

FREE SPEECH IN THE AMERICAN FOUNDING
AND IN MODERN LIBERALISM

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I. INTRODUCTION

It is widely believed that there is more freedom of speech in America today than there was at the time of the founding.¹ Indeed, this view is shared by liberal commentators, as one would expect, as well as by leading conservatives, which is more surprising. "The body of law presently defining First Amendment liberties," writes liberal law professor Archibald Cox, grew out of a "continual expansion of individual freedom of expression."² Conservative constitutional scholar Walter Berns agrees: "Legally we enjoy a greater liberty [of speech] than ever before in our history."³ This shared assessment is correct—from the point of view of the political theory of today's liberalism—but it is incorrect from the point of view of the political theory of the American founding.

This paper will explore this paradox by laying out the two points of view, of the founders and of modern liberalism, from which these two

¹ In this paper, the phrase 'freedom of speech' includes freedom of the press. According to the First Amendment, Congress may not abridge "the freedom of speech, or of the press." I take 'freedom of the press' to mean the right, with the consent of the owner, to make use of any device that produces multiple copies of words or pictures, and to sell or distribute those copies to anyone who consents to accept or buy them (within the limits to be described below). The "press" would therefore include not just printing presses but also radio and television broadcasting facilities, cable television stations and the lines that carry them, movies, copying machines, computer printers, and the Internet. In James Madison's original proposed wording, the Amendment would have guaranteed the right of the people "to speak, to write, or to publish their sentiments." That is, what is protected is not just the right to use a printing press or to go into the newspaper business, but a right of every citizen to publish, to make and distribute copies of words and/or pictures communicating his or her sentiments to the public. The founders would never have accepted the view that the freedom of the press is limited to members of a particular industry called "the press" or "the media." *Annals of Congress*, June 8, 1789, in Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution* (1987; reprint, Indianapolis, IN: Liberty Fund, 2000), 5:128 (quoting Madison).

² Archibald Cox, "First Amendment," in Kenneth L. Karst, ed., *The First Amendment: Selections from the Encyclopedia of the American Constitution* (New York: Macmillan, 1990), 3. See also Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993), 17.

³ Walter Berns, *The First Amendment and the Future of American Democracy* (1976; reprint, Chicago, IL: Gateway Editions, 1985), x. See also John O. McGinnis, "The Once and Future Property-Based Vision of the First Amendment," *University of Chicago Law Review* 63 (1996): 49: "For about the last fifty years, free speech has been the preeminent constitutional right, continually expanded by Supreme Court justices of varying jurisprudential views to protect ever more varied and vigorous expression."

opposite conclusions are drawn. First, I will explain the theory of free speech of the American founders. I will then examine the opposing theory developed by today's liberalism.

I use the term 'founders' to refer to the leading government officials of the period when America's political institutions were created and shaped, between about 1765 and 1820. Although these men had many disagreements, some of them intense, almost all agreed on the basic principles of government. Most of their disagreements arose from different judgments about the application of those principles, such as (in the dispute over the ratification of the Constitution of 1787) how much power the federal government should have, or (in the 1790s) what America's stance should be toward the French Revolution. At the time, these disputes seemed immensely important, as they were, to be sure, in the day-to-day politics of the period. But looking back on that era from today, one cannot help being struck by the broad consensus, transcending partisan differences, about the basic principles of government. This consensus united all the leading founders, from George Washington, Alexander Hamilton, and John Adams on the "right," to James Madison, Thomas Jefferson, and Thomas Paine on the "left."

As for the term 'liberalism', I am aware of the great variety of opinion that can be found under this label. Nevertheless, the word 'liberal' has a distinct meaning in everyday discourse in the United States. Hillary Clinton and Ted Kennedy are liberals; Ronald Reagan is a conservative. Academics, however, often use the term 'liberal' very differently. Michael Sandel, for example, writes:

In the history of political theory, . . . liberalism describes a tradition of thought that emphasizes toleration and respect for individual rights and that runs from John Locke, Immanuel Kant, and John Stuart Mill to John Rawls. The public philosophy of contemporary American politics is a version of this liberal tradition of thought, and most of our debates proceed within its terms.⁴

For my purposes, this scholarly use of the term 'liberal' is misleading. John Rawls's views on the nature of human rights and of the purpose of government are almost entirely opposed to the views of Locke and the American founders. The most obvious difference is in regard to property. The founders strongly defended the individual right to acquire and hold private property. Modern liberals deny this right, or at least greatly qualify it for the sake of social utility. Rawls in particular favors expansive inroads on property rights for the sake of redistribution of income and

⁴ Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), 4-5.

resources from those who have more to those who have less.⁵ I propose, therefore, to use the term 'liberal' in the same commonsense manner as did the late Democratic Senator Paul Wellstone in his book, *The Conscience of a Liberal*.⁶ In Wellstone's sense, a liberal is someone who favors what Wellstone calls "the compassionate agenda." Liberals want to use the power of government to compel the more affluent to provide money or services to those who have less, through policies like government-provided health care and requiring that businesses pay a "decent wage" to their employees.

In this essay, liberals are those whom Richard Rorty calls "the reformist left."⁷ Liberalism in this contemporary sense was born in the late nineteenth century under the name of Progressivism. It did not fully acquire the label 'liberalism' until the 1930s. The liberal movement has grown in importance to the point where almost all American politicians embrace at least some of its doctrines. For example, hardly any Republican would defend the idea that major corporations should have a right to hire only those employees they happen to feel comfortable with. However, the right to freedom of association and to the noninjurious use of one's own property—including the right to hire and fire at will—was affirmed as a fundamental civil right in the American founding and long afterward.⁸ Although liberals over the past century have fought bitterly among themselves over a great many policy matters, their overall approach to government has been quite consistent, as I will try to show later in this paper.

From the point of view of the founders, I will argue, speech in America today is much less free than it was in the early republic. For example, the United States now mandates limits on political speech by certain classes of citizens through campaign finance regulation and other laws, limits that the founders would have thought inconsistent with the right to free speech. They would also have disapproved of the imposition of a licensing scheme on electronic broadcasters. They would have condemned this scheme as an instance of the kind of hateful 'prior restraint' of the press by government that even the British government had abandoned almost a century before the American Revolution.

⁵ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 276 (arguing that a "competitive price system gives no consideration to needs and therefore it cannot be the sole device of distribution," against the founders' view that everyone should be permitted to keep the fruits of his own labor).

⁶ Paul Wellstone, *The Conscience of a Liberal: Reclaiming the Compassionate Agenda* (Minneapolis: University of Minnesota Press, 2002).

⁷ Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Cambridge, MA: Harvard University Press, 1998), 39.

⁸ Richard A. Epstein shows that the Jim Crow system in the post-Civil War South was a radical departure from the presumption in favor of the at-will employment contract, grounded in the natural law tradition of Locke and the founders, that prevailed elsewhere in America. Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge, MA: Harvard University Press, 1992), 98–99, 127, 134.

Further, although the United States has come close to abolishing limits on libel of public figures, on indecency, on obscenity, and on advocacy of violence as a means of political reform, the founders would not have regarded these changes as an expansion of free speech. They would have said that these reforms protect not freedom but *license*, the abuse of free speech. By permitting licentious speech, government, in the founders' view, is failing at one of its core tasks, namely, to secure the natural rights of person and property—rights that are threatened when the laws permit no redress for injury to reputation or to the moral conditions of free government.

Contrarily, from the point of view of the theory of free speech accepted by most contemporary liberals, the founders were wrong on both of the positions just sketched. First, limits on political speech actually serve the cause of free speech by preventing the wealthy from dominating public debate on candidates and elections. Liberals also believe that government regulation of broadcasters promotes, or should promote, a healthy diversity on the airwaves (which in practice often means exclusion of nonliberal viewpoints). Second, liberals condemn the founders' limits on obscenity and pornography as irrational and puritanical, for the same reason that liberals have little sympathy for the founders' belief that government should promote the heterosexual, monogamous family and discourage nonmarital sex.

From the point of view of today's liberalism, the founders restricted speech where it ought to be free (by banning obscenity and speech promoting the overthrow of government), while they allowed speech where it ought to be restricted (by permitting racial and sexual harassment in the workplace, allowing employers to impose their religious views on unwilling employees, and granting the wealthy an unlimited right to dominate elections by spending as much of their own money as they like).

From the founders' point of view, liberals restrict speech where it ought to be free. They ban some citizens from spending "too much" money publishing their opinions on candidates for election. Liberals lay down rules forbidding certain kinds of speech in private schools and workplaces. They impose prior restraint on speech by licensing electronic broadcasting and thereby manipulating the content of broadcasting. From the founders' perspective, liberals have reversed the earlier understanding. Liberals protect licentiousness but not liberty. The founders protected liberty but not licentiousness.

Thousands of books and articles have been written on the topic of free speech. Many of them are accurate and informative, but the tendency among scholars is to look at particular aspects of the question without seeing the matter as a whole. This means that the overall coherence of the earlier approach and today's liberal approach are rarely discussed thematically. For example, some students of free speech in the founding era

have much to say about the debate over the Sedition Act of 1798, but not much about government regulation of obscenity, or the restrictions on speech imposed by government on its own property, or the absence of government regulation of publications during election campaigns. These latter issues are major topics today, and it is important to see why the founders would have disagreed with the more recent approach. My purpose is to look at the big picture. I intend to show all the major elements, and the coherence and intelligibility, of the consensus view shared by most of the founders, and then to do the same with the liberal approach.

I choose to discuss the founders' approach and the modern liberals' approach because these are the two main ways in which the question of free speech has been understood in American history. The founders' conception of politics prevailed—with the major exception of the Southern rejection of the founding principles after 1830—until about 1900. From then on, the political theory of liberalism has grown in importance, at first in intellectual circles and in some major but limited political reforms, but later, after 1965, increasingly in the major institutions of state and national government. America today, I argue, is a nation still governed in many ways by the founding principles, but governed in other ways by the principles of modern liberalism. It is likely that the nation will move in one direction or the other in the coming years. It is useful to know what the alternatives are, and on what principles they are grounded.

Speaking for myself, I find the founders' position superior not only to the liberal approach, but also to any other approach that I have read or heard of. It is worth clarifying the founders' approach to free speech, in my opinion, because their views on government produced what is arguably the best political order known to history. If they got that much right, then their views on free speech deserve our careful study and respect.

The first half of this paper begins with an overview of the founders' principles, then discusses the six leading elements of the founders' approach to free speech. The second half presents the liberal alternative, setting out the liberal redefinition of, or rejection of, these six elements.

II. FREE SPEECH IN THE FOUNDING: BASIC PRINCIPLES

To understand the founders' view of free speech, we begin with their understanding of the general principles of freedom. In their scheme, freedom of speech is only one aspect—certainly an important aspect—of the freedom that government is supposed to secure.

But what is that freedom? The principles of the American founding are not difficult to understand, yet they are widely misunderstood today. On the right, many conservatives believe (e.g., Robert Bork) that the political theory of the founding elevates liberty and equality above all other concerns. In principle, according to this view of the founding, liberty for the

founders meant a complete lack of restraint, the right to do whatever one pleases. So according to these conservatives, the excesses of today's liberalism follow inexorably from the defective principles of the founding.⁹ On the left, it is widely believed that although the founders spoke of liberty and equality, they really only meant liberty for white males, and equality was defined so narrowly that the poor had virtually no rights. So in this view, American history has been a long struggle, still incomplete, for the achievement of genuine liberty and equality for all. President Bill Clinton summed up this view in a 1997 speech:

Keep in mind, when we started out with Thomas Jefferson's credo that all of us are created equal by God, what that really meant in civic political terms was that you had to be white, you had to be male, and that wasn't enough—you had to own property. . . . [T]he story of how we kept going higher and higher and higher to new and higher definitions—and more meaningful definitions—of equality and dignity and freedom is in its essence the fundamental story of our country.¹⁰

Both of these positions are demonstrably wrong.¹¹

According to the Declaration of Independence, all human beings are created equal with regard to their inalienable rights, including life, liberty, and the pursuit of happiness. Five of the early state Declarations of Rights add to this list the acquisition and possession of property and the free

⁹ Robert H. Bork, *Slouching toward Gomorrah: Modern Liberalism and American Decline* (New York: HarperCollins, Regan Books, 1996), 56–65. A variant on this view is held by some "paleoconservatives." They argue that the founding is based on British tradition and common law, not on the principles of natural rights that they fear lead to the excesses of today's liberalism and modern radicalism. Those holding this view include Russell Kirk, *The Conservative Constitution* (Washington, DC: Regnery Gateway, 1990); and M.E. Bradford, *A Better Guide than Reason: Studies in the American Revolution* (La Salle, IL: Sherwood Sugden, 1979). One view that I reject entirely is that of Justice Antonin Scalia, who writes, "what constitutes a 'law abridging the freedom of speech' is either a matter of history or else it is a matter of opinion. Why are not libel laws such an 'abridgment'? The only satisfactory answer is that they never were" (dissenting opinion, *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 [1996]). Justice Scalia's dissent, in which he was joined by Justice Clarence Thomas, may be found at *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668, 686 [1996]. For the founders, freedom of speech is neither a matter of history nor of opinion, but is a constitutionalized natural right that can be understood only in light of political philosophy. They wrestled with questions like whether seditious libel laws are compatible with the First Amendment precisely because they rejected the view that history or opinion could decide the question of what is right.

¹⁰ President William Jefferson Clinton, remarks at the Human Rights Campaign Dinner, November 8, 1997 (pending completion of the Clinton presidential archives, information can be found online at www.clinton.archives.gov [accessed November 10, 2003]). On the poor, see John M. Blum, *Liberty, Justice, Order: Essays on Past Politics* (New York: Norton, 1993), 25: the poor were "defined . . . in a sense as an alien race that had to be held to close discipline."

¹¹ For a response to the critique from the Left, see Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* (Lanham, MD: Rowman & Littlefield, 1997).

exercise of religion. Article 1 of Virginia's Declaration of Rights, adopted in 1776, is typical: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Article 16 reads: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience."¹²

Equal natural rights also imply equal natural duties. Your right to life and liberty means that I have a duty not to harm or enslave you. The founders sometimes used the expressions "law" or "laws of nature" to make this point: reason discovers what the Declaration of Independence calls "the laws of nature and of nature's God." These are laws or rules that nature imposes on us, requiring everyone to respect the fundamental right to liberty of all, including the right to a "separate and equal station" (as stated in the Declaration of Independence) that all peoples or nations are entitled to, as well as the liberty and property of the individual.

Why, one might ask, did the founders believe in human equality in this sense: that no one has the right to rule another without that other's consent? Although the Declaration of Independence and the state Declarations of Rights do not offer an explanation, there are other official documents in the founding that do. And when they do, they tend to make the same argument. The reason that no one has a natural right to rule is because men are neither gods nor angels. Human beings, even the best among them, lack the wisdom and virtue that it would take to justify rule without consent. To put it in nontheological terms: the founders agreed wholeheartedly with Plato and Aristotle that perfect virtue is a just title to rule, but they denied that any human being has perfect virtue. Therefore, no one has the right to rule without consent. This means that all have an equal right to liberty. In a 1773 document published by the Massachusetts Council, James Bowdoin wrote:

Supreme or unlimited authority can with fitness belong only to the sovereign of the universe: And that fitness is derived from the perfection of his nature.—To such authority, directed by infinite wisdom and infinite goodness, is due both active and passive obedience:

¹² Bernard Schwartz, ed., *The Roots of the Bill of Rights* (New York: Chelsea House, 1980), 2:234. Similar language appears in the Declarations of Rights of Pennsylvania (1776); Vermont (1777); Massachusetts (1780); and New Hampshire (1784) (all are reprinted in Schwartz). All five Declarations affirm a right to free exercise of religion or the equivalent; New Hampshire's, Art. 5, calls it a "natural and unalienable right." (In this paper, spelling and punctuation in quotations from older documents are occasionally modernized.)

Which, as it constitutes the happiness of rational creatures, should with cheerfulness and from choice be unlimitedly paid by them.—But with truth this can be said of no other authority whatever.¹³

Human nature is a combination of reason and passions, as was frequently observed in the founding era. God, in contrast, may be said to be pure mind without passion, while the "irrational creation" (as Madison calls them in *Federalist No. 54*), such as dogs and cattle, are purely passionate without reason. Thus, God has a right to rule men, and men have a right to rule dogs and cattle, and in neither case is consent necessary. But no human being is so far superior to any other human being that he or she may rationally be trusted to govern without that other's consent (except for children and those with severe mental defects). This truth is an inference from the fact that men are neither altogether rational nor altogether passionate, but a mixture of both. Therefore, they can be counted on to be both prone to error and not fully devoted to the common good. As Madison sums up the point in *Federalist No. 51*, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

These preliminaries lead to two conclusions about the purpose and foundation of good government. First, its purpose: "To secure these rights, governments are instituted among men," says the Declaration of Independence. Our rights are insecure when there is no government, because, as Jefferson later wrote, "it frequently happens that wicked and dissolute men, resigning themselves to the dominion of inordinate passions, commit violations on the lives, liberties, and property of others, and the secure enjoyment of these" is what "principally induced men to enter into society."¹⁴

The founders' equality principle—that all are equal with respect to their natural rights—leads to a second conclusion about good government, this one concerning its proper foundation. The Declaration of Independence says that governments derive "their just powers from the consent of the governed." If we are born equal with respect to the right to liberty, the only way that the rule of some human beings over others can be justified is if that rule is based on the consent of those who are ruled. Consent must be given in two ways. First, we consent when we become members of a political community. Second, we consent collectively to the laws we live under through periodic elections of those who make the laws. Accordingly, as part of its proof that the consent principle has been

¹³ Answer of the Massachusetts Council, in *The Briefs of the American Revolution: Constitutional Arguments between Thomas Hutchinson, Governor of Massachusetts Bay, and James Bowdoin for the Council, and John Adams for the House of Representatives*, ed. John P. Reid (New York: New York University Press, 1981), 35.

¹⁴ Jefferson, "A Bill for Proportioning Crimes and Punishments," 1778, in Kurland, *The Founders' Constitution*, 5:374.

violated, the Declaration gives numerous examples of the British denial of the right of Americans to be ruled by their elected representatives.

Before we turn to the particular question of free speech, we have to consider in the broadest terms how government secures our natural rights. To deal with threats to our rights from abroad, government must provide a common defense by means of diplomacy and, in the extreme case, of arms. For threats to our rights from our fellow citizens, government must establish criminal and civil law.

The rule of law—especially criminal law—is the most obvious remedy for the insecurity of the state of nature, which is the state of human beings living together without a common government. In the state of nature, as John Locke rightly notes, there are three major defects that make life, liberty, and possessions insecure. First, there is no clearly known law (for the law of nature, mandating that no one is to be injured except for just punishment, is not obvious to everyone). Second, there is no impartial judge (for each is judge in his own cause, which often leads to bias and error in judgment). Third, there is no effective punishment for those who violate the law of nature. A well-constructed government provides clear laws (defining injuries and the appropriate punishments), impartial judgment (through jury trials), and reliable punishment (by fines, imprisonment, or execution).¹⁵ Here is the rationale for dividing state and federal governments in the United States into three branches: legislative, judicial, and executive.

The primary protection of free speech, therefore, is not normally discussed in the literature on the right of free speech. It is not constitutional limitations on government; rather, it is government's willingness and capacity to punish anyone who injures any person or group because of something published or said by that person or group. When a violent mob threw abolitionist Elijah Lovejoy's printing press into the Mississippi River in 1837, the city government, writes Michael Kent Curtis, "refused to act, except to advise Lovejoy and his friends not to reestablish a press in Alton."¹⁶ Not long afterward, another mob attacked and killed Lovejoy when he acquired a new press. After the Civil War, when the Ku Klux Klan operated with impunity in the South, Senator Adelbert Ames (R-MS) noted that "[i]n some counties it was impossible to advocate Republican principles, those attempting it being hunted like wild beasts." Representative William L. Stoughton (R-MI) exclaimed: "If political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon the unarmed and de-

¹⁵ John Locke, *Two Treatises of Government* (1690), ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), *Second Treatise*, sec. 123–31, pp. 350–53. On Locke's decisive influence on the founders' understanding of political principles, see Thomas G. West, "The Political Theory of the Declaration of Independence," in Ronald J. Pestritto and Thomas G. West, eds., *The American Founding and the Social Compact* (Lanham, MD: Lexington Books, 2003).

¹⁶ Michael Kent Curtis, *Free Speech, 'The People's Darling Privilege': Struggles for Freedom of Expression in American History* (Durham, NC: Duke University Press, 2000), 216.

fenseless, it will be fatal alike to the Republican party and civil liberty."¹⁷ More recently, government has failed to prosecute students who seized and destroyed copies of newspapers whose conservative editorial content they disliked. In each of these instances, government's failure to act constituted a denial of the right of free speech.

Liberals sometimes fail to notice that in the founders' view, although government can be the enemy of liberty, a good government is indispensable for securing liberty. Law professor Owen Fiss, for example, makes this error when he writes that "classical liberalism . . . puts the state at war with liberty."¹⁸ This canard was invented long ago. It appears frequently in the work of John Dewey, who wrote that "the great enemy of individual liberty was thought to be the government."¹⁹

Of course, free speech can also be curtailed by government's own action against noninjurious speech that it does not like. This kind of failure to protect free speech is the focus of most scholars who write on this topic. The various state and federal constitutional provisions affirming the right of free speech are directed against this kind of government mischief.

In sum, government protects free speech in two ways: first, by protecting controversial speakers and publishers from private violence; and second, by controlling its own temptation to limit speech that it does not like.

