hein.journals/cdozo24&i=1537.
[324] R. v. Keegstra [1990] 3 S.C.R. 697, para. 65 (Can.).
[325] Fiss, *The Irony of Free Speech*; Franks, *The Cult of the Constitution*; Matsuda et al., *Words That Wound*.
[326] Berlin, "Two Concepts of Liberty," 171, 173.
[327] *See* Brief of the American Civil Liberties Union and the American Civil Liberties Union of Maryland as Amici Curiae in Support of Respondents, Snyder v. Phelps, 562 U.S. 443 (2011) (No. 09-751).
[328] *See* Brief for the Petitioner, Beauharnais v. Illinois, 343 U.S. 250 (1952) (No. 118).
[329] Beauharnais v. Illinois, 343 U.S. 250, 262 (1952)
[330] Helen Shirley Thomas, *Felix Frankfurter: Scholar on the Bench* (Baltimore: The Johns Hopkins Press, 1960), 21.
[331] Thomas, 77–78.
[332] Craufurd D. Goodwin, *Walter Lippmann: Public Economist* (Harvard University Press, 2014), 45; Sanford V. Levinson, "The Democratic Faith of Felix Frankfurter," *Stanford Law Review* 25, no. 3 (1973): 434, 438, 442–44, https://heinonline.org/HOL/P?h=hein.journals/stflr25&i=470.
[333] Factum of the Canadian Civil Liberties Association, R. v. Keegstra, [1990] 3 S.C.R. 697, 6.
[334] *Id.* at 7.
[335] Berlin, "Two Concepts of Liberty," 171, 173.
[336] Locke, *Two Treatises of Government and a Letter Concerning Toleration*, 136.
[337] Locke, 197. "The reason why men enter into society is the preservation of their property; and the end while they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society…whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp

themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of a new legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society."

[338] Locke, 136.

[339] Meiklejohn, *Political Freedom*, 61.

[340] Dewey, *Individualism Old and New*, 5, 18.

CHAPTER FIVE: THE FUTURE OF FREE SPEECH

A Concise Recapitulation of Narrative

To understand the present, we must understand the past. I began this dissertation discussing classical political theory and how the Ancient Athenians bifurcated their understandings of free speech into *isegoria*, the right to voice one's opinion, and *parrhesia*, the license to say what one pleases often through provocative discourse. The sociopolitical objectives of these categories centered around egalitarian democratic participation and ability to express unpopular opinions without political retribution, respectively. The Athenians had no use for negative civil rights because their democracy was direct, not representative. The need to protect individual citizens from a Hobbesian Leviathan was moot because the people themselves exercised ruling authority.

For sociohistorical reasons related to the Transatlantic Revolutions of the late eighteenth and early nineteenth centuries—namely, growing sentiments of individualism and revolutionism accompanying Britain's political suppression of the Thirteen Colonies—the American free-speech tradition began to favor *parrhesia* while the European tradition began to favor *isegoria*. Whereas society viewed freedom, historically, as a positive, egalitarian ability to participate within the democratic process, this Age of Revolution reconceptualized liberty through negative understandings, namely, the right to be free from government action.

The American free-speech framers, both the 1780s-constitutional authors and the 1910s-jurisprudential explicators, understood the historical and philosophical objectives of protecting free expression both as a negative-*parrhesia* right and a positive-*isegoria* responsibility. The writings of James Madison, Zechariah Chafee, Oliver Holmes, Louis Brandeis, and Alexander Meiklejohn, all of whom I discuss throughout the dissertation, make this clear. Among this

group, there was general agreement that free speech, as a positive democratic construct, encourages civic participation, egalitarianism, and equalitarianism, while free speech as a negative right liberates citizens from unwarranted government interference or suppression. Justice Holmes's marketplace of ideas, a once purely theoretical construct offered in dissent, was meant to balance the positive and negative aspects of freedom by empowering marketplace gatekeepers, not governmental ones, to moderate and modulate the extent to which information would be spread and taken for truth.

