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INTRODUCTION

"More than any previous Supreme Court, the Roberts Court made First Amendment free speech jurisprudence the centerpiece of its constitutional agenda." So say Ronald Collins and David Hudson in their searching and detailed analysis, "The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005–2021."[1] Few would disagree with the conclusion that the Supreme Court under John Roberts has made the First Amendment a priority, but there is robust debate about whether the Court is "good" when it comes to the First Amendment. Hence, the *Brooklyn Law Review* symposium on the Roberts Court and the First Amendment made for a lively academic exchange of ideas.[2]

But what does it mean to be "good" on the First Amendment? One traditional indication is whether the Court takes protections for speech, press, religion, assembly, and petition seriously, and issues decisions that protect such rights. In that regard, the Roberts Court's record is decidedly mixed, particularly in matters involving speech by public employees,[3] candidates for judicial office,[4] elementary and secondary students,[5] or speech that implicates national security.[6]

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[1] Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005-2021*, 87 BROOK. L. REV. 5 (2021).

[2] *See generally* Symposium, *Transcript: The Roberts Court and Free Speech Symposium*, 87 BROOK. L. REV. 289 (2021).

[3] *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (government employee statements made pursuant to official duties are not protected speech).

[4] *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (states may bar judicial candidates from personally soliciting campaign funds if the restriction is narrowly tailored to serve a compelling state interest).

[5] *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (school officials may suppress student speech at a school event when the speech promotes illegal drug use).

[6] *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 28, 39–40 (2010) (upholding under strict scrutiny a federal statute prohibiting persons from providing "material support" to groups designated as foreign terrorist organizations).

As a counterpoint, the Court has steadfastly refused to create new exceptions to the First Amendment,[7] and, even in areas where early decisions by the Roberts Court were less protective of First Amendment interests, it has recovered lost ground in some areas. In *Mahanoy Area School District v. B.L.*, for example, the Court resoundingly reaffirmed its landmark decision protecting student free speech rights—*Tinker v. Des Moines Independent Community School District*.[8] It held "courts must be more skeptical of a school's efforts to regulate off-campus speech," noting that "political or religious speech that occurs outside school or a school program or activity" undoubtedly comes with "a heavy burden to justify intervention."[9] Overall, the October 2020 term reinforced the Roberts Court's image for taking First Amendment rights seriously, and, in addition to affirming student-speech rights, upheld protections for associational freedom[10] and free exercise of religion.[11]

Critics of the Roberts Court's record are unlikely to be moved by this growing list of First Amendment victories, as an oft-stated concern is not that the Court fails to protect speech (or other First Amendment interests), but that it protects the *wrong* speech.[12] What follows here is not an analysis of Roberts Court

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[7] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (shielding the "hurtful speech" of protestors picketing near the funeral of a military serviceman from tort liability); United States v. Stevens, 559 U.S. 460, 464, 481–82 (2010) (invalidating a federal statute that prohibited the commercial creation, sale, or possession of depictions of animal cruelty); United States v. Alvarez, 567 U.S. 709, 715–16, 729–30 (2012) (plurality opinion) (invalidating a federal law that prohibited lying about receiving military decorations or medals); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 789, 805 (2011) (striking down a state law that barred the sale or rental of video games depicting violence to minors).

[8] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038 (2021); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

[9] *Mahanoy*, 141 S. Ct. at 2046.

[10] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (invalidating a state disclosure requirement for donor information for nonprofit organizations).

[11] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (invalidating a city's refusal to contract with a private, religious agency for foster care services where the agency refused to certify same-sex couples as foster parents); *see* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65, 69 (2020) (enjoining enforcement of governor's occupancy restrictions on churches and synagogues during the COVID-19 pandemic); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021) (enjoining enforcement of a state's prohibition on indoor worship services during the COVID-19 pandemic); Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (enjoining enforcement of a state's prohibition on indoor worship services during the COVID-19 pandemic); Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (exempting in-home religious gatherings from a state's restrictions on private gatherings during the COVID-19 pandemic).

[12] *E.g.*, Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480 (2014) [hereinafter Shiffrin, *The Dark Side*] (asserting that the Court has waded into the outer darkness of the First Amendment); STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 1–10 (2016) [hereinafter SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT?] (arguing that the Court engages in free speech idolatry and protects speech at the expense of other values).

decisions and their critics, but of the historic notion, propounded by some activists and scholars, that courts should be far more parsimonious and selective in protecting speech rights.

I. THE ANTI-FREE SPEECH MOVEMENT, CENSORSHIP, AND THE FIRST AMENDMENT

A. The Anti-Free Speech Movement

Back in the day, the opponents of free speech were quite up front about it and were easy to spot. They were called "censors." Anthony Comstock, the driving force behind the New York Society for the Suppression of Vice, certainly qualifies. Within a year of starting his vigilante campaign against obscenity in 1872, he had won the support of the most powerful men in New York and persuaded Congress to pass an anti-obscenity bill that would remain on the books nearly a century and a half later. And it was a law that he enforced personally as a special agent for the Post Office. Most states followed the lead of federal law based on reform movements led or inspired by Comstock. Art historian Amy Werbel was not exaggerating when she wrote his literary preferences "served for forty years as the national line between virtue and vice."[13] For more than four decades, Comstock terrorized writers, publishers, and artists—driving some to suicide—yet he maintained his actions were perfectly compatible with freedom of speech.

Comstock did not see prosecution of obscenity (which to him included information on birth control, religious skepticism, advocacy of free love, or any representation of sex or nudity in written or artistic form) as raising any free speech concerns at all. The First Amendment certainly provided no protection, as First Amendment jurisprudence had not yet developed. "Where is the life, or property interest to debauch the morals of the young to be found in the Constitution?" Comstock asked.[14] He confidently asserted that "[n]o man will dare libel our forefathers by suggesting that even for one moment they dreamed that such a claim could be made under their form of government."[15] Comstock maintained that the Constitution accorded

> every man the fullest scope for his views and convictions. He may shout them from the housetop, or print them over the face of every

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[13] Amy Werbel, *Searching for Smut: Hot on the Trail of Anthony Comstock (1844-1915)*, COMMONPLACE: J. EARLY AM. LIFE (Oct. 2010), http://commonplace.online/article/searching-for-smut/ [https://perma.cc/TLX2-XWXQ].

[14] ANTHONY COMSTOCK, TRAPS FOR THE YOUNG 223 (Robert Brenner ed., Belknap Press of Harv. Univ. Press, 1967) (1883).

[15] *Id.*

> fence and building for all I care. But the common law and statutes both declare he must do it in a decent and lawful manner or not at all.[16]

Dr. Fredric Wertham, a prominent psychiatrist who stoked a national panic about comic books in 1950s, expressed similar ideas. He advocated federal and local laws to can the sale of horror and crime-themed comic books to minors, and the backlash crippled the comic book industry at the time. But he maintained the "freedom to publish crime comics has nothing to do with civil liberties."[17] He went on: "Leaving everything to the individual is actually *not* democracy; it is anarchy."[18] In his view, "[t]rue freedom is regulation."[19] Wertham's crusade to adopt laws was framed "primarily [as] a public health issue, not a fundamental issue of censorship," and he blamed the comic book industry for "moral bankruptcy in publishers hiding behind the [First Amendment]."[20]

The actions of figures like Comstock and Wertham were impermanent, and their views eventually were discredited and eclipsed by the development of First Amendment doctrine. But this hardly dampened the enthusiasm for censorship, especially for those with a cause to promote. However, perhaps because First Amendment law became more developed and provided more robust protections, anti-speech rationales increasingly were cloaked in academic jargon.

Herbert Marcuse, a Frankfurt School philosopher of the mid-twentieth century, is to political discourse what Anthony Comstock was to cultural purity. Marcuse championed political repression to advance truth as he saw it. While Comstock was on a mission from god to wipe out all sources of lust and impiety, Marcuse argued the necessity of "conditioning" (that is, restricting) political argument so that the people would be capable of understanding the "real" truth. To do so would require the government to abandon its traditional impartiality toward political ideas so that society could be freed from "the prevailing indoctrination."[21] That is, to permit the people to be autonomous

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[16] ANTHONY COMSTOCK, FRAUDS EXPOSED; OR, HOW THE PEOPLE ARE DECEIVED AND ROBBED, AND YOUTH CORRUPTED 408 (1880).

[17] FREDRIC WERTHAM, SEDUCTION OF THE INNOCENT 326 (Main Road Books 2004) (1954).

[18] *Id.* at 326–27.

[19] Frederic Wertham, *It's Still Murder: What Parents Still Don't Know About Comic Books*, SATURDAY REV. LITERATURE, Apr. 9, 1955, at 11, 11 (citation omitted).

[20] James E. Reibman, *Introduction* to SEDUCTION OF THE INNOCENT, *supra* note 17, at vii.

[21] Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81, 98–99 (1965).

and think freely "they would have to get information slanted in the opposite direction."[22]

What do these abstractions mean in practice? In his 1965 essay, "Repressive Tolerance," Marcuse acknowledged that to establish true democracy "may require apparently undemocratic means."[23] This would mean restricting the rights of speech and assembly for "groups and movements which promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc."[24] As he put it, "the restoration of freedom of thought may necessitate new and rigid restrictions on teachings and practices in the educational institutions which, by their methods and concepts, serve to enclose the mind within the established universe of discourse and behavior—thereby precluding a priori a rational evaluation of the alternatives."[25] The "restoration of freedom of thought" would also require censorship of "scientific research in the interest of deadly 'deterrents,' of abnormal human endurance under inhuman conditions, etc."[26] In this view, "liberating tolerance" means "intolerance against movements from the Right, and toleration of movements from the Left."[27]

As Marcuse put it, "tolerance cannot be indiscriminate and equal with respect to the contents of expression" and "it cannot protect false words and wrong deeds" that "contradict and counteract the possibilities of liberation."[28] In short, to guarantee the blessings of liberty "certain things cannot be said, certain ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude."[29]

Who is to be the arbiter of this system of enforced truth? According to Marcuse, there is only "one logical answer" regarding who is qualified "to make all these distinctions, definitions, [and] identifications for the society as a whole"—it "is the democratic educational dictatorship of free men."[30] However, in a society currently governed by the power elite, indoctrination, and capitalism, those qualified to identify and to

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[22] *Id.* at 99.
[23] *Id.* at 100.
[24] *Id.*
[25] *Id.* at 100–01.
[26] *Id.*
[27] *Id.* at 109.
[28] *Id.* at 88.
[29] *Id.*
[30] *Id.* at 106.

enforce the right ideas "would be a small number indeed."[31] Somehow, this core group of the intelligentsia would have to break "the tyranny of public opinion and its makers in the closed society" by such means as "cancellation of the liberal creed of free and equal discussion."[32]

Let's ponder that for a second. What does it say about a person if, when asked the question, "Who should be the guardians of truth and the final censors for all social discourse?," he or she answers: "Me and a few guys just like me?" To state Marcuse's argument is to discredit it, but some bad ideas just keep coming back.

B. Marcuse's Revenge

Marcuse's ideas founded expression in campus speech codes and some local ordinances adopted in the late 1980s and early 1990s. Harvey Silverglate and Alan Kors highlighted the issue in their 1998 book, *The Shadow University*, where they described the assaults on free speech and academic freedom on college campuses as "Marcuse's Revenge."[33] The predominant purpose of the speech codes was to balance free speech rights with a right to be free from verbal "assault" for students who fell into designated categories of disadvantaged or marginalized groups,[34] but doing so required a redefinition of the First Amendment, which historically had been premised on content and speaker neutrality.

Academic writers at the time who followed in Marcuse's intellectual footsteps include Richard Delgado, Mari J. Matsuda, Charles R. Lawrence III, and Kimberlé Williams Crenshaw, who, in their 1993 book, *Words That Wound*, argued that "defenders of the status quo have discovered, in the first amendment, a new weapon."[35] They called for a conception of "the substance of freedom" that does not protect "a right to degrade and humiliate another human being any more than it implicates a right to do physical violence to another."[36] Another like-minded scholar, Catharine MacKinnon, similarly equated words with actions, "tantamount to . . . saying 'ready, aim, fire' to a firing squad."[37] She advocated "a new model for freedom of expression . . . in

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[31] *Id.*

[32] *Id.*

[33] ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES 67–96 (1998).

[34] *Id.* at 84–86.

[35] RICHARD DELGADO ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7, 14 (1993).

[36] *Id.* at 15.

[37] CATHARINE A. MACKINNON, ONLY WORDS 12 (1993).

which free speech does not most readily protect the activities of Nazis, Klansmen, and pornographers, while doing nothing for their victims."[38] She advocated the censorship of sexual speech (in particular) to prevent discrimination.

While some academics sought to reconceptualize freedom of speech (and thereby rationalize censorship), others more provocatively appeared to embrace the horror. Professor Stanley Fish thus defended censorship in his book, *There's No Such Thing as Free Speech . . . and It's a Good Thing, Too*, in which he advanced the notion that those who are clearly right ought to be able to impose their collective will and silence the other side. He dismissed talk of the value of free expression for its own sake as an empty piety and suggested that the debate over the protection of speech has always been about promoting messages that one side wants heard and censoring ideas they want to silence. And he is fine with that because, after all, everybody does it. Or, more fundamentally, he is fine with it because, in his view, all First Amendment arguments amount to nothing more than a contest of opposing political wills.

Thus, according to Professor Fish, public universities should be able to impose speech codes on their students and the government should be able to prohibit "hate speech" (however one might define that nebulous concept) because that is the side he has chosen.[39] Years later, Fish would expand on these views to acknowledge that "hate speech" is incapable of precise definition and that laws attempting to ban such speech are doomed to fail, but at the same time he reaffirmed his claim that there is no "free speech principle."[40] According to his thesis, censorship is good, if done for the "right" reasons or by the "right" people.[41] But then, everyone has their reasons, don't they?