This is the theoretical framework within which the founders understood freedom of speech and of the press. The first kind of protection of free speech—protecting individual speakers from private violence—is provided by the normal course of the criminal law, condemning robbery, trespass, destruction of property, assault, murder, and so on, and by the civil law, defining and protecting property and contract. The second kind of protection is more complicated, and I will discuss six topics that, taken together, collect the main elements of the founders' approach to setting limits on government's desire to curtail the speech of citizens:

1. There is a fundamental right of noninjurious speech.
2. Government is obliged to discourage or limit injurious speech.
3. Punishment of injurious speech must be by due process of law.
4. Government may not impose 'prior restraint' on speech (e.g., through licensing the right to publish).

¹⁷ Stephen P. Halbrook, "The Fourteenth Amendment and the Right To Keep and Bear Arms: The Intent of the Framers," originally published as Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Congress, 2d Sess., *The Right to Keep and Bear Arms* (1982), 73–74; available online at <http://www.constitution.org/2ll/2ndscol/42senh.pdf> [accessed November 10, 2003].

¹⁸ Owen M. Fiss, *The Irony of Free Speech* (Cambridge, MA: Harvard University Press, 1996), 49.

¹⁹ John Dewey, *Liberalism and Social Action* (1935; reprint, Amherst, NY: Prometheus Books, 2000), 17. See also Dewey, "The Future of Liberalism" (1935), in Howard Zinn, ed., *New Deal Thought* (Indianapolis, IN: Bobbs-Merrill, 1966), 29: In the eighteenth-century approach, "governmental action and the desired freedom were placed in antithesis to each other."

5. Private associations may limit or dictate speech of guests, employees, and students.
6. Government as property owner (speaker, employer, and schoolmaster) has the same speech rights as private associations.

III. FIRST ELEMENT OF FREE SPEECH: THE FUNDAMENTAL RIGHT OF FREEDOM OF NONINJURIOUS SPEECH

James Wilson and James Madison are the two founders who gave the most attention to freedom of speech. Wilson was a signer of the Declaration of Independence, a leading member of the Constitutional Convention of 1787, principal draftsman of the Pennsylvania Constitution of 1790, and later a justice of the U.S. Supreme Court. The more famous Madison was an even more influential member of the Constitutional Convention than Wilson. Madison became the principal author of the Bill of Rights in the first Congress and was later twice elected president of the United States.

In his *Lectures on Law* (1790–91), in which Wilson showed himself to be the foremost legal scholar of the founding generation, he explained the general principle that government must permit all noninjurious activity, whether in speech or deed: “Every wanton, or causeless, or unnecessary act of authority, exerted or authorized, or encouraged by the legislature over the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is, of right, entitled to liberty, personal as well as mental, in the highest possible degree which can consist with the safety and welfare of the state.”²⁰ Wilson did not mean that in the name of safety and welfare, government may indefinitely expand. On the contrary, Wilson’s view was similar to Jefferson’s, as stated in the 1818 Report on the University of Virginia. A primary goal of university education, wrote Jefferson, is “to expound . . . a sound spirit of legislation, which, banishing all arbitrary and unnecessary restraint on individual action, shall leave us free to do whatever does not violate the equal rights of another.”²¹

This liberty to which citizens are entitled includes, as a matter of course, the right to communicate opinions through speech and publishing. While Madison was preparing his speech introducing the Bill of Rights to the first Congress, he wrote that speech was one of the “*natural rights*, retained,” in contrast with government-created rights such as trial by jury.²² Thomas Paine similarly distinguished between natural rights, which may or may not be alienated to government, and civil rights, which are cre-

²⁰ James Wilson, *Lectures on Law* (1790–91), in Robert G. McCloskey, ed., *Works of James Wilson* (Cambridge, MA: Harvard University Press, 1967), 2:649.

²¹ Thomas Jefferson, Report of the Commissioners for the University of Virginia, 1818, in Thomas Jefferson, *Writings*, ed. Merrill D. Peterson (New York: Library of America, 1984), 460.

²² Madison, “Notes for Speech in Congress,” June 8, 1789, in *Papers of James Madison*, vol. 12, ed. Charles F. Hobson et al. (Charlottesville: University Press of Virginia, 1979), 194.

ations of government.²³ In an early defense of free speech (1744), Elisha Williams, a prominent Connecticut politician and preacher, wrote, “In a state of nature men had a right to read Milton or Locke for their instruction or amusement: and why they do not retain this liberty under a government that is instituted for the preservation of their persons and properties, is inconceivable.”²⁴ In this sense, there is an absolute right to freedom of speech, just as there is an absolute or inalienable right to liberty in general.

The founders did not hold a “self-expression” or a “democratic governance” theory of free speech. Such theories, which became fashionable in the twentieth century, leave unprotected many forms of noninjurious speech. For the founders, speech is simply a part of the overall natural right to liberty, which it is the main job of government to secure. As legal scholar John McGinnis notes,

Thus, according to the first principles of the father of the Bill of Rights, free speech is not simply or even principally a means for sustaining a particular form of government; to the contrary, protecting free speech and other property rights is the end for which government is constituted. See *Federalist* 10 (Madison), . . . “The protection of these faculties [the different and unequal faculties for acquiring property] is the first object of government.”

McGinnis correctly calls free speech a “property right” because in Madison’s 1792 essay on property, speech is a form of property: “a man has a property in his opinions and the free communication of them.”²⁵

Besides being defended as a fundamental natural right, freedom of speech was also appreciated by the founders for its usefulness. Its social benefit is often mentioned in founding documents. For example, the Massachusetts Declaration of Rights of 1780 says, “The liberty of the press is essential to the security of freedom in a state: it ought not, therefore to be restrained in this commonwealth.”²⁶ Because of the stated purpose of the

²³ Thomas Paine, “Candid and Critical Remarks on a Letter Signed Ludlow,” June 4, 1777, in Schwartz, *The Roots of the Bill of Rights*, 2:315–16.

²⁴ Elisha Williams, *The Essential Rights and Liberties of Protestants* (1744), in Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730–1805* (Indianapolis, IN: LibertyPress, 1991), 61.

²⁵ McGinnis, “The Once and Future Property-Based Vision of the First Amendment,” 68, citing James Madison, *Federalist* No. 10, in Clinton Rossiter, ed., *The Federalist Papers*, with a new introduction and notes by Charles R. Kesler (New York: Penguin Putnam, 1999), 46. See also James Madison, “Property,” March 29, 1792, in Kurland, *The Founders’ Constitution*, 1:598. More than a half-century later, this view of speech was still the view of Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States* (1868), as noted by James W. Ely, Jr., in his introduction to “Property Rights and Free Speech: Allies or Enemies?” in this volume. Cooley’s work, writes Ely, was “the most important analysis of constitutional law in the late nineteenth century.”

²⁶ Declaration of Rights, Art. 16, Massachusetts Constitution of 1780, in Schwartz, *The Roots of the Bill of Rights*, 2:342.

clause (“security of freedom”), one might be tempted to take this to mean that, according to the founders, political speech was the only kind of free speech that government was strictly required to permit. However, another well-known founding document, the 1774 letter from the Continental Congress to Quebec, praises the usefulness of freedom of the press for additional reasons:

The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.²⁷

For these reasons—speech being both a natural right and highly useful to society—ten of the fourteen early state constitutions or Declarations of Rights, and the Bill of Rights in the U. S. Constitution, name freedom of speech or of the press as a fundamental right, but never a right that is limited to speech about political matters only.²⁸

In the founders’ approach, all citizens enjoy the right of free speech and the right to publish. Today, the organized news media often claim that they should enjoy heightened privileges that are not available to other citizens. For the founders, the “press” is not a “Fourth Estate.” It is a

²⁷ Continental Congress, To the Inhabitants of the Province of Quebec, October 26, 1774, in Kurland, *The Founders’ Constitution*, 1:442.

²⁸ Virginia Declaration of Rights, 1776, art. 12: “the freedom of the press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic governments.” Schwartz, *The Roots of the Bill of Rights*, 2:234.

Pennsylvania Declaration of Rights, 1776, art. 12: “the people have a right to freedom of speech, and of writing and publishing their sentiments: therefore the freedom of the press ought not to be restrained” (Schwartz, 266).

Delaware Declaration of Rights, 1776, sec. 23: “the liberty of the press ought to be inviolably preserved” (Schwartz, 278).

Maryland Declaration of Rights, 1776, art. 38: “the liberty of the press ought to be inviolably preserved” (Schwartz, 284).

North Carolina Declaration of Rights, 1776, art. 15: “the freedom of the press is one of the greatest bulwarks of liberty, and therefore ought never to be restrained” (Schwartz, 287).

Georgia Constitution, 1777, art. 61: “Freedom of the press and trial by jury to remain inviolate forever” (Schwartz, 300).

Vermont Declaration of Rights, 1777, art. 14: “the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not to be restrained” (Schwartz, 324).

South Carolina Constitution, 1778, art. 43: “That the liberty of the press be inviolably preserved” (Schwartz, 335).

Massachusetts Declaration of Rights, 1780, art. 41: “the liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this Commonwealth” (Schwartz, 342).

New Hampshire Declaration of Rights, 1783, art. 22: “the liberty of the press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved” (Schwartz, 378).

means of communication. When Pennsylvania’s 1790 Constitution says that “the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government,” it means that government may not stand in the way of any person or organization that has the resources to purchase a printing press or any other means of duplicating written material. (Today, these would include movies, television, and the Internet.) Pennsylvania’s phrase “every person” means that there are no special privileges for corporations or bodies that make money by selling newspapers.

IV. SECOND ELEMENT OF FREE SPEECH: GOVERNMENT MUST PUNISH OR LIMIT INJURIOUS SPEECH

The speech that we have been discussing so far is noninjurious speech. As for injurious speech, government not only *may* punish it, but is *obliged* to do so (or at least to provide legal recourse for those injured), for the same reason that government is obliged to punish murder and rape. Speech, no less than assault or theft, is capable of harming others.

Government accomplishes its main purpose, namely, to secure the natural right to one’s own person and the fruits of one’s labor, primarily through the penalties of the criminal law and the compensations of the civil law. Jefferson explained the connection between the criminal law and the purpose of government in his preface, part of which I quoted earlier, to a proposed 1778 bill on crimes and punishments in Virginia:

Whereas it frequently happens that wicked and dissolute men, resigning themselves to the dominion of inordinate passions, commit violations on the lives, liberties, and property of others, and the secure enjoyment of these having principally induced men to enter into society, government would be defective in its principal purpose, were it not to restrain such criminal acts by inflicting due punishments on those who perpetrate them.²⁹

The Massachusetts Declaration of Rights, Article 11, affirms the same point:

Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

²⁹ Jefferson, “A Bill for Proportioning Crimes and Punishments,” 1778, in Kurland, *The Founders’ Constitution*, 5:374.

Jefferson and Massachusetts are both stating an implication of the basic purpose of government, which, as stated in the preamble to the Massachusetts Constitution, is "to furnish the individuals who compose it [that is, the body politic], with the power of enjoying, in safety and tranquillity, their natural rights."

Article 11 of the Massachusetts Constitution speaks of injury not only to person and property but also to character. An example would be libel that injures a person's reputation, such as a false rumor, deliberately spread, to the effect that a certain doctor's patients frequently die because of the doctor's incompetence. In this case, as in others, reputation would be a condition for the exercise of one's natural rights.

When limits on speech are discussed today, it is often said that the right of free speech must be balanced against the needs or interests of society. This approach implies that there really is no fundamental right of free speech that government is obliged to respect and protect. This "balancing" approach to rights was first developed during the Progressive Era.³⁰ It is not how the founders thought about this or like questions concerning natural rights. Instead, the question as they saw it was to discern where exercise of the right becomes abuse of the right or a danger to society—that is, where liberty under the law of nature becomes license, or a violation of the law of nature. The Town of Boston's 1772 Rights of the Colonists stated that "the first fundamental natural law" of all commonwealths or states, "which is to govern even the legislative power itself, is the preservation of the society."³¹ Applied to free speech, this means that the question is where the proper liberty of speech ends and where speech becomes harmful to the personal rights of others or to the preservation of the society. Before reaching that limit, the right of free speech may never be rightfully abridged. In the contemporary approach, what is permissible today may be banned tomorrow, if some new social need comes to light against which speech is to be balanced. In its opinion upholding Congress's 1974 campaign finance act, the Supreme Court ruled that the right of free speech had to be balanced against the need "to deal with the reality or appearance of corruption."³² The law in question abolished the right—which had existed uninterrupted from 1776 to 1976—to publish as often as one pleases one's

³⁰ For example, by Roscoe Pound, in "Equitable Relief against Defamation and Injuries to Personality," *Harvard Law Review* 29 (1916): 640 (promoting an approach to free speech balancing the right of free speech against social interests); discussed by David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge, MA: Cambridge University Press, 1997), 188–89. Also at 212: "The progressive position that individual rights should be recognized only to the extent that they contribute to social interests applied in principle to speech as well as liberty of contract. Pound explicitly acknowledged this point when he justified balancing social interests in free speech against competing social interests in the security of state institutions." Pound was "the leading legal figure" among "political progressives . . . in the early twentieth century," according to Rabban (179).

³¹ Town of Boston, Rights of the Colonists, 1772, in Samuel Adams, *Writings*, ed. Harry Alonzo Cushing (New York: Putnam's, 1906), 2:356–57.

³² *Buckley v. Valeo*, 424 U.S. 1, 28 (1976). The Supreme Court reaffirmed this basic "balancing" approach to free speech in *McConnell v. Federal Election Commission* (2003), in which

opinions about all candidates in an election, including candidates with whom one happens to cooperate or coordinate.

In the U.S. Constitution, as in most of the early state constitutions, the right of free speech is not explicitly limited. The limit was implicit in the very concept of freedom. Freedom of speech is not freedom for licentious speech. However, later state constitutions, starting with Pennsylvania's 1790 revision, made the limit explicit: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."³³

There was only one exception to the general rule that injurious speech should be punished, and it was stated explicitly in both the Massachusetts and the United States Constitutions: anything at all, however harmful, may be said in the legislative body.³⁴ This exception was meant to preserve the utmost freedom of deliberation for lawmakers on matters of public policy. The fact that the framers of both constitutions saw fit to include this provision, makes clear that it was an exception to the general rule of holding individuals accountable for injurious speech. Legislators, as all others, may be held legally accountable for anything said *outside* of the legislative body: they can be sued or prosecuted for injurious speech.

The founders recognized four principal kinds of injurious speech:

1. Personal libel: speech that injures an individual.
2. Seditious libel: speech that injures the government.
3. Speech that injures public health or the moral foundations of society.
4. Speech used in the course of, or promoting, other injurious conduct. This would include planning a bank robbery or encouraging others to commit a crime.

One important corollary of the idea of authorial responsibility is that there is no right to publish where an author or publisher cannot be determined, because otherwise no one can be held legally accountable in case of abuse. *The Federalist* and many other writings in the founding era were published anonymously, but always in a newspaper or book whose publisher was known. Nevertheless, it was thought that government should

the Court upheld extensive Congressional restrictions on independent expenditures by organizations wishing to publicize their views on candidates and public policy issues.

³³ Pennsylvania Constitution, 1790, art. 9, § 7; available online at the Pennsylvania Constitution Web Page of the Duquesne University Law School, <http://www.paconstitution.duq.edu/con90.html> [accessed November 10, 2003]. Cf. John Jay's view: "Under governments which have just and equal liberty for their foundation, every subject has a right to give his sentiments on all matters of public concern; provided it be done with modesty and decency." John Jay, "A Hint to the Legislature of the State of New York," 1778, in Richard B. Morris, ed., *John Jay, The Making of a Revolutionary: Unpublished Papers, 1745–1780* (New York: Harper & Row, 1975), 461.

³⁴ Massachusetts Constitution, 1780, Declaration of Rights, art. 21; U.S. Constitution, art. 1, § 6.

not require the actual writer of an article to be named. During the debate over ratification of the U.S. Constitution, "Philadelphensis," an Antifederalist writer, noted that a suggestion had been made in a Massachusetts newspaper "that every writer, for or against the constitution, should leave his name with the printer, to be published if required." "Philadelphensis" responded:

When a political writer gives his name with his piece, he then shows where the opposite party may aim their shafts of malice, falsehood, and scurrility, with certainty and success. Will a man . . . expose his interest, his property, and perhaps his life, to the mercy of a revengeful and probably a powerful party? He certainly will not, if he has common sense.³⁵

Today, because of rules limiting anonymous donations to nonprofit organizations, to ballot initiatives, and to candidates, government officials are easily able to target businesses and individuals who support candidates or political positions that they do not like. For example, when the owner of a major computer company publicly supported the 1993 school choice initiative in California, his company lost important state government contracts in retaliation.³⁶

According to the founders' theory, it would follow that government may not limit the amount of money that a person spends publishing his own opinions about candidates for election, even (or rather above all) if he happens to coordinate his activities with one of the candidates. Yet precisely such limitations are currently the law of the land in the United States. In 1976, when the Supreme Court considered whether restrictive legislation was constitutional, it reasoned that government may ban expenditures on publishing one's views of candidates for election if the expenditures are coordinated with the candidate. The Court wrote: "It is unnecessary to look beyond the [1974 amendments to the Federal Election Campaign] Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation."³⁷ The founders would have been shocked by the idea that government may forbid citizens to spend their own money publishing noninjurious political speech during election campaigns because of a mere "appearance of corruption"—that is, the suspicion that bribery *might* take place.

³⁵ Philadelphensis VIII, *Philadelphia Freeman's Journal*, January 23, 1788, in John P. Kaminski and Gaspare J. Saladino, eds., *The Documentary History of the Ratification of the Constitution*, vol. 15: *Commentaries on the Constitution, Public and Private*, vol. 3 (Madison: State Historical Society of Wisconsin, 1984), 459–60. The editors give the background of this quarrel in 13:573.

³⁶ His company was AST Research, at that time a major manufacturer of personal computers. Facts from Larry P. Arnn, e-mail to the author, October 16, 1995.

³⁷ *Buckley v. Valeo*, 424 U.S. at 26.

It would also follow from the founders' principles that government may not ban the presentation of factual truth in the marketing of non-harmful commercial products. Further, government may not require employers to punish speech that the government disapproves of (e.g., telling jokes that some women or minorities find "harassing"), for government may never compel a private party to do something that government itself is not permitted to do.

A. Personal libel

In his *Lectures on Law*, James Wilson defined libel as "a malicious defamation of any person, published by writing, or printing, or signs, or pictures, and tending to expose him to public hatred, contempt, or ridicule." A fuller definition was given by Chancellor James Kent in his widely read *Commentaries on American Law* (1826): "a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule. A malicious intent towards government, magistrates, or individuals, and an injurious or offensive tendency, must concur to constitute the libel."³⁸

In the founding era there were two views of why libel was regarded as an injury that government should view either as a crime or as something to be compensated. One was that libel is a personal injury, no different from assault or rape. In this view, there is a precise parallel to the analysis of gun rights. My right to bear arms has not been infringed if I am jailed for shooting my neighbor. Nor is my right to freedom of speech infringed if I am punished for maliciously harming the reputation of my neighbor. One member of the founders' generation made the comparison explicit: "Every free man has a right to the use of the press, so he has to the use of his arms." But if he commits libel, "he abuses his privilege, as unquestionably as if he were to plunge his sword into the bosom of a fellow citizen."³⁹ The remedy for abuse in both cases was not prior restraint, as in requiring a license to carry a gun or a censor's approval to publish a magazine, but punishment of an abuse of the right after a trial in a court of law.

In an important Pennsylvania Supreme Court case in 1788, Chief Justice Thomas McKean wrote,

³⁸ Wilson, *Lectures on Law*, in McCloskey, ed., *Works of James Wilson*, 2:647, 649–51. James Kent, *Commentaries on American Law*, 1826, in Kurland, *The Founders' Constitution*, 5:179–80.

³⁹ "Philodemos," *Pennsylvania Gazette*, May 7, 1788, reprinted in Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States*, vol. 2 suppl (Madison: State Historical Society of Wisconsin, 1976); quoted in Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Oakland, CA: The Independent Institute, 1990), 69. Cf. *Commonwealth v. Blanding*, 20 Mass. 304, 314 (Mass. 1825) (no number in the original), opinion of Chief Justice Isaac Parker (stating that in the Massachusetts Constitution, "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction"). Cited in Kurland, *The Founders' Constitution*, 5:177.

With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is true, that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeler admit not of this consolation: the injuries which are done to character and reputation seldom can be cured, and the most innocent man may, in a moment, be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life.⁴⁰

Clearly Justice McKean saw libel as a form of personal injury, even more destructive than the notorious criminal acts of the assassin or the arsonist.

The second founding-era view of libel was to look at instances of it “as breaches of the peace, and as much resembling challenges to fight,” as Wilson writes in his *Lectures on Law*. As “a violation of the right of character,” or of “the right of reputation,” a libel tends to destroy the public safety by provoking citizens to anger that might break out into violent acts.⁴¹

Benjamin Franklin presents this view in a sarcastic essay published in 1789, in which he complains of the unrestraint of the press in attacking men’s reputations. Franklin proposes that if the law will not permit libel lawsuits for damages, then “if an impudent writer attacks your reputation, dearer to you perhaps than your life, and puts his name to the charge, you may go to him as openly and break his head. If he conceals himself behind the printer, and you can nevertheless discover who he is, you may in like manner way-lay him in the night, attack him behind, and give him a good drubbing.”⁴²

Today, more often than in the past, government views libel as a matter of indifference or even as a right contained in the “liberty of the press.” It is very difficult to win a lawsuit for libel, and such hard won victories are often overturned on appeal.⁴³ From the founders’ viewpoint, this is

⁴⁰ *Respublica v. Oswald*, 1 U.S. 319, 324 (Pa. 1788). Cited in Kurland, *The Founders’ Constitution*, 5:126.

⁴¹ Wilson, *Lectures on Law*, in McCloskey, ed. *Works of James Wilson*, 2:647, 649–51.

⁴² Benjamin Franklin, “An Account of the Supremest Court of Judicature in Pennsylvania, viz., The Court of the Press,” September 12, 1789, in Kurland, *The Founders’ Constitution*, 5:130.