The U.S. Supreme Court, throughout the first half of the twentieth century, began expanding the marketplace-of-ideas metaphor. As the Court extended the concept jurisprudentially, society began testing its validity epistemologically. The rise of yellow journalism in the early 1900s spurred the Walter Lippmann-John Dewey debate of the purpose of information gatekeepers and the role of communication within American democracy. Lippmann believed the purpose of communication is to relay expert knowledge to a non-expert public. If the Lippman view is correct, society need not protect provocative, *parrhesia*-based discourse because offensive messages are not conditions predicate to knowledge advancement. Dewey, on the other hand, believed that communication served to promote civic engagement. Protecting *parrhesia*, therefore, is critically important because public-opinion formation often turns on emotional appeal. Their disagreement, while vehement, remained largely philosophical because mass communication was predominately centralized, and information gatekeeping was executed by traditional media organizations. That changed with the rise of digital communications, beginning in the 1960s, which decentralized content moderation processes requiring the public to increase its news media literacy to differentiate truthful from untruthful information.

Internet communications, which, unlike legacy media, lack traditional hierarchical content moderation, brought to focus legal and philosophical issues related to the marketplace-of-ideas theory. Legally, it was unclear who should be liable for tortious speech. This was made clear by *Cubby v. CompuServe*, *Stratton Oakmont v. Prodigy*, and the Communications Decency Act of 1996—the attempted legislative remedy. Philosophically, Internet media demonstrate how the marketplace theory begins to fracture when applied outside contexts of democratic self-maintenance. The theory specifically, and First Amendment jurisprudence broadly, is beneficial to the extent it keeps government actors away from information censorship. The possibility for un- or intentional viewpoint suppression is sufficient to disempower would-be government moderators. But the marketplace is dangerous to the extent it vests epistemological agency in a non-expert public that, by virtue of its non-expertise, cannot be trusted to distinguish accurately justified belief from unjustified opinion.

Marketplaces, to John Milton's dismay, do not produce objective truth; they merely reflect manipulable consumer preferences that can be ideologically misguided. This is why the professions and the disciplines, which traffic almost exclusively in expert knowledge, reject the marketplace of ideas. Free speech, in expert settings, is only tolerated to the extent it adheres to normative institutional standards. If speakers' viewpoints deviate excessively from disciplinary orthodoxy, such as doctors giving faulty diagnoses or attorneys giving bad legal advice, they are punished by way of civil or criminal liability and have no First Amendment recourse. Indeed, the process of peer review is a mechanism to reinforce epistemological standards within scholarly discourse. Truth-discernment is difficult enough for experts—ask anyone who has had a manuscript rejected from scholarly publication. But the marketplace as a truth-finding

mechanism presumes a willingness to become educated and epistemologically competent in ways that are impractical if not impossible for a general public.

Without a gatekeeping mechanism to determine ideological validity, the marketplace of ideas presupposes epistemological equality such that no idea can be false. Axiologically and demonstrably untrue ideas like Holocaust denial, solen elections, or 9/11 trutherism are allowed to compete on equal footing with grounded ideas under a *laissez-faire* assumption that the marketplace's invisible hand will determine the truth. This is incorrect. Classical economic theory holds that, *ceteris paribus*, demand, as a function of supply, will increase as price decreases. The Internet facilitates widespread availability of cheap information, good and bad, such that demand for unfounded ideas turns on investor attention. If sociopolitical forces direct market participants toward conspiratorial notions, demand for cheaply available false information will increase. Markets do not produce truth; they mirror consumer sentiments that can be deliberately misguided.

Governments—including the United States, which is a *mixed*-market economy and not a *free*-market economy—exercise central authority to prevent market abuse. The mission of the U.S. Securities and Exchange Commission, for example, is to block certain actors from deliberately attempting to interfere with the market's free operation. The marketplace of ideas operates under a similar mixed-market theory that the state, in certain circumstances, needs to exercise censorship authority to prevent ideological manipulation. Incitement, defamation, obscenity, child pornography, fighting words, true threats, and false advertising are all examples of speech categories that do not enjoy First Amendment protection. The rationale for these categorical exclusions is twofold: First, law, as a coercive instrumentality, must be able to enforce practical demands of state sovereignty necessary to maintain the social contract.

