


12-2-2016

Protecting Hatred Preserves Freedom: Why Offensive Expressions Command Constitutional Protection

Andrew P. Napolitano

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Jurisprudence Commons](#), [Law and Politics Commons](#), [Legal History Commons](#), [Legislation Commons](#), and the [Other Law Commons](#)

Recommended Citation

Andrew P. Napolitano, *Protecting Hatred Preserves Freedom: Why Offensive Expressions Command Constitutional Protection*, 25 J. L. & Pol'y (2016).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol25/iss1/6>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**PROTECTING HATRED PRESERVES FREEDOM:
WHY OFFENSIVE EXPRESSIONS COMMAND
CONSTITUTIONAL PROTECTION**

*Andrew P. Napolitano**

INTRODUCTION

The First Amendment is *not* the guardian of taste. Instead, the Constitution of the United States wholeheartedly protects freedom of thought and expression, even if generated and defined by hatred, as long as that expression does not produce immediate lawless violence.¹ Although free speech can often lead to tenuous

* Senior Judicial Analyst, Fox News Channel, 1998 to present; Distinguished Visiting Professor of Law, Brooklyn Law School, 2013 to present; Judge of the Superior Court of New Jersey, 1987 to 1995; Adjunct Professor of Law, Seton Hall Law School, 1989 to 2000; Visiting Assistant Professor of Law, Delaware (Widener) Law School, 1980 to 1981; A.B., Princeton University, 1972; J.D., University of Notre Dame, 1975. The author here records his gratitude to the staff and editors of the Brooklyn Law School Journal of Law and Policy for their efforts in putting together this article, and to his Research Fellow, Kimberly Sialiano, Esq., B.A., Lafayette College, 2009; J.D., Brooklyn Law School, 2014, for her invaluable contributions during its production.

¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). In this seminal First Amendment case, Clarence Brandenburg, a Klu Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for his speech at a Klan rally, in which he exclaimed, “[t]he Klan has more members in the State of Ohio than does any other organization. We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.” *Id.* at 446. An audience member expressed his bitter hatred for African-Americans and Jews, stating, “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.” *Id.* at 447. In its holding, the Supreme Court struck down the Ohio statute, which made it a crime to “advocate . . . the duty, necessity, or propriety” of crime, sabotage, violence, or terrorism as a means of “accomplishing industrial or political reform” and to “voluntarily assemble” with any society, group or assemblage of persons “formed ‘to teach or advocate the doctrines of

relationships and uncomfortable debates, it must be defended unconditionally, especially when it is purposefully intended to be hateful or offensive. Too many politicians² and lawmakers³ believe that the freedom of speech protected by the First Amendment attaches only to those ideas and expressions they approve of. This is not so.⁴ What our Founders intended, and what we so desperately

criminal syndicalism.” *Id.* at 448. In unanimously overturning the oppressive Ohio law, the Supreme Court created a distinct line between an “idea” (advocacy of violent or unlawful conduct) which is protected, and an “overt act” (intentional, imminent incitement of such conduct) which is not. *Id.* at 456. Essentially, *Brandenburg* stands for the proposition that all innocuous speech is absolutely protected; and all speech is innocuous when there is time for more speech to challenge it.

² Take for example, President Trump, who as a candidate openly advocated during his campaign rallies that if elected President he would loosen libel laws, and place temporary bans on media outlets if they continued to ask questions he didn’t like. Hadas Gold, *Donald Trump: We’re Going to ‘Open Up’ Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866#ixzz4LNKYJpZm> (quoting Donald Trump, “[I]f I win . . . I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they’re totally protected.”).

³ See Peter Roff, Opinion, *The First Amendment is Alive and Well*, U.S. NEWS (Sept. 12, 2016, 3:30 PM), <http://www.usnews.com/opinion/blogs/peter-roff/2014/09/12/the-first-amendment-is-alive-and-well-despite-harry-reids-efforts> (explaining former Senator Harry Reid’s (D-NV) attempt in 2014 to amend the First Amendment by “giving Congress the power to pass laws that determined what did and what did not constitute heretofore protected political speech,” thereby giving Congress the power to determine what speech is protected under the First Amendment based on what it considers acceptable); see also George Will, *Our Rights and His Wrongs*, WASH. POST (May 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/10/AR2006051001787.html> (discussing how the proposed McCain-Feingold campaign finance law abridges the freedom of speech by regulating the quantity, content, and timing of political speech, and the admission of Senator John McCain (R-AZ) that he would “rather have a clean government than one where . . . First Amendment rights are being respected”).

⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (discussing in the majority opinion, Justice Robert H. Jackson stated that, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

need now, is a commitment to defend offensive, even hateful speech—the speech of the deniers, the affronting, and the politically extreme. It is only in this manner, by having a political system that allows for completely unencumbered freedom of speech, with no caveats or qualifications, that we can have open and lively public debates. Despite Justice Hugo Black’s famous statement—“I read ‘no law abridging’ to mean no law abridging”⁵—the courts and the federal government have incorrectly banished much speech to a place outside the protection of the First Amendment. As a result, the Supreme Court’s decisions in several free speech cases have created what professor Laurence Tribe has called a “patchwork quilt of exceptions.”⁶

For this reason, I argue below that our Founders intended the free speech principle to generate a presumption against restricting any speech, even hateful speech, and that we must harken back to this norm. Plain and simple, hatred is protected under the

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”).

⁵ *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) (affirming the majority’s holding that an ordinance requiring a book store owner to be strictly liable for possessing or selling obscene material—meaning the owner had to know the contents of every book in the store—violated First Amendment rights). Where the majority “invalidate[d] the ordinance solely because it penalizes the bookseller for mere possession,” Justice Black advocated for a more decisive rule which reflected his view that “the First Amendment’s language leaves no room for inference that abridgements of speech and press can be made just because they are slight . . . ‘no law . . . abridging’ to mean *no law abridging*.” *Id.* (emphasis in original).