⁴³ Libel Defense Resource Center, Report on Trials and Damages, 2002 (media defendants in libel trials win the great majority of cases, and at higher rates than in the past, not even counting those that never go to trial). Summary available online at http://www.ldrc.com/Press_Releases/bull2002-1.html [accessed November 10, 2003]. Richard Labunski, in his *Libel and the First Amendment: Legal History and Practice in Print and Broadcasting* (New Brunswick, NJ: Transaction, 1987), shows that the Supreme Court’s libel rulings have made it harder for both “public figures” and private persons to win lawsuits for libel. However, Norman L. Rosenberg paints a more ambiguous picture in his *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill: University of North Carolina Press, 1986), 248–57.

either a likely occasion for personal injury through retaliation or a serious failure to protect citizens against a significant form of personal injury.

B. Seditious libel

The area of the founders’ understanding of free speech where we have the least sympathy today is seditious libel. I will start with a general but still helpful definition: ‘seditious libel’ is speech that is intended to stir up sedition, that is, insurrection or rebellion against the government. The historian Leonard Levy’s 1960 book on this subject was entitled *Legacy of Suppression*. Elsewhere, he insists that the founders’ theory of free speech was “stunted.”⁴⁴ But the prohibition of seditious libel follows logically from the founders’ general theory of liberty, and from their theory of free speech in particular.

Reflecting the consensus of the founders, Supreme Court Justice Joseph Story authored a sensible discussion of the proper limits on free speech, including a brief discussion of seditious libel, in his *Commentaries on the Constitution* (1833). Story began with the liberty of the press clause in the Massachusetts Constitution:

What is the true interpretation of this clause? Does it prohibit the legislature from passing any laws, which shall control the licentiousness of the press, or afford adequate protection to individuals, whose private comfort, or good reputations are assailed, and violated by the press? Does it stop the legislature from passing any laws to punish libels and inflammatory publications, the object of which is to excite sedition against the government, to stir up resistance to its laws, to urge on conspiracies to destroy it, to create odium and indignation against virtuous citizens, to compel them to yield up their rights, or to make them the objects of popular vengeance? . . . In short, is it contended, that the liberty of the press is so much more valuable, than all other rights in society, that the public safety, nay the existence of the government itself is to yield to it? . . . It would be difficult to answer these questions in favor of the liberty of the press, without at the same time declaring, that such a licentiousness belonged, and could belong only to a despotism; and was utterly incompatible with the principles of a free government.⁴⁵

⁴⁴ Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, MA: Harvard University Press, 1960). The book was revised and republished later with the less provocative title *Emergence of a Free Press* (New York: Oxford University Press, 1985). The “stunted” remark is in Leonard W. Levy, *Freedom of the Press* from Zenger to Jefferson (1966; reprint Durham, NC: Carolina Academic Press, 1996), vii.

⁴⁵ Joseph Story, *Commentaries on the Constitution* (1833), sec. 1881, in Kurland, *The Founders’ Constitution*, 5:184. Harry V. Jaffa, in his *Equality and Liberty: Theory and Practice in American Politics* (New York: Oxford University Press, 1965), 179, states the founders’ view: free speech is “a necessary means for deliberating upon public policy. But this deliberation does not extend to everything: above all, it does not extend to the question of whether the

Story's point is that government exists to secure the equal rights of all. If a free government is overthrown, security for liberty will be gone. So there can be no fundamental right to turn the people against the government that secures their rights.

In contrast to the founders' position, Justice Oliver Wendell Holmes, Jr., wrote in *Gitlow v. New York* (1925): "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."⁴⁶ Holmes no longer believed, with the founders, that the purpose of government is to secure the natural rights of the people on the basis of consent. Holmes was a legal positivist. For him, any purpose of government chosen by "the dominant forces of the community" is equally legitimate, whether it be a dictatorship that denies the consent principle and does not acknowledge the equal rights of the bourgeois, or the founders' democracy, which requires consent of the governed and the equal protection of the laws.

The founders denied that the right of free speech includes the right to persuade people to overthrow liberty and turn instead to despotic government. From this point of view, the propriety of laws against seditious libel was perhaps never more clearly seen than in 1940, when the Alien Registration, or Smith Act, was passed. This law made it a federal crime "to knowingly or willfully advocate . . . the . . . desirability . . . of overthrowing or destroying any government in the United States by force or violence."⁴⁷ At the time, Soviet and Nazi agents and their sympathizers were actively promoting this very thing in America, although the main target of the legislation at its inception was Nazi subversion. The Amer-

community shall exchange its freedom for slavery. Certain ends are fixed, and their fixity is the condition of mutability in other respects."

The founders' view was rejected by the Supreme Court after the liberal approach became predominant during the New Deal:

But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia v. Barnette, 319 U.S. 624, 642 (1943). On the founders' understanding of seditious libel, see also Edward J. Erler, "The First Amendment and the Theology of Republican Government," *Interpretation* 27, no. 3 (2000): 231-57 (subversive speech may be banned consistently with natural right); 245 ("debates about whether natural rights are to be secured is not properly protected by the First Amendment"); 242-44 (the First Amendment cannot be grounded in the old British common law of libel because the Declaration of Independence is "the greatest example of seditious libel in history"). See also David Lowenthal, *No Liberty for License: The Forgotten Logic of the First Amendment* (Dallas, TX: Spence Publishing, 1977), 17: "The logic of the case [i.e., in the debate over the Sedition Act] is with the Federalists."

⁴⁶ 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

⁴⁷ Originally at 54 *Statutes at Large* (1940) 670-71. Now, 18 U.S.C. § 2385 (2000). Quoted in *Dennis v. United States*, 341 U.S. 494, 496 (1951).

ican Communist Party was publicly praising Hitler and denouncing Britain. This was the result of the 1939 alliance between Hitler and Stalin. Poland and France had been defeated; England was besieged. The two most powerful tyrants in world history stood on the brink of world conquest, while the United States was the only power that could possibly stop them. From the point of view of the founders, it was not the duty of the government to stand passively aside while the agents of the two murderous tyrannies were actively laboring to turn American public opinion against constitutional democracy.⁴⁸

The question may be raised as to whether the kind of advocacy of the overthrow of the government criminalized in the Smith Act is really seditious libel in the founders' sense. In *Dennis v. United States* (1951), Justice Robert Jackson in a concurring opinion argued, quite plausibly, that "[w]hat really is under review here is a conviction of conspiracy,"⁴⁹ that is, something no different in principle from a conspiracy to commit murder or robbery. The seditious libel that caused such controversy in the founding era was much less obviously connected to the violent overthrow of the government. As we will see, there are reasons to doubt that the expansive idea of seditious libel that was widely accepted at the time of the founding was really compatible with the founders' own principles.

The Sedition Act of 1798 was passed by Federalists at a time when the nation was bitterly divided and on the brink of war with France. The Republican Party of Jefferson and Madison favored France, while President Adams and the Federalist Party, horrified by the excesses of the French Revolution, favored neutrality. Both America and France exacerbated these tensions by attacking each other's shipping, creating an undeclared quasi war. With Republican political meetings and newspapers stirring up hatred against the Adams Administration, the Federalists passed the Sedition Act. It became a federal criminal offense to publish:

any false, scandalous, and malicious writing or writings against the government of the United States, . . . with intent . . . to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, . . . or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of any foreign nation against [the] United States.

This part of the Sedition Act is similar to the Smith Act: it outlaws what is, in effect, the crime of incitement to lawbreaking or aiding a foreign

⁴⁸ For a persuasive account of the danger in which the United States found itself at that time, see Harry V. Jaffa et al., *Original Intent and the Framers of the Constitution: A Disputed Question* (Washington, DC: Regnery, 1994), 331-39. See also Herbert Romerstein and Eric Breindel, *The Venona Secrets: Exposing Soviet Espionage and America's Traitors* (Washington, DC: Regnery, 2000).

⁴⁹ *Dennis*, 341 U.S. at 572.

enemy. More questionable was that part of the Sedition Act that outlawed "any false, scandalous, and malicious writing or writings . . . with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them . . . into contempt or disrepute; or to excite against them . . . the hatred of the good people of the United States." Here the Sedition Act prohibits speech that may not be intended to create rebellion or insurrection, but merely undermines public regard for the government. Historian Gordon Wood writes that this law and the contemporaneous Alien Act "more than anything else have tarnished the historical reputation of the Federalists." Wood calls the Sedition Act a "desperate repressive measure."⁵⁰

Was this measure really repressive? Not in the minds of the great majority of Americans at that time. It is often assumed today that the passionate debate in 1798 over the Sedition Act was about whether the punishment of defamatory speech against government officials was compatible with the principle of freedom of speech. Yet most members of Congress in 1798 believed that it *was* compatible, whether they voted for the act or not. It is true that Republican opponents of the act did sometimes deny any government power over seditious libel in a republican form of government. However, their main argument against the act was not over whether government should punish those who would maliciously "defame the said government," but only over whether the *national* government had that power under the Constitution. Hardly anyone doubted that the *state* governments could punish malicious defamation of government. As Michael Kent Curtis notes, "Republicans often noted that a remedy for libel existed at state law." In other words, the quarrel was, mostly, not over the meaning of free speech but over federalism.⁵¹

Federalists argued, correctly, that the federal Sedition Act was an improvement over state laws on the subject, for the Sedition Act stated that

it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defense, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

The common law of libel, which was followed at that time in the law of the several states, did not permit truth to be a factor in evidence, nor did it permit the jury to determine the law (that is, whether the publication

⁵⁰ The language of the Sedition Act is from the Avalon Project of Yale Law School, available online at <http://www.yale.edu/lawweb/avalon/statutes/sedact.htm> [accessed November 10, 2003]. The Act was scheduled to expire on March 3, 1801. Bernard Bailyn et al., *The Great Republic: A History of the American People*, 4th ed. (Lexington, MA: D.C. Heath, 1992), 329 (Wood was the author of this part).

⁵¹ Levy, *Emergence of a Free Press*, 304–8. Curtis, *Free Speech*, 69.

was, in fact, injurious). The jury decided only the fact (whether the defendant actually published it). The Federalists were right when they claimed that the Sedition Act was more protective of published criticism of government than were state laws.

Not only was there no serious Republican opposition to the idea of seditious libel, but after Jefferson became president in 1801, he became a cheerleader for prosecutions (by state governments) of his Federalist critics. He even mentioned the subject in 1805 in his Second Inaugural Address:

During this course of administration, and in order to disturb it, the artillery of the press has been leveled against us, charged with whatsoever its licentiousness could devise or dare. These abuses of an institution so important to freedom and science are deeply to be regretted. . . . [T]hey might, indeed, have been corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation; but public duties more urgent press on the time of public servants, and the offenders have therefore been left to find their punishment in the public indignation. . . .

No inference is here intended that the laws, provided by the State against false and defamatory publications, should not be enforced; he who has time, renders a service to public morals and public tranquillity, in reforming these abuses by the salutary coercions of the law. . . .⁵²

No participant on either side of the debate over the Sedition Act went so far as to propose the repeal of state laws limiting defamatory speech against government. Nevertheless, Republicans made some arguments that pointed in this direction. Everyone agreed that there ought to be a legal remedy for those harmed by injurious speech, but there were many on both sides who understood that speech against government was a special case that deserved different treatment from other forms of libel. America's government was elective, and elections cannot effectively control government misconduct unless criticism of elected officials is permitted.

The consensus on seditious libel that was reached during the founding era was most famously stated by Alexander Hamilton in the case of *People v. Croswell* (1804). His position was essentially the same as that of the Sedition Act, although one might be surprised to learn this in light of the hostile treatment given to this act in most American history and civil liberties textbooks. As Leonard Levy writes, Hamilton's argument in *Croswell* "was adopted by the state legislature [of New York] in the following year. That position spread rapidly throughout the nation."

Harry Croswell was a Federalist editor who had attacked President Jefferson for allegedly funding a newspaper attack on Washington and

⁵² Jefferson, *Writings*, ed. Peterson, 521–22.

Adams. New York Republican politicians prosecuted Croswell for seditious libel. At his trial, Croswell tried to defend himself by presenting evidence that the things he said about Jefferson were true. The trial judge ruled, first, that truth was not admissible in evidence, and second, that the only question for the jury was whether Croswell had actually published the offending article, not whether the publication was libelous.⁵³

Hamilton became Croswell's counsel when the case was appealed to the New York Supreme Court in 1804. He argued that

The liberty of the press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on government, on magistrates, or individuals. . . . It is essential to [be able to] say, not only that the measure is bad and deleterious, but to hold up to the people who is the author, [so] that, in this our free and elective government, he may be removed from the seat of power. If this be not to be done, then in vain will the voice of the people be raised against the inroads of tyranny. . . . In speaking thus for the freedom of the press, I do not say there ought to be an unbridled license. . . . I do not stand here to say that no shackles are to be laid on this license. I consider this spirit of abuse and calumny as the pest of society.⁵⁴

Hamilton's argument—that a nation whose government is chosen by free elections has to allow considerable leeway for public criticism of government officials—had been anticipated by Adams in a 1789 letter:

Our chief magistrates and senators etc. are annually eligible [i.e., elected] by the people. How are their characters and conduct to be known to their constituents but by the press? If the press is to be stopped and the people kept in ignorance, we had much better have the first magistrate and senators hereditary.⁵⁵

Adams therefore recommended that “it would be safest to admit evidence to the jury of the truth of accusations, and if the jury found them true and that they were published for the public good, they would readily acquit.” This is the standard that Hamilton recommended in *Croswell*. As

⁵³ *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804). My account is based on the excellent treatment of *People v. Croswell* in Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton: Documents and Commentary* (New York: Columbia University Press, 1964), 1:775–806.

⁵⁴ Goebel, *Law Practice of Alexander Hamilton*, 1:809–10. Croswell lost his appeal for a new trial on a tie vote of the New York Supreme Court, but for some unknown reason he escaped being sentenced (804).

⁵⁵ John Adams to William Cushing, March 7, 1789, in Levy, *Freedom of the Press from Zenger to Jefferson*, 153.

mentioned earlier, it quickly became and remained the standard for most states until the 1960s.⁵⁶

All sides in the debate over seditious libel in the founding era recognized that government must guarantee a right to criticize its errors and injustices. In his opinion in the *Croswell* case, then-Judge James Kent agreed with the Hamilton standard, while he criticized the much stricter English law of seditious libel:

And if the theory of the prevailing doctrine in England . . . had been strictly put in practice with us, where would have been all those enlightened and manly discussions which prepared and matured the great events of our Revolution, or which, in a more recent period, pointed out the weakness and folly of the confederation, and roused the nation to throw it aside, and to erect a better government upon its ruins? They were, no doubt, libels on the existing establishments, because they tended to defame them, and to expose them to the contempt and hatred of the people. They were, however, libels founded in truth, and dictated by worthy motives.⁵⁷

Whether the Hamilton-*Croswell* standard is sufficient to secure the proper freedom of public discussion may be doubted, however. In this respect Madison and the other critics of the Sedition Act had a strong argument. One can see the problem in Judge Samuel Chase's instruction to the jury in *United States v. Cooper* (1800). Chase, a Federalist, instructed the jury to punish criticism of the Adams Administration—criticism that, by today's standards, would be regarded as mild. For example, the newspaper at

⁵⁶ *Ibid.*, 378. See *Beauharnais v. Illinois*, 343 U.S. 250, 296–97 (1952); Justice Jackson in dissent wrote that Hamilton's argument in *Croswell*

led to a provision included in the [New York] Constitution of 1821 . . . and has remained in the several Constitutions of that State since: ‘Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.’ It would not be an exaggeration to say that, basically, this provision of the New York Constitution states the common sense of American criminal libel law.

⁵⁷ Opinion of Judge James Kent in *Croswell*, 3 Johns. Cas. at 392–93. Cited in Kurland, *The Founders' Constitution*, 5:169. Kent continues

[If the doctrine of the critics of the Sedition Act] was to prevail, the press would become a pest, and destroy the public morals. . . . The founders of our governments were too wise and too just, ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion, and impurity. Such an abuse of the press would be incompatible with the existence and good order of civil society. (393)

issue in the case had said (as Chase summarized it) that Adams “has brought forward measures for raising a standing army.” Chase told the jury:

In fact, we cannot have a standing army in this country, the constitution having expressly declared that no appropriation shall be made for the support of an army longer than two years. . . . There is no subject on which the people of America feel more alarm, than the establishment of a standing army. Once persuade them that the government is attempting to promote such a measure, and you destroy their confidence in the government. Therefore, to say, that under the auspices of the president, we were saddled with a standing army, was directly calculated to bring him into contempt with the people, and excite their hatred against him.

Thomas Cooper’s right to give truth as a defense (which was permitted under the Sedition Act) did not help him here. Certainly Cooper could have plausibly argued that Adams’s measures for raising an army did look like a plan to establish a “standing army,” given that the army was being established in time of peace. Nevertheless, the judge persuaded the jury that Cooper’s words were false. He was fined four hundred dollars and imprisoned for six months.⁵⁸

Among the leading founders, Madison alone, in his *Report on the Virginia Resolutions* (1800), confronted the difficult question of whether the Hamilton-Croswell standard was sufficient to secure the proper freedom of public discourse. He concluded that the “truth as a defense” standard, although it was superior to the old British common law (which punished even truthful libel against government), did not go far enough. Everyone agreed with Madison’s statement that “[t]he nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by . . . Great Britain.” But Madison argued that seditious libel should never be punishable. His strongest argument was that allowing truth as a defense is not sufficient, because most political writing is only opinion:

[O]pinions, and inferences, and conjectural observations cannot be subjects of that kind of proof which appertains to facts before a court of law. . . .

[I]t is manifestly impossible to punish the intent to bring those who administer the Government into disrepute or contempt, without striking at the right of freely discussing public characters and mea-

⁵⁸ *United States v. Cooper*, 25 F. Cas. 631 (Cir. Ct., District of Pa. 1800) (No. 14,865). Cited in Kurland, *The Founders’ Constitution*, 5:147–51. The case is discussed in Curtis, *Free Speech*, 89–92.

asures; because those who engage in such discussions must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved.⁵⁹

That is, allowing a libeler to claim truth as a defense is not sufficient to permit the necessary latitude for speech about government officials and measures. The case that I just discussed, *United States v. Cooper*, illustrates Madison’s point well.

Madison did not deny that there is such a thing as the abuse of press freedom. (“The committee are not unaware of the difficulty of all general questions which may turn on the proper boundary between the liberty and licentiousness of the press.”) He did not deny the right of a public official to sue his slanderer for damages. (The modern doctrine, which very nearly prevents public officials from recovering damages, was not established until 1964 in *New York Times v. Sullivan*.)⁶⁰ Like all the founders, Madison thought that laws providing legal recourse against injurious speech were necessary. What distinguished Madison from the rest of the founding generation was that he saw more clearly than others that the right of government to protect itself against injurious speech was in tension with the right of the people freely to discuss public officials and their policies. In this conflict of rights, Madison thought that the presumption should be in favor of greater freedom of discussion.⁶¹

⁵⁹ Madison, *Report on the Virginia Resolutions*, January 1800, written on behalf of the Virginia State Legislature; cited in Kurland, *The Founders’ Constitution*, 5:145. A Massachusetts town, commenting on the state Constitution of 1780, discussed the question in terms similar to those that Madison would later use:

Liberty of speech, as it respected public men in their public conduct, was an essential and darling right of every member of a free state upon which in a very eminent degree the preservation of their other rights depends; that nothing spoken with design to give information of the state of the public should be ever subject to the smallest restraint; and that any attempt to oppose such restraint ought to excite an alarm in the people as it inferred a consciousness of demerit on the part of those attempting; That such restraint was more degrading and more strongly marked them slaves than ever the privation of liberty of the press; and that the latter, so absolutely necessary, and therefore so justly dear to every free state, could not be maintained in its full force and vigor without the former. But while we hold up the liberty of the press, as essentially necessary to general freedom, as it respects public men and measures, we reject with abhorrence the idea of its abuse to the injury of private characters.

“Return of Boston,” May 12, 1780, in Robert J. Taylor, ed., *Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution, 1775–1780* (Chapel Hill: University of North Carolina Press, 1961), 148.

⁶⁰ 376 U.S. 254 (1964).

⁶¹ Jefferson seems to have struggled with this problem in his several attempts to propose adequate language for the Virginia state constitution. In his 1776 draft of a constitution, he could not decide whether to allow punishment of seditious libel or not. The first draft included the phrase, “but seditious behavior to be punishable by civil magistrate according to the laws.” Jefferson put the phrase in brackets, perhaps indicating that he regarded it as questionable. In a second draft, he wrote, then crossed out, “but this shall not be held to justify any seditious preaching or conversations against the authority of the civil government.” His hesitation suggests that he sensed the tension we have been discussing, namely,

The fact that legislators were exempted from the laws against libel in whatever they might say in Congress or in some state legislatures⁶² shows that, in an inchoate way, Madison's point was understood in principle by everyone. What the founders on the whole did not see was that in a nation that governs itself through elected officials, the entire nation is, in a sense, in the same position as the legislative body. (During the debate over the Sedition Act, Congressman Nathaniel Macon argued that "[t]he people might be as safely trusted with free discussion, as they whom they have chosen to do their business.")⁶³ The people must be free to exchange opinions about men and measures if elections are to be an effective check on government. Recovery of civil damages for personal libel of public officials should probably be permitted, but there should be careful safeguards to allow a wide scope for expression of critical opinions of government policy.

Although the Hamilton-Croswell standard became the law of the land in most states, law professor George Anastaplo notes that even before the First Amendment was passed, "the popular meaning of 'freedom of the press' was far more liberal than the meaning lawyers had had occasion before 1791 to make explicit in judicial proceedings."⁶⁴ After 1800, writes Michael Kent Curtis, "State seditious libel prosecutions became less and less frequent, and eventually essentially ceased."⁶⁵ Leonard Levy makes a similar point, noting the wide disparity between the official limits imposed in the law of sedition and the actual practice of the press of the 1790s and later. To this extent, Madison's view became the de facto legal standard long before today's view, that laws against seditious libel violate freedom of speech, prevailed.

