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The Sickness unto Death of the Freedom of Speech

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THE SICKNESS UNTO DEATH OF THE FREEDOM OF SPEECH

Marc O. DeGirolami•

Such is the nature of despair, this sickness of the self, this sickness unto death.[1]

Introduction

The "sickness unto death," in Søren Kierkegaard's work of the same name, is the despair an individual experiences in realizing that the self is separated from God.[2] In perceiving the division of the finite self from the infinite God, and in yearning for a union that is impossible, the individual despairs of his individuality—of his autonomous liberty and detachment from the divine—and strives mightily to reattach the self to something collective, extrinsic, and transcendent. Back to God.[3]

Something like this despair now afflicts the freedom of speech in American law and culture. But it was not always so. In the early American republic, free speech was conceived as a natural right that government ought often to constrain in order to achieve or protect certain collective social goods. Its purposes, as well as its limits, were understood in instrumental, communal, and other-regarding terms. Those purposes and limits assumed that the political community could and should make judgments of value among different ideas. And the justifications for and limits of free speech were closely aligned with those invoked for religious freedom. Both freedoms were conceived within a larger framework of collective, extrinsic ends.

But beginning in the middle decades of the twentieth century, courts and commentators increasingly justified the freedom of speech as enhancing and maximizing individual autonomy. Other, earlier justifications and limits steadily receded in prominence. By the late twentieth century, these justifications and limits had been largely supplanted or subsumed by the view that free speech is intrinsically valuable for human identity and self-actualization.

During this period, the self-regarding rationale for free speech was united with a related prudential consideration that repudiated any state or official orthodoxy as to

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[1] SØREN KIERKEGAARD, THE SICKNESS UNTO DEATH: A CHRISTIAN PSYCHOLOGICAL EXPLORATION FOR UPLIFTING AND AWAKENING 21 (Howard V. Hong & Edna H. Hong eds. and trans. 1980).

[2] The phrase is taken by Kierkegaard from John 11:4, where Jesus, having been apprised by Mary and Martha of the illness of Lazarus, says to them: "This sickness is not unto death."

[3] *See generally* DAPHNE HAMPSON, KIERKEGAARD: EXPOSITION AND CRITIQUE, 221-23 (2014) (describing Kierkegaard's view of the "relational self" as one which "understands the person to be grounded extrinsically….Kierkegaard understands this relation to God to be foundational to the self coming to itself.").

the value of speech. The new rule was that the government must never make judgments about the substantive worth of speech, and courts must assiduously guard against communal efforts to set "content-based" limits on the full freedom of speech. In the rhetoric of American law and culture, free speech was, in this period, routinely defended as inherently good for the individual, or even as constitutive of what it means to be American. Some limits remained, but communal political judgments about the value of the content of speech were no longer ever thought legitimate grounds for legal restriction. "Anti-orthodoxy" of all kinds became a watchword of free speech protection. Government could never be granted the power to judge speech's value for both principled and prudential reasons.

Yet once the right of free speech was understood as a self-regarding and intrinsic end of human fulfillment, there was very little to inform its exercise beyond the caprice of the exerciser. As before, the prevailing legal conception of the right of free speech was united with that of the right of freedom of religion during this period: solipsistic, personalized, changeable, deracinated from any common purposes and traditions, and often unchallengeable inasmuch as there were no acceptable, extrinsic criteria for doing so—and certainly none with which the political community could be trusted. Within this framework, the scope of the rights of free speech as well as religious liberty greatly expanded. The last hundred years represent, as one recent book reports, "The Free Speech Century."[4]

In recent years, however, this expansion has met with resistance and arguments by academics as well as judges for constriction. The new free speech constrictors have criticized free speech rights principally by setting them against other rights and interests—sometimes real, sometimes invented, and always deeply felt—of democracy, dignity, equality, sexual autonomy, antidiscrimination, decency, progressivism, and others.[5] For the new free speech constrictors, it is these other rights and interests, not free speech, that are the true or defining American civic goods. There have been parallel developments in debates about the scope of religious freedom. In both contexts, for example, the constrictors use the metaphor of "weaponization" in objecting to rights of religious and speech freedom that they believe undermine other more important political and social goods. In both contexts, some variation of "third party harm" frequently serves as a counterweight to and limitation on First Amendment rights.

In arguing for new free speech limits, the constrictors hearken to an earlier period in attempting to reconceive the freedom of speech instrumentally—as serving, and being delimited by, specific common ends. Once the right of free speech was hollowed out of any common civic ends, it was rendered problematic, if not intolerable, to those who believed that free speech should serve other, greater social and civic interests. The rise of the constrictors was a predictable result, and the right

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[4] See THE FREE SPEECH CENTURY (Geoffrey Stone & Lee Bollinger, eds.) (2018).
[5] For only a partial catalog and discussion, see infra at Part III.

of free speech, having been evacuated of its prior ends and limits, could now be infused with new ones sometimes derived from other areas of constitutional law.[6]

The sickness unto death of the freedom of speech is that the freedom's spectacular success as an American constitutional right on premises of liberal, individual autonomy has been the very cause of mounting and powerful discontent. Its impressive growth in the twentieth century has rendered it fragile, if not actually unsustainable, in its current form. Its unprecedented expansion has brought on an awareness of its emptiness in serving the larger, common political good. The yearning for political community and common purpose transcending individual interest has in turn generated vigorous calls for speech constriction to promote what are claimed to be higher ends—in some cases ends that were promoted by the hypertrophy of the right of free speech itself. Arguments for constriction assume a nearly identical structure in the context of the right of religious freedom.

What binds them together is the claim that expansive First Amendment rights harm others or are more generally socially or politically harmful. In some cases, the same people who argued for the disconnection of free speech rights from common civic ends are now advocating free speech constriction to reconnect free speech to new ends said to be constitutive of the American polity. The same is true for religious freedom. But in a society that is deeply fractured about where the common good lies, imposing new limits on First Amendment rights in the name of dignity, democracy, equality, sexual freedom, third party harm, or any of the other purposes championed by the new constrictors is far likelier to exacerbate social and civic fragmentation than to reconstitute it.

Part I of this paper describes early American understandings of the purposes and limits of the freedom of speech. During this period, the outer bounds of the freedom of speech reflected similar limits on the right of religious freedom: both were conceived within an overarching framework of natural rights delimited by legislative judgments about the common political good. Though there is scholarly debate about how much the 14th Amendment may have altered that approach in certain details, the basic framework remained intact in the nineteenth century.

Part II traces the replacement of that framework with a very different one in the twentieth century, describing the judicial turn toward self-regarding justifications of speech that prioritize individual autonomy, self-actualization, and absolute anti-orthodoxy. Against Professor G. Edward White's description of this development as free speech's "coming of age,"[7] this essay argues that the period is better

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[6] The eminent free speech historian, David Rabban, wrote nearly 20 years ago that "irony abounds in this development," because the "political left typically advocated greater protection for speech" in the pre-war period. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 381 (1997). This essay, though gratefully drawing on Rabban's work in Part II, offers a somewhat different diagnosis of this development in Part III.

[7] *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299 (1996). For further discussion, see *infra* at Part II.

characterized as the "adolescence" of free speech—one marked especially by the ascendancy of internally oriented and self-regarding justifications for both speech and religious freedom.

The essay describes the crisis or despair of free speech and the coming of the speech constrictors in Part III. It concludes briefly in Part IV by recapitulating the parallel paths of the rights of free speech and religious freedom, disagreeing with the work of some scholars who argue that for cultural reasons, free speech in its present expansive form is more secure today than religious freedom. It is, in fact, remarkable that over the centuries, some of the most prominent justifications for and objections to the scope of these rights have proceeded *pari passu* and assumed nearly identical shape.

I. Period One: First Amendment Natural Rights and Limits

All governments negotiate the balance between permitting and restricting speech within an overarching conceptual framework of the ends and limits of free speech. That framework may be thick or thin, explicitly articulated or unspoken, clearly understood or only hazily, if at all, perceived. But all governments grapple with the central problem of free speech—how best to regulate speech so as to avert excessive social hurt, while allowing as much expression as may be tolerated—within a larger set of ideas about the social virtues and vices of speech.[8]

American conceptual frameworks for free speech have not remained static across time. The early American understanding of free speech, for example, was not grounded in an abstract justification or theory of speech's value as a unique good. The right and the good of free speech in eighteenth and nineteenth century America were located within a larger world view that distinguished natural rights—rights that one could exercise in the state of nature or without government action—from other rights that depended upon government intervention.[9] The right of free speech was "natural" in the sense that, unlike others such as habeas corpus or the right to a trial by a jury of one's peers, it was an element of "natural liberty"[10]—"the freedom an individual could enjoy as a human in the absence of government."[11]

Even in the state of nature, the scope of one's natural rights did not encompass uses that interfered with the natural rights of others.[12] As James Madison put it in

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[8] For further discussion of this problem, see Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1487 (2016).
[9] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).
[10] Id. at 252
[11] Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 (1993).
[12] For the founding generation, the state of nature was not an amoral or asocial condition. Rather, it was simply the social condition in which people live before the organized state. See FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 62 (1985) (describing the state of nature as "the absence of organized *political* society and government").

Federalist 43, "the moral relations" and obligations imposed by natural rights "will remain uncancelled" for any state that refused to ratify the Constitution.[13] Yet once natural rights like the freedom of speech were incorporated into the social contract, several additional limitations on them were warranted. The people's representatives, not the judiciary, were empowered to impose these limits in the service of a general concept of common social welfare and protection, variously denominated "the public good," "the common good," "the welfare of the entire society," "the collective interest," or "the general welfare."[14] Though there were often prudential disagreements among lawmakers about what this collective, social ideal demanded—disagreements concerning particular, political applications[15]—there was no challenge to the general principle that the common good properly circumscribed the right of free speech, very much including on matters of substance or content.

The right of free speech coexisted with and promoted the moral duties of the rights-holder to the community.[16] Regulations of speech that promoted public morality were considered "necessary for ensuring sufficient public order to host, defend, and extend individual liberty."[17] So, for example, "[b]lasphemy and profane swearing…were thought to be harmful to society and thus were subject to governmental regulation even though they did not directly interfere with the rights of others."[18] Blasphemy was punished in part to promote public respect for religion, and most especially Christianity—"the foundation of moral obligation"[19]—as well as because of its tendency to disturb public order.[20] The punishment of blasphemy was not thought to be inconsistent with rights of religious free exercise: there was believed to be a difference between what James Kent described as "decent discussion" of religious differences and "revil[ing] with malicious contempt."[21] Additional proscribed speech included certain types of advertising of immoral activities (such as gambling), the making of certain kinds of agreements on Sundays,[22] and other forms of speech thought threatening to the general morality,

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[13] Federalist 43 (Madison).
[14] Campbell, *supra* note __, at 273 (collecting and quoting sources).
[15] Most prominent among which were the advisability of proscribing seditious speech. *Id.* at 278.
[16] *See* THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM 6 (2017) ("Government encourages the people to respect and fight for the natural rights of fellow citizens by promoting appropriate moral conduct, including devotion to the common good.").
[17] *See* MARK E. KANN, TAMING THE PASSION FOR THE PUBLIC GOOD: POLICING SEX IN THE EARLY REPUBLIC 21 (2013).
[18] Campbell, *supra* note __, at 277.
[19] People v. Ruggles, 8 Johns R. 290 (1811).
[20] See JAMES KABALA, CHURCH-STATE RELATIONS IN THE EARLY AMERICAN REPUBLIC 124-28 (2013) (discussing early American blasphemy law); see also Updegraph v. Commonwealth, 11 S&R 394 (Pa. 1824).
[21] Ruggles, supra note __.
[22] Sunday closing laws are not examples of speech restrictions, but they are part of the larger phenomenon of state regulation of activities on Sunday. Their history is recounted in McGowan v. Maryland, 366 U.S. 40 (1961).