Protecting these speech categories would frustrate the state's mandate to promote general welfare and reduce collective societal harm. Second, the normativity of law has social implications for acceptable action. The regulation, or nonregulation, of certain activities signals to other actors whether their future conduct falls within normative social domains.

In Chapter Four, I discuss how society, as a matter of jurisprudential philosophy, cannot tolerate intolerance. Bigoted ideation becomes generalizable to the extent it goes unpunished and encourages people to act correspondingly. Jaundice fosters jaundice. Hateful intolerance's compounding essence affects both vitriolic actors and potentially vitriolic observers. Rancor's self-aggrandizing nature is why safety- or pressure-valve arguments fail and why federal and state laws mete harsher punishments for crimes committed on the basis of protected characteristics like race, religion, ethnicity, nationality, gender, or sexual orientation. Indeed, the principal objective of hate-crime laws is to disrupt intolerant prejudicial philosophies and deter bias-motivated violence.[1] Protecting targeted hateful expression, especially speech that intentionally inflicts emotional distress, flies in the face of law's normative social objectives. And this paradox is not lost on legal scholars.[2] Appertaining to law's normative domain, why does American society punish racist invective underlying physical violence but accept that same invective when it underlies speech acts, demonstrated through an implied jurisprudential rejection of group libel? [3]

Unconditional free-speech civil libertarianism, which enjoys support from across the political spectrum, has inveigled the public into believing that constitutional law cannot be maintained without an unqualified defense of the negative individual right to calumniate a person or group based upon an immutable characteristic. This is incorrect historically as it pertains to the Founding Era. As demonstrated through Chapter Four's critical textual analysis of James

Madison's Fourth Article, the Federalist framers preferred free-expression guarantees that emphasized positive civil and equal rights alongside negative limitations of governmental power. The American free-speech tradition of protecting unrestrained individual liberty as a means to facilitate collective democratic maintenance, discussed in Chapter Two, becomes self-defeating when one person's hate speech denies another person's basic social standing. When the injured party is a minority, hate speech informally stalls that person's ability and willingness to participate within democratic processes because there is no governmental assurance, under law's normative function, that society will recognize the person's elementary dignity. Protecting an unlimited individual right to harm impairs collective autonomy because vulnerable minorities lose their sense of protection, potentially causing them to retreat from communal democratic obligations.

Free-speech absolutism is also incorrect as it pertains to postbellum reconstruction. Congress's attempt to reassure vulnerable minorities of their inherent self-worth, and encourage democratic participation, came through the Thirteenth, Fourteenth, and Fifteenth Amendments. Unlike the Bill of Rights—which, by way of legislative compromises between Federalists and Anti-Federalists, are constrained to negative-liberty guarantees of freedom *from* government—the Reconstruction Amendments contain enabling clauses explicitly authorizing government intervention to impose positive-liberty provisions. But, for reasons related to the Supreme Court misapplying *laissez-faire* neoliberalism, most notably in *Lochner v. New York*,[4] the ratification- and application-based objectives of the Fourteenth Amendment have been widely misconstrued. Setting aside academic and jurisprudential disagreements regarding whether its Enforcement Clause empowers Congress to redress state *and* private action, the Fourteenth Amendment serves to facilitate collective democratic maintenance by mandating respect and dignity due individual

citizens through due process and equal protection. This underlying purpose does not square with traditional notions of American individualism stamped into the collective conscience through colonial mistreatment and departure.

The Supreme Court's neoliberalized free-speech jurisprudence, resulting from the successful advocacy of private civil-libertarian organizations, has created personal freedom über-rights in the First and Second Amendments that have "overshadowed" or "eclipsed," to carry the Court's penumbra metaphor,[5] Fourteenth Amendment equal protection. The Fourteenth Amendment's theoretical aims at bolstering individual self-worth to promote collective self-determination run counter to the romanticized antiauthoritarian mythos of American individualism. Neoliberalism, which promotes, and arguably fetishizes, free-market capitalism by way of reduced government regulation and spending, does not fit neatly within Isaiah Berlin's positive-liberty framework. If law, conceptually, must balance positive and negative attributes of freedom, absolute civil libertarianism must be limited to defending Berlin's "minimum area of personal freedom;"[6] otherwise, libertarianism offends the essence of individual self-actualization. Free speech absolutism damages the positive-negative liberty balance by reframing freedom as an exclusively negative, right-to-be-let-alone phenomenon.