For Fish to point out the existence of intellectual inconsistency ("free speech for me, but not for thee"[42]), has never been much of an argument, and it is far from a justification for speech restrictions. To say that most people can name some kind of speech they want to suppress while zealously guarding their own makes a case for remedial education, not censorship. In any event, one might hope that a robust defense of censorship would

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[38] *Id.* at 109.

[39] STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING TOO 102–33 (1994) [hereinafter FISH, THERE'S NO SUCH THING AS FREE SPEECH].

[40] STANLEY FISH, THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP 45 (2019) [hereinafter FISH, THE FIRST].

[41] *See id.* at 31–61.

[42] NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE (1992).

be more intellectually defensible than hearing former President Donald Trump's acting Chief of Staff, Mick Mulvaney, defiantly telling the press that the United States makes quid pro quo demands of foreign governments all the time, and people should just "get over it."[43] Likewise, the academy should be able to do better in marshalling its arguments than the Nixon loyalists who rationalized the abuses of Watergate by claiming that all politicians engage in dirty tricks.

For that reason, courts that first confronted various policies inspired by these "new model[s] for freedom of expression" (as Catharine MacKinnon described them) were not impressed. The US Court of Appeals for the Seventh Circuit in 1985 struck down an anti-pornography ordinance drafted by MacKinnon and feminist activist Andrea Dworkin as an exercise in "thought control" and flatly inconsistent with the First Amendment.[44] The ordinance had defined "pornography" as "the graphic sexually explicit subordination of women, whether in pictures or in words,"[45] based on MacKinnon's theory that men who see women as subordinate are likely to treat them so. Thus, "pornography" (as defined by the ordinance) could be prohibited regardless of serious merit and without consideration of the predominant theme of the work as a whole because, as MacKinnon explained, "pornography is not an idea; pornography is the injury."[46] This was a throwback to a Comstockian view of "pornography" with a feminist veneer, and the district court rejected it on traditional First Amendment grounds. It held that the law was unconstitutional because its terms were vague, its scope overly broad, and because it established a prior restraint.[47]

The flaws of the Indianapolis ordinance were so fundamental, the court of appeals held that it need not even reach questions of the law's vagueness or prior restraint.[48] It found that the law was an exercise in "thought control" because it banned speech only if it promoted the "wrong" attitudes or beliefs.[49] Indianapolis did not employ established legal standards for obscenity (including graphic depictions that appeal to a "prurient

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[43] *Mulvaney Confesses to Quid Pro Quo: Get Over It (2019)*, CNN (Oct. 18, 2019), https://www.cnn.com/videos/politics/2019/10/18/mulvaney-trump-get-over-it-quid-pro-quo-sot-crn-vpx.cnn [https://perma.cc/2JF6-BC85].

[44] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328, 332–33 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[45] *Id.* at 324.

[46] *Id.* at 328.

[47] American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1331–37 (S.D. Ind. 1984).

[48] *Am. Booksellers*, 771 F.2d at 332.

[49] *Id.* at 328.

interest" in sex that violates contemporary community standards of "patent[] offensive[ness]").[50] The court observed that, under the city's new definition, there was no limit to how graphic and patently offensive a work could be so long as women were not "subordinate[d]" or presented as "enjoying . . . humiliation."[51]

The court directly confronted the claim that porn promotes sexist thinking: "If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech."[52] It noted that the world is filled with bad ideas, and speech that may "influence the culture and shape our socialization,"[53] ranging from bigotry and anti-Semitism to televised violence, is all protected as speech, because "[a]ny other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us."[54] The Supreme Court affirmed the decision without opinion.[55]

Regulation of campus expression through "speech codes" based on like-minded theories met the same fate. A federal court struck down a University of Wisconsin policy drafted by a group of professors that included Richard Delgado, holding that its prohibition of "discriminatory comments, epithets, or other expressive behavior" (among other things) was vague, overly broad, and did not fall within the First Amendment exception for "fighting words."[56] Drawing on the Seventh Circuit's holding invalidating MacKinnon and Dworkin's anti-pornography ordinance, it held that the First Amendment does not permit "balancing" the value of speech (or lack thereof) against the possibility of causing offense.[57] The decision echoed an earlier ruling that rejected a similar policy at the University of Michigan. It found that a ban on "discriminatory harassment" failed to provide "any principled way to distinguish sanctionable from protected speech," and, consequently, "the University had no idea what the limits of the [p]olicy were and it was essentially making up the rules as it went along."[58] In 2018, Delgado looked back at these and other cases and

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[50] *Id.* at 324.

[51] *Id.* at 328.

[52] *Id.* at 330.

[53] *Id.*

[54] *Id.*

[55] Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986), *aff'g mem. Am. Booksellers*, 771 F.2d 323.

[56] UMW Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1177, 1179–81 (E.D. Wis. 1991).

[57] *Id.* at 1173–77.

[58] Doe v. Univ. of Mich., 721 F. Supp. 852, 867–68 (E.D. Mich. 1989).

acknowledged that such campus speech codes are almost always struck down when challenged in court.[59]

II. ACADEMIC RATIONALIZATIONS FOR CENSORSHIP

A. The Rise of Politics

While the courts have recognized and applied strong First Amendment principles, the same cannot be said of those among Marcuse's "democratic educational dictatorship of free men."[60] Support for free expression has waned among certain academics—including some who devote special attention to First Amendment scholarship—as the subjects of protection veered away from issues traditionally associated with progressive politics. Earlier, as First Amendment law developed during the 1930s through the 1970s, liberal academics generally could be counted on to provide a full-throated defense of free speech when it came to supporting the labor movement, struggling for civil rights, battling over academic freedom, opposing restrictions on obscenity, defending anti-war protests, and the like. During this period, liberals primarily supported free expression claims while conservative intellectuals generally were far more skeptical.

This began to change in the 1980s, as a certain faction of feminists like MacKinnon began to advocate restrictions on pornography as civil rights law. At the same time, academics espousing "critical race theory" (like Delgado and Matsuda) drew on MacKinnon's work and argued for adoption of various types of "speech codes." The trend picked up after political conservatives began to perceive legal threats to a variety of issues important to them, and found that they had a First Amendment shield as well. As courts grew increasingly receptive to their arguments, it was now the progressives—particularly within the legal academy—who claimed that the First Amendment had gone too far. This picked up steam after *Citizens United v. FEC*, in which the Supreme Court struck down restrictions on "electioneering communications" and the use of corporate funds to support political candidates.[61]

Today, scholarship increasingly reflects the same political polarization that infects the public at large. In this charged environment, some academic writers question the value of free

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[59] RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY 31 (2018).

[60] Marcuse, *supra* note 21, at 106.

[61] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 321, 368–72 (2010).

speech itself. For example, Cornell University Law Professor Steve Shiffrin complains about the First Amendment's "dark side," and bitterly asks "[W]hat's wrong with the First Amendment?" He criticizes a number of Supreme Court decisions as overprotecting speech, and argues that both liberal and conservative judges "have turned free speech into a fetish."[62] More specifically, Shiffrin decries decisions of the Roberts Court striking down prohibitions on "crush videos," lying about military honors, and the sale or rental of violence-themed video games to minors (among others) as "loathsome," representing "a form of First Amendment stupidity."[63] Shiffrin suggests that, rather than apply strict First Amendment scrutiny to evaluate speech restrictions, courts should instead engage in an ad hoc balancing of interests and should feel free to expand the categories of unprotected speech. Too much protection, he suggests, represents the "sin" of "First Amendment idolatry" that is at odds with human dignity.[64]

If he could have his way, Shiffrin would crack down on pretrial publicity, forbid the publication of information on rape victims, prohibit "crush videos" and violent video games (at least as to minors), restrict pornography (however that slippery concept might be defined), punish racist speech, prohibit demonstrations near funerals, limit commercial speech that substitutes "consumer pleasure for human flourishing," and—of course—limit political speech by corporations.[65] There simply would not be enough hours in the day for the speech police to do its work.

Shiffrin is far from alone among contemporary First Amendment scholars. Professor Burt Neuborne of New York University Law School takes much the same position as Shiffrin (albeit in more temperate language), arguing that the Supreme Court has elevated "useless or harmful speech to underserved heights of protection" while downplaying or ignoring democratic values.[66] Neuborne maintains that liberals were fully aligned with strong First Amendment protections through the mid-twentieth century, when they believed that freedom of speech promoted largely progressive causes—what he calls "the First Amendment era of good feelings."[67] But once the Court began extending the same protections to conservative speakers as well,

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[62] SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT?, *supra* note 12, at 4.

[63] Shiffrin, *The Dark Side*, *supra* note 12, at 1488.

[64] SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT?, *supra* note 12, at 4, 184.

[65] Shiffrin, *The Dark Side*, *supra* note 12, at 1496–97.

[66] BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 106 (2015).

[67] *Id.* at 113.

"some progressives began to suspect they had made a bad First Amendment bargain."[68]

If ever there were any room for doubt about the role of political ideology underlying this shift in academic thinking, it evaporated with Professor Louis Michael Seidman's 2018 article, "Can Free Speech Be Progressive?" Seidman answered his own question with an emphatic "no," because he sees no potential under current First Amendment doctrine for progressives to "weaponize free speech" (his words) to convert the First Amendment into "a powerful sword that would actually promote progressive goals."[69] This is because recognizing constitutional protection for opposing positions does not further his definition of progressivism. Seidman defines this as "the modern political stance favoring an activist government that strives to achieve the public good, including the correction of unjust distributions produced by the market and the dismantling of power hierarchies based on traits like race, nationality, gender, class, and sexual orientation."[70]

The problem with modern free speech doctrine, according to Seidman, is the freedom part. As he sees it, "[t]he doctrine is dominated by obsession with government restrictions on speech and with government interference with listener autonomy."[71] The First Amendment, with its commitment to neutral principles, cannot be progressive in his estimation, because "progressivism is not neutral."[72] Rather, in an ironic nod to Oliver Wendell Holmes, Seidman describes progressivism as "a fighting faith committed to a particular and controversial outcome."[73] Neutrality is a "sham," he argues, because the law favors the status quo, which entrenches the rich and powerful.[74] Thus, he concludes, "*constitutionalizing* the right to freedom of speech leads to an anti-liberal mindset," and "[s]o long as we imagine that the Constitution is the common ground that people of all political persuasions can adhere to, it cannot be progressive."[75]

Seidman is not wrong in this respect: it's hard to fashion a coherent argument for activist government from an amendment that starts with the words "Congress shall make no law."[76]

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[68] *Id.* at 114.

[69] Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2223 (2018).

[70] *Id.* at 2220.

[71] *Id.* at 2236.

[72] *Id.* at 2245.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 2245, 2247.

[76] U.S. CONST. amend. I.

Undaunted by this, Seidman's view of free expression melds the messianic zeal of Anthony Comstock with the asymmetrical rights theory of Herbert Marcuse and adds layers of the types of obfuscations about which George Orwell warned.[77] He merely replaces Comstock's Christian god with "progressivism," which he describes as "neutral," in that "all sensible and humane people should favor that program."[78] Seidman justifies suppressing speech by everyone else, asking (in the style of Stanley Fish) "[i]f speech law is inevitably going to be biased one way or the other, then why not bias it toward progressives?"[79]

Professor Fish defends such result-oriented theorizing by claiming that free speech advocates engage in the same instrumentalist thinking. His 2019 book, *The First: How to Think About Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth, and Donald Trump*, expands on his original thesis that all free speech battles are nothing more than a contest between opposing political wills. Fish argues that First Amendment arguments "are never made in the name of the abstraction itself but in the name of some agenda to which free speech rhetoric has been successfully attached."[80] He asserts "that there is no *general* free-speech principle and that the label of free speech is applied by polemicists to . . . affirm the values they already hold" in order to defend expression "*that should be uttered freely without restrictions because it says things I agree with*" (his italics).[81] He concludes that free speech has no intrinsic value and that (again, his italics) "*the First Amendment is a participant in the partisan battle, a prize in the political wars, and not an apolitical oasis of principle*."[82]

But Fish goes further and asserts that censorship actually *promotes* freedom of speech. This is because some types of speech undermine what commonly are thought of as "free speech values"—promoting deliberative democracy, "the search for truth," informative (rather than corrupting) speech, etc.—and that regulating such "bad" speech therefore "is an act of fidelity" to the First Amendment.[83] Fish argues that any answer to the question "What is the First Amendment for?" logically leads to "censorship somewhere down the line because your understanding of the amendment's purpose will lead you to

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[77] *See* George Orwell, NINETEEN EIGHTY-FOUR (Penguin Books 2013) (1949).
[78] Seidman, *supra* note 69, at 2245.
[79] *Id.*
[80] FISH, THE FIRST, *supra* note 40, at 11.
[81] *Id.* at 19–20.
[82] *See id.* at 4.
[83] *See id.* at 25.

regulate or suppress speech which serves to undermine that purpose."[84] Consequently, he concludes, "censorship is not a violation of the First Amendment but the necessary vehicle of its implementation."[85]

This is a neat trick, to suggest that censorship *is* free speech. It ranks up there with Oceania's slogan that "FREEDOM IS SLAVERY,"[86] Rudy Giuliani's claim that "[f]reedom is about authority,"[87] and Fredric Wertham's assertion that "[t]rue freedom is regulation."[88] But it follows quite naturally from Marcuse's concept of "repressive tolerance," which holds that censorship must be employed to put down ideas or institutions that impede human liberation.[89] Using this logic, unfettered expression is a tool of suppression, while censorship by the correct people promotes "freedom of thought." So, presto chango, censorship is not really *censorship*; it is merely using the tools of censorship to battle the larger repressions of the established order. And, as translated by Professor Fish, censorship actually *enforces* the First Amendment when used to suppress speech that is antithetical to the "First Amendment values" he ironically insists do not exist.[90]

So, we are to free the mind through censorship? Somewhere, Big Brother is beaming with pride.

