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Flemming Rose's Rejection of the American Free Speech Canon and the Poverty of Comparative Constitutional Theory

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FLEMMING ROSE’S REJECTION OF THE AMERICAN FREE SPEECH CANON AND THE POVERTY OF COMPARATIVE CONSTITUTIONAL THEORY

*Robert A. Kahn**

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INTRODUCTION: THE FRIEND OF MY ENEMY IS MY FRIEND

Flemming Rose has been a pivotal person in the European debate over hate speech bans. As culture page editor of *Jyllands-Posten*, Rose commissioned and ran the Danish cartoons in 2005 as a statement against what he saw as “self-censorship.”¹ Since then he has toured the world justifying his

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1. For an overview of the cartoon crisis, see JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* (2009). I discuss Rose’s motivations to run the cartoons in Robert A. Kahn, *Flemming Rose, the Danish Cartoon Contro-*

decision and calling for an abolition of hate speech laws.² More recently, he has put forth an extended theory of hate speech regulation in his memoir, *The Tyranny of Silence* (2010).³ In a short but rich fifteen-page English-language excerpt, Rose discusses the Danish cartoon controversy, recounts a conversation with Salman Rushdie, and explains how hate speech bans facilitated the Nazi rise to power during the period of the Weimar Republic.⁴ But the pride of place in Rose's narrative goes to the Soviet Union.⁵ Defending speech is a matter of opposing Soviet-style censorship—a censorship Rose sees in European Islamists.⁶ As a result, he views supporters of hate speech bans against Islamophobic speech as the new appeasers.⁷

One of the most striking things about Rose's excerpt, however, is what he does not discuss. As I write this essay, I am sitting in St. Paul, Minnesota. In 1992, the United States Supreme Court struck down a St. Paul ordinance banning cross

versy, and the New European Freedom of Speech, 40 CAL. W. INT'L L.J. 243, 260–63 (2009–10) [hereinafter Kahn, *Flemming Rose*].

2. Kahn, *Flemming Rose*, *supra* note 1, at 263–65.

3. FLEMMING ROSE, TAVSHEDENS TYRANNI [THE TYRANNY OF SILENCE] (2010). While the book is currently available in only Danish, Norwegian, and Russian, Rose has translated a fifteen-page English-language excerpt covering the first two chapters. See Flemming Rose, *Read an Excerpt of the Book, TYRANNY OF SILENCE* (Dec. 30, 2010), <http://www.tyrannyofsilence.net/page5/files/7f96eb2af2602318f4829282100ccf99-0.html> [hereinafter Rose, *The Tyranny of Silence (Excerpt)*]. According to the website, Rose's book describes "the people and experiences that have influenced the way he views the world and his understanding of the crisis." *Flemming Rose, Tyranny of Silence, TYRANNY OF SILENCE*, <http://www.tyrannyofsilence.net/index.html> (last visited Nov. 18, 2013). The website also contains a review of the book from Leif Davidsen of *Jyllands-Posten* giving the book five stars and calling it "a study in the anatomy of fear." *Critics and Reviews, TYRANNY OF SILENCE*, <http://www.tyrannyofsilence.net/page2/page2.html> (last visited Nov. 18, 2013). For additional background on Rose's book, see Gina Gustavsson, *Romantic Liberalism: An Alternative Perspective on Liberal Disrespect in the Muhammad Cartoons Controversy*, 62 POL. STUD. 53 (2013). Gustavsson, a researcher at the University of Uppsala, views Rose an exemplar of a "romantic" liberalism under which the cartoons are an act of self-expression rather than an effort to bring Danish Muslims into the modern era. *Id.* at 10–11.

4. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

5. *Id.*

6. *Id.*

7. *Id.*

burning.⁸ Rose did not mention this decision in his excerpt. Nor did he mention *Brandenburg v. Ohio*,⁹ *New York Times v. Sullivan*,¹⁰ or the famous speech-affirming dissents and concurrences of Justices Holmes and Brandeis.¹¹ In 2007, Robert Post, one of the most prolific American writers on the subject of hate speech, wrote an article in the journal *Constellations* arguing that a truly democratic society would not ban the Danish cartoons.¹² Flemming Rose did not mention him either, even though there is some overlap between Robert Post's public-discourse-based justification of speech and Rose's own argument that running the cartoons would help incorporate Muslims into Danish society.¹³

The omission of American arguments about freedom of speech is confusing. Rose is opposed to European hate speech bans.¹⁴ The American First Amendment doctrine, at least since the 1969 *Brandenburg* decision, also rejects hate speech bans, as do many American legal academics. For example, Post argues that hate speech laws threaten the public dialogue necessary for a legitimate democracy,¹⁵ while Eugene Volokh, describing anti-Communist cases of the 1940s and 1950s, warns his readers of the folly of balancing speech against other

8. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). For an inside account of the case, see EDWARD CLEARY, *BEYOND THE BURNING CROSS: A LANDMARK CASE OF RACE, CENSORSHIP AND THE FIRST AMENDMENT* (1995).

9. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

10. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

11. *E.g.*, *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 356, 376 (1927) (Brandeis, J., concurring).

12. Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 *CONSTELLATIONS* 72 (2007) [hereinafter Post, *Religion and Freedom of Speech*].

13. Both Post and Rose view speech as a means of inclusiveness. For Post, the free public discourse renders the democratic process legitimate to the losers of a legislative vote or an election. See Robert Post, *Racist Speech, Democracy and the First Amendment*, 32 *WM. & MARY L. REV.* 267, 282–83 (1991) [hereinafter Post, *Racist Speech*]. For Rose, inclusion of Muslims into the Danish public discourse was one intended result of publishing the cartoons. See Flemming Rose, *Why I Published the Muhammad Cartoons*, *SPIEGEL ONLINE* (May 31, 2006), <http://www.spiegel.de/international/spiegel/opinion-why-i-published-the-muhammad-cartoons-a-418930.html> [hereinafter Rose, *Why I Published the Muhammad Cartoons*].

14. Kahn, *Flemming Rose*, *supra* note 1, at 265–66.

15. Post, *Racist Speech*, *supra* note 13, at 279–83.

rights.¹⁶ Others, such as Peter Teachout, go so far as to criticize specific types of European hate speech laws, such as bans on Holocaust denial.¹⁷

Moreover, Rose has spent a great deal of time in the United States. From 1996 to 1999 he was the Washington, D.C. correspondent for *Jyllands-Posten*, and in the wake of the Danish cartoon controversy he traveled to the United States repeatedly.¹⁸ As such, he must have been aware of these arguments, even if not in the precise form expressed by Post, Volokh, and Teachout.¹⁹ Usually the enemy of my enemy is my friend. Yet Rose refused to make common cause with American opponents of European hate speech laws.

Clearly, *something* in the American free speech story was not culturally appealing to Flemming Rose. On one level, this observation is unremarkable. Just as Robert Delahunty and John Yoo argue against U.S. courts adopting foreign law,²⁰ Flemming Rose is not at fault for ignoring the American First Amendment canon in explaining a controversy that arose in Denmark. Rose's emphasis on the Soviet Union and his discussion with Rushdie, however, suggest that something more may be at play. The problem is not simply that the American speech canon is insufficiently Danish. Instead, Rose ignored the American free speech canon because, as currently constructed, the canon simply does not speak to his situation—that of a free speech *agent provocateur* compelled to publish offensive material to ward off self-censorship.

Rose's rejection of the American free speech canon as inadequate—regardless of why he did it—poses a puzzle for comparative legal scholars. One leading theory, neo-functionalism,²¹ emphasizes doctrinal problems—scholars, judges, and other

16. Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. ROUNDTABLE 223, 238–39 (1996).

17. Peter R. Teachout, *Making "Holocaust Denial" a Crime: Reflections on European Anti-negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 690–91 (2006).

18. Kahn, *Flemming Rose*, *supra* note 1, at 265–67 (describing Rose's trips to the United States).

19. This is especially likely given that Rose worked as a journalist.

20. See generally Robert Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005).

21. See Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2571, 2574 (2007) (book review) (describing functionalism as "the preeminent approach to comparative law" for "generations").

actors seek out the best solutions to legal problems, regardless of where they may be.²² Yet Rose, at the center of a free speech controversy, ignored one of the deepest sources of free speech doctrine. Another tenet of comparative scholars is that over time, the legal doctrine across the globe on a given issue like free speech will converge on shared norms.²³ But, as we shall see, Rose's theory diverges from the American canon in several respects.²⁴ Is Rose simply a poor theorist? Or is *The Tyranny of Silence* excerpt proof that the global debate over free speech theory is more diverse than the convergence scholars suggest it should be?

The rest of this essay explores these questions. Part I gives a rough sketch of the American free speech canon. The canon is a narrative, deeply rooted in American history, which separates the bad times of censorship from the golden ages of speech protection. It also includes a set of maxims—morals derived from the stories such as the marketplace of ideas metaphor and the slippery slope argument. These maxims make the protection of speech appear natural—at least to Americans.

Part II turns to the excerpt from *The Tyranny of Silence* and a recent article, "Words and Deeds," published in the *Index on Censorship*.²⁵ In the place of the American canon, Rose advanced a highly personal theory, one remarkably free from doubt and heavily reliant on the Soviet Union as an anti-Utopia.²⁶ A key argument—that "man" is an inherently storytelling animal—comes from Salman Rushdie, whose novel, *The Satanic Verses*, itself led to a controversy over the limits of speech.²⁷ Rose also discussed the relationship between freedom of speech and the Holocaust.²⁸ While Americans and Europeans

22. *Id.*

23. The emphasis on convergence is even true of scholars, like Ruti Teitel, who take a more discursive approach to comparative constitutionalism. *Id.* at 2586 (arguing that "comparativism offers the potential for global solidarity").

24. *See infra* Part II.

25. Fleming Rose, *Words and Deeds*, INDEX ON CENSORSHIP (Apr. 10, 2012), available at <http://www.indexoncensorship.org/2012/04/words-and-deeds/> [hereinafter Rose, *Words and Deeds*].

26. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

27. *Id.* For an overview of the Rushdie affair, see RICHARD WEBSTER, A BRIEF HISTORY OF BLASPHEMY: LIBERALISM, CENSORSHIP AND 'THE SATANIC VERSES' (1990).

28. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3; Rose, *Words and Deeds*, *supra* note 25.

have debated whether hate speech laws could have stopped the Nazi rise to power, Rose goes a step further and sees hate speech bans as responsible for the Holocaust itself.²⁹ Meanwhile, Rose says very little about the American free speech canon.

Part II also briefly looks at what Rose does say about America. He briefly discusses slavery and sprinkles his pages with quotes from American rock and roll icons like Bruce Springsteen and Bob Dylan,³⁰ a fact that raises even more questions about his failure to cite the free speech canon.

Part III takes up the implications of Rose's neglect of the American free speech canon in *The Tyranny of Silence* excerpt for comparative constitutional theory. The neo-functionalist theory of comparison cannot explain Rose's refusal to adopt a vast body of American jurisprudence that largely supported his right to run the Danish cartoons. At its most basic, Rose's neglect of the American canon reflects the truism of Clifford Geertz and Tip O'Neil that all politics—and speech theory—is local.³¹

Rose's excerpt also poses a challenge to those, like Ruti Teitel, who see doctrinal law converging on a common set of norms.³² He rejected the American canon for a more speech-friendly, *samizdat* alternative based on the daring speaker who stirs the pot to unsettle a slowly creeping, Soviet-style self-censorship.³³ This is significant doctrinally—for once, the United States might not be on the absolutist fringe of the debate over hate speech regulation. It is also significant theoretically because it suggests that there is more than one coherent libertarian position to take.

The essay concludes with a call to incorporate identity theory in the study of comparative constitutional law and to view de-

29. Rose, *Words and Deeds*, *supra* note 25.

30. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

31. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 218 (1983).

32. Teitel, *supra* note 21, at 2586–87.

33. The term *samizdat* was “coined to describe the system of underground publishing in the post-Stalinist Soviet Union.” Ann Komaromi, *The Material Existence of Soviet Samizdat*, 63 SLAVIC REV. 597, 597 (2004). More generally, the term describes “any clandestine production and circulation of texts.” *Id.* During the Cold War, the term signified “political opposition and heroic dissidence.” *Id.* More recently, this framing has become less relevant. *Id.*

bates over a contested area of doctrine—such as hate speech regulation—as an endless conversation rather than a linear march to a world-wide agreement.³⁴

I. THE CLASSIC STORY OF FREEDOM OF SPEECH IN AMERICA

Identifying the “classic” First Amendment story of speech is a difficult task. Each generation has its own account of the First Amendment. What figures in the canon might be different in 1919 (or 1969) than it is today. Moreover, the First Amendment protection of speech means different things to different people. A sympathizer of the antiwar and civil rights movements of the 1960s might view the “worthy tradition” differently from someone who views him or herself as a likely victim of hate speech.³⁵

But there is *some* overlap. Writing in the wake of the Danish cartoon controversy, Post refers to the ban on the teaching of communism as a “classic historical example” of American skepticism of hate speech laws³⁶—the same point raised by Volokh.³⁷ For example, both Post and Volokh see the American

34. My conclusions rest on the fifteen-page English-language excerpt from *The Tyranny of Silence*. In the Danish portion of the book, Rose mentions some American free speech authors, including Aryeh Neier, James Weinstein, and Ronald Dworkin. These passages are quite brief. See ROSE, TAVSHEDENS TYRANNI, *supra* note 3, at 252–54 (discussing Neier), 266–67 (discussing Weinstein), 272–74 (discussing Dworkin). He also briefly discusses Oliver Wendell Holmes’s “fire in a crowded theater” metaphor. *Id.* at 279–80. These passages, however, do not undermine the conclusion that Rose has largely ignored the American free speech canon. For one thing, the passages themselves make up at most five to ten pages of a 478-page book, a fact that shows Rose’s ability to construct a free speech theory largely without reference to the American canon. Not only that, with the exception of the “fire in a crowded theater” passage, Rose does not discuss any of the classic American free speech cases. Indeed, he appears to have come to the fire metaphor through the work of Alan Dershowitz. *Id.* at 471. So while Rose mentions some American legal academics, he largely stays away from the classic cases themselves. A review of Rose’s index reveals a sharp contrast between the brief mention of the American canon, with much lengthier discussions of Salman Rushdie and the Soviet Union. *Id.* at 489–90. Finally, as we shall see, the fifteen-page excerpt departs from the substance of the American canon in several key respects. See *infra* Part II.

35. This underscores the importance of politics in setting out the boundaries of speech protection, something Samuel Walker observed in his study of hate speech regulation. See SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 1–16 (1994).

36. Post, *Religion and Freedom of Speech*, *supra* note 12, at 83.

37. Volokh, *supra* note 16, at 233–34.

experience with anti-Communist laws in the 1940s and 1950s as formative to the nation's understanding of how speech protection works.³⁸ One can compile these areas of overlap into a general narrative, one that divides into four main periods.³⁹

First, after a brief libertarian awakening following the rejection of the Alien and Sedition Acts, the country settled into a long period during which speech restrictions were acceptable, provided that the speech in question was associated with a "bad tendency."⁴⁰ In the early nineteenth century, southern states banned abolitionist speech; later on, speech prosecutions targeted union members and advocates like Moses Harmon of the free love movement.⁴¹ These were the dark ages of American speech regulation—an unhappy time to which no modern American wishes to return.⁴²

Second, after 1919, things began to change. Justices Holmes and Brandeis, in a series of stirring dissents and concurrences, began to articulate a new, more speech-friendly doctrine—speech restrictions were only permissible when there was a "clear and present danger."⁴³ If at first this was a minority position, by the 1930s "speech [had begun] to win" in a series of Supreme Court opinions.⁴⁴ A number of the strongest free speech tropes date from this period—including Justice Holmes's placing the limit on speech at yelling fire in a crowd-

38. Volokh opens his article with a discussion of Communism and returns to it repeatedly. *Id.* at 223, 233–34. For his part, Post refers to restrictions on Communist speech as a "classic historical example" of government abuse of free speech rights. See Post, *Religion and Freedom of Speech*, *supra* note 12, at 83.

39. What follows draws on HARRY KALVEN JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988); WALKER, *supra* note 35.

40. For an overview of the debate over the Alien and Sedition Acts, see JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* (1951).

41. See CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* (1964) (describing restrictions on abolitionist speech). For an entertaining study of the Moses Harmon trial, see Charles J. Reid Jr., *The Devil Comes to Kansas: A Story of Free Love, Sexual Privacy, and the Law*, 19 MICH. J. GENDER & L. 71 (2012).

42. There were, to be sure, some victories for speech before Holmes and Brandeis. For more, see DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1879–1920* (1999).

43. For a discussion of the clear and present danger test, see *infra* note 48.

44. For an overview, see KALVEN, *supra* note 39, at 168–78.

ed theater,⁴⁵ and Justice Brandeis's adage that the best response to bad speech was more speech.⁴⁶ This was the first golden age.

Just as it appeared that the clear and present danger doctrine⁴⁷ would carry the day, there was a relapse. This third period was defined as a time when the twin perils of fascism and communism led to a great concern about protecting the state against internal subversion. Here, Post and Volokh rightly point to *Dennis v. United States*⁴⁸ where the Supreme Court upheld the convictions of twelve members of the New York Communist Party whose sole offense was to teach the doctrine of Marxism-Leninism.⁴⁹ The case is famous for the idea that the immediacy of the danger can be discounted by "the gravity of the evil"⁵⁰—a formulation that took the air out of the "clear and present danger" test and suggested a return to the dark ages of "bad tendency."⁵¹ This was a time of loyalty oaths and

45. For more, see *id.* at 130–36. Interestingly, Justice Holmes made his famous "fire in a crowded theater" comment in *Schenck v. United States*, 249 U.S. 47, 52 (1919), an opinion that upheld a speech restriction. *Schenck* is also the source of the "clear and present danger" test. *Id.*

46. *Whitney v. California*, 274 U.S. 356, 377 (1927) (Brandeis, J., concurring).

47. The term, originally used as a restriction on speech, allows for restrictions when there is a "clear" and "present" danger of harm. See *Schenck*, 249 U.S. at 52 (upholding a conviction under the Espionage Act). With Holmes's dissent in *Abrams v. United States*, however, the term became associated with protection of speech. *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting). The doctrine peaked in the 1940s as the Supreme Court used the test in a variety of subversive advocacy cases. See KALVEN, *supra* note 39, at 179–89; see, e.g., *Taylor v. Mississippi*, 319 U.S. 583, 589–90 (1943) (protecting the right to tell others not to salute the American flag). Kalven describes the *Taylor* Court's use of the test as "almost automatic," adding that the test had become "commonplace." KALVEN, *supra* note 39, at 183.

48. *Dennis v. United States*, 341 U.S. 494 (1951).

49. *Id.* at 497–98.

50. *Id.* at 508–11.

51. See Chester James Antieau, *Dennis v. United States—Precedent, Principle or Perversion*, 5 VAND. L. REV. 141, 146 (1952) (referring to Dennis as "retrogression," one even worse than the "bad tendency" test because it does not require any causal connection "between the expressions of the accused and the substantive evil"). The "bad tendency" test itself emerged in the nineteenth century and traced back to an English rule banning publications that had the tendency to "deprave or corrupt" the reader's mind. Timothy J.

McCarthyism.⁵² The stench of the era spread to other mid-century decisions such as *Chaplinsky v. New Hampshire*⁵³ that might otherwise have been used to support narrow bans of hate speech laws.