peace, and good order.[23] Pennsylvania's 1779 "Act for the Suppression of Vice and Immorality," for example, prohibited "profane swearing, cursing, drunkenness, cock fighting, bullet playing, horse racing, shooting matches, and playing or gaming for money, or other valuable things, fighting of duels and such evil practices, which tend greatly to debauch the minds and corrupt the morals of the subjects of this commonwealth."[24]

Likewise, libelous speech was well within the regulatory power, and what today goes by the name of "expressive conduct"[25] did not enjoy presumptive protection, let alone immunity from government control. To the contrary, the government enjoyed a broad discretion to regulate this manifestation of the natural right of free speech in furtherance of the public good.[26] Laws punishing obscene or sexually suggestive speech also were uncontroversial, inasmuch as the protection of the natural right of marriage was deemed an important office of the state.[27] As William Paley put it in his widely-read "The Principles of Moral and Political Philosophy," "If fornication be criminal, all those incentives which led to it are accessories to the crime, as…wanton songs, pictures, books."[28] Laws against obscenity were not often enforced, but had particular salience in cases where their violation was "open and notorious."[29]

So conceived and delimited, the right of free speech assumed a dualistic structure. At its core was an inalienable natural right to express, as Jud Campbell puts it, "well-intentioned statements of one's thoughts"—statements of thoughts made honestly, "decently,"[30] or in good faith.[31] Parties to the social compact would have no reason to protect the right to make dishonest or bad faith statements of one's dishonest or bad faith thoughts. This narrow right of free speech was nevertheless deep. What it covered was categorically outside the cognizance or jurisdiction of the state and therefore categorically exempt from regulation. The right of stating one's opinions in good faith was derivative of the non-volitional natural fact of having such opinions and of the classical liberal view that it was futile

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[23] Campbell, supra note __, at 310 n.285.
[24] Act of March 14, 1779, Statutes at Large of Pennsylvania, Vol. IX, 333.
[25] See, e.g., United States v. O'Brien, 391 U.S. 367 (1968); Texas v. Johnson, 491 U.S. 397 (1989).
[26] Campbell, *supra* note __, at 286-287 (Some expressive conduct, like instinctive smiles, surely fell on the side of inalienability. But when expressive conduct caused harm and governmental power to restrict that conduct served the public good, there is no reason to think that the freedom of opinion nonetheless immunized that conduct.").
[27] See, e.g., Commonwealth v. Sharpless, 2 S&R 91 (Pa. Sup. Ct. 1815). Geoffrey Stone has emphasized the rarity of such prosecutions. See Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1863 (2007). Yet they did exist, and nobody suggested that sanctioning obscenity, post-publication, was an inappropriate role for the state. See Lakier, *supra* note __, at 2187 (distinguishing between prior restraints on obscenity and criminal prosecutions after publication).
[28] WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 173 (Liberty Fund, ed. 2002) [1785].
[29] See LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 130-31 (1993).
[30] See Ruggles, supra note __.
[31] *Id.* at 280, 282.

to coerce a person either not to have opinions or to change them to conform to someone else's.[32] If there was anything categorically "anti-censorial" about the freedom of speech, it lay only in this narrow core.[33]

But beyond this core lay a vast periphery of other contexts in which the natural right of speech was alienable depending upon political judgments about the requirements of the common good. While the existing deposit of common law traditions assisted the lawmaker in determining the contours of the demands of the public good, decisions about the scope of free speech outside the core were left primarily to legislative judgment and discretion.[34] There was, as Genevieve Lakier has argued, no overarching theory of the sorts of speech that were valuable or worthless, but that did not mean that the content of speech could not be regulated: "expression could be criminally sanctioned whenever it posed even a relatively attenuated threat to public peace and order."[35]

It is this two-tiered framework that formed the basis for a set of shared assumptions about speech which,[36] as Campbell argues, informed the meaning of the Constitution's Speech Clause. To "abridge" the freedom of speech was either to regulate the *unalienable* component of the freedom (that is, the freedom to make good faith statements of one's thoughts, setting aside its own natural limits) or to restrict speech of the *alienable* component beyond what was what required by the need to protect the public good.[37] What Congress could not do in "making no law" that abridged the right of free speech was to exceed the proper limits of a regulatory threshold. But Congress was not thereby removed from evaluating and regulating the content of speech—particularly for purposes of preserving general welfare, common morality, and the public good—*tout court*.

One virtue of this explanatory framework is its analogue in the right to religious freedom. Indeed, in almost every respect, the structure of the protection for and limits of the right of free speech mirrors that of religious freedom. Like the right of

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[32] See, e.g., James Madison, Memorial and Remonstrance Against Religious Assessments ("the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men").
[33] *But see generally* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT (2017). Abrams makes the case for restraint of government censorship as the overriding end of free speech, but he does not adequately distinguish between the modes in which the freedom might be exercised.
[34] Campbell, *supra* note __, at 291.
[35] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2181 (2015). Lakier's core claim concerns the broad condemnation of prior restraints in the early republic and thereafter, irrespective of content. *See id.* at 2180-81. Lakier goes so far as to argue that "post-publication or post-utterance," the government could regulate speech in "whatever way it pleased." *Id.* at 2180. Yet this claim about an absolute authority in the government overlooks the ways in which the limited natural right of speech was protected absolutely.
[36] *See* Hamburger, *supra* note __, at 914 ("Congregationalists and Baptists, Federalists and Anti-Federalists, Southerners and Northerners, all could use the natural rights analysis and, even while developing different versions of that analysis, they appear to have drawn upon certain shared assumptions.").
[37] *Id.* at 305.

free speech, religious freedom was also considered a natural right.[38] James Madison, for example, explicitly united the two, referring in his notes on the Bill of Rights to "natural rights, retained—as Speech and Con[science]."[39] So, too, John Locke, who would write that "Liberty of Conscience is every mans natural Right, equally belonging to dissenters as to [established institutions]."[40] Its inalienability depended, just as for speech, on the view that it was futile for the government to compel people to embrace religious beliefs with which they disagreed.[41]

Yet the nature of the claim about religious liberty was not merely pragmatic but theological: for "true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God."[42] Indeed, the connection between the natural rights justifications for free speech and religious liberty is precisely a view about the operation of the natural laws of God, and about man's created nature and obligations to God.[43] For even if legal compulsion could change a person's mind (an empirical proposition, about which the evidence must surely be more mixed than these Enlightenment voices admit), "yet would not that help at all to the salvation of their souls. For, there being but one truth"—the Christian truth, so it was thought—there is only "one way to heaven," which can only be reached by obedience to the dictates of "conscience."[44]

Just as for speech, the ends and limits of the natural right of religious freedom imparted to it a dual structure, with a core untouchable by positive law, and a periphery that could be policed and regulated by the legislature in furtherance of the common good. At the core, as Vincent Phillip Muñoz has argued, is a form of religious exercise that is wholly exempt from the jurisdiction of the state—a right retained from the state of nature that is not subject to the authority of government.[45] Yet the scope of this unalienable right was, at least by modern lights, narrow. It certainly encompassed the right to worship,[46] but it did not extend to

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[38] See, e.g., Article II of Delaware's 1776 Declaration of Rights: "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings…." Other state constitutions including North Carolina's and Pennsylvania's contain similar provisions.

[39] James Madison, Notes for Speech in Congress (June 8, 1789, in The Papers of James Madison 193, 194 (Hobson & Rutland eds., 1979).

[40] John Locke, *A Letter Concerning Toleration*.

[41] See id. at

[42] Id. at 11.

[43] Madison's argument in the *Memorial and Remonstrance* concerning compelled opinions is conjoined to another concerning "the duty of every man to render to the Creator such homage and only such as he believes to be acceptable to him." Memorial and Remonstrance, supra note __.

[44] Id. at 12.

[45] Vincent Phillip Muñoz, *Two Concepts of Religious Liberty*, 110 Am. Pol. Sci. Rev. 369, 373 (2016) ("This lack of sovereignty means that legislators lack authority to prohibit that which belongs to the natural right of religious liberty.").

[46] Even here, however, there were *natural* limits on the right of religious worship. The possibility of, for example, child sacrifice as part of the natural right to religious worship would have been ruled out.

what Muñoz calls "religious interests."[47] And yet Muñoz and Campbell both emphasize that this approach had the salutary effect of preserving the core of these rights, whether of free speech or religious liberty, in unadulterated form: there could be no judicial balancing away of the core for other putatively greater ends.[48]

Religious interests outside the core, however, spanned the broad periphery of potential claims to religious exemption from general laws on account of religious scruple. And as to these peripherical manifestations of religious freedom, the legislature enjoyed broad delimiting discretion in accordance with its view of the public good, peace, and order.[49] So, for example, the Massachusetts Bill of Rights protects the right of subjects to "worship[] God in the manner…most agreeable to the dictates of his own conscience;…provided he doth not disturb the public peace."[50] There is a longstanding debate between those who claim that religious exemptions were constitutionally required under some circumstances and those who argue that they were always a matter of legislative grace.[51] But even advocates of the former view would probably agree that religious "interests"—particular forms of exercise outside the core protection for worship—were highly regulated in the early American republic, and that constitutional appeal to the courts in such cases was unavailing.

For purposes of this essay, however, the critical point is that the dual hierarchy of the rights of free speech and religion rooted these rights in dual authorities external to the individual. First, in God: for the unalienable element of free speech and free religious exercise was both a right derived from and a solemn duty toward an authority transcending the self. Second, in the political community, and most particularly in its legislature: when the individual left the state of nature, a part of the social contract he entered into assigned the government the responsibility to constrain his natural liberties of speech and religious exercise to further the social goods of safety, morality, and public order. "The founders," writes Thomas West, "did not separate rights from duties. They believed that the laws of nature and of nature's God impose moral obligations on human beings in their dealings with other people."[52] Virtuous behavior was a condition of the freedoms of speech and religion.

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[47] *Id.* at 374.
[48] *Id.* (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) as an example of modern judicial balancing as to the core of religious liberty); Campbell, *supra* note __, at 316 (arguing that the contemporary judicial balancing approach "waters down what was originally absolute protection for well-intentioned statements of one's views").
[49] *See* Muñoz, *supra* note __, at 374.
[50] See Massachusetts Constitution, Article II. (1780); see also Maryland Declaration of Rights, article 33.
[51] Compare Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) and Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990) with Philip Hamburger, *A Constitutional Right of Religious Exemptions: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992).
[52] WEST, *supra* note __, at 47. There is rich disagreement about whether the early republican combination of liberal and republican views—of rights and duties—was integrated and internally consistent or instead a kind of patchwork pastiche whose commitments existed in tension with one

The genesis, nature, and limits of these natural rights all depended upon their connection to sources of authority and obligation outside of and transcending the self.

II. Period Two: The Turn Inward

The early view of free speech's value and limits—which often depended upon judgments about the social worth of free speech—endured into the twentieth century, even if the natural rights framework that grounded it steadily declined in influence.[53] Some scholars have argued that there were significant conceptual changes following ratification of the 14th Amendment, where there was a renewed focus on the freedom of speech,[54] and prosecutions for blasphemy, for example, became problematic under the Establishment Clause through operation of the Privileges or Immunities Clause.[55] Yet whatever changes were intended by the ratifiers of the 14th Amendment, during the period from the Civil War to World War I, the Court consistently upheld regulations of speech that was perceived to have a "bad tendency"—a tendency to produce an action that was threatening to social order and morality.[56] Even defenders of a more expansive scope for free speech rights after the Fourteenth Amendment's ratification acknowledge that the bad tendency test was invoked successfully "against antiwar speech during the Civil War and World War I,"[57] and in between as well. In *Ex Parte Jackson*, for example, the Court unanimously upheld a provision of the Comstock Act of 1873 prohibiting the mailing of lottery advertisements against First Amendment challenge, concluding that a law proscribing "obscene" and "indecent" activities that "are supposed to have a demoralizing influence on the people" was perfectly in keeping with the freedom of speech.[58]

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another. See id. at 44-47. This paper takes no position on that debate, instead simply describing the coexistence of these views.