B. Politics Versus Principle

The academic notion that freedom of speech is nothing but a political argument employed opportunistically to promote some agenda would come as a surprise to actual First Amendment advocates who have devoted careers to defending freedom of expression, including speech (and speakers) they find repugnant. Professor Aryeh Neier, the former National Executive Director of the American Civil Liberties Union (ACLU), who was vilified in the late 1970s for defending the First Amendment rights of Nazis to march in Skokie, Illinois,

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[84] *Id.*

[85] *Id.*

[86] This was one of the guiding principles of the authoritarian state in ORWELL, *supra* note 77, at 17, along with "WAR IS PEACE" and "IGNORANCE IS STRENGTH."

[87] In a 1994 speech, "America's Mayor" (and later Trump consigliere) Rudolph Giuliani was seemingly channeling Big Brother when he asserted "[f]reedom is about authority. Freedom is about the willingness of every single human being to cede to lawful authority a great deal of discretion about what you do." *'Freedom Is About Authority': Excerpts from Giuliani Speech on Crime*, N.Y. TIMES (Mar. 20, 1994), http://www.nytimes.com/1994/03/20/nyregion/freedom-is-about-authority-excerpts-from-giuliani-speech-on-crime.html [https://perma.cc/U687-4NYW].

[88] Wertham, *supra* note 19, at 11 (citation omitted).

[89] *See* Marcuse, *supra* note 21, at 110–11.

[90] FISH, THE FIRST, *supra* note 40, at 4, 19–20, 25.

certainly would disagree. Few have more justifiable reason to hate Nazis and all that they espouse than Neier, who narrowly escaped the Holocaust with his immediate family, while many members of his extended clan perished. But as he explained in his book, *Defending My Enemy*, "I supported free speech for Nazis when they wanted to march in Skokie in order to defeat Nazis. Defending my enemy is the only way to protect a free society against the enemies of freedom."[91]

Neier's defense of the free speech rights of Nazis was not an exercise in the use of high-sounding platitudes to support speakers or philosophies he favors (as Fish understands First Amendment advocacy); it was based on the principle that "[t]he alternative to freedom is power" and that "[t]o defend myself, I must restrain power with freedom, even if the temporary beneficiaries are the enemies of freedom."[92] Fish actually seems to get this point, when he (finally) concludes that "hate speech" laws will always fail because "if you are lucky enough to prevail in an election, you may be able to get your enemy's speech labeled 'hateful.' But when political fortunes turn (as they always will), your enemies will then do to you and your speech what you have done to them."[93] And it is hard to plausibly claim that the defense of speech you hate is unprincipled when doing so comes at significant personal cost. Not only was Neier targeted with thousands of hateful letters, the ACLU lost about thirty thousand members (and about $500,000 in contributions—not an inconsiderable sum in 1977 dollars) over its defense of free speech principles in the Skokie case.[94]

Nadine Strossen, former ACLU president (and daughter of a Holocaust survivor) made the same point, even in the post-Charlottesville environment. In her 2018 book, *Hate: Why We Should Resist It with Free Speech, Not Censorship*, Strossen explains how traditional free speech principles that include a strict requirement of content neutrality are essential to protecting vulnerable members of the population and members of minority groups. It is only through strict adherence to free speech principles—not politics—that such groups can be protected. She marshals numerous examples, both in the United States and

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[91] ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 1–2 (1979).

[92] *Id.* at 4–5.

[93] FISH, THE FIRST, *supra* note 40, at 51.

[94] NEIER, *supra* note 91, at 79.

abroad, confirming that laws restricting speech inevitably are used to punish the very groups they ostensibly were enacted to protect.[95]

It is a straightforward matter of logic: in democracies, policies are made and enforced by the majority. And, unless the rules are made by Marcuse's "democratic educational dictatorship of free men,"[96] minorities simply have to trust that the majorities in charge will protect them. Even then, history provides little cause for optimism, as the experience in Europe illustrates. In Turkey, for example, it is illegal to say that "the Armenian genocide occurred, while in France, it is a crime to [deny it]."[97] In the United States, the very point of having constitutional protections from majority rule, with the assurance that any speech regulation must be content neutral, is to prevent majorities from suppressing disfavored and powerless minorities. That is why First Amendment advocates have defended even the speech they hate—as a matter of principle—not out of political expediency.

So, Professor Fish makes a good point when he identifies scholars who seek to circumscribe First Amendment protections as champions for their particular causes. He aptly labels Catharine MacKinnon an "antipornography crusader," and describes like-minded scholars as "polemicists."[98] For example, in a 2012 book, *The Harm in Hate Speech*, Professor Jeremy Waldron borrowed from MacKinnon's view of the First Amendment and applied it to support laws against hate speech.[99] Although he acknowledged multiple examples of minority rights being trampled by government, Waldron discounted the problem of majoritarian oppression and asserted that hate speech laws somehow are an exception to the general rules of politics. He asserted that many countries have hate speech laws that are administered responsibly "by and large," meaning, apparently, close enough for government work.[100] But even this modest claim is rebutted by Nadine Strossen's in-depth study of such laws, which finds that they are at best ineffective, and in many cases counterproductive.[101]

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[95] NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 81–90 (2018).

[96] Marcuse, *supra* note 21, at 106.

[97] Alan M. Dershowitz, *The Right Shoe of Censorship is Now on the Left Foot*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/outlook/dubious-arguments-for-curbing-the-free-speech-of-nazis/2018/01/31/495cd256-fc96-11e7-8f66-2df0b94bb98a_story.html [https://perma.cc/3HPY-KL2E].

[98] FISH, THE FIRST, *supra* note 40, at 43–44.

[99] JEREMY WALDRON, THE HARM IN HATE SPEECH 74, 89–92 (2012).

[100] *Id.* at 202–03.

[101] STROSSEN, *supra* note 95, at 133–56.

Fish may be overstating the case in calling Waldron a "polemicist," since he wrote his book "not to condemn or reinterpret the U.S. constitutional provisions" but more to "come to terms with the best that can be said for hate speech regulations."[102] Waldron forthrightly acknowledges that his position is a straight-up policy choice, admitting that "a restriction on hate speech or on group defamation is a restriction on speech on account of its content, and that it is the content that explains the restriction."[103] The "polemicist" label is more accurate when applied to academics whose policy preferences come first and constitutional rationalizations are just the tail wagging the dog.

A major tell is that many such theorists are activists who work to implement their policies and propound their constitutional theories to serve those ends. For such academic writers, Stanley Fish is on point when he describes their methodology as first identifying "First Amendment values" and thereby creating a rationale for censoring any speech that falls outside that privileged construct as they have defined it.[104] The tag certainly is apt for such theorists as MacKinnon, who with Andrea Dworkin drafted the Indianapolis anti-pornography ordinance, and others, like Richard Delgado and Mari Matsuda, who advocated for university speech codes and devised constitutional theories to support them. Thus, Delgado and his coauthors describe their work as part of a "liberationist pedagogy" that is "avowedly political" involving "ongoing engagement in political practice."[105] In a 2018 book, Delgado offers what he describes as "a guide for activist lawyers and judges."[106]

The approach of these advocate-academics ignores both the design of the First Amendment and the way in which the law of free speech evolved. The First Amendment is a prohibition of censorship, not a promise of democratic civic engagement, virtue, artistic freedom, or individual self-realization. Those aspirations likely will be advanced by strong protections for freedom of expression, or at least we hope they will, but any failure to achieve these presumed *values* does not change the nature of the constitutional *prohibition* of censorship. The relevant question is not what does the First Amendment promote, but what was it designed to prevent? Rather than searching for constitutional "values" or "effects," Professors Jane

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[102] WALDRON, *supra* note 99, at 11.
[103] *Id.* at 152.
[104] FISH, THE FIRST, *supra* note 40, at 11, 19–20.
[105] DELGADO ET AL., *supra* note 35, at 3, 10–11.
[106] DELGADO & STEFANCIC, *supra* note 59, at 109–33.

and Derek Bambauer have observed that sound theories of free expression all contain "a necessary assumption about what makes the political process *bad*."[107] That is, the First Amendment was premised on the core insight that "humans are incompetent at designing good rules of censorship."[108]

The framers of the Bill of Rights were pretty up front about it. Even if they failed to explain the full meaning of the forty-five words that make up the First Amendment, it seems they were clear in their purpose to deny government the power to interfere with the ability of individuals to develop and express their ideas.

James Madison, who introduced the Bill of Rights in Congress, initially proposed a more descriptive version of what became the First Amendment, not only protecting freedom of religion but also providing that "the full and equal rights of conscience" shall not "be in any manner, or on any pretext infringed."[109] His initial draft provided that the people "shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[110] Finally, his proposed language provided that the people "shall not be restrained from peaceably assembling" nor from petitioning the government.[111] As Madison explained when he introduced the amendment in June 1789, "[t]he rights of conscience [and] liberty of the press . . . should be so secured, as to put it out of the power of the Legislature to infringe them."[112] The point was to limit government power, not to promote a particular policy or value, and the First Amendment as finally adopted did not alter that essential design.

The purpose of quoting the Father of the Bill of Rights is not to suggest an originalist view of the First Amendment that claims its full meaning was cemented at its inception. Nor does this set forth a reading of the First Amendment as an absolute prohibition on any government regulation of the use of words. Quite to the contrary, the meaning of the First Amendment is

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[107] Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 365–66 (2017).

[108] *Id.*

[109] James H. Read, *James Madison*, THE FIRST AMEND. ENCYC., https://mtsu.edu/first-amendment/article/1220/james-madison [https://perma.cc/9UXF-N3YX].

[110] *Id.*

[111] *Id.*

[112] *Sketch of Proceedings of Congress, in the House of Representatives of the United States, Monday, June 8, 1789*, GAZETTE U.S., June 10, 1789, at 67 col. 2, *quoted in* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 59 (1997).

something that developed over time as a response to real-world episodes of censorship. First Amendment principles evolved through this process of solving censorship problems as they emerged, not from academic navel-gazing seeking to define free speech "values." What became "First Amendment principles" were developed case-by-case by confronting censors in the wild; they were not hatched in an ivory tower.

The First Amendment is not self-defining. It has been the job of the courts to work out the meaning of the various legal terms of art the amendment contains, including "abridging," "the freedom of speech," or "of the press," among others. That inquiry is more easily understood when considered in the context of particular controversies (say, Anthony Comstock seeking to silence birth control advocate Margaret Sanger) and with the understanding that the amendment was adopted to cabin the government's power to muzzle speech. Decide enough of those cases and you get a doctrine; issue opinions covering a diverse array of speakers in different circumstances, you get First Amendment jurisprudence. And that is what happened through the twentieth century, leading to increasing levels of protection for speech across the board.

After the reign of Anthony Comstock ended, the age of free speech in America took off. Comstock's death was not the cause of this—his influence had begun to wane long before he died in 1915—which was still more than a decade before the Supreme Court began the laborious task of creating First Amendment doctrine. Things changed in large part because the culture moved on. Victorian mores faded away and society, as well as judges, began to accept the arguments that free speech advocates had been making for decades.

Supreme Court Justices Oliver Wendell Holmes and Louis Brandeis started the ball rolling with notable opinions that set forth principles of free expression, and the Court finally began to apply those ideas to cases in the 1930s.[113] This process was slow but inexorable. In those cases, and during the ensuing decades, the Court recognized free speech protections for news publishers, political radicals, union organizers, religious proselytizers,

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[113] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he 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."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring) ("Those who won our independence believed . . . liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .").

Communists, filmmakers, booksellers, pornographers, academics, civil rights activists, anti-war demonstrators, students, gay rights agitators, women's rights proponents, Klansmen, Nazis, advertisers, pro-choice activists, anti-choice activists, and so on.

Professor Stuart Jay traced this evolution case-by-case, and observed that "[t]he principle of government neutrality regarding expression did not blow in from the desert. Rather, it encapsulates an attitude about the relationship between citizen and state that grew out of" specific cases of censorship.[114] During the formative years of First Amendment jurisprudence, "the Court was presented with an assortment of cases in which individuals were arrested for literally doing nothing other than expressing an unpopular view, or sometimes for simply being in a place that authorities deemed off limits to those who bucked the established order."[115] Harvard Professor (and former US Solicitor General) Charles Fried has written that this yielded the basic building blocks of First Amendment law:

> The principal lines of doctrine are clear. Government may not suppress or regulate speech because it does not like its content—unless it is obscene or demonstrably defamatory. If government regulates the time, place or manner of speech, it must regulate in a way that does not take sides between competing ideas. And if a government regulation directed at other ends has the effect of restricting speech, that regulation too must be neutral.[116]

Academic critics of this evolution argue that it extends protection to the wrong speakers, or to bad speech, and that the resulting jurisprudence is not sufficiently consistent to suit their preferences. Such critiques are to be expected among those who see the First Amendment as nothing more than a struggle between competing political goals, and particularly from those who have been unable to impose their vision of what constitutes "valuable" speech. It is an "eye of the beholder" problem, pure and simple.

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[114] Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 1020 (2008).

[115] *Id.*

[116] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 225 (1992).

III. KNOWING THE CENSORS WHEN YOU SEE THEM

A. Still a Dilemma?

Censors face a dilemma in the United States. They may wield great power and enjoy political favor—for a time—and can ravage individual lives and reputations. But they also are the subject of popular derision and generally end up on the wrong side of history. This is why those who actively seek to suppress speech try vehemently to deny that their actions amount to "censorship," and why they often feel beleaguered even as they marshal the power of the state to serve their purposes. Defensiveness pervades their occupation. Those who engage in the business of censorship have an inferiority complex for a reason—at some level they understand their enterprise is fundamentally un-American. But what of current trends in academia? Some suggest that there is no longer any reticence about censorship, particularly among those who embrace the notion that the First Amendment does indeed go "too far." Such unapologetic endorsements of the need to suppress disagreeable expression seem to contradict the premise that censors in a free society are embattled and defensive. Are these the exceptions that prove the rule?