⁶ See LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 188–92 (1985) (describing what he says is the Supreme Court’s “inconsistent application of . . . First Amendment guarantees”); see also Andrew P. Napolitano, *Whatever Happened to Freedom of Speech? A Defense of “State Interest of the Highest Order” as a Unifying Standard for Erratic First Amendment Jurisprudence*, 29 SETON HALL L. REV. 1197, 1199 (1999) (describing the waning commitment by courts to act as the protectors of the speech liberties guaranteed to individuals and to the media by the First Amendment). It is of note, however, that in recent years the Supreme Court has refrained from creating additional categorical exceptions to the First Amendment. See *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (holding in light of the “content, form, and context,” the speech of several Westboro Baptist Church members picketing near the funeral of military service member involved matters of public concern and thus, no categorical exception to First Amendment protection for speech at or near a funeral was carved out).

Constitution. We all have the right to hate and the right to express our hatred, offend others, and disagree with our elected officials.⁷ Without that principle, we are left with the government controlling our thoughts and punishing the thoughts that it hates and fears. Ultimately, neither our representatives nor judicial system should seek to shut down seemingly hateful speech, leaving it unchallenged.⁸ Instead, as is underscored in *Brandenburg v. Ohio*,⁹ we should be left to refute it with better ideas, thereby enabling all persons to enjoy an environment that allows for individuals to discover truth, achieve personal fulfillment, and participate more meaningfully in our republican form of government.

Part I of this article provides background on the Founders' recognition that the freedom of speech is a right that all persons

⁷ It is important here to distinguish between hate speech, and hate crimes. The former can be loosely defined as speech that is an “incitement to hatred’ . . . primarily against [a person or] group of persons” based on group affiliation, such as race, gender, religion or ethnic origin. William B. Fisch, *Hate Speech in the Constitution Law of the United States*, 50 AM. J. COMP. L. 463, 463 (2002). The difficulty in actually defining this type of speech, however, is discussed below in Section III.B. On the other hand, hate crimes have been defined as illegal activities (such as trespassing or assault) that are “motivated by hatred based on group affiliation.” Richard J. Williams, Jr., *Burning Crosses And Blazing Words: Hate Speech and the Supreme Court’s Free Speech Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 609, 652 (1995) (citing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)). A hate crime statute may “criminalize[] manifested violence toward a person, persons or property based on bias toward race, religion, gender or some other group characteristic,” including defacement or destruction of property, and/or provide penalty enhancements. *Id.* at 637.

⁸ “Only in extremely limited circumstances—such as speech that is intended to incite a riot—can the government legally apply censorship to our speech.” Michael Schaus, *Judge Nap: NAACP’s Call to Prosecute Hate Groups Violates First Amendment – Hate Speech Is Protected*, BIZPACREVIEW (June 23, 2015) <http://www.bizpacreview.com/2015/06/23/judge-nap-hnaacps-call-to-prosecute-hate-groups-violates-first-amendment-hate-speech-is-protected-216986?>

⁹ See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (discussing how the passage of time for speech which challenges the hate speech dissipates the force of the hatred); see also Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 978 (2010) (explaining that “all speakers will be immune from legal liability unless the violent or illegal actions that they advocate occur precisely at the time of the speech. Any lapse in time between speech and action frees the speaker from the legal consequences of his or her advocacy”).

possess by virtue of our humanity, and not merely a right provided by the U.S. government. Part II defends the absolute right to free speech based on three different, yet related, philosophical ideals. Part III argues that the government should not make *any* effort to censor “hate speech” because such censorship would vest the government with the ability to determine what should and should not be considered “hate speech.” Since the U.S. government did not create the right to free speech, it cannot take away what it did not give.

I. “*THE*” FREEDOM OF SPEECH: THE FOUNDING FATHERS EMPHASIS ON OUR NATURAL, PREEXISTING RIGHT OF EXPRESSION

I have consistently argued that the text of the First Amendment speaks for itself: “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech.”¹⁰ Such language reveals that the authors of the Amendment recognized that *the* freedom of speech was a preexisting right, and thus comes from some source other than the Constitution or the government it created. The Amendment would convey an ambiguous meaning about the preexistence of the right of free speech were freedom not modified by “*the*.” This pre-Constitutional meaning cannot, however, be resolved by reference to the text alone; instead we must look to historical documents to help discern how free speech was understood in the early American republic, and evaluate the theory of natural rights.

The Framers’ reference to *the* freedom of speech implies that free speech was not a new concept, but a pre-political right that thus predated the government. That source of law emanates from human nature, whether you believe in an all knowing and all loving God or not. Stated differently, under the Natural Law theory, because all human beings individually yearn to be free from artificial restraint, our freedoms, including that of free speech, stem from our very humanity.¹¹ Since Natural Law posits that our right to freedom of

¹⁰ U.S. CONST. amend. I; see ANDREW P. NAPOLITANO, LIES THE GOVERNMENT TOLD YOU: MYTH, POWER, AND DECEPTION IN AMERICAN HISTORY 77–78 (2010).

¹¹ ANDREW P. NAPOLITANO, CONSTITUTIONAL CHAOS: WHAT HAPPENS WHEN THE GOVERNMENT BREAKS ITS OWN LAWS xii (2004) [hereinafter

speech does not come from the government,¹² the majority cannot legislate it away. Instead, individual liberty is defined primarily in negative terms, as the absence of coercion by the State.¹³ In other words, the government is prohibited from interfering with a personal natural right whose exercise thereof does not require a government permission slip. Moreover, not only is it implied that Congress may *not* interfere with freedom of speech, our independent judiciary has an affirmative duty to *prevent* all state actors from interfering with such freedom.¹⁴ Properly understood then, the First Amendment is not an affirmative grant of individual rights, but a restriction on government that prevents it from infringing on the rights all persons already have.¹⁵

NAPOLITANO, CONSTITUTIONAL CHAOS] (referring to the Natural Law Theory in support to this assertion). See generally THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), <https://www.wdl.org/en/item/117/> (describing Americans as “a free people claiming their rights, as derived from the laws of nature, and not as the gift of their chief magistrate”); JOHN LOCKE, TWO TREATISES OF GOVERNMENT, BOOK 2, Ch. 4 §22 (Peter Laslett ed., 1988) (asserting that it “the natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule”). Most scholars today believe that Jefferson’s views on natural law were animated in some measure by Locke. *The Declaration of Independence and Natural Rights: Thomas Jefferson, Drawing on the Current Thinking of His Time, Used Natural Rights Ideas to Justify Declaring Independence from England*, CONST. RTS. FOUND., <http://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html> (last visited Jan. 14, 2017).