[53] Campbell, *supra* note __, at 259.

[54] See MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 363 (2000).

[55] See generally Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. L.J. 1085 (1995). The thesis of a "second adoption" and a changed meaning of the Establishment Clause has been disputed, however. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

[56] DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132 (1997); *see also* Turner v. Williams, 194 U.S. 279, 294 (1904) (applying the bad tendency test to the views of an anarchist in upholding his conviction and deportation under a federal statute). Rabban notes that this test can be (and was) traced to Blackstone's view that "criminal libels" consisted of writings "of an immoral or illegal tendency," together with other speech that provokes breaches of the peace. 4 William Blackstone, Commentaries, Chapter 11 ("Of offenses against the public peace). But regard for the public good was often implicit in the social contractarian view of the limits of natural rights, a view that Blackstone endorsed. See 1 William Blackstone, Chapter 1 ("The Right of Persons").

[57] Curtis, supra note __, at 385.

[58] 96 U.S. 727, 730-31 (1877).

Even as there were contrary strains of libertarian-inflected thought concerning speech in the nineteenth and early twentieth centuries,[59] and occasionally the odd judicial swipe at what was felt by some to be an outdated and fussy legal moralism,[60] as late as 1907, the Supreme Court would say that the government could punish speech that "may be deemed contrary to the public welfare."[61] And free speech skepticism did not come only from what would today be considered social conservatives. David Rabban has observed that before World War I, progressives were not sympathetic to speech rights that they perceived as inconsistent with positive social reforms or that blocked salutary egalitarian and redistributive measures.[62] As for American judges of the pre-War period, "no group of Americans was more hostile to free speech claims before World War I, and no judges were more hostile than the justices on the United States Supreme Court."[63] All of this was generally in keeping with the early republican view, which tied the freedom of speech closely to legislative judgments about limits on speech to serve the public good, though it was perhaps an even more restrictive approach.

A. The First Wave of Change: Political Speech's Preferred Position

When conceptual change did come to the law in the twentieth century, change whose causes were manifold,[64] it came in two waves. In the first wave, the Supreme Court (following, in part, the scholarly claims of Zechariah Chafee),[65] emphasized that political speech, and especially dissenting political views, merited special solicitude under the First Amendment because of its contribution toward the development and strengthening of democratic government. Though it had not previously been conceptualized in precisely these terms, this democracy-enhancing justification for the right of free speech *might* be seen as consistent with the early American view that there was a core or natural right to the good faith expression of one's thoughts. But the notion that politically dissenting speech merited a near-absolute, or "preferred position,"[66] protection was already a considerable

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[59] Rabban, supra note __, at 23-76 (describing a "tradition of libertarian radicalism" in the late nineteenth century that "defended the primary value of autonomy against the power of church and state). It is notable, however, that this stream of libertarian thought did not have much effect on the courts.

[60] *See, e.g.*, Judge Learned Hand's criticism of the prevailing test of obscenity—whether "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences"—as a discreditable example of "mid-Victorian morals." United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913).

[61] See Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[62] Rabban, supra note __, at 3.

[63] *Id.* at 15.

[64] It is not my purpose to survey the reasons for these changes. Surely the "war to end all wars"—and yet which did no such thing—was one cause, and there were many others. This essay, however, focuses on the nature of the changes to the conceptual framework of free speech as manifested in legal, and primarily Supreme Court, doctrine.

[65] Zechariah Chaffee, Jr., Freedom of Speech (1920).

[66] *See generally* Jones v. Opelika, 316 U.S. 584, 608 (1942) (Stone, J., dissenting). With the addition of Wiley Rutledge to the Court, the rhetoric of "preferred position" for political speech appeared in several of the Court's majority decisions thereafter. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105,

expansion.[67] It meant that the political community was disabled as a legal matter from making any distinctions of value in the political speech of its members.

So, for example, Justice Oliver Wendell Holmes (joined by Justice Louis Brandeis) could say in his *Gitlow* dissent that the speech of a member of the Socialist Party of America could not be punished because it "presented no clear and present danger" to American government;[68] it was merely "redundant discourse" with "no chance of starting a present conflagration."[69] The "test of truth," or truth-seeking, justification described by Holmes in his *Abrams* dissent, it should be remembered, reflected a pragmatic social interest in the soundest civic policymaking that could survive in the marketplace competition for the fittest ideas.[70] Truth-seeking and democratic governance, which are often separated as distinctive ends, thus share certain fundamental premises about the purposes of free speech.[71] In a similar way, Brandeis would write in his *Whitney* concurrence that the speech of a communist could not be criminalized because "[t]hose who won our independence" believed that "public discussion is a political duty; and that this should be a fundamental principle of American government."[72] Brandeis's "remedy" for the hurtful potential of false ideas is "more speech" because he was confident that the "more speech" would be undertaken under the protection of those secure and sturdy pillars of American government—public education and democratic politics—that surely would overwhelm the ineffectual and false views of a weak dissenter.[73] But he believed that democratic citizenship would be strengthened and enriched by the confrontation with dissenting speech, as the power of "rational thought" in democratic decision making would thereby be honed.[74]

The emphasis on the relationship of free speech and democratic government is perhaps nowhere more powerfully in evidence than in the work of the great mid-century speech scholar, Alexander Meiklejohn.[75] Meiklejohn emphasized that the "model" of First Amendment free speech was the town meeting, in which "the people of a community assemble to discuss and to act upon matters of public

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115 (1942). For criticism of the "preferred position" transformation, see WALTER BERNS, FREEDOM, VIRTUE, AND THE FIRST AMENDMENT (1957).

[67] See supra note __.

[68] On the changing meaning of the "clear and present danger" test from something approximating the "bad tendency" test to something more like incitement to violence, see Rabban and White.

[69] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Indeed, Holmes's dismissive attitude toward Gitlow's ineffectual speech—his confidence that American democratic government could tolerate it exactly because it was so unimportant—has been criticized. See HARRY KALVEN, JR., A WORTHY TRADITION (1988). On the differences between Holmes the skeptic and Brandeis the moral crusader, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution 69 (1982).

[70] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[71] See Janus v. AFSCMEC, [citation] (2018) (separating the "democratic form of government" and the "search for truth" ends of free speech).

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

[73] Id.

[74] See id.; *see also* Rabban, supra note __, at 355-371 (emphasizing the democracy-enhancing features of Brandeis's speech jurisprudence).

[75] See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)

interest" and accept procedural and substantive abridgements on their speech to fulfill the core democratic purposes of free speech.[76] The town meeting, he continued, "is not a Hyde Park. It is a parliament or congress. . . . It is not a dialectical free-for-all. It is self-government."[77] His was a communitarian conception of the freedom of speech—an expanded conception of the right both from the early republican position and from the more immediately anterior, highly restrictive view of the pre-War period, that claimed "absolute" protection within the sphere of political speech but not elsewhere.[78]

Yet the Meiklejohnian view was still delimited by some common political ends. The purpose of free speech was the formation of a better and more "rational" type of democratic self-government, which helps to explain Meiklejohn's statement that free speech's "point of ultimate interest is not the words of the speakers, but the minds of the hearers."[79] The paradox in the democracy-enhancing justification for free speech has been noted before: it seems absurd to promote democratic governance by categorically protecting political speech that the people have elected to proscribe by democratically enacted laws.[80] The "minds of the hearers" have already been made up in democratically authorized law. One evasion of the paradox is to concede that by "democratic governance" is meant something other than raw popular or majoritarian preference. Perhaps something that depends upon a sufficient airing of dissenting opinion in order to ensure the proper or "rational" functioning of democracy.[81] Yet the question remains precisely what sort of substantive values are promoted by this justification for free speech, how much airing is enough, and who is to determine what constitutes proper or true democracy.[82]

Yet these difficulties in some ways illustrate the collective and transcendent character of the Meiklejohnian view. True or proper democracy—the people's arrival at "wise decisions"—consists in protection against the "mutilation of the thinking process of the community."[83] But speech that does tend to mutilate the collective enterprise is outside constitutional protection. Meiklejohn could, as early Americans had done, invoke the "general welfare" as an organizing aim and limit on

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[76] Id. at 22

[77] Id. at 23

[78] *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245.

[79] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1960).

[80] For canonical statements of this paradox, see, e.g., LARRY ALEXANDER, IS THERE A RIGHT TO FREEDOM OF EXPRESSION? 137 (2005); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 40-44 (1982); JEREMY WALDRON, LAW AND DISAGREEMENT Chapter 10 (1999).

[81] See generally CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); OWEN M. FISS, LIBERALISM DIVIDED (1996).

[82] I confess to sharing Larry Alexander's opinion that "I never find my views to be 'adequately aired' until everyone agrees with them." Alexander, supra note __, at 138 n.16.

[83] Meiklejohn, supra note __ [Free Speech and Its Relation to SG].

free speech protection.[84] Indeed, the democratic assembly is itself a selective group of people that are loyal to one another: "the people" excludes the criminal, the foreigner, the traitor to the community, and even the person who does not have the community's true interests at heart.[85] The first wave of free speech reconceptualization in this second historical period still retained an important element of mutual moral duty that shaped and delimited the right to speak freely.[86]

B. *The Second Wave of Change: The Inward, Anti-Orthodoxy First Amendment*

The second wave of conceptual change was quite different. The first wave had expanded the scope of speech rights to include a general or presumptive protection against regulation of specifically political dissent. But the right of free speech was still conceived collectively—as serving and being delimited by the common social and political good of achieving a more rational polity, however rationality might be measured. The second wave loosened and eventually removed those collective ends and limits by justifying free speech inwardly, coupled with a more thoroughgoing skepticism about the state's authority to make rules about speech for the common good.

Freedom of speech now was understood to require special protection because verbal expression was believed to go to the essence of what it means to be human, protecting not only the development of individual thought but also the self-realization or self-actualization of the speaker. Thus, free speech was reconceived as intrinsically valuable because it is a prerequisite for complete autonomy: "an autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."[87] This autonomy and identity-based justification was influenced by an egalitarian undercurrent: the notion that we treat people unequally unless we recognize and respect the beliefs that go to the core of their persons—their real or authentic selves. It is reflected in what one casebook refers to with the umbrella term, "individual-centered theories" of the First Amendment,[88] as well as Justice Clarence Thomas's view that "the First Amendment…enact[s] a distinctly individualistic notion of 'the freedom of speech,' and Congress may not simply collectivize that aspect of our society."[89]

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[84] See id at 38-39 ("the constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare").

[85] This view of the relevant political community is consistent with the earlier social contractarian position that there is no "natural right to become a citizen of a society that refuses to accept you." WEST, *supra* note __, at 118.

[86] See Gerhart Niemeyer, *A Reappraisal of the Doctrine of the Freedom of Speech*, 259 ("[T]he question which concerns us is whether the doctrine of free speech admits of any criterion by which utterances may be recognized as either belonging to the circle of mutual loyalty or denying the basic community.")

[87] Thomas Scanlon, *A Theory of Freedom of Expression*, PHILOSOPHY AND PUBLIC AFFAIRS 1:204-226, 216 (1972).