Not at all. To begin with, exceptions don't prove rules—they test them—and in this instance, First Amendment critics, in the words of the Bard, "doth protest too much."[117] Condemnatory rhetoric about First Amendment "stupidity" and talk of constitutional "sin," reveal a fundamental defensiveness in the sense that such scholars evidently believe that the best defense is a loud and snarky offense. In other words, although a number of academic writers advocate restrictions on a broad range of speech, they nevertheless recoil from the mantle of "censor" by claiming the Supreme Court has defined the concept of free expression too broadly. *That's* not speech, they sniff, or, at least, not the kind of speech the Constitution's framers had in mind. Who's a censor? *I'm* not a censor.

Ever since Comstock sullied the name, no one wants to be known as a censor. This is particularly true of those who advocate, or seek to exercise, censorial power. It also is why certain academics disparage "First Amendment values" and devise elaborate theories to explain how their proposals for government to restrict the speech they dislike does not make

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[117] WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act III, sc. 2 ("The lady doth protest too much methinks.").

them "censors." It is manifest in Stanley Fish's insistence that censoring speech actually *implements* the First Amendment and his complaint that, "in our legal culture as it is now constituted, if one yells 'free speech' in a crowded courtroom and makes it stick, the case is over."[118] It is illustrated by the lament of Richard Delgado and his coauthors that writers from across the political spectrum, "from George Will to Nat Hentoff have attacked our efforts," unjustly in their view, by describing it as "the work of 'thought police,' 'leftist censors,' and 'first amendment revisionists.'"[119] They *cannot* be censors, Delgado insists, because "when the government regulates hate speech, it enhances and adds to potential social dialogue, rather than subtracts from it."[120] But censors are as censors do, and their actions exhibit certain defining characteristics.

B. The Foxworthy Scale

There may be a way to cut through the pretense and define more precisely when the label "censor" fits. One approach is inspired by stand-up comedian Jeff Foxworthy, a member of the Blue Collar Comedy Tour, who is famous for (among other things) his series of one-liners that include the phrase "You might be a redneck if . . . ."[121] Examples include: You might be a redneck "if you own a home that is mobile, and fourteen cars that aren't;" "if an episode of *Walker, Texas Ranger* changed your life;" or "if you've been married three times and still have the same in-laws."[122]

Somewhat ironically, Foxworthy's use of stereotype could make him a criminal under the types of hate speech laws proposed by Delgado and others if his jokes were thought to be disparaging of a "protected" group. But Foxworthy's target audience is not among the favored categories, Delgado explains, because "'[c]racker,' although disrespectful, still implies power, as does 'redneck.'"[123] This claim that rednecks and crackers are people of "power" would come as a real surprise to the residents of rural America, who largely feel disempowered and

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[118] FISH, THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 39, at 105; FISH, THE FIRST, *supra* note 40, at 25.

[119] DELGADO ET AL., *supra* note 35, at 11.

[120] DELGADO & STEFANCIC, *supra* note 59, at 94.

[121] JEFF FOXWORTHY, YOU MIGHT BE A REDNECK IF . . . (Warner Records Inc. 1993).

[122] *E.g.*, *Talk: Jeff Foxworthy*, WIKIQUOTE (emphasis added), https://en.wikiquote.org/wiki/Talk:Jeff_Foxworthy [https://perma.cc/2BT3-GSGM] (cataloguing Foxworthy's trademark "Redneck" jokes).

[123] DELGADO & STEFANCIC, *supra* note 59, at 95.

disrespected.[124] But, I digress. The point is, Foxworthy has come up with a million of these lines, because they often ring true.

This same rhetorical device can be employed to help identify who has the mind and the soul of a censor, which may not be funny, but can be just as telling. Below are just a few suggestions.

1. You Might Be a Censor if You Dismiss Support of Free Speech as Empty Dogma.

It is pretty easy to devalue free speech if you can portray its advocates as just a pack of mindless acolytes who mouth First Amendment platitudes as articles of faith. The writings of free speech antagonists are littered with such rhetoric. Academics such as Delgado, Matsuda, Lawrence, and others cannot bring themselves to describe free speech proponents without disparaging them as "absolutists," "purists," "totalist[s]," or "[F]irst [A]mendment fundamentalists."[125] It used to be conservatives like Robert Bork who would complain about "the lunacies of America's rights-crazed culture."[126] But after court decisions increasingly made clear that speech was protected even if the cause was not "progressive," some academic writers became alarmed that they could no longer count on a First Amendment monopoly for "their" issues.

Certain scholars called the drift in free speech thinking away from right-wing moralists and toward libertarians "the new conservative First Amendment Kool-Aid," referring to the 1978 massacre in Guyana when cult followers of the Reverend Jim Jones drank cyanide-laced Flavor-Aide (a Kool-Aid imitator) in a mass suicide.[127] In line with this tack, Professor Mary Anne Franks devotes her book, *The Cult of the Constitution*, to the proposition that First Amendment advocates are unthinking fundamentalists, akin to back-country religionists, who worship at the altar of white male supremacy.[128] Meanwhile, Steve Shiffrin labels First Amendment "idolatry" a "fetish."[129]

A corollary of this strategy is to wave away the First Amendment jurisprudence that evolved through decades of

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[124] *See generally* J.D. VANCE, HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS (2016) (detailing the nuanced struggle of the white working class in America).

[125] DELGADO & STEFANCIC, *supra* note 59, at 35, 38, 141, 145; DELGADO ET AL., *supra* note 35, at 11.

[126] Robert H. Bork, *Thanks a Lot*, NAT'L REV., Apr. 16, 2007, at 24, 24.

[127] WAYNE BATCHIS, THE RIGHT'S FIRST AMENDMENT: THE POLITICS OF FREE SPEECH & THE RETURN OF CONSERVATIVE LIBERTARIANISM 174 (2016).

[128] MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 105–57 (2019).

[129] SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT?, *supra* note 12, at 4, 7–8.

combatting various forms of censorship as mechanical, wooden, or unprincipled.[130] Jeremy Waldron argues that "free-speech 'jurisprudence'" is nothing more than a collection of "traditional myths and slogans" and that law school professors caught in its grip merely teach their students "to spout the mantra 'the marketplace of ideas.'"[131] MacKinnon grumbles that "Americans are taught" to revere freedom of speech "by about the fourth grade and continue to absorb it through osmosis from everything around them for the rest of their lives, including law school, to the point that those who embrace it think it is their own personal faith, their own original view."[132] Stanley Fish calls free speech law nothing more than "a grab bag of analogies, invented-for-the-occasion arguments, rhetorical slogans, shaky distinctions, and ad hoc exceptions" that, in his estimation, overprotect speech.[133]

What is their proposed solution? Delgado and Jean Stefancic insist that "First Amendment doctrine needs to move beyond mechanical tests, such as no content regulation, and thought-ending clichés such as 'the best cure to bad speech is more speech.'"[134] Shiffrin advocates abandoning "frozen categories" of speech considered outside the First Amendment's protection and suggests that courts should be free to expand the range of unprotected speech.[135] In other words, the way to fix the First Amendment is to excise all those troublesome "rule of law" bits.

Ironies abound, of course. It is more than a little problematic to complain about "absolutists" and at the same time argue that traditional First Amendment doctrine is complicated because it recognizes exceptions. Actually, as Shiffrin and others make clear, their argument is that First Amendment law recognizes *too few* exceptions. If the First Amendment is not absolute, they say, then it should be able to accommodate the added exceptions they prefer. But this ignores the century of case-by-case development that led to the current state of the law (that explains the exceptions). It is neither seamless nor perfectly consistent, as it is constantly evolving, but it has led to a certain degree of predictability and ever-increasing protections for freedom of expression in the United States. Accordingly, when Stanley Fish is asked what he would replace it with, he candidly admits "I have no answer at all."[136]

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[130] *Id.* at 95, 185.

[131] WALDRON, *supra* note 99, at 156–57.

[132] MACKINNON, *supra* note 37, at 76-77 (footnote omitted).

[133] FISH, THE FIRST, *supra* note 40, at 1, 4.

[134] DELGADO & STEFANCIC, *supra* note 59, at 33.

[135] SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT?, *supra* note 12, at 71–76.

[136] Nico Perrino, *So to Speak Podcast Transcript: There's No Such Thing as Free Speech, Argues Professor Stanley Fish*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Nov. 5, 2019),

2. You Might Be a Censor if Your Opposition to Free Speech Can Be Summed Up with a Bumper Sticker Slogan.

Negative sloganeering became a familiar ploy in the era of Donald Trump, where reasoned argument took a back seat to labeling. The twice impeached former president routinely disparaged any story he perceived to be unflattering as "fake news" and repeatedly tarred journalists with the Stalinist tag "enemy of the people" for the same reason. This is not argument, it is branding. Like the endless list of dopey nicknames Trump conjured for his adversaries, the point was to use an unflattering handle in the hope of undermining his opposition's credibility. Trump candidly admitted the purpose underlying his attacks in an interview with *60 Minutes* correspondent Lesley Stahl: "I do it to discredit you all and demean you all, so when you write negative stories about me no one will believe you."[137]

Academic critics of strong free speech protections follow the same strategy, albeit in a more erudite and refined way than our reality TV ex-president. One such label that has become popular in recent years is the claim that the First Amendment has been "weaponized." The term went viral after a 2018 *New York Times* piece appeared with the headline, "How Conservatives Weaponized the First Amendment."[138] The *Times* article itself was a balanced analysis by Adam Liptak of how liberals have become increasingly disenchanted with current trends in free speech jurisprudence, but the headline was inspired by Justice Elena Kagan's use (in a dissent) of the vogue term "weaponizing the First Amendment."[139] Justice Kagan, in turn, apparently drew on the current academic popularity of this turn of phrase. In 2016, for example, the American Constitution

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https://www.thefire.org/so-to-speak-podcast-transcript-theres-no-such-thing-as-free-speech-argues-professor-stanley-fish/ [https://perma.cc/FBB3-GL8W].

[137] Eli Rosenberg, *Trump Admitted He Attacks Press to Shield Himself from Negative Coverage, Lesley Stahl Says*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/05/22/trump-admitted-he-attacks-press-to-shield-himself-from-negative-coverage-60-minutes-reporter-says/ [https://perma.cc/BM9S-SD6H].

[138] *See generally* Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/ZQD9-MTNR].

[139] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting). *See generally* Liptak, *supra* note 138.

Society hosted a panel at its Washington, D.C. conference on *The Weaponized First Amendment*.[140]

The use of this metaphor in the First Amendment context may be traced to MacKinnon's quite literal claims from her writings in the 1990s that words are themselves weapons, and from Delgado's argument that "the defenders of the status quo have discovered, in the first amendment, a new weapon."[141] By 2019, MacKinnon jumped further onto the rhetorical bandwagon, writing that the "weaponization of 'speech' for unequal ends . . . has increasingly occurred over the past seventy or so years—prominently for White supremacist and male-dominant sexual ends."[142] Apparently, in her view, pretty much all modern First Amendment jurisprudence has been "weaponized" from its inception.

The term itself is rather meaningless. Like candidate Trump's 2016 threat to "open up [the] libel laws,"[143] the rhetorical device says little more than that the speaker dislikes the current state of the law. "Weaponization" certainly has come a long way from its origins in the 1950s, when rocket scientists like Werner von Braun coined the term to describe the placement of nuclear warheads on ballistic missiles. Now, everything is "weaponized." In December 2019, Representative Jim Jordan of Ohio complained that the impeachment process had been "weaponize[d]" against President Trump.[144]

In a 2016 essay for *Slate*, John Kelly observed that the term had become the "metaphor *du jour*," and that the presidential contest that year had become a hotbed of weaponization. The term perfectly captures the mood of a polarized culture, where "*weaponize* is at the center of this fight between microaggressions and dog whistles, between trigger warnings and P.C. backlash, between the collective sacrifices required of pluralism and the conservatism of privilege, where nuance, complexity, and civil engagement are

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[140] *The Weaponized First Amendment*, AM. CONST. SOC'Y (June 10, 2016), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/5UU2-7Q2L].

[141] MACKINNON, *supra* note 37, at 12; DELGADO ET AL., *supra* note 35, at 7, 14.

[142] Catharine A. MacKinnon, *The First Amendment*: *An Equality Reading*, *in* THE FREE SPEECH CENTURY 140, 157 (Geoffrey R. Stone & Lee C. Bollinger, eds. 2018).

[143] Hadas Gold, *Donald Trump: We're Going to 'Open Up' Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866 [https://perma.cc/9PZE-UXUK].

[144] Dominick Mastrangelo, *Jim Jordan: Democrats 'Willing to Weaponize' Power of Government Against Trump Supporters*, WASH. EXAM'R (Dec. 12, 2019, 10:01 AM), https://www.washingtonexaminer.com/tag/donald-trump?source=%2Fnews%2Fjim-jordan-democrats-willing-to-weaponize-power-of-government-against-trump-supporters [https://perma.cc/8LHG-5F2F].

getting kicked in the ribs."[145] Watching the trend-lines, Kelly concluded: "[W]e've weaponized *weaponize*." [146] It is now one of the most hackneyed expressions used by critics of the First Amendment.

Another cliché is the more wonkish academic criticism that the Roberts Court has "*Lochnerized* the First Amendment," a charge sometimes combined with the claim that free speech has been "weaponized."[147] The term comes from the discredited 1905 decision *Lochner v. New York*, in which the Supreme Court struck down a state law that limited bakers to sixty-hour work weeks.[148] The ruling was sharply criticized at the time in dissents by Justices John Marshall Harlan and Oliver Wendell Holmes, and was later overturned to make way for New Deal era economic regulation. The *Lochner* Era has been reviled as a time in which conservative activist judges imposed their own economic views to strike down government regulations based on substantive due process rights not found in the Constitution's text. Accordingly, *Lochner*ism has been described as "'one of the worst charges that can be leveled against a doctrine or constitutional interpretation, an unequivocal normative repudiation' of what the court has done."[149]

For this reason, the *Lochner* tag has become a popular theme among academics who disfavor First Amendment protection for commercial speech or who believe that the courts have too willingly protected business interests.[150] But the

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[145] John Kelly, *Everything is Weaponized Now. This is a Good Sign for Peace*, SLATE (Aug. 30, 2016, 9:30 AM), https://slate.com/human-interest/2016/08/how-weaponize-became-a-political-cultural-and-internet-term-du-jour.html [https://perma.cc/MT2G-NTTR].