¹² Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 (1993) (explaining how Americans—at the time the Constitution was ratified—characterized freedom of speech as a natural right).

¹³ Eric Mack, *Individual Rights*, in THE ENCYCLOPEDIA OF LIBERTARIANISM 244, 246 (Ronald Hamowy et al. eds., 2008).

¹⁴ NAPOLITANO, CONSTITUTIONAL CHAOS, *supra* note 11, at xiii (“Thus, under the Natural Law, if the Congress, for example, made it unlawful to speak out against abortion, . . . judges can invalidate those acts, even if there were no First Amendment protecting freedom of speech and religion.”). “Because the right to speak and worship as we wish comes from our humanity, not from the government or from the First Amendment, under Natural Law, judges can enforce those rights, notwithstanding the legislature or the executive.” *Id.*

¹⁵ Andrew P. Napolitano, *Free Speech and Political Conventions*, LEW ROCKWELL (July 28, 2016), <https://www.lewrockwell.com/2016/07/andrew-p-napolitano/secret-service-hates-free-speech/> [hereinafter Napolitano, *Free Speech*

The First Amendment was ratified in 1791 after months of debate and discussion by the Congressional Committee organized to develop a Bill of Rights. Within the First Congress, it was James Madison who took up the charge of enumerating a nonexhaustive Bill of Rights.¹⁶ As a result, Madison's stated intentions are perhaps the most relevant in interpreting the Framers' and Ratifiers' understanding of natural law and free speech, particularly regarding how people retain the natural rights they do not surrender.

Madison, in his speech to the House introducing the Bill of Rights, believed that such a list would serve a merely "declaratory" purpose, that "evince[s] that spirit of deference and concession" innate to republican government.¹⁷ The entire declaratory end of this was to "insert [such a list] merely for greater caution."¹⁸ Madison argued that some specific list of natural rights was necessary to calm anxieties, despite the widespread Federalist assertion that such a list was unnecessary,¹⁹ as all rights not surrendered are retained and any power which allows government action to infringe on the rightful free action of individuals is *contrary to nature*.²⁰ Elsewhere in

and Political Conventions] ("Though the First Amendment was originally written only to restrain Congress . . . it is now uniformly interpreted to restrict all government in America from abridging the freedom of speech.").

¹⁶ See 1 ANNALS OF CONG. 441, 448–49 (J. Gales & W. Seaton eds., 1789) (statement of Rep. James Madison). See generally ANDREW P. NAPOLITANO, FREEDOM ANSWER BOOK: HOW THE GOVERNMENT IS TAKING AWAY YOUR CONSTITUTIONAL FREEDOMS 99 (2012) (explaining that when debating whether or not to include an enumeration of rights in the Constitution, the Founders agreed free speech was a natural right, but disagreed on the need to recognize the right in the Constitution if there was no "explicit grant of power to curtail" that right).

¹⁷ 1 ANNALS OF CONG. 449, 457 (J. Gales & W. Seaton eds., 1789) (statement of Rep. James Madison).

¹⁸ *Id.* at 452 (statement of Rep. James Madison).

¹⁹ See *id.* at 455 (statement of Rep. James Madison) ("It has been said by way of objection to a bill of rights . . . that they are unnecessary articles of a republican government, upon the presumption that the people have those rights in their own hands, and that is the proper place for them to rest.").

²⁰ See *id.* at 441 (expressing concern that if Congress continued to ignore the citizens' calls for a bill of rights, Americans "may think we are not sincere in our desire to incorporate such amendments in the constitution as will secure those rights, which they consider as not sufficiently guarded. The applications for amendments come from a very respectable number of our constituents, and it is

Madison's writings, he unequivocally expressed his belief that the First Amendment reflects a natural right of the individual.²¹ In particular, when debating the Sedition Act of 1798²² in the House of

certainly proper for congress to consider the subject, in order to quiet that anxiety which prevails in the public mind").

²¹ For example, "James Madison was a member of the committee that drafted the Virginia proposals" for amendments to the Constitution, and he himself "noted the role [these] proposals played in his proposed draft of the Bill of Rights." KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* n.31 (2009) (quoting *Letter from James Madison to George Washington* (Nov. 20, 1789), in 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1185 (Bernard Schwartz ed., 1971)). The Virginia proposals read as follows: "First, [t]hat there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." *Amendments Proposed by the Virginia Convention* (June 27, 1788), reprinted in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 636 (Neil H. Cogan ed., 1997). Madison considered one's opinions and beliefs to be a component of property, and further espoused that our government was formed in order to guard such interest from infringement of any kind. JAMES MADISON, *PROPERTY*, 266–68 (Mar. 29, 1792), <http://press.pubs.uchicago.edu/founders/documents/v1ch16s23.html> (explaining that property means "'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual' [A] man has a property in his opinions and the free communication of them Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own" (emphasis in original)).

²² In 1798, under the direction of President John Adams, the federal government enacted the Alien and Sedition Acts, one of which made it a federal crime to publish any false, scandalous or malicious writing—even if true—about the president or the federal government, notwithstanding the guarantee of free speech in the First Amendment. Sedition Act, ch. 74, 1 Stat. 596 (1798). The government used this law to torment its political adversaries in the press. See CHARLES SLACK, *LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON AND THE MISFITS WHO SAVED FREE SPEECH* 114, 127–28 (2015) (discussing the case of Matthew Lyons, a Vermont congressman who criticized President John Adams for his "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice," and as a result, was convicted of libel and sentenced to four months in jail. (citing FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATION OF WASHINGTON AND ADAMS* 333 (1849))). Then-Vice President Thomas Jefferson vowed that if he ever became president, these abominable laws would be abolished. *Id.* at 163–64 ("I should be for resolving the

Representatives, Madison exclaimed “[i]f we advert to the nature of republican government, we shall find that the censorial power is in the people over the government, and not in the government over the people.”²³ Thus, as we learn from Madison, the reason this freedom is referred to as *the* freedom of speech is to reflect the Framers’ belief that the right to speak freely is a pre-political, integral aspect of our humanity—not one granted by the government.²⁴ The word “the” reflects the unmistakable revelation that the personal freedom of speech already existed at the time the First Amendment itself was drafted, debated, and ratified.