[88] VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 875-1049 (2d ed. 2012)

[89] Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 506 (1997) (Thomas, J., dissenting).

As the second wave of conceptual change crested, it rapidly absorbed the first wave. American political or civic cohesion was no longer manifested in any shared set of substantive convictions of the people as a community, democratic or otherwise, so much as in an allegiance to individual freedom itself. It was the view that very little that is permanent binds the People other than the conviction that very little that is permanent binds it. The forms of free speech were thought to be synonymous with its social value, and the "dialectical free for all" deplored by Meiklejohn was the result. Indeed, as to substantive evaluations of the content of speech, the second wave dissolved the idea of the People as anything other than a physical aggregation of individual persons.

The Supreme Court's embrace of this second wave was gradual but steady. A critical step in its development was the union of inwardly-oriented justifications for free speech with closely connected pragmatic considerations that the government could not be trusted to make any judgments at all about the communal value of speech. Consider the widely celebrated case of *West Virginia State Board of Education v. Barnette*, in which the Court held that a public-school student who was a Jehovah's Witness could not be compelled to recite the Pledge of Allegiance.[90] The Court justified this conclusion on the ground that the government's efforts at enforcing unifying, communal projects through law were to be feared, and that "as governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be."[91] This is an argument that government orthodoxies enforced by compulsion always lead to conflict—even violent conflict—and so ultimately only "the unanimity of the graveyard."[92] It represented a new commitment to absolute anti-orthodoxy—the view that the government could have no say at all in assessing the communal value of speech.

"Authority," the *Barnette* Court would say, "here is to be controlled by public opinion, not public opinion by authority."[93] One should appreciate just how distant the Court's absolute anti-orthodoxy rule is from the early American position on free speech. The latter clearly contemplated a vital and substantial role for government authority in the regulation of the natural right of speech, as well as considerable discretion in negotiating conflicts of individual freedom and public morality and welfare. The new position in *Barnette* purported to establish "public opinion" as the font of all orthodoxy in proclaiming that "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 matter of opinion, or force citizens to confess by word or deed their faith therein."[94] The state was now cut out altogether from making any evaluations of speech's civic worth through

[90] 319 U.S. 624 (1943).
[91] Id. at 641.
[92] Id.
[93] Id.
[94] Id. at 642.

regulation, replaced for these purposes by "public opinion." Yet "public opinion" was itself not understood by the *Barnette* Court as a communal authority capable of prescribing general rules; the freedom of speech instead entailed an absolute "intellectual individualism" liberated from any governmental control.[95] A pragmatic rule of absolute anti-orthodoxy as to the government thus complemented and promoted the second wave conception of free speech as an entirely interior affair.[96]

In the early years of the second wave, the democracy-enhancing justification for free speech could still be discerned, though it was already greatly diminished. In *Terminiello v. City of Chicago*, for example, in an opinion by Justice Douglas, the Court overturned the conviction of a Catholic priest whose speech was intended to whip up a crowd inside an auditorium into a frenzy against a second crowd pressing to enter the auditorium and hurling bricks, rocks, bottles, and icepicks.[97] The speech was laced with fascist epithets of hate and vilification aimed at particular classes and races of people. In characterizing the quality of the speech at issue, Justice Douglas said:

> The vitality of civil and political institutions in our society depends on free discussion….[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
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> Accordingly, a function of free speech under our system of government is to invite dispute….[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people….Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea….[98]

The passage is extraordinary inasmuch as while Douglas uses the first-wave rhetoric of democratic self-governance, he implies that this sort of speech is not merely the kind of political dissent that must be tolerated, but that it is actually healthful for American democracy. That is, it is not the sort of ineffectually vicious speech that Holmes had sneered at in his *Gitlow* dissent (or that Justice Frankfurter, one year before *Terminiello* was decided, had deprecated as a "wholly neutral futilit[y][99]) but a positive good for the democratic polity and a central concern of the First Amendment. Yet if "inviting dispute" in this fashion is the central function of free speech, then it seems to have far more to do with Terminiello's own authority to do so in the manner of his choosing than with "free debate and free exchange of ideas" among the rabble to whom, and against whom, Terminiello's self-expression

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[95] Id. at 641.
[96] Steven Smith has argued that the governmental anti-orthodoxy view of the First Amendment is untenable. Governments, if they are successful governments, always proclaim and enforce orthodoxies. Steven D. Smith, *Barnette's Big Blunder*, 78 Chi.-Kent L. Rev. 625 (2003).
[97] 337 U.S. 1 (1949).
[98] Id. at 4-5.
[99] Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting).

was directed. Terminiello was empowered to establish his own "orthodoxy," and the state, as Gerhart Niemeyer once put it, must "recognize" the individual's power to say whatever he wills.[100]

The Court's more proximate first-wave invocations of speech's power to shape public debate, or to enhance democratic governance, seem even less persuasive. The newer cases and their justifications instead involve the individual's rights to be unconstrained in the exercise of his muscular right against the state to speak. Perhaps Paul Robert Cohen intended to contribute to democratic self-government and the exchange of ideas in wearing a jacket with the words, "Fuck the Draft," inside a courthouse corridor.[101] Perhaps his expression was so received. But the terms in which the Court justified Cohen's speech rights—the vindication of his "inexpressible emotions" that likely sound to those around him like a "verbal cacophony," or to "lyric[ize]" in whatever vulgarities suited his "taste and style"—suggest that the Court's true justification is not communal but individual.[102]

Today, the second-wave approach to free speech predominates in the Supreme Court. The rise of autonomy-maximizing justifications has resulted in a massive expansion of the varieties of speech that merit constitutional protection. The right of speech is conceived primarily as validating the autonomous self, and the Court largely has dispensed even with its prior honorific nods toward the democracy-enhancing function of speech protection. Speech that is "outrageous,"[103] that is used as an instrument of "aggression and personal assault,"[104] that is "cruel" and sexually arousing because of the torture that it inflicts,[105] that glories in the wanton slaughter of African Americans and Jews,[106] that is personally abusive and intended to "inflict great pain"[107]—all are now protected by the freedom of speech.

The merging of the absolute anti-orthodoxy and individualistic justifications for free speech has become clearer as well. Recall that in the early republic, speech by someone in bad faith could be outlawed, for there was no reason for parties to a social compact to protect lies or speech that was not made in good faith.[108] Yet in 2012, the Court held in *United States v. Alvarez* that speech that is "an intended, undoubted lie" about a concrete fact—in this case, a lie about receiving the Congressional Medal of Honor, which had been proscribed by statute—and known

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[100] *See* Gerhart Niemeyer, *A Reappraisal of the Doctrine of Free Speech* 255.
[101] Cohen v. California, 403 U.S. 15 (1971).
[102] Id.; see also Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEG. STUD. 303 (1991) (describing public expression as an "element of several styles of life" and freedom of speech as an identification with a particular style).
[103] Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988).
[104] Time, Inc. v. Hill, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting).
[105] United States v. Stevens, 559 U.S. 460 (2010).
[106] Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011).
[107] Snyder v. Phelps, 562 U.S. 443, 461 (2011).
[108] See supra notes __, and accompanying text.

to be so at the time spoken receives full First Amendment protection.[109] The Court justified this conclusion by recurring to the absolute anti-orthodoxy rationale that to allow the government to prohibit lying about the receipt of military honors would give it limitless authority—"a broad censorial power unprecedented in this Court's cases"[110]—perhaps even leading to the sort of dystopian surveillance state contemplated by George Orwell.[111]

That pragmatic justification, however, was merely supportive of another justification: that Alvarez's free and false speech is actually a positive social good, since, through the operation of counter-speech, it "can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose."[112] In a "free society," the only remedy for "speech that is false is speech that is true,"[113] Justice Kennedy explained—a view would have been completely foreign at the founding. But the Court has adopted it because, as it has explained in another context, the "fundamental rule of protection" of the freedom of speech—the new core of the freedom of speech—is "that a speaker has the autonomy to choose his own message."[114]

It is, of course, possible to characterize all of this newly protected speech as also, somehow, contributing to the collective aim of democratic self-governance. Perhaps at some deeply subconscious level, it does perform something like the "reawakening" function described by Kennedy in *Alvarez* (though one might ask why it should always be desirable to invite persuasion about at least some of the issues in these cases). Yet to speak of Cohen's speech, or Westboro Baptist Church's speech, or Alvarez's speech, or Stevens's speech, or EMA's speech, as speech that attempts to "persuade" others of some controversial position on a matter of public concern, as the Court sometimes does, seems implausible. If "persuasion" is defined, as David Strauss has argued, as "a process of appealing, in some sense, to reason"[115]—then it verges on the farcical to suggest that animal crush videos, nude dancing,[116] visual depictions of the titillating slaughter of Black people and Jews, and lies about easily verifiable facts such as the earning of military honors perform this function. But First Amendment protection of speech of this kind *does* perform the function simultaneously of revindicating claims of individual recognition and self-actualization, justified in part by an overriding fear of any government-imposed orthodoxy.

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[109] United States v. Alvarez, 567 U.S. 709 (2012). The Court in *Alvarez* distinguished lies in general, which receive full constitutional protection, from lies connected with other legal claims that might be survive constitutional scrutiny, such as libel or fraud.
[110] Id. at __.
[111] Id. at __.
[112] Id. at __.
[113] Id. at __.
[114] Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 573 (1995).
[115] See David Strauss, *Persuasion, Autonomy, and Individual Expression*, 91 Colum. L. Rev. 334 (1992).
[116] In Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), the Court upheld laws that regulated nudity, even when engaged in for expressive reasons. But eight members of the Court recognized the activity of nude dancing as within the compass of free speech protection.

In expanding the ambit of free speech to encompass these interests, the Court has had to eliminate any collective or extrinsic social interest in distinguishing between valuable and worthless speech. The two-track structure of the founding period had to be dismantled. "The First Amendment itself," the Court has claimed, "reflects a judgment by the American people that the benefits of its restriction by the Government outweigh the costs."[117] But that is a judgment utterly inconsistent with most of the history of free speech regulation in this country, in which the rights of free speech were always closely tethered to limits reflecting either legislative or (much later) judicial evaluations of the common good. The Court has reached this view in order to align its own holdings with its vastly expanded, interior and anti-orthodoxy justification for free speech. Justice Stephen Breyer noticed in his *EMA* dissent that the Court's decision was in fact arguably inconsistent with the aim of "rais[ing] future generations, committed cooperatively to making our system of government work"[118]—that is, with the cultivation of what had previously been the democracy-enhancing function (and limit) of absolute free speech protection. In this case, at least, Breyer seems to be observing that the first wave of free speech expansion has been engulfed by the second.