[146] *Id.*

[147] *See* WILLIAM BENNETT TURNER, FREE SPEECH FOR SOME 8, 76–87 (2019).

[148] Lochner v. New York, 198 U.S. 45, 52, 64 (1905), *overruled in part by* Day-Brite Lighting Inc. v. State of Missouri, 342 U.S. 421 (1952), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[149] Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 421 (2006) (quoting Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1212 (2005)).

[150] *E.g.*, Robert Post, *The Constitutional Status of Commercial* Speech, 48 UCLA L. REV. 1, 10 (2000) ("[E]ven if 'speech as such' were to merit some form of First Amendment protection . . . . [t]o locate such a value in the First Amendment would be to justify . . . that the jurisprudence of commercial speech is really a revival of 'the discredited doctrine' of substantive due process 'of cases such as *Lochner v. New York*.'" (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 591 (1980) (Rehnquist, J., dissenting))); Julie Cohen, *The Zombie First Amendment*, WM. & MARY L. REV. 1119, 1148 (2015) ("Scholarly commentary on *Sorrell* has cited the case as evidence of a resurgent *Lochner*ism because the majority opinion reorients First Amendment standards toward the protection of economic liberty."); C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 989–90 (2009) ("In the United States, the Supreme Court repudiated the so-called *Lochner* era . . . . Historically, this change occurred roughly simultaneously with the beginning of vigorous protection of speech freedom. An obvious explanation would be that the Court saw constitutional liberty as essentially a matter for individuals operating outside the commercial sphere while viewing commercial entities more instrumentally. . . . [R]espect for individual autonomy does not require protecting the speech of artificially created and

connection between *Lochner* and the First Amendment is tenuous, where protections for freedom of speech are part of the Constitution's text, while the substantive due process rights at issue in *Lochner* were not. While people can and do debate the merits of particular First Amendment cases involving business or corporate speech, Professor Howard Wasserman has noted that "slapping the *Lochner* tag" on a given decision "does not advance the discussion."[151] It is merely "a pejorative term whose meaning we do not know and cannot agree upon and whose assumed meaning runs a broad range."[152] Consequently, those who tend to rely on such pejorative labeling as a substitute for argument reveal their inner Comstocks.

3. You Might Be a Censor if You Equate Defense of Freedom to Express Disagreeable Ideas with the Endorsement of Bad Speech.

Anthony Comstock simply could not believe that anyone who opposed his crusade to cleanse the culture of immoral influences could possibly be acting out of high principle or good motives. Comstock denounced those who opposed him as being innately depraved and insisted that they were seeking merely to protect "their dear obscenity."[153] Such "free lusters," as he called them, "naturally favor the impure and base" and just want to "tear down the pure and holy."[154] He described those who opposed "his" law as a "howling, ranting, blaspheming mob of repealers," and asserted that "*no sect nor class*, as a sect or class, has ever publicly sided with the smut-dealer, and defended this nefarious business, except the Infidels, the Liberals, and the Free Lovers."[155] Comstock, like most political activists, divided the world into two camps—those for his cause and those against it—and he was incapable of separating his opponents from the

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instrumentally valued commercial entities."); Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1508 (2013) ("A fully inclusive theory of the First Amendment . . . . [a]t some point . . . would encounter the anticanonical influence of *Lochner v. New York* . . . . The consequences of covering all communications would simply be too much to bear." (footnote omitted)); Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2248 (2014) ("Writing shortly after the Supreme Court held that the First Amendment covered commercial speech, Professors Thomas Jackson and John Jeffries accurately foresaw that the First Amendment would become this generation's version of economic due process, a constitutional right restricting the ability of legislatures to regulate business practices." (footnote omitted)).

151 Wasserman, *supra* note 149, at 457.

152 *Id.*

153 *See* COMSTOCK, *supra* note 16, at 393–94; HEYWOOD BROUN & MARGARET LEECH, ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD 191 (1927).

154 COMSTOCK, *supra* note 14, at 196–97.

155 COMSTOCK, *supra* note 16, at 392–93 (footnote omitted).

vice he was working so tirelessly to vanquish. H.L. Mencken observed that "moral gladiators" like Comstock all "know the game" of tarring their adversaries as "apologists for . . . evil."[156]

Some modern anti-speech activists exhibit the same trait. Echoing Comstock, Catharine MacKinnon has written that "it is difficult to avoid the conclusion that the First Amendment is construed as it is so men can have their pornography."[157] Mary Anne Franks employs almost identical language in attacking the ACLU because of its opposition to overly broad and poorly drafted laws against so-called "revenge porn" (which is Franks' special project). She writes "[i]t is difficult to avoid the conclusion that [the ACLU's] motivation for doing so has to do with the gender dynamics of the abuse."[158] Franks closely resembles Comstock in his score-settling polemics of the 1880s. According to Franks, the ACLU has prioritized "white men's free speech rights" over others' because she claims it is "a deeply conservative, and fundamentalist, organization."[159] She goes on: the ACLU's First Amendment advocacy is "defined by consumerism" which has "endeared it to the pornography industry, which found ways to return the favor."[160] I guess *that* will teach groups like the ACLU not to oppose Ms. Franks's legislative proposals.

In the same vein, some advocates of hate speech laws suggest that those who defend Nazis and white supremacists are themselves racist (either consciously or unconsciously). Richard Delgado and Jean Stefancic claim to distinguish groups like the ACLU from "the rest of us, who despise racism and bigotry," and proclaim that "the ACLU and conservative bigots are hand in glove."[161] Far from acting out of principle, they suggest that such First Amendment advocates "prefer defending Nazis to defending their victims," and that "[s]ometimes, defending Nazis is simply defending Nazis."[162] Charles Lawrence asks "which side the civil libertarians are on," and wonders if "the reluctance to regulate hate speech is related to unconscious racism."[163] Meanwhile, Franks charges that free speech advocates are "strangely eager to embrace a narrative that validates prejudices against women, minorities, and fellow liberals."[164]

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156 H.L. MENCKEN, A BOOK OF PREFACES 251 (1917).

157 MacKinnon, *supra* note 142, at 158.

158 FRANKS, *supra* note 128, at 134.

159 *Id.* at 109.

160 *Id.* at 124.

161 DELGADO & STEFANCIC, *supra* note 59, at 109, 161–62.

162 *Id.*

163 Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* DELGADO ET AL., *supra* note 35, at 11, 83.

164 *See* FRANKS, *supra* note 128, at 140.

The tactic of falsely equating the defense of free speech with the ideas being defended—and using it as a way to silence a speaker—was on full display when protestors shouted down an ACLU lawyer at the College of William & Mary in October 2017. Those who disrupted the event were upset that the ACLU had defended the First Amendment right to hold the "Unite the Right Rally" in Charlottesville, Virginia. The protestors stormed the stage brandishing signs with slogans like "Your Free Speech Hides Beneath White Sheets" and "Liberalism is White Supremacy."[165] Tactics like this descend directly from Comstock, who branded those who traded in, or who defended obscenity (as he broadly defined it) "moral cancer planters."[166]

4. You Might Be a Censor if Your First Amendment Theories Perfectly Match Your Political Causes.

Anthony Comstock was fortunate in at least one respect: he did not have to concoct any theories of free expression to support his chosen pursuits. First Amendment doctrine did not yet exist. Being the Victorian Era white male patriarch that he was, Comstock could rely on the parsimonious conceptions of free speech borrowed from English law to prosecute discussions of sex, birth control, literature, art, and anything that pushed the boundaries of traditional womanhood. He believed that the decision in *Regina v. Hicklin* was divinely inspired, for it allowed him to suppress "the evil effect of certain matter, whether printed, written, engraved, drawn, or painted."[167] This had to be what the Constitution's framers intended, he reasoned, for it would "libel our forefathers" to suggest that the Constitution contained a right "to debauch the morals of the young."[168] Those

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[165] PEN AM., CHASM IN THE CLASSROOM: CAMPUS FREE SPEECH IN A DIVIDED AMERICA 66 (2019), https://pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf [https://perma.cc/CE36-H4TM] [hereinafter CHASM IN THE CLASSROOM]; Robby Soave, *Black Lives Matter Students Shut Down the ACLU's Campus Free Speech Event Because 'Liberalism Is White Supremacy'*, REASON.COM (Oct. 4, 2017), https://reason.com/2017/10/04/black-lives-matter-students-shut-down-th/ [https://perma.cc/DE3Y-LXR9]; Francesca Truitt, *Black Lives Matter Protests American Civil Liberties Union*, THE FLAT HAT (Oct. 2, 2017), https://flathatnews.com/2017/10/02/black-lives-matter-protests-american-civil-liberties-union/ [https://perma.cc/WSS6-NH6V].

[166] *See* COMSTOCK, *supra* note 16, at 414.

[167] ANTHONY COMSTOCK, MORALS VERSUS ART 17, 26 (1887). In *Hicklin*, the publisher of an anti-Catholic booklet entitled *The Confessional Unmasked* was convicted under Great Britain's 1857 Obscene Publications Act. The court laid down a definition of obscenity as anything that "deprave[s] and corrupt[s] those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Regina v. Hicklin [1868] LR 3 QB 360, 371 (Eng.). This standard was applied by American courts until overturned by the Supreme Court in *Roth v. United States*, 354 U.S. 476, 489 (1957).

[168] *See* COMSTOCK, *supra* note 14, at 223.

genuinely concerned about fundamentalism would find it here—quite literally—if they cared to look.

Strangely, modern activists who decry "First Amendment fundamentalism" advocate constitutional interpretations that are eerily reminiscent of Comstock's view of free expression. It is no coincidence that doing so supports their policy proposals. But, unlike Comstock, they have to contend with a century of case-law development that has gotten in their way. Dr. Fredric Wertham faced this problem in the 1950s, because emerging free speech jurisprudence was impeding his crusade against horror comics, which he believed caused crime, and superhero comics—like Batman and Wonder Woman—that he believed turned kids gay. So, he insisted that the Constitution's framers never intended to protect such rubbish, calling the invocation of the First Amendment against his activism a "fatal misuse of a high principle."[169] He scoffed at those who cited the First Amendment as "their Magna Charta [sic]," and instead pointed to Comstock era court decisions as setting the proper standard.[170]

During the mid-twentieth century, most liberals (other than Wertham) were comfortable with the evolution of First Amendment law so long as the Constitution was being interpreted to protect leftist political radicals, union organizers, anti-war protestors, and civil rights activists. But once the same rights were recognized for conservatives and corporate entities, then the whole thing went wrong. As Seidman and others concluded, the First Amendment could not be considered reliably "progressive." Some, like Seidman, Neuborne, and Shiffrin, cast a wide net, arguing that First Amendment law should be reinterpreted across the board to be more in line with their political preferences and so it would not "overprotect speech." Others picked their shots more narrowly, and spun theories focusing more on their particular causes. For academics like Delgado, MacKinnon, and Franks, the targets are hate speech, pornography, and "revenge porn." For theorists like Professor Tamara Piety and others, the problem to be overcome involves protections for commercial speech.[171]

One common refrain among academic critics of the First Amendment is that the courts have become result-oriented in their free speech decisions and are actively pushing a partisan

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[169] Fredric Wertham, *What Parents Don't Know About Comic Books*, LADIES' HOME J., Nov. 1953, at 50, 219.

[170] *Id.* at 219; WERTHAM, *supra* note 17, at 330–33.

[171] *E.g.*, TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 2012) (arguing that "unfettered commercial expression both undermines democracy and contributes to social and economic instability").

agenda. But it rings hollow to complain about result-oriented decision-making when your principal beef is that the courts have failed to advance *your* preferred policies. Seidman's argument that the First Amendment is insufficiently "progressive" is a telling example.[172] Likewise, Shiffrin says it is time to stop "the mechanical privileging of free speech" because it "has led us to plainly unacceptable *results*."[173] Professors Jane and Derek Bambauer critiqued the trend among certain academics who have written that the Supreme Court's hostility to speech regulation has ushered in a free speech *Lochner*ism. They observe that "[t]hese scholarly critiques are . . . guilty of the same instrumentalism of which they accuse the Court. Their agenda is the mirror image of the alleged new *Lochner*ism" and "depends entirely on one's political leanings."[174]

It almost sounds like Stanley Fish may be right when he argues that the battle about freedom of speech is just a contest between opposing political factions, except for this: none of the anti-speech theorists propose interpretations of the First Amendment that would limit speech by anyone with whom they are ideologically aligned, while civil liberties groups, like the ACLU, historically have advocated protections even for those with whom they disagree. Weighing the two sides of this debate, the anti-speech position is, in the end, just a variation of "free speech for me but not for thee" with a scholarly gloss.

5. You Might Be a Censor if You Are Certain That There is No "Value" in the Expression You Want to Suppress.

Anthony Comstock was dead certain of many things, but above all he knew that there was no value in the speech he spent his career trying to suppress. How else could a person justify criminal sanctions for a speech crime? He pursued prosecutions of classic literature and art schools, observing that "'art' and 'classic' are made to gild some of the most obscene representations and foulest matters" that "cater[] to the animal in man."[175] And even if the works might possess some vestigial element of merit, Comstock knew that censorship still was the answer because "[a]rt is not above morals. *Morals stand first*."[176] Judge Robert Bork—another

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[172] See *supra* text accompanying notes 69-79 for discussion of Seidman's argument.

[173] *See* SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT?, *supra* note 12, at 186 (emphasis added).

[174] Bambauer & Bambauer, *supra* note 107, at 338–39.

[175] COMSTOCK, *supra* note 14, at 168–69.