The Communications Decency Act of 1996 and its legislative progeny, discussed in Chapter Three, attempted to balance the positive-negative free-speech equilibrium by punishing digitally lewd and prurient expression. Knowing the law would face constitutional challenges, the authors borrowed language from the Supreme Court's holding in *Miller v. California*[7] to circumvent future allegations of vagueness and overbreadth. This proved ineffective as the Supreme Court struck down the CDA's positive-regulatory elements in *Reno v. ACLU*.[8] Another preliminary difficulty was garnering the necessary bipartisan backing for legislative passage,

considering the CDA's protectionist objectives. This support came through market-capitalist aims outlined in Section 230, which abrogated publisher liability for Internet platforms in a neoliberal attempt to entice them into self-regulation. This *laissez-faire* approach, much more aligned with America's sociohistory, was profoundly popular. This proved effective as Section 230's liability safe harbor continues to facilitate digital innovation and entrepreneurship. And yet, this early rejection of authority created an authority of rejection, where in an effort to preserve a puritanical Lockean state of cyberspace, Congress, through Section 230, granted Internet companies near-blanket immunity from civil liability, regardless of whether they attempt to control objectionable content.[9]

A twofold, underlying policy rationale exists for this indemnification: (1) "to encourage unfettered and unregulated development of free speech on the internet, and to promote the development of e-commerce"[10] and (2) "to encourage interactive computer services and users of such services to self-police the internet for obscenity and other offensive material."[11] These justifications are rooted in cyber-libertarianism and free-speech absolutism. By protecting Internet media's First Amendment rights, including the freedom to design,[12] the state empowers corporate self-determination such that platforms are free to promulgate and regulate community standards in ways that maximize economic efficiency.[13] However, while Section 230 sufficiently bulwarks corporate interests,[14] it does little to protect individual self-expression or privacy.[15] Indeed, this lack of user free-speech protection, as it relates to conservative or right-wing ideology, has spurred newfound legislative interest to restrict internet media's independent First Amendment rights.[16]

Free-Speech Rights of Corporations

Modern scholarship has thoroughly explicated the relationship between First Amendment philosophy and corporate speech.[17] But to understand the extent to which Internet media have been able to escape positive-law regulation, a brief discussion of corporate personhood is warranted here. In *First National Bank of Boston v. Bellotti*,[18] the Supreme Court held, for the first time, that the First Amendment grants corporations the right to influence election outcomes in which they have no direct monetary interest. The First National Bank of Boston, alongside a handful of national banking associations and business corporations, wanted to express financial opposition to a Massachusetts Constitutional referendum proposal that would implement a graduated personal income tax.[19] A Massachusetts statute, however, prohibited corporate contributions or expenditures "for the purpose of…influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[20] The Attorney General of Massachusetts, Francis X. Bellotti, threatened to enforce the statute against First National Bank and block its donations to the ballot initiative campaign. First National Bank sued, and the Massachusetts Supreme Judicial Court upheld the statute.

The U.S. Supreme Court reversed, 5-4, holding that the Massachusetts law violated corporations' First Amendment rights to influence election outcomes in which they have no direct monetary interest. Justice Lewis F. Powell, writing for the majority, noted that election-related speech goes to the heart of First Amendment philosophy.[21]

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking [sic] in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.[22]

The law could not survive the exacting scrutiny necessitated by a state-imposed free-speech restriction. Massachusetts had no compelling regulatory interest: neither sustaining the active role of the individual citizen in the electoral process nor protecting corporate shareholders whose views differed from management were sufficient.[23] Furthermore, the statute's protectionist provisions were overinclusive by preventing corporations from opposing ballot initiatives[24] and underinclusive by banning support of ballot measures but allowing lobbying activity.[25] For those reasons, the law was not narrowly tailored and ruled unconstitutional.