The West Virginia Constitution of 1862, written in the heat of the Civil War, provides a competent statement of the founders' understanding of free speech, as this understanding was modified and perfected by the

that it is necessary but hard to reconcile the need to permit honest criticism of government errors and the need to maintain public respect for government that secures our rights. Julian P. Boyd, ed., *Papers of Thomas Jefferson*, vol. 1 (Princeton, NJ: Princeton University Press, 1950), 344, 347n10, 353. However, in 1788, Jefferson would take the position that would later be enshrined in the Sedition Act. In a letter to Madison recommending a federal bill of rights, Jefferson wrote, "A declaration that the federal government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed." Jefferson to Madison, July 31, 1788, in James Morton Smith, ed., *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison, 1776-1826* (New York: W. W. Norton, 1995), 1:545.

⁶² U.S. Constitution, art. 1, § 6; Massachusetts Constitution, 1780, Declaration of Rights, art. 21.

⁶³ *Annals of Congress*, 5:2105 (1798), quoted by Curtis, *Free Speech*, 70.

⁶⁴ George Anastaplo, *The Constitutionalist: Notes on the First Amendment* (Dallas, TX: Southern Methodist University Press, 1971), 144.

⁶⁵ Curtis, *Free Speech*, 115. Curtis's informative discussion of limits on free speech in the pre-Civil War South (117-299) shows convincingly how laws against seditious libel can be the enemy of liberty in a political order that is based on the rejection of the principles of the Declaration of Independence. The Southern states outlawed almost all criticism of slavery, on the ground that such criticism threatened the public safety.

reasoning of Madison in his *Report on the Virginia Resolutions*. The traditional crime of seditious libel is omitted; its place is taken by the right of every person (including government officials) to sue for civil damages, and by the criminalization of any public defense of revolutionary violence:

No law abridging freedom of speech or of the press shall be passed; but the legislature may provide for the restraint and punishment of the publishing and vending of obscene books, papers and pictures, and of libel and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel or defamation. Attempts to justify and uphold an armed invasion of the state, or an organized insurrection therein, during the continuance of such invasion or insurrection, by publicly speaking, writing or printing, or by publishing or circulating such writing or printing, may be, by law, declared a misdemeanor, and punished accordingly.⁶⁶

C. Speech injuring public health, safety, or the moral foundations of society

The founders had no objection to government prohibiting or discouraging products or activities that are unsafe or unhealthy. For the same reason, government might decide to ban the advertising or the promotion of things that are unhealthy or dangerous, such as tobacco or liquor. Liberals today have no difficulty with this governmental power. They defend it, however, not as an exercise of government's legitimate power to regulate dangerous products, but as governmental control of "commercial speech," which they believe deserves little or no free speech protection. McGinnis notes that the earlier American approach did not distinguish between commercial speech and other speech: "as a historical matter, the development of a free press and a commercial press were inextricably linked at the time of the Framing." He cites historian Verner W. Crane, who writes, "It was a commercial age, and produced a commercial press."⁶⁷

Regarding government's view of morality, Washington's Farewell Address in 1796 stated the consensus: "It is substantially true that virtue or morality is a necessary spring of popular government." For this reason, speech or conduct that tends to injure the public morals was subject to

⁶⁶ Constitution of West Virginia, 1862, Art. 2, sec. 4; Special Collections Department, University of Virginia; available online at <http://www.vcdh.virginia.edu/vahistory/reconfiguring/constitution.html> [accessed November 5, 2003].

⁶⁷ McGinnis, "Once and Future Property-Based Vision," 76, quoting Verner W. Crane's introduction to *Benjamin Franklin's Letters to the Press, 1758-1775* (Chapel Hill: University of North Carolina Press, 1950), xvi. The liberal Cass Sunstein disapproves of the view that commercial speech should be protected by the constitutional guarantee of free speech, stating (incorrectly) that "for most of the nation's history, no serious person thought that commercial speech enjoyed constitutional protection" (*Democracy and the Problem of Free Speech*, 3).

governmental control. This point was not controversial, but for that very reason, it was not much discussed during the founding era.

Profanity, obscenity, indecency, pornography, and even blasphemy were treated no differently than public nudity. In a famous 1824 case, *Updegraph v. Commonwealth*, Judge Thomas Duncan wrote for the Pennsylvania Supreme Court:

[L]icentiousness endangering the public peace, when tending to corrupt society, is considered as a breach of the peace, and punishable by indictment. Every immoral act is not indictable, but when it is destructive of morality generally, it is, because it weakens the bonds by which society is held together. . . . If from a regard to decency and the good order of society, profane swearing, breach of the Sabbath, and blasphemy, are punishable by civil magistrates, these are not punished as sins or offenses against God, but crimes *injurious* to, and having a malignant influence on society; for it is certain, that by these practices, no one pretends to prove any supposed truths, detect any supposed error, or advance any sentiment whatever.⁶⁸

In *People v. Ruggles* (1811), another well-known blasphemy case, the opinion authored by Chief Justice James Kent for the New York Supreme Court held that government should ban or at least limit “[t]hings which corrupt moral sentiment, as obscene actions, prints, and writings.” These and similar “offences against religion and morality . . . are punishable because they strike at the root of moral obligation, and weaken the security of the social ties.”⁶⁹

One might wonder whether laws against blasphemy are consistent with the founders’ principles. The purpose of government is to secure the natural rights of the citizens, not to save their souls. Duncan and Kent were aware of this. For that reason, their blasphemy opinions were careful to justify those laws with reasons that are entirely secular.

In *Updegraph*, Judge Duncan explained:

It is open, public vilification of the religion of the country that is punished, not to force conscience by punishment, but to preserve the peace of the country by an outward respect to the religion of the country, and not as a restraint upon the liberty of conscience; but licentiousness endangering the public peace, when tending to corrupt society, is considered as a breach of the peace.

Duncan distinguished between the “inestimable freedom of conscience, one of the highest privileges and greatest interests of the human race,”

⁶⁸ *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 408–9 (Pa. 1824); cited in Kurland, *The Founders’ Constitution*, 5:174–75 (emphasis added).

⁶⁹ *People v. Ruggles*, 8 Johns. 290, 292 (N.Y. Sup. Ct. 1811) (Kent, Ch. J.); cited in Kurland, *The Founders’ Constitution*, 5:101–2.

and “the right publicly to vilify the religion of his neighbors and of the country.” Atheism as such, therefore, is not blasphemy.

Religion was thought to be necessary for morality, and morality was thought to be necessary for the preservation of a good society. (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind” were the famous words of the Northwest Ordinance, passed by Congress in 1787.)⁷⁰ Duncan put blasphemy into the category of an act like “profane swearing,” which “weaken[s] those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual.”⁷¹

The idea that government may impose limits on speech that injures the public morals was anticipated by the founders’ favorite philosopher, John Locke, in his *Letter on Toleration* (1689):

Rectitude of morals, in which consists not the least part of religion and sincere piety, concerns civil life also, and in it lies the salvation both of men’s souls and of the commonwealth; moral actions belong, therefore, to both courts; the external as well as the internal; they are subject to the government of both, of the civil as well as the domestic governor, that is, of the magistrate and conscience. . . .

[Therefore] no doctrines adverse and contrary to human society, or to the good morals that are necessary for the preservation of civil society, are to be tolerated by the magistrate.⁷²

In his *Lectures on Law*, James Wilson treats public indecency as one of the public nuisances “which attack several of those natural rights” of individuals: “Common nuisances are a collection of personal injuries which annoy the citizens generally and indiscriminately,” such that “public peace, and order, and tranquility, and safety require them to be punished or abated.” Therefore, “[t]o keep hogs in any city or market town is a common nuisance. Disorderly houses are public nuisances. . . . Indecency, pub-

⁷⁰ These words are chiseled into the stone over the entrance to the main administration building at Bowling Green State University, Ohio (visited 2003). The founders did not believe that such language, approved by government, violated anyone’s religious liberty.

⁷¹ *Updegraph*, 11 Serg. & Rawle at 408, 403, and 406; cited in Kurland, *The Founders’ Constitution*, 5:172–75. The rarity of blasphemy prosecutions is alluded to on 172. Another important blasphemy case, in which the same argumentation is found, is *People v. Ruggles* (N.Y. Sup. Ct., 1811), opinion of Chief Justice James Kent; cited in Kurland, *The Founders’ Constitution*, 5:101–2.

⁷² John Locke, *Epistola de Tolerantia: A Letter on Toleration* (1689), ed. Raymond Klibansky (Oxford: Clarendon Press, 1968), 123, 131 (my translation). Scholars who write on Locke often miss this strongly antilibertarian strain in the *Letter*. For example, Robert Goldwin appears to think that Locke has no interest in government support of morality: Robert Goldwin, “John Locke,” in Leo Strauss and Joseph Cropsey, eds., *History of Political Philosophy*, 3rd ed. (Chicago, IL: University of Chicago Press, 1987), 484. Similarly, Francis Canavan seems unaware that Locke advocated government supervision of “doctrines adverse . . . to the good morals that are necessary to the preservation of civil society”: Francis Canavan, *Freedom of Expression: Purpose as Limit* (Durham, NC: Carolina Academic Press, 1984), 71.

lic and grossly scandalous, may well be considered as a species of common nuisance. . . . Profaneness and blasphemy are offenses, punishable by fine and by imprisonment."⁷³ Wilson in effect equates here the physical stench of a pigsty with the moral stench of public indecency and whorehouses.

As usual, the founders, in agreement with Locke, did not sharply distinguish between speech (indecent speech) and deed (keeping hogs in the city or operating a whorehouse). Gross actions and expression that tended to undermine the moral basis of the community, especially of the family and the moral formation of the young, were subject to legal limitation.

For a full explanation of the ground of government prohibitions on obscenity and pornography, one would have to reflect on the founders' overall policy on sex and the family. There is no need to do that here.⁷⁴ But the gist of the problem can be easily stated. If sex is a matter of mere pleasure and entertainment with no further consequence, then such prohibitions as existed then were nothing more than puritanical prejudice. But if sex is viewed as an activity whose uniqueness lies in its potential to generate new life—life that is needy and vulnerable for many years—then government has an urgent interest in the terms on which sex is practiced. Government regulation of sex (and therefore of words and pictures promoting nonmarital sex) has two purposes. First, it aims to encourage the limitation of sex to marriage, so that most children will be born to married parents who have an interest, the resources, and a legal obligation to take care of them. Second, government seeks to encourage heterosexual sex and to discourage other forms, so that sex will lead to the birth of enough children, the next generation of citizens, without which the society cannot survive.⁷⁵

D. Speech promoting ordinary crimes

The last kind of injurious speech that the founders thought could be rightly limited by government is relatively uncontroversial, so I will not say much about it. Government may ban speech by those planning or inciting an act that is otherwise criminal, such as a conspiracy to commit a crime. Speech used in planning a murder or bank robbery, or inciting a crowd to violence against an innocent person, is punishable.

⁷³ McCloskey, ed., *Works of James Wilson*, 2:670–71.

⁷⁴ See West, *Vindicating the Founders*, chap. 4, "Women and the Family." See also the opinion of Judge John Finis Philips in *United States v. Harmon*, 45 F. 414 (U.S. Dist. Ct. Kan., 1891). I know of no better defense by an American jurist of the founders' policy of suppressing obscenity, pornography, etc. Philips uses the language of the founders, concerning the security of natural rights and the social compact as the foundation of government, as the ground of government's right to ban obscene material from the U.S. mail.

⁷⁵ In addition to the materials mentioned in the previous note, see Wilson, *Lectures on Law*, in McCloskey, ed., *Works of James Wilson*, 2:598–603 (on the importance of the monogamous, heterosexual family).

V. THIRD ELEMENT OF FREE SPEECH: RESTRAINT OF INJURIOUS SPEECH MUST BE BY DUE PROCESS OF LAW

It is not enough to say (for example, in a Bill of Rights) that noninjurious speech should be free and that only injurious speech is punishable. "Will it be sufficient," Madison famously asks in *Federalist No. 48*, ". . . to trust to these parchment barriers against the encroaching spirit of power?" How is government to be prevented from abusing its duty to protect people against injury? The founders' answer here, as in domestic politics generally, was to require government to operate through laws or general rules passed by elected representative bodies, applied and enforced through an independent executive and judiciary.

The rule of law is meant to enable government to secure our natural rights (protecting against injuries to individuals or to the society at large), while discouraging government from misusing its great power to oppress those with whom government officials happen to disagree. If government censors are in a position to decide behind closed doors which persons or companies will be denied a right to a broadcast or printing license, without having to answer in open court before a jury of ordinary citizens, the likely result is that broadcasting or printing will tend to be limited to friends of the views of government. This was, in fact, the case through most of the history of broadcast regulation, until the late 1980s.⁷⁶

What the rule of law requires is 'due process'. Before government may take away anyone's liberty (including liberty of speech, press, or broadcast), it has to make a general rule that defines the kinds of injurious speech for which people will be held accountable. If government believes that an injury has taken place, it must proceed with a jury trial should the defendant request one.⁷⁷ Hamilton, in his argument in the *Crosswell* case, made some savvy remarks indicating why impartial judgment requires that government officials not be permitted to judge cases of libel without the concurrence of a jury:

[L]et me ask whether it is right that a permanent body of men, appointed by the executive, and, in some degree, always connected with it, should exclusively have the power of deciding on what shall constitute a libel on our rulers; or that they shall share it, united with a changeable body of men, chosen by the people. Let our juries still be selected, as they are now are, by lot. But it cannot be denied, that every permanent body of men, is, more or less, liable to be influenced by the spirit of the existing administration: that such a body may be

⁷⁶ Lucas A. (Scot) Powe, Jr., *American Broadcasting and the First Amendment* (Berkeley: University of California Press, 1987).

⁷⁷ Story, *Commentaries on the Constitution*, sec. 1879, paraphrasing an English author, writes with respect to publications, "if their character is questioned, whether they are lawful, or libelous, is to be tried by a jury, according to due proceedings at law."

inclined to corruption, and that they may be inclined to lean over towards party modes. No man can think more highly of our judges, and I may say personally so, of those who now preside, than myself; but I must forget what human nature is, and what her history has taught us, that permanent bodies may be so corrupted, before I can venture to assert that it cannot be. . . . For though, as individuals, they may be interested in the general welfare, yet, if once they enter into the views of government, their power may be converted into an engine of oppression.⁷⁸

VI. FOURTH ELEMENT OF FREE SPEECH: NO PRIOR RESTRAINT

At the Pennsylvania Ratification Convention of 1787, James Wilson said: "what is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual."⁷⁹

This principle of 'no prior restraint' is a fundamental requirement not only of free speech, but of the rule of law altogether. John McGinnis explains: "Like a licensing law, a prior restraint can be understood as a deviation from the common law's treatment of business enterprises; under the common law, other enterprises were not normally subject to licenses or prior restraints, but rather only to after-the-fact liability for damages they caused."⁸⁰ Law, as understood in the founding, should not require citizens to ask for the permission of government officials before they are allowed to use their property. (There are some exceptions,⁸¹ but the presumption was that the exceptions would serve the overall cause of securing the greatest liberty for all.) A person may not be incarcerated because the government believes he might harm or plan to harm someone. Government should not be permitted to infringe the citizens' right to keep and bear arms, for example (as is often done today) by granting licenses to carry firearms only to certain classes of citizens. Government is similarly forbidden to license the right to speak or publish. 'No prior restraint' means that government may not condition the right to publish

⁷⁸ *People v. Croswell*, in Goebel, ed., *Law Practice of Hamilton*, 1:810.

⁷⁹ Wilson, speech at Pennsylvania Ratifying Convention, December 1, 1787, in Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution*, vol. 2 (Madison: State Historical Society of Wisconsin, 1976), 455.

⁸⁰ McGinnis, "The Once and Future Property-Based Vision of the First Amendment," 92.

⁸¹ William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996) (showing that nineteenth-century regulation was more extensive than one might expect from the myth of laissez faire; his examples, however, confirm the view that the scope and intrusiveness of regulation was far less than in the twentieth century). Andrew Rutten has a sensible assessment of Novak in "The Neglected Politics of the American Founding," *Independent Review* 2, no. 4 (1998), available online at <http://www.independent.org/review.html> [accessed November 13, 2003].

on prior permission from government officials. That is, government is not permitted to get into the business of granting licenses as a condition of publishing a newspaper or magazine, or (in the present time) operating an electronic broadcasting station. From the point of view of the founding, therefore, the entire licensing scheme for electronic broadcasting in the United States would be both unconstitutional and in violation of natural right.

One might respond by pointing out that the government owns the airwaves and, like any other property owner, is therefore legally entitled to dictate the terms of their use. This objection is correct, but its premise is that it is proper for government to ban private ownership of the most important medium of communication in existence. A parallel would be if government insisted that it should own all land because it is a scarce resource that government alone can allocate justly. Government would grant licenses to use this public land on whatever terms government happened to impose. (This arrangement, by the way, already exists on the 54.2 percent of land in the Western states that is owned by the federal government). From the founders' standpoint, a government's refusal to allow any private ownership of the right to broadcast is the equivalent of government ownership of all the land in the country. A society in which government owned the preponderance of the land would not be a free society.

VII. FIFTH ELEMENT OF FREE SPEECH: PROPERTY OWNERS MAY LIMIT OR DICTATE SPEECH OF GUESTS, EMPLOYEES, AND STUDENTS

How do these principles affect the private workplace or other private associations? The general rule is that private associations are permitted to do the same things as a private individual. Everyone is permitted to use his own property and money to promote and publish the views that he believes to be right, assuming that these views are noninjurious, as stated above. Everyone has the right to spend his own money to publish his own sentiments. No one is required to spend his own money or to allow the use of his own property in order to promote views that he disagrees with. Every homeowner may exclude from his property anyone who speaks or acts in a way that the homeowner does not approve. He may exclude atheists, Christians, white people or black, women or men, the disabled, the intelligent, or anyone else for any reason, however arbitrary. But he is not permitted to injure them in their persons or property. The same rule goes for every business, church, private school, club, or any other private association. The owner may set rules on what is permitted or required to be said and done on his property by those who visit or work there. If the visitor or worker does not approve of the rules, he or she may leave or

quit. Likewise, if a visitor, worker, or student does not conform to the owner's rules, the owner is free to send him or her away.

In the founders' view, a private school or college may expel a student for insisting that $2 + 2 = 5$, or for stating in or out of class that the teacher is a fool (even if this happens to be true). Unless a contract dictates otherwise, an employer may fire all workers who argue that Hitler was a good man (or a bad man). For the same reason—namely, the right to the noninjurious enjoyment of one's liberty and property—a worker may quit if he dislikes the conservative or liberal opinions of his boss.

Today, civil rights law has significantly curtailed these freedoms. In the same era when American governments turned the marriage contract into an at-will arrangement by creating no-fault divorce, they greatly limited traditional at-will employment.⁸² Disabilities law, racial and sexual harassment law, and (already in the 1930s) labor law require employers to say or not say certain things in the workplace. The same laws hold employers liable for noninjurious remarks made by employees (that is, remarks that would be held noninjurious in a court of law if those remarks had been made outside the workplace), if those remarks create a hostile work environment on the basis of sex or race.

These laws would have been thought by the founders to violate the employer's or employee's fundamental civil right of free speech and freedom to use one's property in a noninjurious way. This long-standing legal doctrine was not questioned until the twentieth century, when liberal Supreme Court justices promoted a right of access to private property for First Amendment free exercise of religion and free speech purposes. In one of the early cases creating this right, *Marsh v. Alabama* (1946), Justice Stanley Reed's dissent hewed to the older view:

This is the first case to extend by law the privilege of religious exercises beyond public places or to private places without the assent of the owner. . . .

As the rule now announced permits this intrusion, without possibility of protection of the property by law, and apparently is equally applicable to the freedom of speech and the press, it seems appropriate to express a dissent to this, to us, novel Constitutional doctrine. . . .

. . . The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the

⁸² Mary Ann Glendon, *The New Family and the New Property* (Toronto: Butterworths, 1981), 4: "In 1973, Sweden and the American state of Washington changed their laws to permit one spouse unilaterally to terminate a marriage for any reason, or no reason. In 1974, Sweden extended protection against dismissal without cause to all employees in the labor force, and the Supreme Court of New Hampshire became the first in the nation to repudiate the time-honored common-law rule that an employer may terminate an at-will employment contract for any reason, or no reason."

trespasser, even though he trespasses in behalf of religion or free speech.⁸³

In other words, the traditional doctrine was that the owner of private property has complete control over what is permitted to be said on his property. In a 1964 case in which the Court created a constitutional right to picket inside a privately owned restaurant, Justice Hugo Black defended the older view in his dissent: "The right to freedom of expression is a right to express views—not a right to force other people to supply a platform or a pulpit."⁸⁴

Today, conservatives and libertarians have attempted to carve out an "expressive association" exception to civil rights laws. For example, in *Boy Scouts of America v. Dale*, the Boy Scouts were vindicated when the Supreme Court declared them to be an "expressive association" whose "speech" would be coerced if they were compelled to retain Dale, a homosexual assistant scoutmaster.⁸⁵ Dale had sued the Scouts for dismissing him, claiming that the Scouts had violated a New Jersey statute barring discrimination on the basis of sexual orientation in places of public accommodation. From the point of view of the founders, all associations are "expressive associations." Whether or not a private association announces a public code of belief (as the Boy Scouts do with their famous oath), every individual, alone or in association with others, has a right to say what he wants and to exclude those who say what he does not approve.