The second wave swept up not only the Court but many speech scholars as well, who increasingly championed the self-authenticating, self-validating, identity-forming, Romantic account of the freedom of speech. Thomas Emerson's influential *The System of Freedom of Expression* was one of the earliest treatments of free speech as concerned primarily with "individual self-fulfillment."[119] Steven Shiffrin has argued, against the Meiklejohnian position, that the freedom of speech should shield *all* expressions (and not merely the political varieties) of "nonconformity" and "dissent" or defiance of "tradition," "authority," or "conventionality."[120] Shiffrin's account is useful in plotting the transition from a purely political to a more expansively socio-cultural "preferred position" approach.[121] Edwin Baker has emphasized that the core purpose of free speech was to protect the speaker's "authority (or right) to make decisions about himself."[122] Seana Shiffrin has claimed that free speech protects the right of each "thinker" to "becom[e] a distinctive individual," "respond authentically," and fulfill her "interest in being recognized by other agents for the person she is."[123]

But perhaps the seminal account of second-wave free speech protection is Martin Redish's article, *The Value of Free Speech*, in which Redish went so far as to claim that the "one true value" of free speech is "individual self-realization" and that

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[117] Stevens, 599 U.S. at 470.
[118] Brown v. EMA, 564 U.S. at 857.
[119] THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).
[120] STEVEN D. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).
[121] For further discussion of the evolution of Shiffrin's views, see infra at Part III.
[122] C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENTARY 251, 254 (2011).
[123] Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENTARY 283 (2011).

any other justification is ultimately a "sub-value" of this master value.[124] This was a fully liberal, autonomized account of free speech that self-consciously rejected any common ends or limits. To be a free American citizen means not to be controlled by others, but to control oneself,[125] and to be the sole and ultimate arbiter of the value of one's own speech.[126]

In an important article, Ted White described the transformation of free speech protection during this period as its "coming of age."[127] White argued that the great expansion of speech protection as a unique type of right, as "constitutionally and culturally special,"[128] rested on what he called the arrival of "modernism" to law, and specifically to the First Amendment. This was the general view that humans were:

> 'free' in the deepest sense: free to master and to control their own destinies. In holding this "freedom premise" they were rejecting a heritage of causative explanations for the universe that emphasized the power of external, nonhuman forces, ranging from God to nature to inexorable laws of political economy or social organization to determinist theories of historical change. For them a recognition of the subjectivity of perception and cognition meant much more than the belief that individual humans were capable of giving individual meaning to their life experiences. It meant that humans had the potential - the freedom - to alter those experiences.[129]

What White describes as features of "modernism," others have characterized as those of "liberalism," the liberation of humanity from the constraints of religion, association, prejudice, nature, and community custom or tradition.[130] But whichever label is preferred, what stimulated the enormous expansion of free speech rights was precisely a seemingly boundless faith in "the capacity of humans to master their experience and in effect to create their own destiny: it was a powerful affirmation of the capacity and potential of the individual."[131] While the scope of free speech protection was in the first wave of change delimited by what were taken to be empiricist and "rationalist" premises, those rapidly fell away, to be replaced by the centrality of "individual dignity and choice" and its mirror-image justification—absolute government anti-orthodoxy—as the philosophical touchstones of speech protection.[132]

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[124] Martin A. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).
[125] *See* THOMAS A. SPRAGENS, CIVIC LIBERALISM (1999).
[126] See Redish, *supra* note __, at 629 ("[W]e have construed the first amendment to leave to the individual final say as to how valuable the particular expression is.").
[127] G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America*, 95 MICH. L. REV. 299 (1996).
[128] Id. at 308.
[129] *Id.* at 304.
[130] *See generally* PATRICK DENEEN, WHY LIBERALISM FAILED (2018).
[131] White, *supra* note __, at 306.
[132] Id. at 365-66. In addition to *Cohen* and the Nazi march case, White notes that the Court's obscenity cases are critical in this development as well. See id. (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

White observes that the enormous expansion of speech rights in what I have called the second wave proved difficult to reconcile with the aims of democratic self-governance, stimulating the arrival of new, retrenching, democracy-enhancing theories meant to realign speech protection along the "modernist" premises from which it had broken free.[133] Hence, he writes that the freedom of speech had been "severed" from "democratic theory," with all of its attendant rationalist and empiricist premises betokening freedom of speech's "coming of age."[134]

But this characterization misses two crucial points. First, the second wave followed from the first, the first having been itself a reaction against an earlier, much more strictly regulated speech regime designed to promote a thicker set of common ends governed by authorities outside the self. It was only because of the newly created absolute protection for "political" speech bestowed by the first wave—the "invention," as Genevieve Lakier has put it, of a new category of "valuable" speech[135]—that the Court would eventually arrive at its much broader free speech absolutism in the second wave. Second, what the combination of the first and second waves accomplished was precisely to sever the freedom of speech from serving any higher social or collective purposes. The waves together succeeded in fundamentally reorienting the freedom of speech inwardly.

Free speech, therefore, did not come of age in this period, at least if a coming of age is synonymous with maturity. Free speech was not, *pace* White, severed from the premises of modernity; it *fulfilled* those premises. And in so doing, it entered its adolescence, its developmental period of self-involvement, egocentrism, and emotional and behavioral independence. True, certain narrow categories of speech remain proscribed. But the justification for continuing to regulate, say, child pornography, incitement to violence, or "fighting words" does not depend upon their lack of fit within the second wave (they, too, may be justified on grounds of personal fulfillment and absolute anti-orthodoxy), but on the vestigial view that some speech, even if self-fulfilling and deeply—evenly wildly—unorthodox, is just too awful to tolerate.[136] Free speech serves no other, and no greater, end than the promotion and affirmation of any particular identity that any given individual cares to embrace, one that nobody else (neither God nor the political community acting through its government) could delimit on the basis of its content. And this self-regarding, inward justification of free speech was in turn identified with the American national character.[137] The Court and commentators now speak of free speech as a fundamental feature of the "dignity" of the speaker, by which they seem to mean the speaker's sense of self-esteem or *amour propre*.

Just as the general framework for religious liberty mirrored that of free speech

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[133] Id. at 368 and ff. (citing Sustein, Fiss, and others).
[134] Id. at 369.
[135] See Lakier, supra note __.
[136] Indeed, the *Chaplinsky* framework for fighting words has been narrowed to the point of irrelevance.
[137] See DeGirolami, supra note __.

in the early republic,[138] so, too, was religious freedom reconceived in parallel ways during this second period to reflect second-wave commitments—inwardness, solipsism, and absolute autonomy and anti-orthodoxy. The law of religious accommodation, for example, incorporates many of these assumptions. True, the view that a core feature of religious free exercise depends upon premises of individual choice and voluntarism has deep roots in the American experience.[139] Yet the Court's religious liberty cases beginning in the 1960s went well beyond an interest in voluntarism. Indeed, concerns that the free-exercise balancing test authorized a kind of hyper-pluralized anarchy motivated the Court's decision in *Employment Division v. Smith*, where it returned to the pre-*Sherbert v. Verner* exemption regime.[140]

But the passage of RFRA and RLUIPA, together with sundry state versions of RFRA, restored the self-centered approach as the primary test against which religious exemption claims are evaluated. These laws generally instruct courts to avoid inquiries into the centrality of a belief—as, indeed, *Smith* itself had said.[141] What is central is to be determined by the individual, not the religious community. Subjective perceptions of burdens may not be questioned because religious exercise is primarily understood as a matter of autonomous, individual choice—a choice that must be honored because it is personally "fulfilling"[142] and marks off one's distinctive human "identity."[143] Requirements of a religious system of creedal commitments, internal consistency, and even rough alignment of beliefs with others within the religious community or group of which the claimant says he is a member all have been held out of order.[144] The Court has held that an individual's beliefs need not correspond at all with—indeed, may run directly contrary to—the beliefs of the religious group, community, or tradition with which the individual claims to be associated.[145] One could hardly imagine a more internally oriented freedom than religious liberty after these developments.

On the establishment side, the situation is more complicated, but in many ways similar. Separation of church and state may be championed if it is perceived to support the autonomized, voluntarist conception of religious liberty and to strike at the historical and cultural connections between the American state and organized, corporate Christian traditions.[146] But church-state separation is far more

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[138] See supra at notes ___ and accompanying text.
[139] Cites here to Doug Laycock, Chris Lund, Tom Berg.
[140] 494 U.S. 872 (1990).
[141] Id. at 886–87; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012).
[142] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).
[143] See, e.g., Town of Greece v. Galloway, 134 S. Ct. 1811, 1853 (2014) (Kagan, J., dissenting) ("A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world.").
[144] See Thomas v. Review Bd., 450 U.S. 707, 714 (1981).
[145] Id. at 716,
[146] See, e.g. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Property and Power Before the Civil War*, 162 U. PA. L. REV. 307, 371 (2014) ("To the extent that history should govern our

controversial when it is perceived to immunize the corporate personhood of religious groups from government regulations forbidding discrimination on certain specific bases, especially sex and sexual orientation. Indeed, the operation of broad, statutory free exercise and broad, constitutional establishment rules serves precisely to reorient religious freedom away from traditional religious institutions and groups and toward a view of religion as a set of ineffably subjective, inarticulable experiences, desires, and personal commitments, that cannot be touched at all, let alone questioned, by anyone. That perception of religion—as a changeable set of fragmented and idiosyncratic views mirroring the self's then-existing needs—is also reflected in the single-most rapidly growing religious constituency in the United States (particularly among millennials), the unaffiliated "Nones."[147]

With the arrival of the second wave reconceptualization of free speech (and its direct analogue in religious liberty), in sum, came the detachment of the substance of free speech—its content—from any collective aims and limits. The language of absolute anti-orthodoxy seen in *Barnette* is a pragmatic expression of a similar view—that the government as a political community is categorically disabled from making evaluations about speech's worth because there is no longer any acceptable common standard of evaluation. The right of free speech was decisively detached from sources of authority outside the self and reoriented internally. That detachment resulted in the unparalleled expansion of free speech rights. It became, after the work of the second wave, a key symbol of American identity, though an identity that consisted in the rejection of any shared substantive political or social commitments.

III. Period Three: The Coming of the Constrictors

The inwardly-oriented, absolute anti-orthodoxy First Amendment of the second period has been a spectacular success. At no time has the right of free speech been more powerful than it is today. The last hundred years truly have been the "free speech century."[148] But free speech's very successes have rendered it vulnerable to increasingly numerous apprehensions, objections, and attacks. The absence of any acceptable, extrinsic criteria for challenging any conception of freedom of speech also has meant that there have been no acceptable, extrinsic criteria for validating any conception of it.

As the earlier, two-tiered structure of the core and limits of free speech protection was dismantled, critics became conscious of free speech's lack of any common moral direction. And they despaired of its hollowness, its separation from

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understanding of contemporary debates, this Article establishes that protection of the individual against the power of religious organizations was the central preoccupation of those charged with implementing the new law of religious liberty.").

[147] For discussion, see Mark L. Movsesian, Defining Religion in American Law: Psychic Sophie and the Rise of the Nones (citation).

[148] See "The Free Speech Century" (Geoffrey Stone & Lee Bollinger, eds.) (2018).

any value transcending the self, and its complete detachment from any account of the public good. This was the advent of the sickness unto death of the freedom of speech. What good was free speech if it did not sub-serve any particular politics? If the point of free speech was to pursue "the truth" as an "ultimate good," as Holmes argued in his *Abrams* dissent[149] and as many others had also claimed, then little point in it remained if the exchange of ideas could never yield some result relevant to truth. After the second wave, every untruth was treated as a potential truth, and every truth as a potential untruth; the freedom of speech had been disconnected from any notion of Holmes's "ultimate good." The political theorist Gerhart Niemeyer once predicted that when this should happen, the people would "in moral fright embrace any ideological substitute that happens to present itself in a plausible disguise."[150]

Yet the hypertrophy of the freedom of speech did not occur in a vacuum. The freedom of speech may have suffered the sickness unto death, but its illness ran its course alongside the creation of other rights and interests derived from other provisions of the Constitution. Just at the time when the Court was swelling the freedom of speech during the second wave and draining it of any shared communal standards for validating the substance of speech, it was also discovering new rights of dignity, equality, autonomy, and sexual freedom in the Due Process Clauses of the Fourteenth Amendment.