Justice Byron White, joined by Justices William Brennan and Thurgood Marshall, dissented, arguing that the Court erred by not recognizing the importance of state regulation in preserving competing First Amendment interests. Specifically, corporations' disproportionate economic power "may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process."[26] The state may have a compelling interest, according to Justice White, to prevent institutions from using their wealth "to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation."[27] Justice William H. Rehnquist, in a separate dissenting opinion, furthered Justice White's disproportionality argument, noting that fundamental notions of liberty are offended when the law equates natural persons with corporations. Business corporations need not exercise political expression to function economically.[28] Moreover, if a state gives corporations natural legal rights to "enhance its efficiency as an economic entity,"[29] those "blessings," "so beneficial in the economic sphere, pose special dangers in the political sphere" [30] where corporations possess greater speaking/buying power through vast amounts of amassed wealth.

In *Citizens United v. Federal Election Commission*,[31] the Supreme Court held that the First Amendment guarantees unlimited corporate funding of independent political broadcasts in candidate elections.[32] Citizens United, a nonprofit organization, sought to advertise and release a highly critical 90-minute documentary film of Hillary Clinton, who was a candidate in the 2008 Democratic Party Presidential primary election.[33] Advertising the film on broadcast and cable television would violate Section 203 of the Bipartisan Campaign Reform Act (BCRA),[34] which prohibited corporations and unions from making an "electioneering communication"[35] within 30 days of a primary election or 60 days of a general election.[36] Citizens United challenged the law on First Amendment grounds, asserting that Section 203's blanket prohibition of all independent expenditures violated its freedom of speech.[37] The U.S. District Court for the District of Columbia denied Citizens United's motion for a preliminary injunction, upheld the BCRA's challenged provisions, and noted that the film in question was the functional equivalent of express advocacy for, or against, a specific candidate.[38] Citizens United appealed to the Supreme Court.

Writing for a sharply divided 5-4 majority, Justice Anthony Kennedy found that Section 203's prohibition against all independent corporate expenditures violated the First Amendment's freedom of speech guarantee. "If the First Amendment has any force," said Justice Kennedy, "it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[39] Quoting *First National Bank of Boston v. Bellotti*, Kennedy reasoned that because "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual,'"[40] the BCRA's electioneering ban must fall. He also rebuffed the notion that corporate status is a sufficient reason to limit an entity's freedom of speech. "*Bellotti* did not address the constitutionality of the

State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*'s central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."[41]

In his dissent, Justice John Paul Stevens, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, labeled the majority's First Amendment analysis as "profoundly misguided"[42] exacerbated by how the court "rewr[o]te the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case."[43] Insofar as it increases the undue potential for politically and economically powerful corporations to influence political campaigns, the Court's ruling, according to Justice Stevens, threatens the basic integrity of American elected institutions.[44]

> The majority cavalierly ignores Congress' factual findings and its constitutional judgment: It acknowledges the validity of the interest in preventing corruption, but it effectively discounts the value of that interest to zero. This is quite different from conscientious policing for impermissibly anticompetitive motive or effect in a sensitive First Amendment context. It is the denial of Congress' authority to regulate corporate spending on elections.[45]

The Danger of Corporate Personhood

Read together, *Bellotti* and *Citizens United* stand for the proposition that corporations are legal persons with First Amendment rights concomitant to natural persons. This theory can be a useful legal fiction—allowing corporations standing to enter contracts, to hold property, and to sue or be sued.[46] But as Justice Stevens notes in his *Citizens United* dissent, corporations "are not themselves members of "We the People" by whom and for whom our Constitution was established."[47] Extending natural rights to nonnatural entities poses a unique threat to civil liberties because corporations, to a degree, are incapable of understanding Isaiah Berlin's

positive element of freedom.[48] Corporations approach *homo economicus*'s perfect rationality because they cannot, outside well-defined circumstances, choose actions that will result in suboptimal market outcomes. Even corporate social responsibility presumes a degree of profit maximization.[49] Whereas natural persons, on occasion, must be prepared to curtail their individual liberty in economically self-injurious ways to promote the general welfare, fictional persons are incapable of doing so because they are creatures of capitalism, not democracy. These are separate systems with distinct principles and norms underlying their operation.[50] Blurring the distinction between these spheres, according to Wendy Brown, threatens to replace "the distinctively political valences of rights, equality, liberty, access, autonomy, fairness, the state, and the public with economic valences of these terms"[51]—which, in turn, impairs congressional attempts to regulate corporate influence in politics.