VIII. SIXTH ELEMENT OF FREE SPEECH: GOVERNMENT AS PROPERTY OWNER (SPEAKER, EMPLOYER, AND SCHOOLMASTER) HAS THE SAME SPEECH RIGHTS AS PRIVATE OWNERS

The founders applied the rules outlined above to government officials no less than to private citizens. Within some minimal limits—such as the Establishment Clause and the provision in the U.S. Constitution against religious tests for public office—government schools, workplaces, military bases, and libraries were originally understood to be free to decide what would be allowed or required to be said, or not said, as a condition of being on the property or being admitted to the agency or institution. If government wanted to require all state university students to live in coed dorms, or to admit only those who believed in racial equality, these requirements would violate no one's right of free speech. (Of course, gov-

⁸³ *Marsh v. Alabama*, 326 U.S. 501, 512, 516 (1946). See also Ely, "Property Rights and Free Speech," in this volume.

⁸⁴ *Bell v. Maryland*, 378 U.S. 226, 345 (1964). See also *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding a state law compelling a shopping center owner to allow entry to solicitors of signatures for a political petition).

⁸⁵ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). See the discussion of David E. Bernstein, "Expressive Association after *Dale*," in this volume.

ernment officials must operate within the limits of the civil and criminal law that applies to everyone in society.) The homeowner owns his property and may legally expel or admit on the basis of what is or is not said by those who enter his property. For the same reason, government's freedom to set admissions standards, hiring standards, and the content of school curricula and libraries was thought to be a normal and necessary implication of the fact that government owns the property in question. Therefore, government was free to choose to buy or remove library books from its own public or school libraries. It could admit students to or expel them from government-operated high schools and universities because of what they said. It could hire and fire workers on whatever criteria it wished, including political party affiliation or preferential treatment by race.

The older view was affirmed in 1892, when Justice Oliver Wendell Holmes, speaking for the Massachusetts Supreme Judicial Court, rejected the petition of a policeman who had been fired for violating a regulation restricting his political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him." A few years later, Holmes upheld the right of the City of Boston to require that speakers on the Boston Common first obtain a permit from the mayor: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes."⁸⁶ Similarly, in *Ex Parte Curtis*, an 1882 Supreme Court case, the majority held that a law forbidding government employees from contributing for political purposes to other government employees is constitutional.⁸⁷

The same right of free speech for government as for private owners also means that when government speaks, it can say whatever it wants. Gov-

⁸⁶ *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892). *Commonwealth v. Davis*, 162 Mass. 510 (1895), 511, *aff'd* 167 U.S. 43 (1897). Quoted in William W. Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," *Harvard Law Review*, 81 (1968): 1439.

⁸⁷ *Ex Parte Curtis*, 106 U.S. 371 (1882). Also *United States v. Wurzbach*, 280 U.S. 396 (1930), in which Holmes, for a unanimous court, citing *Curtis*, affirmed the right of the government to forbid public employees from soliciting or receiving money from another government employee for political purposes. Also *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding the Hatch Act, which prohibited most federal employees from taking part in political campaigns).

ernment "speaks" by funding certain activities, such as book publishing or art, or by teaching in public schools and universities.

Under the founders' approach, many issues that are hotly debated today would be solved easily. Government would be free to refuse to fund "art" for reasons of indecency alone, such as public nudity displayed in "performance art." Government could hire chaplains for the armed forces or to give prayers in Congress or state legislatures with no concern for "diversity." The university press of a public university could reject a manuscript for any reason whatever, even for "discriminatory" reasons. To the founders, a government agency or school was not a public forum.

IX. MODERN LIBERALISM: BASIC PRINCIPLES

We now turn to a comparison of the founders' approach with that of modern liberalism. The founders aspired to establish a society in which each person's right to liberty, including his right to acquire and use property, would be protected by government. Except for injury to person or property, and matters regarding sex, marriage, and other things connected with the propagation of children, government would mostly leave people alone to live their private lives as they pleased. Government coercion would generally be used only *after* actual injury had occurred, and it could only be applied through due process of law, with clear rules, prosecutions in open court with jury trials, and punishments established and limited by law. Liberals reject the founders' approach as unjust and unhistorical. I will explain what I mean by this in what follows.

Before I do, however, I should note that the typical liberal probably would not agree with all the elements that I will attribute to liberalism. It is equally true that the typical conservative would not agree with all the elements of the founders' position on free speech. One reason for this is that government, public opinion, and elite opinion in America today are neither fully liberal nor fully conservative, but an inconsistent blend of both. From the point of view of the founders, America today has become very liberal. But from the point of view of the most consistent and radical proponents of liberalism, America today remains a very old-fashioned nation, regrettably still living in many ways under the principles and constitutional order established by the founders.⁸⁸ The most clear-headed proponents of liberalism—men such as John Dewey in the late nineteenth and early twentieth centuries, and Ronald Dworkin, Cass Sunstein, Richard Rorty, and John Rawls in more recent times—articulate the liberal position with greater consistency than most.

Rorty, a lively and intelligent liberal, provides a useful summary of the main elements of modern liberalism in his book, *Achieving Our Country*:

⁸⁸ See Mark A. Graber's lament in "Constitutional Theory for People Out of Power," *Good Society* 11, no. 1 (2002): 89–93.

Leftist Thought in Twentieth-Century America. I will condense his argument into three points:

First, liberals believe that the “moral and social order” bequeathed to Americans by the founders became, by the late nineteenth century, “an economic system which starves and mutilates the great majority of the population.” For this reason, liberals believe that there is “a constant need for new laws and new bureaucratic initiatives which would redistribute the wealth produced by the capitalist system.” Before the 1960s, liberals “tried to help people who were humiliated by poverty and unemployment, or by . . . the ‘hidden injuries of class.’” After the 1960s, liberals turned increasingly to helping “people who are humiliated for reasons other than economic status,” such as women, blacks, Hispanics, and homosexuals. Liberals’ goal is “a classless and casteless society.”⁸⁹

Second, the liberal conception of liberty is an ideal that Rorty calls “self-creation” or “self-individualization,”⁹⁰ a cultivation of “a greater diversity of individuals,” to the point where “[i]ndividual life will become unthinkable diverse and social life unthinkable free.” As an example of what this means in practice, Rorty celebrates the “youth culture of the 1960s,” with its “rock-and-roll, drugs, and the kind of casual, friendly copulation which is insouciant about the homosexual-heterosexual distinction.” In the ideal of self-expression, “the only sin is limitation.”⁹¹

These first two liberal principles rest on a third and more fundamental claim: according to Rorty, liberals deny that there is any fixed meaning in the world. Neither God nor nature set any significant limits on the human will. Human beings should be free, not just from oppression by other human beings, but above all free from any “higher” authority either in religion or in a transcendent moral law that binds everyone and limits their wills. (Therefore, liberals tend to be strongly opposed to the moral teachings of traditionalist Christianity and Judaism.) For liberals, the meaning of human life is something that is a product of human making, not divine will or natural law. “The subject is a social construction,” writes Rorty. Life must not be “subjected . . . to some ‘authority’ alleged to exist outside the process of experience.” To state the same point in religious language, “we put ourselves in the place of God. . . . We redefine God as our future selves.”⁹²

In contrast to liberals, the founders believed in what Rorty disparagingly calls “Platonic and theocentric metaphysics”—that is, standards that are “built into human nature.”⁹³ In the Declaration of Independence,

⁸⁹ Richard Rorty, *Achieving Our Country* (Cambridge, MA: Harvard University Press, 1998), 47 (quoting Herbert Croly); 60, 80 (quoting Richard Sennett); and 80–82, 30 (paraphrasing Walt Whitman and John Dewey).

⁹⁰ Richard Rorty, *Philosophy and Social Hope* (New York: Penguin, 1999), 118.

⁹¹ Rorty, *Achieving Our Country*, 28, 30, 24, 26, and 34 (quoting Ralph Waldo Emerson).

⁹² *Ibid.*, 27–29; quotations are from 31 (paraphrasing Dewey and Foucault), 29 (quoting Dewey), and 22 (paraphrasing Whitman).

⁹³ *Ibid.*, 29, 35.

the standards of political justice are the unchanging “laws of nature and of nature’s God.” That is, human nature and/or divine will limit and guide the human will. Accordingly, Jefferson wrote that “the people . . . are inherently independent of all but moral law.”⁹⁴ One example of such a moral law is that no human being should harm or enslave another except to preserve his own life. Another is that sex ought to be confined as much as possible to marriage, so that most children will be brought up by their married biological mothers and fathers.⁹⁵

Rorty refuses to give any theoretical justification for the three liberal principles described above, choosing instead to advise the Left to “put a moratorium on theory” and “try to kick its philosophy habit.”⁹⁶ Yet it is a fact that modern liberalism came into existence as an outgrowth of nineteenth-century German philosophy, which was heavily influenced by the Frenchman, Rousseau. Rousseau had famously declared in 1755 that what human beings are by nature—hardly more than stupid beasts—has almost nothing to do with what human beings are in civilization.⁹⁷ Building on Rousseau’s claim, Hegel and his successors elaborated a theory of history that explains man’s transformation from beast to rational creature. The key point is that human beings largely make themselves what they are through the course of their own historical development. The human mind exists by nature only in embryo. Nature and the rational mind are opposed. Therefore, history replaces God and nature as the explanation of what we most deeply are.⁹⁸

St. Paul, quoting a Greek poet, said that in God “we live and move and have our being.”⁹⁹ In the Greek as well as the Christian perspective, human life is fundamentally dependent on something outside the will of man. For the Greek philosophers, it was nature; for Christians, God. John Dewey, in a provocative correction of the Bible no less than of Greek philosophy, wrote that it is “social conditions in which he [the human being] lives, moves, and has his being.”¹⁰⁰ The *individual* human being on his own is nothing. “Social conditions”—that is, human beings collectively and over time—make us what we are. Human beings, in this light, are victims, mere playthings of historical contingency, because they are formed by forces outside their own wills. But at the same time, human beings are also creator-gods, for social conditions (in which man “lives,

⁹⁴ Jefferson, letter to Spencer Roane, September 6, 1819, in Peterson, ed., *Writings*, 1426.

⁹⁵ West, *Vindicating the Founders*, chap. 4.

⁹⁶ Rorty, *Achieving Our Country*, 91.

⁹⁷ Jean-Jacques Rousseau, *Discourse on the Origins and Foundations of Inequality among Men* (1755), in *The First and Second Discourses*, trans. Roger D. and Judith R. Masters (New York: St. Martin’s Press, 1964).

⁹⁸ Georg W. F. Hegel, *Lectures on the Philosophy of World History: Introduction: Reason in History*, trans. H. B. Nisbet (New York: Cambridge University Press, 1975). On Hegel’s influence on Dewey and Whitman (and therefore on the fundamental direction of later American liberalism), see Rorty, *Achieving Our Country*, 20.

⁹⁹ Acts 17:28.

¹⁰⁰ Dewey, *Liberalism and Social Action*, 58.

moves, and has his being") are made by the joint efforts of human beings over the course of their history. The human race is all powerful; the human individual is a powerless victim dominated by forces outside of his control.

If there are no permanent limits or standards, human life can become whatever we collectively want it to be. For liberalism, then, the question becomes how human beings can use their collective power to liberate every individual from whatever restrains his or her will. Freedom, in the view of modern liberals, is something radical. It is not freedom from the will of other human beings under the law of nature, as it was for the founders. It is freedom from all permanent limitations—from every constraint that human beings have traditionally believed was imposed on them by God or nature. Government, therefore, becomes an ongoing project of liberating human nature not only from political oppression, but above all from such limits as poverty and traditional morality.¹⁰¹

Man's natural vacuity or openness means that there is no such thing as the right or wrong way of life. Compared to Rorty, Dewey was practically the incarnation of old-fashioned decency. Dewey strongly opposed the notion that random or merely self-indulgent activity constitutes genuine freedom. He once wrote that "[i]t is equally fatal to an aim to permit capricious or discontinuous action in the name of spontaneous self-expression." But the terms of Dewey's argument anticipate the "rock-and-roll, drugs, and the kind of casual, friendly copulation" celebrated by Rorty. In his chapter on "Moral Reconstruction" in *Reconstruction in Philosophy*, Dewey calls for greater diversity in life choices. We must "advance to a belief in a plurality of changing, moving, individualized goods and ends." "Growth itself is the only moral 'end.'" In an earlier statement, anticipating the way we talk now, Dewey called the human task "self-realization."¹⁰²

Dewey was the greatest liberal theorist of the twentieth century. During that century, liberalism gradually took over American intellectual life.

¹⁰¹ One might object that once liberalism abandons any claim to be grounded in God or nature, there is no reason to choose liberalism over any other position, even fascism. Most liberals do not confront this objection. But Rorty admits it gleefully; he says that is why he is a liberal ironist. That is, he likes liberalism, but he knows that he can provide no reason for his groundless preference. If Rorty is correct that the premises of liberalism lead to this conclusion, then there is a profound instability built into liberalism, an instability that might lead some to return to God or nature in order to defend liberty, but might encourage others to descend into the abyss of tyranny and what Leo Strauss called "fanatical obscurantism." Richard Rorty, *Contingency, Irony, and Solidarity* (New York: Cambridge University Press, 1989), xv; Leo Strauss, *Natural Right and History* (Chicago, IL: University of Chicago Press, 1953), 6.

¹⁰² John Dewey, *Reconstruction in Philosophy* (1920; enlarged ed., Boston, MA: Beacon Press, 1948), 161–86 (quotations on 162, 177). Dewey published an essay in 1893 entitled "Self-Realization as the Moral Ideal," in Jo Ann Boydston, ed., *The Early Works of John Dewey*, vol. 4 (Carbondale: Southern Illinois University Press, 1967), 42–53. John Dewey, *Democracy and Education* (New York: Macmillan, 1916), chap. 8, "Aims in Education," available online at <http://www.ilt.columbia.edu/publications/dewey.html> [accessed December 17, 2003].

Now liberalism dominates the universities, the movie industry, journalism, and the world of writing and publishing. Liberalism has also made significant inroads into American political institutions, but its victory in politics is very incomplete compared with its academic and literary successes.

In 1992, four members of the Supreme Court gave voice to the relativistic side of liberalism celebrated by Dewey in this way: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁰³ Jefferson would have replied that we are not free to define our own concept of existence and meaning. God and nature have already defined it for us.

X. FIRST ELEMENT OF LIBERAL FREE SPEECH: "COMPLETE FREEDOM FOR NONINJURIOUS SPEECH" REDEFINED

I will now discuss the liberal alternative to the six elements of the founders' approach to free speech. We will see that liberalism does not reject the first two elements (freedom for noninjurious speech and government punishment of injurious speech), but it does redefine injury in a way that the founders would not have recognized. Liberalism rejects the other four elements (due process, no prior restraint, free use of private property, and similar freedom for government to control speech on its property).

It might seem surprising to say that liberals do not favor unlimited freedom of expression, but Stanley Fish is right when he writes that politics is always "the attempt to implement some partisan vision." Therefore, he says, it is inevitable that "a line must be drawn between protected speech and speech that might in some circumstances be regulated, and that line will always reflect a *political* decision to indemnify some kinds of verbal behavior and devalue others."¹⁰⁴ One such "partisan vision" is the founders' ideal of constitutional democracy that secures the natural rights of citizens. Another is a liberal welfare state that limits the individual rights of citizens in order to redistribute resources from the more privileged to the less. Every political standpoint therefore proposes to ban or at least discourage some speech. Liberals agree with the founders in this respect: some speech is injurious and ought to be made illegal. Fish's work is valuable because it clarifies a point that many liberals are reluctant to face, although all liberals believe in government-imposed limits on some speech, as we will see below.

Liberals agree with the founders' view that there should be complete freedom for noninjurious speech, but they understand it differently. For

¹⁰³ *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (joint several opinion).

¹⁰⁴ Stanley Fish, *There's No Such Thing As Free Speech, and It's a Good Thing, Too* (New York: Oxford University Press, 1994), 116, 15.

liberalism, the purpose of government is, first, to make sure that the resources of society are made sufficiently available to the disadvantaged and underprivileged, and second, to foster the limitless diversity that will allow every person to achieve the ideal of moral autonomy and self-realization. What follows is that two kinds of speech that the founders disfavored now become favored: speech criticizing government in the name of radical reform, and speech that is obscene, pornographic, or otherwise immoral from the earlier standpoint.

In the first half of the twentieth century, when socialists and communists were sometimes prosecuted for advocating disobedience to the law or revolutionary overthrow of the government, liberals wanted to get rid of laws prohibiting such advocacy. In *Brandenburg v. Ohio* (1969), the Supreme Court accepted the liberal view that such laws are unconstitutional.¹⁰⁵

Liberals believe people should be free to be morally autonomous, to express themselves as they please. Liberals, therefore, deny the founders' position that there is an unchanging moral code (e.g., sex confined to marriage and oriented toward the procreation of children) that government should promote to secure the liberty of all. Thus, liberals view with suspicion all government limitations on pictures or descriptions of sexual conduct. Law professor Cass Sunstein writes, "Sexually explicit works can be highly relevant to the development of individual capacities. For many, it is an important vehicle for self-discovery and self-definition."¹⁰⁶ The beneficent message of pornography, writes legal scholar David Richards, is "easy freedom without consequences, a fantasy of timelessly repetitive indulgence."¹⁰⁷ Government should not stand in the way of such self-indulgence, but facilitate it.

The liberal view of pornography received an unusually frank defense by the late Supreme Court Justice William O. Douglas. In his concurring opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts* (1966), Douglas included, as an appendix, a speech defending Fanny Hill by Reverend John R. Graham of the First Universalist Church of Denver. Fanny is the whore who is the leading character of the pornographic novel that was the subject of the *Memoirs* case. (In his dissent, Justice Tom Clark described the novel in these terms: "Though I am not known to be a purist—or a shrinking violet—this book is too much even for me. . . . *Memoirs* is nothing more than a series of minutely and vividly described sexual episodes.") Graham argued against the view that sexual desire is something that we should try to control. He proposed to replace the old ideal of self-control with the new ideal of self-expression.

¹⁰⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁰⁶ Sunstein, *Democracy and the Problem of Free Speech*, 215.

¹⁰⁷ Richards is quoted in Steven Shiffrin, "Obscenity," in Karst, *The First Amendment*, 208.

According to Graham, the old ideal is of "a closed world, where life is predetermined and animal-like." The Fanny Hill view is "an open encounter of the total person in the world. Growth and spontaneity and expression are the goals." It means people are free "to choose themselves." The older view offers "warm blankets and cocoons for those who want to lose their humanity." In other words, from the point of view of Justice Douglas and Reverend Graham, those who follow the founders' view of sex and marriage "lose their humanity," while those who follow the free and easy ways of Fanny Hill gain their humanity.¹⁰⁸

Here is a manifesto for the sexual revolution, which was just getting under way in 1965, when Graham gave the speech published by Douglas. Far from injuring society, obscenity and pornography are, according to this version of liberalism, important vehicles for liberating society from its puritanical, constricted past.

The Douglas view was the culmination of a line of thought that was long marginal to the development of liberalism, but which became part of its mainstream by the 1960s. One of the early opponents of the founders' approach to obscenity was Theodore Schroeder, author of "*Obscene Literature and Constitutional Law*" (1911). Schroeder, trained in the law, was the leading activist in the early twentieth century for the abolition of all limits on freedom of expression. At the time, few took Schroeder's book seriously, but it articulated many of the themes that came to be widely accepted later in the century. Schroeder especially emphasized the argument, later taken up by Douglas, that opponents of obscenity are themselves corrupt, repressive, perverse, and monomaniacal. Morality is "relative and progressive." For Schroeder, only hysteria and superstition make people believe that there is anything wrong with obscenity.¹⁰⁹

Political scientist Stanley Brubaker correctly explains why the founders held the opposite view. For them, "freedom of speech is meaningless unless tied to self-government, using that term in both its public and personal sense. . . . [F]reedom presupposes character, and character presupposes self-discipline or self-government. But self-discipline is not self-acquired. It is virtually impossible without cultivation by family, society, and, at least indirectly, by government."¹¹⁰

¹⁰⁸ "Dr. Peale and Fanny Hill," Appendix to the concurring opinion of Justice Douglas, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 433–41 (1966).

¹⁰⁹ Quoted and paraphrased in Rochelle Gurstein, *The Repeal of Reticence: A History of America's Cultural and Legal Struggles over Free Speech, Obscenity, Sexual Liberation, and Modern Art* (New York: Hill and Wang, 1996), 101–6. Gurstein notes that in our time, "to raise objections to so-called free expression—no matter how graphically violent, sexually explicit, perverse, or morbid—is to invite the epithet 'puritan'" (5). See also Graber, *Transforming Free Speech*, 54–62 (discussing Schroeder).

¹¹⁰ Stanley Brubaker, "Original Intent and Freedom of Speech and Press," in Eugene W. Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville: University Press of Virginia, 1991), 89.

XI. SECOND ELEMENT OF LIBERAL FREE SPEECH: GOVERNMENT MUST PUNISH OR LIMIT INJURIOUS SPEECH

For the founders, as we saw earlier, injury is harm to the person or property of another, including his reputation; harm to the government that secures his natural rights; or harm to the morals necessary for the preservation of society. All speech that is injurious in any of these ways may be limited or banned by government. This includes speech injuring reputation; speech injuring the government that secures individual rights; speech injuring the public health, safety, or morals; and speech used in the course of committing ordinary crimes. All other speech is to be permitted.

For liberals, injury is thought to be endemic in a system of free markets, where human beings exchange goods and services on the basis of voluntary contracts. For the founders, free markets are an indispensable element of a free society, in which individuals are expected to take care of most of their daily needs through voluntary private associations freely interacting with other associations. It is a basic tenet of modern liberalism that the freedom achieved by such a system is largely illusory, because it leaves the weak and marginalized at the mercy of the strong and dominant classes. Early in the twentieth century, liberal Progressives emphasized that such a system leaves the underprivileged at the mercy of corporate capitalism. More recently, liberals have focused on the ways that a system securing the individual rights of life, liberty, and property putatively promotes heterosexual bigotry, male dominance of women, and discrimination by whites against people of color. When government fails to provide these victimized groups with the support they need, they are doubly injured by the system.