II. A PHILOSOPHICAL DEFENSE OF FREE SPEECH

The Framers’ recognition of the freedom of speech as a right inherent in all persons is rooted in several tenets of classical liberal philosophy. This section presents the key features of that philosophy in support of the pre-political nature of free speech described in the previous section.

A. Freedom of Speech Realizes Our Personal Natural Inclination for Self-Fulfillment and Individual Autonomy

The First Amendment as imagined by the Framers tolerates the maximum possible public discourse and disagreement; and it commands the government to protect this value from governmental

alien and sedition laws to be against the constitution and merely void . . . [O]ur general government has, in the rapid course of [nine] or [ten] years, become more arbitrary and has swallowed more of the public liberty than even that of England.” (citing *Letter from Thomas Jefferson to John Taylor*, (Nov. 26, 1798), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 21)). Jefferson did become President, and the Acts did expire, but this became “a lesson for future generations: [t]he guarantees of personal freedom in the Constitution are only as valuable and reliable as is the fidelity to the Constitution of those to whom we have entrusted it for safekeeping.” Andrew P. Napolitano, *No More Asking for Permission to Speak*, LEW ROCKWELL (Mar. 21, 2013), <https://www.lewrockwell.com/2013/03/andrew-p-napolitano/the-government-doesnt-give-us-free-speech/>.

²³ 4 ANNALS OF CONG. 934 (1794) (statement of Rep. James Madison).

²⁴ Napolitano, *Free Speech and Political Conventions*, *supra* note 15.

interference for several reasons. First, the freedom of speech is at the core of our individuality. As Justice Thurgood Marshall once said, “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.”²⁵ Ron Paul has eloquently elaborated on this point: “We don’t have the First Amendment to talk about the weather. We have the First Amendment so we can say very controversial things”²⁶ without fear of being harassed, sued, arrested, or jailed. Once the government begins to ban certain speech, however repugnant it is, individual thinking is paralyzed, and ultimately, persons may censor themselves out of fear of persecution. Moreover, government legislation that defines what is appropriate versus incendiary speech insinuates that people cannot think for themselves and prevents the very important process of self-development.

The beauty of the First Amendment is not only that it protects the right of all who speak to be heard, but also the right of everyone in the audience to listen and be exposed to various expressions. Two historical giants, John Milton and Thomas Paine, influenced the drafters of the First Amendment and supported this idea.²⁷ In 1644, the English poet John Milton published *Areopagitica* (referencing “Areopagus,” the highest judicial court of Athens known for orderly discussion and free expression) as an appeal to Parliament to rescind the censor-imposing Licensing Order of June 16th, 1643.²⁸ Milton,

²⁵ *Procunier v. Martinez*, 416 U.S. 396, 427 (1974).

²⁶ *Ron Paul in 2011 GOP Primary Debate in South Carolina*, ON THE ISSUES (May 5, 2011), http://www.ontheissues.org/Archive/2011_SC_Ron_Paul.htm.

²⁷ See David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 875–78 (1986) (tracing the First Amendment doctrine’s “philosophical origins” to John Milton, John Locke, John Stuart Mill, and others) (“As Justice Holmes remarked ‘[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil.’” (quoting *Gompers v. United States*, 233 U.S. 604, 610 (1914))).

²⁸ John Milton, *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicensed Printing to the Parliament of England*, DARTMOUTH: JOHN MILTON READING ROOM (1644), http://www.dartmouth.edu/~milton/reading_room/areopagitica/text.html. The Order was designed to bring publishing under government control by creating official censors to whom authors would submit their work for approval prior to

who vigorously opposed the licensing, argued that pre-censorship of authors was an excuse for state control of thought. He wrote a powerful argument that rings true today—that the endeavor of seeking to know the truth must be prioritized above all else: “A man may be a heretic in the truth, and if he believe[s] things only because his pastor says so, or the assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy.”²⁹

Similarly, in 1794, in the introduction to his masterpiece, *The Age of Reason*, Thomas Paine addressed his fellow citizens of the United States: “I have always strenuously supported the right of every man to his own opinion, however different that opinion might be to mine. He who denies to another this right, makes a slave of himself to his present opinion, because he precludes himself the right of changing it.”³⁰ Paine’s use of the word “slave” is telling. When certain speech is censored, society is at the mercy of what the censors deem appropriate speech. Put another way, society becomes enslaved to the censor’s beliefs.³¹

having it published. Effectively, however, the Order resulted in many search and seizures of books, book burnings, and even arrests. Licensing Order of June 14, 1643, *reprinted in* 2 JOHN MILTON, COMPLETE PROSE WORKS OF JOHN MILTON 797 (1959).

²⁹ Milton, *supra* note 28.

³⁰ THOMAS PAINE, THE AGE OF REASON: BEING AN INVESTIGATION OF TRUE AND FABULOUS THEOLOGY 3 (1852).

³¹ Contemporary jurisprudence echoes this concern. For example, the Supreme Court has guarded the privacy of membership lists of groups engaged in the free trade in ideas and beliefs, especially “where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is . . . more immediate and substantial.” *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 556–57 (1963); *see also* *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (invalidating a New Hampshire law mandating the display of the state motto on automobile license plates and thereby affirming the First Amendment “right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable”).