The final period began in the late 1950s when the Supreme Court started to throw out convictions in three anti-Communist cases,⁵⁴ and it continued to grow during the 1960s as the civil rights movement led the Court in a more libertarian direction.⁵⁵ The culmination was *Brandenburg v. Ohio* when the court restricted speech bans to immediate appeals to imminent lawless action.⁵⁶ This ushered in the age of free speech “absolutism” in which restrictions on political speech were looked on with suspicion. A high point was the Skokie affair, when the Seventh Circuit upheld the right of a small group of American Nazis to march in a community with a large proportion of Holocaust survivors.⁵⁷ The message—repeated in *RAV v. St. Paul*—was clear: when forced to choose between protecting victims of hate speech and freedom of speech itself, American courts would choose the latter.⁵⁸

O'Neill, *Bad Tendency Test*, in THE ENCYCLOPEDIA OF CIVIL LIBERTIES IN AMERICA 61 (David Schultz & John R. Vile eds., 2005).

52. For a discussion of the role of loyalty in American life, see JOHN H. SCHAAR, *LOYALTY IN AMERICA* (1957). For a good account of McCarthyism, see DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* (1983).

53. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding a disorderly conduct citation on the basis of the fighting words doctrine).

54. See KALVEN, *supra* note 39, at 211–26. Kalven described the change in striking terms: “On June 17, 1957 the Cold War came to an end in the Supreme Court of the United States.” *Id.* at 211. The end came after the Court ruled against the government in four cases “generated by official anti-Communism.” *Id.* The most important of these cases was *Yates v. United States*, 354 U.S. 298 (1957), in which the Court reversed convictions brought under the Smith Act against Communist Party leaders in California. KALVEN, *supra* note 39, at 211 (describing *Yates*).

55. WALKER, *supra* note 35, at 14–16. For an extended discussion of how the Civil Rights struggle led to the expansion of press freedoms in the United States, see GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* (2007).

56. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

57. For a brief discussion of the Skokie affair, see Robert A. Kahn, *Cross-Burning, Holocaust Denial and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 169–71 (2006) [hereinafter Kahn, *Cross-Burning*].

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

Yet even during the post-*Brandenburg* period there were exceptions. During the 1980s and 1990s, a number of states upheld laws banning masked demonstrations.⁵⁹ These laws were passed decades earlier to target the Ku Klux Klan.⁶⁰ In addition, a number of cases made it clear that “true threats”—including speech targeting the President—could be punished.⁶¹ In 2003, this led to *Virginia v. Black*, in which the Supreme Court allowed bans on cross burning when done with the intent to intimidate.⁶²

From this chronology emerged several maxims of speech protection. I will highlight four. The first is the marketplace of ideas metaphor of Justice Holmes.⁶³ The idea, borrowed from John Stuart Mill,⁶⁴ is that freedom of speech will encourage debates that over time lead to the truth, or at least to the emergence of the soundest ideas for governing society. While the metaphor has fallen out of favor with time—especially as people have questioned whether the marketplace is equal⁶⁵—the rationale fits nicely with an American focus on equality of opportunity (as opposed to equality of results). This is closely related to the idea of Justice Brandeis that the best response to bad speech is more speech.⁶⁶

A second theme is the slippery slope—the idea that allowing a restriction of one type of speech will lead to multiple restrictions on speech. The idea has been expressed in Lee Bollinger’s fortress model under which any restriction on extremist speech (such as a ban on Holocaust denial) is a breach in the walls that will lead to more restrictions.⁶⁷ The fortress model

59. Kahn, *Cross-Burning*, *supra* note 57, at 173–75.

60. DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* (1965) (giving a state by state account of anti-Klan policies).

61. *See* *Watts v. United States*, 394 U.S. 705 (1969) (acknowledging the power of the state to ban “true threats”).

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

63. Holmes referred to the marketplace of ideas metaphor in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

64. JOHN STUART MILL, *ON LIBERTY* (1859).

65. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

66. Brandeis made this point in his concurring opinion in *Whitney v. California*, 274 U.S. 356, 377 (1927) (Brandeis, J., concurring).

67. *See* LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 76–103 (1986).

fits nicely with the experience of McCarthyism, when freedom of speech was almost taken away in the 1940s and 1950s.

A third, and related, argument often raised by Americans against hate speech laws rests on government mistrust.⁶⁸ One fear is that hate speech laws will be turned against the minority groups they were meant to protect.⁶⁹ Government is not trusted to draw lines between permissible and unacceptable restrictions on speech.⁷⁰

A fourth trope is the idea of libertarian toughness. Ronald Dworkin, opposing restrictions on Holocaust denial laws, spoke about the importance of protecting speech even when it really hurts.⁷¹ Likewise, Justice Brandeis, in his *Whitney* concurrence, criticized those who gave in to fear by burning witches.⁷² Writing a half century later, Lee Bollinger argued that the best reason for tolerating extremist speech was that it increased society's capacity to withstand future acts of extremist speech—in other words, toleration helps America develop a thick skin.⁷³

While this sketch is not definitive, it should be sufficient to compare the standard American account of why hate speech laws violate freedom of speech with the arguments Rose raised in the excerpt from *The Tyranny of Silence*. As we shall see, Rose does not explicitly refer to the canon, and his arguments, at times, are substantively quite different.

68. For an example, see Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 556 (1990) (describing how Great Britain's 1965 Race Relations Act was used against minority groups).

69. *Id.* This rationale has the interesting side effect of neutralizing the race relations problem in the United States. If the government will make race relations worse, they must currently not be that bad.

70. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 10 (1969) (warning that "the apparatus of government required for enforcement of limitations on expression, by its very nature, tends towards administrative extremes").

71. See Ronald Dworkin, *The Unbearable Cost of Liberty*, 3 INDEX ON CENSORSHIP 43, 46 (1994).

72. *Whitney v. California*, 274 U.S. 356, 376 (1927) (Brandeis, J., concurring). However skeptical the American free speech canon is about the state power, in his *Whitney* concurrence, Brandeis expresses a great degree of faith in the ability of the ordinary man or woman to grow through courageous acts of toleration.

73. BOLLINGER, *supra* note 67, at 237–49.

II. ROSE'S THEORY OF FREEDOM OF SPEECH

Rose's early forays into free speech theory in the immediate aftermath of the Danish cartoon controversy did not rely on American examples. For instance, when discussing the Danish tradition of satire, he did not mention *Hustler v. Falwell*⁷⁴ in which the Supreme Court established a broad ranging right to satire. Likewise, his discussion about self-censorship—even when presented before an American audience—did not lean on the American free speech canon. For example, in a 2006 *Washington Post* article defending his decision to run the cartoons, Rose spoke about the Cold War and invoked Karl Popper's *The Open Society and Its Enemies*, but he did not mention Holmes, Brandeis, *New York Times v. Sullivan*,⁷⁵ or *Brandenburg*.⁷⁶

When Rose did invoke the American free speech story, he read it in a novel way. In a 2008 *Copenhagen Post* article attacking the denial of a visa for Dutch politician Geert Wilders, Rose turned Holmes's "fire in a crowded theater" analogy on its head: not only was there a right to yell "fire," but there was also a positive obligation to do so.⁷⁷ This reading of the Holmes metaphor owed something to the particular situation Flemming Rose found himself in. Critics in the United States and elsewhere did not question his right to publish the Danish cartoons; they questioned his wisdom in doing so.⁷⁸ This required a more expansive reading of the Holmes metaphor.⁷⁹

Rose, however, did frequently mention the other Cold War superpower, the Soviet Union.⁸⁰ There are biographical reasons

74. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

75. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

76. See Flemming Rose, Op-Ed., *Why I Published Those Cartoons*, WASH. POST (Feb. 19, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/17/AR2006021702499.html>.

77. Flemming Rose, Op-Ed., *A False Analogy*, COPENHAGEN POST, Feb. 24, 2009, <http://www.in-other-words.dk/background/clippings/editorials/1208.pdf>; see Kahn, *Flemming Rose*, *supra* note 1, at 276–77.

78. See Kahn, *Flemming Rose*, *supra* note 1, at 275–77.

79. In addition, Rose's expansive reading of the Holmes metaphor may reflect what Gina Gustavsson calls Rose's "romantic" liberalism, a term she uses to highlight Rose's preference for action over reflection. Gustavsson, *supra* note 3, at 12.

80. For example, in his *Washington Post* article defending his decision to run the cartoons, Rose refers to the lessons of the Cold War and mentions several Soviet dissidents. See Rose, *Why I Published Those Cartoons*, *supra* note 76.

for this.⁸¹ Rose grew up a critic of Western imperialism and an admirer of the Soviet Union.⁸² This changed after his 1980–1981 visit to Moscow, where he met his future wife and the two were kept under constant government surveillance—an experience he claims taught him more about Marxist-Leninism than all his prior reading on the subject.⁸³ One can see the influence of this experience in his initial response to the Danish cartoon controversy. His *Washington Post* article called “censorship on the grounds of insult” a “popular trick of totalitarian movements” and then rattled off a list of Soviet era dissidents.⁸⁴ He warned that “[i]f you give into totalitarian demands once, new demands follow.”⁸⁵

One could object here that Rose is making a slippery slope argument, albeit a *samizdat* one. But Rose’s *samizdat* framing is noteworthy—he introduced his slippery slope argument as *the* lesson of the Cold War. In addition, one must ask why Rose failed to anchor his argument in the American rhetoric—especially since he was writing in the *Washington Post*.

As one turns from Rose’s early writing to *The Tyranny of Silence*, the terrain becomes more alien from an American perspective. In particular, Rose’s theory of free speech departs from the American canon in five ways. First, Rose inserts himself directly into his theory. Second, he rejects “doubt” as a reason for opposing speech bans. Third, Rose uses Soviet-style censorship as a symbol of all he is up against. Fourth, Rose opposes what he refers to as “insult taboos.” Finally, Rose makes a novel connection between hate speech and the Holocaust. I will take up each point in turn.

A. *The Political Is Personal*

The American free speech story relies on distancing between speakers and those justifying the right to speak. Simply put, in the American concept, there is nothing heroic about speaking. For example, in his *Abrams* dissent, Justice Holmes referred to the authors of a pro-Bolshevik pamphlet as “puny anonymi-

81. For a brief overview of Rose’s experiences in the Soviet Union, see Kahn, *Flemming Rose*, *supra* note 1, at 258–59.