The progress of the obscenity, or sexually suggestive speech, cases of the twentieth century are a useful example. Scholars have noted the connection between the ACLU's advocacy of enlarged speech protection and its promotion of "sex as a civil liberty" in constitutional litigation in the 1930s and 1940s.[151] By the 1960s, the Court's substantive due process jurisprudence had caught up, establishing unenumerated rights of privacy grounding access to birth control (first for married couples,[152] then for individuals[153]) as well as preventing the state—on free speech grounds—from regulating the private possession of obscene material.[154] Gradually, as Leigh Ann Wheeler has observed, "the Court was persuaded that the "sanctity of freedom of speech and sexual privacy" stood at "the very core of American constitutionalism," rendering them mutually reinforcing rights.[155]

True, later obscenity cases implicating other ideals—including the equality of the sexes, human dignity, and what were thought to be intolerable collateral costs—checked some of the progress of sexual libertarianism in the Court's earlier jurisprudence. Cases including *Miller v. California*[156] and *New York v. Ferber*,[157]

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[149] 250 U.S. at 630.
[150] Niemeyer, *supra* note __, at 263.
[151] See generally Leigh Ann Wheeler, How Sex Became a Civil Liberty (2013).
[152] Griswold v. Connecticut, 381 U.S. 479, 483 (1965).
[153] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[154] Stanley v. Georgia, 394 U.S. 557, 565 (1969).
[155] Wheeler, *supra* note __, at 224.
[156] 413 U.S. 15 (1973).

allowing for somewhat greater state regulation of obscenity and holding child pornography to be unprotected by the First Amendment, showed that there were relevant competing values of equality and dignity at stake. Advocacy organizations like the ACLU noticed: the emerging tensions between expanding rights of sexual freedom and broader egalitarian and dignitarian ideals had the effect of moderating the ACLU's sexual libertarianism so as to parry accusations, for example, that it was "privileging men's over women's rights and liberty over equality."[158]

Nevertheless, and these complications aside, the main currents of autonomy, dignity, and equality coexisted harmoniously in the majority of the Court's twentieth century substantive due process and speech jurisprudence, whether the issue was reproductive rights,[159] gay rights,[160] or other sexual liberations more directly implicating expressive freedom.[161] In this way, rights of free speech and rights of sexual equality, dignity, and liberty became mutually supportive, just at the moment when the right of free speech was swelling and turning inward in the later stages of the second wave. Both reflected an absolute, or near-absolute, privileging of certain rights (whether of speech or of sexual autonomy) as against communal interference. While the project of the second wave was to empty the freedom of speech of any external criterion—any transcendent source outside the self, including the democratic polity as a whole—against which to measure the substantive worth of speech, in the event, the hollowing out of free speech created space for its reinfusion with new ends and new limits. These came primarily, though not exclusively, from leading cases in the Court's Fourteenth Amendment substantive due process jurisprudence.

It is these new rights and interests that promised to cure free speech's sickness unto death. These rights and interests could revitalize the First Amendment with what were claimed to be new, extrinsically, communally ordered and delimited ends. Academic and judicial arguments for First Amendment constriction—whether for religious or speech freedom—developed in order to protect, entrench, and advance these new ends. When constituencies that did not share, or that set themselves in opposition to, the new preferred ends invoke the expansive protections of the freedom of speech's second wave to resist them, they are now met with arguments that the First Amendment is not meant for their claims, but to protect higher common purposes.

A. Academic Constrictors

The scholarly literature advocating new free speech limits in the service of ostensibly common ends is vast and growing exponentially, and this article cannot

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157 458 U.S. 747 (1982).
158 Wheeler, supra note __, at 179-80.
159 See, e.g., Roe v. Wade (1973); Planned Parenthood v. Casey; Whole Woman's Health v. Hellerstedt.
160 See, e.g., Lawrence v. Texas; Windsor v. United States; Obergefell v. Hodges (2015).
161 See, e.g., Ashcroft v. Free Speech Coalition (2002); United States v. Stevens

hope to canvass every development.[162] It may instead be more useful to describe the trajectory of certain more prominent arguments.

One of the most interesting scholars of the new constriction is Steven Shiffrin, in significant part because Shiffrin's work marks the transition from the second wave expansion of free speech to constriction today. Shiffrin argued in his 1990 book, *The First Amendment, Democracy, and Romance*, that the core of the freedom of speech protected the individual's "right to speak about any subject and that it most especially guaranteed the right to dissent against existing customs, habits, conventions, processes, and institutions."[163] At the time, Shiffrin framed his claim as a criticism of first-wave reformers like Meiklejohn, who had argued much more narrowly for the democracy-enhancing view of speech protection but also the limits of more expansive speech protection for non-political speech.

Shiffrin's project was to explode those Meiklejohnian limits: all speech representing "nonconformity" should be protected, any "paeans to democracy and self-government" notwithstanding.[164] One of Shiffrin's primary examples of "dissent" concerned the use of offensive profanity—as in George Carlin's well-known monologue of "Filthy Words"—and the Supreme Court's decision to uphold the FCC's sanction of profanity as "too vulgar and too offensive for the radio."[165] For Shiffrin, profanity of this kind was "precisely what the first amendment is *supposed* to protect. Carlin is attacking conventions; assaulting the prescribed orthodoxy;

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[162] For only a very partial list of relatively recent academic claims for speech constriction specifically, see STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? (2016); Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480 (2014); BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2015); Morgan Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2015); RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY (2018) [note the elimination of pornography from the title in this new edition]; Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016); Tabatha Abu El-Haj, *"Live Free or Die": Liberty and the First Amendment*, 78 OHIO ST. L.J. 917 (2017); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687 (2016); Louis Michael Seidman, *Can Free Speech be Progressive?*, Colum. Law Review (forthcoming); Frederick Schauer, First Amendment Opportunism, in Eternally Vigilant: Free Speech in the Modern Era 174, 175, 194-96 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). For scholars advocating constriction of the First Amendment more generally, including the right of free speech, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Caroline Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241 (2015); Symposium, *First Amendment Lochnerism?: Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. KY. L. REV. 1 (2006); On religious freedom constriction in specific, see Gedicks, Schwartzman/Schragger/Tebbe.

[163] Shiffrin, supra note __, at 77.

[164] Id.

[165] Id. at 80 (quoting FCC v. Pacifica Foundation, 438 U.S. 726 (1976)).

mocking the stuffed shirts."[166] One could hardly conceive a more committedly anti-orthodoxy, expansive position.

Yet just over two decades later, Shiffrin's view had altered substantially. In his Melville B. Nimmer Memorial Lecture, Shiffrin argued against free speech "absolutism" and in favor of a balancing approach that weighed the value of free speech against other rights and interests.[167] Some form of absolutism had once been necessary, Shiffrin argued, as a "reacti[on] against puritanical censorship and the political witch-hunting of the McCarthy era."[168] But today, Shiffrin claimed that an approach "that accommodates the First Amendment interests against the interests of concern to the government"—that is, a balancing test that considers social and communal interests—ought to be adopted.[169]

Shiffrin's views thus migrated from an expansive justification for free speech emphasizing absolute protection for "assault" on any "orthodoxy," no matter how necessary that orthodoxy may be from the perspective of the political community, to a balancing test. He now says that protecting and promoting some forms of "human dignity" may outweigh the value of free speech.[170] In discussing the animal-crush video case, *U.S. v. Stevens*, Shiffrin criticizes the treatment and consumption of animals in America as morally problematic, and charges that consumers of animal crush videos are "sick and twisted."[171] Likewise, as to *Snyder v. Phelps*, in which the Westboro Baptist Church protested the United States by chanting anti-gay invective near an American soldier's funeral, Shiffrin writes: "a society unwilling to protect mourners at a funeral from verbal assaults of this kind has lost its way."[172] It has, in Shiffrin's view "committed the sin of First Amendment idolatry" because it has pitted the freedom of speech against "human dignity."[173] "American democracy," too, has been violated by expansive free speech rights now that corporations can speak freely[174]; this is the "dark side" of the First Amendment.[175] What Shiffrin once decried as the overly restrictive democracy-enhancing justification for free speech, he now embraces as a necessary limit.

Shiffrin never explains precisely what accounts for the radical change from once advocating an inwardly-oriented, orthodoxy-smashing, expansive freedom of speech, to speaking in the theologically charged language of First Amendment "sins" and "idolatry," as well as recommending the balancing of speech rights against

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[166] Id.
[167] See Shiffrin, supra note __[Dark Side].
[168] Id. at 1485.
[169] Id. at 1488.
[170] Id. at 1489.
[171] Id.
[172] Id. at 1496.
[173] Id.
[174] Id. (quoting and criticizing Citizens United v. FEC, 588 U.S. 310 (2010).
[175] Id. at 1497. For further elaboration of these points, see Shiffrin's *What's Wrong With the First Amendment?*

dignitarian and democracy-enhancing interests. The Westboro Baptist Church's views may, indeed, be unpalatable; but they are also certainly dissenting, offensive, and politically countercultural. Twenty-five years ago, it would have been unthinkable for Shiffrin to have argued that the First Amendment did not protect Carlin, the political dissenter. Carlin's speech was necessary to smash the puritanical idols. Why is not Westboro Baptist Church the new Carlin?

Yet Shiffrin is not alone. Many other scholars have also argued vigorously for these and other constrictions of free speech—limitations that presuppose widely shared political ends such as a common commitment to "dignity," a particular view about the proper workings of "democracy," the prevention of "third party harm," the preservation and extension of rights of sexual autonomy, or even a specifically partisan political program that sound altogether different than the second-wave view of the First Amendment.

Some scholars frame their arguments for speech constriction in overtly partisan terms. Burt Neuborne, once a staunch advocate of the civil libertarian freedom of speech, now argues that while progressives once promoted extremely broad speech rights in the service of progressive causes, the extension of such rights to "conservatives" has led many progressives to "suspect they had made a bad First Amendment bargain."[176] "Civil liberties once were radical," writes the legal historian Laura Weinrib, but the dream of a radically progressive and liberated politics was never fulfilled by expansive free speech rights.[177] Louis Michael Seidman laments that free speech can never truly be "weaponized" to advance and entrench progressive ends because of the freedom's historical association with "fixed ideas about property rights."[178] Instead, progressives who long for "an activist government that strives to achieve the public good," should simply pursue those ends directly and constrict free speech for use only "as a side-constraint" on the achievement of a truly radical progressive politics.[179]

Not all academic speech constrictors argue in such unabashedly politically partisan terms. Oftentimes, as in Shiffrin's writing, the language of "balancing" is used, together with the enumeration of somewhat underspecified social interests claimed to be of great communal value. Consider Alexander Tsesis's claim that the rights of free speech must be balanced against other community interests in "equality, dignity, creativity, and public peace."[180] Tsesis goes on to say that the right of free speech must be reattached to "the broader constitutional value of equal dignity secured by a system of government whose aim should be the common good."[181] Likewise, in arguing for "free speech consequentialism," Erica Goldberg argues for a fundamental re-orientation in free speech law that would weigh the

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[176] Neuborne, supra note __, at 106-116.
[177] Laura Weinrib, The Taming of Free Speech: America's Civil Liberties Compromise (2016).
[178] Seidman, supra note __.
[179] Id. at __.
[180] Tsesis, supra note __, at 16.
[181] Id. at 20.

benefits of free speech against its costs, analogizing certain sorts of speech to physical acts of violence—including those that involve "revenge" pornography (but not pornography proper).[182] Goldberg writes that she undertakes this proposal for reform "with the aim of rehabilitating core values of our First Amendment doctrine and practice,"[183] as if these core values were either self-evident or, in fact, widely shared.