B. Unregulated Speech Creates a “Marketplace of Ideas” and Promotes the Search for Truth

Second, the freedom of speech is necessary to foster a “marketplace of ideas,” a concept advanced by John Stuart Mill in his work, *On Liberty*, and ingrained in free speech discourse.³² According to Mill, truth is identified when ideas are exchanged, debated, and cultivated over the course of time.³³ Mill also argued that persons and governments must allow unfettered free speech *regardless* of the consequences in order to reap societal benefits of cultural progress, peace, and feelings of mutual respect.³⁴ It is only through this process of allowing individuals to voice diverse, controversial, and even incendiary opinions that persons may air their grievances, resulting in free and open discourse that works as a pressure release valve for their trepidations. Silencing controversial ideas damages all participants: the dissenter, the censor, and, ultimately, society at large.³⁵ Mill argued:

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 The 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

³² See generally JOHN STUART MILL, *ON LIBERTY* (Boston: Ticknor and Fields, 2d ed. 1863) (advocating for an absolutist approach to free speech and complete protection of political speech).

³³ *Id.* at 100–01 (“Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil: there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth, by being exaggerated into falsehood.”).

³⁴ See *id.*

³⁵ See *id.* at 101–02 (“[I]f any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.”).

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.³⁶

Professor Franklyn S. Haiman of Northwestern University elaborated on Mill's thesis, pointing out that "[p]lacing limits on the verbal expression of group hatreds does not make the underlying attitudes go away. Instead they go underground to fester and perhaps erupt in a more violent form later."³⁷

Mill's argument that freedom of expression is guaranteed because of the need to test the truth of ideas in competition with others is perhaps best embodied in one of Justice Oliver Wendell Holmes's most famous dissents. In *Abrams v. U.S.*³⁸ he wrote that, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference

³⁶ *Id.* at 35.

³⁷ Franklyn S. Haiman, *Why Hate Speech Must be Heard*, CHI. TRIB. (Oct. 30, 1991), http://articles.chicagotribune.com/1991-10-30/news/9104070589_1_racist-leaflets-speech-supreme-court. Professor Haiman further argues, "[T]here is a crucial difference between verbal communication and physical blows. A physical blow will hurt no matter what goes on in the victim's mind, but a verbal attack will hurt only if it is mentally understood. It is not the words themselves that hurt but the meaning they convey." *Id.*

³⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *Abrams*, the defendants, five self-proclaimed un-naturalized Russian anarchists, wrote and distributed materials opposing the United States form of government and the deployment of troops into Russia during World War I, and were indicted on four counts of conspiring to violate the Espionage Act of 1917. *Id.* at 616–18. The majority, affirming the convictions, stated:

[W]hile the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our Government . . . the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe.

Id. at 623.

with the lawful and pressing purposes of the law that an immediate check is required to save the country.”³⁹

The First Amendment protects loathsome opinions and those who utter them from suppression by majoritarian forces; after all, popular speech is unlikely to face government oppression. An enlightened and tolerant society does not censor speech; instead, it allows all persons to express their biases and hatreds. New York Law School Professor Nadine Strossen, relying to some degree on Mill’s connection between speech and the search for truth, has argued persuasively that restricting hate speech will only mask hatred, not dissipate it.⁴⁰ Indeed, “[c]ensuring hate speech merely pushes hate underground, where it lurks beneath the guise of civility: invisible but not obliterated . . . impossible to target, and thus impossible to dismantle.”⁴¹ The censoring of hate is far worse than the expression of hate because it “prevents people from judging and evaluating for themselves how to respond to the views—however prejudiced—of their fellow citizens.”⁴²

³⁹ *Id.* at 630 (Holmes, J., dissenting). Furthermore, Justice Holmes explained:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . 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.

Id.; see also H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION 10 (1991) (discussing how Justice Holmes was influenced by the philosophy of John Stuart Mill).

⁴⁰ See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 494 (1990) (“[E]quality will be served most effectively by continuing to apply traditional, speech-protective precepts to racist speech, because a robust freedom of speech ultimately is necessary to combat racial discrimination.”).

⁴¹ Jonathan Haidt & Peter Tatchell, *Hate Speech is Free Speech*, SPIKED ONLINE (June 12, 2016), http://www.spiked-online.com/freespechnow/fsn_article/hate-speech-is-free-speech#.V6TA8UvwwRY (quoting Sarah Haider).

⁴² *Id.* (quoting Frank Furedi).

C. *Unfettered Political Speech Allows for Democratic Self-Governance and Helps Prevent Tyranny of the Majority*

A third general need for unrestricted freedom of speech is that an informed electorate must be free to challenge the government and demand its transparency and accountability. Freedom of speech, particularly political speech, is therefore necessary because voters must have access to information, including full and robust debate about their elected officials, in order to make well-informed decisions. Free expression has value because of the function it performs in checking the abuse of official power and ensuring our participation in government.⁴³

As part of the break with the British system, our Founders sought to preserve the “inalienable” right to govern ourselves.⁴⁴ George Washington cautioned, “If freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter.”⁴⁵ In turn, we as a people consented to be governed, conditioned upon the right to participate via a vote and an absolute right of free speech in all matters concerning the present or proposed policies of government.

Moreover, our country was founded upon words of dissent and open criticism of an unjust government. Those words, used almost

⁴³ Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255–57 (arguing that the First Amendment “protects the freedom of those activities of thought and communication by which we ‘govern’”). Perhaps the ultimate authority regarding this justification is Professor Alexander Meiklejohn, who aptly argued that the Bill of Rights is an integral part of self-government and thus the First Amendment is meaningless unless considered in relation to popular government. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26–27 (1948) (“The principle of the freedom of speech springs from the necessities of the program of self-government . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”).

⁴⁴ Thomas Jefferson, *Rough Draft of the Declaration of Independence*, in 1 THE PAPERS OF THOMAS JEFFERSON 1760–1776, at 423, 423–28 (Julian P. Boyd ed., 1950), <https://jeffersonpapers.princeton.edu/selected-documents/jefferson's-original-rough-draught-declaration-independence-0>.

⁴⁵ *Letter From George Washington to Officers of the Army* (Mar. 15 1783), reprinted in THE PAPERS OF GEORGE WASHINGTON (William M. Ferraro et al. eds., forthcoming 2023), <http://founders.archives.gov/documents/Washington/99-01-02-10840>.

as second nature by our Framers in the wake of the Constitutional Convention of 1787, constitute language that would startle today. For example, when commenting on Shays' Rebellion, an armed uprising of farmers in Massachusetts that had been put down by organized state militia, Thomas Jefferson famously exclaimed:

What country before ever existed a century [and a] half without a rebellion? [And] what country can preserve its [sic] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon and pacify them. What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots [and] tyrants. It is its natural manure.⁴⁶

Jefferson's argument is much the same as John Stuart Mill's in *On Liberty*; namely, that persons should not be silenced by the government.