[176] COMSTOCK, *supra* note 167, at 5.

man of great certitude—said the same thing about suppressing flag burning as a form of political protest. With such an act, he wrote, "no idea was being suppressed but merely a particularly offensive mode of expression."[177]

Modern anti-speech activists make the same arguments. Catharine MacKinnon proclaims that the "pornography industry does not produce art or literature, nor are the pornography pimps artists or literary writers."[178] Beyond that, she says pornography conveys no "ideas" except the subordination of women.[179] Delgado, Waldron and many others argue that racist speech does not promote the search for truth and is "far from the core of political expression."[180] Such "low-value speech" in their view contributes nothing to the marketplace of ideas, and is immune to any curative effect of "more speech."[181] Charles Lawrence argues that racist speech "advances none of the purposes of the first amendment," and concludes that the time has come to "put an end to the ringing rhetoric that condemns all efforts to regulate racist speech."[182] Mary Anne Franks claims that,

> The Trump era exposed the hollowness of liberal free speech platitudes: the belief that truth will eventually prevail, that the best answer to bad speech is more speech, and that protecting the free speech rights of the worst people in society is necessary to protect the free speech of all.[183]

Such arguments are vividly illustrated by events of the recent past. The "Unite the Right Rally" in Charlottesville is an example of speech at its ugliest, and it makes the value of free speech hard to discern. Tensions had been brewing throughout the summer of 2017 over the city's plan to remove a statue of Confederate General Robert E. Lee from a public park, which led to a call by white supremacist Richard Spencer, neo-Nazi groups, and the Ku Klux Klan to organize a "Unite the Right" rally that August. It was kicked off by the repulsive spectacle of a procession through the University of Virginia campus by 250 tiki-torch-wielding marchers who chanted neo-Nazi slogans including "blood and soil" and "Jews will not replace us."[184] The following day,

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[177] Robert H. Bork, *An End to Political Judging?*, NAT'L REV., Dec. 31, 1990, at 30, 31; *see also* BATCHIS, *supra* note 127, at 1.

[178] MacKinnon, *supra* note 142, at 157.

[179] *See id.*; MACKINNON, *supra* note 37, at 21.

[180] DELGADO & STEFANCIC, *supra* note 59, at 72–74, 94, 146, 155.

[181] *Id.*

[182] Lawrence, *supra* note 163, at 437.

[183] FRANKS, *supra* note 128, at 16.

[184] Debbie Lord, *What Happened at Charlottesville: Looking Back on the Rally that Ended in Death*, ATLANTA JOURNAL-CONSTITUTION (Aug. 10, 2018),

confrontations between white supremacists and counter-demonstrators, made more dangerous by an inadequate police response, resulted in multiple injuries and the tragic death of a young woman named Heather Heyer, when twenty-year-old James Alex Fields, Jr. plowed his car into a group of counterprotesters.[185]

Another illustration involves the speech of the Westboro Baptist Church, a peculiar family cult of religious fundamentalists that believes that their god hates the United States because of the nation's tolerance of homosexuality, among other things. The Westboro cultists had chosen as a principal venue for its hateful message the funerals of servicemen, with picket signs such as "Thank God for Dead Soldiers," "Fags Doom Nations," and "God Hates Fags."[186] The Supreme Court found that the First Amendment protects such speech in an 8–1 decision, even as it acknowledged that the hateful and incoherent messages "fall short of refined social or political commentary."[187] In reaching this conclusion, the Court was aware that such speech "can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain."[188]

To this, Professor Shiffrin states that the Westboro protestors made no valuable contribution to the public debate and thus deserve no First Amendment protection.[189] But such arguments about the Charlottesville and Westboro Baptist Church protests miss the point. The First Amendment does not contain literacy or civility tests wherein the state can dictate what speech qualifies for protection according to whether it possesses sufficient merit and has the right temperament. Protection does not depend on the "value" of the speech involved, or on the possibility that the views of Nazis, white supremacists, and religious bigots might one day be vindicated. Constitutional immunities are based not on the chance that Nazis may be proven right, but on the proposition that the government lacks the authority or competence to declare who is wrong and who must be silent. Freedom includes the right to be wrong. Moreover, the value of such speech does not lie in its potential

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https://www.ajc.com/news/national/what-happened-charlottesville-looking-back-the-anniversary-the-deadly-rally/fPpnLrbAtbxSwNI9BEy93K/ [https://perma.cc/KWM2-YERT]; Yair Rosenberg, *'Jews Will Not Replace Us': Why White Supremacists Go After Jews*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/14/jews-will-not-replace-us-why-white-supremacists-go-after-jews/ [https://perma.cc/L6Z8-9S68].

185 Lord, *supra* note 184.

186 Snyder v. Phelps, 562 U.S. 443, 454 (2011).

187 *Id.*

188 *Id.* at 460–61.

189 *See* SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT?, *supra* note 12, at 18–19.

"truth." Some participants in the marketplace of ideas serve mainly as bad examples, and society is worse off when deprived of them. As John Stuart Mill wrote in *On Liberty*, the benefit of false speech, for both current and future generations, is to provide a "clearer perception and livelier impression of truth, produced by its collision with error."[190]

While the Westboro picketers may have intended to send a message of intolerance through Old Testament-style retribution, no one honestly believes that they persuaded anyone of the rightness and necessity of their views. It is hard to imagine anyone seeing their hateful displays and thinking, "Hmmm, maybe those rude and angry people have a point." By most accounts, those who witnessed their bizarre and distasteful signs were repulsed and left to wonder what could produce such callousness and intolerance. The group's anti-American messages likely did more to rekindle a sense of patriotism among those who saw the church's crude denunciations of the United States. Plus, the counterdemonstrations they attracted were often funny and invariably more persuasive.

But one thing is absolutely clear: allowing this fringe group to propagate its idiotic and mean-spirited views did not make Americans less tolerant of gay people or impede the drive toward marriage equality. Four years after the Supreme Court held that the First Amendment protects the Westboro protest, it decided *Obergefell v. Hodges*,[191] affirming a constitutional right to gay marriage.[192] Reactions to the violent clashes in Charlottesville tell a similar story. A week after the Unite the Right rally, forty thousand people turned out in Boston in response to a repeat event. This time, however, police were well prepared, and the event took place with few arrests and no major incidents of violence.[193]

The outpouring illustrates the type of response that the marketplace of ideas invites. If the best remedy for bad ideas is good ones, some might take comfort from the fact that counterdemonstrators marching in opposition to racism and white nationalism outnumbered the protest organizers in Boston by an estimated 800 to 1, and that the event came off

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190 JOHN STUART MILL, ON LIBERTY 18–19 (Batoche Books 2001) (1859).

191 Obergefell v. Hodges, 576 U.S. 644 (2015).

192 *Id.* at 681.

193 Katie Reilly, *Thousands of Counter-Protestors March Against White Nationalism in Boston a Week After Charlottesville*, TIME (Aug. 19, 2017, 8:05 PM), https://time.com/4907681/boston-free-speech-rally-protests-charlottesville/ [https://perma.cc/MD9C-F43Z].

without any serious injuries or property damage.[194] Likewise, a Unite the Right rally planned in Washington, DC on the first anniversary of Charlottesville fizzled and was an embarrassment. Only twenty to thirty white nationalists turned up, and were greatly outnumbered by thousands of counter-protestors.[195] Susan Bro, the mother of Heather Heyer, who died in the violent confrontations in Charlottesville, saw this as the value of combatting hate with speech, not censorship. She observed of the Washington, DC rally, "they showed up in very small numbers and they were met with counter-protesters who were in a very large number, saying go home, go away."[196] This was the best way to deal with hate, she observed, because "once we take away the right to free speech, we may never get it back."[197]

6. You Might Be a Censor if You Equate Speech with Conduct and Believe That it Must be Restricted Because of its Bad Tendencies.

Anthony Comstock saw no distinction between evil thoughts or words and evil deeds. All fell into the category of sin. He considered any writings that touched on sex "a deadly poison, cast into the fountain of moral purity" that necessarily polluted society.[198] Comstock believed that "evil reading" was a "worse evil than yellow fever or small-pox.[199] There was no need to raise a fuss about cause and effect. It was perfectly obvious to him that bad books "breed vulgarity, profanity, loose ideas of life, impurity of thought and deed."[200] By this reasoning, he equated pornography, contraception, and abortion as products of the same original sin: illicit images and stories cause lust, which

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[194] Chas Danner, *Tens of Thousands March Against Hatred and White Supremacy in Boston, Overwhelm 'Free Speech' Rally*, N.Y. MAG. (Aug. 19, 2017), http://nymag.com/intelligencer/2017/08/thousands-march-against-right-wing-rally-in-boston.html (last visited Dec. 29, 2021).

[195] German Lopez, *Unite the Right 2018 Was a Pathetic Failure*, VOX (Aug. 12, 2018, 7:39 PM), https://www.vox.com/identities/2018/8/12/17681444/unite-the-right-rally-dc-charlottesville-failure (last visited Dec. 29, 2021); James Bovard, *Pathetic Unite the Right and Angry Antifa Sputter. There's Still Time to Heed Rodney King.*, USA TODAY (Aug. 13, 2018, 4:32 PM), https://www.usatoday.com/story/opinion/2018/08/12/unite-right-sputters-antifa-fails-hopeful-signs-america-column/971952002/ [https://perma.cc/348B-2A5G].

[196] WithTheEconomist, *Open Future Festival Chicago* at 3:14, YOUTUBE (Oct. 5, 2019), https://youtu.be/_4t12rS6_jo?t=11654 (last visited Dec. 29, 2021).

[197] *Id.* at 3:12.

[198] BROUN & LEECH, *supra* note 153, at 80–81.

[199] COMSTOCK, *supra* note 14, at 5–6.

[200] *Id.* at 25.

leads to sex, which is facilitated by contraceptives, and, when they fail, abortion.

Modern anti-speech activists use the same logic. Catharine MacKinnon does a spectacular Comstock impression: "Pornography is masturbation material. It is used as sex. It therefore is sex."[201] She even ups the rhetorical ante, asserting that pornography is a "technologically sophisticated form of trafficking in women," and that hate speech and pornography are "racial and/or gender-based terrorism."[202] Stanley Fish describes such tactics like this: "[I]f if you want to [prohibit pornography or] hate speech, what you have to do is deny its status as speech and move it over into the category of action."[203] Hence, all that talk of weaponization.

Some take the concept even further. In a 2017 *New York Times* article, psychology professor Lisa Feldman Barrett argued that certain speakers, such as confrontationally conservative (and gay) former *Breitbart News* editor Milo Yiannopoulos, should be banned from campus appearances because, "[f]rom the perspective of our brain cells," some types of speech are "literally a form of violence."[204] Think of it as a form of transubstantiation, but for censors: speech doesn't just cause violence, it *is* violence. Dr. Barrett based her conclusion on the thesis that chronic stress can affect the body's immune system and that certain speech can produce negative health effects. Speech that is merely offensive—such as listening to a scholarly debate on eugenics—would be okay because it would promote long-term learning. By contrast, an appearance by a "hatemonger" like Milo would be something else entirely, she wrote, because "[h]e is part of something noxious, a campaign of abuse."[205] She added: "There is nothing to be gained from debating him, for debate is not what he is offering."[206]

Arguments like this are nothing more than attempts to invoke science to justify political preferences. Needless to say, stress can affect the human body. But it is quite a stretch to link the type of chronic stress that, say, growing up in poverty can cause, to an adverse emotional reaction to a provocative

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[201] MACKINNON, *supra* note 37, at 17 (footnote omitted).

[202] *Id.* at 141, 157.

[203] FISH, THE FIRST, *supra* note 40, at 44–45.

[204] Lisa Feldman Barrett, *When is Speech Violence?*, N.Y. TIMES (July 16, 2017), https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html [https://perma.cc/4GDM-9UB3].

[205] *Id.*

[206] *Id.*

speaker.[207] It is even more difficult when trying to draw a line between "offensive" speech, which can be unpleasant but potentially educational, and "abusive" speech, which under this theory is not considered expression at all. Barrett offers no analytical tools for drawing such distinctions, and those who seek to silence speakers in the real world usually make no attempt at all to do so. But the tactic of trying to convert obnoxious speech into something else that can be regulated is a familiar one, and it is one defining characteristic of the censor. Jeremy Waldron, for example, describes hate speech as "pollution" of the social environment that can be banned (the same argument made by both Comstock and Fredric Wertham).[208]

While few go so far as to make the literal-minded claim that speech "is" the evil thing the state may prohibit, they are quite comfortable assuming cause and effect. Ultimately, they are merely reviving the "bad tendency" test. This was the theory that informed First Amendment law in Comstock's time, and it is the one that was rejected a century ago, beginning with the writings of Holmes and Brandeis.[209] Successive court decisions abandoned the bad tendency test because experience showed that it was all too easy to suppress speech by authors, radicals, and dissenting minorities if all the government had to prove was that the speech *might* have bad effects.[210]

Another problem with the bad tendency approach is that it operates as a universal solvent for First Amendment rights. Thus, MacKinnon invokes it not just to revise First Amendment protections for sexually oriented or racially charged speech, but to undo legal barriers to defamation suits (or, as Trump would say, "open up the libel laws").[211] She complains that because *New York Times Company v. Sullivan*[212] "made it easier for newspapers to publish defamatory falsehoods," individuals "from subordinated groups who take on dominant interests in public are left especially exposed—sexually libeled feminists who oppose pornography, for example."[213] Such efforts to relabel

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[207] Jesse Singal, *Stop Telling Students Free Speech Is Traumatizing Them*, N.Y. MAG. (July 18, 2017), http://nymag.com/intelligencer/2017/07/students-free-speech-trauma.html (last visited Dec. 29, 2021); Jonathan Haidt & Greg Lukianoff, *Why It's a Bad Idea to Tell Students Words Are Violence*, ATLANTIC (July 18, 2017), https://www.theatlantic.com/education/archive/2017/07/why-its-a-bad-idea-to-tell-students-words-are-violence/533970/ [https://perma.cc/H7TH-8856].

[208] WALDRON, *supra* note 99, at 16, 33.

[209] *See* cases cited *supra* note 113.

[210] *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (striking down a law prohibiting mere advocacy of lawless action as a violation of the First Amendment).

[211] MacKinnon, *supra* note 142, at 159–61.