Yet other scholars speak about rights and interests in equality that are also claimed to be fully or somehow relevantly "democratic." The government must protect and promote the "free and equal citizenship" of Americans and their "democratic values," argues Corey Brettschneider, not by criminally punishing "hate speech," but instead by engaging in the ostensibly softer censures and inducements of "persuasion."[184] The state can and should nudge along those groups that do not accept its—or Brettschneider's—view of what "free and equal citizenship" requires; its objective should include, for example, the "transformation of discriminatory religious belief" into something more civically healthy.[185] Similarly, Nelson Tebbe also argues in an egalitarian register that the political good of "full and equal citizenship" requires certain distinctive limits on First Amendment rights, whether of speech or religion.[186]

In some cases, echoes of the early American period in the claims of constrictors are startlingly direct. Morgan Weiland claims in a recent Stanford Law Review article that free speech law assumes a two-tiered structure, with a libertarian "periphery" and a liberal-republican "core."[187] The latter is threatened by the libertarian expansion of free speech in which corporations are granted speech rights, because while individuals have "an innate capacity for self-expression and self-realization," corporations do not and corporate rights end up diminishing individual rights.[188] Weiland's claims about a distinctive "libertarian tradition" that sprung from nothing in the 1970s, and her view that this tradition can be confined to cases involving "corporate" rights, are debatable. As this paper has shown, the second-wave, individually-oriented, libertarian expansion of the freedom of speech decried by Weiland and many others is a much older phenomenon extending as far back as the early twentieth century, and in its earlier years it promoted progressive political ends. The division she creates between corporate and individual free speech protection may not pinpoint the true source and scope of the conceptual

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[182] Goldberg, supra note __, at __
[183] Goldberg, supra note __, at __.
[184] See generally Corey Brettschneider, When the State Speaks, What Should it Say?: How Democracies Can Protect Expression and Promote Equality (2012).
[185] Id. at __.
[186] See generally Nelson Tebbe, Religious Freedom in an Egalitarian Age (2017); Nelson S. Tebbe, Government Nonendorsement, 98 Minn. L. Rev. 648 (2013).
[187] Weiland, supra note __, at __.
[188] Id. at __.

change to which she objects.[189] But the more important point is Weiland's insistence on a two-tiered structure of "core" and "peripheral" speech rights, with the core encompassing communally oriented "republican" values concerning "collective self-determination."[190] The core interests of the collective community as she perceives them are set against the peripheral rights of free speech, and particularly corporate speech. It is a view that mimics the two-tiered structure, though of course not the substance, of early republican views of free speech almost exactly.

As in each of the two previous periods, there are parallels for the right of religious freedom. Here, academic constrictors have instead generally focused on the idea that rights of religious freedom recall the specter (it always is a specter and never a pleasant memory) of *Lochner v. New York*[191] or that they generate social harms of various kinds to third parties—frequently harms that threaten the new sexual rights conceived by the Court in its substantive due process jurisprudence and stabilized in subsequent legislation. Rights of religious freedom therefore must be constricted accordingly, they argue, so as to protect and entrench these more important, common ends.

Elizabeth Sepper, for example, charges that rights of religious freedom often threaten vital social interests in "sex equality and public health" in the same way that *Lochner* and its progeny threatened salubrious social and economic policies.[192] Similarly, the vital social good of "antidiscrimination protections"—and particularly those dealing with sexual liberties—is threatened by broad rights of religious liberty; the latter should accordingly be curtailed when they run up against these other more important rights, especially when antidiscrimination law has the capacity to vindicate interests in personal dignity.[193]

The disparaging comments by Sepper and others who take a similarly critical line about *Lochner* are deeply perplexing. They evince a deep misunderstanding of what the *Lochner* era was all about. Substantive due process in the style of *Lochner* was meant to ensure that the government was properly pursuing the public good, rather than invidiously or arbitrarily depriving individuals of their liberty. Even the reviled *Plessy v. Ferguson*, a decision of the *Lochner* period, insisted that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance of a particular class."[194] *Lochner* itself adopts a similar approach,

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[189] There are analogous claims in the free exercise context, which argue for the primacy, if not the exclusivity, of individual rights of free exercise as against corporate rights. See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 Fordham L. Rev. 1965, 1988 (2007) ("[T]he constitutional significance of religious organizations depends upon what they can do for individuals.").
[190] Id. at 1404.
[191] 198 U.S. 45 (1905).
[192] Sepper, supra note __, at 1479.
[193] Id. at 1492.
[194] 163 U.S. 537 (1896).

balancing the broad police powers of the state for the protection of the community against individual liberties to arrive at what the Court thought were "reasonable" compromises.[195]

Modern substantive due process doctrine, like modern free speech and religious freedom doctrine, is by contrast structured as an effort to identify particularly fundamental liberty interests that cannot be regulated collectively even under a law enacted in good faith for the promotion of the common good. The claims of scholars like Sepper and others who invoke *Lochner* as a legal hobgoblin actually are very similar in structure to the arguments of the *Lochner* period.[196] *They* are today's Lochnerizers, though they bring very different substantive visions of the common good to their work than did judges of the *Lochner* era. Indeed, it is they who insist on the demotion of First Amendment rights to interests that should be balanced in accordance with the public good against other interests they may think are more valuable.

A final group of academic constrictors invokes claims of "harm to third parties" as limitations on First Amendment rights.[197] These voices are particularly useful in cataloguing the new First Amendment constriction because "third party harm" is a sufficiently capacious term to encompass a staggeringly broad array of putatively rivalrous interests. Indeed, third-party harms constrictors are sometimes vague about the kinds of harms that ought to serve as limits on First Amendment rights, and this imprecision is entirely sensible if the view is that the government should have far greater latitude in balancing rights of religious liberty and free speech against other collective social interests thought by these scholars to be of greater worth.

Several prominent third-party harm constrictors do specify, however, that harm to "dignity" should defeat claims of religious freedom. While Shiffrin used the term "dignity" to signal interests implicating animal rights and grieving at a funeral, these constrictors seem generally to mean rival interests involving sexual liberties of various kinds.[198] Thus, for example, Reva Siegel and Douglas Nejaime write that denials of cost-free contraceptive coverage on the basis of claims of religious scruple, and their accommodation through law, are deeply injurious to individual dignity because they "stigmatize and demean" those whose own sexual morality deviates from "traditional morality."[199] Indeed, these harms are claimed to be so serious that accommodating any contrary religious interest might itself be a violation of the First Amendment. "Dignity" has become a kind of totem for

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[195] 198 U.S. at 56-57.

[196] See supra note __ for additional scholars deploying the *Lochner* meme. [List here, including Balkin, Colby, etc.]

[197] See Gedicks; Schwartzman, Schragger, Tebbe; Nejaime & Siegel; Sepinwall, and others.

[198] Douglas Nejaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 Yale L.J. 2516, 2548 2576 (2015).

[199] Id. at 2516.

constriction—a symbol that encompasses a miscellany of interests thought to outweigh rights of speech and religious freedom.

For purposes of this article, the critical point is not to evaluate these, or any other, constricting proposals. It is that increasingly scholars of constriction are hearkening—wittingly or not—to the early American framework in calling for the political community (working through its government) to delimit free speech and religious freedom rights in the service of the public good. The justifications for that constriction are, just as in the early republic, claimed to lie in the core or root goods of the American democratic community. Today, however, these core goods often are derived from the Court's substantive due process jurisprudence, and in particular its decisions about sex as a civil right. Academic constrictors of the First Amendment claim that these common American political values—whether defined in terms of democracy, dignity, equality, sexual freedom, third party harm, or simply as an explicitly politically partisan program—must be balanced against any rights to free speech and religious freedom.

B. Judicial Constrictors

Judges have also recently argued for the constriction of First Amendment freedoms. Like their academic counterparts, judges explicitly invoke "democracy" and "dignity" as rightly imposing limits on free speech, though what precisely they mean by these terms can be as opaque as when first-wave reformers made similar claims about democracy.[200] In the most recent Supreme Court term, four Justices signed two dissenting opinions each of which decried the "weaponization" of free speech by the majority, and it should come as no surprise that one of these cases involved what was perceived as a threat to abortion rights.[201] Judges, too, raise the ghost of *Lochner* in what is meant to be a disparaging analogy.[202] But unlike scholarly constriction, judicial constriction at present tends to be a dissenting view, at least at the Supreme Court. Nevertheless, at least five different Justices on the present Court have endorsed arguments for constriction, though to date never in the same case. The phenomenon of judicial constriction at the Court may be strengthening.

One of the earliest judicial constrictors on the contemporary Court was Justice John Paul Stevens, who emphasized in his well-known dissent in *Citizens United v. FEC* that "society could scarcely function," if every public interest were "an illegitimate basis for qualifying a speaker's autonomy."[203] The "corporate domination of politics," he argued, was a distinctive and grave threat to "democratic integrity," one which had been recognized from "the inception of the republic."[204]

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[200] See supra at note __ [Part II].
[201] See National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2382 (2018) (Breyer, J., dissenting); Janus v. AFSCME, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).
[202] Breyer's opinion in NIFLA v. Becerra.
[203] Citizens United v. FEC, 558 U.S. 310, 422 (2010) (Stevens, J., dissenting in part).
[204] Id. at __.

Corporations should not have free speech rights, he claimed, and regulations of them impinge on no true interests in "autonomy, dignity, or political equality,"[205] which are the fundamental values served by free speech. Stevens framed his argument for constriction exactly as an appeal to the promotion of a "broader notion of the public good"[206]—distinctive ideas about republican government that explicitly draw on the founders' conception of free speech and that are disserved by granting corporations speech rights.

Justice Alito has also advocated free speech constriction, which may suggest that judicial constriction does not necessarily map perfectly onto any particular political preference or orientation. Alito's dissenting opinions in *Snyder v. Phelps*[207] and *United States v. Alvarez*[208] argue that the Court should engage in some kind of evaluations of the "value" of free speech, and that certain types of speech "have no value,"[209] "inflict real harm,"[210] or are may be "vicious verbal attacks that make no contribution to public debate."[211] His dissent in *United States v. Stevens*[212] argues for an extension of *New York v. Ferber*,[213] which had held that child pornography receives no free speech protection, to depictions of animal torture and dismemberment, which likewise "have no appreciable social value."[214] His concurrence in *Brown v. EMA*[215] contended that violent video games may well be different in kind from other media with respect to their potential social harm to "troubled teens," and that the Court should have left open the possibility of balancing such harms against free speech rights in future cases.[216]

All of these opinions by Alito reflect an approach that would have the Court constrict the freedom of speech in its present sprawling form to account for competing social interests in decency and especially harm to third parties. All reflect an emphasis on the exchange of politically and socially worthwhile ideas ("public debate"), to be distinguished from worthless ones, as the freedom of speech's principal object. Yet all also assume contested ideas of what counts as "valuable" and "harmful" speech—assumptions that are difficult to reconcile with the right of free speech after its second wave expansion.

Most recently, the Court has decided two cases highlighting a growing bloc on the Court that favors more thoroughgoing free speech constriction. In arguing for constriction, the four-justice dissents in both cases accused the majority of

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[205] Id. at 467.
[206] Id. at __.
[207] 562 U.S. 443, 463 (2011) (Alito, J., dissenting).
[208] 567 U.S. 709, 739 (2012) (Alito, J., dissenting).
[209] Alvarez, 567 U.S. at 739.
[210] Id.
[211] Snyder, 562 U.S. at 464.
[212] 559 U.S. 460, 483 (2010) (Alito, J., dissenting).
[213] 458 U.S. 747 (1982).
[214] Stevens, 559 U.S. at 498.
[215] 564 U.S. 786, 805 (2011) (Alito, J., concurring).
[216] Id. at 816-21.

"weaponizing" free speech, and both invoked "democracy" and the "true value" of freedom of speech in justifying that constriction. It should come as little surprise that one of the two cases involved abortion rights on one side and conservative Christian beliefs about abortion on the other. The opinions in these cases—the rhetoric they use as well as their substantive disagreements with their respective majority—suggest that the war between free speech constrictors and second-wave expansionists is likely to intensify.