Woodrow Wilson, a Progressive, illustrates the early liberal position in his 1913 book, *The New Freedom*:

We used to think in the old-fashioned days when life was very simple that all that government had to do was put on a policeman's uniform and say, "Now don't anybody hurt anybody else." We used to say that the ideal of government was for every man to be left alone and not interfered with, except when he interfered with somebody else; and that the best government was the government that did as little governing as possible. That was the idea that obtained in Jefferson's time. But we are coming now to realize that life is so complicated that we are not dealing with the old conditions, and that the law has to step in and create new conditions under which we may live, the conditions which will make it tolerable for us to live.¹¹¹

C. Edwin Baker makes a similar argument in his contribution in this volume. Government, he writes, must "create the conditions that enhance

¹¹¹ Woodrow Wilson, *The New Freedom* (New York: Doubleday, 1913), 19–20.

meaningful autonomy. . . . [T]he concern is not with having the maximum abstract freedom of choice but with having opportunities to make those choices one actually wants to make."¹¹² It is not enough for government to stand aside while individuals make their choices. Government must actively change the conditions of society to make the full range of choices available to all.

The late Supreme Court Justice Thurgood Marshall gave a clear statement of the same point in his 1980 dissent in *Harris v. McRae*. Congress had passed a law excluding the funding of abortions through Medicaid. As Marshall saw it, the question was whether the Constitution requires government to pay for poor women's abortions. The Court said no. Marshall thought otherwise. He complained about the Court's decision:

In today's decision . . . the Court suggests that a withholding of funding imposes no real obstacle to a woman deciding whether to exercise her constitutionally protected procreative choice. . . . The Court perceives this result as simply a distinction between a "limitation on governmental power" and "an affirmative funding obligation." For a poor person attempting to exercise her "right" to freedom of choice, the difference is imperceptible.¹¹³

Here is Marshall's argument in the form of a syllogism:

Every woman has a constitutional right to abortion.
If government fails to fund a poor woman's right to abortion, she is being denied her constitutional right.
Therefore, government has a constitutional obligation to pay for her abortion.

Marshall's argument, like Baker's, implies that government has an "affirmative funding obligation" to pay, not only for abortion, but also for *anything* a poor woman has a constitutional right to do. Otherwise, she has (in Baker's words) "abstract freedom of choice," but not "the opportunity to make those choices."

The liberal understanding of injury has a direct application to the question of what kind of speech is injurious. For liberals, speech that undermines the task of helping the poor and other disadvantaged groups is injurious. So also is speech that advances the interests of the dominant

¹¹² C. Edwin Baker, "Autonomy and Informational Privacy," in this volume. See sec. III A of Baker's article.

¹¹³ *Harris v. McRae*, 448 U.S. 297 (1980), 347. See also the remarks of Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago, IL: University of Chicago Press, 1990), 263: The Court correctly "saw that once we acknowledge that some basic rights can only be enjoyed with state economic support, we have left the boundary of negative liberty behind (and, of course, further redistributive incursions on property are likely to follow)."

classes at the expense of those who are excluded. Here, then, is the ground of two kinds of liberal limitations on speech.

The first kind of limit is on what may be said to or about the underprivileged or marginalized classes of society. For liberals, whatever expression perpetuates the existing system of dominance by groups such as whites, males, heterosexuals, the rich, and the nondisabled is injurious speech. Examples would include speech defending the traditional male-headed family, criticizing working women who leave their children in day care, denouncing homosexuality and single motherhood as immoral, pointing out the fact of high crime rates among people of color, defending the right of employers to discriminate on the basis of the employer's view of merit, and making disparaging remarks or jokes at the expense of people of color, women, the poor, the disabled, and homosexuals.

Few liberals would go as far as Catharine MacKinnon, who argues that legal action should be permitted against schools that assign "academic books purporting to document women's biological inferiority to men, or arguing . . . that Fourteenth Amendment equality should be repealed."¹¹⁴ But most liberals favor campus "hate speech" codes and harassment laws, which require that schools and businesses discipline those whose words create a "hostile environment" on the basis of sex, race, or religion. As we will see, such policies lead directly to the punishment of a wide range of speech on the ground that it is "offensive" to some students or workers. MacKinnon's position is more commonly accepted by liberals than one might think.

The second kind of liberal limit on speech is that privileged speakers from the dominant class must not be permitted to speak too much. As Owen Fiss writes, the state "may even have to silence the voices of some in order to hear the voices of the others. Sometimes there is simply no other way."¹¹⁵ Fiss means that freedom of speech in the founders' sense is the right of the wealthy to spend vast quantities of money publishing and broadcasting their views, drowning out the views of the poor and disadvantaged. Fellow legal scholar Robert Post agrees with Fiss: "Liberated from traditional inhibitions against official suppression of speech, the left has mobilized to pursue a rich variety of political agendas."¹¹⁶

Many liberals would still be reluctant to make such a blunt declaration that they favor "official suppression of speech." This does not affect my argument. Within the broad framework just sketched, there is plenty of room for dispute over particular applications of the two liberal limitations on speech. As we will see, there is, in fact, a broad liberal consensus

¹¹⁴ Catharine MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1993), 107.

¹¹⁵ Fiss, *The Irony of Free Speech*, 4.

¹¹⁶ Robert C. Post, "Censorship and Silencing," in Robert C. Post, ed., *Censorship and Silencing* (Los Angeles, CA: Getty Research Institute for the History of Art and the Humanities, 1998), 2; quoted in Daniel Jacobson, "The Academic Betrayal of Free Speech," in this volume. See the introduction of this article.

on quite a few policies that lead to "official suppression of speech." Even those liberals who regard themselves as civil libertarians often endorse the liberal approach to at least some of the policies discussed below.¹¹⁷

My argument goes further than this, emphasizing the continuity between the earlier, civil-libertarian position once preferred by most liberals, and today's growing embrace by liberals of "official suppression of speech" in the name of "democracy." That is, my view is that liberals have always favored, in some degree, government regulation of the content of speech. The most obvious example is broadcast regulation, which began with the Radio Act of 1927. Another is campaign finance regulation, which began in the Progressive Era. This is not to say that no difference exists at all between the earlier liberalism and today's. John McGinnis, noting today's liberal preference for suppression of speech, offers this explanation:

While [Cass] Sunstein's redeployment of the self-governance theory in the service of increased regulation may seem curious at first, it is in fact a logical outcome of that theory's underlying structure. Because the self-governance theory views free speech as an instrument of a collective good—social democracy—rather than as an end in itself, the deregulation that it previously promoted was always contingent on the usefulness of free speech toward that good. Regulation becomes appropriate when a new understanding of the effects of speech makes regulation necessary for advancing the cause of social reform.¹¹⁸

A. Expression excluding or demeaning the underprivileged must be discouraged or punished

Herbert Marcuse's "Repressive Tolerance" (1965) frankly supported "the withdrawal of toleration of speech and assembly from groups and movements which promote . . . discrimination on grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc." Marcuse also advocated "new and rigid restrictions on teachings and practices in . . . educational institutions" to silence defend-

¹¹⁷ Thomas C. Grey believes he can reconcile the "civil-rights approach" with the "civil-liberties approach" by calling the latter a framework within which the civil-rights approach (leading to official suppression of speech) will occur: Thomas C. Grey, "Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment," in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, *Reassessing Civil Rights* (Cambridge, MA: Blackwell Publishers, 1991), 100. I believe that this reconciliation is impossible, for reasons made clear in my overview of the liberal approach, in the text that follows. The liberal approach is *essentially* a "civil-rights approach," because of the basic premises of liberalism. In case of conflict, civil liberties must go, as Fiss understands very well. As he notes, the real liberal view is not that there is "a conflict between liberty and equality but also, and perhaps more fundamental, a conflict between liberty and liberty. . . . What is at issue is two different ways of understanding liberty." Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder, CO: Westview, 1996), 5.

¹¹⁸ McGinnis, "The Once and Future Property-Based Vision of the First Amendment," 56.

ers of the “established universe of discourse and behavior” and to promote progressive reforms. In sum, true tolerance “would mean intolerance against movements from the Right, and tolerance against movements from the Left.”¹¹⁹ Few liberals would put their argument in such blunt terms, but the policies they favor are, in fact, animated by a similar understanding.

There are many government policies initiated by liberals that punish or discourage expression that excludes or demeans those whom liberals regard as underprivileged. I will briefly discuss three of them: harassment law, broadcast regulation, and labor law.

Federal civil rights law forbids discrimination on the basis of race, sex, religion, and national origin in employment and education. For over twenty-five years, federal agencies have declared and courts have ruled that one impermissible form of discrimination is “hostile environment” harassment. The standard is so vague that the question of what constitutes a “hostile environment” is endlessly litigated. There are many cases in which ordinary political argumentation has been found punishable. One court ordered employees to “refrain from any racial, religious, ethnic, or other remarks or slurs contrary to their fellow employees’ religious beliefs.” Another court banned “all offensive conduct and speech implicating considerations of race.”¹²⁰ There are some people who find any criticism of affirmative action “offensive,” even racist. Others are offended when someone alludes to his own religious convictions. So the “hostile environment” rubric in effect makes it potentially illegal for employees to say anything about their own religious beliefs, or to defend the “wrong” kind of political opinions.

Although harassment law is defined neutrally, in the actual enforcement it is almost always women and minorities who are given its protection. The prohibition of speech that harasses women and minorities presupposes that these groups are victims, that is, inherently weak and vulnerable in the workplace, in schools, and in universities. Liberals argue that employers are in a privileged position of power over women and minorities. Government must ban some speech in the workplace in order to protect the victim groups. A woman is presumed to be exploited if she must endure insensitive opinions about women in the place where she

¹¹⁹ Herbert Marcuse, “Repressive Tolerance,” in Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* (1965; 2d printing, Boston, MA: Beacon Press, 1969), 100–101, 109. See the helpful discussion of Marcuse in Andrew Altman, “Equality and Expression: The Radical Paradox,” in this volume (sec. IV of Altman’s paper). Marcuse’s line of argument is a venerable one; a famous early example is Karl Marx, “On the Jewish Question” (1843), in *The Marx-Engels Reader*, ed. Robert C. Tucker, 2d ed. (New York: W. W. Norton, 1978), 26–52 (calling for the abolition of individual religious and property rights because they exalt egoism).

¹²⁰ Eugene Volokh, “What Speech Does ‘Hostile Work Environment’ Harassment Law Restrict?” *Georgetown Law Journal* 85 (1997): 627; available online at <http://www1.law.ucla.edu/~volokh/harass/breadth.htm> [accessed November 5, 2003].

chooses to work. (The same presumption can be found in campaign finance regulation. The voices of the “privileged”—whites, males, heterosexuals, the rich—must be confined in order to protect the underprivileged.)

The public often confuses racial and sexual “hostile environment” rulings with the kinds of laws that the founders would have approved, such as laws against the solicitation of prostitution, laws against personal libel, and laws against obscenity. But sexual harassment is not the equivalent of solicitation of sex, nor is a racial insult tantamount to libel, nor is an off-color joke at work obscene. Yet the liberal theory of harassment law touches words or deeds that merely make a member of a victim class feel uncomfortable. In effect, government requires employers to censor their employees and to punish religious believers and conservatives who express their opinions “in a way that abuses or offends their co-workers.” I do not say that it has never happened, but I know of no instance where a court has punished or enjoined as racial or sexual harassment disparaging remarks against whites or heterosexual males in the workplace.¹²¹

For example, according to a federal court in 1989, the University of Michigan’s harassment policy guide

explicitly stated that an example of sanctionable conduct would include: “A male student makes remarks in class like ‘Women just aren’t as good in this field as men,’ thus creating a hostile learning atmosphere for female classmates.” Doe [who was suing the University because of this policy] said in an affidavit that he would like to discuss questions relating to sex and race differences in his capacity as a teaching assistant in Psychology 430, Comparative Animal Behavior. He went on to say: “An appropriate topic for discussion in the discussion groups is sexual differences between male and female mammals, including humans. [One] . . . hypothesis regarding sex differences in mental abilities is that men as a group do better than women in some spatially related mental tasks partly because of a biological difference. This may partly explain, for example, why many more men than women chose to enter the engineering profession.” Doe also said that some students and teachers regarded such theories as “sexist” and he feared that he might be charged with a violation of the Policy if he were to discuss them. In light of the statements in the Guide, such fears could not be dismissed as speculative and conjectural. The ideas discussed in Doe’s field of study bear sufficient similarity to ideas denounced as “harassing” in the Guide to constitute a realistic and specific threat of prosecution.¹²²

¹²¹ Eugene Volokh, “Freedom of Speech and Workplace Harassment,” *UCLA Law Review*, 39 (1992): 1793–66, 1804–5. See also Kingsley R. Browne, “Title VII As Censorship: Hostile-Environment Harassment and the First Amendment,” *Ohio State Law Journal*, 52 (1991): 481–550.

¹²² *Doe v. University of Michigan*, 721 F. Supp. 852, 860 (E.D. Mich 1989).

The court declared the Michigan harassment policy unconstitutional, lamenting that "It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict. The difficult and sometimes painful task of our political and legal institutions is to mediate the appropriate balance between these two competing values." The founders would have said that the ideals of freedom and equality are one and the same: "all men are created equal" means that all human beings have the same right to be secure in their person and property against injuries committed by others. It does not mean that the liberty of some citizens may be curtailed because other citizens take offense at academic discussions of scientific questions. (In the case just mentioned, "[t]he record before the Court thus indicated that the drafters of the policy intended that speech need only be offensive to be sanctionable.")¹²³

The history of broadcast regulation gives us a second example of government suppression of speech that allegedly demeans the underprivileged. Not surprisingly, the target has most often been conservative speech. From the 1930s to 1987, the Federal Communications Commission (FCC) required broadcasters to adhere to a policy of nonpartisanship or "fairness" in their treatment of controversial ideas. This doctrine was frequently used by the administrations of Franklin Roosevelt and John Kennedy to silence conservative broadcasters. In the 1930s, the FCC threatened not to renew the broadcast license of the Yankee Radio Network of New England. The network had made the mistake of broadcasting editorials critical of Roosevelt and the New Deal. In its ruling, the FCC said, "Radio can serve as an instrument of democracy only when devoted to the communication of information and exchange of ideas fairly and objectively presented. . . . It cannot be devoted to the support of principles he [the broadcaster] happens to regard most favorably. . . . These requirements are inherent in the conception of the public interest." No station that praised Roosevelt was threatened with nonrenewal. In fact, all stations were expected to broadcast Roosevelt's speeches and "fireside chats," many of which were intensely partisan.

From the founders' point of view, the Yankee Radio Network incident was a blatant example of the danger of government control over the content of what gets published. But from the Roosevelt Administration's point of view, government was merely requiring that broadcasters be responsible. The Yankee Radio Network was opposed to the New Deal, but the New Deal was, in Roosevelt's mind, a program that would rescue the average American from the clutches of "economic royalists"—the big

¹²³ *Id.* at 853, 860. The founders also would have said that Michigan may run its university in any way it pleases. If it chooses to impose an antiscientific policy on its students that makes it difficult to discuss important truths about the differences between men and women, there are no natural or constitutional rights of free speech to stand in the way. But the founders also would have said that such policies may not be imposed by government on private institutions.

corporations and other conservatives—who had no legitimate place in the system.¹²⁴

Roosevelt's idea of freedom was made perfectly clear in his 1944 State of the Union address to Congress, a message that the Yankee Radio Network was presumably expected to carry without commentary. After Roosevelt outlined the liberal goals of his domestic policy, he said:

[There are] grave dangers of "rightist reaction" in this Nation. . . . Indeed, if such reaction should develop—if history were to repeat itself and we were to return to the so-called "normalcy" of the 1920's—then it is certain that even though we shall have conquered our enemies on the battlefields abroad, we shall have yielded to the spirit of Fascism here at home.

In the midst of World War II, in which Americans of all political persuasions were fighting and dying for their country, Roosevelt equated the Republican Party—the party of the "normalcy" of the 1920s—to the Nazis. He meant this quite sincerely. For the Republicans were the party of the founders' idea of an individual right to property, one of those original inalienable "political rights" that, as Roosevelt explained earlier in the same speech, had "proved inadequate to assure us equality in the pursuit of happiness."¹²⁵ As the party of "economic royalism," the Republican Party of the 1920s had no legitimate place in a free America. We can see why Roosevelt would not be troubled by an FCC devoted to minimizing conservative broadcasting content. In his view, free speech for those who would overthrow the New Deal would be like the founders legitimizing seditious libel: it would be like the founders giving freedom of speech to those who would overthrow free government and replace it with monarchy.

In the 1960s, the Kennedy administration's FCC used the so-called Fairness Doctrine to threaten, intimidate, and occasionally take away the broadcast licenses of conservative radio stations. Kennedy's Assistant Secretary of Commerce, Bill Ruder, later admitted, "Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue." One of these cases went to the Supreme Court, which, in its unanimous decision in *Red Lion Broadcasting Co. v. Federal Communications Commission* (1969), saw no free speech concerns in an FCC threat to deny a broadcast license renewal to a station that refused to air a liberal attack on its own broad-

¹²⁴ Speech before the Democratic National Convention, June 27, 1936, in John Gabriel Hunt, ed., *The Essential Franklin Delano Roosevelt* (New York: Gramercy Books, 1995), 115.

¹²⁵ Message to the Congress on the State of the Union, January 11, 1944, in B.D. Zevin, ed., *Nothing to Fear: The Selected Addresses of Franklin Delano Roosevelt, 1932–1945* (New York: Houghton Mifflin, 1946), 397, 396.

cast.¹²⁶ In another 1969 case, the D.C. Circuit Court of Appeals ordered the FCC to revoke the broadcast license of WLBT television in Jackson, Mississippi, a station that had defended segregation, opposed the civil rights legislation of the 1960s, and failed to include blacks in its programming. Then-Judge Warren Burger, when this case was first heard by the court in 1966, thundered: "After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty."¹²⁷

Liberal law professor Lucas A. (Scot) Powe is a critic of broadcast licensing because he sees that government officials, including those in the Nixon Administration, have successfully and often cynically used licensing to manipulate broadcast content and ownership. Powe writes, "The laws of broadcasting have not changed in the years since Nixon's exile. Are we thus in any better position to fight off another president with an inclination to threaten his foes with financial devastation?" But most liberals (as well as many conservatives) support broadcast regulation as uncontroversial and desirable.

In 1967, while the FCC was requiring Red Lion to broadcast a liberal reply to its conservative criticisms, the Commission changed its regulations to make it clear that the Fairness Doctrine would not impose similar requirements on liberal broadcasters. Scot Powe writes:

The FCC . . . exempted from its new rules bona fide news interviews and commentary or analysis in the course of bona fide newscasts. Eric Sevareid [a prominent liberal commentator on CBS News] was now in the clear; the Reverend Billy James Hargis [the conservative whose commentary was broadcast by Red Lion] was not.¹²⁸

¹²⁶ *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969). Although the Fairness Doctrine has been repealed—by President Reagan's libertarian FCC, not by the courts—*Red Lion* is still considered good law in the federal judiciary.

¹²⁷ *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d. 994 (D.C. Cir. 1966). The case returned to the court three years later: 425 F.2d. 543 (D.C. Cir. 1969). Burger became Chief Justice of the Supreme Court shortly after the June 1969 decision.

¹²⁸ For detailed discussions of these and other examples of official suppression of speech on the airwaves, see Powe, *American Broadcasting and the First Amendment* (the quotation two paragraphs above is on 106 and this quotation is on 88–89); Thomas G. Krattenmaker and Lucas A. (Scot) Powe, Jr., *Regulating Broadcast Programming* (Cambridge, MA: MIT Press, 1994); Jonathan W. Emord, *Freedom, Technology, and the First Amendment* (San Francisco, CA: Pacific Research Institute, 1991); and Fred W. Friendly, *The Good Guys, the Bad Guys, and the First Amendment: Free Speech vs. Fairness in Broadcasting* (New York: Random House, 1976). On the WLBT case, see also Taylor Branch, *Pillar of Fire: America in the King Years, 1963–65* (New York: Simon & Schuster, 1998), 263–65, 271, 413, 504. For a fuller but still brief overview of the history of broadcast regulation in America, see Thomas G. West, "The Decline of Free Speech in Twentieth-Century America: The View from the Founding," in Kenneth L. Grasso and Cecilia Rodriguez Castillo, eds., *Liberty under Law: American Constitutionalism Yesterday, Today, and Tomorrow*, 2d ed. (Lanham, MD: University Press of America, 1998), 157–80.

The new rules, as former CBS News president, Fred Friendly, characterized them, "clearly defined protections for the broadcast journalist as opposed to the religious or political crusader": note the "crusader" imagery, used to demonize conservatives as warlike and aggressive. In other words, the FCC interpreted the Fairness Doctrine in such a way as to harass conservatives (Friendly's "religious or political crusaders"), but it gave liberals ("broadcast journalists") the freedom to say whatever they wished. Conservatives challenged liberal broadcasters on several occasions before and after the *Red Lion* case and lost every time. Friendly wrote:

After virtually every controversial program—"Harvest of Shame," . . . "Hunger in America" [1960s programs advocating liberal political reforms]—fairness complaints were filed, and the FCC rejected them all. As FCC general counsel Henry Geller put it, "We just weren't going to get trapped into determining journalistic judgments. . . ." ¹²⁹

The contrast with the founders' approach could not be greater. The presumption of the FCC in the 1960s and 70s was that the Constitution's guarantee of freedom of speech and of the press applied only to "broadcast journalists" and not to "religious or political crusaders," as if the First Amendment was written to protect professionals who work for large news media organizations, but not ordinary citizens who might want to publish their right-wing and, therefore, presumably amateurish and ill-informed opinions.