[212] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[213] MACKINNON, *supra* note 37, at 79, 81.

words as actions (or "weapons") and to regulate them because of their tendency for evil are part of a tradition that harkens back to Comstock as a way to undermine First Amendment protections across the board.

7. You Might Be a Censor if You Cannot Argue About Free Speech Issues Without Using Euphemisms and Apocalyptic Metaphors.

Euphemism has always been a tool favored by censors; it is doubtful that they could do their work without it. Anthony Comstock was the unparalleled master of the apocalyptic mixed metaphor. To him, licentious publications were worse than the plagues of Egypt, that, "like the fishes of the sea, spawn millions of seed, and each year these seeds germinate and spring up to a harvest of death."[214] Reading an unclean book was "a worse evil than yellow fever or small pox."[215] Dime novels were "products of corrupt minds [that] are the eggs from which all kinds of villainies are hatched," and bawdy theaters were the "recruiting stations for hell."[216] Fredric Wertham was a piker by comparison, but he did his best. Wertham compared the comics industry to Hitler and said that comic books were akin to communicable diseases, asserting: "You cannot resist infantile paralysis in your own home alone. Must you not take into account the neighbor's children?"[217]

Modern anti-speech activists embrace this technique, as it is a corollary of relabeling speech as conduct. As with many of these indicia, MacKinnon leads the pack. She denounces pornography (as she broadly defines it) as "terrorism," "the original fake news," and "lies, pure and simple, about women's and children's sexuality."[218] Of course, the other side of the euphemistic coin of saying that speech isn't speech is to use metaphor to suggest that censorship isn't censorship. Thus, Professor Waldron's response to the argument that hate speech laws might be used to punish fringe or unpopular views is to assert that "[o]ne might as well say that laws against drinking-and-driving represent an attack on the discrete minority of drunk drivers."[219] This echoes Fredric Wertham's claim that a comic book ban "is no more a restriction of freedom of speech than not

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[214] COMSTOCK, *supra* note 14, at 41.

[215] *Id.* at 6.

[216] *Id.* at 21, 25, 48–49.

[217] *Juvenile Delinquency* (*Comic Books*): *Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary*, 83d Cong., 2d Sess. 84 (1954) (testimony of Dr. Fredric Wertham, Director, LaFargue Clinic).

[218] MacKinnon, *supra* note 142, at 141, 158.

[219] WALDRON, *supra* note 99, at 203.

selling whiskey to children is restraint of trade."[220] Delgado and Stefancic similarly seek to distance hate speech laws from "speech" regulation by analogizing them to managing an electric grid. They posit that hate speech is not a "core" First Amendment value, so it is a misallocation of resources to defend it, just as it would be wasteful to divert primary energy production to peripheral uses (like enabling "teenagers and young adults to recharge their cell phones").[221] Such is the rhetoric of the censor: use exaggerated metaphor to hype the danger to be conquered while minimizing any connection to restricting speech.

8. You Might Be a Censor if You Believe That Silencing Speech You Dislike is the Exercise of *Your* Rights.

This was another thing about which Anthony Comstock harbored no doubt: his mission to crush immorality was not just ordained by his god, it was his holy mission and the exercise of his fundamental rights. And, just as certainly, the targets of his crusade were exercising no "rights" of their own. Comstock knew in his bones that "[f]reedom to speak or print does not imply the right to say or print that which shocks decency, corrupts the morals of the young, or destroys all faith in God."[222] And he complained about free thinkers who believed that free speech meant that they had the right to do and say as they pleased "without regard to the rights, morals or liberties of others."[223] In the words of Jazz Age writer Ring Lardner, "Shut up he explained."[224]

This is the ethos of "cancel culture" and the disinvitation movement on college campuses, which has picked up steam in recent years. Brandeis University, named for the Supreme Court justice who once wrote that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth,"[225] cravenly rescinded its offer of an honorary degree to rights advocate Ayaan Hirsi Ali because of protests over her statements condemning Islam and its treatment of women.[226] Student protests in 2014 caused Christine Lagarde,

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[220] WERTHAM, *supra* note 17, at xi n.17, 302–05.

[221] DELGADO & STEFANCIC, *supra* note 59, at 148.

[222] COMSTOCK, *supra* note 14, at 199.

[223] BROUN & LEECH, *supra* note 153, at 175.

[224] Ring Lardner, *The Young Immigrunts*, *in* SHUT UP, HE EXPLAINED: A RING LARDNER SELECTION 13, 28 (Babette Rosmond & Henry Morgan eds., 1962).

[225] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[226] Richard Perez-Pena & Tanzina Vega, *Brandeis Cancels Plan to Give Honorary Degree to Ayaan Hirsi Ali, a Critic of Islam*, N.Y. TIMES (Apr. 8, 2014), https://www.nytimes.com/2014/04/09/us/brandeis-cancels-plan-to-give-honorary-degree-to-ayaan-hirsi-ali-a-critic-of-islam.html [https://perma.cc/N3TC-S9K8].

the first woman to head the International Monetary Fund, to withdraw as commencement speaker at Smith College, and Condoleezza Rice, former secretary of state, to cancel as commencement speaker at Rutgers University.[227] Others targeted for disinvitations at various schools included conservative columnist George Will, former Secretary of State Madeleine Albright, former US Attorney General Eric Holder, and comedian Bill Maher.[228] Between 2000 and 2017, there was a nearly seven-fold increase in efforts to cancel speakers.[229] According to the Foundation for Individual Rights in Education (FIRE), which tracks such matters, there were 379 efforts to block speakers on US college campuses during this period, and almost half—46 percent—were successful.[230]

But aren't such student protests examples of "more speech" that First Amendment advocates claim to crave? No, not when the purpose is to silence the speaker through intimidation or violence, or when authorities are enlisted to enforce their demands. Then it becomes the "heckler's veto," a term coined by Professor Harry Kalven, Jr. in the 1960s to describe segregationists who acted to silence civil rights demonstrators, usually with the backing of the police.[231] Brookings Institute scholar Jonathan Rauch explains the difference. He explains that those who practice free speech values seek to add information to the debate with their message of protest, while cancel culture seeks to shut down disfavored views. "The goal here is for a group, a usually self-defining group to express its solidarity in contrast to another group who it hates. Preferably by shutting it down or shutting it up."[232] The other purpose is not to add to public

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[227] Richard Perez-Pena, *After Protests, I.M.F. Chief Withdraws as Smith College's Commencement Speaker*, N.Y. TIMES (May 12, 2014), https://www.nytimes.com/2014/05/13/us/after-protests-imf-chief-withdraws-as-smith-colleges-commencement-speaker.html [https://perma.cc/Q27R-LK6X]; Emma G. Fitzsimmons, *Condoleezza Rice Backs Out of Rutgers Speech After Student Protests*, N.Y. TIMES (May 3, 2014), https://www.nytimes.com/2014/05/04/nyregion/rice-backs-out-of-rutgers-speech-after-student-protests.html [https://perma.cc/ERB4-BDZX].

[228] GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND 48 (2018).

[229] *See Disinvitation Database*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/cases/disinvitation-season/ [https://perma.cc/958G-UVPV] (database cataloguing attempts to disinvite speakers from public and private American colleges and universities starting in 2000); *see also Pomp and Circumstances: Booted Speakers Raise Academic Concerns*, NBC NEWS (May 2, 2014, 10:47 AM), https://www.nbcnews.com/news/education/pomp-circumstances-booted-speakers-raise-academic-concerns-n90141 [https://perma.cc/V39E-NM4Q].

[230] LUKIANOFF & HAIDT, *supra* note 228, at 47.

[231] *See* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–60 (1965) (discussing the heckler's veto as a barrier to civil rights).

[232] Nico Perrino, *So to Speak Podcast Transcript: The 100th Episode, the State of Free Speech in America*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Dec. 13, 2019),

discussion but to engage in "virtue signaling."[233] Still, there are gradations of culpability. Those who merely agitate to silence speakers they dislike have the soul of the censor; those who seek to coerce the result are the actual censors.

For some theorists, silencing a speaker because of hateful or discriminatory rhetoric is not the heckler's veto; it is an act of liberation that frees up the voices of the oppressed. Focusing just on the First Amendment reads the Constitution too narrowly, they argue, because the Fourteenth Amendment promises equality. These different constitutional guarantees are in tension, according to this view, because enforcing First Amendment protections for speech that denigrates women, minorities, or other groups undervalues the Fourteenth Amendment interest in equality. According to Delgado and Stefancic, speech and equality are "opposite sides of the same coin," which is another way of describing the protection of rights as a zero-sum game—to get more of one, you must have less of the other.[234] MacKinnon argues that "[t]he law of equality and the law of freedom of speech are on a collision course," and that when "equality is mandated, racial and sexual epithets, vilification, and abuse should be able to be prohibited, unprotected by the First Amendment."[235] Thus, in the name of equal protection of the law, some speakers must be treated differently and silenced. This is necessary to facilitate speech by members of historically disadvantaged groups who otherwise might feel discouraged from participating in the marketplace of ideas.

These theorists assert that speech must be restricted by law for it to be "truly free," and that legal protections must apply differently to individuals based on their constituent groups in order to achieve "equality." However, this theory of free speech is predicated on a fundamental misreading of the Constitution. Both the First and the Fourteenth Amendments are limits on *governmental* power. The First Amendment prohibits the use of law to abridge speech; the Fourteenth Amendment, among other things, guarantees each citizen equal protection of the laws. But to read the equal protection clause as an affirmative grant of governmental power to restrict speech by individuals who say things that advocate (or result in) inequality is constitutional gibberish. As Charles Fried has written, such reasoning is based on a foundational error that mistakes "an effect of the principle for the principle itself."[236]

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https://www.thefire.org/so-to-speak-podcast-transcript-the-100th-episode-the-state-of-free-speech-in-america/ [https://perma.cc/TAA2-B6XS].

[233] *Id.*

[234] DELGADO & STEFANCIC, *supra* note 59, at 114–15.

[235] MACKINNON, *supra* note 37, at 71, 108.

[236] Fried, *supra* note 116, at 226.

With this characteristic, the way to recognize censors is by their Orwellian reasoning and Marcusian proposals. Their diagnoses of the problems and their prescriptions for solutions are pure Newspeak. Just as Oceania declared, "Freedom is Slavery,"[237] these theorists insist that free speech is censorship. According to MacKinnon, those who make First Amendment arguments represent "a replay of McCarthyism;"[238] Seidman claims that "the assertion of a constitutional right to freedom of speech is dictatorial" and "at war with free thought."[239] As in the allegorical *Animal Farm*, where the leaders proclaimed that "ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS,"[240] these theorists assert that the path to equality is through enforcing asymmetrical speech rights. They would thus employ the "tools of censorship" to restrict "regressive" speakers in the name of freedom of speech.

9. You Might Be a Censor if You Believe in Forcefully Suppressing Speech to Stop the *Real* Censors.

For some, getting a speaker disinvited from a venue is just not enough. Those who disrupted a free speech presentation by the ACLU's Claire Guthrie Gastañaga at the College of William & Mary did more than register their displeasure about the ACLU of Virginia's role in helping secure permits for the "Unite the Right" rally in Charlottesville.[241] The placard-wielding demonstrators forced Gastañaga off the stage, shouting slogans like "ACLU, You Protect Hitler Too" and "The Revolution Will Not Uphold the Constitution."[242] When Gastañaga tried to engage with some students to answer questions as she was being forced out, the protestors blocked this, too, threateningly encircling the ousted speaker and shouting more loudly.[243] If you are willing to engage in this sort of bullying, you just might be a censor.

A similar confrontation occurred in 2017 at Middlebury College, when angry students disrupted a presentation by conservative sociologist Charles Murray, injuring Professor Allison Stanger, the faculty interlocutor for the event.[244]

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[237] *See supra* note 86 and accompanying text.

[238] MACKINNON, *supra* note 37, at 76–77; *see also* MacKinnon, *supra* note 142, at 140, 142.

[239] Seidman, *supra* note 69, at 2247.

[240] GEORGE ORWELL, ANIMAL FARM 96 (Plume/Harcourt Brace 1996) (1946).

[241] CHASM IN THE CLASSROOM, *supra* note 165, at 66.

[242] *Id.*

[243] Soave, *supra* note 165; *see also* Truitt, *supra* note 165.

[244] CHASM IN THE CLASSROOM, *supra* note 165, at 30.

Students had attempted to cancel Murray's speaking invitation because of continuing controversy over his 1994 book *The Bell Curve* (coauthored with Richard Herrnstein). Controversial from the time it was published, the book suggested, among other things, that differences in IQ scores may be explained in part by genetic factors, including race.[245] When the disinvitation bid failed, protestors crowded the room and shouted Murray down, pounded the walls, and pulled fire alarms. A mob pursued Murray and Stanger when they tried to escape campus, and Professor Stanger sustained a whiplash injury and concussion in the resulting scuffle.[246]

Earlier the same year, masked demonstrators at Berkeley shattered windows and set fires to block the appearance of the confrontationally conservative former *Breitbart News* editor Milo Yiannopoulos.[247] The rioting caused an estimated $100,000 in damage.[248] Yiannopoulos, whose entire shtick is to provoke and offend, had already had appearances disrupted at several other universities. Two months after his Berkeley speech was canceled, threats of violence at the school led to rescheduling, and ultimately cancellation, of a speech by right-wing provocateur Ann Coulter.[249] In the ensuing weeks, acts of violence and threats led campus officials to cancel speakers at Auburn University, Claremont McKenna College, and (again) Berkeley.[250]

The self-described (and ironically named) "anti-fascist" activists (now, with the new, improved label *antifa*!) argue that they may justifiably silence political opponents by using violence if necessary, as an act of "self-defense." As Mark Bray puts it in

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[245] Erwin Chemerinsky & Howard Gillman, Free Speech on Campus 63–64 (2017).

[246] *Id.*; *see* LUKIANOFF & HAIDT, *supra* note 228, at 87–88; KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 107 (2018).