First Amendment jurisprudence cannot become economized because the marketplace operates on competition-based principles of victory and loss which law cannot afford to accommodate. In Chapter Four, I discuss how market capitalism presumes, broadly speaking, a zero-sum relationship among market participants such that one actor's gains are precisely balanced by another actor's losses. This type of inequality may function appropriately in a purely economic setting; and even there, it is not without government regulation. But to unduly impute economic theory onto law—which, by its nature, is humanistic—threatens to recast concepts of freedom, liberty, equality, and justice in zero-sum terms.[52] *Bellotti* and *Citizens United*'s erasure of distinctions between fictitious and natural persons, and by extension, their erasure of distinctions between capitalism and law, misconstrues the First Amendment as a capital right, not a civil right.[53] The marketization of the First Amendment pits free-speech guarantees into

legal competition with other constitutional provisions, namely, the Fourteenth Amendment's guarantee of equal protection.

As a matter of constitutional law and moral philosophy, the First Amendment should not prevail at the Fourteenth's expense. Economizing democratic theory through First Amendment neoliberalization befouls sociopolitical equality because negative freedoms of expression have newfound potential to eclipse positive freedoms of equal protection. The legal treatment of corporations as persons with natural rights exacerbates this danger because it fails to recognize their asymmetrical buying power within the blurred ideological-economic marketplace. Through Chapter Three's discussion of Tim Wu's *The Master Switch*,[54] I demonstrate how government regulation of media corporations is an initially frustrating but eventually necessary factor to prevent market abuse and ensure competition-based fairness. Section 230 of the Communications Decency Act—which, by abrogating distributor liability, facilitated modern crowdsourced cyber-architecture—absolved Internet companies of legal and moral duties to safeguard netizens' free expression or police content on their websites.

The Eventuality of Free Speech

Because unfettered free expression can catalyze advancements in knowledge, democracy, and individual self-actualization, managing speech is, and should be, a far from simple proposition. My proposals, discussed below, to balance the positive and negative attributes of freedom of speech are divided into legal and extra-legal suggestions.

Amend Section 230

To the chagrin of early Internet theorists and cyber-libertarians, the Internet is not the Rawlsian original position nor Lockean state of nature idealized by 1990s American culture. Digital communications, with their relative anonymity and pseudonymity, can facilitate hate-

filled and inflammatory rhetoric because users feel empowered to defy social norms. Section 230 codified this neoliberal *volksgeist*, or cyber-*geist*, into American law. This allows Internet platforms, as corporate persons, to exercise their own First Amendment rights in potentially disproportionate ways without fear of civil liability. Congress should not repeal Section 230 because it continues to facilitate crowd-sourced cyber-architecture that could not exist without abrogated distributor liability.

Congress should, however, amend Section 230 to mandate increased transparency regarding how Internet companies enforce their content screening policies. These practices are entirely opaque because corporations, as legal persons, enjoy protection from disclosing their proprietary algorithms and First Amendment protection from compelled speech. Congress must create economic and moral incentives to encourage the disclosure of moderation-related data so policymakers and civil society leaders can analyze claims related to enforcement (in)effectiveness, bias, and evenhandedness. These mandated disclosures should not include proprietary algorithms because revealing secret technical information may allow would-be competitors to steal intellectual property. Increased transparency will cultivate equality by allowing the public to analyze content-moderation policies, while ongoing secrecy will only exacerbate partisan claims of media favoritism and political interference.