Despite the clear protections found in the First Amendment, the freedoms protected therein are under constant assault today, whether it be protesters arrested and forced into "free speech zones"⁴⁷ or government whistleblowers forced to seek asylum for exposing

⁴⁶ Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), in 5 THE WORKS OF THOMAS JEFFERSON (CORRESPONDENCE 1786-1789) 384, 362 (Paul Leicester Ford ed., 1905), <http://oll.libertyfund.org/title/802/86685>; see also Letter from Thomas Jefferson to Abigail Adams (Feb. 22, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 174-75 (Julian P. Boyd ed., 1955), <http://founders.archives.gov/documents/Jefferson/01-11-02-0182> ("The spirit of resistance to government is so valuable on certain occasions, that I wish it to be always kept alive. It will often be exercised when wrong, but better so than not to be exercised at all.").

⁴⁷ The concept of free speech zones "originat[ed] on college and university campuses in response to the student activism of the 1960s," but more recently, free speech zones have been imposed to contain public expression of opinion, where protests or political activity are confined to designated areas. Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 DRAKE L. REV. 949, 949-50 (2006). For example, Texas Tech University, a public university, "designated a twenty-foot-wide gazebo capable of holding no more than forty people as the sole free speech zone on campus." *Id.* at 951 (citing Betsy Blaney, *Lawsuit Claims Tech Curbing Free Speech*, HOUSTON CHRON., June 13, 2003, at 37).

extraordinary violations of our constitutionally protected privacy rights.⁴⁸ As Lenny Bruce famously said, take away the right to say “fuck” and you take away the right to say “fuck the government.”⁴⁹

III. PROBLEMS WITH REGULATING “HATE SPEECH”: WHY THE FIRST AMENDMENT UPHOLDS THE PRESUMPTION AGAINST RESTRICTING HATE SPEECH

A. *The Slippery Slope: An Imprecise, Elastic Concept of “Hate Speech”*

Even if we were to allow ourselves to be censored by the federal government where matters of offense or hatred are concerned, it is unclear whose standards we would look to when identifying or distinguishing “hate speech.” Virtually any belief opposed by any group or faction can be deemed “hatred” and that belief openly touted, labeled “hate speech.” Thus, distinguishing hate speech from the broader category of free speech is an endeavor that introduces

⁴⁸ For example, in 2010, Thomas Drake, a senior executive with the National Security Agency, was indicted under the Espionage Act for leaking classified information, after speaking out on “secret mass surveillance programs, multibillion-dollar fraud and intelligence failures from 9/11.” Timothy Bella, *NSA Whistleblower Thomas Drake: ‘I’ve Had to Create a Whole New Life’*, ALJAZEERA AM. (Nov. 12, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/11/12/nsa-whistleblower-thomas-drake-protections-espionage.htm>. Most recently, Edward Snowden exposed to the world a secret order of the Foreign Intelligence Surveillance Court, which required Verizon, “on an ongoing daily basis,” to provide the NSA information with all “communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls.” Amy Davidson, *The N.S.A.-Verizon Scandal*, NEW YORKER (June 6, 2013), <http://www.newyorker.com/news/amy-davidson/the-n-s-a-verizon-scandal>; see also Andrew P. Napolitano, Opinion, *A Government of Secrecy and Fear—Why Edward Snowden Deserves the Thanks of Every Freedom-Loving American*, FOX NEWS (Oct. 24, 2013), <http://www.foxnews.com/opinion/2013/10/24/government-secrecy-and-fear-why-edward-snowden-deserves-thanks-every-freedom.html> (arguing that if the government violated the Constitution via the National Security Agency’s spying operations, and Edward Snowden knew about this, he had a moral and Constitutional obligation to reveal such and should be lauded for doing so, not exiled).

⁴⁹ FUCK: A DOCUMENTARY (Rainstorm Entertainment 2005).

too many subjective judgments, ever-changing based on factors such as who the speaker is or what part of the country you are in.⁵⁰ One person's hate speech is often another person's music, however fiercely expressed. And therein lies the problem: if persons do not know how hate speech is defined, how can we anticipate how the law will be enforced?

The theory of anti-hate speech laws is that hate speech often leads to violence, violence demands police and consequently, the expenditure of public resources, and as a result, the government can make it illegal to spout hatred in order to conserve its resources.⁵¹

⁵⁰ For example, it is common experience in 2017 that some African Americans may use the n-word differently, at times as a term of endearment, as compared to ill-intentioned white supremacists. See Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1520–21 (1996) (“Although the term ‘nigger’ has long been an element of black vernacular, the word has recently emerged into the mainstream, primarily through rap music, and has come to be viewed by some as a term of empowerment when used by blacks.”). While the latter speaker may lack civility when they use this word, they do not lack the right to say it. The government cannot grant more protection to the victims of one word over victims of other seemingly hateful words.

⁵¹ In *Terminiello v. City of Chicago*, the Supreme Court held that it would violate the First and Fourteenth amendments to criminally charge a speaker for breach of the peace, even where the clash between supporters and protestors resulted in “several disturbances” and an “angry and turbulent” crowd. *Terminiello v. City of Chicago*, 337 U.S. 1, 3–4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”). In the dissent, however, Justice Jackson countered and echoed the argument that many proponents of hate speech regulation espouse, that free speech “depends on local police, maintained by law-abiding taxpayers Can society be expected to keep these men at [a speaker's] service if it has nothing to say of his behavior which may force them into dangerous action?” *Id.* at 31–32, 37 (Jackson, J., dissenting) (arguing further that “[t]he Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact”); see also ANDREW P. NAPOLITANO, *SUICIDE PACT: THE RADICAL EXPANSION OF PRESIDENTIAL POWERS AND THE LETHAL THREAT TO AMERICAN LIBERTY*, at xxix–xxxii (2014) [hereinafter NAPOLITANO,