82. *Id.* at 258.

83. *Id.*

84. Rose, *Why I Published Those Cartoons*, *supra* note 76.

85. *Id.*

ties.”⁸⁶ Rather, the people who are brave in the United States are those who resist the temptation to respond to speech, rather than those who, as Justice Brandeis put it in his *Whitney* concurrence, “feared witches and burnt women.”⁸⁷ Likewise, Bollinger’s tolerant society depends on forbearance.⁸⁸ The liberal citizen is characterized by his or her refusal to respond to speech with action.⁸⁹

The Tyranny of Silence excerpt is different. Rose is unapologetically central to the story.⁹⁰ As the publisher of the Danish cartoons, he is a global figure—one often heckled and criticized. Rose reports how he was called “the Danish devil” by the local media in Qatar and how his visit there required the largest security operation since an earlier visit by Michael Jackson.⁹¹ Admitting that, in his younger days, he was “almost too eager to please,”⁹² Rose reached the conclusion that “as a public figure” he has “come to symbolize a much greater set of issues confronting the world today.”⁹³ Later he compares his role in the Danish cartoon controversy to the fall of the Berlin Wall—historians cannot work out the causation of either event.⁹⁴ Whatever Rose is, he does not view himself as a puny anonymity.

On one level this makes sense. By running the Danish cartoons, Rose did play a major role in a global (and European) controversy over the limits of freedom of speech.⁹⁵ As such, it may be fitting that Rose plays a major role in his book, especially if one views it as an apologia for the cartoons. However,

86. *Abrams v. United States*, 250 U.S. 616, 626 (1919) (Holmes, J., dissenting).

87. *Whitney v. California*, 274 U.S. 356, 376 (1927) (Brandeis, J., concurring).

88. EMERSON, *supra* note 70, at 10 (concurring that “maintaining a system of freedom of expression” requires “[s]elf-restraint, self-discipline and maturity”).

89. Note the contrast to Gustavsson’s concept of Rose’s active “romantic” liberalism. Gustavsson, *supra* note 3, at 12.

90. Rose makes frequent reference to his high-profile role as publisher of the Danish cartoons, at one point complaining that “everywhere I go I provoke controversy.” Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. For an overview of the Danish Cartoon controversy and Flemming Rose’s role in it, see Kahn, *Flemming Rose*, *supra* note 1, at 258–68.

to the extent the book has as its focus Rose's actions in running the cartoons, one may wonder about the reach of American free speech theory. Where Holmes, Brandeis, and Bollinger have exercised restraint, Rose has acted.

Rose also made his book personal in a second, more intimate way. Rose does not simply figure as the person who ran the cartoons, but instead relies heavily on his experiences living in the Soviet Union.⁹⁶ To a lesser extent, he relies on his experience of being—unfairly in his mind—criticized for running the cartoons.⁹⁷ Both experiences play into two central themes of his free speech theory—the rejection of doubt and his use of the Soviet Union as an anti-utopia.

B. The Temptation of Doubt

Early on in his book, Rose raises the possibility of basing a defense of speech on doubt.⁹⁸ His initial motivation appears to be humility (or insecurity). In the immediate aftermath of the cartoon controversy, Rose wanted to document “that I was right and others were wrong.”⁹⁹ With time, however, Rose grew less sure. Why did he “instinctively enter the fray?”¹⁰⁰ Such involvement was not typical for Rose—he “doubt[s] too much for that.”¹⁰¹ The cartoon controversy posed a personal mystery: Why did a mild-mannered newspaper editor ignite a global controversy?

There is a narcissistic element to this—here is “the great man of history” theory being explored by a “great man” himself. But Rose went on to make a broader point about doubt and freedom of speech:

Doubt evokes something unfinished, something uncertain and imperfect, yet it is also, as the history of Western civilization has shown, a great resource which is founded on the basis of strong sense of self, a deeply rooted existential courage that leaves room for debate and challenges established truth. Mov-

96. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

ing through doubt towards a new truth is a process that is sometimes shocking, painful and explosive.¹⁰²

Doubt is “essential” for democracies because the latter are founded on the idea that “no one has a monopoly on truth.”¹⁰³ Moreover, doubt “nurture[s]” democratic institutions, including freedom of speech.¹⁰⁴

Rose’s connection between doubt, democracy, and freedom of speech is very interesting. He seems to share Post’s concern about the importance of free speech for democratic legitimacy.¹⁰⁵ Not only that, Rose’s emphasis on “existential courage” and speech parallels Justice Brandeis’s concurring opinion in *Whitney*:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify the suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.¹⁰⁶

Both Brandeis and Rose see protecting speech as a courageous act—even if their views about the connection between doubt and free speech are different (Rose views doubt as a reason to protect speech, while Brandeis sees speech as liberating the human subject from “irrational fears”).

Rose’s paean to doubt is also similar to Laurence Rosen’s comment about *The Satanic Verses*, which Rosen saw as a perhaps unsuccessful attempt “to consider how doubts about fundamentals could exist without fear that such doubts would destroy the faith.”¹⁰⁷ Here is an opening that could connect Rose to the moderate Muslims he likes to champion in his newspaper.

Finally, Rose’s emphasis on doubt dovetails with a skepticism that lurks behind many American rationales for the protection of speech. For example, the marketplace of ideas depends in

102. *Id.*

103. *Id.*

104. *Id.*

105. See Post, *Racist Speech*, *supra* note 13.

106. *Whitney v. California*, 274 U.S. 356, 376 (1927) (Brandeis, J., concurring).

107. LAURENCE ROSEN, *THE CULTURE OF ISLAM: CHANGING ASPECTS OF CONTEMPORARY MUSLIM LIFE* 172 (2002).

part on doubts about the state's ability to find the truth. The same can be said of the argument that hate speech will be used against minority groups. In a similar manner, Post relies on American state skepticism to explain why hate speech bans exist in Europe but not in the United States.¹⁰⁸ Given all of this, do Rose's comments about doubt suggest that a Euro-American convergence is in the offing?

Maybe not. Rose does not stick with doubt for long. "Of course," adds Rose, there are "limits to doubt."¹⁰⁹ When doubt prevents one from distinguishing "between right and wrong," it becomes "a threat to democracy."¹¹⁰ Nobody could doubt, for example, the difference between "the prisoner in the concentration camp and the regime that imprisoned him."¹¹¹ As we shall see, Rose connects his rejection of doubt to the Soviet Union, the prime example of a totalitarian regime for Rose.¹¹²

But is this the only reason Rose rejects doubt? I am not so sure. There are many ways to think about Soviet-style censorship and freedom of speech that do not remove doubt. For example, why shouldn't the Soviet enforcement of Marxist-Leninist truths leave Rose with an enhanced appreciation of doubt? Likewise, I am not sure why the other parts of his theory of free speech require a rejection of doubt.

For Rose, the danger of doubt may be personal. Rose wrote the *Tyranny of Silence* after standing at the center of an international controversy during which he suffered through what he saw as unjust criticism of his decision to run the cartoons.¹¹³ Rose likened this critique to an "assault."¹¹⁴ Perhaps his personal experiences explain his conclusion that there must be limits to doubt—both for societies and individuals.¹¹⁵

108. Robert Post, *Hate Speech*, in *EXTREMIST SPEECH AND DEMOCRACY* 122, 137 (James Weinstein & Ivan Hare eds., 2009).

109. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

110. *Id.*

111. *Id.*

112. *See infra* Part II.C.

113. Indeed, he felt that many of the critiques were unjustified. *See* Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3 ("It has been difficult to hear others tell my story and interpret my motives without any particular knowledge or basis for their assertions.")

114. *Id.*

115. *Id.* Rose himself focuses on "[t]he connection between . . . the personal motivations of the individual and all his or her views on greater sociopolitical questions." *Id.*

C. Rose's Samizdat Speech Theory

As noted above, Rose makes much of his experience in the Soviet Union. He describes it as a place where freedom was not a given and everyone looked over his or her shoulders.¹¹⁶ These experiences helped Rose understand that “words meant something”—not to the government but to the speaker.¹¹⁷ Indeed words could even be “dangerous.”¹¹⁸ In such a “fearful climate,” official censorship was “almost unnecessary”—instead, “the tyranny of silence was king.”¹¹⁹ Notice the shift in Rose’s thought. In the traditional American free speech paradigm, the focus is on the harm posed by the speaker. Is the United States a tolerant enough society to allow a neo-Nazi or Klan member to utter racist comments? The answer is usually “yes.” Indeed, for Lee Bollinger, the decision to tolerate a hate speaker in a specific instance serves as proof of the society’s tolerant nature.¹²⁰

Rose takes a different perspective. Instead of concentrating on the harm posed by speech, he focuses on the speaker. In a society like the Soviet Union, fear became so enshrined that words become “dangerous” and people become afraid to speak.¹²¹ Rose uses his Soviet experience in two ways. First, he uses it to create a general explanation of why freedom of speech is essential.¹²² Second, he uses Cold War-era arguments against Soviet sympathizers in the West to buttress his core theory of speech protection.¹²³ We will take up each point in turn.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. See BOLLINGER, *supra* note 67.

121. To be fair, Rose’s focus on the danger of speaking is somewhat similar to the language used by Justice Brandeis in his *Whitney* concurrence in which he praises Americans for having “eschewed silence coerced by law.” *Whitney v. California*, 274 U.S. 356, 375-76 (1927) (Brandeis, J., concurring). But for Brandeis, the brave act is a social one—to “eschew silence” American citizens enacted free speech protections into the Constitution. *Id.* By contrast, Rose’s heroism is that of the individual, who faces danger whenever he or she speaks. This is consistent with Gustavsson’s characterization of Rose’s free speech theory as “romantic.” See Gustavsson, *supra* note 3, at 10–11.

122. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

123. *Id.*

Soviet-style censorship, however deplorable, does not immediately suggest a reason for protecting speech. The Soviet Union is long gone. Even the most robust European welfare state falls short of Soviet-style repression. This poses a potential challenge to Rose's use of his Soviet experience.