Expand Criminal and Civil Law

Civil remedies provide optimal redress for parties injured by speech acts because they exclude government actors from view-point regulation. In Chapter Four, I discuss the U.S. Supreme Court case *Snyder v. Phelps*[55] and how, by disallowing intentional-infliction-of-emotional-distress claims under the First Amendment's marketplace of ideas theory, the Supreme Court eviscerated *Chaplinsky v. New Hampshire*'s fighting-words doctrine.[56] Parties

injured by hate speech should be allowed, as a matter of law, to pursue their claims in civil court. Civil liability serves twin objectives of making injured parties whole while blocking government actors from holding censorship positions. But based on the Court's ideological uniformity in *Snyder*, this recommendation is unlikely.

If common-law remedies cannot be expanded, states should experiment, under Justice Brandeis's laboratories-of-democracy concept,[57] with expanding civil or criminal defamation statutes to include group libel. This is Jeremy Waldron's principal argument in *The Harm in Hate Speech*[58] and the reason for Chapter Four's discussion of *Beauharnais v. Illinois*.[59] *Beauharnais*, while severely undercut by subsequent case law,[60] stands for the proposition that state statutes criminalizing group defamation based on race or religion can be constitutional and consistent with First Amendment doctrine. Justice Frankfurter was correct in noting that this type of legislation is something with which states should be allowed to experiment. And as my analysis of *R. v. Keegstra* demonstrates, international democracies have successfully experimented with these types of laws. The U.S., after all, remains an international outlier as one of the only advanced democracies without hate-speech legislation.[61]

Reset Moral Normativity

Freedom is not merely the absence of government regulation; it is the presence of equal protection. This echoes Viktor Frankl's indelible sentiment in *Man's Search for Meaning*.

> Freedom, however, is not the last word. Freedom is only part of the story and half of the truth. Freedom is but the negative aspect of the whole phenomenon whose positive aspect is responsibleness. In fact, freedom is in danger of degenerating into mere arbitrariness unless it is lived in terms of responsibleness. That is why *I recommend that the Statue of Liberty on the East Coast be supplemented by a Statue of Responsibility on the West Coast*.[62]

For sociohistorical and application-based reasons rooted in American individualism, hate speech laws may not be well-suited to U.S. jurisprudence. But it remains irrefutable and important that

elementary justice demands positive state action to safeguard equal dignity jurisprudentially and model correct ethical behavior socially.[63] Law is not merely a system of commands; it is a normative process that signals to the community common standards of decency and morality.[64]

While much of this dissertation critically analyzes jurisprudential *laissez-faire*, the answer to our modern free-speech dilemma is creating a Digital Reconstruction Era where society is forced to recognize and acknowledge the power and potential harm of speech. Market actors themselves, including corporate persons, should facilitate this digital *Zeitenwende*. Society should reconceptualized freedom of speech based on the First Amendment's original objectives of promoting positive and negative liberty. Private information gatekeepers should assist with this process by encouraging, alongside democratic participation, media literacy and epistemological competency. All of us—corporations, professional associations, and individual citizens—have deontological obligations to exercise our information gatekeeping functions in ways that serve the public good. We must continue to build a Statue of Responsibility in our natural pursuit of fairness, justice, and equality for all.

Notes

[1] Gail Mason, "The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion," *Theoretical Criminology* 18, no. 1 (February 1, 2014): 75–92, https://doi.org/10.1177/1362480613499792.

[2] *See e.g.,* Frederick M. Lawrence, "Resolving the Hate Crimes/Hate Speech Paradox; Punishing Bias Crimes and Protecting Racist Speech," *Notre Dame Law Review* 68, no. 4 (1993): 673–722, https://heinonline.org/HOL/P?h=hein.journals/tndl68&i=681.

[3] *See* Garrison v. Louisiana 379 U.S. 64, 83 (1964) (Douglas, J. concurring) (noting that *Beauharnais v. Illinois*, 343 U.S. 250 (1952) "should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment.").

[4] Lochner v. New York, 198 U.S. 45 (1905).

[5] *See e.g.,* Griswold v. Connecticut, 381 U.S. 479, 483-85 (1965) (noting cases where penumbras emanating from enumerated constitutional rights give substance to the unenumerated constitutional right of privacy). *See also* Burr Henly, "Penumbra: The Roots of a Legal Metaphor," *Hastings Constitutional Law Quarterly* 15, no. 1 (1987): 83–84, https://heinonline.org/HOL/P?h=hein.journals/hascq15&i=99. Henly notes that Justice Oliver Wendell Holmes first used the word "penumbra" in an 1873 law review article.