This attitude incorrectly presumes, as President Woodrow Wilson did when he prosecuted individuals for publicly singing German beer hall songs during World War I,⁵² that the government is the origin of free speech and can lawfully limit the speech it has authorized to that which it does not hate or fear.⁵³ But the Constitution does not grant the government the power to restrict an individual's speech based on moral or value judgments. As argued above, the right to speak is a natural, personal right. From that it follows that the right cannot be transferable to an artificial institution like the government, nor can it be judged according to community standards.⁵⁴ The whole purpose of the First Amendment is to assure that the individuals—and not the government—choose what they think, say, publish, hear, or observe. The government may not define speech, chill speech, or deter persons from the free exercise

SUICIDE PACT] (criticizing Justice Jackson's dissent, which rejects the Natural Law and reasoned that the unprosecuted exercise of the "hecklers' veto"—"when an aroused audience succeeds in silencing a speaker . . . by . . . demanding his arrest" or drowning out his speech—does not violate the First Amendment).

⁵² During World War I, under President Wilson, the government enacted the Espionage Act of 1917 and the Sedition Act of 1918, imposing restrictions on German-born Americans with the stated goal of eliminating disloyal statements during wartime. Espionage Act, ch. 30, tit. I, 40 Stat. 217 (1917) (current version at 18 U.S.C. § 2388 (1976)); see also *People and Events: Prelude to the Red Scare: The Espionage and Sedition Acts*, PBS, http://www.pbs.org/wgbh/amex/goldman/peopleevents/e_redscare.html (last visited Jan. 14, 2017) (giving historical background on Espionage and Sedition Acts). As a result, "the U.S. government maintained a list of German-born aliens or citizens, and imprisoned more than 6,000 of these immigrants from 1917–1918 for allegedly assisting Germany's war effort." *The Anti-German Crusade*, BOUNDLESS U.S. HISTORY, <https://www.boundless.com/u-s-history/textbooks/boundless-u-s-history-textbook/world-war-i-1914-1919-23/the-war-at-home-180/the-anti-german-crusade-988-8773/> (last visited Jan. 14, 2017); see also NAPOLITANO, SUICIDE PACT, *supra* note 51, at 71–79 (discussing President Wilson's suppression of unpopular viewpoints during World War I by, among other things, unconstitutionally "flooding the marketplace of ideas . . . with known falsehoods to whip the country into a belligerent, anti-German frenzy").

⁵³ Andrew P. Napolitano, *What Freedom of Speech?*, LEW ROCKWELL (Jan. 15, 2015), <http://www.lewrockwell.com/2015/01/andrew-p-napolitano/what-freedom-of-speech/>. "It also presumes that all ideas are equal, and none [are] worthy of hatred." *Id.*

⁵⁴ See *supra* Part I.

thereof.⁵⁵ The government can speak *only* when it is necessary for governance (e.g., the library is closed, the speed limit is sixty-five miles per hour, the line forms here). To say that the government has the freedom of speech to express an opinion, or determine what is “hatred,” is very dangerous. The government has limitless resources, which can be abused for political ends to drown out speech it hates and fears. If the government can express opinions on matters of public interest, it will dominate the debate. Yet very few can take the government on.

*B. Even if “Hate Speech” is Identified, Its Proscription
Amounts to Creating Orwellian “Thought Crimes”*

Hate speech is an Orwellian concept used to describe unpopular beliefs or opinions that are improperly inferred to fall outside the protections afforded by the First Amendment.⁵⁶ In the most general

⁵⁵ It is important to note that the Supreme Court has held that the Government’s *own* speech is *not* protected by the First Amendment’s right to free speech. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (holding that the decision of the Texas Department of Motor Vehicles Board to reject the respondents’ proposed license plate design featuring a confederate flag was not impermissible discrimination on the basis of viewpoint in violation of the First Amendment). Writing for the majority in *Walker v. Sons of Confederate Veterans*, Justice Breyer noted that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” *Id.* at 2245 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009)). Moreover, “[b]ecause the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.” *Id.* at 2250. In his dissent, Justice Alito argued that the majority had incorrectly expanded the government speech doctrine to include not only speech by the government, but also government “blessing” of private speech. *Id.* at 2261 (Alito, J., dissenting).

⁵⁶ GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (New American Library, 1950). In George Orwell’s novel, *1984*, the government attempts to control not only the speech and actions but also the thoughts of its subjects, labeling disapproved thoughts with the term “thought crime.” *Id.* at 19. The Thought Police use psychology and ever-present surveillance to find and control, or eliminate members of society who are capable of the mere thought of challenging the ruling authority. Orwell described the new totalitarians as follows: “The party is not interested in any overt act: the thought is all we care about. We do not merely destroy our enemies; we change them.” *Id.* at 253. “We are not content with negative obedience, nor even with the most abject submission. When finally you

sense, hate speech is prejudice directed at individuals or groups on the basis of their identity—be it racial, cultural, political, or lifestyle orientations. However, since at some level all humans are biased, the focus on bias in hate speech codes is problematic because it leads to discrimination between “prohibited bias” and “sanctioned bias;” effectively between unacceptable and acceptable hate.⁵⁷ Anti-hate speech legislation means that politics will determine whether speech is a reflection of closely held ideals, a painful reaction to years of subjugation, or a salacious joke.⁵⁸ Therefore, hate speech laws

surrender to us, it must be of your own free will . . . It is intolerable to us that an erroneous thought should exist anywhere in the world.” *Id.* at 255.

⁵⁷ Haidt & Tatchell, *supra* note 41. In particular, the Supreme Court has observed that the very purpose of speech protection is to shield “those choices of content that in someone’s eyes are misguided, or even hurtful.” *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995)) (permitting picketing on public land outside of a military serviceman’s funeral with signs reading, “Thank God for Dead Soldiers,” “Pope in Hell,” and “God Hates Fags,” because they regarded matters of public concern). Moreover, “[u]nder 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.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40, 352 (1974) (restricting a state’s ability to *presume* harm in defamation cases); *see, e.g.*, JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* 21 (Michael Tony & Norval Morris eds., 1998) (arguing that “creating a hate crime jurisprudence forces us to proclaim which prejudices are worse than others, itself an exercise in prejudice”).