In *National Institute of Family Life Advocates v. Becerra*,[217] the Court reviewed a challenge to California regulations imposed on pro-life pregnancy resource centers. One required state-licensed centers to advertise the availability of state-subsidized abortion, while a second required unlicensed centers to notify women prominently and in several languages that they were not licensed. The law manifested an intent to target "largely Christian-belief based" centers, which California state legislators believed were not sufficiently "forward-thinking" about abortion, as recorded in the statute's legislative history.

In a 5-4 opinion, Justice Thomas held that the statute violated the freedom of speech because its provisions compelled the centers to express content-specific messages, including about obtaining the very service to which the centers objected—abortion. Justice Kennedy's concurrence, joined by Justice Gorsuch, argued that the regulations were intended to squelch the pro-life views of the centers: "It is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable."[218]

Justice Breyer dissented, joined by Justices Kagan, Ginsburg, and Sotomayor. If a state may require an abortion provider to tell a woman seeking an abortion about adoption services (as the Court had held in *Planned Parenthood v. Casey*),[219] Breyer argued, it should also be able to require pro-life centers to tell a woman about the availability of state-subsidized abortion. But the dissent went much further, charging that the majority had empowered pro-life centers "to use the Constitution as a weapon" to defeat "reasonable" "economic and social laws." The "true value" of free speech, wrote Breyer, is only "obscure[d], not clarify[ied]" by invoking it in an "[in]appropriate case" like this"—a situation where state officials were simply doing their best to protect the "health and safety" of their people.[220] "Even during the *Lochner* era," said Breyer, the Court "was careful to defer to state legislative judgments concerning the medical profession."[221] In the dissent's view, the Court's holding in *NIFLA* was more egregious than those of the *Lochner* era itself.

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[217] 138 S. Ct. 2361 (2018).
[218] Id. at 2379 (Kennedy, J., concurring).
[219] 505 U.S. 833 (1992).
[220] Id. at 2383 (Breyer, J., dissenting).
[221] Id. at 2382.

In the other case, *Janus v. American Federation of State, County, and Municipal Employees*,[222] the Court struck down an Illinois law that compelled non-members to pay public-sector union fees. The Court reversed *Abood v. Detroit Board of Education*,[223] which had held that compulsory public-sector agency fees were constitutional, so long as the money was used only for activities "germane" to collective bargaining rather than for what the Court then described as separate "political and ideological projects." In an opinion for the Court by Justice Alito on behalf of the same five-Justice majority as in *NIFLA*, the Court held that these compulsory union fees forced support (in the form of financial subsidies) for messages with which the litigants disagreed, and *Abood's* distinction between permissible and impermissible expenditures had proved easier to articulate than apply.

As in Justice Breyer's *NIFLA* dissent, Justice Kagan's *Janus* dissent accused the majority of "weaponizing" the freedom of speech and "unleash[ing] judges" to ravage salutary democratically validated policies.[224] Kagan denounced the justices in the majority as "black-robed rulers overriding citizens' choices" and censured them for "turning the First Amendment into a sword": "the First Amendment," she lectured, "was meant for better things. It was meant not to undermine but to protect democratic governance."[225]

Kagan's *Janus* dissent is probably the strongest example of judicial constriction to date. The function of the freedom of speech, in her view, is not to override certain sorts of healthy or valuable democratic choices of the kind made by state officials in *NIFLA* and *Janus*. Rather, individual rights like free speech should reinforce and promote this sort of "democratic governance" in furtherance of the public good—the "better things" that California and Illinois had wisely given its people—and judicial oversight in these kinds of cases sets the Court on the "long road" to juristocracy.

"Black-robed," as a term of abuse, was first used by Justice Scalia in his dissent in *United States v. Windsor*, to describe the Court's arrogation to itself of the power to strike down the Defense of Marriage Act—a decision that Kagan joined—on the basis that the statute restricting marriage for federal purposes to two members of the opposite sex ran afoul of the Court's substantive due process sexual liberties jurisprudence.[226] Kagan almost certainly intentionally echoed Scalia, though it seems plain that her views of sound and unsound social policies, and of the circumstances in which the Court legitimately overturns democratic choices, are rather different than Scalia's. Indeed, notwithstanding the rhetorical warfare of the *NIFLA* and *Janus* dissenters, both of these decisions do showcase the Court's enduring embrace of second-wave free speech expansionism—the dominant

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[222] 138 S. Ct. 2448 (2018).
[223] 431 U.S. 209 (1977).
[224] Janus, 138 S. Ct. at 2501 (Kagan, J., dissenting).
[225] Id.
[226] 570 U.S. 744 (2013).

conceptual framework for roughly a century. Yet if this conception of free speech is today serving conservative ends, as Breyer, Kagan and the other dissenters who joined them charge, one should recall that for many decades it promoted progressive ends in the Court's cases involving defamation, obscenity, sexually explicit speech, and other twentieth century expansions of free speech.[227]

The metaphor of First Amendment "weaponization" that was deployed in both cases was minted a few years ago to attack religious freedom, when *Hobby Lobby v. Burwell*[228] was the case that evoked so much outrage.[229] The metaphor is effective because it re-characterizes certain kinds of exercises of religious liberty—particularly those that are believed to threaten the new rights of sexual liberty and autonomy—as acts of violence, similar to the way that some academic constrictors argue that speech may sometimes function as an act of violence.[230] It was and remains a technique of those using the image of weaponry and violence to scare-quote "religious freedom" and set it against "civil rights," the tacit assumption being that religious freedom is not also a civil right.[231] Some academic constrictors, as we have seen, are inclined to use the metaphor of First Amendment weaponry positively, in advocating for aggressively partisan uses of free speech.[232] But until the 2017 Supreme Court term, the metaphor had not appeared in any Supreme Court opinion. It is sobering to see four justices now deploying it against the freedom of speech.[233]

But it is not unexpected. The sickness unto death of the freedom of speech—the dissatisfaction and anxiety that resulted from its disconnection from any overarching idea of the public political and moral good transcending the self, just as the right was swelling to an unprecedented scope—has brought on a powerful reaction. The First Amendment constrictors argue that new values, derived from new rights and interests in dignity, equality, democracy, third party harm, and others, must be set and balanced against the freedoms of speech and religion. These

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[227] See supra at Part II.
[228] 134 S. Ct. 2751 (2014).
[229] See, e.g., Dale Carpenter, *The Clash of "Religious Freedom" and Civil Rights in Indiana*, Washington Post (March 30, 2015), at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/the-clash-of-religious-freedom-and-civil-rights-in-indiana/?utm_term=.046b79689a62 ("“What started out as a shield for minority religious practitioners like Native Americans and the Amish is in danger of being weaponized into a sword against civil rights."); Peter Montgomery, *The Weaponization of Religious Liberty*, Religion News Service (June 8, 2016), at https://religionnews.com/2016/06/08/the-weaponization-of-religious-liberty/; Irin Carmon, *Religious Freedom Arguments Used to Weaponize the First Amendment*, MSNBC (Jan. 19, 2016), at http://www.msnbc.com/msnbc/religious-freedom-arguments-used-weaponize-the-first-amendment
[230] See supra at note __ [Goldberg article].
[231] See, e.g., Carpenter, supra note __...
[232] See Seidman, supra note __.
[233] The media immediately noticed and followed suit. See, e.g., Adam Liptak, *How Conservatives Weaponized the First Amendment*, NEW YORK TIMES (June 30, 2018), available at https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html.

values were generated and entrenched in part by the hypertrophic First Amendment itself. Just as nature abhors a vacuum, these new interests poured in to fill up the void created by free speech's second wave reformers. For the constrictors, these new rights and interests are the cure for the sickness unto death, inasmuch as they reunite the freedom of speech with, as Justice Kagan put it, the "better things"—the public good, and perhaps even Holmes's "ultimate good"[234]—of American political and moral life.

IV. The Unity of Speech and Religion

It is an open question whether arguments for First Amendment constriction will ultimately prove successful in constitutional law and elsewhere. They may well be adopted at some point by a majority of the Supreme Court, though to date they have only persuaded at most a quorum of dissenters. Given the deeply fractured state of American political life, and in the wake of the political wreckage that has followed the second wave expansion of free speech, one might be tempted to believe that imposing new limits on First Amendment rights in the name of dignity, democracy, equality, sexual freedom, third party harm, or any of the other purposes championed by the new constrictors is far likelier to exacerbate social and civic fragmentation than to reconstitute it. On the other hand, perhaps at this point any course of action—whether constriction or continued expansion of First Amendment rights—is likelier to result in further fracture than greater civic unity.

Whatever the future may hold, the rights of free speech and religious liberty are likely to suffer similar fates. This paper has shown how at each of the principal periods of their respective development—in the early republic, during the twentieth century dual-wave expansion, and today—the justifications for and limitations on these two rights have proceeded in tandem. From the two-tiered natural rights framework of the 18th and 19th centuries, to the inwardly-oriented, absolute anti-orthodoxy explosion of the second wave in the 20th century, to contemporary arguments for constriction in the service of a putative democratic common good, it is in fact remarkable that the progress of these two American rights has proceeded nearly, and with only some exceptions, *pari passu*.

Some scholars see things differently. For example, in a subtle article that compares the cultural power of the right of religious freedom against other First Amendment rights including free speech and association, John Inazu argues that various American sociological developments, including the declining religiosity of Americans at least as respects traditional religions and the sense that religious liberty has been captured by specific ideological constituencies, will weaken the right of religious liberty in ways that may not affect other First Amendment rights.[235] Inazu contends that "with enough reflection," people may be willing to

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[234] See Abrams dissent.

[235] John D. Inazu, *More is More: Strengthening Free Exercise, Speech, and Association*, 99 Minn. L. Rev. 485, 531-34 (2014).

acknowledge the value of associational and speech freedoms even for those with whom they disagree, in ways that that may be more difficult or unavailing when it comes to religious freedom.[236]

In other work, I have voiced some doubts about Inazu's view on the ground that in a society in which the government takes on an increasingly large place and role in the life of the citizenry, the protection of rights becomes a zero-sum game.[237] Every inch gained is a gain for individual rights like that of religious freedom, and every inch lost is a gain for the state. This dynamic should, in time, affect all rights, very much including the right of free speech, because the key issue is not evolving cultural perceptions of any given right's strength and ambit, but evolving cultural perceptions of the strength and ambit of the state's proper power.

But the conclusions of this paper offer a separate, historical reason for skepticism about Inazu's view concerning the differential power of rights of religious and speech freedom. The fundamental frameworks within which these rights are situated, and the shared assumptions that have influenced commonly accepted views about their justifications and limits, run together across the history of their development. The early republic was informed by the natural rights framework; the twentieth century by modernism and liberalism; and today perhaps a new structural and theoretical framework is emerging in the claims of the constrictors. Rights of free speech and religious freedom are often invoked by the discontents in these regimes—those who reject or at least stand to one side of the dominant cultural orthodoxies and frameworks. And those who embrace the dominant frameworks of any given era are likely to oppose vigorously claims of First Amendment right that obstruct or impede the progress and entrenchment of those frameworks. The migration of the "weaponization" accusation—from religious freedom to free speech over only a short span of years—suggests that the fate of the rights of religious freedom and free speech today, as in past eras, is likely to be conjoined.

Conclusion

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[236] Id. at 531 ("Claims for religious exceptionalism are unlikely to prevail against growing cultural resistance to the free exercise right.").

[237] See generally Marc O. DeGirolami, *Free Exercise By Moonlight*, San Diego Law Review (end section).