The WLBT case provides an excellent illustration of what the liberal devotion to fairness, balance, and diversity means in practice. As Lee Bollinger summarizes the case, WLBT's "license was stripped after years of presenting only a prosegregationist point of view and refusing to permit blacks, who constituted over half of its community, an opportunity to respond."¹³⁰ In 1969, when this action occurred, very few television stations were promoting a "segregationist point of view." WLBT may have been the only television station in America that did so. Hundreds of other stations were promoting an antisegregationist point of view, with no attempt to provide balance and no right of reply to segregationists. Not one of those stations lost its license for failing to provide a proper forum for the prosegregationist viewpoint. No one would have dreamed of challenging a broadcast license for such a failure. If any station had lost its license on such grounds, there would have been a public uproar, because hardly anyone outside the deep South was willing to defend

¹²⁹ Friendly, *The Good Guys*, 28, 55. See also S. Robert Lichter et al., *The Media Elite* (Bethesda, MD: Adler & Adler, 1986), 15, 17, 55.

¹³⁰ Lee C. Bollinger, *Images of a Free Press* (Chicago, IL: University of Chicago Press, 1991), 131.

segregation publicly. (I am not defending segregation as a policy; rather, I am pointing out that the government's censorship of broadcasters had nothing whatever to do with "fairness" in the sense that all points of view should be properly represented in broadcasting. The government permitted only one point of view on civil rights and racial diversity.)

Similarly, the FCC stripped WXUR, a tiny Christian conservative radio station, of its license because of its failure to provide the balance mandated by the Fairness Doctrine. Judge David Bazelon of the D.C. Circuit Court of Appeals, dissenting from the opinion that endorsed the FCC's action, noted that by driving WXUR off the air, there was less diversity of viewpoint on the radio, not more: "WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. The station was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area. . . . The Commission's strict rendering of fairness requirements, as developed in its decision, has removed WXUR from the air. . . . It is beyond dispute that the public has lost access to information and ideas."¹³¹ No liberal station has ever lost its broadcast license for failing to provide sufficient air time for conservative viewpoints. Apparently, for liberalism, "diversity" means inclusion of liberal viewpoints and exclusion of antiliberal viewpoints to the extent that the public and the politicians are willing to tolerate that exclusion.

Before we leave the subject of broadcast regulation, I should note that government ownership and regulation of the airwaves has not only curtailed conservative expression, but liberals have been targeted as well. President Nixon took advantage of the regulatory apparatus erected by liberals, but unlike the Kennedy Administration, Nixon's limited itself to threats rather than legal actions against broadcasters that it disliked. However, there were definite plans to go well beyond threats. If Nixon had not been driven from office as a result of the Watergate scandal, he probably would have attempted to punish the *Washington Post*, for its opposition to his policies, by creating license renewal problems for its television affiliate. Charles Colson, one of Nixon's top aides, had phoned the owner of CBS, another activist media critic of his administration, and threatened to "break the network." But what happened was the exact opposite. The *Washington Post* and the major networks brought Nixon to his knees and helped to break him by their determined investigations of Watergate.

The lesson of the Nixon episode is that liberals' trust in government regulation is a potential danger to liberalism itself. Once government is given the authority to dictate the content of broadcasting, then everything

¹³¹ Powe, *American Broadcasting and the First Amendment*, 93-96 (describing the demise of WXUR). Judge Bazelon, dissenting in *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir., 1972), 69-70; quoted in the concurring opinion of William O. Douglas, *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), 160n11. The Supreme Court refused to review the *Brandywine* case on appeal: 412 U.S. 922 (1973).

depends on who happens to control the levers of political power. One purpose of political liberty, including freedom of speech and the press, is to enable those who are not in power to criticize those who are in power, to make the case to the public for a change of "men and measures." The liberal view of free speech curtails that liberty.

After President Ronald Reagan's appointees became a majority on the FCC, the Commission abolished the Fairness Doctrine in 1987. In the wake of this deregulation, airing of political views in the broadcast media dramatically increased, particularly in radio, where conservative viewpoints began to flourish. However, the end of the Fairness Doctrine does not mean that broadcast media are free. In fact, the growing presence of conservative views in the media was a result of the fact that the FCC itself became more conservative in the 1980s. The authority of the FCC over broadcasters remains in place. Since 1987, Democrats in Congress have made several unsuccessful efforts to reinstate the Fairness Doctrine. At some point they are likely to succeed, and the old policy of censorship could return in full force.

A third example of liberal limitations on speech that is supposedly hostile to the disadvantaged is in the area of labor law. In the 1960s, when the workers of the Gissel Packing Company were considering whether or not to join a labor union, the company argued that its "financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education [of the employees] would make re-employment difficult." When the union lost the election, it appealed to the National Labor Relations Board (NLRB). The NLRB reversed the election result, ruling that the company had unlawfully "interfered with the exercise of a free and untrammelled choice in the election." The Supreme Court upheld the NLRB's action: "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." By stating its opinion without proof, the company violated the NLRB rule against a "threat of retaliation based on misrepresentation and coercion."¹³²

How, one might wonder, could the Court equate an expression of a sincere belief with "misrepresentation and coercion," or the suggestion by a company that unionization might lead to a plant closing with "a threat of force"? Unions, of course, are permitted to say whatever they wish against employers. The logic here is the same as in campaign finance regulation: "liberty" requires the silencing of one class of citizens in order to protect the victim class. Workers are supposedly systemically weaker than employers, so the government has to balance the scale by putting limits on the rights of employers to convey their honest opinions to workers.

Going beyond current policy, some liberals (for example, Catharine MacKinnon and Catherine Itzin) would like government to ban pornog-

¹³² *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969).

raphy, not because it is immoral, but because it contributes to the subordination of women. Other liberals, such as Nadine Strossen, defend pornography because of its contribution to women's "freedom and autonomy": it conveys the message "that none of my thoughts are bad, that anything goes."¹³³ Here is a clash of one liberal principle with another liberal principle: expression serving personal self-realization and expression contributing to the continuing subordination of a victim class. That is why liberals can be found on both sides of the pornography debate.

B. Too much speech by the privileged must be discouraged or punished

In addition to the liberal restrictions on things said to or about groups that liberals designate as underprivileged or historically oppressed, there is another impetus to regulation that seeks to limit the speech of certain categories of speakers. This idea arises from the same liberal view that government must make sure that the disadvantaged are treated fairly. The problem, as liberals see it, is that those who are less privileged have less money to purchase broadcast companies, magazines, and publishing houses. Owen Fiss writes that "the concern is with the claims of those groups to a full and equal opportunity to participate in the public debate." To that end, "[s]ometimes we must lower the voices of some in order to hear the voices of others." After all, writes Fiss, the First Amendment "emphasizes social, rather than individualistic, values." In other words, freedom of speech is not an individual right.¹³⁴ Political scientist Mark Graber holds a similar view, as can be seen in this blunt remark: "Affluent Americans have no First Amendment right that permits them to achieve political success through constant repetition of relatively unwanted ideas."¹³⁵

Fiss and Graber do not openly advocate the banning of conservative speech, as Herbert Marcuse did. They prefer to speak more vaguely of fairness, diversity of viewpoints, and "unwanted" speech. Fiss and Graber present a less aggressive version of Marcuse's argument, but the principle is the same. Those nonliberals who have the loudest voices under the current system must be silenced, and those liberals whose voices are excluded must be given a megaphone.

This may sound like a brand of radicalism that few liberals would adopt. However, the same kind of reasoning lay behind the Federal Election Campaign Act of 1971, as amended in 1974. The law limited not only

¹³³ MacKinnon, *Only Words*; Catherine Itzin, ed., *Pornography: Women, Violence, and Civil Liberties* (New York: Oxford University Press, 1992); and Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York: Scribner, 1995), 14, 161 (quoting Sallie Tisdale). In support of Strossen's view, see also James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Boulder, CO: Westview, 1999).

¹³⁴ Fiss, *The Irony of Free Speech*, 18, 2.

¹³⁵ Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley, CA: University of California Press, 1991), 233.

donations to candidates but also spending on publications or broadcasting by candidates and even by private citizens and organizations acting independently but in support of an identifiable candidate. The purpose of this law, according to its supporters (as summarized by the Supreme Court), was "to mute the voices of affluent persons . . . and thereby to equalize the relative ability of all citizens to affect the outcome of elections," or, in another formulation, to restrict "the voices of people and interest groups who have money to spend . . . , equalizing the relative ability of all voters to affect electoral outcomes."¹³⁶ This is the view, as we have seen, that in a society that allows rich and poor to speak freely, the voice of the poor will be drowned out by loudspeakers paid for by the rich, and instead of freedom, the outcome will be domination by the privileged classes over the underprivileged.

Statements by supporters of the Campaign Reform Act of 2002, which was voted for by almost every House and Senate Democrat, and opposed by a large majority of Republicans,¹³⁷ reveal with perfect clarity that these laws are not really about corruption at all. Although all incumbents benefit from such laws, they are especially designed to limit the speech of conservatives. The following are quotations from the congressional debate. Senator Paul Wellstone (D-MN): "I think these issue advocacy ads are a nightmare." Senator Maria Cantwell (D-WA): The act "is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves." Senator Tom Daschle (D-SD): "I believe that negative advertising is the crack cocaine of politics." Representative Jan Schakowsky (D-IL), explaining which "issue ads" and "negative ads" these Democrats were worried about: "If my colleagues care about gun control, then campaign finance is their issue so that the NRA does not call the shots." Democratic Representatives Marty Meehan (D-MA), Rosa DeLauro (D-CT), and Christopher Shays (R-CT), and Democratic Senators Harry Reid (D-NV) and Dick Durbin (D-IL) said that the National Rifle Association's campaign statements were a problem that the act would solve. Several liberal Republicans echoed these sentiments.¹³⁸

¹³⁶ *Buckley v. Valeo*, 424 U.S. 1, 25–26, 17 (1976). Liberal Senator Eugene McCarthy (D-MN) made the following comment on the 1974 act: "[T]here is no question that this new law gives special preference to the Democratic Party. I am surprised that the Republicans did not recognize that, though they did halfway sense it, all except the liberal Republicans, whose principal function is to shoot the wounded after the battle is over." Quoted in John Marini, "Money in Politics," in Peter W. Schramm and Dennis J. Mahoney, eds., *The 1984 Election and the Future of American Politics* (Durham, NC: Carolina Academic Press, 1987), 201. This article is one of the best analyses of the logic of campaign finance reform that I have seen.

¹³⁷ Bipartisan Campaign Reform Act of 2002, roll call votes, available online at <http://thomas.loc.gov/bss/d107/d107laws.html> [accessed November 6, 2003]. See P.L. 107–151.

¹³⁸ Brief of the National Rifle Association, *McConnell v. Federal Election Commission* (251 F. Supp. 2d 176 [D.D.C., 2003]), November 6, 2002, available online at <http://www.cooperkirk.com/nra.doc> [accessed December 19, 2003], 3–4, 19. Several of these remarks were quoted by Justice Antonin Scalia in his dissent in *McConnell v. Federal Elections Commission*, 540 U.S. ____ (2003).

The architects of the New Deal argued that the wealthy have to be restricted in how they may use their property in order to protect the interests of the poor. In campaign finance regulation, the wealthy have to be restricted in how they use their speech if liberal members of Congress—the self-styled defenders of the poor—are to avoid being criticized (“negative advertising”). Senator Jim Jeffords (I-VT) summed up the liberal view with perfect frankness: issue ads “are obviously pointed at positions that are taken by you saying how horrible they are.”¹³⁹ In other words, an excellent method of preventing conservatives from “saying how horrible” liberals’ views are is to use the power of government to punish those who have the gall to make such criticisms.

Ronald Dworkin argues, in an essay defending campaign finance regulation, that “money is the biggest threat to the democratic process.” But Dworkin is not much concerned about the alleged buying of access to government by wealthy businessmen and lobbyists. More important, money distorts politics because television campaign ads are “aggressive, simple-minded.” Dworkin argues that if reporters and nonpartisan groups provided more of the information on election campaigns to the public, “political argument might become less negative and more constructive.” It would not really “violate free speech for Congress to deprive the public of everything a rich candidate might wish to tell it in repeated television commercials.” For it is a “premise of democracy that citizens must be able, as individuals, to participate on equal terms.” This means, says Dworkin, that “each citizen must have a fair . . . opportunity . . . to command attention for his own views.” This cannot happen if the wealthy are permitted to publish their views freely on candidates and issues in an election campaign. An unlimited right of free speech merely permits “rich candidates to drown out poor ones.”¹⁴⁰

Similarly, arguing for a ban on the amount of money that may be spent publicizing one’s views on candidates and elections, John Rawls wrote that government needs to maintain the “fair values of political liberties” by restricting the right of the wealthy to speak freely. “[T]he aim of achieving a fair scheme of representation can justify limits on and regulations of political speech in elections.”¹⁴¹

The same arguments that are used to justify criminalization of campaign speech by the wealthy also justify government limits on media corporations. C. Edwin Baker writes, “a person does not have a first amendment right to use wealth to suppress the speech of others. . .

¹³⁹ Brief of the National Rifle Association, 3.

¹⁴⁰ Ronald Dworkin, “The Curse of American Politics,” *New York Review of Books*, October 17, 1996, 19–24.

¹⁴¹ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 356–63 (quotation on 362). For a fine discussion, see Tiffany R. Jones, “Campaign Finance Reform: The Progressive Redefinition of Free Speech,” paper presented at the annual meeting of the American Political Science Association, August 2003.

[Therefore,] a restriction on owning more than one media outlet would also be valid.”¹⁴² That is, government may decide at what point a person speaks “too much” and ban further speech by that individual or corporation. Jonathan Emord has shown, in his analysis of *Associated Press v. United States* (1945), how antitrust enforcement puts government in the position of dictating news content.¹⁴³ President Richard Nixon attempted to use threats of antitrust litigation against the *Washington Post* to influence its news coverage of his administration.¹⁴⁴ This was a rare instance in which regulation supported by liberals was used against liberals. In the end, Nixon did not succeed, while liberals did succeed for many years in postponing the emergence of a conservative electronic media.

Legal scholar Lino Graglia shows how liberals use codes of judicial conduct to discourage or ban campaign speech by conservative candidates for judgeships. These codes typically limit speech of judicial candidates to “nonpartisan” content. Just as was the case with the FCC’s enforcement of the Fairness Doctrine, in *Republican Party of Minnesota v. White* (2002), acceptable nonpartisan topics for a judicial candidate were said to be “how he proposes to ensure that minorities and women are treated more fairly by the court system” and “remedies for race and gender bias.”¹⁴⁵ In other words, liberal arguments are nonpartisan and therefore permitted; conservative arguments are partisan and therefore forbidden.

C. Speech promoting ordinary crimes

Liberals accept the founders’ view that speech involved in planning or inciting an act that is otherwise criminal may rightly be limited by government. However, liberals want to exempt what Kent Greenawalt calls “public ideological encouragement,” which includes advocacy of revolution or violence against government.¹⁴⁶ This difference from the founders can perhaps be explained by the fact that the most frequent and influential public ideological advocacy over the past century has come from the Left.

¹⁴² C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989), 268–69.

¹⁴³ Emord, *Freedom, Technology, and the First Amendment*, 222–24 (discussing *Associated Press v. United States*, 326 U.S. 1 [1945]).

¹⁴⁴ Powe, *American Broadcasting and the First Amendment*, 121–41 (on Nixon’s use of broadcast regulation, including antitrust, to intimidate the networks).

¹⁴⁵ Lino A. Graglia, “Restrictions on Judicial Election Campaign Speech: Silencing Criticism of Liberal Activism,” in this volume (citing *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2553 [2002]).

¹⁴⁶ Kent Greenawalt, *Speech, Crime, and the Uses of Language* (New York: Oxford University Press, 1989), 266–69, 339–40. See also Steven H. Shiffrin’s defense of dissent in *Dissent, Injustice, and the Meanings of America* (Princeton, NJ: Princeton University Press, 1999).

XII. THIRD ELEMENT OF LIBERAL FREE SPEECH: REJECTION OF "DUE PROCESS OF LAW"

In the founders' view, if government wanted to punish or restrict speech, it was supposed to do it through due process of law. What this meant in most cases was the right to be accused only under a law that had a clear meaning, the right to a jury trial, the right to confront one's accusers and cross-examine them, the right to a lawyer, and the right to require government to make its case in public. Hamilton's remarks in the *Croswell* case emphasized the importance of juries to guard against government misconduct.¹⁴⁷

In the liberal policy areas that we have discussed so far, and in some to be discussed later, due process in this sense is not available to those who are accused of injurious speech. It is difficult for there to be personal accountability if one's membership in a class (i.e., "the wealthy"), instead of one's unlawful conduct, determines one's right to speak. The "privileged" whose voices are determined by government to be too loud have no opportunity to defend the noninjuriousness of their speech. They are never accused of anything; they are simply silenced. The law treats all speech emanating from certain classes of people as ipso facto injurious, and there is nothing that the accused can do about it. For example, it is a criminal offense for a person to spend his own money publishing and mailing a book explaining and defending the views of a friend who is running for public office, if he spends more than the amount permitted by campaign finance law. The crime is in the amount spent, not the words spoken.

Similarly, enforcement of harassment law against accused employees or students rarely reaches a court of law. Typically, an internal investigation conducted behind closed doors in the business or educational institution (and sometimes no investigation at all, as I have observed at my own university) resolves the question, and the accused may find himself without a job as well as without an explanation. For it is often the case that employers deliberately conceal from an employee what the charges against him are, citing "privacy" concerns of the accuser. The employee is also often deprived of an opportunity to defend himself, to hire a lawyer, to cross-examine his accusers, or even to know who his accusers are. These "private trials" are not exactly mandated in the law, but the government puts employers and schools on notice that if they do not respond vigorously to claims of sexual and racial harassment, they will be liable for damages in lawsuits filed by the victims.

Finally, through all the years of regulation of broadcast content by the FCC, government has never had to prove that the speech it disapproved of was injurious. The only question was whether the broadcaster fol-

lowed FCC guidelines. As discussed in the previous section, when the Fairness Doctrine was applied only against conservatives, silenced broadcasters had no effective legal remedy. That is, the real matter at issue—whether the broadcast content was improper or injurious—never came before a jury. As long as license renewal is based on a vague standard like "the public interest, convenience, or necessity," in the words of the 1934 Communications Act, a broadcaster has no opportunity to defend his broadcast content in a trial proceeding on the basis of clear legal definitions of injurious speech.

XIII. FOURTH ELEMENT OF LIBERAL FREE SPEECH: PRIOR RESTRAINT THROUGH LICENSING IS PERMITTED AND SOMETIMES PREFERRED

Licensing is a hallmark of liberalism, but if owners must ask permission of government to use their property, they do not really own it in the founders' sense of ownership. A basic tenet of liberalism is suspicion of private owners and trust in government. As Owen Fiss writes, instead of viewing government with suspicion, as Americans used to, "we must contemplate the possibility that the state will use its considerable powers to promote goals that lie at the core of a democratic society."¹⁴⁸

The liberal preference for licensing over private ownership may be seen most dramatically in the fact that the federal government owns over fifty percent of the Western land in the United States, but only four percent of land east of the Mississippi.¹⁴⁹ The reason is that the East was settled at a time when the founders' principles prevailed in government. Private ownership of land was thought to be desirable. Government did everything it could to get land into the hands of private owners as quickly as possible. But the government-owned parts of the West were settled mostly after 1900, when the liberal view came to predominate. In this view, private ownership was disfavored. Many farmers, ranchers, loggers, miners, and oil drillers throughout the West are not permitted to buy their land, but instead must ask the government for a permit (license) to use the land that the government refuses to sell.

Most liberals and conservatives seem unaware that the government today operates a vast system of prior restraint on electronic broadcasting through its licensing system. Yet all scholars know that the founders' concept of free speech precluded the use of prior restraint through licensing. Benno Schmidt, the former president of Yale University, writes, "the First Amendment tolerates virtually no prior restraints [on speech or the press]. This doctrine is one of the central principles of our law of freedom

¹⁴⁸ Fiss, *The Irony of Free Speech*, 26.

¹⁴⁹ U.S. Census Bureau, *Statistical Abstract of the United States* (Washington, DC: Government Printing Office, 1997), sec. 6, p. 228, table 369, "Total and Federally Owned Land, 1960 to 1994, and by State, 1994."

¹⁴⁷ See above, section IV B, *Seditious libel*.

of the press. . . . the doctrine is presumably an absolute bar to any wholesale system of administrative licensing or censorship of the press, which is the most repellent form of government suppression of expression. . . ."¹⁵⁰ Yet we have had such a system in place since the Radio Act of 1927, and Schmidt does not notice it.

Parenthetically, we should note the weakness of a much belabored canard that broadcast regulation is necessary because of a scarcity of broadcast frequencies.¹⁵¹ The absurdity of this claim can be seen by a comparison with land, which is also scarce. If broadcasting rights must be owned and allocated by government because of scarcity, why is all land not owned and allocated by government for the same reason? Even liberals such as Lee Bollinger now admit that the scarcity rationale makes no sense. Bollinger writes:

These facts that more people would like to broadcast than there is space in the electronic spectrum . . . may be true, but it does not follow that the only possible method of allocation is through government licensing and regulation. There are alternatives, the most important being the system of private property rights and a market. Developing a system of private property rights in the spectrum, just as has been done with land, would permit the sale, or gift, of spectrum space.¹⁵²

For liberals, the real justification for licensing is to make sure that what gets broadcasted actually serves the "public interest" as they conceive it.