⁵⁸ In our “politically correct” world, it is often acceptable to ridicule or even silence closely-held religious beliefs, but not those who feel disenfranchised by such views. For example, when a Christian baker refused to make a cake for a same-sex couple in Oregon, the bakers were ordered to pay \$135,000 in emotional damages to the complainant, and the state prevented the bakers from speaking about such refusal by slapping them with a cease and desist order. David French, *Oregon Slaps Christian Bakers with a Fine and Gag Order for Refusing to Help Celebrate Gay Wedding*, NAT’L REV. (July 3, 2015, 6:26 PM), <http://www.nationalreview.com/corner/420744/oregon-slaps-christian-bakers-fine-and-gag-order-refusing-help-celebrate-gay-wedding>. The Christian bakers’ speech was deemed unacceptable under public opinion, and so was held to be legally impermissible. *See id.* However, those who voiced *their* beliefs—namely, their criticism of the bakers’ beliefs—were allowed to do so freely, seemingly because it reflected the more popular view. *See id.* George Orwell also warned against this fickle distinction between so-called acceptable and unacceptable hate:

criminalizing the vocalization of a criminal intent without a real act are unconstitutional because they would require the criminalization of an additional element—a government-proscribed thought—most commonly, racial, religious, political, or sexual-orientation based hatred not traditionally deemed criminal.⁵⁹ Who would want to live here if the government could punish *thought*?

These “thought crimes” were prevalent in the debate centered around the proposed Local Law Enforcement Hate Crimes Prevention Act of 2009 (HR 1913). Representative Steve King (R-IA) noted that the broad definitions in the so-called hate crimes

The point is that the relative freedom which we enjoy depends on public opinion. The law is no protection. Governments make laws, but whether they are carried out, and how the police behave, depends on the general temper in the country. If large numbers of people are interested in freedom of speech, there will be freedom of speech, even if the law forbids it; if public opinion is sluggish, inconvenient minorities will be persecuted, even if laws exist to protect them . . . The notion that certain opinions cannot safely be allowed a hearing is growing. It is given currency by intellectuals who confuse the issue by not distinguishing between democratic opposition and open rebellion, and it is reflected in our growing indifference to tyranny and injustice abroad. And even those who declare themselves to be in favour of freedom of opinion generally drop their claim when it is their own adversaries who are being prosecuted.

George Orwell, *Freedom of the Park*, TRIB. MAG. (Dec. 7, 1945), http://orwell.ru/library/articles/park/english/e_fpark.

⁵⁹ Ames, *Hate Crimes and Thought Crimes: A Question of Mens Rea*, SUBMITTED TO A CANDID WORLD (Oct. 15, 2009), <https://acandidworld.wordpress.com/2009/10/15/hate-crimes-and-thought-crimes-a-question-of-mens-real/>. Compare *Wisconsin v. Mitchell*, 508 U.S. 479, 484 (1993) (finding a statute that enhances the penalty of an offense accompanied by a hate crime constitutional, noting that “[a] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment”), with *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379–81 (1992) (finding a criminal law that prohibited placing, on public or private property, a burning cross, swastika, or other symbol likely to arouse “anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender” unconstitutional because it criminalized not the behavior itself, but improperly focused on the motivation for criminal behavior; stated differently, the thinking that results in criminal behavior).

legislation amounted to thought crimes because “without the thought, you’re not going to have the hate, and it can only be defined by trying to look into the skull of the victim and in the head of the perpetrator at the same time, let alone what might be in the head of the judge.”⁶⁰ For the most part, the arbitrariness of hate speech codes restricts legitimate speech and assumes that people are not smart enough to hear hateful ideas and reject them.

CONCLUSION

Free speech can no longer be considered “free” when expression across the nation is being increasingly limited, restricted to so-called free speech zones, or completely blocked.⁶¹ As the Framers intended, the Natural Law tradition provides intrinsic grounds on which to justify the freedom of speech and provides us with a standard by which to assess the legitimacy of laws regulating free speech. The freedom of speech preceded the existence of the United States, and our Constitution recognizes that it is a right inherent in human nature. Because government was instituted to protect rights, it has an obligation to respect all persons’ individual speech liberty. Because the value of free expression lies within “the information it conveys, the thoughts it provokes, and the greater clarity about the world it provides,” the value should not be measured by a “bureaucratic balancing act” that weighs prominent cultural norms against the subjective opinions of those in power.⁶²

⁶⁰ 155 Cong. Rec. 64 (2009); *see, e.g.*, Richard Cohen, *Laws Won’t Rein in Hate*, WASH. POST (Aug. 4, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/03/AR2009080302222.html> (asserting that “[t]he real purpose of hate-crime laws is to reassure politically significant groups” and emphasizing that the result is the punishment of “thought or speech”).

⁶¹ *See* John W. Whitehead, *Have We Allowed the First Amendment to Become an Exercise in Futility?*, LEW ROCKWELL (Mar. 3, 2014), <https://www.lewrockwell.com/2014/03/john-w-whitehead/free-speech-rip/> (“If citizens cannot stand out in the open on a public road and voice their disapproval of their government, its representatives and its policies, without fearing prosecution, then the First Amendment with all its robust protections for free speech, assembly and the right to petition one’s government for a redress of grievances is little more than window-dressing on a store window—pretty to look at but serving little real purpose.”).

⁶² Haidt & Tatchell, *supra* note 41 (quoting Greg Lukianoff).

Free speech is not the cause of the tensions that are growing around us, but the only possible solution to them. The remedy for hateful, abusive, offensive, revolutionary, disruptive speech is not censorship, but rather more speech, even when the government does not like the speech or has the power to punish it—a power it should *never* have—because it should never be making judgments about what speech it likes and hates. Ultimately, the First Amendment demands that the test for acceptance or rejection of speech in the marketplace of ideas be made by individuals—uninfluenced, undeterred, and unmolested by the government.⁶³

⁶³ Napolitano, *Free Speech and Political Conventions*, *supra* note 15.