Not surprisingly, Rose responds to this challenge on a personal level. Just as Soviet citizens feared to speak, so has he.¹²⁴ Describing his post-cartoon controversy experiences to Salman Rushdie, Rose explained how "unpleasant" it was "to hear your own story told without ability to comment."¹²⁵ He realized the solution when he heard Rushdie say on television that "man" is "a story-telling animal" and "the ability to tell one's own story is an existential right."¹²⁶ Rose, following Rushdie, explained how:

[A]ny attempt to limit the story-telling impulse is not merely censorship, or infringement upon a political right to freedom of speech; it is an act of violence against human nature, an existential assault that transforms man into something he is not.¹²⁷

On one level, this is similar to arguments that defend speech based on personal autonomy.¹²⁸ But Rose goes a step further. Not only does he view "any" speech restriction as "an act of violence against human nature," but he also has a concrete Soviet-inspired example of what this looks like.

Here, Rose's Cold War arguments come into play. Rose describes the "closed society," in Soviet terms, as a place where the government dictates history and those who challenge the official account of history face "censorship, imprisonment, or elimination."¹²⁹ In defending his position, Rose warns against those who argue that toleration of speech is a "cultural" is-

124. *Id.*

125. Rose added that the experience "felt like an assault." *Id.* One wonders how Rose would respond to American critical race theorists, like Charles Lawrence and Mari Matsuda, who argue that the victims of hate speech face silencing. See WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari Matsuda et al. eds., 1993).

126. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

127. *Id.* (emphasis added).

128. See C. Edwin Baker, *Autonomy and Hate Speech*, in EXTREMIST SPEECH AND DEMOCRACY 139 (James Weinstein & Ivan Hare eds., 2009).

129. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

sue.¹³⁰ While conceding that some cultures are more individualistic while others are more collective, Rose warns against following the example of the “self-knowledge” school, “which advocated that scholars describe and analyze the oppressive regime on its own terms.”¹³¹ These scholars, in the name of cultural relativism, marginalized the Soviet civil rights movements and presented the dissidents as pawns of the Western powers.¹³²

This leaves Rose with a contrast. In free societies, people can “tell and retell our own and other people’s stories”—all topics are open for public debate.¹³³ The resulting “exchange of ideas” can move history forward.¹³⁴ As examples, he discusses how “challenges to the conventional wisdom” hastened the demise of American slavery, National Socialism in Germany, and Communism in the Eastern Bloc.¹³⁵ By contrast, once one begins “limiting and controlling certain expressions” one is “only discussing what level of un-freedom” is acceptable.¹³⁶ Put more bluntly, societies that censor speech are taking steps toward Soviet totalitarianism.

To buttress his argument, Rose draws a connection between Islam and Soviet Communism. For example, he sees “parallels” between Soviet dissidents and dissenters against Islam.¹³⁷ Like the earlier dissidents, opponents of Islam play a critical role in making sure that the West lives up to its values.¹³⁸ On a personal level, the Islam-Soviet connection helps Rose justify his own actions while assuring his place in history. He published the Danish cartoons as a response to self-censorship, just like the dissidents who helped bring down the Berlin Wall.¹³⁹

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Interestingly, Rose makes no reference to Oliver Wendell Holmes’s marketplace of ideas metaphor here.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. The Islam-Communism connection also has a biographical element. Rose adopted his views about a possible connection between Islam and Communism while covering the Chechen wars of the 1990s as a reporter. As a good anti-Communist, his initial sympathy was with the Chechens, but this later changed. See Kahn, *Flemming Rose*, *supra* note 1, at 259.

D. Rose's Call to Abolish "Insult Taboos"

As we have seen, Rose draws heavily on his experiences in the Soviet Union to establish that silencing is dangerous, given the human need to speak. When faced with what he sees as the new Soviets—radical Islam, the Organization of Islamic Countries (“OIC”) and its defenders—Rose is on fairly comfortable ground. He can refer to the Soviet past and explain the importance of speaking out, and he has a ready-made argument against censorship. But Rose’s argument is limited in scope. It would ban blasphemy laws, especially with draconian penalties one often finds in a majority of Muslim countries, but it would appear less effective as an argument against the garden variety hate speech laws one finds in Europe.¹⁴⁰

But Rose’s support of free speech does not stop at preventing radical Islamists from cowering dissenters into silence. He takes the position that “any” restriction on speech leaves speakers (and the larger society) un-free.¹⁴¹ In its near-absolutism, this argument has an American feel to it. But Rose does not rely on the harmlessness of the speech, or the positive role speech played in the American movement for civil rights.¹⁴² Instead, Rose centers his argument on multiculturalism and political correctness.¹⁴³

Rose begins with a choice faced by modern societies in which people of different cultures live and work together in close proximity.¹⁴⁴ A society committed to equality could make an agreement to ban all offensive speech. The logic of this arrangement is clearly stated: “If you respect my taboos, I’ll respect yours.”¹⁴⁵ This solution, however, risks spiraling out of control. Once one starts banning Holocaust denial, crimes against Communism, or disrespectful cartoons about the

140. While one can oppose European hate speech laws on the merits, their existence does not make France, Germany, or Denmark a totalitarian state. For more on European hate speech laws, see ERIK BLEICH, *THE FREEDOM TO BE RACIST?: HOW THE UNITED STATES AND EUROPE STRUGGLE TO PRESERVE FREEDOM AND COMBAT RACISM* 17–43 (2011).

141. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

142. For more on the argument that the civil rights movement sparked an expansion of freedom of speech in the United States, see WALKER, *supra* note 35, at 14–16.

143. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

144. *Id.*

145. *Id.*

prophet, where does one end?¹⁴⁶ There is only one way to avoid the chaos from mutual insult taboos—namely, an understanding that “in a democracy no one can claim the right to be not offended.”¹⁴⁷

This has some overlap with the American accounts of speech. Rose’s concern about where to stop after banning Holocaust denial, crimes against Communism, and offensive cartoons is a classic slippery slope argument.¹⁴⁸ His point about no one having the right not to be offended is very close to Volokh’s own response to the Danish cartoons—the fact that “I’m offended” is not a good enough reason to ban a speech act.¹⁴⁹

On the other hand, Rose places great emphasis on jokes. He begins with the idea that no group in a democracy has the “exclusive” right to tell stories about itself.¹⁵⁰ In fact, he imagines something close to a free-for-all. In a democracy:

Muslims have the right to tell jokes and critical stories about Jews; non-believers can skewer Islam anyway they like. Danes may mock Swedes and Norwegians, whites can joke about blacks, and blacks can joke about whites.¹⁵¹

To do otherwise is “simple-minded” and “harmful.”¹⁵² He then asks whether practices like female circumcision and forced marriage should be above criticism because they are only practiced by a minority.¹⁵³

This line of argument is noteworthy in several respects. First, it goes beyond the slippery slope argument in the way it assigns a positive value to joking. Criticism plays an important role for Rose. In addition to helping to curb objectionable social practices, it avoids “ghettoization” and makes it easier to communicate with others.¹⁵⁴ As Rose puts it, in an open society it is

146. *Id.*

147. *Id.*

148. The fear that restriction of a narrow category of speech will lead to other, broader restrictions is also a staple of Lee Bollinger’s fortress model of speech protection. See BOLLINGER, *supra* note 67, at 76–103.

149. Eugene Volokh, *The Twelve Cartoons in Detail*, VOLOKH CONSPIRACY (Mar. 10, 2006), <http://www.volokh.com/2006/03/10/the-twelve-mohammed-cartoons-in-detail/>.

150. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

much harder to maintain that an idea is “evil, perverse, or insane, unless that’s truly the case.”¹⁵⁵ The closest American parallel is Lee Bollinger’s point that tolerating offensive speech creates an ability in society to tolerate more speech.¹⁵⁶ But Rose goes even further—he sees insults as improving the quality of the discussion by fostering a climate of inclusiveness.¹⁵⁷

In this regard, Rose’s defense of joking may owe something to the Danish tradition of satire he mentioned in his earliest defenses of the cartoons.¹⁵⁸ He argued—unconvincingly to many—that the cartoons would have the impact of integrating Muslims by including them in a national culture of joking.¹⁵⁹ As I pointed out in another article a few years ago, there is some evidence that informal joking and teasing do indeed play a role in Danish culture.¹⁶⁰

If this reading of Rose is correct, it says something about how theories of free speech get created. By hook or crook, he has become connected with a major twenty-first century freedom of

155. *Id.*

156. See BOLLINGER, *supra* note 67, at 237–49. The focus on the positive value of public criticism and debate for a democratic society also bears some similarity to Justice Brennan’s argument in *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide open.”).

157. To continue the comparison with Justice Brennan’s opinion in *Sullivan*, Brennan sees the public value in a “robust” debate, but Brennan limited himself to public officials, hardly a minority group. Brennan also seems to lack Rose’s faith in the power of public teasing to foster an atmosphere of inclusiveness. In this regard, Brennan’s opinion calls for a Dworkinian trade-off: public officials enduring offensive speech so that society as a whole will have a more open debate on public issues. See Dworkin, *supra* note 71, at 46.

158. For example, Rose raised the satire point during a CNN interview at the start of the controversy. Kahn, *Flemming Rose*, *supra* note 1, at 263.

159. For the failure of these arguments to win over American supporters, see *id.* at 268–78.

160. See Kahn, *Flemming Rose*, *supra* note 1, at 279–82. My article traces back Rose’s inclusiveness argument to two Danish norms. The first is *hygge*—the idea of social informality and social teasing, something that has been described as an adaptation to the lonely Scandinavian nights. *Id.* at 280–81 (discussing STEVEN M BORISH: THE LAND OF THE LIVING: THE DANISH FOLK HIGH SCHOOLS AND DENMARK’S NON-VIOLENT PATH TO MODERNIZATION (1991)). The second idea, egalitarian uniformity (*folkelighed*), expresses the goal of teasing: to keep the “talented” in their place by pressing the message that nobody is better than anyone else. *Id.* at 282–83. Taken together, these ideas raise a specifically local, albeit partial explanation for why the cartoons controversy took place in Denmark.

speech controversy. In defending himself, Rose has relied on a specifically Danish way of viewing jokes and insults.¹⁶¹ As such, the Danish concept of social teasing will gain from Rose's fame (or notoriety). This complicates efforts to view the debate over hate speech policy as moving in a single direction toward a common, global set of policies.