[247] Lucy Pasha-Robinson, *Berkeley Cancels Milo Yiannopoulos Speech After Violent Protests Erupt*, INDEPENDENT (Feb. 2, 2017, 1:35 PM), http://www.independent.co.uk/news/world/americas/uc-berkeley-cancels-milo-yiannopoulos-speech-after-violent-protests-erupt-a7559056.html [https://perma.cc/M7LE-T5T9]; CHASM IN THE CLASSROOM, *supra* note 165, at 32, 34.

[248] CHASM IN THE CLASSROOM, *supra* note 165, at 34.

[249] Joseph Russomanno, *Speech on Campus: How America's Crisis in Confidence Is Eroding America's Free Speech Values*, 45 HASTINGS CONST. L.Q. 273, 274 (2018); Thomas Fuller & Stephanie Saul, *Berkeley Reschedules Coulter, but She Vows to Keep Original Date for Speech*, N.Y. TIMES (Apr. 21, 2017), https://www.nytimes.com/2017/04/20/us/berkeley-reversing-decision-says-ann-coulter-can-speak-after-all.html [https://perma.cc/324R-HSTZ].

[250] Robert Shibley, *Colleges Are Ground Zero for Mob Attacks on Free Speech, Lawyer Says*, WASH. POST (Mar. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/03/07/colleges-are-ground-zero-for-mob-attacks-on-free-speech-lawyer-says/ [https://perma.cc/EY8S-QPBW]; *see* Peter Holley, *A Conservative Author Tried to Speak at a Liberal Arts College. He Left Fleeing an Angry Mob*. WASH. POST (Mar. 4, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/03/04/a-conservative-author-tried-to-speak-at-a-liberal-college-he-left-fleeing-an-angry-mob/ [https://perma.cc/P2FM-WZVY].

his 2017 book, *Antifa: The Anti-Fascist Handbook*, "[i]nstead of privileging allegedly 'neutral' universal rights, anti-fascists prioritize the political project of destroying fascism and protecting the vulnerable regardless of whether their actions are considered violations of the free speech of fascists or not."[251] Bray's conclusion is drawn from a hodge-podge of arguments that speech isn't truly free under the current system, that the fascists (or their defenders) would restrict far more speech than would the protestors, and the claim of a moral obligation to suppress speech they know to be wrong. The conclusion? Violent suppression equals free expression. Bray asserts that "the antiauthoritarian position held by the majority of antifa is actually *far more pro-free speech* than that put forward by the liberals."[252] The argument is nothing more than bargain-basement Marcuse based on the same Orwellian meme—that freedom may be achieved through censorship.

10. You Might Be a Censor if You Equate Speech You Oppose with Mental Illness.

Anthony Comstock didn't need to call his adversaries crazy, because he knew they were something far worse—they were sinful. But in modern times, psychiatry has a stronger grip on most people than does religion, so one tactic used by censors to discredit and delegitimize their opponents is to challenge their mental stability. A 2019 *Psychology Today* article asks whether "Trump Derangement Syndrome," an instinctive negative reaction to all things Trumpian, is a real mental condition.[253] Spoiler alert: it isn't. Do politicians evoke strong negative visceral or emotional reactions? Of course they do. Given the reptilian state of politics today, it would be irrational *not* to have such feelings. But is it deranged? No. Nor is it a new thing to brand as a "syndrome" the strong opposition to a polarizing political figure. Since the "derangement syndrome" neologism was coined by columnist Charles Krauthammer in 2003 in describing reactions to President George W. Bush, it has been applied successively to politicians across the political spectrum ranging from Sarah Palin to Barack Obama, the Clintons, and Al Gore.[254]

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[251] MARK BRAY, ANTIFA: THE ANTI-FASCIST HANDBOOK 107 (2017).

[252] *Id.* at 107 (emphasis added).

[253] Rob Whitley, *Is "Trump Derangement Syndrome" a Real Mental Condition?*, PSYCH. TODAY (Jan. 4, 2019), https://www.psychologytoday.com/us/blog/talking-about-men/201901/is-trump-derangement-syndrome-real-mental-condition [https://perma.cc/NN6L-52B5].

[254] *Bush Derangement Syndrome*, RATIONALWIKI (Dec. 21, 2020, 6:09 PM), https://rationalwiki.org/wiki/Bush_Derangement_Syndrome [https://perma.cc/86G4-R69L].

Outside the United States, the medicalization of political opposition is more than just partisan histrionics and has a much darker history. After Stalin's death in 1953 and the closure of forced labor camps, the Soviet Union committed thousands of political dissidents to institutions for "treatment" after diagnosing them with such ailments as "sluggish schizophrenia."[255] Disagreement with Communist dogma was diagnosed as "philosophical intoxication" or "delusion of reformism" and those with such "non-standard beliefs" were involuntarily committed.[256] A 2014 report to the European Parliament raised concerns that such repressive measures were making a comeback in Vladimir Putin's Russia.[257] In China, punitive psychiatry was used against religious groups, political dissidents, and whistle blowers, with abuses reaching a peak during the Cultural Revolution from 1966 to 1976.[258] It has been estimated that millions of people were declared "mentally sick" under Mao's rule, and official documents suggest that in the 1980s, 15 percent of forensic psychiatric cases had political connections.[259]

Although the United States has been spared such abuses, the notion that having the wrong ideas is a mental illness (and is susceptible to forced re-education or medical treatment) is not unknown to us. In a 2016 book, *Are Racists Crazy? How Prejudice, Racism, and Antisemitism Became Markers of Insanity*, historian Sander Gilman and sociologist James M. Thomas examine historic efforts to unravel the psychological origins of racism.[260] Starting with discredited research from the eighteenth and nineteenth centuries that purported to link race and psychological disorders, they trace scholarship through the twentieth century suggesting that prejudice is a group sickness that could be subject to "treatment." They point to the increased use of pathological language around racism in conference presentations, scholarly articles, and treatment protocols, and discuss a 2012 Oxford

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[255] Fiona Clark, *Is Psychiatry Being Used for Political Repression in Russia?*, 383 LANCET 114, 114 (2014); *Political Abuse of Psychiatry in the Soviet Union*, WIKIPEDIA (July 13, 2021, 9:35 PM), https://en.wikipedia.org/wiki/Political_abuse_of_psychiatry_in_the_Soviet_Union [https://perma.cc/7UFR-ACT8].

[256] *Political Abuse of Psychiatry in the Soviet Union*, *supra* note 255.

[257] Clark, *supra* note 255, at 114.

[258] ROBIN MUNRO, HUMAN RIGHTS WATCH & GENEVA INITIATIVE ON PSYCHIATRY, DANGEROUS MINDS: POLITICAL PSYCHIATRY IN CHINA TODAY AND ITS ORIGINS IN THE MAO ERA 1–2, 39 (2002); *Political Abuse of Psychiatry in the Soviet Union*, *supra* note 255.

[259] MUNRO, *supra* note 258, at 142; *Political Abuse of Psychiatry in the Soviet Union*, *supra* note 255.

[260] SANDER GILMAN & JAMES M. THOMAS, ARE RACISTS CRAZY? HOW PREJUDICE, RACISM, AND ANTISEMITISM BECAME MARKERS OF INSANITY (2016); *see also* Rebecca Onion, *Is Racism a Disease?*, SLATE (Nov. 17, 2016), https://slate.com/news-and-politics/2016/11/is-racism-a-psychological-disorder.html (last visited Dec. 29, 2021).

University study in which subjects were given a pill to moderate "implicit bias." In one 2005 example they cite, California prison inmates were administered antipsychotic drugs to combat what the divisional chief psychologist for the state prison system called "delusional disorders of racism and homophobia."[261] In this way, moral shortcomings are medicalized.

We are a long way from China's Cultural Revolution, but vestiges of it may be found in mandatory orientation programs on university campuses in the United States. Alan Kors, the Henry Charles Lea Professor Emeritus of History at the University of Pennsylvania, has written that, through such programs, "some form of moral and political re-education has been built into freshman orientation and residential programming."[262] The purpose is to "cure" the various "isms," including racism, sexism, and classism.[263] Similarly, the vocabulary of mental illness, with terms like homophobia and Islamophobia, has crept into common discourse about what should be seen as moral and ethical problems. Psychoanalyst and philosopher Erich Fromm objected to efforts to classify Nazis as mentally ill, observing that doing so was "a substitute for valid ethical concepts" and it tended to "weaken the sense of moral values, by calling something by a psychiatric term when it should be called plainly evil."[264] A habit of branding those with bad ideas as sick and in need of "treatment" or "re-education" might make you a censor.

CONCLUSION

It is not the purpose here to present a new theory of the First Amendment or to engage directly in the ongoing scholarly debates over its interpretation. Those discussions are ably presented in the many books, law review articles, and academic conferences that address the jurisprudence of free expression. The ideas that emerge from such works often are incorporated into the court decisions that make up the body of precedent in this area. This debate over constitutional meaning is unending, as is case law development. The more modest goal here is to examine the role censors have played in this development, and to suggest ways to recognize them when they are in our midst. If the point of the First Amendment is to prevent

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[261] *Id.* at 3 (internal quotation marks omitted).

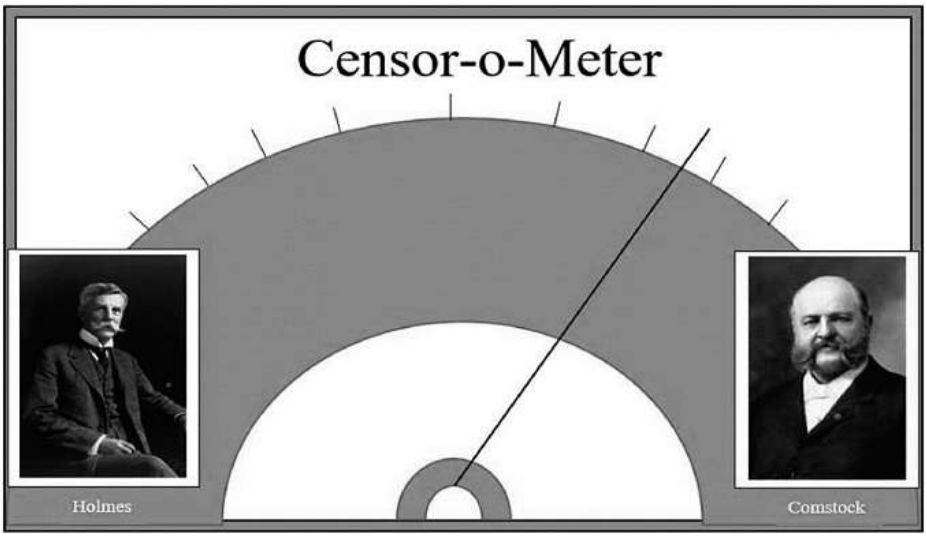
[262] Alan Kors, *Thought Reform 101: The Orwellian Implications of Today's College Orientation*, REASON.COM (Mar. 2000), https://reason.com/2000/03/01/thought-reform-101-2/# [https://perma.cc/2PGW-UXFC].

[263] *Id.*

[264] Onion, *supra* note 260.

censorship, having a sense of how to identify censors may help avoid mistakes of the past and provide direction for the future.

If a "Censor-o-Meter" existed to gauge where First Amendment critics fall on the censorship scale, it might measure whether the advocate more resembles Oliver Wendell Holmes or Anthony Comstock (see ***Figure 1***). Those exhibiting the most moral certitude, who are convinced of their own infallibility (as well as the venality of their opponents), and who enthusiastically propose government coercion to enforce their preferences would register on the Comstock side of the meter; those who are not too sure that they are right, who believe the search for truth is an ongoing process, and who are skeptical of the government's ability to dictate truth would fall on the Holmes side. Let's call it the "Foxworthy Scale." At one end of the scale is the spirit of liberty; at the other is "the spirit that lighted the fires of the Inqu[i]sition" (as Ezra Heywood said of Comstock).[265] A person's score would depend on how many of the "you-may-be-a censor-if . . . " characteristics he or she has, with bonus points for those who fancy themselves "activists" directly involved in suppressing speech.



Of course, any proposal to restrict speech must stand or fall on its own merits, based on the strength of its animating ideas and its consistency with First Amendment law. But it might also help round out the analysis by examining how proponents of such measures score when examined for their authoritarian tendencies. On the Foxworthy Scale, some armchair First Amendment skeptics, like Stanley Fish or Lawrence Seidman, may barely move the

[265] EZRA H. HEYWOOD, CUPID'S YOKES 11–12 (1876).

needle. Activists like Fredric Wertham and Catharine MacKinnon, on the other hand, who worked directly with government authorities to censor speech, would go "up to 11," in the meme popularized in the 1984 mockumentary, *This is Spinal Tap*.[266]

History teaches that people with dictatorial tendencies cannot be trusted to make decisions about what speech should be censored. Marcuse's "democratic educational dictatorship of free men" is an authoritarian's fantasy. Zechariah Chafee, the prominent early academic scholar of free expression, wondered what type of person might be suited to the task of censor. He concluded that volunteers would likely be "of the Comstock temperament who are morbidly sensitive about the morals of others. Constant preoccupation with questionable books or plays [or social attitudes, for that matter] is not good for any man. It throws him off his balance, and takes away his sense of proportion."[267]

Comstock's biographer, Heywood Broun, was even more blunt:

> A case of sorts can be made out for censorship in any field, if you can imagine the job being administered by the wisest man in the world, or one of his five or six closest rivals. But no wise man would ever accept such a post. As things are constituted, it is pretty safe to assume that any given censor is a fool. The very fact that he is a censor indicates that.[268]

It therefore pays to know censors when you see them. Using past experience to identify the mind of the censor may be one way to help keep censorship from recurring in our future.

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[266] *Up to Eleven*, WIKIPEDIA (July 9, 2021, 3:05 PM), https://en.wikipedia.org/wiki/Up_to_eleven [https://perma.cc/5X2V-5N5C].

[267] ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 532–33 (1941).

[268] HEYWOOD BROUN, *Epilogue* to ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD, *supra* note 153, at 275.