[6] Berlin, "Two Concepts of Liberty," 171, 173.

[7] Miller v. California, 413 U.S. 15, 24-25 (1973).

[8] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[9] Goldman, "Speech Showdowns at the Virtual Corral," 845, 852–53.

[10] Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003).

[11] *Id.* at 1028

[12] Balkin, "Virtual Liberty."

[13] Kaye, *Speech Police*, 46.

[14] "CDA 230: The Most Important Law Protecting Internet Speech."

[15] Kosseff, *The Twenty-Six Words That Created the Internet*, 145–47.

[16] *See* Kelly, "Internet Giants Must Stay Unbiased To Keep Their Biggest Legal Shield, Senator Proposes."

[17] *See generally* Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, Massachusetts: Harvard University Press, 2016); Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright Publishing Corporation, 2018); Susanna Kim Ripken, *Corporate Personhood* (Cambridge: Cambridge University Press, 2019).

[18] First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[19] *Id.* at 767.

[20] *Id.* at 767-68 (citing Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp. 1977)).

[21] *Id.* at 776 (noting that "[t]he speech proposed by appellants is at the heart of the First Amendment's protection.").

[22] *Id.* at 777.

[23] *Id.* at 787-88.

[24] *Id.* at 793-94.

[25] *Id.* at 793.

[26] *Id.* at 809.

[27] *Id.* at 809.

[28] *Id.* at 825.
[29] *Id.* at 825-26.
[30] *Id.* at 826.
[31] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
[32] *Id.* at 350 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.").
[33] *Id.* at 319-20.
[34] Pub. L. No. 107-155,116 Stat. 81 (2002) (containing the entirety of BCRA).
[35] 2 U.S.C. § 441b (2006). Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. BCRA § 203 amended § 441b to prohibit any "electioneering communication."
[36] 2 U.S.C. § 434(f)(3)(A)(i)(II).
[37] Citizens United, 558 U.S. at 321-323.
[38] *Id.* at 322-26.
[39] *Id.* at 349.
[40] *Id.* at 349.
[41] *Id.* at 347.
[42] *Id.* at 394 (Stevens, J., concurring in part and dissenting in part).
[43] *Id.* at 394.
[44] *Id.* at 396.
[45] *Id.* at 463-64.
[46] Ripken, "Corporate First Amendment Rights After Citizens United," 214.
[47] Citizens United, 558 U.S. at 466 (Stevens, J., concurring in part and dissenting in part).
[48] Berlin, "Two Concepts of Liberty," 178–79.
[49] Susan L Young and Mona V Makhija, "Firms' Corporate Social Responsibility Behavior: An Integration of Institutional and Profit Maximization Approaches," *Journal of International Business Studies* 45, no. 6 (August 1, 2014): 670–98, https://doi.org/10.1057/jibs.2014.29.
[50] Timothy K. Kuhner, "Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory," *Virginia Journal of Social Policy & the Law* 18, no. 3 (2011): 460, https://heinonline.org/HOL/P?h=hein.journals/vajsplw18&i=401.
[51] Brown, *Undoing the Demos*, 155.
[52] Brown, 156.
[53] Brown, 160.
[54] Wu, *The Master Switch*.
[55] Snyder v. Phelps, 562 U.S. 443 (2011).
[56] Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942).
[57] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as

a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.").

[58] Waldron, *The Harm in Hate Speech*.

[59] Beauharnais v. Illinois, 343 U.S. 250 (1952).

[60] *See e.g.,* Garrison v. Louisiana, 379 U.S. 64 (1964).

[61] Waldron, *The Harm in Hate Speech*, 185.

[62] Viktor E. Frankl, *Man's Search for Meaning*, Gift Edition (Boston: Beacon Press, 2014), 124. The italicized text is part of the original quotation.

[63] Waldron, *The Harm in Hate Speech*, 103.

[64] Waldron, 58, 85.