E. Speech Restrictions and the Nazi Rise to Power

Opponents of hate speech laws often discuss the Nazi past.¹⁶² There are good reasons for this. In the aftermath of the Holocaust, restrictions on hate speech laws have been premised, in part, on a revulsion against Hitler's crimes.¹⁶³ The argument can be stated broadly—"Words can lead to deeds"—which focuses the concern on Nazi speech in general. Or one can make a narrower argument—the lax enforcement of speech restrictions during the Weimar Republic facilitated the Nazi rise to power. The latter argument was relied on by Karl Loewenstein, who used it to justify his militant democracy theory.¹⁶⁴

American proponents of speech protection have also taken up the Nazi past. They have tried a variety of responses. For example, Ronald Dworkin, opposing Holocaust denial laws, simply balanced the Nazi harm against freedom of speech—the latter calls for sacrifices, even those that "really hurt."¹⁶⁵ Another set of arguments focus on the passage of time. Criticizing Holocaust denial laws, Peter Teachout asks whether such laws are necessary sixty years after Nuremburg.¹⁶⁶ Finally, some writers, like Aryeh Neier, noting the presence of hate speech bans during the Weimar Republic, took up the causal question directly—given these bans, how can the rise of the Nazis be blamed on freedom of speech?¹⁶⁷

161. Kahn, *Flemming Rose*, *supra* note 1, at 280–82.

162. For examples of free speech advocates who take this step, see Teachout, *supra* note 17, at 689–92; Dworkin, *supra* note 71, at 46.

163. For an overview, see Cyril Levitt, *Under the Shadow of Weimar: What Are the Lessons for the Modern Democracies*, in UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENTS IN SIX COUNTRIES 15 (Louis Greenspan & Cyril Levitt eds., 1993).

164. See Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417 (1937).

165. Dworkin, *supra* note 71, at 46.

166. See Teachout, *supra* note 17, at 689–92.

167. ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 160–68 (1979).

As someone who called in Israel for the open publication of *Mein Kampf*,¹⁶⁸ Rose had to respond to these arguments. And respond he did—but in a quite novel way. When explaining how it was wrong to let only members of a given minority group tell jokes about themselves, he used the Nazis as an example of a “persecuted and marginalized minority.”¹⁶⁹ To be sure, Rose is no Holocaust denier. His “Words and Deeds” piece is devoted to exploring the relationship between hate speech and the Nazi crimes against the Jews.¹⁷⁰ But the reference to Nazis as “a persecuted and marginalized minority” is bizarre.

To put this in American terms, does anyone refer to the Ku Klux Klan as a “persecuted minority?” Or consider the Skokie affair. It led to a wave of resignations from the ACLU.¹⁷¹ All of this occurred even though Frank Collin, the leader of the Nazi band who wanted to march in Skokie, was dismissed by many at the time as an attention seeker, a puny anonymity rather than a Nazi threat.¹⁷² Despite this, the Seventh Circuit, upholding Collin’s right to protest, did not refer to the Nazis as a “persecuted . . . minority.”¹⁷³ Instead, it expressed regret that, despite “several thousand years of attempting to strengthen the often thin coating of civilization,” there would be those “who would resort to hatred and vilification.”¹⁷⁴

Rose also has some unusual things to say about the Nazi rise to power. In his “Words and Deeds” article, Rose makes a number of telling arguments against the position that freedom of speech facilitated the Nazis.¹⁷⁵ For example, he argued that even though those who “defended the offended could adorn themselves with halos of justice,” prosecutions actually gave Nazis such as *Der Stürmer* editor Julius Streicher “a glorious opportunity to bait the Jewish community in the German courtrooms and in a national press, which otherwise would

168. See Kahn, *Flemming Rose*, *supra* note 1, at 265.

169. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

170. Rose, *Words and Deeds*, *supra* note 25.

171. For a discussion of the conflict within the ACLU, see DAVID HAMLIN, *THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE* (1980) (Hamlin was the executive director of the Illinois American Civil Liberties Union chapter during the Skokie affair).

172. See Kahn, *Cross-Burning*, *supra* note 57, at 169–71.

173. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3; *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

174. *Collin v. Smith*, 578 F.2d at 1210.

175. Rose, *Words and Deeds*, *supra* note 25.

have spared them precious little ink.”¹⁷⁶ He also noted how Weimar courts issued narrow interpretations of the law against religious incitement—for example, by treating anti-Semitic propaganda as targeting Jews as a “race” and therefore falling outside the scope of the law.¹⁷⁷ To buttress his points, Rose referred to American and Canadian participants in this debate, such as historian William Showalter and Alan Borovoy, then leader of the Canadian Civil Liberties Association.¹⁷⁸

But Rose reached an unusually broad conclusion. Instead of simply rejecting the premise that Nazi hate speech paved the way for the Holocaust, Rose turned it on its head: “In fact, one might forcibly argue that what paved the way for the Holocaust was the *ban* on hate speech.”¹⁷⁹ This statement is ambiguous. Read the wrong way, it can be seen as transferring some of the blame for the Holocaust from the Nazis to supporters of Weimar-era hate speech bans, a group that doubtless included some Jews.

Other parts of the article reflect Rose’s Soviet experience. For example, he started a section of the article, titled “Nazi Germany and free speech,” by discussing how in the Soviet Union, “the machinery of propaganda vanished away nationalism.”¹⁸⁰ He went on to describe Hitler’s Germany as a “tyranny of silence,” under which “no freedom existed to counter the witch-hunt against the Jewish community.”¹⁸¹ However reasonable this description is of speech restrictions in Hitler’s Germany, which grew draconian as the Second World War progressed,¹⁸² the phrasing is odd. Was censorship—even Hitler’s—an important causal factor behind the Holocaust? One gets the sense that Rose is stretching his *samizdat* free speech theory beyond its comfort zone.¹⁸³

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* (emphasis in original).

180. *Id.* (emphasis added).

181. *Id.*

182. See INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 140–52 (1991) (describing how the People’s Court would extract harsh punishments—including the death penalty—for the expression of defeatist sentiments).

183. To raise another point about Rose’s treatment of the Nazi past, in his book Rose explains how “a particular interpretation of *the prelude to the Second World War in Europe*” is “affecting [hate speech] legislation all over the

Overall, Rose's foray into the Nazi past was a strange one. He made a larger argument than he needed to carry his point (i.e., hate speech bans, rather than being ineffective, helped cause the Nazi seizure of power) and sought to remake the Nazi past in the image of Soviet repression.¹⁸⁴

F. Where Does America Fit In?

To summarize, Rose's theory of freedom of speech departs from the classic American free speech story in several respects. His account is unduly personal, and after some temptation, Rose rejects the skepticism so characteristic of the American free speech canon.¹⁸⁵ Instead, Rose relies on his experiences in the Soviet Union to create an account that emphasizes the harm censorship poses to the speaker, rather than the harm the tolerated speech poses to society.¹⁸⁶ According to Rose, *any* restrictions on speech leave the speaker—and society—less free.¹⁸⁷ Rose combines this with a confidence in the power of jokes, insults, and good-natured teasing to advance social change, something he may draw from Danish political culture.¹⁸⁸ Finally, faced with the Nazi example—a hurdle present for Europeans who oppose hate speech laws—he falls back on his anti-Soviet theory of speech protection.¹⁸⁹ The period to be concerned with is not the Nazi rise to power, it is the “tyranny of silence” that ensued after 1933.¹⁹⁰

America figures very little into all of this. For someone who was a staple on CNN at the height of the cartoon controversy,¹⁹¹ this is odd. One can speculate on reasons for this. Was Rose disappointed in the failure of most American papers to run the Danish cartoons? Or was his theory of free speech

globe.” Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3 (emphasis added). Rose's choice of language hearkens back to the Nuremberg trials when the evil of the Holocaust was not viewed separately from Germany's responsibility for starting the Second World War.

184. In *The Tyranny of Silence*, Rose deals with the Weimar example in a more measured way. According to Rose, the Republic failed to enforce the laws it had. Moreover, “evil deeds, not evil words” toppled the Republic. *Id.*

185. *See supra* Parts II.A, II.B.

186. *See supra* Part II.C.

187. *See supra* Part II.D.

188. *Id.*

189. *See supra* Part II.E.

190. *Id.*

191. Kahn, *Flemming Rose*, *supra* note 1, at 263–64.

largely in place before he came to “symbolize a much greater set of issues?”¹⁹² Or does this say something about how free speech theories—like political theories more generally—are inherently grounded in the identity of the nation, ethnic group, or society that holds them? To put it another way, is the real problem one of expecting—from an American perspective—that Rose would mention Oliver Wendell Holmes, the marketplace of ideas, or Justice Brandeis’s concurring opinion in *Whitney v. California*?¹⁹³

But before drawing larger conclusions, let us focus on what Rose does draw from the United States. Some of Rose’s arguments could have been presented in classic American terms. For example, his discussion of insult taboos could be worked into a slippery slope argument (or something akin to Lee Bollinger’s fortress model).¹⁹⁴ Rose also comes close to the marketplace of ideas theme, especially when describing how fulsome discussions brought down Nazi Germany, Soviet Russia, and American slavery.¹⁹⁵ There would have been more comparisons, perhaps, had Rose gone with his passing comments about the role of doubt in justifying freedom of speech.