We saw earlier the effect of licensing on broadcast content. If government can pull the plug on a business at will, it can dictate how that business conducts itself. It can regulate, as FCC critics have long noted, "by raised eyebrow."¹⁵³ Until the abolition of the Fairness Doctrine in 1987, the federal government often used the threat of nonrenewal to promote liberal (or, in Nixon's case, conservative) broadcast content. The founders saw the ban on licensing as the most important protection of free speech, yet the fact that broadcast licensing constitutes a massive

¹⁵⁰ Benno C. Schmidt, Jr., "Prior Restraint and Censorship," in Leonard W. Levy et al., ed., *The First Amendment: Selections from the Encyclopedia of the American Constitution* (New York: Macmillan, 1986), 246. McGinnis, "The Once and Future Property-Based Vision of the First Amendment," 92 n178: "There is substantial agreement that the [founders'] concept of the freedom of the press precluded federal licensing laws or government-enforced monopolies." For many years, broadcast regulation did both. Market entry was intentionally limited by the FCC, which restricted the number of television channels and held back the development of cable for many years: Powe, *American Broadcasting and the First Amendment*, 216–47.

¹⁵¹ For example, in *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. at 390.

¹⁵² Bollinger, *Images of a Free Press*, 89.

¹⁵³ Emord, *Freedom, Technology, and the First Amendment*, 186, quoting Erik Barnouw, *The Golden Web*, vol. 3, of *A History of Broadcasting in the United States* (New York: Oxford University Press, 1968).

instance of prior restraint has been routinely ignored by scholars as well as politicians ever since its inception in 1927.

Cass Sunstein is an enthusiastic proponent of government licensing of broadcasting. In *Democracy and the Problem of Free Speech*, Sunstein calls for a "New Deal for speech."¹⁵⁴ Sunstein has done scholars the service of making explicit what is often left implicit in liberal discussions of free speech. He begins from the fact that the New Deal essentially abolished property rights, which he takes to be a good thing. It means that we can get rid of the old habit of believing that human beings have natural rights. For Sunstein, all rights come from the government. "'Naturalness' is generally irrelevant from the point of view of law, politics, and morality." "Simply as a matter of fact, property rights are creations of law." The *New York Times* has a legal right to decide which writers to publish and which to exclude. Sunstein says that the *Times* has this right to exclude because government makes and enforces laws against trespassing. Since government in this sense "creates" property by defining it, Sunstein argues, it can and should rearrange the existing distribution of property in the public interest. It does so every time it tells a property owner that he must build wheelchair ramps for the disabled. Sunstein sees no difference between a broadcast license and "private" property micromanaged by government. Both are, in effect, conditional grants from government to private persons. His conclusion: government should treat "privately" owned newspapers and magazines the same way it treats broadcasters. From the point of view of the founders, this would mean the end of a free press.¹⁵⁵

Sunstein himself is rather moderate in the practical inferences he draws from his radical premises. These premises would easily justify measures that most Americans (and Sunstein himself) would regard as extreme. For example, why not establish a Federal Publishing Commission (FPC), on the model of the FCC or the Equal Employment Opportunity Commission? Rejected authors could be given the right to sue publishers on the ground of discrimination against diverse viewpoints. If editorial policies had a disparate impact on points of view that have traditionally been underrepresented in print, the new FPC and the courts could order remedies, with appropriate goals and timetables. Book publishers whose lists were insufficiently inclusive might be required to publish a certain percentage of "diverse" manuscripts. Magazines and newspapers could be ordered to set aside a certain portion of each issue for groups representing "discreet and insular" minority viewpoints.

Using the FCC model, publishers would have to send a copy of everything they publish to the Federal Publishing Commission. Every few years the FPC would consider whether to renew the publisher's license. Renewal would be granted only if the publisher's product included suf-

¹⁵⁴ Sunstein, *Democracy and the Problem of Free Speech*, 17.

¹⁵⁵ *Ibid.*, 28–34, 109. Sunstein's argument was anticipated by Jerome A. Barron, "Access to the Media—A New First Amendment Right," *Harvard Law Review* 80 (1967): 1641–78.

ficient diversity, access to those “whose views should be expressed,” and “balance” in presentation of controversial topics.

These inferences, which follow from Sunstein’s premise, are not as far outside the mainstream as one might hope. As we saw earlier, in the 1969 *Red Lion* decision, the Supreme Court strongly affirmed government’s right to dictate the content of electronic broadcasting. Far from being forbidden by the First Amendment, the Court wrote, “Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed. . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” Otherwise, said the Court, the public would not hear from “those unable without government assistance to gain access to those frequencies for expression of their views.”¹⁵⁶ By the same reasoning, the Court could have legitimized government control over the print media as well. After all, there is far greater scarcity in the number of commercially viable daily newspapers than there is in radio or television stations. The Court could have logically argued that “it is the right of the readers, not the right of the publishers, which is paramount,” because otherwise the public would not hear from “those unable without government assistance to gain access to the print media for expression of their views.” To quote another Supreme Court decision, “it would be strange indeed . . . if the . . . First Amendment should be read as a command that the government was without power to protect the freedom” of the press by regulating the print media so that they will provide the public with “information from diverse and antagonistic sources.”¹⁵⁷

In sum, according to Sunstein’s version of the liberal understanding of free speech, in principle government is required to supervise the content of what gets published and broadcast, in order to promote an appropriate diversity of viewpoints in the marketplace of ideas. Sunstein’s “New Deal for speech”—along with the radical policy implications already noted—is the logical culmination of this understanding.

Sunstein’s position is widely shared by academic liberals. His *Democracy and the Problem of Free Speech* won a book prize from Harvard in 1994.¹⁵⁸ Legal scholar Stephen Carter writes: “Left unregulated, the modern media could present serious threats to democracy.”¹⁵⁹ Bollinger in-

¹⁵⁶ *Red Lion*, 395 U.S. at 390, 400.

¹⁵⁷ *Associated Press v. United States*, 326 U.S. 1, 20 (1945). In later cases, the Supreme Court has backed away from the position that government may interfere with the content of the print media for the sake of diversity or fairness: *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). But libertarians like Emord and liberals like Sunstein agree: there is no significant difference in principle between print and broadcasting; therefore, either there is no reason for government to have any right to regulate content (Emord, *Freedom, Technology and the First Amendment*, 281–85) or there is every reason (Sunstein).

¹⁵⁸ Sunstein won the 1994 Goldsmith Book Prize from the Joan Shorenstein Barone Center on the Press, Politics and Public Policy at the John F. Kennedy School of Government at Harvard. McGinnis, “The Once and Future Property-Based Vision of the First Amendment,” 56.

¹⁵⁹ Carter is quoted in Powe, *American Broadcasting and the First Amendment*, 252.

vites us to take note of “the risks to democracy of a more or less completely free press.” He argues that “press freedom might, instead of enhancing public discussion and decision making, actually prove to be a threat to it. . . . The press can exclude important points of view.” Like Sunstein, Bollinger approves of the tradition of government regulation of the content of electronic broadcasting through licensing.¹⁶⁰

XIV. FIFTH ELEMENT OF LIBERAL FREE SPEECH: SPEECH
RIGHTS MUST BE REDISTRIBUTED FROM PRIVILEGED
TO OPPRESSED BY LIMITING THE RIGHT OF PRIVATE
OWNERS TO USE THEIR PROPERTY TO SAY WHAT
THEY WANT OR TO EXCLUDE THOSE
WITH WHOM THEY DISAGREE

For the founders, it was a fundamental natural right that property owners have an almost unlimited right to do whatever they wish with their property. The only limit was the principle that one must not harm others. This limit was to be defined in the civil law. The courts in the first century of American history often quoted the phrase *sic utere tuo ut alienum non laedas*: “use your own in such a way that you do not harm another’s.” Generally, if government believed that your use of your own property was injurious, it had to prove so in a court of law.

For the founders, it was also a gross violation of a fundamental natural right for government to take the property of one person and transfer ownership to another. Justice William Paterson wrote in the 1795 Supreme Court case of *Vanhorne’s Lessee v. Dorrance*:

The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary both to the letter and spirit of the Constitution.¹⁶¹

For the founders, the private workplace or school was the equivalent of the private home or club. It was a place where the owner enjoyed complete freedom to dictate the terms on which guests, workers, or students would be invited to join or remain.

John Dewey regarded the distinction between the public and the private spheres as disastrous to the cause of liberty in the modern world. He believed that if government is required to leave the private sphere alone except for the punishment of overt injuries, the weak and underpriv-

¹⁶⁰ Bollinger, *Images of a Free Press*, 38, 26.

¹⁶¹ *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (1795).

ileged members of society will remain oppressed. Therefore, businesses and private schools are not viewed as private, but rather as quasi-public, or at least affected with a public interest. The employer is no longer free to operate a workplace as he wishes. Instead, he must conform to government rules on what may or may not be said. The purpose of this government intrusion is to protect the vulnerable groups in society: workers, racial minorities, women, the disabled, homosexuals, and any other categories that seem to be disadvantaged. For liberalism, the purpose of government is not to secure the natural rights of the governed, but, rather, to make sure that everyone has appropriate access to the resources that are needed to live as one wishes. This means that government has to micromanage relations between all persons in society who are unequal in power. It has to break down the integrity of the private sphere.

Therefore, liberals reject the founders' view that it is a fundamental right, both natural and civil, for private property owners and associations to do or say whatever they want, and to exclude or invite whomever they want, as long as they do not injure anyone. Liberals view the private sphere as inherently suspect, that is, as potentially oppressive of liberty or self-expression. Civil rights law in modern times has come to mean especially laws that limit the freedom of private employers and schools to conduct themselves as they wish. It is widely believed that if it were not for government coercion of private property owners, workers would have low wages, and women and racial minorities would not have access to decent jobs or schools. Part of the agenda of government oversight of the internal management of private associations is the regulation of what employers may or may not say; this limitation has been extended to employees as well. This follows naturally from the liberal view that owners of businesses and schools cannot be trusted to act responsibly unless their rights of free association are limited by government. How can the workplace be made comfortable for women and minorities unless government punishes employers for their employees who make jokes or unpleasant remarks about these groups?

Liberalism begins with the premise that private property is at the disposal of the public for the sake of the public welfare. If one citizen has more, and another less, government is authorized to transfer property without compensation. This kind of transfer is viewed as necessary because, as Mark Graber writes, "Many Americans are still financially unable to participate effectively in the marketplace of ideas. Hence, some policy must address whether, under contemporary conditions of material inequalities, persons should have unlimited power to convert their economic advantages into political resources."¹⁶²

One liberal solution to this problem, as we saw earlier, is to "mute" or "silence" those who spend "too much" publishing or broadcasting

¹⁶² Graber, *Transforming Free Speech*, 205.

their views. Another approach is to take speech rights (in the form of the use of a printing press or broadcast facilities) away from those who have "too much" and reallocate them to those who "need" them more. As Fiss writes, government "may have to allocate public resources—hand out megaphones—to those whose voices would not otherwise be heard in the public square."¹⁶³ The government will take the megaphones away from those who have them and give them to those who do not.

This mandatory reallocation of private resources was what the FCC's Fairness Doctrine did. A station would broadcast something that the FCC viewed as biased or partisan (usually, that meant nonliberal); it would then have to provide free air time to someone to respond. Liberals continue to favor "access regulation," that is, compelling owners of electronic media to turn some of their broadcast time over to people whose views they disagree with. The "need" for access is to be decided by government agencies, such as the Federal Communications Commission, staffed by supposedly nonpartisan experts. As Jeffrey Abramson and Elizabeth Bussiere write, "the public interest also requires that the crucial channels of mass communication be open to the citizenry at large, that political debate over the media be open to as wide an array of views and voices as is practically possible. If it takes legal regulations to achieve these access goals, then so be it."¹⁶⁴

A similar liberal policy compelled private owners of shopping malls or airports to allow the uncompensated use of their property by demonstrators. The Supreme Court has upheld the right of state legislatures to compel private use of private property belonging to someone else.¹⁶⁵ But the Court has rejected the liberal idea that there is a constitutional right of access to a newspaper owned by another. Sunstein and some other liberals disagree. Steven Shiffrin, for example, writes, "Unless one thinks that the gatekeepers of the print and broadcast media afford meaningful access to dissenters, a strong commitment to the value of dissent should tilt one toward upholding schemes of regulation designed to afford mean-

¹⁶³ Fiss, *The Irony of Free Speech*, 4.

¹⁶⁴ Jeffrey Abramson and Elizabeth Bussiere, "Free Speech and Free Press: A Communitarian Perspective," in David M. O'Brien, ed., *The Lanahan Readings in Civil Rights and Civil Liberties*, 2d ed. (Baltimore, MD: Lanahan Publishers, 2003), 90. See also Bollinger, *Images of a Free Press*, 111, 114–15 (although "[a]ccess regulation carries the greatest potential for altering the press as we have known it and for exposing us to grave risks," it is desirable in electronic broadcasting); Sunstein, *Democracy and the Problem of Free Speech*, 55, 58, 88 (government should mandate access for excluded viewpoints because "access is the practical equivalent of the right to speak, and it is [currently] allocated very much on the basis of private willingness to pay"); Fiss, *Irony of Free Speech*, 69 (access regulations are desirable because they "limit the autonomy of the press in the name of freedom"); and Graber, *Transforming Free Speech*, 2 (access rights are needed because expression rights are "enfeebled in a world where their exercise increasingly depends on the economic power to have one's voice heard").

¹⁶⁵ *PruneYard Shopping Center v. Robins*, 447 U. S. 74 (1980).

ingful access.”¹⁶⁶ In other words, government should compel private property owners to let nonowners use the property to publish or broadcast their own views.

XV. SIXTH ELEMENT OF LIBERAL FREE SPEECH: GOVERNMENT
HAS LITTLE RIGHT TO CONTROL EXPRESSION IN PUBLIC
FUNDING OF THE ARTS, PUBLIC EDUCATION,
AND GOVERNMENT WORKPLACES

For the founders, property owned by government could be used on the same terms as private property. Government could set the terms of use in any way it pleased. The only limit would be general principles such as “No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public” (Massachusetts Declaration of Rights, 1780, Article 6). In other words, government ownership of property, and allocation of its use, is limited by the principle that government exists for the common good, not for the private advantage of particular persons or groups. Other than the citizen’s privilege of access to public sidewalks and highways for the purpose of travel, this gave government a lot of leeway in its use of its property.

Today, liberals and most conservatives reject this view. Now there is constant litigation over what opinions government is allowed to favor or disfavor in its use of its own property. For example, as I stated previously, in the older view, a public school would be permitted to buy any books it wanted for a school library, and it would also have full discretion to get rid of any books from that library. Liberals argue, however, that once a public school buys a book for a school library, it is not permitted to remove that book, if its motive is objection to the book’s ideological content. This view was upheld by the Supreme Court in 1982.¹⁶⁷ It was probably no coincidence that the Court affirmed this liberal view when a conservative group of parents objected to library books that were obscene and/or politically liberal or radical.

In the founders’ view, public schools, acting in the place of parents, could treat students as they wished, short of injuring them in the legal sense. School authorities could spank students, expel them, or honor them on any basis the authorities pleased. Now, liberals argue that the right of free speech means that students must be allowed to express their political views in public school. In *Tinker v. DesMoines Independent Community School District* (1969), when a student was disciplined for wearing

¹⁶⁶ Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Princeton, NJ: Princeton University Press, 1993), 99.

¹⁶⁷ *Board of Education v. Pico*, 457 U.S. 853 (1982).

a black armband in protest of the Vietnam War, the Supreme Court took the side of the student, saying that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁶⁸ The founders would have agreed that citizens never give up their constitutional rights, but if they exercise their rights on the job or in public school in a way that their employer or schoolmaster disapproves, they may not complain about the consequences. There is no free speech right in public school to give a frank opinion of one’s teachers. There is also no right to display antiwar symbols if the school decides that such displays distract from its educational mission. In other words, students must conform to the school rules.

Similarly, in government employment, as I noted earlier, government was permitted to set any terms it wished. By 1983, this position had long been abandoned, as Justice Byron White wrote in *Connick v. Myers*:

For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights. The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”¹⁶⁹

Liberals also argue that when government gives grants to artists, it must not exclude some art on the grounds of indecency, because indecency is protected by the right of free speech. Owen Fiss writes that government’s refusal to fund indecent art has a “silencing effect” that “arises from the scarcity of resources.”¹⁷⁰ Failure to fund indecent “art” might mean that the Mapplethorpe exhibit launched in 1989—which included sexually explicit homosexual photographs, including one in which a man was urinating into the mouth of another—would not be shown in art museums that rely on taxpayer funding. In response to Fiss, the founders would have said that government not only has the right not to fund such material, but government should probably outlaw it on grounds of indecency.

It might seem, by Fiss’s reasoning, that any art not funded, whether indecent or not, is silenced. If this is the argument, then every artist in America who is not funded has suffered from government censorship. Here the logic of the liberal position returns us to Thurgood Marshall’s

¹⁶⁸ *Tinker v. DesMoines Independent Community School of District*, 393 U.S. 503, 506 (1969).

¹⁶⁹ *Connick v. Myers*, 461 U.S. 138, 143–44 (1983); citing *McAuliffe v. Mayor of New Bedford*, 155 Mass. at 220.

¹⁷⁰ Fiss, *The Irony of Free Speech*, 30, 35.

extravagant claim that any constitutional right that government fails to fund is, in effect, being denied by government. Fiss avoids this absurd conclusion by adding that since government must silence some artists by failing to fund them, the ones silenced should be those whose point of view is already available to the public; that is, the First Amendment “can be viewed as a mechanism for protecting the robustness of public debate, for exposing the public to diverse and conflicting viewpoints on issues of public importance.” Since the late Robert Mapplethorpe’s homosexual photographs “challenge orthodox views about sexuality,” the First Amendment requires that such art be funded, while pro-heterosexual art is not required to be funded.¹⁷¹

Liberals argue that the older view was based on a distinction between rights (which government must protect) and privileges (which government may give to some but not others). Legal scholar Rodney Smolla correctly notes that this distinction is based on the Lockean approach of the founders. But he objects on the ground that the rights-privilege distinction “is intolerable in a modern society that aspires to make itself genuinely open and free. Government is now so large . . . that freedom of speech would be rendered an empty guarantee if government retained carte blanche to attach to the receipt of government benefits any restrictions on speech that it pleased.”¹⁷²

The obvious problem with this liberal view is that government often attaches to the receipt of benefits all kinds of restrictions on speech. It cannot help doing so. Approval of a grant from the National Endowment for the Humanities is contingent on saying and writing certain things that please the reviewers—things that, if left unsaid, would lead to the disapproval of the proposal. Grants approved generally must fall within the bounds of orthodox academic scholarship. The winning scholars have the *privilege* of a government grant, while the losers get no grant, because of what they said in their applications. From the founders’ standpoint, the most serious objection to the liberal approach is that when government dispenses grants, it *should* discriminate on the basis of the public benefit that the grants are intended to secure. This is what justifies taxation in the first place: the public good. If government chooses to hire a teacher, it not only may but should refuse to hire those who believe that Nazism is the best form of government, or that sexual liaisons between teachers and students are desirable. (I am assuming that speech defending these beliefs is not against the law.) As Holmes said, there are a great many things a person has a constitutional right to say and do that might disqualify one for a government job or grant. This is as it should be.

¹⁷¹ Ibid., 37–38. On Marshall, see the text accompanying note 113 in Section XI.

¹⁷² Rodney A. Smolla, *Free Speech in an Open Society* (New York: Vintage, 1993), 182. See also Van Alstyne, “The Demise of the Right-Privilege Distinction in Constitutional Law,” *supra* note 86.

XVI. CONCLUSION

Liberals and conservatives today often misunderstand each other when they discuss freedom of speech. They often accuse each other of failing to protect freedom of speech, not noticing that each has a different and opposing definition of this concept. This paper is meant to clarify the dramatic gulf dividing the founders’ conception from the liberal conception. One common error made all too often by both liberals and conservatives—that the founders’ view is simply that of today’s liberalism in embryo, or in an incomplete or incoherent version¹⁷³—is perhaps the greatest obstacle to an accurate analysis of American politics today.

A second common error that I have refuted is the view that liberals favor expansion of speech rights, while conservatives want to restrict them. What I have shown is that both liberals and those who follow the founders’ view agree that some speech is harmful and should be restricted, while other speech is harmless and should be permitted. However, since the liberal view of harm is so distant from the founders’ view, it is usually the case that where one side wants to restrict, the other wants to permit, and vice versa. As I said at the beginning, from the perspective of the founders, liberals want to restrict noninjurious speech while unleashing licentiousness, and from the perspective of liberals, the founders did the same. But what the two sides mean by “noninjurious” and “licentious” is almost diametrically opposed.

Finally, government policy on free speech in America today is neither what the founders wanted nor what liberals want. It is an incoherent blend of both positions. On the one hand, liberals have succeeded in getting most limits removed on obscenity and pornography. Liberal inroads on property rights are extensive, with far-reaching restrictions on the speech rights of business owners and others. As long as the Communications Act of 1934 remains unrepealed, government continues to have the legal right to dictate the content of electronic broadcasting. Perhaps most dangerously, liberal efforts to limit speech in elections through campaign finance laws have had considerable success.

On the other hand, in many ways the founders’ view continues to hold sway. Government control over the content of print media continues to be mild. So far, the Internet is mostly unregulated. The FCC’s abolition of the Fairness Doctrine during the Reagan Administration enabled the robust growth of conservative talk radio and television. As a consequence, the freedom of electronic broadcasting in the twenty-first century is closer to what the founders would have wanted than it was through most of the twentieth. While not without danger, American campaign finance law is far more tolerant of campaign speech than is the case in many European

¹⁷³ See the quotations from Robert Bork and Bill Clinton at the beginning of Section II.

countries. The Supreme Court still more or less agrees with the spirit of the founders that a ban on spending by candidates (at least of their own money) or by independent citizens to publicize their views (on particular issues if not candidates) violates the right of free speech: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."¹⁷⁴

In the near future, America will probably continue to waver between the liberal and the founders' approaches to free speech. But because the understandings of justice behind each approach are so profoundly opposed, this mishmash of incompatibles is not likely to last indefinitely. This essay is meant to help Americans think more sensibly about the choice that they will eventually have to make in favor of liberty or despotism.

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¹⁷⁴ *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).