However, the excerpt from *The Tyranny of Silence* contains only one explicit reference to the free speech canon. Early on in the excerpt Rose commends the American “tradition of upholding absolute freedom of expression” to his European readers:

Faced with growing diversity, Europe has recently tended to increase restrictions on the freedom of expression; the majority of the laws criminalizing the denial of the Holocaust have been passed since the fall of the Berlin Wall. The United States, with its tradition of upholding absolute freedom of expression, stands more and more alone on this issue. In my

192. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

193. Maybe Rose is uncomfortable with American canons, the rejection of McCarthyism, and the Cold War framing that goes with it. Consider Harry Kalven Jr.’s observations that, for the Supreme Court, the Cold War ended in 1957. KALVEN, *supra* note 39, at 211. How appealing can this be for Fleming Rose who, in his own way, is still fighting the Cold War today?

194. For more on Rose’s use of slippery slope arguments, see Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3; see also BOLLINGER, *supra* note 67, at 76–103.

195. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

opinion, Europe should learn more from our friends on the other side of the Atlantic.¹⁹⁶

On one level, the message here is fairly straightforward—Europe should become more like the United States and adopt “absolute freedom of expression.” One wonders, however, why in the excerpt of *The Tyranny of Silence*, there is little else on offer.¹⁹⁷

By mentioning Europe’s growing diversity, Rose draws a contrast with an already diverse America.¹⁹⁸ In an earlier *Spiegel* article, Rose struck a similar tone. In the article, he described a visit to Brighton Beach where he encountered a “burgeoning, bustling, and altogether vibrant Russian immigrant community” and marveled at “America’s ability to absorb newcomers”—something Europe apparently lacked.¹⁹⁹

Rose is also a fan of American rock music. To be sure, in his *Spiegel* article he called John Lennon’s *Imagine* “beautiful but stupid”²⁰⁰—a reflection perhaps of his experiences in the Soviet Union. But he started a heading of *The Tyranny of Silence* excerpt, titled “Satire and Mass Murder,” with quotations from Bob Dylan and Bruce Springsteen songs.²⁰¹

Despite this, Rose has kept his distance from American *legal* culture. Perhaps the marketplace of ideas is less pithy than Bruce Springsteen. Perhaps it reflects unease with the classic American world view of freedom of speech. Or perhaps, unlike the dominant global position of American rock and roll music, in the worldwide discussion over freedom of speech Holmes,

196. *Id.*

197. Let me reiterate that my comments are based on the English-language excerpt on Rose’s website. There may well be more discussion of the United States in the yet to be translated part of his 528 page book.

198. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

199. Rose, *Why I Published the Muhammad Cartoons*, *supra* note 13. Interestingly, Rose mentions American slavery as one of the three systems of evil brought down by the power of free speech. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3.

200. Rose, *Why I Published the Muhammad Cartoons*, *supra* note 13.

201. Rose, *The Tyranny of Silence (Excerpt)*, *supra* note 3. The Bob Dylan lyrics Rose used were: “Never been’ able to separate the good from the bad/ Ooh, I can’t stand it, I can’ stand it /It’s making me feel so sad.” From Bruce Springsteen, Rose quoted: “I woke up this morning to an empty sky.” *Id.* Likewise, Rose’s website promoting his book sports a quote from Simon & Garfunkel: “Fools, said I, you do not know, silence like a cancer grows.” *Id.*

Brandeis, and the rest of the American free speech canon are not the only game in town.

III. ROSE AND COMPARATIVE CONSTITUTIONAL THEORY

Rose's failure to rely on the American free speech canon in *The Tyranny of Silence* also has implications for how comparative law scholars look at the global discourse over areas of legal doctrine such as freedom of speech. One of the leading theories, neo-functionalism, takes the position that "the relevant unit of analysis is not a geographic entity, such as a country or region . . . but rather the problem and its legal solution."²⁰² The goal of comparative analysis is to solve a doctrinal question—such as when to ban hate speech.²⁰³ For neo-functionalists, there is no other reason to turn to foreign law. In the words of comparative scholar Rudolph Jhering: "The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need."²⁰⁴

One could avoid the theoretical issue by simply concluding that the American canon was not "useful" for Rose. As Jhering puts it, "No one bothers to fetch a thing from afar when he has one as good or better at home."²⁰⁵ This possibility, that the American speech canon is not "useful," can help counter the tendency of Americans to view the First Amendment as the panacea to all the world's problems.²⁰⁶

But what if the American canon in fact does contain at least *something* useful to Rose? Neo-functionalism starts from the premise that people are rational actors who seek the "best" solution to their legal problems—be it abolishing the death pen-

202. Teitel, *supra* note 21, at 2574.

203. Over time, comparative analysis will lead to a "significant degree of congruence between problems and their possible solutions." *Id.* at 2576 (quoting NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASE AND MATERIALS* 8 (2003)).

204. *Id.* at 2575 (quoting Rudolph Jhering) (internal citations omitted).

205. *Id.*

206. This tendency was especially strong after the fall of the Berlin wall. For example, A.E. Dick Howard, reading through the constitutions of the "fledgling democracies" of "Central and Eastern Europe," argued that "the United States Constitution and Bill of Rights are widely recognized as furnishing paradigms of the fundamental principles that define constitutional democracy." A.E. Dick Howard, *How Ideas Travel: Rights at Home and Abroad*, in *CONSTITUTION MAKING IN EASTERN EUROPE* 14–15 (A.E. Dick Howard ed., 1993).

alty for juveniles, extending gay rights, or protecting freedom of speech.²⁰⁷ The good lawyers join hands across the world—or at least across the democratic world²⁰⁸—to solve common problems. Rose's memoir complicates this picture. He ignored a potentially useful interpretive frame of reference.

While neo-functionalists insist on leaving out “nationality,” is it possible that considerations of national identity helped to explain Rose's rejection of a “foreign” model of speech interpretation? One can see echoes of national identity in the debate over the global protection of hate speech dominated by an unwillingness of Americans to adopt European theories of hate speech regulation and vice versa.²⁰⁹

For example, Hungarian scholar András Koltay called Lee Bollinger's argument that allowing hate speech makes a society more tolerant a “brave and genuine *American* theory.”²¹⁰ Koltay added that such a theory may flourish “in the homeland of two hundred years of uninterrupted constitutional development” but that “the European eye looks at it as a curiosity.”²¹¹ One sees something similar in Canadian complaints about American First Amendment “romanticism.”²¹² These two incidents can be viewed as resistance to an Americanization of free

207. See Teitel, *supra* note 21, at 2577–78. Here Teitel is justly critical, accusing the neo-functionalists of assuming “[a] shared understanding of the aims of constitutionalism that has not yet emerged.” *Id.* at 2576.

208. *Id.* at 2592.

209. This dynamic works in two ways. First, the stories and narratives that accompany legal doctrines like the American free speech canon are a source of shared identity, creating an imagined community in which Americans across the country know what free speech is. In this regard, the First Amendment canon is an expression of national identity, no different from a monument, museum, or public park. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 163–80 (rev. ed. 1991) (describing how maps, census data, and museum icons hold a much broader “imagined community” together). Second, members of a given community will reject what they perceive as alien legal doctrines as a way of distinguishing themselves from other groups. See Fredrik Barth, *Introduction*, in *ETHNIC GROUPS AND BOUNDARIES* 9, 15–16 (Fredrik Barth ed., 1969).

210. ANDRÁS KOLTAY, *FREEDOM OF SPEECH: THE UNREACHABLE MIRAGE* 13 (2013) (discussing BOLLINGER, *supra* note 67) (emphasis added).

211. *Id.*

212. See Robert A. Kahn, *Hate Speech and National Identity: The Case of the United States and Canada* 16–17 (Univ. of St. Thomas Legal Studies Research Paper No. 08-02, 2008) (citing Alan Borovoy et al., *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 17 *BUFF. L. REV.* 337, 353–54 (1987)).

speech discourse, and Rose's arguments can be viewed as a third.

This leads to a second point. Rose did not simply ignore the American speech canon. He also relied on his experience in the Soviet Union and his conversations with Salman Rushdie.²¹³ These are not Danish sources, but they are not American either. This raises a second problem with comparative constitutional theory. In critiquing the neo-functionalists, Teitel calls for a "dialogic" approach to the study of comparative constitutional discourse.²¹⁴ The new approach involves moving from "diffusion and reception" of legal ideas to "dialogue" that "is not bound in path-dependent or hierarchic ways."²¹⁵

On one level this is encouraging. Teitel rightly charges neo-functionalism with "abstract[ing] problems from their particular contexts to arrive at a constitutionalism hardly identifiable with politics or place."²¹⁶ But for Teitel the dialogic approach is still "normative"—her goal is "global solidarity," which will create "cosmopolitan effects" that may "transcend" individual states.²¹⁷ In the area of human rights, the dialogue will render a "universal law of humanity," what she calls "the culmination of comparativism."²¹⁸

If Rose were interested in "global solidarity," he could have built a theory of free speech that rested at least partly on the American free speech canon. But he did not. Indeed, his emphasis is on the story-teller who is propelled by human nature to fight self-censorship.²¹⁹ This is quite different from the American free speech ethos, which views tolerating offensive speech as an act of restraint and suggests that there is more than one way of defending freedom of speech.²²⁰ The gap between Rose's theory and the American norm highlights the competitive nature of speech claims—one already evident in

213. ROSE, THE TYRANNY OF SILENCE, *supra* note 3.

214. Teitel, *supra* note 21, at 2584–87.

215. *Id.* at 2586.

216. *Id.* at 2577.

217. *Id.* at 2586–87.

218. *Id.* at 2593.

219. ROSE, THE TYRANNY OF SILENCE, *supra* note 3.

220. BOLLINGER, *supra* note 67, at 243.

the heated debates about the competing rationales for protecting speech.²²¹

Of course, Rose is not merely a free speech theorist; he is also a participant in a global dispute. When one combines this with the global outrage that accompanied the publication of the Danish cartoons, one would be tempted to dismiss Rose.²²² But this does not do justice to the scope of issues Rose covers in his book and the depth of his thought. Nor is Rose alone. The conception of human nature that underlies his theory draws heavily from Salman Rushdie.²²³ Rather than wishing Rose's theory away, the more intellectually honest course is to accept that there are multiple theories of speech protection, all of which are competing with each other in an increasingly well-connected world.²²⁴

221. See generally KOLTAY, *supra* note 210, at 3–18 (describing rationales for protecting speech based on truth-seeking, democratic legitimacy, and personal autonomy).

222. Jytte Klausen, writing as the controversy reached its peak, was dismissive of Rose, describing the cartoons as a “gag, the kind you do when the news was slow.” See Jytte Klausen, *Cartoon Jihad—Rotten Judgment in the State of Denmark*, SPIEGEL ONLINE (Feb. 8, 2006), <http://www.spiegel.de/international/cartoon-jihad-rotten-judgment-in-the-state-of-denmark-a-399653.html>. Others saw the cartoons as part of a broader anti-Muslim sentiment brewing in Denmark. See Robert A. Kahn, *The Danish Cartoon Controversy and the Exclusivist Turn in European Civic Nationalism*, 8 STUD. ETHNICITY & NATIONALISM 524, 528–30 (2008) (describing the political climate in which the Danish cartoons ran).

223. In a 2012 speech in Delhi, Rushdie defended speech in language very similar to Rose. See Alison Flood, *Salman Rushdie Defends Freedom of Speech in a Rousing Address in Delhi*, GUARDIAN, Mar. 27, 2012 (describing the “human being” as a “language animal” and describing censorship of any kind as an “existential crime”).

224. Indeed, the Rose-Rushdie position on speech, with its emphasis on the human need to tell stories, could challenge the standard accounts of speech based on truth, democratic deliberation, and personal autonomy, especially given the Rose-Rushdie emphasis on the role of the artist in society. Another feature is how—in both the Danish cartoon and *Satanic Verses* controversies—the expressive act becomes an iconic text whose public display is itself a symbol of freedom of speech. Thus, when Kurt Westergaard, the author of the turban cartoon, was attacked, one response was to re-run the Danish cartoons. *Newspapers Reprint Prophet Mohammed Cartoon*, CNN (Feb. 13, 2008), <http://www.cnn.com/2008/WORLD/europe/02/13/denmark.cartoon>. Likewise, after a Rushdie event was cancelled in Delhi, his supporters engaged in a public reading of *The Satanic Verses*. See Flood, *supra* note 223.

Likewise, Teitel misses this element of conflict and uncertainty when she writes that “comparativism offers the potential for global solidarity” and that comparative constitutionalism can “interrogate[] foreign mores as a step in the pursuit of universal morality.”²²⁵ Are “global solidarity” and “universal morality” always worthy goals? What if, for example, the “universal morality” imposes a ceiling on rights rather than a floor? Consider, for example, the question of banning Holocaust denial. In 2008, the European Union adopted a framework decision requiring that member states ban Holocaust denial, thereby expanding a ban that may make sense in France, Germany, and Austria to other countries where Holocaust denial is less of a problem.²²⁶ The Europe-wide directive is a move toward a universal norm, but this does not necessarily mean it is a good decision.²²⁷

The global discourse over free speech is best seen as a rough and tumble argument. There may well be areas—such as the death penalty for juveniles—where there is evidence of convergence.²²⁸ And it is certainly legitimate to argue, as a normative matter, that the global debate over free speech should converge around a given set of norms, something Geert Wilders asserts when he calls for “[a] First Amendment for Europe”²²⁹—although this formulation still leaves Asia, Africa, and Latin

225. Teitel, *supra* note 21, at 2586, 2588.

226. For an overview, see Laurent Pech, *The Law of Holocaust Denial in Europe: Toward a (Qualified) EU-wide Criminal Prohibition*, in GENOCIDE DENIALS AND THE LAW 185, 186–87 (Ludovic Hennebel & Thomas Hochmann eds., 2011).

227. For example, Pech, after studying the law, concluded that “public authorities should . . . resist the enticing temptation to use the force of criminal law to ‘sanctify’ clearly established historical facts.” *Id.* at 234.

228. See ROGER HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 187–94 (2008).

229. See Geert Wilders, *The First Amendment Is What We Need in Europe*, GATESTONE INST. (May 1, 2012), <http://www.gatestoneinstitute.org/3042/geert-wilders-first-amendment>. Geert Wilders, an anti-immigrant Dutch politician, was tried and acquitted of hate speech charges. For more, see Robert A. Kahn, *The Acquittal of Geert Wilders and Dutch Political Culture* 1–3 (Univ. of St. Thomas Legal Studies Research Paper No. 11-31, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1956192. In future work I plan to take up the actual influence of First Amendment doctrine at the Wilders trial.

America out of the picture.²³⁰ But little insight is gained by pretending that the conversation as a whole is converging on a shared set of goals if this is not the case.²³¹ While all comparative study involves making simplifying choices, Teitel's emphasis on "solidarity" and "cooperation" leaves too much out of an unwieldy, raucous conversation—at least in the area of hate speech regulation. Despite her stated desire to move away from the static neo-functional method, her dialogic approach amounts to neo-functionalism in new clothing.

CONCLUSION: THE LIMITS OF CONVERGENCE

Born in Denmark, enamored of the Soviet Union—until he tried to live there—and then the subject of global outrage after he published twelve cartoons of the Prophet Mohammed, Flemming Rose was shaped by his experiences. The same applies for the theory of freedom of speech he developed in *The Tyranny of Silence*. He compared himself to Soviet dissidents, not Holmes and Brandeis; he borrowed Salman Rushdie's view of "man" as a story-telling animal against whom any speech restriction was an "existential insult," implicitly rejecting Justice Holmes's view of the speaker as a "puny anonymity." And when he sought to explain the benefit of toleration for society as a whole, he fell back on the Danish tradition of satire, not Lee Bollinger's genuinely "American" argument that toleration is good for the social fabric of the country.

This leads to two larger conclusions. First, global theories of comparative constitutional interpretation—while extremely helpful to conceptualize issues—can only go so far in explaining why people living in a given society support or oppose hate speech bans. Personal experience and local culture also play a role. So, in this regard, the functionalists are wrong to disre-

230. See, e.g., Tanya Kateri Hernandez, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 UNIV. PENN. J. INT'L. LAW 805, 805–06 (2011) (describing how discussions of hate speech regulation often ignore Latin America).

231. To her credit, Teitel recognizes that in some doctrinal areas, such as criminal procedure, "the normative desirability of . . . convergence is debatable" because of "stark differences in legal cultures and political traditions." Teitel, *supra* note 21, at 2594. On the other hand, do these "stark differences" necessarily play any less salient of a role in the protection of other human rights?

gard nationality (and more generally place) in accounting for which legal doctrines triumph in a given legal system. To put it another way, lawyers are people too—they will select ideas not simply because they are useful, but because they like them. What they like will be influenced by culture.

The turn to national identity theory would return comparative law to its late nineteenth-century origin, a time of radical nationalism.²³² This early comparative theory was faulted as “static,” “descriptive,” and “Eurocentric.”²³³ But there is a difference. The late nineteenth-century comparative lawyers saw “national laws as autonomous, static, incontrovertible entities”—a reflection of nation-states seen in the same way.²³⁴ By contrast, the modern identity theory is much more fluid. Anderson, instead of taking nations as given, views them as created by discursive practices.²³⁵ Likewise, Barth rejected the static, formalistic concept of identity, with a recognition that identity depends on boundaries and can change as the boundaries change.²³⁶ What is more, even from a neo-functionalist perspective, taking considerations of national identity into account will enrich doctrinal analysis by suggesting reasons why a given doctrinal perspective will be more “useful” (or at least more convincing) in one society or culture than in another.²³⁷

Second, the global marketplace of ideas is a competitive one. Dialogue is not simply about “global solidarity” that arrives at a “universal ‘law of humanity.’”²³⁸ Rather than leading toward a communitarian *Galaxia* that marks the end point of the Isaac Asimov *Foundation* novels,²³⁹ the global discourse over hate

232. See Colloquium, *Comparative Law: Problems and Prospects*, 26 AM. U. INT'L L. REV. 935, 942 (2011).

233. *Id.* at 942–43.

234. *Id.* at 942; see HUGH SETON-WATSON, NATIONALISM OLD AND NEW (1965).

235. ANDERSON, *supra* note 209, at 6 (describing the nation state as an imagined community).

236. Barth, *supra* note 209, at 14–15.

237. For a discussion of the role of national identity theory in the international law context, see Robert J. Delahunty, *Nationalism, Statism and Cosmopolitanism*, 5 NW. INTERDISC. L. REV. 77, 129–36 (2012).

238. Teitel, *supra* note 21, at 2586–87, 2593.

239. Isaac Asimov's *Foundation* series explores a future in which humans settle the Milky Way Galaxy. The “foundation” is a plan to restore order to the galaxy after the collapse of the First Galactic Empire. *Galaxia* is an alternative plan in which individual humans become part of a single living or-

speech regulation is better seen as an endless discussion. During this discussion, some ideas will be dominant for a time; then they will be challenged and replaced by other ideas. And make no mistake, the American free speech canon has been very popular over the past half century. But Flemming Rose's ability to construct an extended defense of his decision to run the Danish cartoons without more than scarcely mentioning it raises doubts about the supposedly hegemonic position of the American canon in the global free speech debate. It also raises deeper doubts about whether free speech discourse will ever "culminate" in a hegemonic, universal singularity—a doctrinal black hole so powerful that divergent views no longer escape.²⁴⁰

ganism that encompasses all humans living in the galaxy. ISAAC ASIMOV, *FOUNDATION'S EDGE* 358–66 (Doubleday & Co. ed. 1982).

240. Even Asimov was uncomfortable with an end to all conflict. After having set the human convergence as the future of the Milky Way, Asimov, in the last ten pages of his final book, raises the possibility of an attack by a non-human species from beyond the galaxy. His point is mine—conflict, change, and uncertainty are an unavoidable part of human existence. ISAAC ASIMOV, *FOUNDATION AND EARTH* 344–56 (Doubleday & Co. ed. 1986).